STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 81, LOCAL 1102,	)	
Petitioner,	)	**ULP No. 05-04-477**
v.	)	
CITY OF WILMINGTON,	)	
Respondent.	)	

APPEARANCES

Perry F. Goldlust, Esquire, Aber, Goldlust, Baker & Over for AFSCME, Council 81, Local 1102
Martin C. Meltzer, Esquire, Assistant City Solicitor, for City of Wilmington

BACKGROUND

The City of Wilmington ("City") is a "public employer" within the meaning of section 1302(p)[1] of the Public Employment Relations Act, 19 Del.C. Chapter 13 ("PERA" or "Act").

AFSCME, Council 81, Local 1102 ("AFSCME" or "Union") is an "employee organization" within the meaning of section 1302(i) of the Act [2] and was the "exclusive

[1] 19 Del.C. §1302(p): Public employer or employer" means the State, any county of the State or any agency thereof, and/or any municipal corporation, municipality, city or town located within the State or any agency thereof, which upon the affirmative legislative act of its common council or other governing body has elected to come within the former Chapter 13 of this title or which hereafter elects to come within this chapter, or which employs 100 or more full-time employees.

bargaining representative" of the bargaining unit of certain employees of the City of Wilmington at all times relevant to this dispute. 19 Del.C. 1302(j). [3]

The material facts giving rise to this dispute occurred after the expiration of the parties' prior collective bargaining agreement on June 30, 2001, but before the execution of the successor agreement on December 2, 2004. By agreement of the parties, the successor agreement was retroactive and effective upon the expiration date of the prior agreement, June 30, 2001.

In February 2004, the City posted a vacancy in the classification of Revenue Enforcement Agent. Following the evaluation of seven (7) certified candidates Employee Perez was rated at 74, Employee Lambert at 71.32 and Employee Russ at 62.48. Following the selection of Employee Perez, Employees Lambert, Russ and a third employee, Eloise Watson, filed grievances protesting Perez' selection.[4]

A Step IV grievance meeting was held on September 23, 2004. Thereafter, it was determined that Employee Perez did not possess a graduate equivalency degree (GED), which resulted in his disqualification. The City contends that both grievants and the Union agreed that the decision of the Step IV Hearing Officer would be final and binding and resolve all pending grievances.

The Step IV hearing was reconvened on November 17, 2004. Following the hearing, the employee with the next highest score, Employee Lambert, was selected to

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[2] 19 Del.C.(i): "Employee organization" means any organization which admits to membership employees of a public employer and which has as a purpose the representation of such employees in collective bargaining, and includes any person acting as an officer, representative or agent of said organization.

[3] 19 Del.C. §1302(j): "Exclusive bargaining representative" or "exclusive representative" means the employee organization which as a result of certification by the Board has the right and responsibility to be the collective bargaining agent for all employees in that bargaining unit.

[4] Eloise Watson subsequently withdrew her grievance and is no longer involved in this matter.

replace Employee Perez. Employee Russ and the Union then filed for arbitration of the Russ grievance.

The City refused to participate in the arbitration hearing based upon the case of Litton Financial Printing Division v. NLRB, 501 U.S. 190, 137 LRRM 2441 (1991) and the agreement attributed to the grievants and the Union that the decision of the Step IV Hearing Officer would be final and binding thereby resolving the pending grievances.

On April 25, 2005, AFSCME filed this unfair labor practice charge alleging that by refusing to process grievances the City violated 19 Del.C. §1307(a)(5).[5]

With its May 6, 2005, Answer the City filed a Counter Complaint. The Executive Director dismissed the counter-charge in the Probable Cause Determination issued on June 8, 2005. The Executive Director did, however, find probable cause to believe that a violation by the City of 1307(a)(5) may have occurred.

A hearing was held on July 12, 2005, to address the alleged violation by the City of §1307(a)(5). Written post-hearing briefs were received on August 31, 2005. The following discussion and decision result from the record thus compiled.

ISSUE

Whether the City, by refusing to process the Russ grievance to arbitration, engaged in conduct in violation of 19 Del.C. §1307(a)(5)?

[5] 19 Del.C. §1307(a)(5): (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 bargaining unit, except with respect to a discretionary subject.

PRINCIPAL POSITIONS OF THE PARTIES

City: Where all of the facts and occurrences of a grievance occur after the expiration of the collective bargaining agreement, the grievance is not arbitrable without the mutual consent of the parties.

The city recognizes that mandatory subjects of bargaining are generally subject to the prohibition against unilateral change. In Hilton-Davis Chemical Company, 185 NLRB 241, 75 LRRM 1036 (1970), however, the National Labor Relations Board held that arbitration clauses are excluded from the prohibition on unilateral change and do not survive the expiration of a collective bargaining agreement. The United States Supreme Court has also recognized this exception. Litton, supra.

The City argues that Delaware law is consistent with the federal law governing the private sector in that both jurisdictions have held there is no duty to arbitrate a labor dispute absent the mutual consent of both parties. Delaware Public Employees, et al. v. New Castle Co., CA13314S, 1994 LEXIS 168, at *6 (Del.Ch., August 25, 1994) (citing United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582, 46 LRRM 2416 (1960).

The City argues that the retroactive effective date of the current collective bargaining agreement does not apply to prior grievances without specific contract language documenting such an intent. To conclude otherwise would be contrary to Litton and City of Wilmington v. FOP Lodge 1, CA 20244 NC, 2004 Lexis 168 (Del.Ch., June 24, 2004).

AFSCME: Under Delaware labor law, arbitration is the favored method of resolving labor disputes.

While similar in many ways to the Labor Management Relations Act ("LMRA"), the Delaware Public Employment Relations Act has distinct differences, one of which is the status of contractual arbitration provisions. This distinction is noteworthy because public sector employees in Delaware, unlike private sector employees subject to the jurisdiction of the National Labor Relations Board, have no economic weapons (the right to strike) to provide leverage in collective bargaining. In the private sector, binding grievance arbitration is the negotiated quid pro quo that a union will forego its legal option to strike. Where public employees are prohibited from striking, public employers should be prohibited from repudiating arbitration.

Unlike the federal LMRA, the Delaware Public Employment Relations Act mandates the "grievance procedure" is a "term and condition of employment." In the private sector, parties can rely on statutorily sanctioned economic weapons to resolve labor disputes. In Delaware, however, the Public Employment Relations Act envisions the utilization of negotiated grievance procedures and is designed so that terms and conditions of employment remain in place at all times, subject to change only by the mutual agreement of the parties or a binding decision by an interest arbitrator.[6] To abrogate arbitration is inconsistent with the stated policy and purpose of the Public Employment Relations Act.[7]

[6] 19 Del.C. §1313(c): The public employer and the exclusive bargaining representative shall negotiate written grievance procedures by means of which bargaining unit employees, through their collective bargaining representatives, may appeal the interpretation or application of any term or terms of an existing collective bargaining agreement; such grievance procedures shall be included in any agreement entered into between the public employer and the exclusive bargaining representative.

[7] 19 Del.C. §1301: Statement of Policy. It is the declared policy of the State and the purpose of this chapter to promote harmonious and cooperative relationships between public employers and their employees and to protect the public by assuring the orderly and uninterrupted operations and functions of the public employer.

Even applying the Court's analysis in Litton, the City would still be required to arbitrate the grievance in this instance. Under Litton, a post-expiration grievance can be said to arise under the contract and, therefore, be considered arbitrable where, inter alia, "under normal principles of contract interpretation, the disputed contractual right survives expiration of the Agreement." Litton, supra., 501 US at 206.

In 1994, three years after the Litton decision, the Third Circuit Court of Appeals concluded that the dispute resolution procedures in a collective bargaining agreement which has nominally expired may, under normal principles of contract interpretation, survive during the post-expiration period. The post-expiration conduct of the parties may provide sufficient evidence upon which to conclude that an "implied-in-fact" collective bargaining agreement came into existence after the contract's expiration date. Luden's Inc., v. Local 6 of Bakery, Confectionery & Tobacco Workers, International, 28 F.3d 347, 146 LRRM 2587 (3d Cir., 1994).

The post-expiration conduct of the City and the Union in this matter, including their agreement to make the successor collective bargaining agreement retroactive, establishes the existence of a post-expiration "implied-in-fact" Agreement.

The conduct of the parties in processing these specific grievances by relying upon the application of contract provisions and maintaining other contractual provisions such as the wage schedule coupled with the fact that Delaware does not permit post-expiration unilateral changes in the status quo of terms and conditions of employment support the conclusion that there was an "implied-in-fact" collective bargaining agreement in place.

DISCUSSION

In 1962, the United States Supreme Court affirmed a decision by the National Labor Relations Board ("NLRB") holding that a private sector employer commits an unfair labor practice under the LMRA when it unilaterally alters a term and condition of employment which is a mandatory subject of bargaining. NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962). The Delaware PERB adopted the Katz rule in Appoquinimink Ed. Assn. v. Bd. of Education, Del. PERB, ULP No. 1-2-84A, I PERB 23 (1984).

In 1970, the NLRB held that private sector contractual grievance arbitration clauses were excluded from the Katz prohibition on unilateral change. In Hilton-Davis, supra., the NLRB concluded that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." Hilton-Davis, @ 1038, citing United Steelworkers, supra.. The Delaware Court of Chancery, under different facts, adopted this principle in Del. Public Employees, supra., when it enjoined arbitration of a grievance because it did not involve the interpretation or application of the parties' collective bargaining agreement.

In 1991, the U.S. Supreme Court in Litton, (citing Hilton-Davis) held that under the LMRA a party cannot be compelled to arbitrate a grievance in which all of the underlying facts occurred after the expiration of a collective bargaining agreement. The Developing Labor Law, describes the Litton decision:

> In *Litton Financial Printing Division v. NLRB*, the Supreme Court approved the [NLRB]'s rules, which provide for the continuation of grievance provisions but not necessarily of arbitration provisions. The Court accepted the reasoning of the Board that the arbitration promise is an explicit and time-limited surrender by the parties of the rights of economic self-help guaranteed to the parties by the [LMRA] itself, and

> that the duty to bargain requires that the parties be free to insist upon their respective positions to the point of economic conflict. [8]

The Court noted three instances when the underlying facts of a post-expiration grievance are arbitrable because they arise under a collective bargaining agreement: 1) it involves facts and occurrences that arise before expiration; 2) the post-expiration conduct infringes upon a right that accrued or vested under the collective bargaining agreement; 3) or where, under normal principles of contract interpretation, a disputed contractual right survives the expired collective bargaining agreement.

The Delaware Court of Chancery in 2004 granted the City of Wilmington's motion to permanently enjoin the arbitration of a post-expiration grievance in which all of the material facts giving rise to the grievance occurred after the expiration of the collective bargaining agreement. City of Wilmington v. FOP Lodge No. 1,. supra. The Vice Chancellor relied upon Litton in reaching this decision, but discounted the difference between the private sector statutory right to resort to economic self-help after the expiration of an agreement and the Delaware public sector statutory prohibition against the use of such self-help at any time. Applying Litton, the Vice Chancellor held that none of the three circumstances was present to establish that the grievance arose under the provisions of a collective bargaining agreement.

The City bases its position squarely on the decisions in Litton and City of Wilmington v. FOP Lodge No. 1, supra., which it argues preclude arbitration of the grievance at issue here. AFSCME, however, argues that the conduct of the City and the Union during the post-expiration period constitutes sufficient grounds upon which to find a duty to arbitrate.

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[8] The Developing Labor Law 780 (Patrick Hardin & John E. Higgins, Jr., eds., 4th ed.. 2001)

AFSCME bases its position on a 1994 decision by the Third Circuit Court of Appeals in Luden's Inc., supra. There, the Court of Appeals held . . .

> . . .3 [T]hat in a continuing employment relationship an arbitration clause may survive the expiration or termination of a CBA intact as a term of a new, implied-in-fact CBA unless (i) both parties in fact intend the term not to survive, or (ii) under the totality of the circumstances either party to the lapsed CBA objectively manifests to the other a particularized intent be it expressed verbally or non-verbally, to disavow or repudiate that term.
>
> This result injects substantially more stability and certainty into labor law, and promotes the primary statutory objectives of peaceful and stable labor relations underpinning the NLRA, at the slight cost of a notice requirement forcing a party to make clear its wish no longer to abide by the arbitration clause.
>
> In the circumstances of this case, where neither party in any palpable way challenged the continued vitality of the arbitration provision in particular (as opposed to the CBA as a whole) before the dispute erupted, and where no evidence shows that both the parties in fact intended their obligation to arbitrate grievances to be discharged, we think that the parties' duty to arbitrate grievances according to the terms of their 1988 CBA was never totally discharged. In other words, Luden's general undifferentiated termination of the 1988 CBA effective July 2, 1992 merely transmuted the parties' duty to arbitrate into a term of an implied-in- fact CBA which the parties formed on that date. 146 LRRM @ 2599-2600.

To determine whether the duty to arbitrate arose as a term of an implied-in-fact contract, the Court first examined the federal common law of collective bargaining agreements. The Court observed:

> Thus, general principles of contract law teach us that when a contract lapses but the parties to the contract continue to act as if they are performing under a contract, the material terms of the prior contract will survive in tact unless either one of the parties clearly and manifestly indicates, through words or through conduct, that it no longer wishes to continue to be bound thereby, or both parties mutually intend that the terms not survive. The rationale for this rule is straightforward: when parties to an ongoing, voluntary contractual relationship, especially a relationship which by its nature generally implies that some

> mutually agreed upon rules govern its configuration, continue to behave as before upon the lapse of the contract, barring contrary indications, each party may generally, reasonably expect that the lapsed agreement's terms remain the ones by which the parties will abide. Id. At 2593.

The 3rd Circuit Court of Appeals restated this premise from Luden's, Inc., in its 1999 decision in Durham Life Insurance Company v. Evans, 166 F.3d 139 (3d.Cir., 1999):

> Under *Luden's*, an arbitration clause in a lapsed CBA will continue in effect until one side clearly indicates through words or conduct that it no longer wishes to be bound. The termination of the CBA does not generally signal an intent to abandon arbitration, and discontent with other aspects of the CBA (such as compensation provisions) does not mean that an arbitration obligation ends when the CBA terminates. [FN 15]

In the current matter, there is no evidence to suggest that either party through words or conduct conveyed to the other intent not to continue to be bound by the terms of the expired Agreement or that the parties did not, in fact, continue to function under the provisions of the expired Agreement insofar as its terms and conditions are involved. Specifically, with regard to the contractual grievance and arbitration procedure, there is no evidence that either party ever expressed or evidenced its intent not to be bound by those provisions of the expired collective bargaining agreement until AFSCME sought to take the instant grievance to arbitration. To the contrary, when the Union filed the grievance in question, it cited alleged violations of Articles 6.1, 6.5, 6.7 and 6.8 of the expired collective bargaining agreement. Pursuant to the expired agreement, the City's Labor Relations Manager relied upon Article VI, Sections 6.5, 6.7 and 6.8, when she issued her Step 3 decision denying the grievance.

The grievance was next heard at Step Four of the Grievance and Arbitration Procedure (Article 4 of the expired Agreement) by the City's Assistant City Solicitor on September 23, 2004. The Step Four Answer entitled STEP FOUR GRIEVANCE, dated September 29, 2004, denied the grievance, citing Article 6.2 and 6.8 of the expired Agreement as the reason for the denial.

On October 2, 2004, the Field Representative from AFSCME, District Council 81, contacted the City requesting that the Step Four meeting be reconvened because the Union had not completed the presentation of its case on September 23, 2004. The Step Four meeting was reconvened on November 17, 2004. In his decision dated November 22, 2004, entitled STEP IV GRIEVANCE , the Assistant City Solicitor again denied the grievance citing Article 6.5 as the reason.

At least through STEP FOUR, the grievance and arbitration provisions of the expired Agreement governed the processing of the grievances of Employees Lambert and Russ and other provisions of the contract were cited as the basis for both parties' substantive positions concerning the merits of the grievances.

The record to this point establishes the parties had entered into an implied-in-fact contract which included the grievance and arbitration procedure as defined in the nominally expired agreement.

In addition to general principles of contract law, the United States Supreme Court in Litton also examined the compatibility of an implied-in-fact contract, including the duty to arbitrate, with federal labor policy. However, the present matter involves State public sector labor policy which, for the purpose of this decision, replaces federal labor policy as the focus of the compatibility requirement.

The Delaware Courts have generally accepted the validity of implied-in-fact contracts. In Lawrence v. DiBiase, C.A. No. 99C-02-190-JRS, Slip op. at 17 (Del. Super., Feb. 27, 2001), the Court observed:

> An implied in fact contract is legally equivalent to an express contract; the only difference between the two is the proof by which the contract is established. "An express agreement is arrived at by words, while an implied agreement is arrived at by acts." (quoting Trincia v. Testardi, Del.Ch., 57 A.2d 639, 642 (1948)).

Section 1302 of the Public Employment Relations Act, 19 Del.C. Ch. 13, ("Act") provides, in relevant part:

> (e) "Collective bargaining" means the performance of the mutual obligation of a public employer through its designated representatives and the exclusive bargaining representative to confer and negotiate in good faith with respect to terms and conditions of employment, and to execute a written contract incorporating any agreements reached. However, this obligation does not compel either party to agree to a proposal or require the making of a concession.

Section 1302(t) of the Act provides, in relevant part:

> Terms and conditions of employment" means matters concerning or related to wages, salaries, hours, grievance procedures . . .

In 1984, the PERB recognized the importance of maintaining the status quo of terms and conditions of employment as a means of "promoting harmonious and cooperative relationships" when it held that terms and conditions of employment constitute mandatory subjects of bargaining which may not be unilaterally altered by either parties without violating §1307(a)(5) or §1307(b)(2), of the Act. Appoquinimink, supra.

The PERB later expanded this principle holding that a public school employer in Delaware may not unilaterally alter the status quo of a mandatory subject of bargaining at

the initiation of the statutory impasse resolution procedures. New Castle County Vo-Tech. Ed. Assn. v. Bd. of Ed., Del. PERB, ULP No. 88-05-025, I PERB 309, 317 (1988)[9]:

> There is no statutory basis upon which to conclude that impasse, a prerequisite for mediation, also permits the employer to unilaterally change the status quo. To the contrary, such a conclusion would be inconsistent with the declared policy of the State and the purpose of the statute which is to ". . . promote harmonious and cooperative relationships between reorganized public school districts and their employees and to protect the public by assuring the orderly and uninterrupted operations and functions of the public school system." 14 Del.C. Section 4001.

The PERB further emphasized the importance of prohibiting the unilateral change of a term and condition of employment when it held that a party may not unilaterally alter a term and condition of employment even after the conclusion of the impasse resolution procedures except where extraordinary or compelling circumstances exist. Appoquinimink Education Association, DSEA/NEA v. Appoquinimink School District, Del.PERB, ULP .98-09-243, III PERB 1785,1807 (1998).

The General Assembly recognized the benefit of resolving disputes through arbitration when it amended the Public Employment Relations Act and the Police Officers' and Firefighters' Employment Relations Act in 1999 to require binding interest arbitration as the exclusive means for resolving disputed issues during negotiations.[10]

Further, the Delaware Court of Chancery, when reversing the PERB's decision to retain jurisdiction and process an unfair labor practice charge rather than deferring the

[9] Decisions of the PERB under 14 Del.C. Ch 40, the Public School Employment Relations Act, 19 Del C. Ch. 13, the Public Employment Relations Act, or 19 Del. C. Ch 16, the Police Officers' and Firefighters' Employment Relations Act are controlling as to the other two Acts where the statutory language is identical. IAFF Local 1590 and FOP Lodge 1 v. City of Wilmington, ULP No. 89-09-041, Del.PERB, I PERB 457 (1990).

[10] 19 Del.C. §1315 and 19 Del.C. §1615, respectively.

matter to the contractual arbitration procedure observed: "Delaware public policy strongly favors the use of contractual dispute resolution procedures to resolve disputes between public employers and the bargaining representatives of their employees." Delaware State University Chapter of the American Association of University Professors v. Delaware State University, Del.Ch., CA 1389-K, III PERB 1971, 1999 (2000), citing City of Wilmington v. Wilmington Firefighters Local 1590, Del.Supr., 385 A. 2d 720, 724-725 (1978) and City of Wilmington v. Fraternal Order of Police, Del. Supr., 510 A. 2d 1028, 1029 (1986).

In Cofrancesco v. City of Wilmington, 419 F. Supp. 109, 93 LRRM 2387 (D. Del., 1976), the United States District Court for Delaware observed;

> Delaware law extends to State, county and municipal employees many of the same rights to organize and bargain collectively that the LMRA affords to employees in the private sector. 19 Del.C. §1301, et. seq. In cases where problems raised under Delaware's labor law are similar to those that arise under the LMRA, Delaware could be expected to consider and, in all likelihood, follow federal law.

This pronouncement in Cofrancesco, while certainly valid is not absolute. As early as 1984, the Delaware PERB observed:

> 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 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 the Seaford School District, Case No. 2-2-84: " While such decisions may provide guidance, there are distinctions that exist between the public and 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, supra., ULP 1-3-84-3-2A, 35, 40-41.

The present case involves two policy considerations which distinguish the federal Labor Management Relations Act from the Delaware Public Employment Relations Act. The first is that private sector employees (who are subject to the provisions of the LMRA under the jurisdiction of the NLRB) enjoy the right to strike, which is universally accepted as the quid pro quo for binding grievance arbitration. In the absence of this right to strike at the state level, the General Assembly mandated at 19 Del.C.§1302(t) that "grievance procedures" are a "term and condition of employment. In Appoquinimink, supra., and its progeny, the PERB has declared that terms and conditions of employment (including the grievance and arbitration procedure), constitute mandatory subjects of bargaining, without exception, and are not subject to unilateral change. This has been the accepted state of the law under the Public Employment Relations Act, the Police Officers' and Firefighters' Employment Relations Act and the Public School Employment Relations Act for twenty-one years.

The Union also argues that the parties' agreement at the conclusion of negotiations that the successor Agreement would be effective upon be the expiration date of the prior Agreement eliminates any hiatus between the prior Agreement and the successor Agreement.

Litton expressly allowed for the arbitration of post-expiration grievances where the parties so agreed. No argument was offered by the City why there should be a difference between a pre-expiration agreement to continue adherence to the grievance and arbitration provisions and a post-expiration agreement as to the retroactivity of a successor Agreement. It was incumbent upon the City to state its intention and negotiate with the Union if the retroactivity agreement of the successor agreement was to be

limited to exclude the grievance and arbitration procedure. Applying the principles of Luden's, Inc., in this case the parties to the collective bargaining agreement continued to act as if they were performing under the contract; therefore, the material terms of that prior agreement survived intact with neither party clearly and manifestly indicating through words or conduct that it no longer wished to continue to be bound thereby. Luden's, Inc., supra., 146 LRRM 2593.

The record in this matter establishes the City's obligation to arbitrate arising from the existence of a valid implied-in-fact collective bargaining agreement is consistent with not only general standards of contract law but also with the underlying State policy, upheld and enforced by Delaware courts, favoring arbitration as the preferred method of resolving labor disputes between the parties.

DECISION

By refusing to process the Russ grievance to arbitration, the City engaged in conduct in violation of 19 Del.C. §1307(a)(5).

REMEDY

1. The City is to cease and desist from initiating unilateral changes in terms and conditions of employment.

2. The City is directed to arbitrate the Russ grievance in which the underlying facts occurred during the term of an "implied in fact" collective bargaining agreement..

It is so ordered.

October 4, 2005
Date

Charles D. Long, Jr.,
Executive Director