

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF:

STATE OF DELAWARE, DEPARTMENT OF HEALTH AND)	Representation Petition
SOCIAL SERVICES, DIVISION OF DEVELOPMENTAL)	<u>No. 16-08-1077</u>
DISABILITIES SERVICES (DHSS/DDDS),)	
)	DECISION AND ORDER
and)	DISMISSAL
)	
AMERICAN FEDERATION OF STATE, COUNTY, AND)	Therapist III, DHSS/DDDS,
MUNICIPAL EMPLOYEES, COUNCIL 81, AFL-CIO,)	Stockley Center
LOCAL 3514.)	

Appearances

Monica Gonzalez-Gillespie, SLREP/HRM/OMB, for DHSS/DDDS

Lance Geren, Esq., Freedman & Lorry, for AFSCME Council 81

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 Department of Health and Social Services (“DHSS”) is an executive branch department of the State and the Stockley Center (“Stockley”) is a State facility operated by DHSS and its Division of Developmental Disabilities Services (“DDDS”).

The American Federation of State, County and Municipal Employees, Council 81, AFL-CIO (“AFSCME”) is an employee organization within the meaning of 19 Del.C. §1302(i). AFSCME, through its affiliated Local 3514, is the exclusive bargaining representative of a bargaining unit of Stockley employees defined in DOL Case 34.

On or about June 8, 2016, the State filed a modification petition seeking to exclude the

Therapist III working at the Stockley Center from the bargaining unit represented by AFSCME Local 3514, asserting the position meets the 19 Del.C. §1302(s) supervisory exclusion.

AFSCME objected to the exclusion of the Therapist III position from the LU 3514 bargaining unit.

A hearing was scheduled and conducted on October 17, 2016, for the purpose of creating a record on which a determination could be made on the State's petition to exclude the Therapist III position. The parties closed orally on the merits of the petition, but also submitted written argument, at the Hearing Officer's request, on the issue of waiver and later on the relevance and impact of the Bargaining Unit Modification for AFSCME 3514 on February 25, 2016.¹

The decision reached herein results from review of the record thus created.

OPINION

As with all questions concerning bargaining unit composition, the decision in this case is highly fact bound and temporally specific. *Justice of the Peace Court and JP Court Constables*, PERB Decision on Review, REP. 07-12-608(a), VI PERB 4281, 4285 (2009). In order to reach a conclusion on statutory and regulatory application and interpretation, the underlying facts must be determined based on the record created by the parties.

AFSCME Local 3514 represents a bargaining unit of DHSS, Division of Developmental Disabilities Services employees who work in the Stockley Center. Since at least 2004 and up to February 25, 2016, this bargaining unit included the following job classifications:

Nurse I, II, III
Nurse Supervisor
CMRP Nurse
CMRP Nurse Supervisor²

¹ Representation Petition 15-12-1025.

² It is noted that Nurse Supervisor positions are also included in the Merit Unit 6 definition.

In 2007, the PERA was modified to extend to State merit employees the right to negotiate compensation. This extension in the scope of bargaining was established in 19 Del.C. §1311A and was conditioned upon positions being represented and included in twelve statutorily identified units of merit classifications. State Merit Unit 6 is defined to include merit positions in, “professional patient care which is composed of registered nurses, public health nurses, psychiatric nurses, therapists, dietitians and similar professional classes” (“Unit 6”). 19 Del.C. §1311A(b)(6).

In April 2010, AFSCME petitioned to represent all unrepresented Unit 6 positions.³ In response, the State provided a list of all job classifications which it determined fell within the Unit 6 definition. The State’s list included the Therapist III job classification. By agreement of the State and the two affected exclusive bargaining representatives who represented Unit 6 positions at that time (AFSCME and the Delaware State Education Association), the unit was determined to include Therapist III positions, statewide.⁴

Thereafter, a mail ballot election was conducted by the Public Employment Relations Board (“PERB”) in which all State employees who were employed in Unit 6 positions who were not in a bargaining unit (i.e., were not represented by either AFSCME or DSEA at that time) were provided the opportunity to vote in a PERB conducted certification election. The majority of the votes cast were in favor of representation by AFSCME Council 81; consequently, all of the previously unrepresented Unit 6 positions statewide were thereafter represented by AFSCME. It is undisputed that until the Unit 6 election in July, 2010, the Therapist III position

³ Representation Petition 10-04-741.

⁴ At the time of the initial petition for the Unit 6 Bargaining Unit Determination, there were no Therapist I and II positions which were filled and working in the State of Delaware. *State of Delaware and AFSCME Council 81 & DPHNA, DSEA/NEA, REP 10-04-741, VII PERB 4623, 4625 (2010)*. Subsequently, the parties agreed it had been an oversight not to include Therapist I and II positions. Therapist I and II positions fall below Therapist III positions within the class series. *State Exhibit B*. The Unit 6 definition was corrected to include Therapist I and II positions on August 18, 2016, again by agreement of the parties. *Representation Petition 16-08-1077(a)*. It is noted that Therapist I, II, and III positions are also included in the Recognition clause of the Unit 6 negotiated agreement.

at Stockley was not represented for purposes of collective bargaining.

Section 1311A of the PERA provides direct instruction to PERB in defining the composition of State Merit units:

... The Board shall determine the proper assignment of job classifications to bargaining units and the bargaining unit status of individual employees and shall provide for certified bargaining representatives to combine bargaining units or portions of bargaining units of employees they represent within the bargaining units defined in this section based upon the classification of the employees represented.⁵

This section of the statute clearly states that the §1311A units are to be created by properly assigning “job classifications” to the units. It does not provide a process by which individual positions within a classification may be differentiated based upon a consideration of variations in duties at different work locations. It is axiomatic that the purpose of a merit system is to fairly and equitably classify all employees who are performing similar functions under similar circumstances across the system.

Section 1311(b) sets forth the time constraints for a group of represented employees who wish to decertify (or replace) their current bargaining representative. It states, “... If a lawful collective bargaining agreement of no more than three years duration is in effect, no petition shall be entertained unless filed not more than 180 days nor less than 120 days prior to expiration of such agreement.” These agreements would be negotiated by “terms and conditions” bargaining units of State merit employees, and are referred to as “noncompensation” agreements.

Section 1311A(d) (which applies to the State Merit units) states that only “noncompensation” collective bargaining agreements negotiated under §1313 of the PERA can serve as a contractual bar to a decertification petition filed by bargaining unit employees. In order for State merit employees to have their full rights to be represented by an exclusive bargaining representative of their collective choosing or to choose not be represented, once they

⁵ 19 Del.C. §1311A(b)

are certified for representation in one of the defined Merit units (pursuant to §1311A(b)), they must also be assigned to a traditional “terms and conditions” bargaining unit (pursuant to §1310). Consequently, the State and AFSCME have submitted petitions to PERB to modify existing “terms and conditions” bargaining unit certifications to include positions which have been granted initial bargaining rights as part of Merit unit certification processes.

Consistent with this practice, on or about December 15, 2015, the State filed a petition to modify the bargaining unit which is represented by AFSCME Local 3514 to include Therapist I, II, and III positions.⁶ AFSCME did not object to the petition and the bargaining unit was modified, by agreement of the parties, to include Therapist I, II and III positions. Consequently, as of February 25, 2016, at the State’s initiation, the bargaining unit represented by AFSCME Local 3514 was modified and noticed to include Activity Therapist I, II and III.

The State later filed the instant petition on June 8, 2016, to now exclude the Therapist III position at Stockley because it is a “supervisory” position within the meaning of 19 Del.C. §1302(s). The petition is denied for two reasons.

First, statutorily, there is no dispute that the Therapist III job classification has been determined to be properly included in Merit Unit 6 and that this classification provides professional patient care, similar to nurses, public health nurses, psychiatric nurses, therapists, dietitians and similar professional classifications. All positions classified as Therapist III were determined in 2010 to be properly assigned to Merit Unit 6 and AFSCME was certified as the exclusive bargaining representative of all previously unrepresented employees holding positions classified as Therapist III in July 2010. There is no statutory support for concluding that employees in job classifications which have been properly determined to be included in a Merit unit and for which an exclusive bargaining representative has been certified, can be determined

⁶ Representation Petition 15-12-1025. *PERB Exhibit 1.*

to be ineligible for representation in “terms and conditions” bargaining units.

The statutory requirement that job classifications be placed in §1311A Merit units for purposes of negotiating compensation implicitly presumes that the assignment of individual positions to a job classification under the State merit system has structural integrity. The Merit System of Personnel Administration Act, 29 Del.C. Chapter 58 explicitly charges the Director of Management and Budget:

... shall provide for the preparation, maintenance and revision of a position classification plan for all positions in the classified service and all merit comparable positions, based upon similarity of duties performed and responsibilities assumed so that uniform qualifications and pay ranges shall apply to all positions in the same classification. 29 Del.C. §5915(a)

In this case, the career ladder for Therapist states the Therapist III position performs “the most complex therapist work for therapy discipline” and that the Therapist III’s “may supervise other therapists, assistants and support staff.” The classification description requires Therapist III’s to have the “ability to oversee therapists and various support personnel” as well as the “ability to plan and conduct professional workshops.” Both of these requirements are consistent with the type of clinical oversight which is reasonable to expect from an employee who is responsible for performing duties at the highest level of professional competence within his or her licensed professional occupation. The class series also notes that the Therapist III is at the top of the career ladder; consequently, promotion into this classification is not competitive.

The Therapist IV position, on the other hand, is explicitly defined as “supervisory level” work, with responsibility to plan, organize, and supervise the administration of a therapy program and to supervise therapists and support staff. The Therapist IV job classification explicitly states, “[t]he elements of supervision include planning, assigning, reviewing and evaluating performance, training and recommending hire, termination and discipline.” Therapist IV’s are expected to have knowledge of supervisory principles and practices, as well as

knowledge and skill in operating a therapy program. Clearly, the Therapist III and Therapist IV positions differentiate between clinical oversight and program operation which includes supervision.

OMB has established procedures and processes by which an agency may request a position classification be reconsidered. If the agency believes its operational needs requires this position to plan, organize and supervise the administration of its therapy program and the therapists and support staff employed in that program, it has self-help available by requesting the position be considered for reclassification.

Secondly, this petition does not meet the criteria for modification established by PERB Rule 3.4(8). In order to establish that the petition is properly filed, the Petitioner must first satisfy one or more of the threshold criteria set forth in Rule 3.4(8) is met, specifically that:

- (1) there has been a substantial change in the nature of the duties and working conditions of the position in question ; or
- (2) a new job has been created; or
- (3) some other compelling reason warrants consideration of the petition.

The petition does not allege either that a new position was created or that a compelling circumstance justifies considering modification of the bargaining unit definition. The Petitioner, therefore, must show a substantial change in the nature of the duties and working conditions of the Therapist III position since the bargaining unit was modified on February 25, 2016. *In RE: DHSS Division of Mental Retardation Community Nurses*, Representation Petition 95-06-146. II PERB 1247, 1248 (1995).

The placement of the Therapist III job classification in Unit 6 was initiated by the State in responding to AFSCME's petition in 2010 for a Unit Determination. At that time, the evidence in this matter establishes the Therapist III was performing the same scope of duties for which she was responsible until her retirement in 2015. After her retirement and through the date of the

hearing on October 17, 2016, the position remained vacant and unfilled.

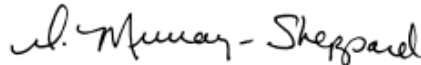
There was no evidence presented to support the conclusion that the duties and responsibilities of the position had changed since the previous incumbent retired, and more specifically since February 2016 when the bargaining unit represented by AFSCME Local 3514 was modified to include this position.

DECISION

For the reasons discussed above, the modification petition filed by the State to remove a single Therapist III position from representation under Merit Unit 6 and AFSCME Local 3514 is denied because it is inconsistent with the requirements and rights of employees under 19 Del.C. §1311A and §1310. Further the position does not meet the regulatory threshold criteria set forth in PERB Rule 3.4(8) for modifying a bargaining unit definition.

WHEREFORE, the petition is dismissed and the Therapist III position at the Stockley Center remain in the bargaining unit represented by AFSCME Local 3514.

IT IS SO ORDERED.



DEBORAH L. MURRAY-SHEPPARD
Executive Director
Del. Public Employment Relations Bd.

Dated: April 28, 2017