

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

DAVID F. BOURDON	:	
	:	
Petitioner,	:	
	:	Declaratory Statement
AND	:	
	:	
	:	<b><u>D.S. No. 03-08-400</u></b>
STATE OF DELAWARE, OFFICE OF STATE PERSONNEL,	:	
AND DEPARTMENT OF HEALTH & SOCIAL SERVICES,	:	
Respondent.	:	

Appearances

*Roy S. Shiels, Esq., Brown, Shiels, Beauregard & Chasanov, for Petitioner*  
*Gertrude L. Holland, Esq., State Labor Relations Service, for Respondent*

**JOINT STIPULATION OF FACT**<sup>1</sup>

1. David F. Bourdon (Bourdon), a resident of the State of Delaware, is and was for some years prior to October 2, 2002, an employee of the State of Delaware.
2. Prior to October 2, 2002, Bourdon was employed by the State of Delaware, Department of Health and Social Services (Department) at the campus of the Delaware Psychiatric Center in New Castle, Delaware.
3. Prior to October 2, 2002, Bourdon was a member of AFSCME Council 81, Local 640 (Union). Union was and has been recognized by the State of Delaware, State Personnel Office as the bargaining agent for employees at the aforesaid campus, and had entered into a Collective Bargaining Agreement (CBA) with Department.
4. On October 2, 2002, Bourdon's employment was terminated by Department based on its claim he had abandoned his position, by being absent from work without approved leave after July 23, 2002, in violation of the CBA.

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<sup>1</sup> The facts set forth herein were mutually stipulated by the parties on November 12, 2003.

5. Union thereafter represented Bourdon at steps of the grievance process in accord with the CBA. One of those steps, required by the CBA, is known as “pre-arbitration” and requires a meeting, scheduled by the State Personnel Office (SPO). That meeting was scheduled by SPO for April 8, 2003.

6. Bourdon has claimed a defense to the Department’s charge of abandonment. His absence was caused by incarceration and he intended to return thereafter, which facts he claims Department knew. Department claims it knew from a third party Bourdon was incarcerated and did not know whether Bourdon intended to return.

7. The pre-arbitration meeting was held in April 8, 2003, as scheduled. Bourdon was not present at that meeting. Neither SPO nor Department notified Bourdon of the meeting. SPO denies it had any legal obligation to give Bourdon such notice. Bourdon claims and has claimed that he was unaware of the scheduling of that meeting until after the meeting had ended. SPO takes no position regarding the accuracy of that claim.

8. Bourdon claims and has claimed he is legally entitled under 19 Del.C. Section 1304(b) to present his own grievance at any point or throughout the CBA grievance process, without preconditions. Bourdon also claims he was not aware of such right when the grievance process began for his grievance. SPO takes no position regarding the accuracy of that claim.

9. Prior to April 8, 2003, Bourdon did not give notice to Department or SPO of any intent to represent himself at any point in or throughout the grievance process.

10. Both Department and SPO were aware of 19 Del.C. Section 1304(b) at all times relevant to this Stipulation.

11. SPO claims that had Bourdon communicated to SPO his desire to personally present his grievance before April 8, 2003, it would have followed the provisions of 19 Del.C. Section 1304(b) as required. Bourdon takes no position regarding the accuracy of that claim.

12. Bourdon claims that by the time he became aware of the April 8, 2003 meeting and its result the time for requesting arbitration in accord with the CBA had elapsed. SPO takes no position regarding the accuracy of that claim.

13. Union did not, subsequent to the April 8, 2003 meeting, request arbitration of Bourdon's grievance.

14. Bourdon's request of SPO regarding rescheduling the April 8, 2003 meeting, and SPO's response, are stipulated as contained in the following letters:

Exhibit A: Letter dated July 24, 2003, printed on letterhead "Law Offices of Brown, Shiels, Beauregard & Chasanov":

Monica Washington, Hearing Officer  
State Personnel Office  
New State Office Building, 10<sup>th</sup> Floor  
820 N. French Street  
Wilmington, DE 19801

RE: David F. Bourdon – DHSS

Dear Monica:

Mr. Bourdon, who is a union member, has been to this office regarding his termination. The matter was apparently before you several months ago at a pre-arbitration phase. Mr. Bourdon was not present. The matter, a claim of abandonment of his position pursuant to Article 15.3 of the Union Agreement was decided adversely to Mr. Bourdon. The language of the contract regarding abandonment is essentially the same as Merit Rule 6.0600.

The reason Mr. Bourdon was not present, he indicates, is that no one advised him of the scheduling of the pre-arbitration and he was completely unaware of it until after it had occurred. I believe that Mr. Bourdon is legally entitled to himself be present and present information contesting the charge of abandonment and therefore under the circumstances the arbitration should be rescheduled to permit him to do so. In short, the circumstances of the disposition of Mr. Bourdon's contractual grievance are similar to the circumstances in Bracy v. City of Wilmington, Dec. 18, 2002, (2002 WL 31845919 Del.Super.). In that case, as here, there was no actual notice to claimant of a hearing and the issue was lost by default. When the claimant learned after the hearing the case was lost he secured new legal representation, who sought a new hearing, which the administrative tribunal denied. The Superior Court, on appeal reversed. The reason Bracy was unaware of the hearing, and received no notice, was his incarceration. The reason for Mr. Bourdon's absence from work was similar, although the extent to which this was known to the State is not presently clear. Nor is it presently clear why the State denied leave requested by Bourdon before incarceration.

Thus it is clear Mr. Bourdon received no notice of the pre-arbitration hearing and as a result was denied a legal right. It is not clear whether the State, or anyone else, made reasonable

efforts to provide notice. Mr. Bourdon, I believe, has a legal right by statute to protect his interests in grievances (and particularly termination grievances) and denial of the right by lack of notice, or reasonable effort to provide notice, should entitle him to be heard now, when lack of notice is made known to the Hearing Officer.

Trusting that I will hear from you at an early convenience regarding the requested rescheduling, I am

Very truly yours,  
BROWN, SHIELS, BEAUREGARD & CHASANOV

*/s/ Roy S. Shields*

RSS/bs  
cc: Mr. Phil Williams  
Mr. David Bourdon

**Exhibit B:** Letter dated July 31, 2003 on letterhead with a State seal, entitled "State Personnel Office"

Roy S. Shields, Esquire  
Brown, Shields, Beauregard & Chasanov  
108 East Water Street  
P.O. Box Drawer F  
Dover, Delaware 19903

RE: David F. Bourdon

Dear Mr. Shields:

This is in response to your letter to Monica Washington of July 24, 2003 in the above matter.

You have objected to the fact that a meeting was held on April 8, 2003 (at which Mr. Bourdon was not present) to discuss the grievance AFSCME filed on his behalf under the union contract with the State, and have requested that we reschedule the meeting so that Mr. Bourdon can attend.

As you know, AFSCME is the exclusive representative for bargaining unit employees. It therefore has the legal "right and responsibility to be the collective bargaining agent" for those employees, 19 Del.C. Section 1302(j), to hold grievance meetings on their behalf and, within specified contractual limits, determine which individuals should be present at grievance meetings. The State does not notify employees directly of grievance meetings; rather, it provides notice to AFSCME who, in turn, notifies those individuals it determines are needed to attend the meetings.

My understanding is that AFSCME consciously decided to hold the meeting without Mr. Bourdon and did not request to postpone it due to his absence. Had AFSCME made such a request, we certainly would have considered it. Since no request was ever made, we proceeded with the meeting in Mr. Bourdon's absence. I also understand that AFSCME elected not to pursue Mr. Bourdon's grievance following the meeting.

While I understand your position 19 Del.C. Section 13014(b) */sic/* empowers employees to present “complaints to a public employer and from having such complaints adjusted without the intervention of the exclusive representative for the bargaining unit of which they are a part,” Mr. Bourdon never made such a request to the State. Rather, he relied upon AFSCME to file and process the grievance on his behalf.

In short, therefore, AFSCME exercised its authority to hold the grievance meeting in Mr. Bourdon’s absence. Given AFSCME’s status as the exclusive bargaining representative, and absent any indication that Mr. Bourdon desired to pursue his grievance without AFSCME’s intervention, the State proceeded with the grievance meeting. For all of these reasons, we have no authority to reschedule a grievance meeting some 3 ½ months after it was originally held.

I trust this has adequately responded to your question. If you would like any additional information, please do not hesitate to contact me.

Sincerely yours,

*/s/ Jerry M. Cutler*  
Jerry M. Cutler, Esq.  
Manager of Labor Relations

jmc/bh

c: Phil Williams  
Mary Beth Gzym

Following receipt of the Stipulated Facts, the parties were provided with the opportunity to provide written legal argument. Counsel for each party filed opening and responsive letter memoranda, with the final argument received on December 29, 2003. The decision herein reached is based upon the record thus created by the parties.

### **ISSUE**

Is the Petitioner, a grievant, legally entitled under 19 Del.C. §1304(b) to independent notice by the employer of pre-arbitration meetings scheduled pursuant to the grievance procedure contained in the collective bargaining agreement negotiated by the public employer and the exclusive representative of the employee’s bargaining unit?

## OPINION

Prior to a consideration of the merits of this petition, it must first be established that this matter is properly postured for issuance of a declaratory statement. The Public Employment Relations Board is statutorily directed,

- (4) To provide by rule a procedure for the filing and prompt disposition of petitions for a declaratory statement as to the applicability of any provision of this chapter or any rule or order of the Board. Such procedures shall provide for, but not be limited to, an expeditious determination of questions relating to potential unfair labor practices and to questions relating to whether a matter in dispute is within the scope of collective bargaining. 14 Del.C. §4006(h)(4).<sup>2</sup>

Unlike unfair labor practice charges which assert the statute has been violated and request remediation of the asserted wrongs, a declaratory statement addresses questions concerning applicability of statutory provisions and/or PERB rulings.

PERB Regulation 6, Petitions for Declaratory Statements, defines the procedural requisites for petitions:

### 6.1 Filing of a Petition

- ... (b) A petition may be filed when there exists a controversy concerning:
  - (1) A potential unfair labor practice;
  - (2) Whether a matter is within the scope of collective bargaining as defined by statute; or
  - (3) The application of any statutory provision or regulation or order of the Board.

The instant petition questions whether the application of 19 Del.C. §1304(b) requires a public employer to provide independent notice of a pre-arbitration meeting to a grievant which is scheduled with that grievant's exclusive representative pursuant to the terms of the negotiated grievance procedure. The petition therefore meets the requirements of subsection (b) of PERB Rule 6.1

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<sup>2</sup> This provision of the Public School Employment Relations Act is specifically incorporated by reference into the Public Employment Relations Act, 19 Del.C. Chapter 13 at §1306.

PERB Regulation 6.1 further requires that a proper petition concern a “controversy” which must meet the following criteria:

- (c) A controversy exists within the meaning of this Regulation when:
  - (1) The controversy involves the rights and/or statutory obligations of a party seeking a declaratory statement;
  - (2) The party seeking the declaratory statement is asserting a statutory claim or right against a public employer, an exclusive representative or a public employee who has an interest in contesting that claim or right;
  - (3) The controversy is between parties whose interests are real and adverse; and
  - (4) The matter has matured and is in such a posture that the issuance of a declaratory statement by the Board will facilitate the resolution of the controversy.

Section 1304(b) of the Public Employment Relations Act states:

Nothing contained in this section shall prevent employees individually, or as a group, from presenting complaints to a public employer and from having such complaints adjusted without the intervention of the exclusive representative for the bargaining unit of which they are a part, as long as the representative is given an opportunity to be present at such adjustment and to make its view known, and as long as the adjustment is not inconsistent with the terms of an agreement between the public employer and the exclusive representative which is then in effect. The right of the exclusive representative shall not apply where the complaint involves matters of personal, embarrassing and confidential nature, and the complainant specifically requests, in writing, that the exclusive representative not be present. 19 Del.C. §1304(b).

The petition asserts Mr. Bourdon has a right and that the State has a derivative obligation under §1304 to independently notify a grievant of pre-arbitration hearings. There is no question that the Petitioner and the State have adverse interests in this matter and that each has an interest in the resolution of this claim. The matter is postured such that issuance of a decision by the PERB will delineate both the Petitioner’s rights and the State’s obligation. Therefore, this petition is appropriate for issuance of a declaratory statement as it meets the prerequisites of PERB Rule 6.1.

A consideration of the merits of this petition must begin with an understanding of the stated purpose of the PERA, found in section 1301 of the PERA:

It is the declared policy of the State and the purpose of this chapter to promote harmonious and cooperative relationships between public employers and their employees and to protect the public by assuring the orderly and uninterrupted operations and functions of the public employer. These policies are best effectuated by:

- (1) Granting to public employees the right of organization and representation;
- (2) Obligating public employers and public employee organizations which have been certified as representing their public employees to enter into collective bargaining negotiations with the willingness to resolve disputes relating to terms and conditions of employment and to reduce to writing any agreements reached through such negotiations; and
- (3) Empowering the Public Employment Relations Board to assist in resolving disputes between public employees and public employers and to administer this chapter.

The grievance procedure is a mandatory subject of bargaining under the PERA.<sup>3</sup> Public employers and exclusive bargaining representatives of employees must include a grievance procedure in any agreement negotiated under the PERA.

The public employer and exclusive bargaining representative shall negotiate written grievance procedures by means of which bargaining unit employees, through their collective bargaining representatives, may appeal the interpretation or application of any term or terms of an existing collective bargaining agreement; such grievance procedure shall be included in any agreement entered into between the public employer and the exclusive bargaining representative. 19 Del.C. §1313 (c).

The character and terms of a grievance procedure are unique to the parties who have negotiated and contracted to employ that procedure to resolve disputes. Procedural questions such as how, when and where a grievance can be filed; how, when and by whom grievance meetings are convened; and whether and how many levels a grievance procedure will have are determined by the employer and the exclusive bargaining representative through collective bargaining.

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<sup>3</sup> Public employers and certified exclusive bargaining representatives are required to collectively bargain with respect to “terms and conditions of employment” which are defined to include “. . . matters concerning or related to wages, salaries, hours, grievance procedures and working conditions . . .” 19 Del.C. §1302(t).



Collectively bargained grievance procedures are contractual in nature, rather than statutory like merit system complaints.

The contractual grievance procedure negotiated by the State of Delaware, DHSS, DADAMH and AFSCME Local 640 governs the process by which Mr. Bourdon's grievance was processed.<sup>4</sup> There is no dispute that a grievance was filed contesting Mr. Bourdon's termination and that "the Union thereafter represented Bourdon at steps of the grievance process in accord with the CBA [*collective bargaining agreement*]."<sup>5</sup> Whether Mr. Bourdon was entitled under this contractual procedure to independent notification is circumscribed by the contractual language of the 1998-2001 collective bargaining agreement defining Step 5 of the grievance process:

8.81 If the grievance is still not resolved, it may be appealed to the State Deputy Director of Employee Relations (hereinafter Deputy Director). Such appeal shall be made in writing within 15 working days of the Step 4 response, and a meeting shall be scheduled with the Union within 10 working days. If the grievance is not resolved at that meeting the Union may request arbitration if the grievance involves a provision of the Agreement.

The contract clearly states "a meeting shall be scheduled with the Union" and further provides that if the meeting is unsuccessful, the Union may request arbitration. This language is in stark contrast to the description of Steps 1 through 4 of the grievance process which specifically reference the role of the grievant and the Union shop steward.

The question thus becomes whether §8.81 of the negotiated collective bargaining agreement is in conflict with 19 Del.C. §1304(b) and therefore invalid or unenforceable under the PERA.

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<sup>4</sup> Public employers are required to file copies of all negotiated agreements with the PERB, and the agency is required to maintain a current file of all such agreements as part of the public record; as such, it is not necessary that the agreement in question be formally placed on the record. 19 Del.C. §1313(f). Like cited cases, if the agreement is referenced in the arguments, this agency will review the document in considering the arguments of the parties.

<sup>5</sup> ¶5 of the parties' Joint Stipulation of Fact.

The Petitioner argues 19 Del.C. §1304(b) creates a right of individual bargaining unit members to represent themselves at any step of a negotiated grievance procedure, without condition. The Petitioner's reliance upon §1304, Employee Organization as Exclusive Representative, to establish the right of an individual bargaining unit member to be notified separately concerning a meeting between his exclusive bargaining representative and the public employer is misplaced. Public employee rights are clearly set forth under §1303 of the Act, which states:

Public employees shall have the right to:

- (1) Organize, form, join or assist any employee organization except to the extent that such right may be affected by a collectively bargained agreement requiring the payment of a service fee as a condition of employment.
- (2) Negotiate collectively or grieve through representatives of their choosing.
- (3) Engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection insofar as any such activity is not prohibited by this chapter or any other law of the State.
- (4) Be represented by their exclusive representative, if any, without discrimination.

In comparison, Section 1304, Employee Organization as exclusive representative, defines the right of the labor organization certified as exclusive bargaining representative of an appropriate bargaining unit of public employees.

- (a) The employee organization designated or selected for the purpose of collective bargaining by the majority of the employees in an appropriate collective bargaining unit shall be the exclusive representative of all the employees in the unit for such purpose and shall have the duty to represent all unit employees without discrimination. Where an exclusive representative has been certified, a public employer shall not bargain in regard to matters covered by this chapter with any employee, group of employees or other employee organization.
- (b) Nothing contained in this section shall prevent employees individually, or as a group, from presenting complaints to a public employer and from having such complaints adjusted without the intervention of the exclusive representative for the bargaining unit of which they are a part, as long as the representative is given

an opportunity to be present at such adjustment and to make its view known, and as long as the adjustment is not inconsistent with the terms of an agreement between the public employer and the exclusive representative which is then in effect. The right of the exclusive representative shall not apply where the complaint involves matters of personal, embarrassing and confidential nature, and the complainant specifically requests, in writing, that the exclusive representative not be present.

- (c) Upon the written authorization of any public employee within a bargaining unit, the public employer shall deduct from the payroll of the public employee the monthly amount of dues or service fee as certified by the secretary of the exclusive bargaining representative and shall deliver the same to the treasurer of the exclusive bargaining representative. Such authorization is revocable at the employee's written request. Such deduction shall commence upon the exclusive representative's written request to the employer. Such right to deduction shall be in force for so long as the employee organization remains the exclusive bargaining representative for the employees in the unit. The public employer is expressly prohibited from any involvement on the collection of fines, penalties or special assessments levied on members by the exclusive representative.

The protection afforded by subsection (b) is to the exclusive representative, to be present in any discussions (except for the most confidential) wherein a complaint might be adjusted which could potentially impact the collective bargaining agreement. If there is derivative notice requirement of this section, it is that the exclusive bargaining representative be notified where the public employer is scheduled to meet with an employee or group of employees on a complaint.

The Petitioner argues that as a grievant under the parties' collective bargaining agreement, the State has an obligation to inform him of his right to present his complaint without intervention by his exclusive bargaining representative, as, he asserts, the State currently does for merit system grievants. The stipulated record does not establish what procedure the State uses in processing merit system grievances, and this argument is irrelevant to the question at hand. A thorough review of the statute, including §1304 within the context of the entire act, does not support the conclusions the Petitioner advances.

The State and the exclusive representative of the bargaining unit of which the Petitioner is a member have negotiated a written grievance procedure as required by the PERA. Step 5 of the negotiated procedure requires that the State meet with the exclusive representative in a pre-arbitration meeting. Unlike prior steps in the negotiated procedure, there is no requirement that

the grievant attend or that a formal decision be rendered in writing. The Petitioner's statutory right throughout the grievance procedure as defined by 19 Del.C. §1303 is to grieve through his exclusive representative and to be represented by that representative without discrimination.

### **DECISION**

For the reasons set forth above, the State is not obligated under 19 Del.C. §1304(b) to provide notice to a grievant of the scheduling of a Step 5 pre-arbitration hearing where the collective bargaining agreement specifically states such meeting shall be between the employer and the exclusive bargaining representative.

/s/Deborah L. Murray-Sheppard  
DEBORAH L. MURRAY-SHEPPARD  
PRINCIPAL ASSISTANT  
DELAWARE PERB

DATED: 12 FEBRUARY 2004