

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES
COUNCIL 81, LOCAL 2004,

Petitioner,

v.

STATE OF DELAWARE, DEPARTMENT OF
SERVICES FOR CHILDREN, YOUTH
AND THEIR FAMILIES,

Respondent.

U.L.P. No. 95-07-148

Perry F. Goldlust, Esq., Heiman, Aber & Goldlust, for AFSCME Local 2004
Jeffrey R. Nayda, Manager, State Labor Relations Services, for Department of
Services of Children, Youth and Their Families

BACKGROUND

The Petitioner is an exclusive bargaining representative within the meaning of 19 DeL.C. §1302(i), of the Public Employment Relations Act ("Act" or "PERA"). The Respondent is a public employer within the meaning of Section 1302(n) of the Act.

On August 4, 1994, the Respondent announced the initiation of a workforce transition at the Ferris School, a rehabilitation facility for youthful offenders. The program involved the creation of thirty-nine (39) new positions entitled Treatment Specialists and various other support classifications. Because no additional positions were authorized, the Respondent reclassified existing positions in order to create the proper mix of new positions necessary to staff the transition program. A significant number of the positions reclassified were in the Youth Rehabilitation Counselor II classification ("YRC II").

In order to assist employees in the YRC II classification to qualify for advancement to the position of Treatment Specialist, the Respondent established a special education program. The program provided the opportunity for employees who possessed a minimum of fifty-five (55) college credits to pursue completion of the college degree required of the Treatment Specialist at a local college at no cost to the employee.

Qualified employees enrolling in the Program were required to work on either the A or B shift. This requirement was intended to maximize the services provided by the Treatment Specialist since the C shift is the night shift during which time the residents are, for the most part, confined to their rooms and sleeping.¹ Employees participating in the educational program were reclassified to the position of YRC III, a newly created higher rated classification. The few remaining YRC II positions required on the A and B shifts were filled by seniority. The employees in the remaining YRC II positions were transferred to the C shift and advised that their positions would be eliminated at the end of the year. If, by that time, they had not located other employment they were to be laid off.

Thea Scott and John Hector were two (2) YRC II employees who did not possess the minimum fifty-five (55) college credits necessary to qualify for the special education program. In order to make her position on the A shift available for the transition package, Employee Scott was transferred to the C shift into a YRC II position soon to be vacated by an early disability retirement. Employee Hector was transferred from his position on the A shift as an accommodation under the Americans with Disability Act.²

¹ Shift hours are: A shift - 8:00 a.m. to 4:00 p.m.; B shift - 4:00 p.m. to 12:00 a.m.; C shift - 12:00 a.m. to 8:00 a.m.

² Employee Hector's protest of his reassignment remains resolved and has no bearing on the decision reached, herein.

On or about March 1, 1995, Employees Scott and Hector filed grievances alleging a violation of both the collective bargaining agreement and the State Merit Rules claiming they were unfairly denied the opportunity to participate in the college degree program solely for the reason that they did not possess the minimum fifty-five (55) college credit hours.

The grievances were processed through Step 4 in accord with Article 7, Grievance Procedure, of the collective bargaining agreement. The Step 4 meeting was held on May 19, 1995, before Ralph W. Head, the designee of the Deputy Director for Employee Relations. In his decision issued on June 30, 1995, Mr. Head concluded that:

In this matter, the Grievants, because they lack the required credits, are treated as a class of employees separate and apart from those who have the credits and are therefore being unfairly denied the opportunity to take advantage of the Education program offered to others.

DECISION

After careful review of the evidence in this matter, the Department must grant the Grievants an equal opportunity to obtain degrees necessary for the Specialist position.

Although the Head decision was not appealed by either party, the State continued to deny Employee Scott and Employee Hector the opportunity to participate in the special education program. On or about July 10, 1995, the Department of Services for Children, Youth and Their Families, the State agency involved in this matter, requested the Deputy Director for Employee Relations to clarify and reconcile the Head decision with what it believed to be a contrary decision previously issued by the Deputy Director ("Bassett" decision).

On July 19, 1995, the Petitioner filed this unfair labor practice alleging that by its refusal to comply with the Head decision, the State violated 19 Del.C. Ch. 40 (1994) (hereinafter "Act") Section 1307, Unfair Labor Practices, (a)(1) and (a)(5). Section 1307 provides, in relevant part:

(a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:

- (1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this Chapter,³
- (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.

A hearing was held on August 16 and August 18, 1995. Simultaneous briefs were filed with the final brief filed on September 28, 1995.

ISSUES

UNION:

Issue #1: In the absence of an appeal, the State's failure to comply with the Head decision constitutes a unilateral change in the negotiated grievance procedure, which is a mandatory subject of bargaining. In support of its position, the Petitioner cites prior Public Employment Relations Board ("PERB") decisions holding that failure to abide by the negotiated grievance procedure constitutes a unilateral change in the status quo of a mandatory subject of bargaining and is, therefore, a per se violation of Section 1307(a)(5), of the Act.

Issue #2: If the Respondent objected to the Head decision, regardless of the reason, its only recourse was to appeal the decision to the Director of State Personnel and then to the Merit Employment Relations Board ("MERB), provided for in the grievance procedure.

In the absence of an appeal, the Step 4 decision is final and binding upon the parties as it pertains to grievants Scott and Hector.

³ The alleged violation of 1307(a)(1) was dismissed at the conclusion of the hearing by agreement of the parties.

The Petitioner argues that Executive Order 12 which confers upon the Deputy Director the authority to assure uniform employer positions does not supersede the negotiated provisions of Article 7.

Issue #3: The general educational assistance program available to all employees is far more limited than the special education program and would not comply with the "equal opportunity" mandate of the Head decision. By continuing to deny the grievants the opportunity to participate in the special education program after the issuance of the Head decision on June 30, 1995, the Respondent has not complied with the Step 4 decision.

Issue #4: The Respondent's continuing refusal to comply with the Head decision constitutes a unilateral change in the status quo of a mandatory subject of bargaining, i.e., the grievance procedure, which is a per se violation of Section 1307(a)(5), of the Act.

STATE:

Issue #1: The development and implementation of the State Merit Rules is a responsibility within the exclusive jurisdiction of the MERB independent from the collective bargaining obligations set forth in the Public Employment Relations Act. Because the only issue in the Scott/Hector grievances considered at Step 4 involved alleged violation(s) of the Merit Rules, the Head decision is not covered by the Public Employment Relations Act. Any dispute concerning the status of the matter after the Head decision is subject to review only through appeal to the State Personnel Director and ultimately to the MERB. Consequently, there can be no violation of 1307(a)(5), of the Public Employment Relations Act, as alleged. For this reason, the PERB is without jurisdiction to decide the matter.

Issue #2: Pursuant to Executive Order 12, the Deputy Director for Employee Relations has the authority to "provide policy direction" to department and agency managers and to personnel representatives. Consistent with this grant of authority, the Deputy Director has authority to resolve inconsistent positions, as is the case with the Bassett and Scott/Hector decisions.

The Respondent further argues that by rejecting the validity of the fifty-five (55) credit hour requirement as the basis for reclassifying employees, the Head decision is contrary to State law and, therefore, unenforceable. In support of its position, the Respondent cites the FY '95 and FY '96 Budget Acts which expressly confer upon the Department of Services for Children, Youth and Their Families the authority to identify employees eligible to participate in the special education program.

The Respondent contends that if the Petitioner disagrees with the position of the State concerning the Step 4 decision in the Scott/Hector grievances, its sole recourse is to appeal to the State Personnel Director and then to the MERB, pursuant to Article 7 of the collective bargaining agreement and Sections 20.0000 and 21.0000, of the Merit Rules.

Issue #3: The Respondent denies that it has failed to comply with the Head decision. It maintains that the broad remedial directive contained, therein, i.e., to "grant the Grievants an equal opportunity to obtain the degree necessary for the 'Specialist position'" can be complied with by the grievant's applying for acceptance into the Department's Educational Leave/Tuition Assistance Program.

Issue #4: The Scott/Hector grievances were, in fact, processed in accord with the procedure set forth in Article 7, of the collective bargaining

agreement. This fact coupled with the authority of the Deputy Director to resolve conflicting positions with regard to State policy, requires a finding that there has been no violation of 1307(a)(5), as alleged.

OPINION

Issue #1: Does the Public Employment Relations Board have jurisdiction to resolve the issues raised by the petition?

Designated representatives of the public employer and the exclusive bargaining representative are required to confer and negotiate in good faith with respect to "terms and conditions of employment." 19 Del.C. §1302(d) "Terms and conditions of employment means matters concerning or related to wages, salaries, hours, grievance procedure and working conditions; provided, however, that such term shall not include those matters determined by this Chapter or other law of the State to be within the exclusive prerogative of the public employer." 29 Del.C. §1302(q).

Considered together, Sections 1302(d) and 1302(q) of the Public Employment Relations Act ("PERA") establish mandatory subjects of bargaining. Inherent in the term mandatory subject of bargaining is the prohibition against unilaterally altering the status quo of a term and condition of employment. Appoquinimink Ed. Assn. v. Bd. of Ed., U.L.P. 1-3-84-3-2A

Del.PERB. (1984)⁴

The term "grievance procedure" is expressly included within the statutory definition of "terms and conditions of employment." Therefore, a unilateral change in the negotiated grievance procedure constitutes a per se

⁴ Prior PERB rulings decided under the Public School Employment Relations Act, 14 Del.C. Chapter 40 (1982) and/or the Police Officers and Firefighters Employment Relations Act to those of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994), Local 1590 v. City of Wilmington, Del.PERB, U.L.P. 89-05-037 (1989).

violation of Section 1307(a)(5), of the Act, regardless of intent. Indian River Ed. Assn. v. Bd. of Ed., U.L.P. 90-09-053, Del.PERB (1991), Wilmington Firefighters Assn. v. City of Wilmington, U.L.P. 93-06-085, Del.PERB (1994).

Substance rather than form controls the determination of whether or not a particular subject is a mandatory subject of bargaining. Therefore, the inclusion of the procedure for processing complaints alleging violations of the State Merit Rules in Article 7 of the collective bargaining agreement does not mean that it necessarily qualifies as a mandatory subject of bargaining.

The issue raised by the appeal to Step 4 of the Scott/Hector grievances was whether or not a violation of the State Merit Rules had occurred. It is the State's failure to comply with the Step 4 decision which the Petitioner contends constitutes a unilateral change in a mandatory subject of bargaining. The critical question which must be answered in resolving the jurisdiction issue is, therefore, whether the procedure for processing complaints alleging a violation of the State Merit Rules is a mandatory subject of bargaining within the meaning of Section 1302(q), of the Public Employment Relations Act.

Section 20.0210 of the Merit Rules provides, in relevant part:

20.0210 An employee who is in a bargaining unit covered by a collective bargaining agreement shall process any grievance through the grievance procedure outlined in the collective bargaining agreement. However, if the subject of the grievance is non-negotiable pursuant to 29 Del.C. §5938, it shall be processed in accordance with 20.0000 and 21.0000. (emphasis added)

Article 7 of the collective bargaining agreement establishes two (2) distinct, although in part similar, procedures for processing grievances. Grievances alleging violations of the collective bargaining agreement are

processed through a four (4) step procedure. If unresolved, they may be appealed to binding arbitration. Complaints alleging violations of the Merit Rules are similarly processed through the same four (4) steps of the procedure. However, if unresolved, they are appealable to the State Personnel Director and then to MERB, as provided for in Section 20.034 of the Merit Rules.

The authority to establish, adopt and amend the State Merit Rules is a responsibility conferred exclusively upon the MERB. 29 Del.C. §5914. Section 5914 also provides that a State Merit Rule becomes law when properly established, adopted or amended. Pursuant to this statutory grant of authority, the MERB adopted State Merit Rule 20.0210 which provides that for employees covered by a collective bargaining agreement alleged violations of the State Merit Rules shall be processed under the negotiated grievance procedure, except for those subjects specifically reserved under 29 Del.C. §5928(c).

The meaning of Section 20.0210 is clear and unambiguous on its face and cannot reasonably be construed as transforming the rule-making authority conferred upon the MERB by 29 Del.C. §5914 into a mandatory subject of bargaining under Section 1302(d), of the Public Employment Relations Act. If, within its statutory authority, the MERB chose to amend the State Merit Rules by deleting Rule 20.0210, all complaints alleging a violation of the Merit Rules would then be processed in accordance with the procedures set forth in Rules 20.0000 and 21.0000, therein.

Simply put, the Respondent is not required to bargain a procedure for processing complaints alleging a violation of the State Merit Rules. Consequently, the alleged failure of the Respondent to comply with the procedure adopted by the MERB in Rule 20.0210 for processing allegations of Merit Rule violations does not involve a mandatory subject of bargaining.

While an alleged unilateral change in a non-mandatory subject of bargaining included within the collective bargaining agreement is a proper subject for the grievance procedure, it is not a breach of the duty to bargain in good faith.

The PERB has no authority to resolve disputes involving the interpretation or application of either the collective bargaining agreement or the Merit Rules. Such issues are ultimately within the exclusive authority of an arbitrator or the MERB, respectively.

For this reason, the PERB is without jurisdiction to resolve the issues raised by the petition. It is, therefore, unnecessary to consider the remaining issues raised by the complaint.

DECISION

The conduct alleged in the Complaint does not involve a mandatory subject of bargaining. Therefore, there can be no violation of Section 1307(a)(5), of the Public Employment Relations Act, as alleged. Because the PERB has no authority to rule on alleged violations of the Merit Rules, the Complaint is dismissed for lack of jurisdiction.

IT IS SO ORDERED.

/s/Charles D. Long, Jr.
Executive Director

/s/Deborah L. Murray-Sheppard
Principal Assistant

Dated: October 20, 1995