

PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF DELAWARE

AMERICAN FEDERATION OF STATE, COUNTY AND :
MUNICIPAL EMPLOYEES, AFL-CIO, COUNCIL 81, : **PERB Review of**
AND LOCALS 879, 1036, AND 1443, : **Executive Director's**
: **Decision**
Appellants, :
:
v. :
: **ULP No. 09-07-694**
STATE OF DELAWARE, OFFICE OF MANAGEMENT :
& BUDGET AND DEPARTMENT OF TRANS- :
PORTATION, DIVISION OF MAINTENANCE & :
OPERATIONS, :
Appellee. :

Appearances

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

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.

The American Federation of State, County and Municipal Employees, Council 81, ("AFSCME") is an employee organization within the meaning of §1302(i) and its affiliated Locals 879, 1036 and 1443 are exclusive bargaining representatives within the meaning of 19 Del.C. §1302(j) of the bargaining unit of DOT employees who work in the

Division of Maintenance Operations in New Castle, Kent and Sussex Counties.

The State and DOT are parties to a collective bargaining agreement with AFSCME 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 that the State violated 19 Del.C. §1307(a) (2), (3), (5), and (6) by unilaterally freezing all career ladder promotions and announcing that change (without first negotiating it with AFSCME) directly to bargaining unit members.

On July 28, 2009, the State filed its Answer to the AFSCME's Charge in which it denied the material allegations set forth therein. On August 4, 2009, AFSCME filed its Reply to New Matter in which it denied the material allegations set forth in the State's New Matter.

A Probable Cause Determination was issued on December 14, 2009, finding probable cause to support the allegation that an unfair labor practice may have occurred. The parties entered into a Joint Stipulation of Facts in lieu of hearing and the Hearing Officer issued his decision on November 15, 2010, finding:

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

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 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 State merit law, career ladder advancement is not a mandatory subject of bargaining for this bargaining unit.

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.

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.

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

The Charge was dismissed in its entirety.

On or about November 17, 2010, AFSCME requested the full Public Employment Relations Board review and reverse the Hearing Officer's decision, asserting it is contrary to law.

The State submitted its response to AFSCME's request for review on November 30, 2010, requesting the appeal be denied and that the Hearing Officer's decision be affirmed.

A copy of the complete record in this matter was provided to each member of the Public Employment Relations Board. A public hearing was convened on December 15, 2010, at which time the full Board met in public session to consider the request for review. The parties were provided the opportunity to present oral argument and the decision reached herein is based upon consideration of the record and arguments presented to this Board.

DISCUSSION

On appeal, AFSCME asserts the decision below was contrary to law and that the Hearing Officer "failed to properly apply the language of 19 Del.C. Chapter 13 as set forth in the Union's opening brief. It premises its challenge on the 1972 decision of Vice Chancellor Short in *State v. AFSCME Local 1726*¹, which held,

... good faith negotiation implies that the employer will perform those acts within its powers necessary to bring about enforcement of its undertakings. Therefore, the Department may not hide behind a veil of administrative inaction drawn across the terms of

¹ 298 A.2d 362 (Del.Ch. 1972).

an otherwise properly negotiated agreement.²

AFSCME asserts that the Vice Chancellor's decision requires the State to meet its negotiated obligations by maintaining the financial support to implement those obligations. It argues that the State has essentially bifurcated the Executive Branch into the Governor and OMB, and all other State agencies, essentially creating an unconstitutional "superagency" in OMB. AFSCME points to the fact that the memo implementing the freezing of career ladder advancement was issued well before the passage of the FY2010 Budget Act on which the State justifies this action. It argues it is the General Assembly which is responsible for the allocating State expenditures, not an Executive Branch agency. It asserts there is no authority under Delaware law for OMB to unilaterally establish terms and conditions of employment. There was no direction from the Governor to freeze career ladder advancement. Through the usurpation of the authority of the Governor and the General Assembly, it argues OMB has exceeded its authority and violated the PERA by directing DOT to abrogate its contractual obligation to advance bargaining unit employees under the negotiated career ladder provisions.

AFSCME argues OMB's directive to suspend career ladder progression placed bargaining unit employees in a very difficult situation. While employees were encouraged to attain the skills, experience and certifications necessary for advancement and they were encouraged to continue to assume more responsibilities, they were denied the compensation which should have accompanied such advancement.

Finally, AFSCME argues the Hearing Officer erred in his application of Merit Rule 3.3.3³ to determine that career ladder advancement constitutes a "promotion" and is,

² Supra, p. 368.

³ Merit Rule 3.3.3 states in relevant part, "...Movement from one level to another within Approved Career Ladders is a promotion, not a reclassification."

therefore, not a mandatory subject of bargaining. It asserts that under common application of the principles of statutory construction, a “rule” cannot be construed to “trump a statute.”⁴

It is well established by the case law of this Board that violations of negotiated collective bargaining agreements are subject to resolution through the parties’ negotiated grievance and arbitration procedures. Encouraging resolution of such disputes over the interpretation and application of the terms of an agreement promotes PERB’s statutory purpose to support and promote collective bargaining.

Only when an unfair labor practice charge alleges that one party’s action constitutes a unilateral change in a mandatory subject of bargaining (i.e. “terms and conditions of employment”) does PERB have authority to consider whether such action may also have violated the party’s duty to bargain in good faith. Even under these circumstances, this Board has exercised discretionary restraint in deferring to the parties’ negotiated grievance and arbitration procedure where resolution of the charge turns on interpretation and application of the terms of the negotiated collective bargaining agreement.

In the instant case, AFSCME asserts OMB directed DOT to abrogate the terms of Article 15⁵ of the negotiated agreement by freezing career ladder advancement. This

⁴ 29 Del.C. §5938(c) excludes 29 Del.C. §5918, Promotions, from negotiable subjects of bargaining under the State Merit law.

⁵ 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.

change cannot rise to the level of an unfair labor practice unless it concerns a mandatory subject of bargaining. The Hearing Officer correctly understood 29 Del.C. §5938(c) to remove promotions from the scope of mandatory collective bargaining for State merit employees.

AFSCME argues, unconvincingly, that advancement within a career ladder does not constitute a promotion. Advancing an employee to a new title and advanced pay rate based on the acquisition of additional training, experience and/or certification constitutes a promotion within the generally understood meaning of promotion, i.e., “the act or fact of being raised in position or rank”.⁶ Whether such advancement in position and rank is accomplished through a competitive promotional process requiring posting, application, interviews and selection of a successful candidate or a non-competitive advancement process based upon management’s determination that an employee has satisfied the

(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.

⁶ Merriam Webster Dictionary.

promotional standards necessary to advance, it is still a promotion if it involves advancing in rank and pay grade.

Whether the State violated Article 15 of the collective bargaining agreement by issuing a memorandum in May, 2009 (nearly two months before action by the General Assembly) directing DOT management not to advance bargaining unit employees in the career ladder is subject to resolution through the parties' negotiated grievance and arbitration procedure. Having determined that promotion (including career ladder advancement) is not a mandatory subject of bargaining, there is no basis for finding the employer violated its duty to bargain in good faith under the Public Employment Relations Act.

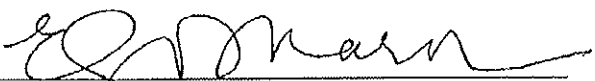
Finally, questions of the constitutional authority of OMB, vis-à-vis the Governor and the General Assembly, were not necessary for resolution of this charge and are better left to resolution in an appropriate judicial forum.

DECISION

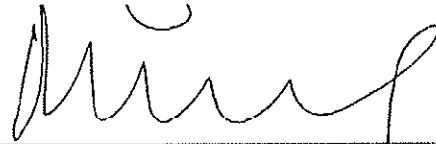
After reviewing the record, hearing and considering the arguments of the parties, the Board unanimously affirms the decision of the Hearing Officer dismissing AFSCME's Charge that the State violated 19 Del.C. §1307(a) (2), (3), (5), and/or (6) by implementing a freeze in career ladder advancements and communicating that information directly to bargaining unit employees.

Wherefore, AFSCME's appeal of the dismissal of the Charge is denied.

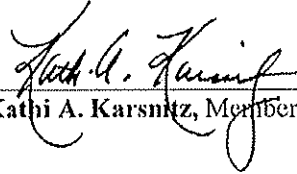
IT IS SO ORDERED.



Elizabeth D. Maron, Chairperson



R. Robert Currie, Jr., Member



Kathi A. Karsnitz, Member

DATE: January 20, 2011