

**PUBLIC EMPLOYMENT RELATIONS BOARD
FOR THE STATE OF DELAWARE**

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,)	
DELAWARE STATE UNIVERSITY CHAPTER,)	
Petitioner,)	<u>ULP No. 05-04-479</u>
)	Probable Cause Determination
DELAWARE STATE UNIVERSITY,)	
Respondent.)	

BACKGROUND

Charging Party, American Association of University Professors, Delaware State University Chapter (“AAUP”), is an employee organization which admits to membership Delaware State University employees and has as a purpose the representation of those employees in collective bargaining, pursuant to §1302(i) of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13 (1986). The AAUP represents a bargaining unit of DSU faculty (as defined by DOL Case #113) and is certified as the exclusive bargaining representative of that bargaining unit. 19 Del.C. §1302(j).

The Respondent, Delaware State University (“DSU”) is a public employer within the meaning of 19 Del.C. §1302(p)

AAUP and DSU are parties to a current collective bargaining agreement which term extends from July 1, 2002 through August 31, 2009. This Agreement contains the following provision concerning negotiations during the term of the Agreement:

This Agreement shall be in full force and effect beginning July 1, 2002. This Agreement shall continue in force and effect until August 31, 2009. The Parties agree to open negotiations on economic and limited special issues

presented by either party to commence no later than the third year (February 28, 2004) and the fifth year (February 28, 2006) of this Agreement.

Whenever such notice is given by either party of a proposed change, the nature of any proposed change desired must be stated in the notice and the parties shall promptly enter into negotiations.

If pursuant to such negotiations an agreement on renewal or modification of this Agreement is not reached prior to the expiration date, this Agreement shall continue in effect during the period of negotiations until a new Agreement is reached.

In recognition of the budgetary process of the State of Delaware, both parties agree to begin preliminary discussion that would be directly affected by the State budget request for the next fiscal year during August of the final fiscal year of this Agreement. [Article 23.2]

On or about October 20, 2003, DSU notified the AAUP that it wished to reopen negotiations. The parties agreed that a proposal concerning “Distance Learning” came within the “limited special issue” provision of the reopener clause. DSU indicated it desired to have a relationship with Sessions.edu¹ regarding distance learning.

DSU admits its faculty has “. . . historically been involved in the development and implementation of new courses and education programs.”

On or about April 18, 2005, the DSU Faculty Senate rejected DSU’s proposal to contract with Sessions.edu by a vote of 20 to 5. The proposal was then submitted to and approved by the Board of Trustees in what the AAUP describes as an “extraordinary telephonic meeting . . . so that the Sessions.edu program would become effective immediately.”

On or about April 29, 2005, the AAUP filed an unfair labor practice charge alleging DSU has violated 19 Del.C. §1307(a)(5)² by unilaterally modifying a term and condition of

¹ The Charge alleges that Sessions.edu is a New York based corporation which issues certificates based on courses completed over the internet.

² 19 Del.C. §1307(a): It is an unfair labor practice for a public employer or its designated representative to do any of the following:

employment. The AAUP avers DSU reduced the faculty's role in the governance of the University when the Board of Trustees unilaterally authorized the President of the University to enter into an agreement with Sessions.edu. The AAUP alleges the agreement between DSU and Sessions.edu provides:

. . . [S]tudents would pay sessions.edu whose faculty would provide instruction over the Internet and a certificate of coursework completed. Sessions.edu would transmit a portion of the tuition to DSU, which would issue a masters degree based upon Sessions.edu certification. Sessions.edu has agreed to pay DSU a substantial amount for the rental of DSU's name and prestige.

The Charge requests the Public Employment Relations Board order DSU to bargain with the AAUP in good faith concerning "economic and limited special issues" and to cease and desist from implementing the sessions.edu program prior to reaching agreement with the AAUP concerning Distance Education. The AAUP also requests PERB issue an injunction prohibiting DSU from unilaterally implementing the program prior to the resolution of this unfair labor practice charge.

On May 19, 2005, DSU filed its Answer to the Charge, denying the AAUP's essential allegation that its actions violated the statute or its duty to bargain in good faith. DSU also asserts the charge is barred by "the doctrines of waiver and unclean hands" and, alternatively, that "any alleged factual basis for the unfair labor practice is lawful as a function of management." The University also argues the preliminary relief sought by the AAUP is without factual or legal basis and is unwarranted. DSU requests the charge be dismissed and that the AAUP be required to pay all reasonable costs incurred by DSU with respect to this charge.

The AAUP filed its response on June 1, 2005, denying DSU's affirmative defenses.

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- (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject

DISCUSSION

Regulation 5.6 of the Rules of the Delaware Public Employment Relations Board requires:

- (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 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 has, or 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.

Whether DSU has violated its duty to bargain in good faith depends upon whether the issue of distance learning is a mandatory subject of bargaining. Appoquinimink Education Assn. v. Bd. of Education, Del.PERB, ULP 1-3-85-3-2A, I PERB 35, 37 (1984). A unilateral change in a mandatory subject of bargaining constitutes a *per se* violation of the duty to bargain in good faith and violates 19 Del.C. §1307(a)(5). Brandywine Education Assn. v. Bd. of Education, Del.PERB, ULP 85-06-005, I PERB 131, 143 (1985).

After reviewing the pleadings and considering them in a light most favorable to the Charging Party, I find probable cause exists to believe that an unfair labor practice may have occurred.

The pleadings do not provide enough information as to the nature of the program, whether it is a new program, whether it has been "implemented", the history of AAUP involvement in negotiating programmatic changes, etc., to establish a factual record on which

argument can be received and a decision rendered at this point. Therefore, a factual record must be created for this purpose.

The Public Employment Relations Board is specifically empowered to issue orders providing for temporary and/or preliminary relief in unfair labor practice proceedings, where such relief is determined to be just and proper. 19 Del.C. §1308(c). A successful request for preliminary injunction must establish first that there is a reasonable probability that the Charging Party will prevail on the merits and secondly, that the Charging Party will suffer irreparable harm if its request for relief is denied. Failure to establish either element precludes the awarding of the requested relief. New Castle County Vocational-Technical Education Association v. Bd. of Education, Del. PERB, ULP 88-05-025, I PERB 257, 260 (1988).

The AAUP contends DSU students will be irreparably harmed “. . . if they are induced to take courses leading to a DSU degree, but DSU is later precluded from awarding the degree based upon sessions.edu certification.” DSU students are not a party to this action and the AAUP is the exclusive representative of the interests of the faculty and other professional employees in the bargaining unit. AAUP has not established it will suffer irreparable harm if the University is not preliminarily enjoined at this point.

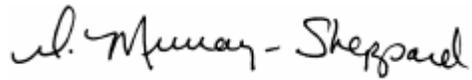
DECISION

Consistent with the foregoing discussion, the pleadings establish a sufficient basis for concluding that there may have been a violation of the statutory duty to bargain in good faith in violation of 19 Del.C. §1307(a)(5). A hearing will be convened as soon as possible for the purpose of creating a record on which a decision can be rendered in this matter.

The AAUP's motion for preliminary injunction is denied because there has been no irreparable harm alleged involving parties to this matter.

IT IS SO ORDERED.

DATE: 22 July 2005

A handwritten signature in cursive script that reads "D. Murray-Sheppard". The signature is written in black ink and is positioned above a horizontal line.

DEBORAH L. MURRAY-SHEPPARD
Hearing Officer
Del. Public Employment Relations Bd.