

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

DELAWARE STATE TROOPERS ASSOCIATION,	:	
	:	PERB Review of Executive
Appellant,	:	
	:	Director's Decision
v.	:	<hr/>
	:	
STATE OF DELAWARE, DEPARTMENT OF	:	ULP No. 20-09-1248
SAFETY AND HOMELAND SECURITY, DIVISION	:	
OF STATE POLICE,	:	
	:	
Appellee.	:	

Appearances

Jeffrey M. Weiner, Esq., for Delaware State Troopers Association

Khrishna 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).

On September 28, 2020, DSTA filed an unfair labor practice charge with the Public Employment Relations Board (“PERB”) alleging the State engaged in conduct in violation

of 19 Del. C. §1607 (a)(1), (a)(5) and (a)(6). On October 19, 2020, the State filed its Answer to the Charge which included Affirmative Defenses and New Matter. On October 27, 2020 DSTA filed its Response denying the affirmative defenses and new matter set forth in the State's Answer.

On January 8, 2021, the Executive Director issued a decision on the pleadings,¹ consistent with PERB Rule 5.6(a), in which she found the Charge failed to establish a sufficient factual or legal basis to support the conclusion that there was probable cause to believe the alleged unfair labor practices may have occurred. The Charge was therefore dismissed.

On January 12, 2021, DSTA requested review of the Executive Director's decision by the full Public Employment Relations Board. The State responded in writing to DSTA's request for review on January 22, 2021.

A copy of the complete record in this matter was provided to each member of the Public Employment Relations Board. A hearing was convened on February 17, 2021, at which time a quorum of the Board met in public session² to hear and consider the FOP's request for review. The parties were provided the opportunity to present oral argument and to answer questions from the Board. The decision reached herein is based upon consideration of the record and the arguments presented by the parties.

DISCUSSION

¹ *Delaware State Troopers Assn. v. DSHS, Department of State Police*, ULP 20-09-1248, IX PERB 8321 (1/8/21).

² In accordance with Governor Carney's March 13, 2020 Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat, the hearing was conducted by video conference, using the Zoom platform. Log-in instructions were provided to the parties and members of the public prior to the hearing. Two out of three members of the Board heard the appeal. 14 *Del. C. §4006(b)* (as incorporated by reference at 19 *Del. C. §1605*) permits a quorum to act.

The Board's scope of review is limited to the record created by the parties and consideration of whether the Executive Director's decision is arbitrary, capricious, contrary to law, or unsupported by the record. After consideration of the record and the arguments of the parties on appeal, the Board must vote to affirm, overturn, or remand the decision to the Executive Director for further action.

The facts in this case are not in dispute. DSP notified DSTA that it was initiating the process for testing, examining, and creating the 2020 promotional lists of officers who would be eligible for promotion to the ranks of Sergeant, Lieutenant and Captain in November, 2019. The new 2020 lists for each rank would replace the promotional lists established by the same process in 2018. The memorandum stated that testing would be conducted in February through April, 2020, and would be followed by oral boards. The oral boards were expected to begin in March for those seeking to be qualified as eligible to be promoted to Captain, in late March for the Lieutenant's list, and in April for those seeking to be qualified for promotion to Sergeant.

The written examinations for all three ranks were conducted according to schedule. The oral boards for officers who hoped to be promoted to the rank of Captain were also conducted and the 2020 promotional list for Captain was issued on March 31, 2020.

The oral boards could not be conducted as planned for the Sergeant and Lieutenant lists due to the emergency restrictions put in place in response to the COVID-19 pandemic in late March, 2020.³ But for the restrictions on in-person contact, it is undisputed that the Sergeant and Lieutenant promotional lists would have been completed before June 30, 2020. DSTA's express preference was to have the oral boards conducted in-person and

³ Declaration of the Governor, the Honorable John C. Carney of a State of Emergency for the State of Delaware Due to a Public Health Threat, effective March 13, 2020.

DSP acceded to this preference. Because those in-person interviews could not be safely conducted, they were delayed until September, 2020.

The Executive Director held that, even when considered in a light most favorable to the Charging Party, the pleadings were 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. In its request for review, DSTA argued the Executive Director erred as a matter of law in concluding that the State's decision to delay promotions to fill vacant Sergeant, Lieutenant and Captain positions was not a mandatory subject of bargaining. It requests the decision dismissing the unfair labor practice charge be reversed and remanded to the Executive Director for hearing and a decision on the merits. The State argued the decision was based on substantial evidence, was not arbitrary or capricious, and was not contrary to law, and should, therefore, be affirmed.

When the Colonel announced on August 6, 2020 that vacancies which occurred between June 30 and the anticipated issuance of the 2020 lists would not be filled until the new lists were completed, she did not state that the vacancies would never be filled or that the promotional process had been suspended.⁴ The previous Colonel stated in his memorandum which accompanied the 2018 lists that "Promotions would be selected from the bands until such time as a new list is published" and that the selections for promotion would be at the discretion of the Colonel. Article 2 of the parties' negotiated collective

⁴ This is a material difference from the facts in *City of Cleveland* (14 NPER OH-2338 (Ohio SERB, 1992)), which DSTA argues should inform PERB's decision in the current matter. In the *Cleveland* case, the promotional list expired in November 1989. In April 1990, the City's Civil Service Commission indefinitely suspended all promotional examinations; consequently, there were no promotional lists from which to promote. The parties were able to reach a settlement agreement under which the promotional examination process would be reinstituted in early 1991. The City, however, failed to initiate the exams as it had agreed. The remedy instituted in that case by SERB was to direct the city to rescind its decision to cease making promotions, to return to the status quo, and to bargain with the exclusive bargaining representative of its police officers any decisions to cease conducting promotional examinations or to cease making promotions.

bargaining agreement also explicitly reserves the right to promote exclusively to the Colonel.

The Executive Director correctly found that neither the negotiated provisions of the parties' collective bargaining agreement or the Colonel's memoranda address when a vacancy must be filled. Nor is there an indication in this record that the Colonel did not intend to fill the vacancies as soon as possible, following the completion of the oral boards and issuance of the 2020 lists.

Whether the three-month delay in filling the promotional vacancies was "reasonable" under the circumstances is not relevant to the issue in this case. The Charge alleged DSP unilaterally instituted a change in the promotional process in violation of its obligation to bargain concerning mandatory subjects of bargaining. DSP did not promote anyone who was not on the 2018 Sergeant and Lieutenant promotional lists; indeed, it did not promote anyone until after the 2020 lists were issued consistent with the representation that promotions, if any, would be made from the promotional lists until new lists were developed in response to the recognized promotional testing process.

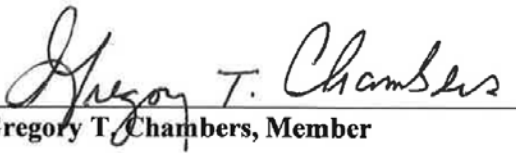
DECISION

After reviewing the record, and hearing and considering the arguments of the parties, the Board unanimously affirms the decision of the Executive Director that the Charge fails to establish a sufficient factual or legal basis on which it might be concluded that there is probable cause to believe that the alleged unfair labor practices may have occurred. Wherefore, the decision is affirmed and the appeal is denied.

IT IS SO ORDERED.

DATE: March 4, 2021


Kathi A. Karsnitz, Member


Gregory T. Chambers, Member