

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY,	:	
AND MUNICIPAL EMPLOYEES COUNCIL 81,	:	
LOCAL 2305,	:	<b>REVIEW OF THE EXECUTIVE</b>
	:	
Appellant,	:	<b>DIRECTOR’S DECISION</b>
v.	:	
	:	
STATE OF DELAWARE, DEPARTMENT OF HEALTH	:	<b><u>U.L.P. No. 08-04-619</u></b>
AND SOCIAL SERVICES, DELAWARE	:	
PSYCHIATRIC CENTER,	:	
	:	
Appellee.	:	

**Appearances**

*Perry F. Goldlust, Esq., on behalf of AFSCME Local 2305*

*Aaron Shapiro, SLREP, on behalf of the State*

**BACKGROUND**

The State of Delaware (“State”) is a public employer within the meaning of 19 Del.C. §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 agency of the State and the Delaware Psychiatric Center (“DPC”) is a facility operated by DHSS.

The American Federation of State, County and Municipal Employees, Council 81, Local 2305 (“AFSCME”) is the exclusive bargaining representative of a bargaining unit of Registered Nurses at DPC, within the meaning of 19 Del.C. §13012(j).

On April 4, 2008, AFSCME filed an unfair labor practice charge alleging DHSS violated 19 Del.C. §1307(a)(1), (a)(2), (a)(5), and (a)(8) by interfering with the individual rights of bargaining unit members and the internal administration of the union. The Charge also alleged

the State had failed or refused to provide information to AFSCME which was necessary to effectively represent the Union President in a disciplinary grievance. The State filed its Answer on April 16, 2008, denying all material allegations and asserting under New Matter that the charges relating to the alleged failure to provide information should be deferred to the negotiated arbitration procedure. AFSCME responded by denying the State's New Matter.

A Probable Cause Determination was issued by the Executive Director on August 4, 2008, in which the charges relating to the failure to provide information were deferred to the negotiated arbitration procedure. A full hearing was conducted on October 8, 2008 and written argument was submitted by the parties.

On January 22, 2009, the Executive Director issued her decision dismissing the Charge, finding that "the evidence presented does not support the allegation that DHSS/DPC interfered with or intended to interfere with bargaining unit members in the exercise of their statutory rights and/or with the internal administration of the Union in violation of 19 Del.C. §1307(a)(1) and/or (a)(2)."

On or about January 30, 2009, AFSCME requested review of the Executive Director's decision. The State moved AFSCME's Request for Review be dismissed January 30, 2009, asserting the appeal was not timely filed. AFSCME responded on February 2, 2009, opposing the State's Motion.

A copy of the complete record in this matter was provided to each member of the Board and the full Board convened in public session on February 18, 2009, to consider AFSCME's request for review. The parties were permitted the opportunity to make argument and answer the questions of the Board at that time.

## DISCUSSION

### I. Motion to Dismiss Appeal as Untimely

Any request for review of a decision by the Executive Director must be filed in accordance with PERB Rule 7.4, which states in relevant part:

#### 7.4 Review of the Executive Director's Decision

The Executive Director's decision shall be subject to review by the Board at the request of any party, or upon the Board's own motion. Such a request for review by a party must be filed with the Board within five (5) days of the date upon which the party is served with the decision...

The record includes a copy of the January 22, 2009 letter from the Executive Director to the parties which transmitted the decision. The letter notes that the decision was transmitted both by electronic transmission (e-mail) and by U.S. Mail. The e-mail transmission was executed at 4:27 p.m. on Thursday, January 22, 2009. During the hearing before this Board on February 18, the Executive Director advised that the hard copy was not placed in the U.S. mail to the parties until the following morning (Friday, January 23, 2009) because the State mail room in the Carvel State Office Building ceases accepting and processing mail between 3:30 and 4:00 daily.

AFSCME's counsel provided a copy of the decision which he received by U.S. Mail and which was date stamped in his office on Monday, January 26, 2009. It is undisputed that AFSCME filed its Request for Review on Friday, January 30, 2009.

The State argues the appeal is untimely based upon PERB Rules 1.1 and 7.4.

#### 1.1 Computation of Time

- (a) In computing any period of time prescribed by or allowed by the Act, these Regulations or an Order of the Board, the day of the act or event after which the designated period of time begins to run shall be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period shall run until the end of the next day which is neither a Saturday, Sunday or legal holiday.
- (b) Whenever a party has the right or is required to do some act or take action within a prescribed period after service of a notice or other paper, and the notice or other paper is served by mail, three (3) days shall be added to the

prescribed period; provided, however, that three additional days shall not be added to any extension of such time that may have been granted...

AFSCME disputes the State's timeliness argument based upon the January 26, 2009, date stamp which it asserts evidences its receipt of the hard copy of the decision. It argues that the time for filing an appeal began to run with its receipt of the mailed copy of the decision.

A recent Superior Court decision required that all time lines relating to the filing of an appeal pursuant to Rule 7.4 must be strictly construed, "Board Regulation 1.9<sup>1</sup> provides that the Board rules are to be liberally construed, but Regulation 1.10<sup>2</sup> states that '[n]otwithstanding the provisions of Regulation 1.9 ... the Board shall strictly construe all time limitations contained in the Act or in these Regulations.'" *AFSCME Council 81 v. State of Delaware, Office of Management and Budget, and the Public Employment Relations Board*, Del. Super., C.A. 08M-02-078-JEB, VI PERB 4079, 4081(Babiarz, Jr., 2008).

Rule 1.3, Service and Filing of Documents: Proof of Service, defines "service" at subsection (d):

- (d) Service shall be complete upon personal delivery, depositing of the message or document with a telegraph company, charges prepaid, or depositing the message with the United States mail, properly addressed and stamped.

Rule 1.3 defines service to have been completed when the decision was placed in the mail on January 23, 2009. Rule 1.3(b) requires that when service is made through the U.S. Mail, "three (3) days shall be added to the prescribed period." Applying Rule 1.1(a), the appeal period ran for eight days from and including January 23, 2009, on which the decision was served by placing it in U.S. mail. The appeal period closed on Friday, January 30, 2009.

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<sup>1</sup> 1.9 Construction of the Regulations: These regulations set forth rules for the efficient operation of the Board and the orderly administration of the Act. They are to be liberally construed for the accomplishment of these

<sup>2</sup> 1.10 Timeliness: Notwithstanding the provisions of Regulation 1.9, and so that the Act may be efficiently enforced and disputes thereunder swiftly resolved, the Board shall strictly construe all time limitations contained in the Act and in these Regulations.

Consequently, AFSCME's appeal is timely and the State's Motion to Dismiss based on timeliness is denied.

## II. Review of the Merits

The Executive Director concluded that the record in this case was insufficient to conclude that DHSS, by and through its investigation of the harassment complaint against the Union President, interfered with or intended to interfere with bargaining unit members of their statutory rights and/or with the internal administration of the Union in violation of 19 Del.C. §1307(a)(1) and/or (a)(2). Upon consideration of the record below and arguments presented on appeal, the Board finds the decision of the Executive Director is supported by the record and that she did not commit an error of law or otherwise abuse her discretion.

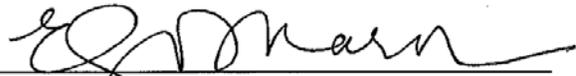
Not every investigation which involves or concerns a union official is presumptively based on union animus. In this case, AFSCME argues that the proof of the animus is evidenced by the escalation in the proposed discipline of the union president from verbally counseling to a five day disciplinary suspension. The Executive Director did not find any evidence to support the animus claim and on review, the Board does not see where she missed any evidence that might have materially changed the decision.

The record supports the conclusion that the investigation was initiated because of an employee complaint, which DHSS investigated. There is no support for the conclusion that DHSS initiated the investigation for the purpose of targeting the Union President or based on an improper motive. The facts on the record do not establish a prima facie case of animus. There is no nexus established between the investigation and any improper motive or impact on either individual employees or the administration of the unions.

**DECISION**

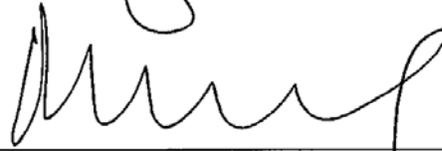
For the reasons set forth above, following review of the complete record in this case, the Public Employment Relations Board finds AFSCME's appeal was timely within the requirements of PERB Regulation 7.4 and also unanimously affirms the decision of the Executive Director to dismiss the Charge as unsupported by the evidence of record.

**IT IS SO ORDERED.**



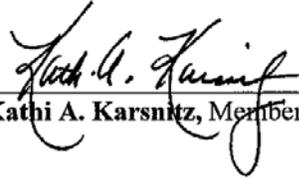
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**Elizabeth D. Maron, Chairperson**



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**R. Robert Currie, Jr., Member**



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**Kathi A. Karsnitz, Member**

DATED: March 9, 2009