

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

<b>RED CLAY EDUCATION</b>	)	
<b>ASSOCIATION, DSEA/NEA,</b>	)	
	)	
<b>Charging Party,</b>	)	
	)	
<b>v.</b>	)	<b><u>ULP No. 05-10-496</u></b>
	)	<b>Probable Cause Determination</b>
<b>BOARD OF EDUCATION OF</b>	)	
<b>THE RED CLAY CONSOLIDATED</b>	)	
<b>SCHOOL DISTRICT,</b>	)	
	)	
<b>Respondent.</b>	)	

**BACKGROUND**

The Red Clay Consolidated School District (“District”) is a public employer within the meaning of §4002(n) of 14 Del.C. Chapter 40, the Public School Employment Relations Act (“PSERA”). The Red Clay Education Association, DSEA/NEA (“RCEA”) is an employee organization within the meaning of §4002(h) of the PSERA. The RCEA is the exclusive bargaining representative of the certificated non-administrative employees, not including supervisory or staff personnel, employed by the District within the meaning of §4002(i) of the PSERA.

On October 11, 2005, RCEA filed an Unfair Labor Practice Charge against the District alleging conduct in violation of §4007(a)(5),<sup>1</sup> of the Act. The Charge alleges that the State Board of Education adopted a “Policy for Appraising Teachers and Specialists” (“DPAS Guidelines”) which prescribes minimum requirements for the appraisal of teachers and specialists. (Para. 6 of the charge) On April 18, 2005, Lawrence Parker, a teacher at the Cab Calloway School of the Performing Arts was placed on an Individual Improvement Plan (“IIP”).

Paragraph 24 of the Charge alleges:

The DPAS guidelines provide that a teacher or specialist can be placed on an IIP when one of two situations exists. First, when a teacher’s performance in any of six identified categories has been appraised as “Needs Improvement” or “Unsatisfactory” on a Performance Appraisal. Second, when a teacher’s overall performance has been identified as unsatisfactory on a Lesson Analysis. By issuing an IIP to Parker absent either of these situations, the District has unilaterally altered the status quo of a mandatory subject of bargaining, evaluation procedure, and thereby violated its obligation to bargain in good faith.

On October 21, 2005, the District filed its Answer and New Matter, denying portions of the material facts and the alleged violation of §4007(a)(5). Under New Matter, the Respondent alleges the following: 1) The charge is untimely under the 180-

---

<sup>1</sup> §4007. Unfair labor 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 of employees in an appropriate unit.

day statute of limitations set forth in §4008, of the PSERA;<sup>2</sup> 2) The Charge is moot and unripe and therefore should be dismissed with prejudice. The District contends that the DPAS Guidelines, as cited by the RCEA, explicitly provide that “[a]n Individual Improvement Plan shall be developed when an individual’s performance in any category has been appraised as Needs Improvement o[r] Unsatisfactory on a Performance Appraisal . . .” RCEA Ex. 2, Supp. 4, Sec. C(5)). Because Mr. Parker’s 2004-2005 Performance Appraisal rated his performance as “Unsatisfactory” in each of the areas addressed in his IIP, placing him on an IIP was justified and the Unfair Labor Practice Charge does not, therefore, present a live case or controversy ripe for adjudication; 3) The matter should be deferred to contractual arbitration because the RCEA has not yet exhausted the grievance procedure set forth in Article 3 of the Agreement, including arbitration.

On November 4, RCEA filed its Response To New Matter. RCEA maintains that 180 days from April 15, 2005 (the date Mr. Parker was placed on the IIP) is October 15, 2005. Because October 15<sup>th</sup> fell on a Saturday, the filing period was extended until Monday, October 17, 2005. Further, Monday, October 10, 2005, was Columbus day which, pursuant to PERB Rule 1.1,<sup>3</sup> is not counted in calculating the 180-day filing period.

---

<sup>2</sup> Same – Disposition of complaints. (a) . . . Evidence shall; be taken and filed with the Board, provided, that no complaint shall issue based on any unfair labor practice ccurring more than 180 days prior to the filing of the charge with th Board.

<sup>3</sup> PERB Rule I, General Provisions, 1.1. Computation of Time. (a) In computing any period of time prescribed by or allowed by the Act, these Regulations or an Order of the Board, the day of the act or event after which the designated time begins to run shall be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period shall run until the end of the next day which is neither a Saturday, Sunday or legal holiday.

RCEA also maintains that the basis of the Unfair Labor Practice Charge is the IIP which was effective, by its terms, on April 18, 2005. Further, a recognized exception to the mootness doctrine is situations capable of repetition, which is the case here.

RCEA points out that the parties' collective bargaining agreement provides only for advisory grievance arbitration rather than binding grievance arbitration. Because of the District's unwillingness in a similar matter to accept an advisory arbitration decision limiting the issuance of an IIP to the circumstances expressly set forth in the DPAS Guidelines, the instant matter does not qualify for deferral under the parameters of the PERB's discretionary deferral policy.

### **DISCUSSION**

The defenses to the Unfair Labor Practice Charge raised by the District under New Matter are unpersuasive. The Charge was filed within 180-days from April 18, 2005, the date which RCEA cites as the occurrence of the triggering event. Further, there exists an actual controversy capable of reoccurring which deserves resolution. Deferral is not appropriate since the District has declined to accept a non-binding grievance arbitrator award in a similar matter involving the same issue holding that the issuance of an IIP is limited to the qualifying circumstances set forth in the DPAS Guidelines.

### **DETERMINATION**

Construed in a light most favorable to the Charging Party, the pleadings constitute probable cause to believe that an unfair labor practice, as alleged, may have occurred. Specifically, the issue is whether by placing Mr. Parker on the IIP in question the District

violated 14 Del.C. §4007(a)(5).

Date: December 19, 2005

/s/Charles D. Long, Jr.  
Charles D. Long, Jr.,  
Executive Director,  
Del. Public Employment Relations Bd.