

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

AMERICAN FEDERATION OF STATE, COUNTY,)	
MUNICIPAL EMPLOYEES, COUNCIL 81,)	PERB Review of
LOCAL 1102)	Executive Director's
Petitioner,)	Decision
v.)	
)	<u>ULP No. 05-04-477</u>
CITY OF WILMINGTON, DELAWARE,)	
Respondent.)	

Appearances

*Perry F. Goldlust, Esq., Aber, Goldlust, Baker & Over, for AFSCME Council 81
Martin C. Meltzer, Esq., Assistant Solicitor, City of Wilmington*

BACKGROUND

The City of Wilmington, Delaware (“City”) 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 1102 (“AFSCME”) is an “employee organization” within the meaning of §1302(i) of the PERA and is the exclusive bargaining representative of a bargaining unit of City employees within the meaning of 19 Del.C. §1302(j).

AFSCME and the City have a long-standing collective bargaining relationship. They were parties to a collective bargaining agreement which by its terms expired on June 30, 2001.

Following lengthy negotiations, a successor agreement was executed on December 2, 2004, which was retroactive to and effective on July 1, 2001.

On or about April 25, 2005, AFSCME filed this unfair labor practice charge alleging that by refusing to process to arbitration a grievance contesting the results of a promotional process, the City unilaterally altered the status quo of a mandatory subject of bargaining in violation of its duty to bargain in good faith as set forth in 19 Del.C. §1307(a)(5).

At the completion of the pleadings, a probable cause determination was issued on June 8, 2005, and a hearing was convened on July 12, 2005. The receipt of written post-hearing argument concluded on August 31, 2005.

The Executive Director issued his decision on October 4, 2005, in which he found that, “by refusing to process the Russ grievance to arbitration, the City engaged in conduct in violation of 19 Del.C. §1307(a)(5).” He ordered the City to 1) cease and desist from initiating unilateral changes in terms and conditions of employment; and 2) to arbitrate the Russ grievance in which the underlying facts occurred during the term of an “implied in fact” collective bargaining agreement.

On October 12, 2005, the City requested review of the Executive Director’s decision by the full Board; AFSCME filed its response on October 21, 2005. A copy of the complete record in this matter was provided to each member of the Board. A hearing was scheduled for November 16, 2005, but was twice postponed at the request of and by mutual agreement of the parties.

The full Board convened in public session on January 18, 2006, to consider this request for review. Following consideration of the complete record below and the arguments of the parties on review, the Board unanimously reached the following decision.

DISCUSSION

Upon consideration of the record and arguments of the parties, we find the Executive Director did not abuse his discretion, commit an error of law, nor did he err in his application of the law to the facts present. Therefore, we affirm the Executive Director's decision.

The City argues on appeal that the Executive Director abused his discretion when he refused to hear the City's waiver defense. Specifically, the City sought to present evidence and argument that AFSCME and the grievants had agreed at the initiation of the Step IV hearing that the decision of the Grievance Officer would be final; consequently, AFSCME's right to arbitrate the Step IV decision was forfeited by waiver. This alleged agreement was not reduced to writing and AFSCME disputes the City's characterization of the scope and content of the agreement.

In order to prevail in avoiding arbitration based upon the waiver argument, the City must first concede that there was a right to arbitrate. The fact that the Step IV Grievance Officer¹ sought a waiver agreement from the grievants and AFSCME infers that the City was operating on the premise that the grievance was subject to arbitration in November, 2004.

Further, the question of whether AFSCME effectively waived its right to arbitrate this grievance arises under application of the parties' contractual grievance and arbitration procedure. It is, therefore, proper subject matter for consideration by an arbitrator. The Executive Director did not abuse the discretion of this agency by denying the City the opportunity to present evidence regarding the alleged waiver. Whether there was an effective waiver by AFSCME and/or the grievants will certainly be in issue before the arbitrator, the venue in which this factual issue is properly raised.

The City also argues the decision below is based upon a mistake of law. The Public Employment Relations Act which this Board is charged to administer is markedly and materially

¹ We note the Step IV Grievance Officer was Assistant City Solicitor Meltzer who also represented the City in this unfair labor practice proceeding

different from the federal labor statutes. Under the PERA, the grievance procedure is explicitly listed as a term and condition of employment, and is therefore, unquestionably a mandatory subject of bargaining. The statute reinforces the importance of the grievance procedure in §1313(c):

The public employer and the 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 procedures shall be included in any agreement entered into between the public employer and the exclusive bargaining representative.

This Board has a twenty-two year history of requiring that parties abide by their agreements relating to mandatory subjects of bargaining, unless and until they negotiate and agree to change those terms and conditions of employment or a contrary result is imposed through the binding interest arbitration process. To now reverse direction and preclude the operation of a specific type of grievance resolution is unwarranted and unsupported by the statute.

The statutory issue before the Executive Director was whether the grievance procedure, which explicitly includes binding grievance arbitration as its final step, is a mandatory subject of bargaining for which the status quo must be maintained during the period following expiration of the collective bargaining agreement and during the period of negotiations for a successor agreement.

The grievance procedure through all of its steps is the keystone to maintaining harmony and cooperation and insuring stability in public sector labor relations in Delaware. Lawmakers in this state have mandated that the grievance procedure is a mandatory subject of bargaining and this Board has consistently held that the continuation of the status quo of mandatory subjects of bargaining during the period following expiration of a collective bargaining agreement is

fundamental to preserving the balance created by the statute. We believe this mandate is clear in the statutory purpose with which we are charged.

DECISION

Consistent with the foregoing discussion, the decision of the Executive Director is affirmed.

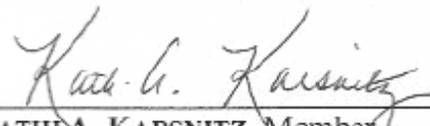
IT IS SO ORDERED.



ELIZABETH D. MARON, Acting Chairperson



R. ROBERT CURRIE, JR., Member



KATHIA A. KARSNITZ, Member

DATE: 3 March 2006