

**PUBLIC EMPLOYMENT RELATIONS BOARD
FOR THE STATE OF DELAWARE**

DELAWARE STATE UNIVERSITY,)	
)	<u>ULP No. 04-06-431</u>
Petitioner,)	
)	Probable Cause Determination
AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,)	
DELAWARE STATE UNIVERSITY CHAPTER,)	
)	
Respondent.)	

BACKGROUND

Charging Party Delaware State University (“DSU”) is a public employer within the meaning of §1302(p) of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13 (1986).

The Respondent, American Association of University Professors, Delaware State University Chapter (“AAUP”) is an employee organization which admits to membership DSU employees and has as a purpose the representation of those employees in collective bargaining, pursuant to 19 Del.C. §1302(i). The AAUP represents a bargaining unit of DSU faculty and other professional employees (as defined by DOL Case #113) for purposes of collective bargaining and is certified as the exclusive bargaining representative of that bargaining unit. 19 Del.C. §1302(j).

DSU and AAUP are parties to a current collective bargaining agreement which term extends from July 1, 2002 through August 31, 2009. This Agreement contains the following provision concerning negotiations during the term of the Agreement:

This Agreement shall be in full force and effect beginning July 1, 2002. This Agreement shall continue in force and effect until August 31, 2009. The Parties agree to open negotiations on economic and limited special issues presented by either party to commence no later than the third year (February 28, 2004) and the fifth year (February 28, 2006) of this Agreement.

Whenever such notice is given by either party of a proposed change, the nature of any proposed change desired must be stated in the notice and the parties shall promptly enter into negotiations.

If pursuant to such negotiations an agreement on renewal or modification of this Agreement is not reached prior to the expiration date, this Agreement shall continue in effect during the period of negotiations until a new Agreement is reached.

In recognition of the budgetary process of the State of Delaware, both parties agree to begin preliminary discussion that would be directly affected by the State budget request for the next fiscal year during August of the final fiscal year of this Agreement. [Article 23.2]

On or about October 20, 2003, DSU notified the AAUP that it wished to reopen negotiations and provided a preliminary list of issues about which it wished to negotiate.

By letter dated October 30, 2003, the AAUP responded:

Pursuant to the terms of the Agreement, the AAUP will negotiate concerning the very few proposals concerning only "economic ... issues" and a limited number of related matters (*e.g.*, distance learning). However, unless the AAUP accepts a University proposal, the current Agreement remains in effect until August 31, 2009.

The AAUP does not believe that the University's remaining proposals fall within the "limited special issues" for which the reopener requires bargaining. Please explain the University's definition of "limited special issues" and provide copies of any negotiation notes or minutes concerning this issue. Upon receipt of the University's definition and supporting documentation, the AAUP will formally respond the University's definition.

The Chief Negotiators of the AAUP and the DSU teams subsequently met and on January 28, 2004, executed the following Letter of Agreement:

In the matter of Renegotiation, the Parties agree that "Limited Special Issues" shall mean issues not addressed in the current cba or matters that have become dated and should be revisited prior to 2009. These matters must be of such importance that a memorandum of understanding is not sufficient.

/s/ James R. Mims
Chief Negotiator – University

/s/ James S. King
Chief Negotiator – AAUP

Date: 1/28/2004

On or about February 4, 2004, DSU's Associate Provost for Administration formally notified the AAUP that DSU intended to open negotiations "on economic and limited special issues". A list of articles DSU submitted for renegotiation was attached and included issues affecting nineteen contractual provisions. The letter requested the parties agree on a "calendar of events" to include negotiation of ground rules, exchange of proposals, and a schedule of meeting dates.

By memorandum dated March 18, 2004, the AAUP team through its President agreed to meet with the DSU team ". . . to negotiate the Economic Reopener only."

By letter dated March 29, 2004, DSU Vice President for Human Resources and Legislative Affairs responded, in part,

The Limited Special Issues are clearly subject to bargaining . . . I am hopeful that the Association will reconsider its position in this matter and notify me by close of business on 4/5/04, of its intent to negotiate the Limited Special Issues. If not, the University will file an unfair labor practice charge against the Association or declare Impasse (the failure of the public employer and the exclusive representative to reach agreement in the course of collective bargaining) or both.

The AAUP responded by letter dated March 30, 2004, contesting DSU's assertion that the AAUP had failed to bargain in good faith, stating, "Any disagreement concerning the scope of 'limited special issues' cannot be considered a refusal to bargain in good faith. The AAUP will negotiate over economic issues and upon those issues the parties agree fall within the 'limited special issues' the parties agreed to negotiate."

On June 4, 2004, DSU filed this unfair labor practice charge asserting the AAUP had refused to bargain in good faith and thereby violated 19 Del.C. §1307(b)(2)¹ by:

- a. Refusing to meet in a timely manner for the purpose of commencing negotiations.
- b. By refusing to bargain regarding any limited special issues requested by the University.
- c. By announcing in advance of any negotiations that “unless the AAUP accepts a University proposal, the current Agreement remains in effect until August 31, 2009.”
- d. By announcing on May 20 and May 28, 2004, after it had previously agreed to soon commence negotiations, that it would not commence negotiations until late in August because, as nine-month employees, the bargaining unit employees were not obligated to bargain during the summer months.

On June 9, 2004, the AAUP filed its Answer to the Charge, denying all material allegations. The AAUP also filed a Counter Charge asserting that DSU failed and refused to bargain in good faith in violation of 19 Del.C. §1307(a)(5).²

On or about June 22, 2004, DSU filed an Answer to the Counter-Charge, denying all material allegations and requesting the Counter-Charge be dismissed.

The parties met with the Delaware PERB on July 29, 2004, for purposes of defining the scope and further processing of DSU’s Charge and the AAUP’s Counter Charge. As a result of that meeting, the parties agreed to hold the charges in abeyance for sixty days in order to “allow the parties to mutually resolve the scope of the reopener question through good faith

¹ 19 Del.C. §1307(b) It is unfair labor practice for a public employee or for an employee organization or its designated representative to do any of the following:

(2) Refuse to bargain collectively in good faith with the public employer or its designated representative if the employee organization is an exclusive representative.

² 19 Del.C. §1307(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.

negotiations.” A meeting was scheduled between counsel and information exchanged concerning subsequent meetings of the teams. The parties agreed to advise PERB of the status of the negotiations on or before October 1, 2004. The Charges would only be reactivated if the negotiation efforts were unsuccessful in resolving the scope of the reopener.

By letter dated September 30, 2004, DSU responded that although the parties had not had significant substantive discussions,

Nevertheless, rather than litigate and negotiate simultaneously, DSU respectfully requests that the pending charge and request for mediation be held in abeyance pending several negotiation sessions that presumably will soon be scheduled. The University believes that making progress in negotiations is far more important than proving a case of bad faith bargaining. Accordingly, on behalf of the University, I request that the investigation of the current charges be held in abeyance if and until such time as DSU wishes to proceed with them.

By letter dated October 1, 2004, the AAUP indicated that it had conveyed to DSU a list of proposals on which it was willing to negotiate (including eight of the DSU proposals and a “special provision for a Distance Learning program, limited to faculty involved in Distance Learning.”) AAUP indicated it was preparing counter proposals and suggested the DSU team contact the AAUP directly to schedule future negotiation sessions.

More than seven months later, on or about May 9, 2005, DSU amended its Unfair Labor Practice Charge, specifically alleging that the AAUP had violated its duty to bargain in good faith:

- ¶5 (e) By refusing to meet at reasonable times once negotiations “commenced” including refusing to meet at any time early in the morning or late in the day, again with the clear purpose of rendering the reopener meaningless. This occurred within the context of the fact that negotiations had already been stalled by the Union’s failure to negotiate since February 2004.
- ¶5 (f) By announcing in April 2005 that it would not negotiate in the summer of 2005 because ostensibly the Union was not obligated to bargaining [*sic*] during summer months. This occurred within the context of the fact that negotiations had already been stalled by the Union’s failure to negotiate in good faith since February 2004, including but not limited

to its identical refusal to negotiate during the summer of 2004 (a subject of the prior charge alleging bad faith bargaining by the Union.)

DSU's Amended Charge also included a request for injunctive relief, asserting:

[DSU seeks] injunctive relief requiring the Union to negotiate on a set schedule for a period of time at least through the summer months pending resolution of this unfair labor practice charge since Delaware State University is being irreparably harmed by the Union's failure to negotiate in good faith. Specifically, an injunction is required because the University cannot, without injunctive relief, otherwise recapture the benefits of its bargain in obtaining the reopener clause which grants to it the opportunity to pursue and obtain mid-term modifications to the collective bargaining agreement.

The AAUP filed its Answer to the Amended Charge on May 16, 2005, in which it admitted the new allegations were factually accurate, but denied that the facts proved a refusal to bargain in good faith. The AAUP asserts that Section 23.2 of the parties' collective bargaining agreement prohibits either party from making unilateral changes after reaching impasse in negotiations:

. . . If pursuant to such negotiations an agreement on the renewal or modification of this Agreement is not reached prior to the expiration date, this Agreement shall continue in effect during the period of negotiations until a new Agreement is reached.

Further, the AAUP contends that §14.4.2³ supports its position not to negotiate during the summer and asserts that "the parties have consistently applied this provision to negotiations because DSU does not pay AAUP negotiators for working during the summer." It also alleged that DSU has refused to meet with the AAUP at reasonable times.

The AAUP clarified its position by letter dated June 16, 2005, to request that its Counter Charge be revived and to deny DSU's allegations of "irreparable harm" or that injunctive relief is warranted.

³ §14.4.2: Time limits throughout this Article, referring to "days" shall mean "working days" which are defined as days exclusive of Saturday, Sunday, formal holidays, periods when Institutes, Registration, classes and examinations are not scheduled, periods when the University is closed, and Summer Sessions. . .

Finally, DSU filed its response to New Matter raised in the AAUP's Answer by letter dated June 21, 2005. It asserts that reliance on §14.4.2 of the collective bargaining agreement is misplaced as that section applies only to computing time under the Grievance and Arbitration proceedings, and that the University has not waived its right to meet with the Union for purposes of negotiating during the summer months, either expressly or by practice.

DISCUSSION

Regulation 5.6 of the Rules of the Delaware Public Employment Relations Board requires:

- (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. If the Executive Director determines that there is no probable cause to believe that an unfair labor practice has occurred, the party filing the charge may request that the Board review the Executive Director's decision in accord with provisions set forth in Regulation 7.4. The Board will decide such appeals following a review of the record, and, if the Board deems necessary, a hearing and/or submission of briefs.
- (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; otherwise he shall issue a probable cause determination setting forth the specific unfair labor practice which may have occurred.

The Delaware General Assembly conferred upon the Public Employment Relations Board authority and responsibility to “. . . assist in resolving disputes between public employees and public employers . . .” 19 Del.C. §1301(3). The statute also requires employers and unions to “enter into collective bargaining negotiations with the willingness to resolve disputes relating to terms and conditions of employment and to reduce to writing any agreements reached through such negotiations.” 19 Del.C. §1301(2)

The duty to bargain in good faith compels meaningful negotiations but does not require “either party to agree to a proposal or require the making of a concession.” 19 Del.C. §1302(e).

In one of the earliest cases decided by the Delaware PERB, the standard was established for evaluating the quality of negotiations when questioned by one of the parties:

When deciding failure to bargain in good faith issues, it is necessary to examine the “totality of conduct” of the parties. NLRB v. Montgomery Ward, 9th Cir., 133 F.2d 676 (1943). The validity of a single position can only be ascertained from the overall record. While a party’s posture as it relates to a particular subject, in and of itself, might qualify as an unfair labor practice, viewed in the light of the continuing and evolving negotiations process, it may well prove otherwise. It is the totality of conduct that tests the quality of negotiations. Absent sufficient proof of an unwillingness by the party charged to maintain an open mind and a willingness to sincerely search for common ground upon which settlement can be based, it is not the Board’s prerogative to dictate bargaining strategy. Seaford Education Association v. Bd. of Education, Del.PERB, ULP 2-2-84S, I PERB 1, 7 (1984).

The pleadings support a conclusion that probable cause exists to believe that at least one of the parties may have violated its duty to negotiate in good faith. Which party, however, can only be evaluated once the scope of the reopener under Article 23 of the parties’ collective bargaining agreement has been determined. Whether the AAUP in fact refused to negotiate during the summer months and whether DSU had agreed to annual summer hiatuses will also be in issue. In order to create a record to support a decision, a hearing will be convened as soon as possible.

It is apparent from the pleadings that these parties have reached a point in their negotiations where third party assistance is warranted. In fact, PERB has advised the parties that mediation is appropriate and that a mediator will be appointed, pending resolution of DSU’s request for injunctive relief to compel the AAUP to meet during the summer months. The scope of the mediator’s authority shall be limited to those areas of dispute which the parties agree are subject to negotiation under the terms of the reopener, as clarified in a letter to the parties from the PERB dated June 30, 2005.

This agency is specifically empowered to issue orders providing for temporary and/or preliminary relief in unfair labor practice proceedings, where such relief is determined to be just

and proper. 19 Del.C.§1308(c). A successful request for preliminary injunction must establish first that there is a reasonable probability that the Charging Party will prevail on the merits and secondly, that the Charging Party will suffer irreparable harm if its request for relief is denied. Failure to establish either element precludes the awarding of the requested relief. New Castle County Vocational-Technical Education Association v. Bd. of Education, Del. PERB, ULP 88-05-025, I PERB 257, 260 (1988).

In this case, both DSU and the AAUP allege the other has failed to bargain in good faith, based on the same set of facts, viewed from opposing perspectives. Which party prevails will depend upon the interpretation and application of the reopener provision to this set of facts. At this time it is impossible to determine, based on the pleadings, which side might prevail without the benefit of a complete factual record and legal argument.

DSU contends that it is being irreparably harmed by the AAUP's refusal to bargain during the summer months because the University "cannot recapture the benefit of its bargain in obtaining the reopener clause which grants to it the opportunity to pursue and obtain mid-term modifications to the collective bargaining agreement." The parties are currently bound by an existing collective bargaining agreement that does not terminate for another four years, on August 31, 2009. Both parties are entitled to the benefit of that agreement. There is nothing in the record which suggests that even if the parties do engage in negotiations on all of the issues that DSU seeks to negotiate, that the outcome of that bargaining process will be the acceptance of DSU's proposals. To presuppose such an outcome would negate the need to negotiate.

Therefore, DSU's motion for injunctive relief is denied. I note, however, that a year has passed in which the parties acknowledge they have made little progress in negotiations on their own and during which DSU did not seek to revive its charge until the week that the spring semester ended. It is in neither party's interest to delay the resolution of the scope of the reopener any longer

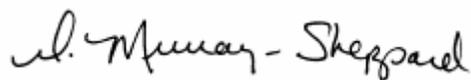
DECISION

Consistent with the foregoing discussion, the Charge and Counter-Charge each establish a bases for concluding that there may have been a violation of the statutory duty to bargain in good faith by the parties' failure to make progress in their negotiations under the reopener provision of their current collective bargaining agreement. A hearing will be convened as soon as possible for the purpose of creating a record on which a decision can be rendered in this matter.

Because it is not clear which side has the probability of prevailing in the final resolution and because there has been no specific irreparable harm alleged, DSU's motion for preliminary injunction is denied.

IT IS SO ORDERED.

DATE: 18 July 2005



DEBORAH L. MURRAY-SHEPPARD
Hearing Officer
Del. Public Employment Relations Bd.