

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

DELAWARE STATE UNIVERSITY,)	
)	<u>ULP No. 05-06-487</u>
Petitioner,)	
)	Probable Cause Determination
AMERICAN FEDERATION OF STATE, COUNTY &)	
MUNICIPAL EMPLOYEES, AFL-CIO,)	
COUNCIL 81, AND ITS LOCAL UNIONS 1007 &1267,)	
)	
Respondent.)	

BACKGROUND

Charging Party Delaware State University (“DSU”) is a public employer within the meaning of §1302(p) of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13 (1986).

The Respondent, American Federation of State, County and Municipal Employees, AFL-CIO, Council 81 and its Local Unions 1007 and 1267 (“AFSCME”) is an employee organization which admits to membership DSU employees and has as a purpose the representation of those employees in collective bargaining, pursuant to 19 Del.C. §1302(i). AFSCME Local Union 1007 is the exclusive collective bargaining representative of the bargaining unit of Clerical/Technical employees as defined in DOL Case 1167; AFSCME Local Union 1267 represents a unit of DSU Plant Maintenance employees as defined by DOL Case 44. Del.C. §1302(j).

DSU and AFSCME were parties to a collective bargaining agreement with a term of July 1, 1998 through June 30, 2001.¹ That Agreement covers three AFSCME bargaining units, including those represented by Locals 1007 and 1267, plus Local 2888, which represents a bargaining unit of DSU Public Safety employees.² The collective bargaining agreement contains the following provision, Article XXXI, entitled “Term of Agreement”:

This agreement should go into effect as of July 1, 1998 and continue in effect through June 30, 2001, and from year to year thereafter unless at least ninety (90) days prior to the expiration date of this Agreement, or any anniversary date thereafter, notice in writing shall be given to either party by the other party of the desire to amend, alter, abrogate or negotiate a new Agreement.

On or about June 29, 2005, DSU filed this unfair labor practice charge against AFSCME alleging violations of 19 Del.C. §1307 (b)(2) and (b)(3), which provide:

- (b) It is unfair labor practice for a public employee or for an employee organization or its designated representative to do any of the following:
 - (2) Refuse to bargain collectively in good faith with the public employer or its designated representative if the employee organization is an exclusive representative.
 - (3) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

Specifically, DSU alleges the parties’ collective bargaining agreement expired on June 30, 2005. Prior to that expiration, the parties had engaged in unsuccessful negotiations for mid-term modifications to the Agreement. The parties agreed to Ground Rules for those negotiations on or about June 1, 2004, which included:

Beginning not later than January 15, 2005, the individual AFSCME units (1007, 1267 and 2888) will begin to negotiate new agreements (for each unit) to be effective July 1, 2005. [*Charging Party Exhibit A*]

¹ The cover of the collective bargaining agreement indicates the term extends through 2002. AFSCME contends at ¶ 4 of this New Matter that there was a one year mutual renewal of the contract from July 1, 2001 through June 30, 2002.

² AFSCME Local 2888 is not a party to this dispute.

When the parties failed to resolve their “mid-term negotiations”, DSU advised AFSCME on or about March 14, 2005, that it would initiate negotiations for an agreement to be effective July 1, 2005, pursuant to the parties’ negotiation Ground Rules. The letter was addressed to AFSCME’s Chief Negotiator and was authored by DSU’s Chief Negotiator and Vice President for Human Resources and Legislative Affairs, Mark Farley:

This letter is to clarify the status of our negotiations with each of the three AFSCME Locals (1007, 1267, 2888). In March 2004, we resumed negotiations with the intention of reaching an agreement that would expire on June 30, 2005. We had agreed in our Negotiating Ground Rules dated June 1, 2004, (attached) that the current collective bargaining agreement would terminate by mutual agreement and by operation of law on June 30, 2005 regardless of whether we reached an agreement on revisions to the current agreement or not. In view of the fact that an agreement has not been reached to date, we believe it would be more productive to commence negotiations for the a *[sic]* new contract rather than try to negotiate changes to an existing agreement that will expire in less than 90 days from today.

We have agreed to meet with each of the Units in April 2005 to negotiate an agreement that would become effective July 1, 2005 (if ratified by both parties prior to that date). Accordingly, the University plans to provide you with its opening proposal sufficiently in advance of those meetings to enable you to review them and be prepared to negotiate. We also encourage the Unions to provide us with their opening proposals in anticipation of the first meeting to negotiate the contract to be effective July 1, 2005.

We further propose that all negotiations, beyond those already scheduled, be held during non-compensable time. *[Charging Party Exhibit B]*

On or about April 11, 2005, DSU submitted to AFSCME “a comprehensive two-year proposal through June 30, 2007³, containing changes to the collective bargaining agreement that [was] to expire on June 30, 2005.” *[Charging Party Exhibit C]*

DSU alleges that AFSCME has “flatly refused” to negotiate any of DSU’s April 11, 2005 proposals, and that AFSCME has taken the position that the parties “can only negotiate the subjects that were raised as part of the mid-term negotiations.” DSU argues AFSCME’s position

³ Charging Party Exhibit C’s cover page is entitled “04-05 Proposal, Delaware State University, Dover, Delaware, UNION CONTRACT, American Federation of State, County and Municipal Employees, AFL-CIO, and its Locals Number 1007, 1267, 2888”

is inconsistent with the parties' negotiated Ground Rules and fails to consider that the parties are now engaged in negotiations for a new longer-term agreement, rather than for mid-term modifications.

DSU requests PERB to 1) find that AFSCME violated the statute by refusing to bargain in good faith; 2) order AFSCME to cease and desist from all actions which violate the statute; 3) affirmatively order AFSCME to negotiate in good faith with respect to DSU's current proposals; 4) order AFSCME to reimburse DSU for its costs of filing this charge, including its reasonable attorneys' fees; and 5) provide such other appropriate relief as the Board deems just and proper.

On or about July 20, 2005, AFSCME filed its Answer to DSU's charge in which it denied all material allegations contained therein. The Answer also contained New Matter, which included a counter-charged alleging that DSU violated 19 Del.C. §1307 (a)(2) and (a)(5).

- (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
 - (2) Dominate, interfere with or assist in the formation, existence or administration of any labor organization.
 - (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, in support of its counter-charge, AFSCME asserts it placed DSU on notice of its desire to negotiate a successor agreement prior to the June 30, 2002 anniversary of the contractual expiration in accordance with Article XXXI of that agreement. Thereafter, on September 11, 2002, the parties entered into negotiations.⁴ At that time, DSU's Chief Negotiator was Clifton Coleman.

During the negotiations which began on September 11, 2002, the parties agreed upon ground rules which required that all proposals for changes to the collective bargaining agreement must be introduced within the first three sessions. The parties complied with this requirement

⁴ There is no dispute that the parties did, in fact, enter into negotiations on 9/11/02.

and over the course of the next seven months, the parties had approximately ten negotiation sessions.

AFSCME asserts the negotiations were suspended briefly between April 23 and the fall of 2003 after DSU took the position that it was unable to afford salary increases. That position was later rescinded and negotiations resumed in the fall of 2003, with DSU bringing a new Chief Negotiator, Sheila Davis.

Negotiations continued until March 4, 2004, when Mark Farley became Chief Negotiator for DSU. Following his appointment, AFSCME alleges DSU presented a new set of proposals, contrary to the parties' ground rules. The Counter-Charge asserts at ¶17 that, “. . . in an effort to avoid a stalemate in negotiations, the Union agreed to permit DSU to introduce new proposals limited to . . . work and overtime scheduling; exclusion of FLSA exempt and confidential positions from the Union (in a separate discussion outside of negotiations); grievance procedure; essential personnel; creation of a new “Employee Rewards Program”; and compensation.”

On or about June 1, 2004, the parties again agreed to a modified set of Negotiating Ground Rules. The parties continued to negotiate and agreed to language modifications which AFSCME attached to its Answer. [*Union Exhibit 1*] Negotiations continued until AFSCME received the March 14, 2005, letter from Chief Negotiator Farley advising that the “collective bargaining agreement would terminate by mutual agreement and by operation of law on June 30, 2005.” DSU presented its “Opening Proposal” at the next negotiation session of April 23, 2005. AFSCME asserts the scope of the purported “Opening Proposal” again exceeded the scope of the negotiations agreed to pursuant of the parties' ground rules, and violated DSU's obligation to bargain in good faith.

Subsequently, on July 5, 2005, DSU informed AFSCME it would unilaterally implement its “Opening Proposal” and that it refused “to agree to arbitration as the last step of the grievance

procedure.” Further, DSU Chief Negotiator Farley issued the following memorandum to DSU employees in bargaining units represented by AFSCME:

DATE: 7/5/05
TO: Employees of AFSCME Locals 1007, 1267, and 2888
FROM: Mark Farley, Vice President of Human Resources
RE: Classified Employee Collective Bargaining

As you know the collective bargaining agreement with AFSCME has expired. Unfortunately the University and AFSCME did not reach a new agreement.

We are advising you that since the contract expired, there is no legal obligation that you must belong to the Union or pay dues or a service fee. You have the right to be a member of the Union or not be a member – it is your decision. If you wish, you can revoke your membership by advising the Union that you no longer wish to be a member. The University has no position on that issue; we just want you to know what your rights and options are. Since those options have changed due to the contract’s expiration, I am advising you of the change.

Similarly, you now have the right to revoke your dues deduction from your paycheck. You can simply send me a note (signed and dated) indicating that you no longer want any deductions taken from your paycheck for either dues or service fees. Again, this choice is totally up to you. *[Respondent Exhibit 2]*

AFSCME argues that by introducing new proposals three years into the parties’ negotiations, the threat or actual implementation of its “Opening Proposal” without impasse, the issuance of the letter to bargaining unit members concerning withholding of dues and service fees, and the refusal to arbitrate grievances violate DSU’s duty to bargain in good faith. 19 Del.C. §1307(a)(5). Further, its actions concerning the deduction of dues and service fees and refusal to arbitrate grievances dominate, interfere with or assist in the formation, existence or administration of any labor organization in violation of §1307(a)(2)

AFCME requests in its Counter-Charge that PERB 1) find DSU has committed an unfair labor practice; 2) compel DSU to maintain the status quo ante of the conditions that existed before DSU presented its “Opening Proposal”; 3) require DSU to notify every member of the bargaining unit and post a notice prominently on employee bulletin boards, that it continue to

collect Union dues and service fees; 4) require DSU to continue to process grievances through arbitration, where necessary; 5) require DSU to honor the language agreed to by the parties until impasse resolution procedures have been completed; 6) order DSU to participate in good faith in PERB mediation and binding interest arbitration proceedings, if necessary; and 7) require DSU to pay AFSCME's attorney's fees and such other remedies as deemed fair and equitable.

On or about August 12, 2005, DSU filed an Answer to the Counter-Charge, denying all material allegations, and asserting AFSCME's complaint is barred by the doctrines of waiver and unclean hands. On August 17, 2005, AFSCME denied DSU's affirmative defenses.

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.

The duty to bargain in good faith compels meaningful negotiations but does not require "either party to agree to a proposal or require the making of a concession." 19 Del.C. §1302(e). In one of the earliest cases decided by the Delaware PERB, the standard was established for evaluating the quality of negotiations when questioned by one of the parties:

When deciding failure to bargain in good faith issues, it is necessary to examine the "totality of conduct" of the parties. NLRB v. Montgomery Ward, 9th Cir., 133

F.2d 676 (1943). The validity of a single position can only be ascertained from the overall record. While a party's posture as it relates to a particular subject, in and of itself, might qualify as an unfair labor practice, viewed in the light of the continuing and evolving negotiations process, it may well prove otherwise. It is the totality of conduct which tests the quality of negotiations. Absent sufficient proof of an unwillingness by the party charged to maintain an open mind and a willingness to sincerely search for common ground upon which settlement can be based, it is not the Board's prerogative to dictate bargaining strategy. Seaford Education Association v. Bd. of Education, Del.PERB, ULP 2-2-84S, I PERB 1, 7 (1984).

This Board has consistently held that conduct which is inherently destructive of the collective bargaining process constitutes a *per se* violation of the duty to bargain in good faith. Examples of *per se* violations include the unilateral change in the status quo of a mandatory subject of bargaining such as the refusal to process a grievance as required by the negotiated grievance procedure (Indian River Ed. Assn. v. Bd. of Education, Del.PERB, ULP 90-09-053, I PERB 667 (1990)); and unilaterally changing existing benefit plans (New Castle County Vo-Tech Education Assn. v. Bd. of Education, Del.PERB, ULP 88-05-025, I PERB 309 (1988)).

DSU relies upon its construction of the contractual expiration language and the parties' negotiating ground rules dated June 1, 2004, to support its description of the negotiations which undisputedly occurred between September 2002 and April 23, 2005, as concerning "mid-term modifications". Its argument implies that the parties had an agreement that if those negotiations were not successful, the parties were free to walk away from any tentative agreements or understandings reached during those two and a half years of negotiations, and begin to negotiate a new agreement, beginning with a clean slate.

AFSCME disputes DSU's construction of the parties' ground rules and understandings. PERB has a long line of case precedent which clearly establishes that unilateral changes in the status quo of mandatory subjects of bargaining, even after impasse resolution procedures have been initiated, constitute *per se* violations of the duty to bargain in good faith. While it is conceivable that parties could agree to a post-expiration change, the burden is on the party

asserting such agreement to establish the existence of that agreement. This is DSU's responsibility in this case.

There is no question that the grievance procedure is a mandatory subject of bargaining under the PERA. PERB has consistently held that unilateral changes in the negotiated grievance procedure, even after nominal expiration of a collective bargaining agreement, violates the duty to bargain in good faith.

DSU Vice President Farley's July 5, 2005 letter concerning DSU's suspension of dues and/or fair share payroll deductions raises a question as to whether this action interfered with the existence or administration of the Union. That will be the Union's responsibility to establish.

There are many questions raised by these pleadings which require both evidence and argument to evaluate. Those questions include:

- 1) Was there agreement between the parties the negotiations which undisputedly occurred between September 11, 2002, and April 23, 2005 were for "mid-term modifications" to an existing bargaining agreement? Was there a mutual agreement to extend the collective bargaining agreement from July 1, 2001 through June 30, 2005?
- 2) Did AFSCME "flatly refuse" to continue negotiations on April 23, 2005, contrary to its duty to bargain in good faith and does that violate 19 Del.C. §1307(b)(2) under the circumstances?
- 3) Did DSU unilaterally implement its "Opening Proposal" and if so, did that constitute a violation of 19 Del.C. §1307(a)(5)?
- 4) Did DSU's July 5, 2005, letter to bargaining unit employees instructing them as to how to withdraw their assent to have dues and/or service fees withdrawn from their paychecks violate 19 Del.C. §1307(a)(2)?

- 5) Did DSU unilaterally refuse to process grievances to arbitration, and if so, did that action violate 19 Del.C. §1307(a)(2) and/or (a)(5)?

The pleadings raise sufficient cause to require a hearing be held to establish a record on which the charge and counter-charge can be considered.

DECISION

Consistent with the foregoing discussion, the pleadings establish probable cause to believe that AFSCME and/or DSU may have violated its duty to bargain in good faith, and that DSU may have dominated, interfered with or assisted in the formation, existence or administration of the labor organization. The pleadings raise a number of factual and legal disputes, which can only be resolved following receipt of evidence and argument.

WHEREFORE, a hearing will be scheduled within the next thirty days to receive such evidence and argument in order that a decision can be rendered on the claims of the parties.

IT IS SO ORDERED.

DATE: 18 November 2005



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