

**PUBLIC EMPLOYMENT RELATIONS BOARD**

**STATE OF DELAWARE**

<b>AMERICAN FEDERATION OF STATE, COUNTY,</b>	:	
<b>AND MUNICIPAL EMPLOYEES, COUNCIL</b>	:	
<b>81, AFL-CIO,</b>	:	<b>REQUEST FOR REVIEW OF</b>
	:	<b>THE DECISION OF THE</b>
Appellant,	:	<b>INTEREST ARBITRATOR</b>
	:	<b>CONCERNING STATE MERIT</b>
v.	:	<b>UNIT #11</b>
	:	
<b>THE STATE OF DELAWARE,</b>	:	<b><u>BIA 08-05-625</u></b>
	:	
Appellee.	:	

**INTERIM DECISION ON PRELIMINARY MOTION TO DISMISS**

*Appearances*

*Perry F. Goldlust, Esq., for AFSCME Council 81  
Aaron Shapiro, Senior Labor Relations Specialist, SLREP, for the State*

**BACKGROUND**

The American Federation of State, County and Municipal Employees, Council 81, AFL-CIO (“AFSCME”) is an employee organization within the meaning of section 1302(i) of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13. AFSCME was certified as the exclusive bargaining representative of a unit of State of Delaware merit system employees defined by 19 Del.C. §1311A (b)(11)<sup>1</sup> on or about November 9, 2007.

<sup>1</sup> 19 Del.C. §1311A (b)(11) defines this bargaining unit as “Correctional Supervisors which is composed of correctional lieutenants, staff lieutenants, correctional captains, and similar occupations.”

The State of Delaware is a public employer within the meaning of 19 Del.C. §1302(p).

AFSCME and the State engaged in unsuccessful negotiations for a collective bargaining agreement for the Unit 11 bargaining unit, pursuant to 19 Del.C. §1311A. Binding interest arbitration procedures were initiated and hearings were held on September 6, October 4, and October 7, 2011, before Arbitrator Ralph H. Colflesh, Jr., Esq.

By e-mail sent at 6:15 p.m. on Thursday, October 11, 2011 to the Executive Director of the Public Employment Relations Board, the Arbitrator provided a copy of his interest arbitration award with the following information:

This is the draft Interest Arbitration Award in the Unit 11 matter. I finished it tonight after a long effort over much of the weekend in order to meet the statutory deadline. I have not sent it to the parties, as I believe PERB should disseminate it. I will put a hard signed copy in the mail to you with the State's LBO<sup>2</sup> as an attachment tomorrow (Tuesday, Oct. 11). Please email the postal address to which it should be sent.

The following morning, the Executive Director provided electronic copies of the Arbitrator's Award to the parties, with the following transmittal letter:

I am enclosing a copy of the Interest Arbitrator's decision in the above-captioned matter which was received in this office during the evening of October 11, 2011. Arbitrator Colflesh will provide a hard copy of his decision to this office by mail, to which he indicated he will attach a copy of the State's last, best, and final offer. I will provide the complete document to you promptly upon request.

Please be advised that 19 Del.C. §1315(e) provides, "the decision of the arbitrator shall become an order of the Board with 5 business days after it has been served on the parties."

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<sup>2</sup> Last, Best Offer

The decision and transmittal letter were sent by e-mail to the representatives of record in the interest arbitration proceeding, with copies provided to the Arbitrator, AFSCME and State representatives to whom previous correspondence had been provided during the processing of this case. Paper copies were also placed in the mail to all addressees.

It is admitted that the Arbitrator's decision, as it was received from the Arbitrator on October 11, 2011, was received by representatives of the parties electronically on October 12, 2011, and AFSCME affirmed it received the paper copy sent by the Executive Director on October 14, 2011, through the U.S. Mail.

It is undisputed that the "complete document" referenced in the Executive Director's October 12, 2011 correspondence was not sent to the parties either directly by the Arbitrator or by the Executive Director.

On or about October 20, 2011, AFSCME filed a Request for Review of Arbitrator's October 11, 2011 Award and Decision.

On or about October 24, 2011, the State filed its Objection to AFSCME Council 81's (Unit 11) Request for Review of Arbitrator's October 11, 2011 Award and Decision, asserting the request was untimely. The State moved to have AFSCME's Request for Review denied for lack of jurisdiction.<sup>3</sup>

In response, AFSCME filed a Response to the State's Objection and a Motion to Enlarge the Period of Time to File An Appeal of the Arbitrator's Decision because of Excusable Neglect., asserting the duration of the applicable appeal period was not clear.

A copy of the complete record in this matter was solicited from the parties and provided to each member of the Public Employment Relations Board. A public hearing

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<sup>3</sup> The State's Objection to AFSCME's Request for Review is herein referred to as the State's Motion to Dismiss.

was convened on November 16, 2011, at which time the full Board met in public session to hear and consider the preliminary motions. The parties were provided the opportunity to present oral argument and the decision reached herein is based upon consideration of the record and the arguments presented to the Board.

### **DISCUSSION**

The Board notes that AFSCME's Request for Review of the Arbitrator's Decision raises a number of issues of first impression. For the first time since the modification of the PERA in August, 2007, these parties exercised the option to select an interest arbitrator from a list provided by the American Arbitration Association ("AAA") rather than having the Executive Director or her designee serve as the Interest Arbitrator.<sup>4</sup> The provisions of §1315 of the PERA do not differentiate between the processes to be followed and the standards to be applied by the interest arbitrator, whether that individual is a PERB agent or chosen through AAA process. The statute requires the arbitrator to hold open, public hearings<sup>5</sup>; empower the arbitrator to administer oaths and issue subpoenas<sup>6</sup>; require the arbitrator to make written findings of fact and a decision which is limited to a determination of which of the parties' last, best and final offers should be accepted in its entirety; and specifies the factors the arbitrator must take into consideration in reaching his or her decision.<sup>7</sup>

The statute also directs the interest arbitrator to serve his or her decision on the

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<sup>4</sup> In all previous and subsequent interest arbitration proceedings, the Executive Director or her designee has served as the Binding Interest Arbitrator.

<sup>5</sup> 19 Del.C. §1315 (c); 19 Del.C. §1313(b)

<sup>6</sup> 19 Del.C. §1315(d)

<sup>7</sup> 19 Del.C. §1315 (d)

public employer, the certified exclusive representative, and the Board.<sup>8</sup> In this case, the Arbitrator did not provide a copy of his decision to anyone other than the Board's Executive Director.

In considering the State's Motion to Dismiss AFSCME's appeal because it was untimely, the Board is concerned that service was not properly effectuated as required by 19 Del.C. §1315(e). For this reason, the State's Motion to Dismiss is denied.

In order to rectify this oversight, the Board hereby orders a copy of the complete award be immediately provided to both parties.

No interests would be served by requiring AFSCME to refile its request for review after its receipt of the complete award. These negotiations and interest arbitration proceedings have been on-going for more than four years. The Board notes the attachment which was not included in the original distribution of the Award is the State's last, best and final offer, which was in the record and known to both parties prior to issuance of the arbitration award. Including this attachment does not impact the decision or supporting findings in the Arbitrator's decision and award.

The State is provided the opportunity to respond to the substance of AFSCME's request for review. Should it choose to file a response, such response may be file with PERB's Executive Director on or before Tuesday, November 29, 2011.


The Board will consider AFSCME's Request for Review at its next meeting on Tuesday, December 6, 2011.


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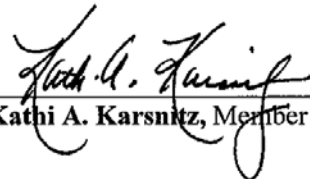
<sup>8</sup> 19 Del.C. §1315(e) states: Within 30 days after the conclusion of the hearing but not later than 120 days from the day of appointment, the arbitrator shall serve the arbitrator's written determination for resolution of the dispute on the public employer, the certified exclusive representative and the Board. The decision of the arbitrator shall become an order of the Board within five business days after it has been served on the parties.

**WHEREFORE**, the State's Motion to Dismiss AFSCME's Request for Review is denied.

**IT IS SO ORDERED.**

  
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**Elizabeth D. Maron, Chairperson**

  
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**R. Robert Currie, Jr., Member**

  
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**Kathi A. Karsnitz, Member**

DATE: November 21, 2011