

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

DELAWARE CORRECTIONAL OFFICERS)	
ASSOCIATION, THOMAS J. LIGHTHALL, and)	
JAMES A. FRITSCH,)	
Charging Parties.)	
)	Review of Hearing
)	Officer's Decision
v.)	ULP No. 00-02-275
)	
STATE OF DELAWARE, DEPARTMENT)	
OF CORRECTION, PATRICK CIRWITHIAN)	
and AVERY HARMON,)	
Respondents.)	

BACKGROUND

The Delaware Correctional Officers Association (“DCOA”) is an employee organization within the meaning of Section 1302(h) of the Public Employment Relations Act, 19 Del.C. Chapter 13, (1994) (“PERA”). DCOA is the exclusive bargaining representative of uniformed correctional officers of the Delaware Department of Correction (“DOC”), within the meaning of Section 1302(i) of the Act.

The Department of Correction is an agency of the State of Delaware (“State”), which is a public employer within the meaning of Section 1302(m) of the Act.

On February 14, 2000, DCOA filed Unfair Labor Practice Charge No. 00-02-275 alleging anti-union statements by Patrick Cirwithian, DOC Food Service Director and Avery Harmon, Food Service Director I and that James Fritsch and Thomas Lighthall were not promoted to the position of C/O Cook Manager because of their union activity. DCOA contends the State violated Section 1303(3) and Section 1307(a)(1), (a)(3), (a)(4) and (a)(6) of the Act.

On February 22, 2000, the State filed its Answer denying the Charge and setting forth New Matter. On March 2, 2000, DCOA filed its Response to the New Matter. Hearings were held on May 16 and June 12, 2000 and closing argument was provided in written post-hearing briefs filed with the Public Employment Relations Board (PERB) on September 8 and September 26, 2000. The Executive Director issued his decision October 27, 2000 in which he ruled that:

1. Patrick Cirwithian and Avery Harmon were designated representatives of the State of Delaware while acting within the scope of their authority as Food Service managers for the Department of Correction.
2. No statement by Patrick Cirwithian constituted a violation of 19 Del.C. Sections 1303(3) or 1307 (a)(1), (a)(3) or (a)(6), as alleged.
3. Statements made by Avery Harmon, an employee of DOC, an agency of the State, the State, and Avery Harmon violated 19 Del.C. Sections 1303(3) and 1307(a)(1), (a)(3) and (a)(6), as alleged.
4. Statements made by Avery Harmon, an employee of DOC, and agency of the State, the State did not violate 19 Del.C. Section 1307 (a)(4), as alleged.
5. The promotion selection procedure did not violate 19 Del.C. Sections 1303(3) or 1307(a)(1), (a)(3), (a)(4) or (a)(6), as alleged.

The State was ordered to:

- (a) Cease and desist from engaging in conduct which tends to interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.
- (b) Within ten (10) days of receipt of the Notice of Determination from the Public Employment Relations Board, post the Notice in all areas where notices of general interest to the bargaining unit employees are normally posted, including but not limited to all locations to which bargaining unit employees are normally assigned.
- (c) Refrain from taking any retaliatory actions against members of DCOA.

On November 2, 2000, the DCOA filed a request with PERB to review the Executive Director's decision. The PERB met on January 25, 2001 at which time only two (2) of the three (3) Board members were present (Mr. Currie was absent). At the conclusion of that meeting, both Board members agreed to affirm the Executive Director's decision regarding his findings pertaining to the unfair labor practice charge, both as to Mr. Harmon's statements and the promotion process, and that, the question of the remedy relating to Mr. Harmon's anti-union statements be remanded to the Executive Director to determine the appropriate remedy. The parties were given the opportunity to submit a position paper to the Executive Director for his reconsideration of this question.

The PERB, on May 1, 2001 voted to vacate the January 25, 2001 decision. This action resulted from the discovery, subsequent to the January 25th meeting that the Board had lacked the complete record of the prior hearings (primarily the transcript of those hearings), which inadvertently had not been given to them prior to the January 25th hearing.

During the PERB's May 15, 2001 meeting, the DCOA submitted several cases that resulted in the State objecting to the introduction of any case law to which the State did not have an opportunity in writing to respond. Following an Executive Session with the Board's attorney, the Board agreed not to issue a decision that day but rather to allow the record to remain open for the submission of any additional case law by the parties. The hearing to review this material and to reach a decision was set for June 20, 2001.

At the June 20, 2001 hearing, Mr. Currie and Mr. Kressman voted to uphold the Executive Director's decision in its entirety without the need for any additional remedy. Board Member Maron disagreed and is filing a separate dissenting opinion.

DISCUSSION

The Positions of the Parties contained in the Hearing Officer's decision presents the essential arguments in what has been a long and involved case.

The two basic issues presented to the Board in the June 20th meeting were: (1) DCOA's request that the Board review the Executive Director's decision that no unfair labor practice had been committed by Mr. Cirwithian; and (2) The Board review the cease and desist remedy for the unfair labor practice committed by Mr. Harmon and either order a more severe penalty or remand the issue to the Executive Director.

The DCOA, in a May 31, 2001 letter to the PERB members, stated in part that . . . "The Executive Director has ruled that unfair labor practices existed and the State has not appealed. With regard to Mr. Harmon's actions, the C.P.'s ("Charging Parties") have appealed only the remedy, not the findings. With regard to Mr. Cirwithian's actions, the C.P.'s have appealed the decision that no unfair labor practice existed"

Based upon the record before us, the Board majority agrees with the Executive Director's decision that Mr. Harmon violated 19 Del.C. Sections 1303 and 1307(a)(1), (a)(3) and (a)(6). DCOA argued the Executive Director's Cease and Desist order is a mere slap on the wrist and urged the Board to order a more severe penalty. They suggested several remedies including the assessment of attorney's fees against the State; promotions for those aggrieved and demotions for those at fault plus back pay and seniority to Mr. Fritsch and Mr. Lighthall. The C.P.'s even suggested that the State submit a potential remedy for review by the Charging Parties which, if agreement could be reached, could then become the remedy.

In the original Unfair Labor Practice charge, DCOA requested the PERB order DOC:

- (a) to cease and desist from engaging in conduct described in this petition;
- (b) to promote Thomas J. Lighthall and James A. Fritsch to CO/Cook Manager;
- (c) to demote Patrick Cirwithian from a supervisory position to a non-supervisory position;
- (d) to demote Avery Harmon from a supervisory position to a non-supervisory position; and
- (e) to award back pay and seniority to Thomas J. Lighthall and James A. Fritsch.

The Board majority concluded after a complete review of the entire record, that DCOA had failed to establish Mr. Harmon discriminated against employees based upon union activity. Insofar as the promotion procedure, Mr. Harmon rated Mr. Lighthall and Mr. Fritsch higher than others on the selection team during the first round of interviews,

including those against whom no allegations of anti-union bias were made. During the second round of interviews he rated Mr. Lighthall higher than did anyone else on the selection team. It is reasonable to conclude that had he been truly biased against Mr. Fritsch and Mr. Lighthall, he would have given them lower scores.

The State has established that the decisions of the selection team were appropriate and valid. Our review of the applications of Mr. Gibbs and Mr. Legates (the applicants selected), when compared with Mr. Fritsch and Mr. Lighthall, reveals there were in fact, legitimate and nondiscriminatory reasons for the selection decisions. Accordingly, we do not accept DCOA's argument that a penalty more severe than the Cease and Desist order proscribed by the Executive Director is appropriate. After reviewing all of the evidence and arguments, including the cases submitted by the parties, we conclude that while violations occurred, they are not of such severity as to warrant a remedial order other than the Cease and Desist order imposed by the Executive Director.

In reviewing whether the Cease and Desist order is an appropriate remedy, we sought guidance in a text widely utilized by labor lawyers and labor law practitioners, namely The Developing Labor Law: the Board, the Courts, and the National Labor Relations Act, 3rd ed., Bureau of National Affairs (1992). (Mr. Cutler also quoted from this text in the State's Post-Hearing Brief). Quoting from that text, the authors state that “. . . where the employer has committed violations of Section 8(a)(1) – interference with, restraint of, or coercion of employees in the exercise of Section 7 rights – the Board will normally issue a cease and desist order . . . In general, the order will proscribe the conduct found to be unlawful in the specific case.” (Supra. at 1835). Also, in cases where the employer has committed violations of Section 8(a)(3) [in Delaware - 19 Del.C.

Section 1307(a)(3)], the standard remedy is a cease and desist order proscribing the misconduct. A review of the cases cited by DCOA affirms our belief that the Executive Director properly held that Mr. Harmon's conduct did not warrant a more severe penalty.

As regards Mr. Cirwithian, the Executive Director stated “. . . None of the witnesses attributed anti-union statements to Mr. Cirwithian and there is no other evidence supporting either the allegation set forth in Paragraph 14 of the Charge, or that Mr. Cirwithian otherwise made anti-union statements . . .” (Paragraph 14 of the Unfair Labor Practice Charge alleged that Mr. Cirwithian stated that employees were either “for me or against me”). DCOA claimed this statement meant that individuals involved in union activities were against him. The documents in this case, including the hearing transcripts, do not support DCOA's claim. The Board majority accordingly accepts the Executive Director's findings as stated in his Conclusions of Law that no statement by Patrick Cirwithian constituted a violation of the statute as alleged and no action against Mr. Cirwithian is therefore warranted. The Hearing Officer, in this case the Executive Director, heard the direct testimony of the advocates and witnesses and in our opinion, is in the best position to determine the credibility of such testimony. Accordingly, his conclusions are entitled to be given great weight in determining the ultimate decision.

DECISION

Consistent with the foregoing discussion, the Board majority adopts the Executive Director's ruling that the State is ordered to:

1. Cease and desist from engaging in conduct that tends to interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.
2. Refrain from taking any retaliatory actions against members of DCOA.

IT IS SO ORDERED.

/s/Henry E. Kressman

Henry E. Kressman
Chair

/s/R. Robert Currie, Jr.

R. Robert Currie, Jr.
Member

Dated: July 20, 2001

MINORITY OPINION

I respectfully disagree with the decision of the majority finding that the remedy of a cease and desist order was sufficient. Under 19 Del.C. Section 1308(b)(1), this Board has broad legal and equitable discretion to take such reasonable affirmative action as will effectuate the policies of the Public Employment Relations Act. I believe that the cease and desist order is inappropriate and does not go far enough in righting the wrong found to be done. 19 Del. C. Section 1308(a). It is undisputed that the employee, Avery Harmon, violated the statute by his comments and statements to his supervising

employees. As a result, the promotion selection procedure was flawed and tainted by Mr. Harmon 's involvement. The fact that Mr. Harmon may have rated the charging parties higher during the process is a red herring and carries no weight. Since the process was tainted by Mr. Harmon's involvement, I find that the appropriate remedy is for the State to redo the selection process without his participation. See September 25, 2000 DOC Reply Statement (Letter of Jerry M. Cutler to Charles D. Long, Jr.).

WHEREFORE, after reviewing the entire record, caselaw and the relevant statutes, and considering the arguments from the parties and the deliberations of the other Board members, I would order the State to void the result of the selection process and conduct a new selection procedure for the position at issue, Correctional Food Service Director I, without the involvement of Avery Harmon.

/s/Elizabeth D. Maron
Elizabeth Daniello Maron, Esq.

Dated: July 20,2001