IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, COUNCIL 81,	)	
	)	C.A. No. 7155-VCP
Appellant-Below, Appellant,	)	CITATION ON APPEAL FROM THE DECISION OF THE PUBLIC EMPLOYMENT RELATIONS BOARD DATED DECEMBER 28, 2011 (BIA NO. 08-05-625)
v.	)	
STATE OF DELAWARE,	)	
Appellee-Below, Appellee.	)	

MEMORANDUM OPINION

Submitted: March 7, 2013
Decided: July 31, 2013

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PARSONS, Vice Chancellor.

MEMORANDUM OPINION

Pending before this Court is an appeal, brought pursuant to 19 *Del. C.* § 1309, from an order by the Public Employment Relations Board (the "PERB"). After negotiations over a new collective bargaining agreement failed, the appellant, a union representing the employees of the Delaware Department of Corrections, and the appellee, the State, invoked a binding interest arbitration process. The arbitrator appointed to oversee the dispute decided in favor of the State, and the union sought review before the PERB. The PERB upheld the arbitrator's decision, and the union now asserts that the PERB erred as a matter of law because the arbitrator lacked subject matter jurisdiction to pick the proposal the State made in the arbitration. The core issues presented in this case are: (1) whether the union waived its purported subject matter jurisdiction argument by failing to raise it before the arbitrator; and (2) whether the PERB erred as a matter of law in finding that the arbitrator had subject matter jurisdiction. I uphold the PERB's decision, concluding that the union waived the arguments it failed to raise before the arbitrator, and that in any event, the PERB did not err as a matter of law.

I. BACKGROUND

A. Facts[1]

1. Failed negotiations

The American Federation of State, County & Municipal Employees, Council 81, ALF-CIO ("AFSCME") is the exclusive bargaining representative of the approximately 190 workers employed by the Delaware Department of Corrections who hold supervisory positions in the bargaining unit defined in 19 *Del. C.* § 1311A(b)(11) as "correctional lieutenants, staff lieutenants, correctional captains, and similar occupants" ("Unit 11"). In February 2008, AFSCME and the State of Delaware (the "State") began negotiations for a new collective bargaining agreement ("CBA"). The negotiations lasted approximately three years, and the parties reached tentative agreements on numerous issues, but ultimately they could not agree on three items: wages, a physical performance requirement ("PPR"), and the term of the agreement.

2. Binding interest arbitration

To resolve the impasse, the parties initiated a binding interest arbitration process under 19 *Del. C.* § 1314 by submitting the matter to mediation. After the mediation failed, an arbitrator, Ralph H. Colfesh, Jr., Esq. (the "Arbitrator"), was appointed by the PERB and charged with choosing either the State's or AFSCME's last, best, final offer

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[1] The facts recited herein are drawn from the Record of the Public Employment Relations Board Docket No. 08-05-625 (May 24, 2012) (the "PERB Appeal Record" or the "Record"). The PERB Appeal Record appears on the docket in this case, C.A. No. 7155-VCP, as Docket Item Nos. 4–14. The Record contains sequential pages from 1 to 718. In this Memorandum Opinion, citations to the Record are made in the following form: PERB Appeal Record at [page number].

("LBFO"). Both parties' LBFOs incorporated the tentative agreements they had reached on various provisions of the CBA, and both came to agree that the term of the agreement should be for two years. But, the parties' wage proposals varied. AFSCME based its proposal for wage increases in each of the two years of the contemplated contract on the percentage increase of the general fund revenue estimate as adopted by the Delaware Economic and Financial Advisory Council ("DEFAC"), not to exceed a year-over-year increase of 3.75%. The State proposed wage increases in terms of fixed percentage increases varying from 1% to 1.5%. The State's proposal also mandated that any future employee hired into or promoted to a correctional officer series position in Unit 11 must pass a PPR to receive any annual contractual pay increase. According to the State's LBFO, the PPR test would be offered on an annual basis and any employee who did not pass the test would be permitted to re-take the test once within six months of the first test. If the employee was successful on the re-take, he would receive the annual contractual pay increase, pro-rated to the date of the re-take. Finally, all employees in Unit 11 before the date of the Arbitrator's award would be exempt from the PPR. During the arbitration proceedings, neither party objected to the propriety of the other party's LBFO.

The Arbitrator conducted a three-day evidentiary hearing to determine which party's LBFO was most consistent with the statutory factors contained in 19 *Del. C.* § 1315(d).[2] During the hearing, the State argued that its PPR was in the best interests of

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[2] The seven enumerated factors to be considered under 19 *Del. C.* § 1315(d) are:

(1) The interests and welfare of the public.

the public as it addressed operational and safety concerns at the Department of Corrections. AFSCME responded that the State's inclusion of a PPR supported the award of AFSCME's LBFO because such a requirement would promote a "divisive atmosphere" in the correction facilities as the PPR test would not be required of other correctional employees. As such, AFSCME asserted that Section 1315(d)(7), which allows the Arbitrator to consider factors "which are normally or traditionally taken into

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> (2) Comparison of the wages, salaries, benefits, hours and conditions of employment of the employees involved in the arbitration proceedings with the wages, salaries, benefits, hours and conditions of employment of other employees performing the same or similar services or requiring similar skills under similar working conditions in the same community and in comparable communities and with other employees generally in the same community and in comparable communities.
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> (3) The overall compensation presently received by the employees inclusive of direct wages, salary, vacations, holidays, excused leaves, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
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> (4) Stipulations of the parties.
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> (5) The lawful authority of the public employer.
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> (6) The financial ability of the public employer, based on existing revenues, to meet the costs of any proposed settlements; provided that any enhancement to such financial ability derived from savings experienced by such public employer as a result of a strike shall not be considered by the arbitrator.
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> (7) Such other factors not confined to the foregoing which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, binding arbitration or otherwise between parties, in the public service or in private employment.

consideration in the determination of wages, hours, and conditions of employment," compelled the Arbitrator to select AFSCME's LBFO, which did not contain the divisive PPR.

Ultimately, the Arbitrator, charged with the task of picking either the State's or AFSCME's LBFO in its entirety and without modification,[3] chose the State's LBFO. In his written findings of fact, the Arbitrator stated that AFSCME's variable wage increase proposal was not in the best interest of the public,[4] was not supported by comparisons of wages to similarly situated workers,[5] and prevented the consideration of the "overall compensation" of Union 11 employees because it blindly linked wages to the DEFAC revenue projections without regard to actual revenue growth.[6] Conversely, the Arbitrator found that the State's proposal was supported by the factors specified in 19 *Del. C.* § 1315(d).[7] The Arbitrator also noted that the State's PPR proposal could affect Unit 11 wages "because repeated failures of the PPR test could result in withholding of a wage

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3 19 *Del. C.* § 1315(d).

4 PERB Appeal Record at 551 (discussing factor (1)).

5 *Id*. (discussing factor (2)).

6 *Id*. (discussing factor (3)).

7 *Id*. at 553 (noting that "the interests and welfare of the public . . . will be better served by the State's proposal," that Unit 11 will be "competitively compensated in wages and benefits among similarly situated employees performing a corrections supervisory service," that the State's wage proposal increases the unit's "overall compensation" . . . and that "[n]one of the other statutory criteria are adversely impacted by the State's wage proposal").

increase."[8] Though the Arbitrator questioned the wisdom of the PPR, he nonetheless found the State's proposal on the whole to be superior to that of AFSCME, and he awarded the State's LBFO.

3. The PERB's Decision

On October 20, 2011, AFSCME appealed the Arbitrator's decision to the PERB under 19 *Del. C.* § 1315, arguing that the Arbitrator had exceeded his jurisdiction by accepting the State's LBFO. Specifically, AFSCME asserted that the State's PPR proposal was not a permissible subject of bargaining as it was not related to "compensation" as that term is defined in 19 *Del. C.* § 1311A(a)(1),[9] but rather affected "position classification," which is excluded from the permissible scope of bargaining under Section 1311A(a). AFSCME also argued that the PPR proposal would effect an illegal amendment on the CBA, and would thereby place an impermissible burden on correctional officers in other units who wanted to be promoted into Unit 11.

On December 28, 2011, the PERB unanimously affirmed the Arbitrator's decision. First, the PERB concluded that the State's PPR proposal constituted a matter "concerning compensation" because it addressed conditions under which an annual wage increase

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[8] *Id*. at 556 (observing that, under 19 *Del. C.* § 1315(d), the only factors that could be negatively affected by the PPR are those associated with wage and wage comparisons).

[9] 19 *Del. C.* § 1311A(a)(1) defines "Compensation" "as the payment of money in the form of hourly or annual salary, and any cash allowance or items in lieu of a cash allowance to a public employee by reason of said employee's employment by a public employer . . . ."

could be earned.[10] Next, the PERB explained that the PPR proposal did not place an impermissible prerequisite on correctional officers seeking to join Unit 11 as it neither altered the minimum qualifications for a Unit 11 position nor affected the classification of unit positions or the application process.[11] Finally, the PERB held that the Arbitrator had provided sufficient information in his decision to enable the PERB to determine that the award was not "arbitrary, capricious, otherwise contrary to law, or unsupported by the record."[12] As such, the PERB found that the Arbitrator had executed his responsibilities in conformance with the statutory mandate.

B. Procedural History

On December 29, 2011, AFSCME filed a notice of appeal from the PERB's decision seeking review in this Court pursuant to 19 *Del. C.* § 1309(a). The stated grounds for AFSCME's appeal were that (1) the PERB erred as a matter of law and (2) the PERB's decision was not supported by substantial evidence. AFSCME moved for summary judgment on July 3, 2012, arguing that "there is no genuine issue as to any material fact, and [it] is entitled to judgment as a matter of law."[13] After full briefing, I

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10 PERB Appeal Record at 715.

11 *Id.*

12 *Id*. at 716–17.

13 In a footnote in its answering brief, the State suggests that "summary judgment is not an appropriate procedural mechanism" to resolve this matter because this Court sits in an appellate capacity. Ans. Br. of Appellee-Below, Appellee, the State of Del. ("State's Ans. Br.") 1 n.1. The State, however, did not press this objection or demonstrate why the Court should not resolve this matter on AFSCME's motion for summary judgment.

heard argument on AFSCME's motion on March 7, 2013. This Memorandum Opinion constitutes my ruling on AFSCME's appeal from the PERB's decision.

C. Parties' Contentions

On appeal, AFSCME contends that the State's LBFO contained an element that was not a proper subject of collective bargaining under Title 19 Chapter 13 of the Delaware Code and, thus, that the Arbitrator should have rejected the State's offer. Specifically, AFSCME argues that the State is authorized to engage in "compensation bargaining," but by including the PPR in its LBFO, the State drew the Arbitrator into a matter over which he did not have jurisdiction. According to AFSCME, the PPR is a matter of "position classification," and is not "compensation" as that term is defined in 19 *Del. C.* § 1311A(a)(1). Thus, AFSCME asserts that the PPR was not a proper subject for bargaining and the Arbitrator did not have subject matter jurisdiction to adopt the State's LBFO. AFSCME further argues that the Arbitrator, by adopting the State's LBFO, effected an illegal amendment to the terms and conditions of the existing CBA between AFSCME and the State.

The State asserts that the PERB's decision should be affirmed because it is supported by the record below and free from legal error. In support of its position, the State argues, first, that AFSCME waived its jurisdictional argument by failing to raise it before the Arbitrator. The State further contends that AFSME's position before the Arbitrator—*i.e.*, that the inclusion of the PPR proposal supports adoption of AFSCME's LFBO rather than the State's—in fact contradicts AFSCME's new jurisdictional challenge. For this reason, the State avers that AFSCME now should be estopped from

bringing its jurisdictional argument before this Court. Lastly, and in any event, the State contends that the PPR affects "compensation" within the meaning of 19 *Del. C.* § 1311A and that, therefore, the Arbitrator had subject matter jurisdiction over the binding interest arbitration and properly selected the State's LBFO.

II. ANALYSIS

A. Standard of Review

"On appeal of an administrative agency's adjudication, this Court's sole function is to determine whether the Board's decision is supported by substantial evidence and is free from legal error."[14] In reviewing a decision of the PERB, the Court of Chancery is bound to accept as correct all relevant factual conclusions that are supported in the record by "substantial evidence."[15] "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[16]

This action is before me on a motion for summary judgment, and the issues presented in this appeal appear to be purely legal. An agency's conclusions of law are reviewed *de novo*.[17] In undertaking such a review, this Court bears in mind the PERB's

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14 *Angstadt v. Red Clay Consol. Sch. Dist.*, 4 A.3d 382, 387 (Del. 2010).

15 *See Bd. of Educ. of Colonial Sch. Dist. v. Colonial Educ. Ass'n*, 1996 WL 104231, at *4 (Del. Ch. Feb. 28, 1996), *aff'd*, 685 A.2d 361 (Del. 1996).

16 *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988).

17 *See* 29 *Del. C.* § 10142(c) ("The appeal shall be on the record without a trial de novo."); *Fraternal Order of Police, Lodge No. 15 v. City of Dover*, 1999 WL 1204840, at *2 (Del. Ch. Dec. 10, 1999), *aff'd*, 755 A.2d 388 (Del. 2000) (TABLE) (citing *AFSCME, Council 81, Local 2004 v. State*, 1996 WL 435432, at

expertise in labor law and the relevance of that expertise in formulating policy under statutes like the Public Employment Relations Act ("PERA").[18] In the end, however, the Court remains obligated to conduct a plenary review of a PERB decision when the issue is the proper construction of statutory law and its application to undisputed facts.[19]

"When the Court acts in its appellate capacity on an appeal from an administrative agency, it is limited to the record and will not consider issues not raised before the agency."[20] This waiver rule "furthers the goal of permitting agencies to apply their specialized expertise, correct their own errors, and discourage litigants from reserving issues for appeal."[21] A challenge to subject matter jurisdiction, however, is so crucial

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*3 (Del. Ch. July 29, 1996), *rev'd*, 696 A.2d 387 (Del. 1997)); *Colonial Educ. Ass'n*, 1996 WL 104231, at *4.

18 *Fraternal Order of Police, Lodge No. 15 v. City of Dover*, 1999 WL 1204840, at *7 (internal quotation marks and citations omitted); *Seaford Bd. of Educ. v. Seaford Educ. Ass'n*, 1988 WL 8773, at *1 (Del. Ch. Feb. 5, 1988).

19 *See Pub. Water Supply Co. v. DiPasquale,* 735 A.2d 378, 381 (Del. 1999); *see also id.* at 382 ("A reviewing court may accord due weight, but not defer, to an agency interpretation of a statute administered by it.") & n.8. "Delaware courts do not accord agency interpretations of the statutes which they administer so-called *Chevron* deference, as do federal courts in reviewing administrative decisions under the federal Administrative Procedures Act." *Del. Comp. Rating Bureau, Inc. v. Ins. Comm'r,* 2009 WL 2366009 (Del. Ch. July 24, 2009) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)). Rather, in interpreting a statute, Delaware courts must "ascertain and give effect to the intent of the legislature." *In re Adoption of Swanson*, 623 A.2d 1095, 1096 (Del. 1993).

20 *Lewis v. State*, 2007 WL 315359, at *4 (Del. 2007) (quoting *Welding & Boiler Repair Co. v. Zakrewski*, 2002 WL 144273 (Del. 2002)).

21 *Id*. (quoting *Down Under, Ltd. v. Del. Alcoholic Bev. Control Comm'n*, 576 A.2d 675, 677 (Del. 1989)).

that it may be raised at any time before a final judgment by the parties or *sua sponte* by the Court.[22]

B. Did the PERB Err as a Matter of Law in Ruling that the Arbitrator Had Authority to Select the State's LBFO?

AFSCME asserts that the PERB erred as a matter of law when it upheld the Arbitrator's decision to award the State's LBFO because the Arbitrator did not have jurisdiction to grant the State's proposal. AFSCME argues to this Court, as it did to the PERB, that the Arbitrator lacked subject matter jurisdiction to grant the State's offer because that offer contained the PPR, which AFSCME maintains was not a permissible matter of bargaining. The State, before reaching the argument of whether the PPR was a proper component of the State's LBFO, first argues that AFSCME waived its jurisdictional argument by failing to assert that defense before the Arbitrator. AFSCME admits that it did not raise its concerns regarding subject matter jurisdiction before the Arbitrator. But, AFSCME contends that is immaterial because the lack of subject matter jurisdiction can be raised at any time during the course of a judicial proceeding. Therefore, AFSCME denies that it has waived this argument.

1. The issues AFSCME raises are not questions of subject matter jurisdiction

AFSCME fashions its motion as one for summary judgment for lack of subject matter jurisdiction. AFSCME premises its jurisdictional argument on its allegations that the PPR is (1) a "position classification" proposal and (2) a non-economic demand, both

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[22] *Plummer v. Sherman*, 861 A.2d 1238, 1243 (Del. 2004).

of which, AFSCME contends, are outside the scope of an interest arbitrator's jurisdiction. AFSCME's contentions about the PPR, however, do not bring into question the subject matter jurisdiction of the Arbitrator.

Subject matter jurisdiction is an issue of adjudicatory competence.[23] A motion for summary judgment for lack of subject matter jurisdiction "brings into issue the actual power and authority of the court to hear and determine the class of cases to which the particular action belongs, as well as to evaluate the merits of the particular action and the relief sought."[24] Here, the Arbitrator's authority to hear and determine the case arises by statute under 19 *Del. C.* § 1315. It is undisputed that the parties properly brought their dispute before the Arbitrator in accordance with 19 *Del. C.* § 1315(b).[25] Section 1315(c) provides that "[t]he arbitrator shall hold hearings in order to define the area or areas of dispute, to determine facts relating to the dispute, and to render a decision on unresolved contract issues." Section 1315 also instructs the Arbitrator that its decision shall be "limited to a determination of which of the parties' last, best, final offers shall be accepted in its entirety" based on consideration of any relevant factors, including seven specifically enumerated factors.[26]

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23 *See* Restatement (Second) of Judgments § 11 (1982) (subject matter jurisdiction is "authority to adjudicate the type of controversy involved in the action").

24 *Texcel v. Commercial Fiberglass*, 1987 WL 19717, at *2 (Del. Super. Nov. 3, 1987).

25 19 *Del. C.* § 1315(b) (discussing the method by which an arbitrator is selected).

26 19 *Del. C.* § 1315(d); *see also supra* note 2 (listing the seven factors).

Based on this grant of statutory authority, the Arbitrator had jurisdiction to determine whether the State's LBFO was improper based on the inclusion of the PPR. AFSCME presented no legal authority or persuasive argument for the proposition that the Arbitrator was not empowered to make this determination. Furthermore, under 19 *Del. C.* § 1311A, the scope of bargaining includes (1) compensation and (2) any items negotiable for state merits employees pursuant to Section 5938 of Title 29.[27] There is at least a colorable argument that the PPR is a matter of compensation. Indeed, both the Arbitrator and the PERB interpreted the statute in that manner. The nature of AFSCME's challenge, therefore, is not a matter of the Arbitrator's authority to decide the case before him. Rather, AFSCME raises the legal issues of whether the Arbitrator's interpretation of compensation under Section 1311A was correct, and whether the Arbitrator erred in accepting the State's LBFO because it includes the PPR that AFSCME later argued to the PERB and to this Court is an impermissible "position classification."

AFSCME's argument that the Arbitrator could not choose the State's LBFO, therefore, properly could have been brought before the Arbitrator because the Arbitrator had the authority to decide the legal issues presented by that argument. AFSCME's dispute as to the propriety of the State's LBFO centers on legal questions within the scope of the Arbitrator's authority to conduct a binding interest arbitration under 19 *Del. C.* § 1315. Because of this, I conclude that AFSCME's arguments are legal issues, not issues of adjudicatory competence or subject matter jurisdiction.

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[27] *See* 19 *Del. C.* § 1311A(a)(1), (2).

2. Because AFSCME's arguments are not matters of subject matter jurisdiction, they can be waived

Furthermore, it appears that AFSCME has framed its argument as one of subject matter jurisdiction solely to by-pass the State's waiver argument. The State contends that AFSCME waived its claims that the PPR was an improper subject of bargaining outside the Arbitrator's subject matter jurisdiction, as well as AFSCME's argument that the PPR constituted an "illegal amendment" to an existing contract, because AFSCME failed to make these arguments before the Arbitrator. The State also made this waiver argument to the PERB.[28] In addition, the State contends that, in fact, the argument AFSCME made against the PPR to the Arbitrator is inconsistent with the argument it now makes about jurisdiction, and therefore, AFSCME should be judicially estopped from making its jurisdictional argument. Specifically, the State points to the fact that in oral argument before the Arbitrator, AFSCME asserted that the PPR would promote a "divisive atmosphere" in the correction facilities and that this fact supported the Arbitrator's adoption of AFSCME's offer over the State's offer. The State characterizes AFSCME's "divisive atmosphere" argument as inconsistent with the argument about jurisdiction AFSCME now makes because the "divisive atmosphere" argument assumes the appropriateness of the Arbitrator's consideration of the PPR under the 19 *Del. C.* § 1315(d) factors.

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[28] *See* PERB Appeal Record at 692–93. The PERB did not address the State's waiver argument in its decision.

In Delaware, "under the waiver rule, issues and arguments not raised to an administrative agency cannot be considered by a reviewing court."[29] Here, AFSCME did raise the argument regarding the Arbitrator's lack of jurisdiction to adopt the State's LBFO before the PERB. Nevertheless, the State urges this Court to extend the waiver doctrine to cover AFSCME's failure to raise the argument before the Arbitrator, asserting that application of the waiver doctrine in this instance would further the purpose of that doctrine, which is to prevent litigants from reserving issues for argument on appeal after the evidentiary record before the arbitrator has closed.[30] I agree. There is a colorable argument as to whether the State's LBFO was improper based on its PPR component. By failing to raise this argument before the Arbitrator, AFSCME deprived the Arbitrator of the opportunity to rule on this issue. Now AFSCME claims that because the Arbitrator, in AFSCME's view, could not properly select the State's LBFO, he must be required, by default, to select AFSCME's LBFO. In effect, AFSCME presents a "heads I win, tails you lose" scenario. According to AFSCME, the Arbitrator either had to pick AFSCME's proposal or, if he did not, he would be acting outside the scope of his subject matter

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29 *Down Under, Ltd. v. Del. Alcoholic Beverage Control Comm'n*, 576 A.2d 675, 677 (Del. Super. 1989) (citing *Tenneco Oil Co. v. Dept. of Energy*, 475 F. Supp. 299, 307 (D. Del. 1979); *see also Danby v. Osteopathic Hosp. Ass'n of Del.*, 104 A.2d 903 (Del. 1954)).

30 *See* State's Ans. Br. 16 (citing *Teamsters Local Union No. 764 v. J.H. Merritt & Co.*, 770 F.2d 40, 42–43 (3d Cir. 1985) ("This court has recognized the principle that a party may waive its right to raise on appeal an objection to the decision of an arbitrator when the party failed to address the objection before the arbitrator in the first instance.")).

jurisdiction, rendering his decision null and void. Such procedural gamesmanship is not consistent with the purpose of binding interest arbitration under 19 *Del. C.* § 1315, which is to encourage parties to agree on as much as they can through negotiation and then submit a LBFO to an arbitrator who will hear evidence in support of each offer before he picks which offer should form the contract between the parties. As the PERB explained, binding interest arbitration "places a burden on each party to fashion a reasonable and supportable offer based upon the statutory criteria . . . ."[31] But AFSCME's win-by-default jurisdictional argument would permit AFSCME to undo the Arbitrator's decision based on an issue AFSCME never presented to the Arbitrator. This is not consistent with the letter or spirit of the finality of binding interest arbitration.

For these reasons, I conclude that AFSCME is bound by the position it took before the Arbitrator.[32] Because I find that AFSCME has waived its jurisdictional argument, and because, as I explain next, AFSCME would lose on the merits of its argument in any event, I do not reach the question of whether AFSCME also should be judicially estopped from bringing its jurisdictional argument.

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31 PERB Appeal Record at 718.

32 This Court previously has held that failure to challenge an arbitrator's authority to make an award amounts to a waiver of that argument. *See ITT Hartford Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 1999 WL 1204842, at *3 n.8 (Del. Ch. Dec. 8, 1999) (explaining that "[b]y not objecting to the authority or jurisdiction of the arbitrator to award prejudgment interest, defendant arguably waived any such argument in this court").

C. Did the PERB Err as a Matter of Law in Ruling that the State's LBFO Constituted a Matter Concerning Compensation?

Even if AFSCME had not waived its jurisdictional argument, I find that the PERB did not err as a matter of law in concluding that the State's LBFO constituted a matter concerning "compensation" despite the inclusion of the PPR. There does not appear to be any dispute that the Arbitrator had subject matter jurisdiction to determine matters concerning compensation.[33] AFSCME's primary argument to this Court, as it was to the PERB, is that the PPR is not a matter of compensation, but rather is an issue of "position classification," which was not within the scope of an interest arbitrator's jurisdiction.[34] AFSCME emphasizes that matters of "position classification" explicitly are excluded from the meaning of compensation under 19 *Del. C.* § 1311A, and from the permissible scope of bargaining. AFSCME explains that matters of "position classification" include duties, responsibilities, and job-related requirements. To support its position, AFSCME cites the "position classification" portion of the Merit Rules, which provide:

> 3.1 The Director shall establish and maintain a method of classifying and reviewing all positions. Positions substantially alike in duties and responsibilities and requiring essentially the same knowledge, skills and abilities shall be grouped into the same class and pay grade.

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[33] Under 19 *Del. C.* § 1311A: "Notwithstanding any other provision in this Code, exclusive representatives of state merit employees, who are in the classified service and not working in higher education, shall collectively bargain in the units provided pursuant to subsection (b) of this section. *The scope of bargaining shall include* . . . (1) Compensation . . . ."

[34] Appellant's Op. Br. at 9.

> 3.1.1 Class specifications shall contain the title and code identifying the class, give examples of the characteristics and indicate duties and responsibilities that may be assigned to positions of the class and set forth uniform job related job requirements and the knowledge, skills and abilities required to do the work.

The PPR, according to AFSCME, is a job related requirement, not unlike the requirement to pass a drug test or maintain a commercial driving license. For these reasons, AFSCME argues that the PPR was not within the scope of compensation bargaining between the State and AFSCME, and therefore, the Arbitrator had no authority to choose the State's proposal.

As the State points out, however, AFSCME has failed to explain how the PPR constitutes a "position classification" as it does not require or abolish specific duties, responsibilities, and job requirements of a position or class of positions within Unit 11. Rather, as the State argues, the PPR only alters a unit member's ability to receive a salary increase. Unit members who do not pass the PPR would not face a change in job classification, responsibilities or duties nor would they be prevented from receiving a promotion. Similarly, applicants seeking a correctional officer position in Unit 11 need not pass the PPR to be placed in such a position. For these reasons, the State argues, the PPR is not a matter of "position classification" under 19 *Del. C.* § 1311A but rather is an issue of "compensation."

I start by reviewing the PERB's findings as to the meaning of "compensation." As mentioned above, this Court accords due weight to the PERB's expertise as to the

meaning of the statute it administers.[35] The PERB regularly deals with the definitions of the terms in Delaware's labor laws. Nevertheless, on appeal, the PERB's conclusions of law are subject to *de novo* review by this Court.

The PERB summarized AFSCME's argument this way:

> [AFSCME argues that the Arbitrator] exceeded his statutory authority when he determined the State's last, best, final offer was more consistent with the criteria set forth in 19 *Del. C.* § 1315 than was AFSCME's offer. It asserts the State's offer could not be accepted because it included a provision that required bargaining unit employees to pass an annual physical fitness test in order to receive a negotiated wage increase. AFSCME argues that this provision is excluded from the scope of permissible bargaining because it affects "position classification."[36]

The PERB rejected AFSCME's argument, finding that "the State's proposal does, in fact, constitute a matter concerning compensation, as it addresses the conditions under which an annual wage increase (which is clearly 'the payment of money') may be earned."[37] Thus, in deciding to uphold the Arbitrator's award, the PERB also found that the PPR was a matter of compensation.

It is a well accepted rule of statutory interpretation that "[i]f the statute is found to be clear and unambiguous, then the plain meaning of the statute does not create

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35 *Public Water Supply Co. v. DiPasquale*, 735 A.2d 378, 382–83 (Del. 1999) ("Statutory interpretation is ultimately a responsibility of the courts. A reviewing court may accord due weight, but not defer, to an agency interpretation of a statute administered by it.").

36 PERB Appeal Record at 713.

37 *Id*. at 715.

ambiguity."[38] Here, I find that the PERB's decision is supported by the unambiguous definition of the term compensation contained in the statute. Section 1311A(a) provides:

> (1) *Compensation*, *which shall be defined as the payment of money in the form of hourly or annual salary, and any cash allowance or items in lieu of a cash allowance* to a public employee by reason of said employee's employment by a public employer, as defined in this chapter, whether the amount is fixed or determined by time, task or other basis of calculations. Position classification, health care and other benefit programs established pursuant to Chapters 52 and 96 of Title 29, workers compensation, disability programs and pension programs shall not be deemed to be compensation for purposes of this section . . . .[39]

This language makes clear that compensation includes the payment of money in the form of wages or salary. Because the PPR affects increases in annual salary, it affects compensation. AFSCME's argument that the PPR cannot properly be seen as compensation fails because it is inconsistent with the plain words of the statute. Furthermore, AFSCME has failed to cite any authority that persuasively supports its contention that the PERB erred in construing the term compensation under the statute.

In addition, I find that the PERB properly concluded that the PPR was not a "position classification." The PERB noted that the PPR

> does not alter the minimum qualifications for any Unit 11 position, nor does it affect the classification of unit positions or the application process. The provision affects only employees in Unit 11 bargaining unit positions

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[38] *Ins. Comm'r of State of Del. v. Sun Life Assurance Co. of Can. (U.S.)*, 21 A.3d 15, 20 (Del. 2011).

[39] 19 *Del. C.* § 1311A(a) (emphasis added).

> (prospectively) by establishing a condition under which annual wage increases will be awarded, not whether an individual may apply for a position.[40]

Indeed, the fact that compliance with the PPR is not a prerequisite to holding any position within Unit 11 makes clear that the PPR is not a job requirement or duty. Therefore, I conclude, in part based on PERB's interpretation of Section 1311A, that the State's PPR proposal does not constitute issue of "position classification."

In addition, AFSCME argues that because the PPR was a "non-economic demand" made by the State, its adoption would change the terms and conditions of employment, and such a change also would exceed the scope of the Arbitrator's subject matter jurisdiction. Again, AFSCME's argument is premised on the assumption that the PPR was a non-compensation matter. Having concluded already that the PPR is a matter of compensation, I consider this assumption incorrect as a matter of law. Furthermore, I find that considering the PPR to be part of the "terms and conditions of employment" within the meaning of Section 1302(t) would not render the PPR an impermissible matter for binding interest arbitration. Under 19 *Del. C.* § 1302(t), "'[t]erms and conditions of employment' means matters concerning or related to wages, salaries . . ." and other things not determined to be within the exclusive prerogative of the public employer. The PPR, as a matter of compensation, properly may be considered to be part of the "terms and conditions of employment" as contemplated by the PERA. The fact that several other non-compensation "terms and conditions of employment" were part of the LBFOs

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[40] PERB Appeal Record at 715–16.

submitted by both AFSCME and the State to the Arbitrator further supports my decision that adopting the PPR as part of the State's LBFO was within the Arbitrator's jurisdiction.

Finally, AFSCME argues that because the Arbitrator's award changed the "terms and conditions" of employment, it effected an illegal amendment of an existing contract that was not before the Arbitrator. That is, AFSCME contends that the Arbitrator's award changed the requirements of employment in Unit 11 and thereby changed the CBA in an impermissible manner—*e.g.*, one that would affect both bargaining Units 10 and 11. This argument also must fail because, as previously explained, the PPR is a matter of compensation and did not impermissibly change the conditions of employment in Unit 11. Additionally, as the PERB found, the PPR does not place an "impermissible prerequisite" on correction officers seeking promotion into Unit 11 because it does not change the application process, or alter the minimum qualifications, for any Unit 11 position.[41] I concur with the PERB's findings on this issue, and as such, I conclude that the PERB did not err in upholding the Arbitrator's award.

III. CONCLUSION

For the foregoing reasons, I affirm the decision of the Delaware PERB in favor of the State's LBFO in this matter.

IT IS SO ORDERED.

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[41] PERB Appeal Record at 715. The PERB specifically noted that Unit 10 officers seeking promotion into Unit 11 had their own bargaining unit to represent them. *See id*.