

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

|   |   |                                  |
|---|---|----------------------------------|
| <b>AMERICAN FEDERATION OF STATE, COUNTY</b> | : |                                  |
| <b>AND MUNICIPAL EMPLOYEES, COUNCIL 81</b>  | : |                                  |
| <b>LOCAL 3109,</b>                          | : |                                  |
|   | : |                                  |
| <b>Charging Party,</b>                      | : |                                  |
|   | : | <b><u>ULP No. 11-07-819</u></b>  |
| <b>v.</b>                                   | : | <b>Decision on the Pleadings</b> |
|   | : |                                  |
| <b>NEW CASTLE COUNTY, DELAWARE,</b>         | : |                                  |
|   | : |                                  |
| <b>Respondent.</b>                          | : |                                  |

New Castle County, Delaware, (“County”) is a public employer within the meaning of 19 Del.C. §1302(p) of the Employment Relations Act, 19 Del. C. Chapter 13 (“PERA”).

The American Federation of State, County and Municipal Employees, Council 81, (“AFSCME”) is an employee organization within the meaning of 19 Del.C. §1302(i). AFSCME, by and through its affiliated Local 3109, is the exclusive bargaining representative of a bargaining unit of Managers, Administrators and Professional employees of New Castle County (as defined by DOL Case 100) within the meaning of §1307(j) of the PERA.

The County and AFSCME Local 3109 are parties to a collective bargaining agreement with a term of April 1, 2008 through March 31, 2011, which was in effect at all times relevant to this Charge. This agreement contains a negotiated grievance procedure.

On July 11, 2011, Charging Party filed an unfair labor practice charge alleging conduct by the County in violation of 19 DeL.C. §1307(a)(1) and (a)(5), which provide:

- §1307(a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
- (1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.
  - (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.

The Charge alleges the County refused to schedule a Step III grievance hearing in violation of its duty to bargain in good faith, thereby unilaterally modifying the negotiated terms of a mandatory subject of bargaining, i.e., the grievance procedure.

On August 3, 2011, the County filed its Answer to the Charge admitting the relevant facts. The County asserts it informed AFSCME that “the County is not blatantly disregarding the time limits established in the CBA. As you know, we have a similar case pending (*Schiavi*)<sup>1</sup>. Our position with that case, as well as Ms. Lawler’s; is that the matter is not grievable and will be resolved in court.” The basis for the County’s position that the denial of a position reclassification is neither grievable nor arbitrable under the collective bargaining agreement is “the 3109 contract does not contain a grievance mechanism for a denial of a Position Classification Questionnaire.”

### **DISCUSSION**

Regulation 5.6 of the Rules of the Delaware Public Employment Relations

Board requires:

- (a) Upon review of the Complaint, the Answer and the

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<sup>1</sup> The *Schiavi* case refers to a separate grievance filed by bargaining unit employee Schiavi which the County asserts raises a similar issue to that presented in the Lawler grievance.

Response the Executive Director shall determine whether there is probable cause to believe that an unfair labor practice may have occurred. If the Executive Director determines that there is no probable cause to believe that an unfair labor practice has occurred, the party filing the charge may request that the Board review the Executive Director's decision in accord with the provisions set forth in Regulation 7.4. The Board shall decide such appeals following a review of the record, and, if the Board deems necessary, a hearing and/or submission of briefs.

- (b) If the Executive Director determines that an unfair labor practice may have occurred, he shall where possible, issue a decision based upon the pleadings; otherwise, he shall issue a probable cause determination setting forth the specific unfair labor practice which may have occurred.

There are no material issues of fact presented in the pleadings. AFSCME alleges (and the County admits) on March 1, 2010, bargaining unit employee Susan Lawler ("Lawler") filed a Position Classification Questionnaire requesting that her job be re-evaluated and upgraded under §10.2 of the collective bargaining agreement. On June 2, 2010, the Chief Human Resources Officer notified Lawler that her PCQ had been denied.

On September 21, 2010, management and AFSCME representatives met purportedly to discuss concerns with the PCQ review process. On October 26, 2010, after not having received any follow-up to the meeting from the County, as had been promised, AFSCME filed a grievance.

Step Three of the negotiated grievance procedure, Hearing Officer, states, in relevant part,

- 5.11 If the decision in Step 2 is unsatisfactory, the Union shall have the right, through its President, to appeal to the Step Three Hearing Officer for a hearing of the case. Request for such a hearing before the Hearing Officer must be made to the Chief Human Resources Officer in writing with a copy to the Hearing Officer within ten (10) working days after the decision in Step

Two. The Hearing Officer shall meet monthly, if necessary, to hear the appealed grievances submitted at least one (1) week prior to the hearing date.

The County admits that on or about January 7, 2011, the President of Local 3109 requested the Lawler grievance be advanced to Step III. The email, addressed to the County's Chief Human Resources Officer, states:

Back in October and early in November of 2010, AFSCME Local 3109 filed two grievances (System-wide and Lawler) at the Step II level. As of this date, no hearing has been scheduled and there has been no contact from the Office of Human Resources concerning these grievances. In speaking to the leadership of the other AFSCME Locals, this seems to be a global trend.

Since New Castle County has failed to follow the provisions of our collective bargaining agreement, please move these grievances to Step III level and schedule in accordance with the contractual language.

The documentation attached to the Charge and Answer evidences unsuccessful efforts were made by the parties to schedule the Step III hearing in March and April, 2011; however as of May 5, 2011, a hearing had still not been scheduled. In response to a series of emails from AFSCME in June and July, the County's Chief Human Resources Officer responded on July 6, 2011:

Understanding that the Lawler grievance has not been heard at Step III, it is New Castle County's position that the substance of both cases is quite similar. As noted below, the Schiavi matter will be resolved in court. That decision will impact the Lawler grievance. I anticipate the Schiavi case will be filed early next week.

Attached to the County's Answer is a Petition for Declaratory Relief filed in Superior Court, on July 22, 2011. The petition specifically requests the Court "declare whether Local 3109, on behalf of its member Schiavi, has the right to grieve and/or arbitrate the denial of this PCQ, under 10 *Del.C.* §6501 *et seq.*, the 'Declaratory Judgment Act'". In ¶5 of that Petition, the County also asserts, "The parties agreed to

hold the Arbitration in abeyance until such time that a determination could be made by this Honorable Court as to whether 3109, on behalf of its member, Schiavi, has the right to grieve and/or arbitrate the denial of this PCQ.”

The narrow issue raised by this unfair labor practice charge does not involve either the merits of the substantive issue presented in the underlying grievance or the question of whether contesting a PCQ determination is a proper subject for resolution through the contractual grievance procedure. The issue is whether the County committed the unfair labor practices alleged when it failed or refused to schedule the Step III grievance hearing.

It is well-established in Delaware PERB case precedent that a unilateral change in the status quo of mandatory subjects of bargaining constitutes a *per se* violation of a party’s duty to bargain in good faith and 19 Del.C. §1307(a)(5). *ILA Local 1694-1 v. Diamond State Port Corporation*, ULP 11-02-787, VII PERB 4977, 4983 (2011); *affirmed* VII PERB 5069 (6/21/11). PERB has held that the “grievance procedure is a mandatory subject of bargaining and may not be unilaterally changed by either party, either overtly or by inaction.” *Donahue v. City of Wilmington*, ULP 08-11-637, VI PERB 4123, 4128 (2008). Once agreed upon, the negotiated grievance procedure may not be modified or ignored unless the parties have mutually agreed to do so. *Caesar Rodney Education Assn. v. Bd. of Education*, ULP 02-06-360, IV PERB 2729, 2733 (PERB Decision on Review, 2002); *affirmed* C.A. No. 1549-K, IV PERB 2933 (Chan.Ct., 2003).

Here, there is no allegation that the County has filed an action to bar the processing of the Lawler grievance through the contractual grievance and arbitration procedure. The County may not refuse to process a grievance because it believes a similar issue is before the Court for resolution in a separate, unrelated matter, unless and

until the union agrees to suspend processing. It is particularly concerning in this case that nearly six months after AFSCME requested the Lawler grievance be advanced to Step III, the County finally responded (on July 6, 2011) that it would not schedule the grievance, based upon the petition it “intended” to file in Superior Court. That petition was not filed until July 22, 2011. The admitted length of the delay and the failure to move the grievance through Step III as required by the collective bargaining agreement is remarkable.

Additionally, the underlying facts in the Schiavi case (before Superior Court) are not identical to those present in the Lawler grievance at issue here. Notably, in Schiavi, the parties agreed to hold the processing of the grievance in abeyance pending a decision by the Court. There is no evidence the parties have reached a similar agreement to suspend processing of the Lawler grievance.

Absent agreement to the contrary, the parties are bound by the clear and unambiguous terms of their negotiated agreement which dictates the manner and schedule for processing grievances at Step III. When the County chooses to unilaterally ignore its obligation to process grievances through the negotiated procedure, it violates its duties and obligations under the PERA.

### **CONCLUSIONS OF LAW**

1. New Castle County, Delaware is a public employer within the meaning of 19 Del.C. §1302(p).
2. 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 Local 3109, is the exclusive bargaining representative of a bargaining unit of Managers, Administrators and Professional employees of New Castle County (as defined by DOL Case 100) within the meaning of §1307(j) of the PERA.

3. The County and AFSCME Local 3109 are parties to a collective bargaining agreement with a term of April 1, 2008 through March 31, 2011, which was in effect at all times relevant to this Charge.

4. The grievance procedure is a mandatory subject of bargaining. Unilateral changes to the status quo of a mandatory subject of bargaining constitutes a per se violation of the PERA.

5. New Castle County unilaterally modified the negotiated terms of the grievance procedure by failing or refusing to schedule and conduct a Step III grievance hearing, in violation of its duty to bargain in good faith and 19 Del.C. §1307 (a)(5).

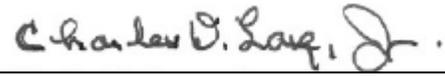
6. By this action, the County has also interfered with the rights guaranteed to employees by the PERA, in violation of 19 Del.C. §1307 (a)(1).

**WHEREFORE,** New Castle County is hereby directed to cease and desist from failing or refusing to abide by the terms of the negotiated grievance procedure and to immediately schedule the Step III hearing on the Lawler grievance.

FURTHER, New Castle County is directed to advise the Public Employment Relations Board within forty-five (45) days of the date of this decision of its compliance with this Order.

**IT IS SO ORDERED.**

Date: August 16, 2011

Handwritten signature of Charles D. Long, Jr. in cursive script, positioned above a horizontal line.

Charles D. Long, Jr.  
Hearing Officer  
Del. Public Employment Relation Board