

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY,	:	
AND MUNICIPAL EMPLOYEES, COUNCIL 81,	:	
LOCAL UNION 3936,	:	
	:	
Charging Party,	:	<u>ULP 10-09-765</u>
	:	
v.	:	Probable Cause
	:	Determination
STATE OF DELAWARE, DEPARTMENT OF STATE,	:	
DELAWARE VETERANS HOME,	:	
	:	
Respondent.	:	

BACKGROUND

The State of Delaware (“State”) is a public employer within the meaning of section 1302(p) of the Public Employment Relations Act, 19 Del.C. Chapter 13. The Department of State (“DOS”) is an agency of the State and the Delaware Veterans Home (“DVH”) is a facility operated by DOS.

The American Federation of State, County and Municipal Employees, Council 81, Local Union 3936, (“AFSCME”) is an employee organization within the meaning of 19 Del.C. §1302(i). It is the exclusive bargaining representative, within the meaning of 19 Del.C. §1302(j), of certain State employees working at DVH, including Dieticians, Certified Nursing Assistants (“CNA”), Licensed Practical Nurses (“LPN”), Activity Aides, Advance Practice Nurses and Registered Nurses (“RN”).¹

¹ AFSCME was certified as the exclusive bargaining representative of State Merit Unit 2 (non-professional patient care positions) under 19 Del.C. §1311A on April 29, 2008. AFSCME was certified as the exclusive bargaining representative of State Merit Unit 6 (professional patient care

On September 8, 2010 AFSCME filed an unfair labor practice charge with the Public Employment Relations Board (“PERB”) against the State alleging conduct in violation of 19 Del.C. §1307(a)(1), (a)(2), (a)(3) and/or (a)(5), which provide:

- (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 in or because of the exercise of any right guaranteed under this chapter.
 - (2) Dominate, interfere with or assist in the formation, existence or administration of any labor organization.
 - (3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.
 - (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.

Specifically, the charge alleges that when DVH announced a new shift schedule which included changes to the hours of work of bargaining unit employees, the State unilaterally altered the status quo of a mandatory subject of bargaining. DVH circumvented AFSCME by announcing the changes directly to bargaining unit employees without first negotiating with the union and by ignoring the AFSCME’s requests to initiate negotiations. By these actions, DVH “fomented discord and undermined the union’s support and credibility” with the bargaining unit.

The Charge alleges that one member of the bargaining unit, an RN who works a

positions) under 19 Del.C. §1311A on July 10, 2010. A “terms and conditions” bargaining unit of Professional and Non-professional Patient Care employees at the Delaware Veterans Home was certified under 19 Del.C. §1310 on October 1, 2010.

compressed work schedule would have to resign if the announced change was implemented. AFSCME alleges the new schedule would result in the constructive discharge of this RN, a union supporter, who was active in the organizing effort.

By letter dated September 9, 2010, the State responded DVH had voluntarily elected to stay implementation of the planned September 12, 2010 schedule change. The State also requested an extension of time in which to file its response to the Charge “in order to allow and encourage the parties to seek a mutual resolution of AFSCME’s claims.” The extension was granted by PERB and the State was directed to provide its Answer to the Charge on or before Monday, October 25, 2010.

When the State failed to file its Answer by October 25, PERB requested a status update on the parties’ efforts to reach a mutual resolution. Through numerous pieces of correspondence, the parties agreed they had not been able to resolve the underlying issue. The State was again requested to file its Answer to the Charge, and after being granted a second extension, the Answer was received on November 8, 2010.

In its Answer, the State denied many of the factual and legal assertions of the Charge. It asserts in ¶18,

...[W]ithout waiving any denial, the State denies AFSCME had any authority as an exclusive representative of RN positions at DVH at any time relevant and material to the Charge. Further answering and without waiving any denial, at all times relevant and material to the Charge the State denies AFSCME secured any separate or independent right or authority to represent and negotiate on behalf of any position at DVH outside of the context of coalition bargaining authorized by 19 Del.C. §1311A. Further answering and without waiving any denial, the State does not assert that AFSCME is presently without any authority as an exclusive representative, but does assert that it has initiated efforts with AFSCME to resolve any concerns with scheduling practices, and that the parties are now progressing to general negotiations with the non-compensation bargaining unit representing RNs, LPNs and CNAs, which was certified after the initial Charge was filed.

The State requests the Charge be dismissed and that the requested relief be denied. No new matter was alleged to which a response was permitted.

This Probable Cause Determination is based upon a review of the pleadings.

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.

For purposes of determining 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. *Flowers v. DART/DTC*, Del.PERB, Probable Cause Determination, ULP 04-10-453, V PERB 3179, 3182 (2004).

It is undisputed the State "decided to make the schedule changes" and that the Union was not involved in collective bargaining (as that term is defined in 19 Del.C. 1302(e)) concerning the schedule change prior to the filing of the Charge. Exhibit 3 to

the Charge indicates the “restructured schedule” included changing from 12.5 hour daily shifts to 7.5 hour daily shifts. The State admits that the restructured schedule would also require employees to extend their shifts from the existing five minute overlap to fifteen minutes at both the start and end of each shift. The State admits in ¶8 of its Answer,

DVH consulted with the nursing employees to determine individual scheduling preferences and choice, including direct meetings with employees to confirm their choice of shifts and days off. Those choices were then compiled and posted on September 3, 2010 for the RNs/LPNs and on September 7, 2010 for CNAs.

The shift was scheduled to go into effect on September 12, 2010.

There are three elements which must be established in order for AFSCME to prevail on this charge, namely, 1) did DVH announce a unilateral change; 2) did the announced change affect a mandatory subject of bargaining; and 3) would the announced change unilaterally alter the status quo of a mandatory subject of bargaining in violation of 19 Del.C. §1307(a)(5)? *AFSCME Local 936 v. DHSS, DHCI*, ULP 08-02-618, VI PERB 3971, 3974 (Del. PERB, 2008).

The subject of this unfair labor practice charge specifically involves an alleged unilateral change in hours, which is defined to be a mandatory subject of bargaining. 19 Del.C. §1302(t).² Paragraphs #4 and #5 of the Charge and Answer raise factual issues relating to whether the announced change was unilateral. Viewed in a light most favorable to the charging party, the pleadings establish a sufficient basis to believe an unfair labor practice may have occurred.

This Board’s early decision in *Christina Education Association, Inc. v. Board of*

² “Terms and conditions of employment” means matters concerning or related to wages, salaries, hours, grievance procedures and working conditions; provided, however, that such term shall not include those matters determined by this chapter or any other law of the State to be within the exclusive prerogative of the public employer.

*Education of Christina School District*³, in which the employer announced a change in starting time for bargaining unit employees, is instructive in the current matter:

Unilateral disruptions of the status quo are unlawful because they frustrate the statutory objective of establishing working conditions through the collective bargaining process. *Appoquinimink Education Assn. v. Gd. Of Education*, ULP 1-2-84A, I PERB 23 (Del.PERB, 1984). The status quo of a term and condition of employment is subject to change only through the collective bargaining process. *New Castle County Vo-Tech Education Assn. v. Bd. of Education*, ULP 88-05-025, I PERB 309 (Del. PERB, 1988).

The statute clearly establishes that the parties are obligated to negotiate in good faith with respect to terms and conditions of employment... which "...means matters concerning or related to wages, salaries, hours, grievance procedures and working conditions." The question of starting time is, therefore, a mandatory subject of bargaining within the parameter of hours.

The District argues that it fulfilled its obligation to bargain in good faith by communicating with the Association in late July, 1988. What constitutes good faith bargaining can only be determined by review of the totality of the conduct by the parties, on a case-by-case basis. *Smyrna Education Assn. v. Bd. of Education*, ULP 87-08-15, I PERB 207 (Del. PERB 1987). By its own testimony the District established that it was aware of the magnitude of its transportation problems throughout the 1987-88 school year. On July 20, 1988, its intent to start secondary schools at 7:15 a.m. was distributed to administrators in preparation for the new school year. Whether or not this was a draft policy is not as important as the fact that the District had unilaterally decided upon a solution which involved the alteration of a mandatory subject of bargaining.

...[T]he facts support the Association's contention that it was presented with a fait accompli and asked to "go along" only as an afterthought. ... The burden in on the party seeking change in a mandatory subject of bargaining to provide the other side with timely notice of its desire and to provide the opportunity for good faith bargaining... In this case, the Christina School District provided neither timely notice of its desire to alter school hours nor did it attempt to constructively bargain such a modification with the Association.

The State raises a legal issue as to whether AFSCME had any "separate or independent right or authority to negotiate on behalf of any position at DVH outside of the context of coalition bargaining as authorized by 19 Del.C. §1311A" at the time of the

³ ULP 88-09-026, I PERB 359,367 (Del.PERB, 1988)

announced schedule change. This legal question will be addressed preliminarily in a decision on the underlying merits. It is noted, however, that the State does not claim that AFSCME is not currently the exclusive bargaining representative for purposes of terms and conditions bargaining for the employees at issue in this matter.

Concerning the allegations of interference with employee rights and/or unlawful interference, domination, or assistance in the formation, existence or administration of the union, the test is well established under Delaware case law.

The test is not whether any employee was actually intimidated, coerced or restrained, but whether the conduct reasonably tended to interfere with either the free exercise of employee rights or administration of the union. An objective standard is required to evaluate that “reasonable tendency.” *Sussex County Vo-Tech Teachers’ Assn. v. Bd. of Education*, ULP 88-01-021, I PERB 287, (Del.PERB, 1988).

The test is also well-established for union animus (an alleged violation of §1307(a)(3)), which has been alleged concerning the effect of the announced schedule change on Karen Monahan, who AFSCME asserts was an activist in the union organizing drive. AFSCME has the burden to establish a prima facie case that 1) the employee was engaged in protected activity; 2) the employer was aware of the employee’s activities; and 3) the protected activity was a substantial or motivating factor in the employer’s action. Once that is established, the burden shifts to the employer to establish the presence of a legitimate business interest which, despite the protected activity, would have resulted in the same employment decision. *Colonial E.A. v. Colonial School District*, ULP 93-11-095, II PERB 1071, 1077 (Del.PERB, 1994), citing *Wilmington Firefighters Assn. v. City of Wilmington*, ULP 93-06-085, II PERB 935, 954 (Del. PERB, 1994).

DETERMINATION

A review of the pleadings in this matter supports the finding that there is probable cause to believe that the change in hours announced by the State may constitute a violation of 19 Del.C. §1307 (a)(1), (a)(2), (a)(3), and (a)(5), as alleged.

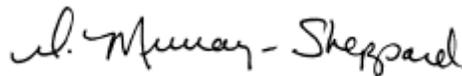
The pleadings raise questions of fact which can only be resolved following a hearing convened for the purpose of creating an evidentiary record upon which a decision can be rendered.

There are also a number of legal issues raised by the pleadings on which the parties will be permitted to present argument, based upon the evidentiary record.

A hearing will be scheduled forthwith and pre-hearing conference will be held for the purpose of defining the issues to be addressed at the hearing.

In its Answer, the State confirms that no schedule change has been implemented. The parties are encouraged to continue their efforts to negotiate a mutually acceptable resolution of this dispute.

DATE: November 22, 2010



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