

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY,)
AND MUNICIPAL EMPLOYEES, AFL-CIO,)
COUNCIL 81 AND LOCALS 879, 1036, AND 1443,)
)
Charging Parties,)
)
v.) **ULP NO. 09-07-694**
) **Hearing Officer’s Decision**
STATE OF DELAWARE, OFFICE OF MANAGEMENT)
& BUDGET, AND DEPARTMENT OF TRANS-)
PORTATION, DIVISION OF MAINTENANCE &)
OPERATIONS,)
)
Respondents.)

APPEARANCES

Perry F. Goldlust, Esq. *for AFSCME Council 81*
Hannah Messner, *SLREP/HRM/OMB, for the State*

BACKGROUND

The 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 (1994). The Office of Management and Budget (“OMB”) and the Department of Transportation (“DOT”) are agencies of the State of Delaware.

The American Federation of State, County, & Municipal Employees, Council 81, AFL-CIO, (“AFSCME”) is an employee organization which admits public employees to membership and has as a purpose the representation of those employees in collective

bargaining pursuant to 19 Del.C. §1302(i). AFSCME, through its affiliated Locals 879, 1036 and 1443, is the certified exclusive bargaining representative of Department of Transportation employees who work in the Division of Maintenance and Operations in New Castle, Kent and Sussex Counties within the meaning of 19 Del.C. 1302(j).

The State of Delaware, Department of Transportation, Division of Maintenance and Operations and AFSCME (by and through its affiliated Locals 879, 1079, 1443) are parties to a single collective bargaining agreement which has a term of December 14, 2006 through December 13, 2010.

On or about July 17, 2009, AFSCME filed an unfair labor practice charge alleging the State violated 19 Del.C. §1307(a)(2), (3), (5), and (6):

- (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
 - (2) Dominate, interfere with or assist in the formation, existence or administration of any labor organization.
 - (3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.
 - (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.
 - (6) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

The Charge alleges on or about May 12, 2009, without consultation with Council 81 or the Locals, DOT communicated directly with bargaining unit employees through a Career Ladder Memorandum which is alleged to make significant and unilateral changes to the administration of Article 15. The Charge further alleges that Training is a mandatory subject of bargaining under the PERA. AFSCME charges that OMB and DOT:

- Took the complained of action without consultation or bargaining with AFSCME;
- By sending the Memo directly to bargaining unit members OMB and DOT intended to unilaterally change terms and conditions of employment by circumventing Council 81 and the Locals in order to undermine bargaining unit employees' perception of the union in protecting the collective bargaining agreement and to cause confusion and distrust between the Union and its members.
- The announcement of the change being sent directly to bargaining unit members was not based on any law or right given to either OMB or to the Secretary of DOT. The action was taken to intentionally mislead bargaining unit members and was done with reckless disregard for the confusion and anger the distribution of the knowingly false information would have on bargaining unit employees.

On or about July 28, 2009, the State filed its Answer to the Unfair Labor Practice Charge, denying all material allegations contained therein. The Answer also included New Matter in which the State alleged the Charge should be dismissed because:

- PERB does not have jurisdiction over the alleged unfair labor practice charge because the acts complained of in the Charge are within the exclusive authority of the Executive Branch of government under the law. It asserts that Section 70(a)¹ of the 2010 State Appropriations Act provides that 29 Del.C. 6529² provides OMB with authority which "...

¹ Section 70. (a) For Fiscal Year 2010, 29 Del. C. § 6529 is interpreted to include the ability to implement a hiring review process. All State agencies with the exception of Legislative, Judicial, Higher Education and school districts shall be subject to the provisions of 29 Del. C. § 6529 as interpreted by this section. Implementation of a hiring review process shall require all positions to be reviewed and approved by the Director of the Office of Management and Budget prior to filling. All non-cabinet agency hiring requests shall also require the review and approval of the Controller General prior to filling.

(b) In the event the authority granted in subsection (a) of this section is implemented, Chapters 3.0000 and 13.0000 of the Merit Rules notwithstanding, the Director of the Office of Management and Budget shall have the authority to extend temporary promotions based on agency need until the hiring review process has ended. At the time the hiring review process has ended, those temporary promotions granted during the hiring review process shall be subject to the limitations identified in the Merit Rules governing the duration of temporary promotions.

² § 6529. Control of agency expenditures. The Director of the Office of Management and Budget is hereby empowered and directed to exercise, subject to the approval of the Governor, such control over the monthly and/or quarterly rates of agency expenditures of funds appropriated to such agency as the Director of the Office of Management and Budget may deem necessary to assure the effective and continuous operation of the various agencies during the fiscal year. The

includes but is not limited to, the authority to implement a Hiring Freeze and/or extend that Hiring Freeze to include Career Ladder Promotions.”

- The Charge fails to state a claim for which relief can be granted because improper unilateral changes must affect mandatorily negotiable subjects of bargaining under the PERA. “Compensation” is only included in the scope of bargaining after PERB has authorized compensation bargaining under 1311A of the Act. AFSCME has not been authorized to bargain compensation for the employees at issue in this Charge.
- The Charge fails to state a claim for which relief can be granted under §1307(a)(2) because AFSCME does not allege any conduct which tends to “dominate, interfere with or assist in the formation, existence or administration of any labor organization.”
- The Charge fails to state a claim for which relief can be granted under §1307(a)(3) because AFSCME does not allege any conduct which tends to “encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.”
- The Charge fails to state a claim for which relief can be granted under §1307(a)(5) because AFSCME does not allege any conduct which would support the conclusion that the State failed or refused to bargain collectively in good faith with the exclusive representative of represented employees.
- The Charge fails to state a claim for which relief can be granted under §1307(a)(6) because AFSCME does not allege any conduct which would support the allegation that the State failed or refused to comply with any provision of the PERA or with PERB rules.

On or about August 4, 2009, AFSCME filed its Response to New Matter denying all material allegations contained therein.

On December 14, 2009, the PERB’s Executive Director issued a Probable Cause Determination finding the pleadings provide a sufficient basis for finding probable cause to believe that an unfair labor practice in violations of 19 Del.C. §1307(a)(2), (a)(3),

authority of the Director of the Office of Management and Budget under this section shall apply to local and special school districts insofar as they administer funds supplied by the State, but not with regard to funds raised locally.

(a)(5) and/or (a)(6) may have occurred. The Probable Cause Determination dismissed the State's contention that the PERB lacks jurisdiction to hear and resolve the current dispute. With regard, thereto, the Executive Director observed:

The Public Employment Relations Board was created by an act of the General Assembly and signed into law by the Governor in 1982. PERB is, by statute, a neutral, independent agency which is not subject to the control or supervision of any cabinet agency or officer thereof. The Board is expressly charged with administering the PERA. 19 Del.C. §1301(3). Its powers and responsibilities with respect to the administration of the unfair labor practice provisions of the statute are set forth in §1308, Disposition of Complaints:

- (a) The Board is empowered and directed to prevent any unfair labor practice described in § 1307 (a) and (b) of this title and to issue appropriate remedial orders. Whenever it is charged that anyone has engaged or is engaging in any unfair practice as described in § 1307(a) and (b) of this title, the Board or any designated agent thereof shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice charge and including a notice of hearing containing the date and place of hearing before the Board or any designated agent thereof. Evidence shall be taken and filed with the Board; provided, that no complaint shall issue based on any unfair labor practice occurring more than 180 days prior to the filing of the charge with the Board.
- (b)(1) If, upon all the evidence taken, the Board shall determine that any party charged has engaged or is engaging in any such unfair practice, the Board shall state its findings of fact and conclusions of law and issue and cause to be served on such party an order requiring such party to cease and desist from such unfair practice, and to take such reasonable affirmative action as will effectuate the policies of this chapter, such as payment of damages and/or the reinstatement of an employee; provided however, that the Board shall not issue:
 - a. Any order providing for binding interest arbitration on any or all issues arising in collective bargaining between the parties involved; or
 - b. Any order, the effect of which is to compel concessions on any items arising in collective bargaining between the parties involved.

- (2) If, upon the evidence taken, the Board shall determine that any party charged has not engaged or is not engaging in any such unfair practice, the Board shall state, in writing, its findings of fact and conclusions of law and issues and dismiss the complaint.
- (c) In addition to the powers granted by this section, the Board shall have the power, at any time during proceedings authorized by this section, to issue orders providing such temporary or preliminary relief as the Board deems just and proper subject to the limitations of subsection (b) of this section.

Accordingly, the State's assertion that PERB is without jurisdiction to consider this unfair labor practice charge is without basis, and therefore is dismissed. P. 4425

In lieu of an evidentiary hearing, on February 8, 2010, the parties entered into the following Stipulation of Facts. To close the record, the parties submitted written argument in support of their respective positions. Charging Party's argument was received by the PERB on March 22, 2010, and the State's argument was received on March 23, 2010. The State filed reply argument on April 6, 2010. The following discussion and decision result from the record thus compiled.

FACTS

The parties signed a joint Stipulation of Facts, which stated:

1. Respondent State of Delaware ("State"), is a public employer within the meaning of 19 Del.C. § 1302(p). The State of Delaware, Office of Management and Budget ("OMB"), and Department of Transportation ("Department"), are cabinet Departments of the State.
2. The Charging Party, American Federation of State, County and Municipal Employees, Council 81 ("Council 81"), Locals 879, 1036, and 1443 ("Local Unions"), is an employee organization within the meaning of 19 Del C. § 1302(i). Council 81 and the Local Unions are the exclusive bargaining representatives, within the meaning of 19 Del.C. § 1302(j), of State Merit Employees whose position have been assigned to bargaining units represented

by the Local Unions. Locals 879, 1036, and 1443 share one collective bargaining agreement with the State.

3. Council 81 and its Local Unions have a collective bargaining agreement with the State.
4. Attached is a true and correct copy of the CBA.
5. On July 1, 2009, the Delaware General Assembly passed the FY 2010 Appropriations Act (“Budget Act”), which was signed into law by the Governor also on July 1, 2009. Attached is a true and correct copy of the Budget Act for FY 2010.
6. These changes were done unilaterally and without consultation or negotiations with Council 81 or its Locals.
7. The memorandum attached as an exhibit to the Charge was distributed to employees in the Department of Transportation, on or about the dates identified therein. They were distributed without prior notice to Council 81 or the Local Unions.

The Stipulation of Facts was signed by the authorized Labor Relations and Employment Practices Specialist for the State and by Counsel for AFSCME.

The memorandum referenced in Paragraph 7 of the joint Stipulation of Facts was attached as Exhibit 2 to the Charge and stated:

**Guidelines for Monitoring Employee Career Ladder Progression
During the Hiring Freeze**

At the direction of the Office of Management and Budget effective February 18, 2009, career ladder promotions were included in the hiring freeze implement on November 1, 2008.

Our career ladder requirements include time constraints, requirements to demonstrate certain skills, and in instances completion of required coursework. During the freeze managers and supervisors should encourage employees to continue to learn the new skills, take any required courses, and assume higher level duties to prepare for promotion when the freeze is lifted. That said, it should also be emphasized that there is no opportunity for retroactive promotions when the freeze is lifted.

Depending on the duration of the freeze, there may be instances where some employees should have progressed more than one step in the career ladder. The Office of Human Resource Management has agreed that we

may consider reviewing such promotions differently because of the freeze. Barring receipt of other freeze restrictions, and providing the employee meets all the requirements for promotion, an individual could be considered for movement for more than one step. Given this, it is important to encourage employees to continue to complete career ladder requirements. Here is an example for movement for more than one step:

An Equipment Operator (EO) I should have been promoted to EO II effective March 1, 2009. This promotion can't take place because of the freeze. Normally, an EO will work one year at the II level, then promote to EO III.

Assume the freeze lifts on July 1, 2010. By that time, the employee is eligible to be an EO III. Assuming the employee meets all the requirements for promotion, the supervisor will process the appropriate paperwork for the employee to promote to EO III. In essence, we are waiving the requirement to work at the II level.

Specific guidelines for managers and supervisors are as follows:

- Continue to track the employee's progress in successfully meeting career ladder task/skill requirements and completion of any necessary training or coursework.
- Annotate the career promotional requirement statement and any internal checklists used with the date completed and your initials and maintain any documentation that measures and verifies successful performance at the next higher level.
- Maintain this documentation in your section for each employee.
- **Do not** complete the Career Ladder Promotional Certification Form or make any written recommendation for promotion to your supervisor or the division director.
- **Do not** assemble the career ladder promotional package until the freeze is lifted.
- When the freeze is lifted, DeIDOT Human Resources will notify you and provide instructions for how to submit the career ladder paperwork.

Encouraging employees to pursue completing the requirements for the next higher level(s) and your documentation of same not only will assist in expediting processing of promotional packages when the freeze is lifted, it plays an important role in helping DeIDOT meet operational needs. In general, it's also important for employees to continue learning to prepare themselves for other opportunities that may become available.

If you have any questions, please contact Human Resources.
5/12/09

Article 15 of the December 14, 2006 through December 13, 2010 collective bargaining agreement between the State of Delaware, Department of Transportation, Division of Maintenance and Operations and Council 81 of the American Federation of State, County and Municipal Employees, AFL-CIO, and its affiliated Local 879, 1036 and 1443 states:

ARTICLE 15 – TRAINING

Section 1.

In order that the State may be assured a force of competent craftsmen to fill the needs for the future and also that employees working in the lower classifications may have an opportunity to acquire additional knowledge and skill, the State, with input from the Union, shall establish effective training programs offered on an on-going basis.

Section 2.

- (a) Training programs will be offered by seniority in classification and the State will endeavor to permit all employees equal opportunity to participate in such programs.
- (b) Training programs conducted by the State will be held during normal working hours. If for any reason training is scheduled outside the normal workday, the employee will be compensated appropriately.

Section 3.

- (a) Upon successful completion of such training programs, an employee may apply for certification. Once certified on a piece of equipment, the certification becomes permanent and copies of any certificate(s), diplomas, operators cards, etc. shall be part of the employee's permanent record with the State.
- (b) Equipment Operator Certification Teams shall include one Union member as identified to the State by the Union.

Section 4.

Training committees shall be formed in each District which shall include 2 bargaining unit employees on each committee, as well as appropriate Union and State representatives. The committees shall meet semi-annually to discuss training issues. One such meeting shall deal with Transportation Equipment Operator issues only, and the second with other types of training. The State shall notify the appropriate Local President of employees selected for training in their occupational specialty in advance

of the training. Bargaining unit employees who assist in training shall not lose any bargaining unit rights enjoyed under this agreement while assuming such duties.

- (a) Promotion will become effective on the first day of the first full pay period immediately following verification of successful completion of all promotional standard requirements.
- (b) The State shall amend training manuals no more than once per quarter of each calendar year, except where safety issues and equipment changes require more frequent updates.

ISSUE

WHETHER THE STATE VIOLATED 19 DEL.C. §1307(A)((2), (3), (5) AND (6) WHEN IT UNILATERALLY CHANGED THE ADMINISTRATION OF THE CAREER LADDER PROGRAM AND/OR COMMUNICATED THE CHANGE DIRECTLY TO THE AFFECTED EMPLOYEES, BYPASSING THE UNION?

PRINCIPAL POSITIONS OF THE PARTIES

Charging Party: OMB is an administrative agency in the Executive branch of government and as such can have no broader powers than the Governor. The State offers no written document from the Governor directing OMB to nullify a negotiated collective bargaining agreement or exempting the State from the provisions of 19 Del.C. § 1301 (2), which obligates a public employer and the exclusive bargaining representative to . . . “confer and negotiate in good faith with respect to terms and conditions of employment, and to execute a written contract incorporating any agreements reached . . .”.

Section 1302 (t), of the Act defines “terms and conditions of employment” as, “matters concerning or related to wages, salaries, hours, grievance procedures and working conditions; provided however, that such terms shall not include those matters determined by this Chapter or any other law of the State to be within the exclusive prerogative of the public employer.” Charging Party maintains that, “training programs

and how and when employees are to be paid upon completion of certain milestones are terms and conditions of employment” and as such constitute mandatory subjects of bargaining for which the *status quo* may not be unilaterally altered.

AFSCME argues the subject of training and how and participation in a Career Ladder program do not fall within the “exclusive management prerogative” exception to mandatory bargaining, citing 19 Del.C. §1305, Public Employer Rights, which provides:

A public employer is not required to engage in Collective bargaining on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion or policy as the functions and programs of the public employer, its standards of services, overall budget, utilization of technology, the organizational structure and staffing levels and the selection and direction of personnel.

AFSCME argues that although the legislature reserved to the exclusive jurisdiction of management the determination of the “overall budget,” this limitation on the duty to bargain does not extend to the constituent parts of the budget.

AFSCME further argues that the State’s reliance on Section 70(a) of the Budget Act for Fiscal Year 2010 as authorizing the freeze on Career Ladder progression is misplaced. Section 70(a) provides, in relevant part: “Implementation of a hiring review process shall require all positions to be reviewed and approved by the Director of the Office of Management and Budget prior to filling.”

Section 70(a) of the Budget Act does not amend any statute (including the PERA) nor does it contain any reference to freezing the Career Ladder program insofar as employee promotions and salary increases. There is also no evidence of any formal action by the Governor to this effect.

Charging Party points out that the memorandum announcing the suspension of the formal Career Ladder program occurred on May 12, 2009, well before the July 1, 2009 effective date of the FY 2010 Budget Act, resulting in the retroactive application of the law.

Included in Charging Party's written argument is a section entitled Reconciliation of Merit System and The Act in which Charging Party cites sections of various statutes as support for its position that, "jurisdiction has been conferred upon the PERB to hear complaints about ULP charges against the State . . ."³

Finally, Charging Party argues that by directly communicating with the bargaining unit employees concerning the intended change in the Career Ladder program without at least first advising the exclusive bargaining representative constitutes a *per se* unfair labor practice intended to undermine the effectiveness of the Union.

State: The State argues that Career Ladder promotions do not constitute a "term and condition" of employment within the meaning of 19 Del.C. § 1302 (t) and are not a mandatory subject of bargaining. Merit Rule 3.3.3 provides, in relevant part, "when a position is reclassified into a Career Ladder, placement of the position incumbent is based on promotional standards approved by the Director."

Pursuant to 29 Del.C. § 5938 (c) and 29 Del.C. § 5918, promotions are not a mandatory subject of bargaining. 29 Del.C. § 5938 (c) provides:

The rules adopted or amended by the [Merit Employee Relations] Board under the following sections shall apply to any employee in the classified service represented by an exclusive bargaining agreement under Chapter 13 of Title 19, except in the case of collective bargaining agreements reached

³ Because this issue was considered and resolved by the Executive Director in her Probable Cause Determination it will not be addressed again in this decision.

pursuant to §1311A⁴ of Title 19: §§ 5915 through 5921, 5933, 5935 and 5937 of this title.

Section 5918, covers merit employee promotions. Thus, progression from one level of a Career Ladder to another is, by definition, a promotion.

19 Del.C. § 1305, re-enforces the State's exclusive authority and control over "matters of inherent managerial prerogative" including "staffing levels," "organizational structure," "the selection and direction of personnel" and the State's "overall budget." Career Ladder promotions impact all of these areas which constitute exceptions from the duty to bargain.

The State further argues that, except for agreements reached pursuant to 19 Del.C. §1311 A, merit employee compensation is reserved exclusively to the State and therefore, not a mandatory subject of bargaining. In further support of its position that compensation resulting from Career Ladder promotions is excluded from collective bargaining, the State also cites Section 18 of the Budget Act which provides, in relevant part:

Notwithstanding any provisions of this Act or the Delaware Code to the contrary, no provision of Chapter 4.0 of the Merit Rules shall be considered compensation for the purposes of collective bargaining.

This provision of the Budget Act clearly applies to Merit Rule 4.6 ("Promotions") and Merit Rule 4.12 ("Pay Rates After Reclassification Or Grade Change.").

Despite the inclusion of Career Ladders in Article XV of the collective bargaining agreement, it is well settled that a unilateral mid-term modification of a non-mandatory subject of bargaining does not constitute an unfair labor practice. *Pittsburgh Plate and Glass Co.*, 404 U.S.157, 92 S.Ct. 383, L.Ed.2 341 (1971). The Delaware statute mirrors

⁴ The existing collective bargaining agreement between these parties was not "reached pursuant to 19 Del.C. §1311A.

the National Labor Relations Act and Delaware can, therefore, reasonably be expected to follow federal precedent. *CoFrancesco v. City of Wilmington*, 419 F.Supp. 109 [93 LRRM 2387] (D.Del., 1976); *Sussex County v. Communication Worker of America, AFL-CIO*, Rep. Pet. No. 07-02-577, VI PERB 3949, 3957 (2008).

The State further argues that Career Ladder Promotions are within the State's exclusive hiring authority. The State contends that 29 Del.C. §6529 empowers and directs OMB, "to exercise, subject to the approval of the Governor, such control over the monthly and/or quarterly rates of agency expenditures of funds appropriated to such agency as the Director of the Office of Management and Budget may deem necessary to assure the effective and continuous operation of the various agencies during the fiscal year . . ."

Based upon 29 Del.C. §6529 and Section 70(a) of the Budget Act, the State concludes that OMB is empowered to implement a hiring review process for all positions, including new hires, promotions, and positions filled through Career Ladder advancement. A Career Ladder promotion resulting in an increase in compensation is clearly within OMB's authority pursuant to 29 Del.C. §6529, since there is a resulting impact on the "monthly and/or quarterly rates of agency expenditures of funds appropriated to such agency."

The State also argues that the current collective bargaining agreement does not govern Career Ladder promotions in that it establishes only the timing of Career Ladder promotions but does not include the Career Ladder promotional process or its mechanics.

Even if it is determined that the collective bargaining agreement governs Career Ladder promotions, "the authority of OMB as provided for in 29 Del.C. §6529, as clarified by § 70(a) of the Budget Act, supersedes any provision of the relevant CBA."

Finally, the State claims there is no evidence or claim that any employee was adversely affected by the changes to the Career Ladder promotions or denied training opportunities as mandated by the collective bargaining agreement.

DISCUSSION

Although numerous and varied, the arguments of the parties in support of their respective positions focus primarily upon whether the movement of employees through a Career Ladder constitutes a mandatory subject of bargaining. Consistent with the following discussion, I conclude that it does not.

It is well-established by PERB case law that a party may not unilaterally alter the status quo of term and condition of employment within the meaning of 19 Del.C. §1302(t). Terms and conditions of employment (which include "... matters concerning or related to wages, salaries, hours, grievance procedures and working conditions") constitute mandatory subjects of bargaining. An employer's unilateral change in the status quo of a mandatory subject of bargaining violates the duty to bargain in good faith set forth in 19 Del.C. §1307 (a)(5). *Local 1590, IAFF v. City of Wilmington*, ULP 89-05-037, I PERB 413 (1989). *AFSCME, Locals 879, 106, and 1143 v. State of Delaware, OMB and DelDot*, Probable Cause Determination, ULP No. 09-07-694.

Section 70 (a) of the FY 2010 Appropriations Act incorporates by reference (with certain exceptions not applicable here) 29 Del.C. §6529, Control of agency expenditures, which authorizes the Director of OMB to control agency expenditures. It provides:

The Director of the Office of Management and Budget is hereby empowered and directed to exercise, subject to the approval of the Governor, such control over the monthly and/or quarterly rates of agency expenditures of funds appropriated to such agency as the Director of the Office of Management and Budget may deem necessary to assure the

effective and continuous operation of the various agencies during the fiscal year. The authority of the Director of the Office of Management and Budget under this section shall apply to local and special school districts insofar as they administer funds supplied by the State, but not with regard to funds raised locally.

Pursuant to this Section, included in the authority conferred upon the Director of the Office of Management and Budget by 29 Del.C. §6529, is the authority to review and approve vacancies before they are filled. Without negotiating with the Union, the Director of OMB included within the hiring freeze the movement of employees through a Career Ladder program. This resulted in the instant unfair labor practice charge by AFSCME alleging failure to bargain concerning a mandatory subject of bargaining.

As hereafter discussed, in addition to Section 70(a) of the FY 2010 Appropriations Act and 29 Del.C. §6529, other Delaware laws affect the resolution of this dispute. Chapter 59 of Title 29, Merit System of Personnel Administration, provides in §5938(c):

The rules adopted or amended by the Board under the following sections shall apply to any employee in the classified service represented by an exclusive bargaining representative or covered by a collective bargaining agreement under Chapter 13 of Title 19, except in the case of collective bargaining agreements reached pursuant to §1311A of Title 19; §§5915 through 5921, 5933, 5935 and 5937 of this Title.

Delaware's Chancery Court addressed the bargaining status of the designated subjects excluded from the duty to bargain by 29 Del.C. §5938 (c) holding that, "The categories covered by the excepted sections, and as to which the merit system rules are controlling and collective bargaining is unauthorized . . . are not proper subjects for collective bargaining and the Facility cannot be compelled to bargain on them." *Laborers' Intern. Union of North America, Local 1029 v. State through Dept. of Health and Social Services*, 310 A.2d 667 (Del. Ch. 1873, aff'd 314 A.2d 919 (Del. Supr. 1974).

29 Del.C. §5918, one of the excepted sections to the duty to collectively bargain expressly set for the in §5938 (c), is entitled Promotions and states:

The rules shall provide or promotions, giving consideration to the applicant's qualifications, performance record, seniority, conduct and, where practicable, to the results of competitive examination. Vacancies shall be filled by promotion whenever practicable and in the best interest of the classified service. Any promotional competition for a position funded solely by general funded appropriations, involving 2 or more candidates and a qualifying examination certified by the Director, shall be considered a competitive examination under §5917 of this Title.

There is no question that movement through a Career Ladder constitutes a promotion. Merit Rule 3.3.3 provides:

When a position is reclassified into a Career Ladder, placement of the position incumbent is based on promotional standards approved by the Director. Movement from one level to another within Approved Career Ladders is a promotion, not a reclassification.

Because movement through a Career Ladder constitutes a promotion under the State merit system (and is excluded from collective bargaining by 29 Del.C. §5938(c)) it cannot also be a mandatory subject of bargaining under the Public Employment Relations Act. If there is no duty to bargain, the employer cannot have violated its duty to bargain in good faith or to have violated 19 Del.C.§1307(a)(5). Consequently, that charge is dismissed.

AFSCME's allegation that the State violated of 19 Del.C. §1307(a)(2) and (a)(3) by communicating directly with bargaining unit members and circumventing the union is also without merit. AFSCME's reliance on the NLRB's decision in *Southern California Gas Co.*⁵ is misplaced. The NLRB states in that decision:

In order to prove such a violation, it must be shown that the Respondent [Employer] is communicating with its represented employees and that the discussion is for the purpose of establishing or changing wages, hours and

⁵ 316 NLRB 979 (1995)

terms of conditions of employment within the meaning of Section 8(d) or undercutting the Union's offer to establish or change them, and finally, such communication must be to the exclusion of the Union. {citing *Obie Pacific, 196 NLRB 458,459 (1972)*}.⁶

Having determined that movement through a Career Ladder does not constitute a mandatory subject of bargaining for State merit employees who are not involved in §1311A bargaining, there is no basis for concluding that the State impermissibly communicated directly with the employees or that it otherwise violated 19 Del.C. §1307 (a)(2) and/or (a)(3), as alleged.

CONCLUSIONS OF LAW

1. The State of Delaware is a public employer within the meaning of 19 Del.C. §1302(p). The Office of Management and Budget and the Department of Transportation are agencies of the State of Delaware.

2. Charging Party, the American Federation of State, County, & Municipal Employees, Council 81, AFL-CIO, is an employee organization which admits public employees to membership and has as a purpose the representation of those employees in collective bargaining pursuant to 19 Del.C. §1302(i). Through its affiliated Locals 879, 1036 and 1443, AFSCME is the certified exclusive bargaining representative of Department of Transportation employees who work in the Division of Maintenance and Operations in New Castle, Kent and Sussex Counties within the meaning of 19 Del.C. 1302(j).

3. The State and AFSCME are parties to a current collective bargaining agreement, which includes Article 15, Training, which addresses training programs and

⁶ Southern California Gas Company and Utility Workers Union of America, AFL-CIO, Local 132, 316 NLRB 979, 982 (1995).

certification of employees for promotion following the completion of training. This collective bargaining agreement was not reached pursuant to 19 Del.C. §1311A.

4. On or about July 1, 2009, the General Assembly of the State of Delaware passed the FY 2010 Appropriations Act, which included Section 70(a) authorizing the Director of OMB to approve vacancies before they are filled.

5. On or about May 12, 2009, bargaining unit employees received a memorandum from DOT entitled “Guidelines for Monitoring Employee Career Ladder Progression During the Hiring Freeze,” which notified employees that career ladder promotions were also frozen.

6. Merit Rule 3.3.3 defines career ladder advancement as a promotion for State merit employees.

7. 29 Del.C. §5938 excludes promotions (as defined by 29 Del.C. §5918) from the scope of collective bargaining for agreements which cover State merit system employees and which are not reached pursuant to 19 Del.C. §1311A. Consequently, because career ladder advancement is defined as a promotion and promotions are not negotiable under the State merit law, career ladder advancement is not a mandatory subject of bargaining for this bargaining unit.

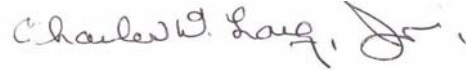
8. The State did not violate its duty to bargain in good faith or 19 Del.C. §1307(a)(5) when it unilaterally froze career ladder advancement for bargaining unit employees because promotions are not a mandatory subject of bargaining.

9. The State did not violate 19 Del.C. §1307 (a)(2) and/or (a)(3) when it communicated with bargaining unit employees concerning the freezing of career ladder advancements because promotions are not mandatory subjects of bargaining.

10. The record establishes no basis for concluding the State violated 19 Del.C.
§1307(a)(6), as alleged.

WHEREFORE, THE CHARGE IS DISMISSED IN ITS ENTIRETY.

Date: November 15, 2010



Charles D. Long, Jr.,
Hearing Officer
Del. Pubic Employment Relations Board