

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

STATE OF DELAWARE,)	PERB Review of
Appellant,)	Deputy Director's
v.)	Decision
)	
AMERICAN FEDERATION OF STATE, COUNTY,)	<u>REP. 07-08-588</u>
MUNICIPAL EMPLOYEES, COUNCIL 81.)	UNIT 11 DETERMINATION
Appellee.)	

Appearances

Aaron Shapiro, OMB/HRM/LREP, for State of Delaware

Perry F. Goldlust, Esq., Aber, Goldlust, Baker & Over, for AFSCME Council 81

BACKGROUND

The appellant, State of Delaware (“State”), is a public employer within the meaning of §1302(p) of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13.

The appellee, American Federation of State, County and Municipal Employees, AFL-CIO, Council 81, (“AFSCME”) is an “employee organization” within the meaning of §1302(i) of the PERA and is the exclusive bargaining representative of State employees within the meaning of 19 Del.C. §1302(j). It is undisputed that AFSCME represents all employees who hold positions covered by the bargaining unit defined at 19 Del.C. §1311A(b)(11), defined as, “Correctional supervisors, which is composed of correctional lieutenants, staff lieutenants, correctional captains, and similar occupations.”

On or about August 17, 2007, AFSCME filed a Petition for Bargaining Unit Determination and Certification of Exclusive Bargaining Representative. The petition was forwarded to the State for response and following multiple correspondences, meetings and conversations, the parties stipulated both to the composition of Unit 11 and that AFSCME was the certified representation of all bargaining unit positions.

On November 9, 2007, the Deputy Director issued a Notice of Compensation Unit Definition: Correctional Supervisors and Similar Occupations, which stated,

Recently enacted amendments to the Public Employment Relations Act, 19 Del.C. Ch. 13, require that in order to negotiate for compensation, State employees must first be represented within one of twelve bargaining units defined in §1311A(b):

... The [PERB] shall determine the proper assignment of job classifications to bargaining units and the bargaining unit status of individual employees and shall provide for certified bargaining representatives to combine bargaining units or portions of bargaining units of employees they represent within the bargaining units defined in this section based upon the job classifications of the employees represented. 19 Del.C. §1311 A (b).

SB 36¹ Unit 11, defined as “Correctional supervisors which is composed of correctional lieutenants, staff lieutenants, correctional sergeants and similar occupations” (19 Del.C. §1311A (b)(11)), has been determined to include the following classifications, based upon the agreement of the parties:

C/O Laundry Manager
C/O Physical Plant Maintenance
Supervisor
C/O Physical Plant Maintenance Trade
Foreman
Correctional Staff Lieutenant
Correctional Lieutenant
Correctional Captain
Correctional Operations Manager
Correctional Counselor Supervisor
Recreation Program Specialist

¹ “SB 36” refers to Senate Bill 36, AN ACT TO AMEND TITLES 19 AND 29 OF THE DELAWARE CODE RELATING TO COLLECTIVE BARGAINING, which was passed during the 144th General Assembly and signed into law by the Governor on August 2, 2007. “SB 36 unit” is used by PERB to refer to a reorganized bargaining structure for a specified group of State merit employees, as mandated by 19 Del.C. §1311A (b) as a prerequisite to bargaining compensation.

Recreation Program Supervisor
C/O Stores Warehouse Supervisor
C/O YRS Food Service Supervisor
C/O YRS Food Service Director I & II

It is undisputed that all of these classifications within the Department of Correction and DSCYF, Division of Youth Rehabilitation are currently represented for purposes of collective bargaining by affiliated locals of AFSCME Council 81.

WHEREFORE, Unit 11 positions are exclusively represented by AFSCME and this unit is eligible to bargain compensation consistent with §1311 A(g).

Questions concerning this matter should be addressed to the Public Employment Relations Board, (302) 577.5070; deperb@state.de.us

By e-mail correspondence dated November 13, 2007, the State requested PERB undertake the voluntary recognition process set forth in 19 Del.C. §1311A:

This is in response to the PERB's November 9, 2007 letter which states that Bargaining Unit 11 "is eligible to bargain compensation consistent with §1311A(g)." The PERB appears to be suggesting that since all job titles appropriate for inclusion in Unit 11 are currently represented by AFSCME in a non-compensation bargaining unit, there is no need to follow the statutory process for certifying or recognizing AFSCME as the exclusive bargaining representative for Bargaining Unit 11 as specified in 19 Del.C. § 1311A(b). We respectfully disagree.

Section 1311A(e) provides two mechanisms for an employee organization to achieve the status referred to as "exclusive bargaining representative." The first is by an employee organization filing a petition with the PERB that it desires to be certified as the exclusive representative for the unrepresented employees in a unit, with either 30% of the un-coerced signatures of the unrepresented employees (where no employees are represented), or by 30% of the un-coerced signatures of the combined total of unrepresented and represented employees. The Board would then take action on the petition in accordance with §§ 1310 and 1311. The second mechanism is by voluntary recognition from the employer.

In this case, the State has agreed to AFSCME's request for voluntary recognition in Bargaining Unit 11. The required process at this juncture is clearly spelled out in § 1311A(e)(1-3). Thus: 1) AFSCME must file a petition with the Board alleging that a majority of employees in the Bargaining Unit wish to be represented by the employee organization for the purposes of the unit defined in §1311A(b); 2) the Board must verify by signatures not more than 12 months old from the filing of the

petition, that a majority of the employees in the unit have authorized the employee organization as their exclusive bargaining representative; and, 3) notices of exclusive recognition without an election must then be posted. By directing that Bargaining Unit 11 is now eligible to bargain compensation, the PERB has not followed these statutory requirements.

Section 1311A(g) does not permit a different result. This section provides that bargaining for compensation can only begin once “all of the eligible employees in such unit are represented by an exclusive bargaining representative.” As noted above, the statute provides only two mechanisms by which an employee organization can become an “exclusive bargaining representative”—certification or voluntary recognition. The statute provides no authority to set aside the requirements of § 1311A(e), nor does it provide any other alternative to the processes provided for certifying or recognizing an exclusive representative for compensation bargaining.

Therefore, the State requests that the PERB move expeditiously to follow the statutory process so that compensation bargaining can begin as quickly as possible.

By letter dated November 19, 2007, the Deputy Director advised the parties that because all Unit 11 employees were undisputedly represented by AFSCME, the provisions cited by the State were not applicable:

I am writing in response to your inquiry as to whether PERB would conduct a process to certify AFSCME as the exclusive representative of SB36 Unit 11, which includes Correctional Supervisors and similar occupations. As indicated in the Notice of Compensation Unit Definition and transmittal letter dated November 9, 2007, PERB has completed its statutory responsibilities and noticed that the unit is eligible to bargain compensation pursuant to the modified Public Employment Relations Act.

The following background is provided to inform you of the basis for PERB’s conclusion:

- 19 Del.C. §1311A(e) applies “where no employee organization is certified to represent some or all of the employees in a bargaining unit defined in subsection (b)”. In this case it has been established that affiliated locals of AFSCME Council 81 are certified to represent all of the employees in Unit 11.
- Subsection (e) further provides that nothing in the statute prohibits the State from voluntarily recognizing an employee organization as the exclusive representative for a specific bargaining unit without an election, where PERB certifies that “no other employee organization is currently

certified or recognized as the exclusive bargaining representative of any of the employees in the unit.” In this case, all of the classifications included in Unit 11 (and consequently the employees holding positions in those classifications) are currently represented by an exclusive bargaining representative. The wishes of this group of employees have been expressed through the certification process; consequently, “recognition” is both redundant and unnecessary. Any option for the State to recognize an exclusive representative has been superseded by the desire of the employees as expressed through the statutory certification process which included a secret-ballot election. It is a fundamental canon of statutory interpretation that a construction which results in redundancy should be rejected.

- Like the NLRB, the Delaware PERB is charged with finding an appropriate balance between the competing interests of protecting employee freedom of choice and promoting stability of bargaining relationships. There is nothing in the statute which requires that a certified exclusive bargaining representative be recertified or that its existing certification is compromised or revoked simply because the scope of bargaining is expanded. Moving into the twelve identified SB 36 units is a condition precedent for State merit employees to bargaining over the expanded scope of negotiations which includes compensation. There is nothing in the statute which supports a conclusion that the passage of the recent modifications changed the right of employees currently represented by an exclusive bargaining representative to continue to be represented by that representative, regardless of the scope of negotiations. Nor did it change the obligation of the State to negotiate exclusively with a certified bargaining representative, or the obligation of the certified representative to represent all of the employees in the unit it was certified to represent. This interpretation is logically consistent with the requirement of §1311A(b) which requires that PERB provide for the combining of exclusive representatives to form bargaining coalitions where positions in SB36 units are currently represented by more than one labor organization in order to allow for the expanded scope of negotiations.
- Interpreting the statute to require “recognition” for an already certified representative, potentially raises a question as to whether the State can voluntarily withdraw its recognition of a union from a SB 36 unit or whether a group of employees or a rival union can file a decertification petition immediately following notification of voluntary recognition. Voluntary recognition is a well established principle under federal labor law, and a recent NLRB decision reversed a recognition-bar doctrine which has been in place since 1966. In *Dana Corp.*, 351 NLRB 28 (9/28/07), the NLRB held that voluntary recognition of a labor organization by an Employer does not bar a decertification petition or a rival union petition that is filed within 45 days of the notice of recognition. The Board’s majority concluded that voluntary recognition based on a showing of majority status should not warrant immediate imposition of an

election bar. It held that the uncertainty surrounding recognition based on an authorization card majority (as opposed to the certainty of certification after an election), justified delaying an election bar for a period during which unit employees can decide whether they prefer a Board-conducted election. Under the NLRB's new policy, an employee or rival union can file a petition with a showing of support of 30% of the unit during the 45-day period following notice that the union has been voluntarily recognized. Delaware courts have directed that State law follow federal precedent where statutes are similar and have specifically directed that Delaware look to the NLRA for guidance in matters of labor law.

- Interpretation of 19 DeL.C. §1311A(e) to require that a voluntary recognition process be followed for a State SB36 unit which is currently represented by a single certified exclusive representative is inconsistent with the overall purposes of the statute and the protected status of certified exclusive bargaining representatives under the PERA. It also raises a question as to whether, should the State decline to voluntarily recognize an already certified representative, collective bargaining on compensation could be delayed indefinitely. This interpretation is illogical and not supported by the statutory language when read as a whole.

WHEREFORE, notices were provided to the State for posting in the workplace which advise all affected employees that the scope of Unit 11 and the bargaining status of employees in that unit has been determined and that the unit is ready for compensation bargaining. As directed in the November 9, 2007 letter, those notices should be posted immediately in public places in the workplace where notices affecting Department of Correction and/or DSCYF/ Division of Youth Rehabilitation employees in Unit 11 positions are normally posted.

Finally, Unit 11 (where all of the positions in the defined unit are currently represented) may be unique. By application of the statutory language, the SB36 recognition provision applies to a unit where a single labor organization is certified to represent a portion of the SB36 unit and seeks to be recognized to represent the remaining positions which are unrepresented, i.e., no labor organization is currently certified as the exclusive bargaining representative.

On or about November 26, 2007, the State filed an appeal of the Deputy Director's Determination of Unit Compensation Bargaining Eligibility.

On or about November 29, 2007, AFSCME filed a Motion to Dismiss the State's Appeal of Determination of Unit 11 Compensation Bargaining Eligibility, in which it asserted the appeal was not timely filed because the Deputy Director's final decision was

rendered on November 9, 2007. Consequently, by operation of PERB Regulation 1.1, the State's appeal would be required to be filed on or before November 13, 2007.

On or about December 3, 2007, AFSCME filed a Response on the Merits of State of Delaware's Appeal of Determination of Unit 11 Compensation Bargaining Eligibility wherein it moved the State's appeal be dismissed on its merits.

The Public Employment Relations Board requested the parties provide written memorandum setting forth their respective positions in support of or opposition to AFSCME's Motions to Dismiss. Written submissions were received from both parties.

A copy of the complete record in this matter was provided to each member of the PERB.

The full PERB convened in public session on December 19, 2007, to consider State's Request for Review of the Deputy Director's decision. Following consideration of the complete record below and the arguments of the parties on review, the Board unanimously reached the following decision.

DISCUSSION

Motion to Dismiss for Timeliness

The Board unanimously denies AFSCME's motion to dismiss the State's request for review as untimely. The Board is aware of its obligation under its rules and practice to process appeals in an expeditious manner. This case, however, presents a unique set of circumstances because it is the first case to be processed under the SB36 modifications to the Public Employment Relations Act. The modification of the statute to include 19 Del.C. §1311A created a new right for State merit employees to bargain compensation but conditioned that right on employees being represented within one of twelve identified bargaining units.

In this case, the parties stipulated to the composition of Unit 11 and that all of the bargaining unit positions were represented by AFSCME. Based upon these undisputed facts, the Deputy Director issued a Notice of Compensation Unit Determination on November 9, 2007 which stated, "... Unit 11 positions are exclusively represented by AFSCME and this unit is eligible to bargain compensation consistent with 1311A(g)."

The State responded by e-mail correspondence on November 13, 2007, invoking its interpretation of 19 Del.C. §1311 A (e), which provides:

- (e) Notwithstanding any other provision in this Code to the contrary, where no employee organization is certified to represent some or all of the employees in a bargaining unit defined in subsection (b) of this section, an employee organization desiring to be certified as the exclusive representative of the unrepresented employees in such unit shall file a petition with the Board, accompanied by a combination of the un-coerced signatures of at least 30% of the unrepresented State employees in a unit described in said subsection (b) of this section. Alternatively, an employee organization may file a petition with the Board, accompanied by the un-coerced signatures of at least 30% of the combined total of unrepresented state employees and state employees currently represented by the petitioning employee organization in a unit described in said subsection (b) of this section. The Board or its designee shall act on such petition in accordance with §§ 1310 and 1311 of this title. Nothing contained herein shall be deemed to prevent a public employer from voluntarily recognizing an employee organization as the exclusive bargaining representative for a specified bargaining unit without an election so long as the following conditions have been met:
 - (1) A petition shall have been filed with the Board by an employee or group of employees or employee organization acting in their behalf alleging that a majority of employees in a unit identified in subsection (b) of this section above wish to be represented by an employee organization for such purposes; and
 - (2) The Board verifies that a majority of the employees in such unit have, within 12 months of the submission of the petition to the Board, signed authorizations designating the employee organization specified in the petition as their exclusive bargaining representative and that no other employee organization is currently certified or recognized as the exclusive bargaining representative of any of the employees in the unit; and
 - (3) The Board determines that notices have been posted, where notices to affected employees are normally posted, for a period of at least 10 calendar days, advising that exclusive recognition will be granted without an election to a named employee organization for such unit.

Specifically, the State requested PERB follow the process for voluntary recognition of AFSCME as set forth in subsections 1-3 above, as precondition to determining that the parties were properly postured for compensation bargaining.

The November 9 Notice of Compensation Unit Definition was the first formal notification to the parties of the PERB's interpretation and application of the new statutory provisions of 19 Del.C. §1311A. Consequently, the State's November 13 correspondence is analogous to a Motion for Reargument in which the State essentially asserts the Deputy Director erred in applying the statute to determine that Unit 11 was eligible to bargain compensation consistent with the statutory mandates. Until the State received the Deputy Director's explanation of November 19, it did not have all the information it needed to decide whether to appeal the decision or not.

Under the unique circumstances presented in this case, including the first application of the SB36 modifications to the PERA, the State's November 26 Request for Review following the Deputy Director's November 19 correspondence explaining the basis for her decision is not untimely.² We recognize the importance of keeping representation issues moving toward resolution in order not to deprive employees of their statutory right to collectively bargain, but no prejudice was caused by the brief delay in this case.

Review on the Merits:

Upon consideration of the record and arguments of the parties, we find the Deputy Director did not abuse her discretion, commit an error of law, nor did she err in her application of the law to the facts present.

The State argues the SB36 modifications to the PERA mandate a "separate but

parallel” process for certifying State Merit compensation bargaining units. It asserts this process must be separate and distinct from the well-established and long-standing process for creating bargaining units and certifying exclusive bargaining representatives as defined 19 Del.C. §1302, and prescribed in §§1310 and 1311. The State did not provide statutory support for its position, arguing only that it reads §1311A(e) to require a contemporaneous showing of choice by employees, regardless of prior bargaining status.

This Board, however, does not find any language in the statute which requires such a contemporaneous reaffirmation of existing exclusive bargaining representatives. In fact, §1311A(e) specifically relates to situations “where no employee organization is certified to represent some or all of the employees in a bargaining unit” defined in §1311A. In this case, the parties stipulated that every single bargaining unit position is currently represented by AFSCME. Clearly, this is not a situation to which §1311A(e) applies.

To read the statute as the State argues would require a determination by PERB that existing certifications of exclusive representatives of State employees have somehow become stale. Those certifications resulted from elections held pursuant to the requirements of 19 Del.C. §1310 and §1311, or through grandfathering of existing bargaining units and representatives which were established by PERB predecessor, the Governor’s Council on Labor. Sections 1310 and 1311 of the statute did not change and in fact, §1311A(e) requires PERB to process petitions seeking to represent unrepresented employees “in accordance with §1310 and §1311” of the statute. The §1311A modification to the PERA does not dissolve existing bargaining units or effectively decertify certified bargaining representatives, but provides an alternative process by which unrepresented

² The time between November 19 and November 26 included two State holidays (November 22 & 23) and a weekend.

State merit employees may seek representation, as a precondition to compensation bargaining on a statewide basis.

The statute does require a two part process for determining when the obligation to enter into compensation bargaining is ripe. First, PERB is required to determine which classifications and positions are included under the §1311A(b) compensation unit definitions, and second, PERB must determine whether those employees are currently represented by a certified bargaining representative. 19 Del.C. §1311A(b). If there are positions within the defined unit which are not represented, §1311A(e) defines the process by which those employees may seek representation, as a predicate to wage bargaining. As previously stated, however, there are no unrepresented employees in Unit 11.

In expanding the scope of bargaining for State merit employees and conditioning compensation bargaining as defined in §1311A, the General Assembly placed those changes within the existing collective bargaining statute, wherein the concepts of exclusivity and the rights and responsibilities of the parties in collective bargaining are clearly defined. The law conditions the expansion of bargaining rights for State merit employees on a reorganized bargaining structure in order to facilitate statewide bargaining concerning compensation issues. It provides that exclusive representatives of employees in each individual unit shall join together in a bargaining coalition to bargain collective for employees in each unit. It does not disturb the existing certification of exclusive representatives, nor does it require a reaffirmation of existing certifications. To read the statute to require that all represented employees reaffirm their bargaining representatives would fundamentally disrupt the long-standing and effective labor management relationships between the State and its employees. There is no indication in the language of the statute that the General Assembly intended anything other than to condition the expansion of collective bargaining to include compensation issues on the requirement that


all merit employees in each of the identified units be represented. There is a valid and recognizable interest in having employees in identical classifications being subject to the same compensation policies and practices, whether those policies and practices are determined exclusively by the employer or collectively bargained.

For these reasons, the Board affirms the Deputy Director's decision.


DECISION

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


IT IS SO ORDERED.



ELIZABETH D. MARON, Acting Chairperson



R. ROBERT CURRIE, JR., Member



KATHI A. KARSNITZ, Member

DATE: 23 January 2008