

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

<b>AMERICAN FEDERATION OF STATE, COUNTY, AND</b>	)	
<b>MUNICIPAL EMPLOYEES, AFL-CIO,</b>	)	<b>PERB Review of</b>
<b>COUNCIL 81 AND ITS LOCAL UNION 247</b>	)	<b>Executive Director's</b>
<b>Petitioner,</b>	)	<b>Decision</b>
<b>v.</b>	)	
<b>STATE OF DELAWARE, DEPARTMENT OF</b>	)	<b><u>ULP No. 04-05-429</u></b>
<b>CORRECTION,</b>	)	
<b>Respondent.</b>	)	

**BACKGROUND**

The State of Delaware, Department of Correction (“DOC”) is a public employer within the meaning of section 1302 (p) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (“PERA”) and is the Respondent to this unfair labor practice charge.

The Charging Party, American Federation of State, County and Municipal Employees, AFL-CIO, Council 81, Local Union 247 (“AFSCME”) is an employee organization which admits to membership DOC employees and has as a purpose the representation of those employees in collective bargaining, pursuant to 19 Del.C. §1302(i). AFSCME Local Union 247 is the exclusive collective bargaining representative of a bargaining unit of DOC employees assigned to work in Adult Correctional Facilities as defined by DOL Case 123. Del.C. §1302(j).

At all times relevant to this dispute, DOC and AFSCME were parties to a collective bargaining agreement which had a defined term of April 1, 1993 through March 31, 1996. It is not disputed that the Agreement has been extended from year-to-year since 1996 by agreement of the parties.

On or about May 20, 2004, AFSCME filed this unfair labor practice charge against DOC alleging a violation of 19 Del.C. §1307 (a)(5) which provides:

- (a) It is 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 discretionary subjects.

Specifically, AFSCME alleges that DOC unilaterally altered the status quo of a mandatory term and condition of employment when it posted position vacancies within the Food Service and Maintenance sections of the Bureau of Administration by geographical region rather than statewide.

On or about June 21, 2004, DOC filed its Answer to the charge denying all material allegations contained therein. The Answer also asserted that the Charge was not timely filed because DOC had been posting the notices by the complained of method for a number of years. Consequently, DOC argued any complaint was well past the 180 day statute of limitations for filing an unfair labor practice charge and AFSCME had clearly waived any right it might have had to complain by its long-standing acceptance of the regional posting practice. DOC also asserted that the Charge was proper subject matter for deferral to the parties' negotiated grievance and arbitration procedure because it alleged a violation of the contract.

On July 21, 2004, AFSCME filed its Response to New Matter. The parties thereafter requested the matter be held in abeyance pending settlement discussions. When those discussions did not result in resolution of the issue, the parties requested a hearing be convened for the purpose of addressing the question of whether the charge was timely under 19 Del.C. §1308(a). A hearing was convened by the Executive Director on April 5, 2005, and written post-hearing submissions were received.

On August 5, 2005, the Executive Director addressed the issue which was placed before him by the parties, finding:

By its tacit agreement over approximately a twelve (12) year period, the Union has waived its right to challenge the longstanding practice of posting vacancies in maintenance and food service sections in the Department of Correction by geographical region. [Decision, V PERB 3393, 3399]

The Executive Director based his decision on the record facts that DOC had not altered its posting practices for at least twelve years, and that copies of the Notices of Vacancy had been provided to Union officials. He did not reach the issue of whether the practice of posting notices by geographic region rather than statewide violated the collective bargaining agreement. He found:

The current method of posting has a well-documented long-standing history with the Union clearly on notice as to the practice. These facts coupled with the Union's failure to protest over at least a twelve (12) year period constitute a valid waiver of the Union's right to now protest the practice in the form of an unfair labor practice. [Decision, V PERB 3393, 3399]

On August 10, 2005, AFSCME requested review of the Executive Director's decision, and DOC responded on August 18, 2005.

A copy of the complete record in this matter was provided to each member of the Public Employment Relations Board. The Board met in public session to consider this matter on October 19, 2005, and again on November 9, 2005 to consider AFSCME's request for review. Following consideration of the full record below and the receipt of oral argument from both AFSCME and DOC, the Board unanimously reached the decision set forth herein.

## DISCUSSION

Upon review of the record, we find merit in AFSCME's argument that the collective bargaining agreement between Local 247 and DOC is clear and unambiguous on its face, wherein it provides in Article 28:

28.1 Vacancies at each institution shall be posted by shift and days off. Applicants for transfer to such posted shift and days off shall be selected in order of seniority of those employees eligible to bid.

The parties do not dispute that the DOC Maintenance Section is defined by §7.5 of their agreement to be a statewide "institution" as that term is used in the agreement. This definition is reaffirmed in ¶1 of the March 24, 1997 Memorandum of Agreement between these parties. It is also not disputed that the Notices of Vacancies in the Maintenance section are posted by geographical region, and are not posted statewide as required by the negotiated agreement.

The parties' collectively bargained agreement contains a provision which precludes any changes or waivers of that Agreement except if made in writing and executed by the parties after ratification by the Union.<sup>1</sup>

Where the status quo of a mandatory subject of bargaining is established by the clear and unambiguous language of the collectively bargained agreement, any variation from that status quo constitutes a per se violation of the duty to bargain in good faith. Where the parties have further agreed and placed into their contract a requirement that any waiver of the contractual terms must be in writing and executed by the parties, there is no valid basis for finding a "tacit agreement" exists sufficient to justify a change in that clear and unambiguous contractual requirement.

---

<sup>1</sup> §18.1: No agreement, alteration, understanding, variation, waiver or modification of any of the terms or conditions or covenants contained herein shall be made by any employee or group of employees with the employer, and in no case shall it be binding upon the parties hereto unless agreement is made and executed in writing between State Labor Relations Services and the Union, and the same has been ratified by the Union.

**DECISION**

Consistent with the foregoing discussion, the decision of the Executive Director is reversed and we find the State of Delaware Department of Correction violated 19 Del.C. §1307(a)(5) by unilaterally altering the status quo of a mandatory subject of bargaining in violation of its duty to bargain in good faith.

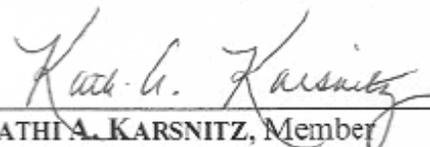
WHEREFORE, DOC is hereby ordered to:

1. Cease and desist from violating the statute.
2. Restore the status quo ante, posting Notices of Vacancies for Maintenance and Food Service statewide and filling those vacancies consistent with the agreements contained in the collective bargaining agreement.

**IT IS SO ORDERED.**

  
\_\_\_\_\_  
ELIZABETH D. MARON, Acting Chairperson

  
\_\_\_\_\_  
R. ROBERT CURRIE, JR., Member

  
\_\_\_\_\_  
KATHIA A. KARSNITZ, Member

DATE: 20 January 2006