

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF:	:	
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AMERICAN FEDERATION OF STATE, COUNTY, AND	:	
MUNICIPAL EMPLOYEES, AFL-CIO,	:	
COUNCIL 81, LU 3384,	:	
	:	
AND	:	<b>Mediation Request</b>
	:	<b><u>06-09-538</u></b>
	:	
STATE OF DELAWARE, DEPARTMENT OF SERVICES	:	
FOR CHILDREN, YOUTH, AND THEIR FAMILIES,	:	
DIVISION OF YOUTH REHABILITATIVE SERVICES.	:	

Appearances

*Aaron Shapiro, SLRS/HRM/OMB, for State of Delaware, DSCYF, DYRS  
Patricia Bailey, for AFSCME Council 81, LU 3384*

The State of Delaware (“State”), is a public employer within the meaning of §1302(p) of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13 (1994).<sup>1</sup> The Department of Services for Children, Youth and their Families (“State”) is an executive branch department of the State and the Division of Youth Rehabilitative Service (“DYRS”) is a State agency.

The American Federation of State, County and Municipal Employees, Council 81 (“AFSCME”), is an employee organization within the meaning of 19 Del.C. §1302(i).<sup>2</sup>

<sup>1</sup> “Public employer” or “employer” means the State, any county of the State or any agency thereof, and/or any municipal corporation, municipality, city or town located within the State or any agency thereof, which upon the affirmative legislative act of its common council or other governing body had elected to come within the former Chapter 13 of this title, or which hereinafter elects to come within this chapter, or which employs 100 or more full-time employees.

<sup>2</sup> “Employee organization” means any organization which admits to membership employees of a public employer and which has as a purpose the representation of such employees in collective bargaining, and includes any person acting as an officer, representative, or agent of said organization.

AFSCME, through its Local Union 3384, is the exclusive bargaining representative of a bargaining unit DSCYF/DYRS employees which includes Youth Rehabilitation Counselor Supervisors.

The State and AFSCME are parties to a current collective bargaining which term extends from June 19, 2003 through June 19, 2006. Article 20.2 of that Agreement provides that it shall automatically renew annually “unless either party shall give the other party written notice of desire to terminate, modify, or amend” the Agreement by December 21 of any year. Such notice was not provided by December 21, 2005 and the parties are not currently engaged in negotiations for a successor agreement.

On September 26, 2006, AFSCME filed with the Public Employment Relations Board (“PERB”) a Request for Mediation under Article 8, Work Week and Work Schedules, of the Agreement. Specifically, AFSCME bases its request on subsection 8.3 of the Agreement:

The parties agree that work schedule changes and/or work flexibility may be necessary. Prior to any systematic change in existing work schedules, the State will give the Union 45 days advance notice. Within seven days after the notice date, the State and the Union will meet to discuss the changes and explore options and alternatives. If there is no agreement within 10 days after the notice date, the State or the Union may notify PERB of the need for mediation. Within 15 days after the notice date, the first mediation session will be scheduled. There will be no more than 3 mediation sessions. The mediation sessions shall be scheduled within 15 and 30 days after the notice date. If there is no agreement 30 days after the notice date, the mediator will prepare his/her written findings. The mediator’s written findings shall be submitted to the parties no later than 7 days after the final mediation session. The Secretary for the Department of Children, Youth and Their Families or his/her designee shall review the findings and issue a decision within 7 days of receipt of the mediator findings.

By letter dated October 2, 2006, the Public Employment Relations Board (“PERB”) requested that AFSCME and the State provide background on the dispute in accordance with

PERB Regulation 8.1.<sup>3</sup> The letter specifically noted that PERB's statutory responsibility for mediation is provided in §1314 of the Public Employment Relations Act, 19 Del.C. Chapter 13, and further noted the parties' "contractual language requires a number of prerequisite steps for a 'systematic change in existing work schedules'".

On October 11, 2006, the State responded essentially asserting that 1) AFSCME had waived any right to mediation in that it did not follow the contractual procedure to invoke mediation and 2) the schedule change at issue was not "systematic" as specified in Article 8.3 of the Agreement. The State summarized its position in its submission:

Upon reviewing the internal standards of Article 8.3, the Department did provide notice to the Union and an opportunity to meet and discuss the proposed change through the September 27, 2005 meeting between the Superintendent and the Union President. The Union did not request mediation 'within 10 days after the notice date,' nor was any mediation scheduled '[w]ithin 15 days after the notice date...' Therefore the Union has not availed itself of the opportunity for mediation as dictated by the Article. It is worth noting that there is no requirement for mediation under the Article, but only that there is a timely and discretionary opportunity for mediation at the request of either party, under a prescribed set of circumstances.

More importantly, it is the Department's position that the standards and processes under Article 8.3 were never invoked by the weekend supervisory schedule change because there was no 'systematic change' as required by 8.3. The schedule change only applied to supervisory

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<sup>3</sup> PERB Regulation 8.1 Request for Mediation

In the event mediation is requested by one or more of the parties or in accord with 14 Del.C. §4014(a), 19 Del.C. §1614(a) or 19 Del.C. §1314(a), such request must be submitted in writing to the Executive Director and contain at least the following information:

- (1) The name, address and telephone number of the public employer and the name and title of its representative;
- (2) The name, address and telephone number of the exclusive representative, and the name and title of its representative;
- (3) A description of the bargaining unit, including the approximate number of public employees in the unit;
- (4) The dates and duration of negotiation sessions;
- (5) The termination date of the current agreement, if any; and
- (6) A detailed statement of the facts giving rise to the parties' failure to reach agreement, including all issues in debate.

staff; no other employees at the facility were affected. And, no other YRC supervisor schedules outside of the facility were changed to reflect those at the Stevenson House; the New Castle County Detention Center and Ferris School YRC supervisory schedules were not changed in accordance with the changes at the Stevenson House. Consequently there was no 'systematic change' that could properly trigger the mediation procedures under 8.3.

The State maintains that the Department acted appropriately when implementing necessary schedule changes for the Stevenson House supervisory staff. The State further maintains that Article 8.3 of the Agreement was not invoked according to its own terms, but, should it be determined that 8.3 is applicable, then the Union neglected to adhere to the timelines and standards contained therein. For these reasons, the State respectfully requests that the PERB decline to authorize any mediation of this matter.

On October 13, 2006, AFSCME filed its response to PERB's request, wherein it set forth the chronology of events which precipitated the mediation request:

The employees classified as Youth Rehabilitation Counselor Supervisor working at New Castle County Detention Center and Stevenson House work schedules expressly implied in Article 8., Work Week and Work Schedules, Section 8.23 which states:

8.23 New Castle County Detention Center's and Stevenson House's Work Schedule will remain the same, subject to change in accordance with Section 8.3.

The reference Sections 8.3 implies that prior to any change under 8.23, the Union shall be given advance notice of 45 days followed by a mutually agreed upon negotiated process.

On or about October 4, 2005, the 'YRS' Counselor Supervisors received a memorandum informing them of a schedule change to be effective October 20, 2005. The Union filed an institution grievance October 5, 2005, which proceeded through the grievance steps up to and including pre-arbitrations unsuccessfully.

. . . The Union's position is and shall remain, that the State's notification to the employees of New Castle County Detention Center or to the employees of Stevenson House or, and any subsequent change to their work schedules as stated in Section 8.23 is contrary to the 'CBA' and as such, therefore deemed void for failure by the State to honor the CBA pursuant to Articles 8, Section 8.3, Section 18.1

respectively.

### DISCUSSION

The Public Employment Relations Board's responsibility and authority for providing mediation is circumscribed by the specific contractual mandate of 19 Del.C. §1314:

#### **§ 1314. Mediation**

- (a) If, after a reasonable period of negotiations over the terms of an agreement or after a reasonable time following certification of an exclusive representative, no agreement has been signed, the parties may voluntarily submit to mediation. If, however, no agreement is reached between the parties by 60 days prior to the expiration date of an existing collective bargaining agreement, or, in the case of a newly certified exclusive representative, within 60 days after negotiations have commenced, both parties shall immediately notify the Board of the status of negotiations.
- (b) If the parties have not voluntarily agreed to enlist the services of a mediator and less than 30 days remain before the expiration date of the existing collective bargaining agreement, or, in the case of a newly certified exclusive representative, more than 90 days have elapsed since negotiations began, the Board must appoint a mediator if so requested by the public employer or the exclusive bargaining representative. The mediator shall be chosen from a list of qualified persons maintained by the Board, or upon agreement of the parties, from the federal Mediation and Conciliation Service, and shall be representative of the public.
- (c) If the labor dispute has not been settled after a reasonable period of mediation, during which both parties have made a good faith effort to settle their differences, the parties jointly or individually may petition the Board in writing to initiate binding interest arbitration. In lieu of a petition, the mediator may inform the Board that further negotiations between the parties, at that time, are unlikely to be productive and recommend that binding interest arbitration be initiated. The public employer and the exclusive bargaining representative may initiate binding interest arbitration at any time, by mutual agreement.
- (d) Any costs involved in retaining a mediator to assist the parties in reaching a negotiated agreement shall be paid by the Board. (69 Del. Laws, c. 466, § 1; 72 Del. Laws, c. 272, § 3.)

The question of when mediation is appropriate under the statute was addressed by Vice Chancellor Allen in an early review in *Seaford Board of Education and Seaford Education Association*, Ch. Ct., CA 9491, I PERB 243 (1988). The Vice Chancellor focused upon the purpose of mandatory mediation, concluding that the State has a viable

and important interest in “promoting negotiations towards an agreement ... when the threat that [employees] will be required to work without a contract becomes greater.”

*Seaford* (Supra), 254. That decision specifically addressed a conditional reopener, wherein the Court held:

... I thus conclude that when a collective bargaining agreement contains a negotiated ‘re-opener’ clause (either fixing a future date for further negotiation of the subject treated or stating a later condition upon the happening of which the matter treated will be open to further negotiation), the agreement does not have a single expiration date for purposes of Section 1014(b); that the date upon which further negotiation is to commence under Article 15.2 of the parties’ agreement constitutes one expiration date and that, with respect to the matter that is subject to further negotiation, the Board is obligated under Section 4014(b) to appoint a mediator upon application of either party once that date has passed and the parties have not succeeded in reaching agreement on the point left open by them. *Seaford*, Supra, 257.

In this case, the condition under which AFSCME seeks mediation is a contractual term but is not a conditional reopener of the parties’ collective bargaining agreement. Additionally, the terms under which mediation may be sought is circumscribed by very specific contractual prerequisites. Whether those prerequisites have been met requires interpretation of Section 8.3 of the parties’ agreement. Such interpretation and application of the collective bargaining agreement is the exclusive province of the negotiated grievance procedure, which in this case, culminates in binding arbitration.

Consequently, at this point in time, PERB has no jurisdiction or authority to initiate impasse resolution proceedings in this matter. The proper course for resolution of the dispute is to submit this matter to arbitration for a determination as to whether the contractual prerequisites of Section 8.3 have been met.

**IT IS SO ORDERED.**

*Deborah L. Murray-Sheppard*  
DEBORAH L. MURRAY-SHEPPARD  
PERB Hearing Officer

DATED: 20 November 2006