

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF:

DELAWARE PUBLIC EMPLOYEES, COUNCIL	:	
81, LOCAL 3109, AFSCME, AFL-CIO,	:	
	:	
Petitioner,	:	
	:	REPRESENTATION PETITION NO.
AND	:	
	:	<u>22-10-1330 (Clarification)</u>
NEW CASTLE COUNTY, DELAWARE,	:	
	:	
Respondent.	:	

RE: CHIEF PROCUREMENT OFFICER

Appearances

*Lance Geren, Esq. and Tyler McCaffery, Esq., O'Donoghue & O'Donoghue,
for AFSCME LU 3109*

Laura T. Hay, Esq., New Castle County, Assistant County Attorney

New Castle County, Delaware (“County”) is a public employer within the meaning of 19 *Del. C.* § 1302(p).

The American Federation of State, County, and Municipal Employees, AFL-CIO, Council 81 (“AFSCME”) is an employee organization within the meaning of §1302(i) of the Public Employment Relations Act, 19 *Del. C.* Chapter 13 (PERA). AFSCME, through its affiliated Local 3109, is the exclusive bargaining representative of the bargaining unit which does or did include the position of Chief Purchasing Agent, within the meaning of 19 *Del. C.* §1302(j).

The County and AFSCME Local 3109 are parties to a collective bargaining agreement which was in effect at all times relevant to the processing of this petition.¹

On October 26, 2022 AFSCME filed a representation petition with the Delaware Public Employment Relations Board seeking to clarify the bargaining unit of “Managers and Administrators” and “Professional employees” (as defined in DOL Cases 100 and 159, respectively) to include the recently created Chief Procurement Officer. AFSCME asserts the Chief Procurement Officer (Pay Grade (“PG”) 34) results from the retitling of the former Chief Purchasing Agent (PG 34).

By letter dated November 15, 2022, the County opposed AFSCME’s requested clarification of the existing bargaining unit asserting the Chief Procurement Officer was ineligible for representation because it is a supervisory position responsible for managing, supervising and evaluating a staff of professional and para-professional employees. The County later modified its position to assert that the Chief Procurement Officer performs different functions and is subject to different minimum qualifications than those of the Chief Purchasing Agent and, therefore, does not result from a retitling of the prior position.

In order to resolve the issues raised, a hearing was scheduled and conducted on May 16, 2023, at which the parties were provided the opportunity to submit documents and elicit testimony through direct and cross examination of witnesses. The record was closed with the submission of written argument by the parties. This decision results from the record thus created.

ISSUE

WHETHER THE RECENTLY CREATED POSITION OF CHIEF PROCUREMENT

¹ The effective dates of the collective bargaining agreement are April 1, 2019 through June 30, 2023. Article 24.1, Duration of the Contract.

OFFICER RESULTS FROM THE RETITLING OF THE FORMER CHIEF PURCHASING
AGENT?

FACTS

Bargaining Unit History:

There is no dispute that the Chief Purchasing Agent position, at Pay Grade 34, was a bargaining unit position represented by AFSCME Local 3109. The Chief Purchasing Agent position was included in the bargaining unit of professional employees by the Governor's Council on Labor on July 10, 1991. DOL Case 159(k).²

Facts on the Merits:

In 2021, the County hired a vendor to conduct the New Castle County, Delaware Public Works Procurement Disparity Study to evaluate supplier diversity and to lower the barriers to participation in bidding for County contracts for small and minority-run businesses. The study initially focused on public works capital projects but was extended to other supplier interactions.³ The Study concluded the County needed to secure changes in the State Code, in order "... to engage more diversity of suppliers and get them engaged to the entry point of the County..."⁴

The County's Chief of Technology and Administrative Services testified that at some point around the time of the retirement of the former Chief Purchasing Agent, he met with a group of County employees involved in the purchasing process to review the job specifications in order to "open up the opportunities for future applicants."⁵ The group found inconsistencies in the requisite

² AFSCME Local 3109 also represents a second bargaining unit of Managers and Administrators. DOL Case 100.

³ 5/16/23 Hearing Transcript ("TR") @ p. 22.

⁴ TR @ p. 23.

⁵ TR @ p. 21-22.

number of years required for the positions of Senior Purchasing Agent (5 years) and the Chief Purchasing Agent (also 5 years). The group also identified that New Castle County was the only public employer in Delaware that required a professional certification for procurement.⁶

As a result of the group's work, the existing purchasing positions were renamed to Assistant Procurement Agent, Procurement Agent, Senior Procurement Agent, and Chief Procurement Officer ("CPO"). The new CPO classification was modified to require at least seven (7) years of prior experience and one year of supervisory experience.⁷ It was the only position the County characterized as including changes to its prior job duties.⁸

By email dated April 28, 2022, all County employees were notified of and received a copy of the agenda for the May 5, 2022 meeting of the Human Resources Advisory Board ("HRAB").⁹ The agenda included:

4. Recommendation of new class specification for Chief Procurement Officer (Pay Plan and Rates of Pay for Non-Union Classified Service Employees) – Pay Grade 34 (\$79,223 - \$122,901 per year).¹⁰

The minutes of the May 5, 2022 HRAB meeting reflect that the new class specification for the Chief Procurement Officer was approved:

Mike Hojnicky, Chief of Technology and Administrative Services... present[ed] the new job specification. The original job specification, which is the Chief Procurement Agent was last modified in 2015 when an individual retired, and they looked at all the job functions within the Procurement Office. They changed the titles of Assistant Purchasing

⁶ Supra.

⁷ Joint Exhibit 1.

⁸ TR @ p. 22.

⁹ County Exhibit 11. County Code requires the HRAB to review and recommend approval of modifications to existing classifications and/or creating new classifications, before County Council considers the changes.

¹⁰ The County provided an unsigned copy of Ordinance 22-076 to which was appended (at Exhibit C) the Pay Plan and Rates of Pay for Non-Union Classified Employees effective July 1, 2022, which lists the Chief Procurement Officer, noting, "There will be no discernible fiscal impact upon the adoption of this Ordinance." The salary scale for Pay Grade 34 positions is: \$80,015 (Level 1) through \$124,129 (Level 10). County Exhibit 4.

Agent, Purchasing Agent, as well as their Senior Purchasing Agent. The new position would add functionality not previously included in the job description, such as managing the surplus supplies and equipment, maintaining the systems data tables, and being responsible for supervision of such. The job specification also increased the years of purchasing experience, as the Chief had the same 5 years of experience as the previous senior, so they elevated that to 7 years of experience. In addition, they added new job duties such as: Administers the Supplier Diversity Program and develops a policy/procedures outreach program, obtaining the annual report. This would be a new focus for the department to codify this as an area of responsibility as they emphasize supplier diversity and engaging small, minority-owned businesses, and develop a program to go out and manage that process. This job specification is a merit position that would be a direct report to Mr. Hojnicky, as one of his front-line supervisor/managers.

Dr. Beaty asked, as a new position, whether someone was in another position and whether Mr. Hojnicky was repurposing this, reclassifying it, or if there would be two positions. Mr. Hojnicky replied that he would have one position, essentially, establishing a new position using that vacancy, and that position number funding to fund this position. Dr. Beaty also asked if the vacancy was being filled on an open-competitive recruitment process, to which Mr. Hojnicky replied that it would.¹¹

A comparison of the classification specifications for the Chief Purchasing Agent (as last revised on July 10, 2015)¹² and the Chief Procurement Officer (as adopted on July 19, 2022)¹³, reveals:

- The General Statement of Duties is unchanged.
- The Distinguishing Features of the two positions are identical except that “the New Castle County Small Business Development Plan” is changed to “the New Castle County Supplier Diversity Program.”
- The Chief Purchasing Agent specification includes under Examples of Work “Administers the Small Business Development Initiatives, including educational workshops, outreach, certification, electronic databases, joint ventures and partnerships.” The related example in the Chief Procurement Officer specification states, “Administers the Supplier Diversity Program development initiatives, including educational workshops, outreach, vendor registration, and partnerships.”

¹¹ County Exhibit 5.

¹² Joint Exhibit 2.

¹³ Joint Exhibit 1.

- In the “Examples of Work (Illustrative Only)”, the following sections were deleted from the Chief Purchasing Agent class specification in drafting the specifications for the Chief Procurement Officer:
 - Oversees the development, maintenance and usage of the highly complex automated procurement processing system;
 - Provides reports and information to the Executive Office and Council on emergency purchases, contract status, and bid requests;
 - Conducts studies of vendor performance, meets with vendors to resolve irregularities, and establishes corrective measures.
- The Chief Procurement Officer specification includes the following work examples which were not included in the Chief Purchasing Agent specification:
 - Develops annual and quarterly supplier diversity reports; creates and monitors departmental performance metrics;
 - Manages the County surplus equipment and supplies;
 - Provides and presents reports and information to the Executive Office and Council as required;
 - Maintains financial systems procurement data tables as required.
- The minimum qualifications for a Chief Purchasing Agent were: “At least five (5) years experience at the level of a Purchasing Agent, possession of the Certified Professional Public Buyer (CPPB) and/or Certified Professional Public Officer (CPPO) Certification from the Universal Public Purchasing Certification Council, and/or Certified Professional Manager (CPM) Certification; and possession of a Bachelor’s Degree from an accredited college or university with major course work in business administration; or an equivalent combination of experience, education or training directly related to the required knowledge, skills, and abilities. The CPPB and/or the CPPO and CPM must be obtained within the first three (3) years of employment or promotion to this position and must be actively maintained as a condition of continued employment.”
- The minimum qualifications for the Chief Procurement Officer are: “At least seven (7) years purchasing experience in procurement of goods and services (professional and non-professional) to include at least one-year supervisory experience and possession of a Bachelor’s Degree with a preference of major course work in business or public administration, or an equivalent combination of professional certifications, education or training directly related to the required knowledge, skills, and abilities.”

At the time that the changes were made to create the Chief Procurement Officer classification, the Chief Purchasing Agent position was vacant.

The County provided an unsigned copy of Ordinance 22-076¹⁴ to which was appended (at Exhibit C) the Pay Plan and Rates of Pay for Non-Union Classified Employees effective July 1, 2022, which lists the Chief Procurement Officer. The appended non-union salary scale for Pay Grade 34 positions is: \$80,015 (Level 1) through \$124,129 (Level 10).¹⁵ The difference between the non-union and negotiated wage rates for Pay Grade 34 positions varies from \$30/year at Level 1 to \$45/year at Level 10. Ordinance 22-076 notes, “There will be no discernible fiscal impact upon the adoption of this Ordinance.”

On June 28, 2022, Ordinance 22-093 was introduced in County Council to update the job titles for the Assistant Purchasing Agent, Purchasing Agent, and Senior Purchasing Agent. The titles were changed to Assistant Procurement Agent, Procurement Agent, and Senior Procurement Agent. The retitling did not change the pay grades or the fact that the positions are represented by AFSCME Local 1607 for purposes of collective bargaining. The Ordinance states:

... [T]he Department [of Administration] also recommends that the class specifications for Assistant Procurement Agent, Procurement Agent, and Senior Procurement Agent be updated to include a more focused description of responsibilities for all purchasing activities in the purchasing of a wide range of commodities within the Office of Procurement...¹⁶

The job descriptions for the Assistant Procurement Agent, Procurement Agent, and Senior Procurement Agent were appended to the Ordinance. Other than the title change, the requirement that the Procurement Agent and Senior Procurement Agent obtain and maintain Certified Public Buyer certification from the Universal Public Purchasing Certification Council was dropped.

¹⁴ County Exhibit 4, as introduced on June 14, 2022.

¹⁵ Exhibit I to the 2019-2023 Collective Bargaining Agreement, @ p. 60. The 2019-2023 collective bargaining agreement lists the salary range for Pay Grade 34 (which also lists the former Chief Purchasing Agent), effective July 1, 2022, as \$79,985 (Level 1) through \$124,084 (Level 10).

¹⁶ County Exhibit 13, noting this copy is unsigned and does not indicate the date of adopting by County Council or approval by the County Executive.

Responsibility to manage the County Surplus equipment and supplies was also dropped from the Senior Procurement Agent's illustrative examples of work in the class specification.¹⁷

In the fall of 2022, the County put out a bid for a small business enterprise ("SBE") vendor with the goal of identifying a resource with a broad understanding of supplier diversity. The Chief of Technology and Administrative Services described the outreach work being done by the SBE vendor:

The vendor is going to start the initial outreach on behalf of New Castle County. It's going to come from a mailing ... and then the vendor will be making phone calls and following up, and then if... when the vendor has issues with our vendor self-service portal, that falls back on [the CPO] and our Research Aide to help, and our Assistant Purchasing Agent to assist the vendors in resolving their sign-on issues or anything that they have.¹⁸

He testified the vendor is also responsible to build out a strategy for enhanced community outreach to ensure that diverse bidders have the opportunity to submit successful bids for contracted work. The County is also in the process of creating and hiring a new Small Business Enterprise Coordinator position within the County Executive's Office.¹⁹

The County provided a draft Threshold and Informal Bid-Quote Process.²⁰ Although only a draft of that planned process, the purpose statement is informative:

New Castle County ("County") seeks to create a level playing field and increase participation and opportunities of small business enterprises (SBEs). As recommended in a 2022 New Castle County, Delaware Public Works Procurement Disparity Study, the County will implement a new Small Business Enterprise Equity Program to assist small businesses, notably underutilized African American, Asian-American, and Native-American businesses, in competing for county construction contracts (prime and sub), professional, and goods and services procurement offerings. The SBE Program will align and coordinate

¹⁷ Supra. It was, however, added to the examples of work in the Chief Procurement Officer's class specification. Joint Exhibit 1, p. 2.

¹⁸ TR @ p. 32.

¹⁹ TR @ p. 33.

²⁰ County Exhibit 8.

directly with the Office of Economic Development, Procurement, and Public Works to attain the County's supplier equity contracting goals.

POSITIONS OF THE PARTIES

AFSCME:

AFSCME asserts the County has failed to demonstrate through the evidence produced that there are substantial and significant differences between the former Chief Purchasing Agent and new Chief Procurement Officer positions. The County provided evidence on only two "new duties", namely responsibilities relating to supplier diversity and management of the County's surplus property programs. Both of these functions are listed and were the responsibility of the former Chief Purchasing Agent position. It is undisputed that the Chief Procurement Officer position absorbed all of the duties for which the Chief Purchasing Agent was responsible (including supplier diversity and surplus property) and that it replaced the vacant Chief Purchasing Agent position.

Much of the County's arguments are based on potential future changes and plans for the Supplier Diversity Program, which includes oversight of a Small Business Enterprise (SBE) vendor with which the County has contracted. AFSCME counters that the expansion of one initiative, while still requiring the Chief Procurement Officer to perform every single functions of the former Chief Purchasing Agent, does not constitute a significant and substantial change in the position.

AFSCME also argues that the increase in the years of prior experience for the Chief Procurement Officer positions (from five to seven years) was done only for alignment purposes, as the County's witness testified. As such, it is immaterial to a determination of whether there was a substantial and significant change in duties and responsibilities. Similarly, the removal of the requirement to attain and retain purchasing certification from an outside organization did not affect

the Chief Procurement Officer's responsibilities; it simply opened up the potential hiring pool.

AFSCME also argues that because the responsibilities of the subordinate positions are unchanged, it is illogical to assert that the responsibilities of their supervisor, the Chief Procurement Officer, have significantly changed. The Chief Purchasing Agent supervised and managed the staff and operations of the Purchasing Office; the Chief Procurement Officer does the same for the renamed Procurement Office.

County:

The County asserts the Chief Procurement Officer performs different functions from and is subject to different minimum qualifications than the former Chief Purchasing Agent position, and is, therefore, a new position (rather than a retitling). It asserts that the Chief Procurement Officer is expected to have a "higher level of engagement" with the revised Supplier Diversity Program. The Chief Procurement Officer is responsible to maintain financial systems procurement data tables, which the County argues did not appear in the Chief Purchasing Agent's responsibilities. It also notes that the CPO is expected to take the surplus equipment and supplies program from "informal" to "the next level".

The increase in the number of years of required prior experience from five to seven and the new requirement that the Chief Procurement Officer have at least one year of prior supervisory experience differentiates the two positions, the County argues. Removing the requirement that the CPO attain and maintain a purchasing certification opened up hiring opportunities.

Finally, the County argues that PERB should give "significant weight" to the County Human Resources Advisory Board's creation of the new classification, which was subsequently adopted by the County Council.

DISCUSSION

The purpose of a clarification petition is to determine whether the position in issue is included or excluded from a currently certified bargaining unit. A Unit Clarification does not amend or modify the existing bargaining unit definition; it simply clarifies whether the existing unit definition covers the position(s) or classification(s) in question.²¹ PERB's express authority to determine appropriate bargaining units carries with it the implied authority to police certifications and to clarify them as a means to effectuate the policies of the PERA. A Unit Clarification petition cannot seek enforcement, application or interpretation of the recognition clause of the parties' collective bargaining agreement.²²

New Castle County was seeking to improve the efficacy and effectiveness of its small business enterprise outreach to minority businesses in securing bids for County work contracts. The SBE Outreach process is not limited to the Procurement (former Purchasing) Department but also includes the Office of Economic Development in the County Executive's Office and the Department of Public Works.²³ The development of outreach strategies and identification of qualifying SBEs was conducted by a vendor, who also reviews and sets up the new database for tracking small and minority owned businesses.

In a June 30, 2022 email to State Senator Marie Pinkney, the County's Public Works Manager²⁴ explained the role of the consultants in modifying the Small Business Enterprise ("SBE") program:

... the County is in the process of retaining a consultant to assist in developing and implementing the SBE program. Once they are on board, we plan to work with them to develop necessary changes to

²¹ COAD & State DOC, Rep. Pet. 08-01-613, VI PERB 4033, 4040 (2008)

²² Appoquinimink Education Association, DSEA & Appoquinimink School District, Rep. Pet. 13-05-906, VIII PERB 5869, 5879 (2013).

²³ County Exhibit 8.

²⁴ Identified at TR, p. 40.

criteria for award for contracts under the bid threshold. Based on my limited knowledge, these criteria are likely to include requiring that the County reach out to a minimum number of SBEs for each bid and/or consideration of the “distribution of work” to ensure that many different SBEs are given opportunities rather than one or two getting most of the work.

Currently, all bids other than Public Works Construction contracts are managed by the Purchasing Division because they make sure that the bid process is administered fairly and consistently. They have a certain number of bids that they solicit based on the dollar amount of the contract. They also focus on SBE and DBE businesses when bids are under the threshold. The [*proposed*] legislation would enable the County to send even more bids to SBEs...²⁵

The County urges that due consideration be given to the recommendations of the County’s Human Resources Advisory Board. The critical pieces of the HRAB’s review are that the former and the new position perform work of a similar nature and complexity, as evidenced by the fact that both the Chief Purchasing Agent and the Chief Procurement Officer are Pay Grade 34 positions. The new position replaces the prior position. Both positions had and have responsibility for developing small business initiatives, including educational workshops, outreach, partnerships.

The differences between the two positions are in the prioritization of the responsibilities and implementing different and perhaps more creative ways of accomplishing the same work, now in collaboration with a vendor. The Chief Procurement Officer continues to be responsible for supervising and overseeing a staff of Procurement (formerly Purchasing) Agents, who had no change in their duties or responsibilities.

The Chief Procurement Officer is not the only position responsible for working with the contracted vendor to improve the County’s record on hiring diverse contractors. A position was to be added in the Economic Development Office of the County Executive. The Public Works

²⁵ County Exhibit 6. It is noted that as of the date of the hearing, the enabling legislation had not yet passed the General Assembly. House Bill 72 was ultimately signed into law by the Governor on July 21, 2023.

Department is also involved in improving the County's outreach to SBEs.²⁶

The Chief of Technology and Administrative Services explained the example of work characterized as "Maintains financial systems procurement data tables as required":

The other one is developing the reporting structure so we can effectively and routinely monitor the progress of our supplier diversity outreach. Yes, we used to do some annual spend reports that was referenced by a previous witness, but those reports were not consistently done. They were not... let me say this... I don't want to say bad data, but we never had the real validation of all the data that we're doing under the program which I'll talk about in a minute. So it is developing new reports, validating the data, diving into finding out what is the barriers in why people are not... or what are we spending... the product or the money... the County funds on and with what vendor.²⁷

On its face, this is not a new duty. The Union's witness (who formerly worked as a Purchasing Agent) testified the County had long maintained a database of certified minority businesses. The testimony of the Chief of Technology and Administrative Services reflects an emphasis on validating the data which is collected and maintained, and prioritizing better understanding the data in order to expand contracting opportunities, i.e., a different way of tracking and maintaining the same type of data.

The County also asserted that management of the surplus property program was a new duty of the Chief Procurement Officer. Previously this duty was not included in the class specification for the Chief Purchasing Agent. The class specification for the prior Senior Purchasing Agent, however, included as an example of work, "Manages the County surplus equipment and supplies."²⁸ Directly managing a function for which the predecessor position had oversight responsibility does not constitute a significant change in duties which substantially differentiates the Chief Procurement Officer from the Chief Purchasing Agent.

²⁶ County Exhibit 8.

²⁷ TR, p. 29.

²⁸ County Exhibit 13, Exhibit C, page 21 of 115.

Finally, the County argues that the changes in the minimum qualifications for the CPO position differentiates the Chief Procurement Officer from the Chief Purchasing Agent. Both positions had and have supervisory responsibility over the subordinate staff in the (now) Procurement Office. Requiring "... at least one-year of supervisory experience" does not change the fact that both positions were responsible to perform supervisory duties. At best, it contracts the potential applicant pool. Similarly, requiring seven, rather than five years of "purchasing experience in procurement of goods and services (professional and non-professional)" also serves to limit the potential applicant pool, but does not affect the scope of duties for which the Chief Procurement Officer is responsible. Eliminating the requirement that the Chief Procurement Officer have certification from the Universal Public Purchasing Certification Council²⁹ may have expanded the pool of potential applicants, which the Chief of Technology and Administrative Services testified was the purpose of the change,³⁰ but again, it did not change the scope of the Chief Procurement Officer's responsibilities.

DECISIONS

Based on the record created by the parties, review and consideration of the arguments presented by the parties, and application of the PERA, the County has not met its burden to establish that the Chief Procurement Officer position is substantively different from the predecessor Chief Purchasing Agent position.

WHEREFORE, the petition is granted and the position of Chief Procurement Officer is determined to result from a retitling of the former Chief Purchasing Agent position. Consequently,

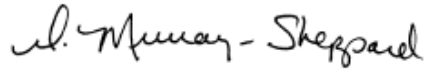
²⁹ The Chief of Technology and Administrative Services testified that a successful candidate for the Chief Purchasing Agent position was afforded three (3) years in which to acquire this certification. TR, p. 53.

³⁰ TR., p. 22.

the position continues to be represented within the bargaining unit of County professional employees represented by AFSCME Local 3109.

IT IS SO ORDERED.

DATE: December 29, 2023



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