

**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>DS/ULP No. 06-06-524</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 bargaining representative of the bargaining unit of the District's certificated professional employees. 14 Del.C. §4002(i).

The District and the RCEA are parties to a current collective bargaining agreement, which has a term of September 1, 2005 through August 31, 2008.

On June 2, 2006, RCEA filed a Request for Declaratory Statement and Unfair Labor Practice Charge requesting the Public Employment Relations Board to determine whether the dress code implemented on January 30, 2006, constitutes a mandatory subject of bargaining within the meaning of 14 Del.C. §4002(r).

The District filed its Answer on June 29, 2006, admitting in part and denying in part the material allegations and asserting its right to adopt the dress code under Article 10.10 of the parties' agreement, the waiver by the Association of any right to contest the policy pursuant to the zipper clause of that agreement, and that the charge was not timely filed.

RCEA responded on July 20, 2006, by denying the District's new matter.

On or about September 25, 2006, the parties submitted to PERB a Stipulation of Fact "solely for the purpose of submitting to the Executive Director the narrow issue of whether the Dress Code constitutes a mandatory subject of bargaining." The parties reserved the right to provide evidence of other facts should there be future proceedings concerning the issues raised in the unfair labor practice charge.

The Executive Director issued a declaratory statement on December 15, 2006, wherein he found "that the dress code unilaterally implemented by the Red Clay School District constitutes a mandatory subject of bargaining."

On December 27, 2006, the District requested review and stay of enforcement of the Executive Director's decision. The Public Employment Relations Board received written argument on review from the parties, with the final brief received on February 23, 2007.

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 March 14, 2007, to consider the District's Request for Review of the Executive Director'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

The District argues the Executive Director erred in applying the balancing test established in *Appoquinimink Education Association v. Bd. of Education of the Appoquinimink School District*, Del. PERB, ULP 1-3-84-3-2A, I PERB 35, 50 (1984). That test states:

Where a subject in dispute concerns or is related to wages, salaries, hours, grievance procedures and working conditions, and also involves areas of inherent managerial policy, it is necessary to compare the direct impact on the individual teacher in wages, salaries, hours, grievance procedures and working conditions as opposed to its probable effect on the operation of the school system as a whole. If the probable effect on the school system as a whole clearly outweighs the direct impact on the interest of the teachers, it is to be excluded as a mandatory subject of bargaining; otherwise, it shall be included within the statutory definition of terms and conditions of employment and mandatorily bargainable. (*emphasis added*)

The test does not seek to “balance” the interests of the employer and the employees but rather looks to determine where the greater interest lies. The purpose of the Public School Employment Relations Act is to promote harmonious and cooperative working relationships through collective bargaining. It is logical and sensible under that framework that parties would be encouraged and required to negotiate working conditions because of their impact on employees and consequently on the working environment. Indeed, in order to create a healthy and productive working environment, both the employer and the employees have a real and identifiable interest in negotiating working conditions.

The *Appoquinimink* test on its face favors a finding of negotiability and sets the standard for removing issues from the scope of mandatory negotiations. It requires that “the probable effect on the school system as a whole clearly outweighs the direct impact on teachers.” (*emphasis added*). In order to apply the test, there must be support on the record for both the

probable effect on operations and the direct impact on employees. It is clear that a dress code that prohibits specific types of clothing that have previously been acceptable will have a direct economic impact on staff who may be required to purchase new clothing and shoes in order to comply with the policy.

The probable effect on operations is not clear in this case. Other than the District's assertion that it is common sense that better dressed teachers improve the learning environment, there is nothing in the record that supports that conclusion. The District argues that it was not required to prove a problem existed or that the dress code would further its educational mission and improve the quality of its operation. By not providing such support, the District acted at its peril.

The District also asserted in its Request for Review that the Executive Director erred in concluding that the potential for discipline for violating the dress code "tips the balance" toward being a mandatory subject of bargaining. The Board does not read the Director's decision as finding potential discipline tipped the balance; the Director found that the potential imposition of discipline "lends further support to the conclusion that the dress code at issue in the instant petition is a mandatory subject of bargaining." *Red Clay Education Assn, DSEA/NEA v. Red Clay Consolidated School District*, Del. PERB, DS 06-06-524, V PERB 3697, 3712 (2006). The determination that the imposition of a dress code is a mandatory subject of bargaining had already been determined based on application of the balancing test.

DECISION

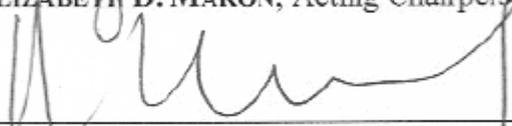
Consistent with the foregoing discussion, the Board unanimously affirms the decision of the Executive Director finding the Dress Code distributed by the Red Clay Consolidated School District on December 5, 2005, as revised and implemented on January 30, 2006, is a mandatory subject of bargaining.

This decision is not a finding that an unfair labor practice has been committed but constitutes the resolution of the preliminary issue of scope of negotiability, determining “whether a matter in dispute is within the scope of collective bargaining” as set forth in 14 Del.C. §4006(h)(4).

The determination as to whether there has been a failure to bargain in good faith and unfair labor practice will require the receipt of evidence and argument should the Association choose to pursue the unfair labor practice charge.

IT IS SO ORDERED.


ELIZABETH D. MARON, Acting Chairperson


R. ROBERT CURRIE, JR., Member


KATHI A. KARSNITZ, Member

Dated: 5 April 2007