

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

RED CLAY CONSOLIDATED SCHOOL DISTRICT,)	
)	PERB Review of the
Appellant,)	Hearing Officer's
)	Decision
v.)	
)	<u>ULP No. 05-10-496</u>
RED CLAY EDUCATION ASSOCIATION, DSEA/NEA,)	
)	
Appellee.)	

Appearances

*Alfred J. D'Angelo, Jr., Esq., Buchanan, Ingersoll & Rooney, P.C., for the District
Jeffrey M. Taschner, Esq., General Counsel, Delaware State Education Association*

BACKGROUND

The appellant, Red Clay Consolidated School District ("District"), is a public school employer within the meaning of §4002(n) of the Public School Employment Relations Act ("PSERA"), 14 Del.C. Chapter 40.

The appellee, Red Clay Education Association, DSEA/NEA ("RCEA" or "Association") is an employee organization which admits to membership District employees and has as a purpose the representation of those employees in collective bargaining, pursuant to 14 Del.C. §4002(e). RCEA is the exclusive collective bargaining representative of the bargaining unit of the District's certificated professional employees. 14 Del.C. §4002(i).

On October 11, 2005, RCEA filed an unfair labor practice charge alleging the District had instituted a unilateral change in the performance evaluation process, in violation of its duty to bargain in good faith under 14 Del.C. §4007(a)(5).

The District filed its Answer to the Charge on October 21, 2005, denying the material allegations and asserting under new matter that the charge should be dismissed as untimely, moot and unripe, or alternatively, should be deferred to the parties' contractual grievance and arbitration procedure. RCEA responded by denying the District's new matter.

The Executive Director issued a probable cause determination on December 19, 2005, wherein he found probable cause to believe an unfair labor practice may have occurred. He also dismissed the District's affirmative defenses, finding the charge was timely filed and that an actual controversy existed which was subject to recurrence and therefore warranted resolution. The Executive Director declined to defer the charge to the contractual grievance procedure because that process culminated in a non-binding decision and the District had declined to accept the arbitrator's decision in a similar case.

A hearing was held on February 14, 2006, written argument was received from the parties thereafter, and the Hearing Officer rendered her decision on July 6, 2006, in which the following conclusions were reached:

- The performance evaluation process is a working condition and therefore constitutes a mandatory subject of bargaining.
- The District and the Association negotiated and incorporated by reference into their collective bargaining agreement the Delaware Performance Appraisal System ("DPAS") as the process to be used for purposes of evaluating bargaining unit employee performance.
- The District implemented a unilateral change in the performance evaluation process when it placed a teacher on an Individual Improvement Plan ("IIP") following a classroom observation and Lesson Analysis on which the observing principal did not conclude "Performance is Unsatisfactory."

- By implementing a unilateral change in a mandatory subject of bargaining, the District committed a *per se* violation of its duty to bargain in good faith, in violation of 14 Del.C. §4007(a)(5). *Red Clay Education Association v. Bd. of Education, Del.PERB, ULP 05-10-496, V PERB 3591, 3606 (2006).*

The District was ordered to cease and desist from implementing Individual Improvement Plans following classroom observations in which the educator's overall performance was not rated unsatisfactory unless and until such procedure was negotiated with the RCEA. The District was also ordered to post notices in the workplace.

On July 17, 2006, the District requested review of the Hearing Officer's decision followed by a Motion to Stay Enforcement of the Decision and Order Pending Review on July 31, 2006. RCEA opposed the District's Motion to Stay. The full Public Employment Relations Board ("Board" of "PERB") heard argument from the parties on the Motion on August 16, 2006. This Board rendered its decision denying the Motion on August 17, 2006. *Red Clay Education Association v. Bd. of Education, Del.PERB, ULP 05-10-496, PERB Decision on Motion to Stay, V PERB 3631 (2006).*

RCEA filed its Response to the District's Request for the Review on or about August 21, 2006. A copy of the complete record in this matter was provided to each member of the PERB.

The full PERB convened in public session on September 25, 2006, to consider the District's Request for Review of the Hearing Officer's Decision. Following consideration of the complete record below and the arguments of the parties on review, the Board unanimously reached the following decision.

DISCUSSION

It is undisputed and settled law that employee performance evaluation procedures are a mandatory subject of bargaining under the Public School Employment Relations Act. The

District and the Association negotiated and reached agreement that DPAS is the performance evaluation system that would be used to evaluate the District's professional staff.

The parties also negotiated into their agreement that any changes to DPAS by the State Department of Education("DOE") (§16:9) or recommended by a contractually established Evaluation Committee and approved by the local School Board (§25:4) would be incorporated into the District's application of the negotiated performance evaluation procedures.

There is nothing in the record or the arguments of the parties that suggests that the District's use of an IIP in circumstances other than at the end of the Performance Appraisal cycle or following an overall unsatisfactory classroom observation was ever discussed, negotiated, recommended by the contractual Evaluation Committee or mandated by the State DOE as a DPAS modification.

The District's argument that, in the absence of an express prohibition in the DPAS guidelines, it can use the IIP form to document any type of substandard performance or performance concern it deems appropriate is contrary to the purpose of the statute. There is a mutual obligation between the parties to negotiate concerning terms and conditions of employment, including the performance evaluation system. Where the resulting collective bargaining agreement expressly adopts a specific procedure for conducting performance evaluations, and further notes the method by which that procedure might be modified during the term of the agreement, it is not logical to conclude that the same process can be modified simply because the guidelines do not expressly prohibit a particular act.

The District's argument that the Hearing Officer erred in affirming the arbitrator's decision in *Red Clay Consolidated School District and RCEA* (Issuance of IIP to Ristano, Tilghman, & Volkens), AAA 14 390 02087 04, Colflesh, R., August 3, 2005. [Joint Exhibit 10] is misplaced. That decision was rendered in a separate grievance which is not currently before this Board. The Hearing Officer relied upon the arbitrator's decision in discerning the status quo

of the negotiated performance evaluation system, a necessary step in determining whether there was, in fact, a unilateral change. Identification and application of the status quo of a mandatory subject of bargaining is within the scope of PERB's responsibility and required to determine whether there has been a *per se* violation of the duty to bargain in good faith.

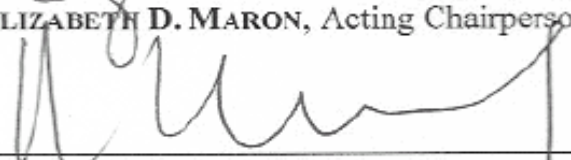
The District has also argued that the zipper clause of the agreement waives any right the Association may assert to negotiate during the term of the agreement. Broad zipper clauses are generally employed in situations where a collective bargaining agreement is silent on an issue in dispute. In this case, the parties clearly negotiated this issue, reduced their agreement to writing and further agreed to the circumstances under which that procedure could be modified. The general zipper clause cannot be invoked to supersede the clear language for modification under the agreement. The present case is distinguishable from the Chancery Court's decision in *Red Clay Ed. Assn. v. Bd. of Education of Red Clay Consolidated School District*, 139 LRRM 2904, 1992 WL 14965 (Ch.Ct. 1992), on that basis.

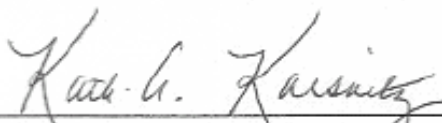
DECISION

Consistent with the foregoing discussion, this Board unanimously affirms the decision of the Hearing Officer in its totality. Red Clay Consolidated School District violated its duty under the Public School Employment Relations Act to bargain in good faith when it unilaterally implemented a change to a mandatory subject of bargaining, namely the performance evaluation process. By so doing, the District violated 14 Del.C. §4007 (a)(5).

IT IS SO ORDERED.


ELIZABETH D. MARON, Acting Chairperson


R. ROBERT CURRIE, JR., Member


KATHIA A. KARSNITZ, Member

Dated: 28 December 2006