

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

DELAWARE STATE TROOPERS ASSOCIATION,	:	
	:	
Charging Party,	:	
	:	<u>ULP No. 20-09-1248</u>
v.	:	
	:	
STATE OF DELAWARE, DEPARTMENT OF	:	PROBABLE CAUSE DETERMINATION
SAFETY AND HOMELAND SECURITY, DIVISION	:	AND ORDER OF DISMISSAL
OF STATE POLICE,	:	
	:	
Respondent.	:	

Appearances

Jeffrey M. Weiner, Esq., for Delaware State Troopers Association
Krishna Hawkins, State Labor Relations & Employment Practices, for DSHS/DSP

BACKGROUND

The State of Delaware (“State”) is a public employer within the meaning of 19 Del. C. §1602(l) of the Police Officers and Firefighters Employment Relations Act, 19 Del. C. Chapter 16 (“POFERA”). The Department of Safety and Homeland Security (“DSHS”) is an agency of the State. The Division of State Police (“DSP”) is a division of DSHS.

The Delaware State Troopers Association (“DSTA”) is an employee organization within the meaning of 19 Del. C. §1602(g). It is the exclusive representative of the bargaining unit of all Delaware State Troopers from the rank of Trooper through Major, within the meaning of 19 Del. C. §1602(h).

DSTA and the State are parties to a current collective bargaining agreement which has a term of July 1, 2018 through June 30, 2021.

On September 28, 2020, DSTA filed an unfair labor practice charge with the

Delaware Public Employment Relations Board (“PERB”) alleging conduct by the State in violation of 19 Del. C. §1607(a)(1), (a)(5) and (a)(6), which state:

- (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 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.
 - (6) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

DSTA charges the State unilaterally instituted a change in the terms and conditions of employment of bargaining unit employees when it delayed promoting Troopers to vacant Sergeant, Lieutenant, and Captain positions. It alleges DSP violated the Colonel’s Operational Memoranda 01-18 and 05-19 when it notified DSTA that the development of the 2020 promotional lists for the ranks of Sergeant and Lieutenant was delayed due to COVID-related public health restrictions and that it would not promote into officer vacancies (which opened on or after June 30, 2020) until the new lists were issued. DSTA charges this failure to promote from the 2018 promotional lists until the 2020 lists were issued constitutes a unilateral change in a mandatory subject of bargaining which violates the POFERA.

On October 19, 2020, the State filed its Answer to the Charge admitting many of the facts, providing additional information concerning the reasons for delay in the completion of the 2020 promotional lists, and denying DSTA’s legal conclusions and assertions of violations of the POFERA.

The State included in its Answer affirmative defenses in response to the Charge. It

asserts the Charge fails to allege facts sufficient to establish that DSP may have violated 19 Del. C. §1607(a)(1), (a)(5) and/or (a)(6). It acknowledges that its inherent authority to control staffing is not without limitations. It asserts, however, that DSTA's demand that DSP "immediately promote Troopers in fact concerns the most fundamental aspects of a public employer's management of its workforce and employees, exclusively reserved to DSP by the POFERA, other law and numerous PERB decisions."¹

DSTA filed its Response to the State's New Matter on October 27, 2020, in which it denies the affirmative defenses set forth therein. DSTA asserts the State's Answer and New Matter "ignores salient issues" which include:

- Staffing levels for DSP Sergeants and/or Lieutenants was established in the State's Fiscal Year 2021 Budget;
- Delay in promoting from the 2018 promotional lists has been found and is likely to be discriminatory based on *Bullen v. Chaffinch*;²
- Promotions have been held to be mandatory subjects of bargaining by public employment relations boards in other states;
- Courts in other states have held promotions are mandatory subjects of bargaining; and
- In West Virginia, the State Police faced similar COVID-19 testing issues and promoted off the existing promotional list when the creation of a new list was delayed.

This probable cause determination is based on review of the pleadings submitted by the parties.

FACTS

The following uncontested facts are derived from the pleadings:

The DSP Colonel issued Memorandum 01-18, Rules for the 2018 Sergeant, Lieutenant, and Captain Promotional Processes on January 5, 2018.³ The Memorandum

¹ State's Answer and New Matter, footnote 2.

² 336 F.Supp. 342 (USDC-DE, 2004).

³ Charge Exhibit B.

notified all Troopers that EB Jacobs had been contracted to “develop, administer, and oversee all examination components of the 2018 Promotional Processes for the ranks of Sergeant, Lieutenant, and Captain.” It outlined the process by which eligible Troopers could request to test to be included on the promotional lists, identified the components of the tests and necessary qualifications for consideration, and the dates and timeframes for the testing and oral boards. It specifically stated that testing would take place between March 2018 and May 2018, noting that exact dates would be announced. Estimated dates for oral boards (which would occur after the written tests) were also included.

Following completion of the 2018 Promotional Processes, the Colonel issued lists of individuals who had qualified for potential promotion to the ranks of Captain, Lieutenant and Sergeant on June 13, 2018.⁴ The memoranda stated for each list:

1. Listed below are the results of the promotional process and the list of bands for the rank of *[named rank]*. Bands are listed in alphabetical order.
2. Promotions will be selected from the bands until such time a *[sic]* new list is published. Selections within the bands will be at the discretion of the Superintendent⁵ consistent with the rules previously published in Memorandum No. 01-18.
3. Additional bands will be published if and when it appears that promotions may be selected.

The June 13, 2018 published lists included the names of five individuals who were immediately eligible for promotion to Captain, twelve individuals who were immediately eligible for promotion to the Lieutenant, and six individuals in Band A and fourteen individuals in Band B who were eligible for promotion to the rank of Sergeant.

On or about November 13, 2019, the Colonel issued Memorandum 05-19 which established the Rules for the 2020 Sergeant, Lieutenant, and Captain Promotional

⁴ Colonel’s Memoranda 03-18, 04-18, and 05-18. Charge Exhibit C.

⁵ The Colonel and the Superintendent are one and the same. Because the Charge refers to the Colonel, that term is adopted herein, except where the quoting from documents.

Processes. The Memorandum again noted that EB Jacobs (now part of PSI, a global testing and assessment organization) had been contracted to “develop, administer, and oversee all components of the 2020 Promotional Processes...”⁶ The 2020 Memorandum states “testing will take place in February 2020 through April 2020”. The Colonel anticipated the oral boards would be conducted in March, 2020 for individuals seeking to be qualified as eligible for promotion to Captain; in late March for those seeking to be included on the Lieutenant list; and in April for those seeking to be included on the Sergeant list.

On March 31, 2020, the Colonel issued the 2020 promotional band for Captain, which named six individuals who were immediately eligible for consideration for promotion to Captain.⁷ Two of the individuals on the 2020 list were also on the 2018 eligibility list. Unlike the 2018 Captain band memorandum (No. 03-18), the 2020 memorandum was more specific about the period in which the list would be used: “... Promotions will be selected from the bands until May 31, 2022, or until such time as a new list is promulgated.” Selection for promotion remained at the discretion of the Colonel.

In its letter to the newly appointed Colonel and Lieutenant Colonel dated August 6, 2020, the DSTA President stated, “Both the DSTA and DSP should be mindful that any failure to promote within a reasonable time may be subject to a grievance, is a mandatory bargaining subject, and possibly an unfair labor practice.”⁸

By email dated September 14, 2020, addressed to DSTA’s President and counsel, the Colonel provided a promotional process update, which stated:

As previously reported, the pandemic⁹ has resulted in an unforeseeable

⁶ Answer Exhibit A.

⁷ Memorandum 01-20; Answer Exhibit B.

⁸ Charge Exhibit D.

⁹ PERB takes administrative notice the COVID-19 State of Emergency due to the public health threat issued by Governor John Carney on March 12, 2020. This order and its subsequent and

and unfortunate delay of the 2020 Promotional Process Oral Boards and Structured Resume. The Human Resources Section has worked diligently to ensure this process could be completed in the timeliest manner possible and oral boards are scheduled for late September. As you know, the 2020 Promotional Process would have been completed in June with the creation of a complete set of new promotional bands. The Executive Staff has therefore been faced with determining a fair and equitable course of action regarding promotional selections. After considering the views of the Delaware State Troopers Association, and after consulting with PSI (formerly known as EB Jacobs), counsel and others, the Executive Staff has determined that the fairest approach is to wait for the culmination of the 2020 Promotional Process before filling vacancies that have arisen since June 30, 2020 and that are expected to arise in the coming weeks. Again, your patience has been greatly appreciated while we complete this process.

On October 9, 2020, the Colonel issued the 2020 promotional band for Lieutenant, which named twenty-four individuals who were immediately eligible for consideration for promotion to Lieutenant.¹⁰ Eight of the listed individuals were also listed on the 2018 Lieutenant eligibility list. The Lieutenant Memorandum stated the list would be used for purposes of promotional selections through May 31, 2022, or until a new list was promulgated.

On October 19, 2020 the Colonel issued the 2020 promotional bands for Sergeant, which named twenty-one individuals who were eligible for consideration for promotion to Sergeant, of which four are in Band A, eight are in Band B, and nine are in Band C.¹¹ Three of the individuals who are now in Sergeant Band A were included in the 2018 Band B and one individual in the 2020 Band C was listed in the 2018 Band B. The Sergeant Memorandum also states the list will be used for purposes of promotional selections through May 31, 2022, or until a new list was promulgated.

frequent modifications limited in person meetings, gatherings, and travel beginning March 13, 2020 through all times relevant to this Charge.

¹⁰ Memorandum 09-20; Answer Exhibit B.

¹¹ Answer Exhibit B.

DISCUSSION

Rule 5.6 of the Rules and Regulations of the Delaware Public Employment

Relations Board provides:

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

For purposes of reviewing the pleadings to determine whether probable cause exists to support the charge, factual disputes revealed by the pleadings are considered in a light most favorable to the Charging Party in order to avoid dismissing a valid charge without the benefit of receiving evidence in order to resolve factual differences. *Flowers v. DART/DTC*, ULP 04-10-453, V PERB 3179, 3182 (Probable Cause Determination, 2004).

The Charge alleges the Colonel's failure to promote to fill vacant officer positions within a reasonable time constitutes a unilateral change in a mandatory subject of bargaining. It relies on two operational memoranda issued by the Colonel to support this allegation. The memoranda address the process by which the promotional lists which identify individuals who are eligible for promotion will be developed and the additional criteria to be considered when Troopers are considered for promotion into a promotional vacancy for a Sergeant, Lieutenant or Captain position. Neither memorandum addresses when a vacancy must be posted or filled. Whether the Colonel's decision to delay filling

promotional vacancies is a mandatory subject of bargaining is elemental to PERB's jurisdiction in this case.

The burden on the charging party to support this type of charge was established in one of the earliest decisions issued by the Delaware Public Employment Relations Board. Appoquinimink Education Assn. v Bd. of Education, ULP 1-2-84A, I PERB 23, 26 (PERB, 1984), adopting NLRB v. Katz, U.S., 369 US 736 (1962). An alleged unilateral change does not violate the employer's obligations under the POFERA unless it involves a mandatory subject of bargaining. The parties are required to confer and negotiate in good faith with respect to "... matters concerning or related to wages, salaries, hours, grievance procedures and working conditions...",¹² i.e., mandatory subjects of bargaining. Should the issues be determined to be a mandatory subject of bargaining, the analysis would then turn to consideration of what constitutes the status quo for that issue under the circumstances presented.

The POFERA also reserves certain rights to the public employer's inherent managerial policy. While the employer may choose to negotiate concerning these permissive subjects of bargaining, it is not required to bargain concerning, "... such areas of discretion or policy as the functions and programs of the public employer, its standards of service, overall budget, utilization of technology, the organizational structure and the staffing levels, selection and direction of personnel."¹³

The terms and conditions of employment defined in §1602(n), i.e., mandatory subjects of bargaining, are explicitly limited to exclude matters of inherent managerial policy reserved to the employer's discretion by §1605.

The charges made by DSTA do not challenge the process by which DSP developed the

¹² 19 Del. C. §1302(n).

¹³ 19 Del. C. §1605, Employer rights.

2020 promotional lists or the list itself. It specifically challenges DSP's alleged failure to fill promotional vacancies "within a reasonable period of time." It specifically asserts that the decision to delay filling promotional vacancies "could likely adversely impact 15 Troopers", without providing any legal or factual support for this assertion.

There is no precedent in Delaware case law for concluding that issues related to promotions are mandatory subjects of bargaining. To the extent that other state employment agencies and/or courts may have determined that promotional eligibility, testing criteria, and methodology for creating promotional lists are mandatorily negotiable, those decisions were rendered under statutes which are not identical to the public sector bargaining laws of Delaware. These issues all go to "how" an employer identifies which bargaining unit employees are qualified to be considered for promotion. This charge does not question any of those issues and a decision as to negotiability of promotion processes will remain for another case, another day when they are in issue.

When and whether an employer decides to fill a promotional vacancy falls squarely within inherent managerial policy of staffing levels and selection of personnel. To the extent that parties may choose to negotiate concerning this issue, any agreements reached would be subject to enforcement through their negotiated grievance procedure. It is well established in Delaware PERB case law that the unfair labor practice forum is not a substitute for the grievance procedure.¹⁴

DSTA and DSP have not entered into an agreement concerning the timing for filling promotional vacancies. To the contrary, these parties explicitly agreed that the Colonel retains the right and authority to promote, as memorialized in Article 2, of their collective bargaining agreement, which states in relevant part:

The Management of the Division of State Police and the direction of all

¹⁴ *Brandywine Affiliate, NCCEA/DSEA/NEA v. Brandywine Board of Education*, ULP 85-06-005, I PERB 131, 142-143 (PERB, 1986).

Division personnel, including the right to hire, assign, suspend, transfer, promote, discharge or discipline for just cause and to maintain discipline and efficiency of its members ... is vested exclusively in the Superintendent... In no case shall the exercise of the above prerogative of management be in derogation of the terms and conditions of this Agreement or of the State law. ¹⁵

There are no other provisions of their agreement which specifically mention or address “promotion”. The agreement does, however, include a provision which addresses pay rates for Troopers who are assigned to duty at a higher rank. ¹⁶

Finally, the cases cited by the parties in the pleadings were reviewed and considered in reaching this decision. DSTA’s assertion that the United States District Court for the District of Delaware’s 2004 decision in *Bullen v. Chaffinch* is applicable to the facts of its unfair labor practice charge is without basis in law or fact. The decision to instate the named plaintiffs in that case to Sergeant positions was based on a post-trial motion following the jury’s finding that, but for DSP’s illegal discrimination against the two individuals, they would have been promoted. The decision states:

The very purpose of remedial measures in an unlawful employment discrimination case is to “place persons unconstitutionally denied an opportunity or advantage in the position they would have occupied in the absence of [the] discrimination.” *U.S. v. Virginia*, 518 U.S. 515, 547 (1996).

There is no allegation in this case that the Colonel engaged in any discriminatory acts when she chose to delay the filing of the vacant officer positions until the new promotion lists were issued. In fact, both lists were issued less than a month after the filing of the Charge, and within two months of the Colonel’s notice to DSTA that she would delay filling the positions until the lists were received. Being placed on a promotion-eligibly list does not guarantee promotion. The charge does not identify any Trooper who was “likely to be

¹⁵ Charge Exhibit A.

¹⁶ Article 24, Working out of Rank, Charge Exhibit A.

adversely affected” nor does it identify the purported harm.

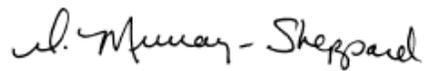
The case decision from public sector PERB-like agencies in other states and related decisions of courts are not precedential or binding as they were not considering application of the Delaware POFERA. While they may provide guidance in some instances, none were found to be directly on point for the issue of mandating when promotional vacancies must be filled. It is also noted that West Virginia has no statutory framework for public sector collective bargaining; consequently, how West Virginia chose to handle COVID-19 issues relating to promotions has no impact on the jurisdiction of the Delaware PERB to consider the allegations set forth in this Charge.

DETERMINATION

Considered in a light most favorable to the Charging Party, the pleadings are not sufficient to establish that the State unilaterally modified a mandatory subject of bargaining or violated 19 Del. C. §1607 (a)(1), (a)(5) and/or (a)(6), as alleged.

Having found no probable cause exists to find that an unfair labor practice may have been committed, the Charge is dismissed.

DATE: January 8, 2021



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