STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 81, LOCAL UNION 936,	:	
Charging Party,	:	**ULP 08-02-618**
v.	:	**Probable Cause Determination**
STATE OF DELAWARE, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DELAWARE HOME FOR THE CHRONICALLY ILL,	:	
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 Health and Social Services ("DHSS") is an agency of the State and the Delaware Hospital for the Chronically Ill ("DHCI") is a facility operated by DHSS.

The American Federation of State, County and Municipal Employees, Council 81, Local Union 936, ("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 DHCI in the bargaining unit defined by DOL Case 10.

On February 15, 2008, 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)(5), which provides:

> (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
>
> > (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 by changing the hours of work of bargaining unit employees, the State unilaterally altered the status quo of a mandatory subject of bargaining.

On March 4, 2008, the State filed its Answer denying the charge and setting forth New Matter. Paragraphs 8 through 20 of the New Matter allege that resolution of the charge requires the interpretation of Article 8 of the parties' collective bargaining agreement, Hours of Work, and the matter should, therefore, be deferred to the contractual arbitration procedure.

Also on March 4, 2008, AFSCME filed a Request for Entry of Default Judgment. The basis for AFSCME's request is the State's alleged failure to file its Answer to the Charge within the time required by Rule 5.3(a) the PERB's Rules and Regulations.

On March 6, 2008, the State filed its Answer to AFSCME's Request for a Default Judgment asserting that the State was granted a one week extension and that its failure to present its request for an extension in writing, as directed by the PERB, constituted harmless error.

On March 10, 2008, AFSCME filed its Response denying the New Matter set forth in the State's Answer to the Charge.

DISCUSSION

I. Motion for Default Judgment

There is no allegation by AFSCME that the State has established a pattern of filing documents outside the time periods established by either the statute or PERB Rules and Regulations. Further, the State maintains that it was granted a one week extension by the Executive Director and that its Answer was filed within the period of the one week extension.

The State maintains that its only error was failing to provide written confirmation of the one week extension as requested by the Executive Director and that its failure to do so constitutes harmless error which does not warrant the extreme penalty of a default judgment.

In the absence of a history of late filings by the State and/or an allegation that the delayed filing resulted in prejudicial error to the Charging Party, AFSCME's request for a default judgment is denied.

II. Probable Cause for the Unfair Labor Practice Charge

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).

The underlying substantive issue defined by the pleadings is whether the November 2, 2007 Memorandum from DHCI's Director of Nursing to all CNA staff constitutes a unilateral change in the status quo of hours of work as contemplated by 19 Del.C. §1302(t). That memorandum states:

> Effective January 1, 2008, Certified Nursing Assistant staff hours will change as follows:
>
> 06:45 a.m. – 15:00 p.m.
> 14:45 p.m. – 23:00 p.m.
> 22:45 p.m. – 07:00 a.m.
>
> Scheduled hours will now be similar to the nurse's *[sic]* and will include a 45-minute meal break. This change in hours will allow the CNA staff to make rounds at the change of shift.

There are three elements which must be established in order for AFSCME to prevail on this charge, namely, 1) did DHCI announce a unilateral change; 2) did that change affect a mandatory subject of bargaining; and 3) did the change unilaterally alter the status quo of a mandatory subject of bargaining in violation of 19 Del.C. §1307(a)(5)? *Polytech Custodians Association, DSEA/NEA v. Polytech School District*, Del. PERB, Probable Cause Determination, ULP 04-03-420, V PERB 3125 (2004).

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).[1] 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.

III. Motion to Defer to Arbitration

Having determined that probable cause exists to continue with the processing of this charge, it is necessary to consider the impact, if any, of PERB's pre-arbitral deferral policy on this case. The State asserts the dispute is governed by application of Article 8 of the parties' collective bargaining agreement, and the charge should therefore be deferred to the parties' negotiated arbitration process. Article 8 is entitled "Hours of Work" and contains numerous provisions relating to subjects other than hours of work. Paragraph 8.4 provides, in relevant part: "Employees shall not have their shift or days off involuntarily changed …" The provision does not specifically address "hours" which is the mandatory subject of bargaining raised in the unfair labor practice charge. "Shifts" and "hours" are not necessarily synonymous. There is, therefore, no logical reason for concluding that the interpretation of Article 8 of the contractual grievance procedure controls the resolution of the instant unfair labor practice charge.

The State's request that the matter be deferred to the contractual arbitration procedure is denied because resolution of a grievance under paragraph 8.4 of the

[1] "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.

collective bargaining agreement does not resolve the underlying issue concerning the duty to bargain in good faith raised by this charge.

DETERMINATION

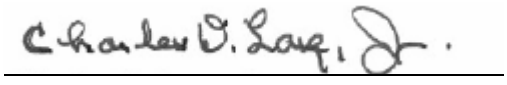
AFSCME's Motion for Default Judgment is denied for the reasons set forth in the discussion above.

The State's request to defer the processing of this charge to the parties' negotiated arbitration procedure is denied for the reasons set forth in the discussion above.

A review of the pleadings in this matter supports the finding there is probable cause to believe that the change in hours proposed by the State may constitute a violation of 19 Del.C. §1307(a)(5), as alleged. A hearing will be scheduled in order to receive evidence and argument to establish a record on which a determination can be made as to whether the State violated the statute as alleged.

In its Answer, the State commits the proposed change in hours will not occur prior to June, 2008. It also asserts that the parties have and continue to engage in discussions concerning the proposed change. They are encouraged to continue their efforts to negotiate a mutually acceptable resolution of this dispute.

11 April 2008
(Date)



Charles D. Long, Jr., Hearing Officer
DE Public Employment Relations Board