

**PUBLIC EMPLOYMENT RELATIONS BOARD**

**STATE OF DELAWARE**

AMERICAN FEDERATION OF STATE, COUNTY,	)	
AND MUNICIPAL EMPLOYEES, LOCAL 2305,	)	
	)	
Charging Party,	)	
	)	<b><u>ULP No. 08-04-619</u></b>
v.	)	
	)	
STATE OF DELAWARE, DEPARTMENT OF HEALTH	)	<b>Probable Cause</b>
AND SOCIAL SERVICES, DELAWARE	)	<b>Determination</b>
PSYCHIATRIC CENTER,	)	
	)	
Respondent.	)	

**BACKGROUND**

The State of Delaware (“State”), is a public employer within the meaning of §1302(p) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994) (“PERA”). 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 an employee organization which admits to membership public employees and has as a purpose the representation of employees in collective bargaining pursuant to 19 Del.C. §1302(i). It is the exclusive bargaining representative, within the meaning of 19 Del.C. §1302(j), of Registered Nurses I, II, III and RN/Trainer Educators III employed at DPC, as certified in DOL Case No. 35.

On April 4, 2008, AFSCME filed an unfair labor practice charge alleging conduct by the State, by and through a DHSS Labor Relations employee, that interfered with, or was intended to interfere with individual bargaining unit members in the exercise of their

statutory rights and with the internal administration of the Union in violation of 19 Del.C. §1307(a)(1) and (a)(2).<sup>1</sup> Specifically the Charge alleges the Labor Relations employee questioned a bargaining unit employee concerning her relationship with and her opinion on the effectiveness of AFSCME Local 2305 Union President and had a conversation with a second bargaining unit employee concerning unspecified internal affairs of the Union.

The charge also alleges the Union President was suspended in March 2008, based upon a statement allegedly made by him for the purpose of attempting to intimidate a witness in a pending arbitration and also of other witnesses between June, 2006, and July, 2007. It further charges the State has failed to provide information requested by the Union that the State relied upon to support the President's suspension. AFSCME charges the failure to provide this information adversely affected its ability to represent the Union President at his presuspension hearing, in violation of 19 Del.C. §1307(a)(5) and (a)(8).<sup>2</sup> As of the date of filing on April 4, 2008, the Charge alleges the requested information had not been provided.

On April 16, 2008, the State filed its Answer denying the material allegations and charges. The State's Answer also contained New Matter contending that the unfair labor practice charge should be deferred to the parties' contractual arbitration procedure.

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<sup>1</sup> 19 Del.C. §1307, Unfair labor practices. (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.

<sup>2</sup> 19 Del.C. §1307, Unfair labor practices. (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; (8) Refuse to disclose any public record as defined by Chapter 100 of Title 29.

On April 25, 2008, AFSME filed its Response denying the New Matter set forth in the State's Answer to the Charge.

## DISCUSSION

### *I. Probable Cause for the Unfair Labor Practice Charge*

Regulation 5.6 of the Rules of the Delaware Public Employment Relations Board provides:

- (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 there is no probable cause to believe that an unfair labor practice may have occurred, the party filing the charge may request that the Board review the Executive Director's decision in accord with the provisions set forth in Regulation 7.4. The Board will review 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 charge which may have occurred.

For the purpose of reviewing the pleadings to determine 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 benefit of receiving evidence in order to resolve factual differences. *Flowers v. DART/DTC*, Del. PERB Probable Cause Determination, ULP No. 04-10-453, V PERB 3179, 3182 (2004).

Considered in a light most favorable to the Charging Party, the pleadings in this case constitute probable cause to believe that an unfair labor practice may have occurred. The allegations of this Charge place two issues before PERB, namely:

1. Whether the State interfered with or intended to interfere with individual bargaining unit members in the exercise of their statutory rights and with the internal administration of the Union in violation of 19 Del.C. §1307(a)(1) and/or (a)(2), as alleged, and
2. Whether the State violated 19 Del.C. §1307(a)(5) and/or (a)(8) by failing or refusing to provide documents and information necessary for AFSCME to adequately represent its Union President.

## *II. Deferral to Arbitration*

Having determined that probable cause exists to continue with the processing of the charge, it is necessary to consider the impact, if any, of PERB's pre-arbitral deferral policy on this case. The State alleges that the dispute is governed by the application of Article 16, of the collective bargaining agreement. The Union's Response specifically references Article 16.18 of the collective bargaining agreement, which provides,

If disciplinary action is taken, the Union shall, upon request, be provided a copy of all documents or any other evidence, used as a basis for the disciplinary action.

Whether the State has breached its duty to bargain or failed to provide documents depends upon application of the parties' negotiated standard found in Article 16.18, of the collective bargaining agreement. Pursuant to Article 5.8 of the collective bargaining agreement, this determination is subject to the negotiated arbitration procedures.

Exercising the PERB's discretionary deferral policy requires that the following conditions be satisfied:

1. A decision on the unfair labor practice charge turns on the interpretation of a provision of the parties' collective bargaining agreement;

2. The parties have a long standing and well established collective bargaining relationship;
3. The employer has clearly indicated its willingness to submit the contractual issue to arbitration.

Deferral in this matter is consistent with and satisfies the requirements of the PERB's discretionary deferral policy. It is also consistent with Chancery Court's holding in *DSU v. DSU-AAUP*:

...When a collective bargaining agreement includes a specific provision addressing a union's entitlement to information relevant to the investigation and processing of a grievance, that specific contractual provision should be deployed in the first instance by the union. Further, the PERB should defer to the resolution of information disputes by the contractual dispute resolution process. *DSU v. DSU-AAUP*, Del.Chan., C.A. 1389-K, IV PERB 2483, 2455 (2002).

### **DETERMINATION**

A review of the pleadings in this matter supports the finding that there is probable cause to believe that there may have been violations of 19 Del.C. §1307 (a)(1), (a)(2), (a)(5) and/or (a)(8), as alleged.

However, as the parties agreed to Article 16.18 in their current collective bargaining agreement which sets forth specific language relating to the obligation of the State to produce information used as the basis for discipline, resolution of the alleged violations of 19 Del.C. §1307(a)(5) and (a)(8) is deferred to the parties contractual arbitration procedure.

Consistent with its deferral policy, this agency retains jurisdiction to consider these charges upon petition by a party for any of the following reasons:

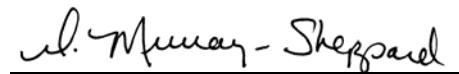
1. The arbitration award rendered fails to resolve the statutory claim;
2. Either party refuses to abide by the arbitrator's decision;
3. The arbitral process is unfair; and/or

4. The dispute is not being resolved by arbitration with reasonable promptness.<sup>3</sup>

**WHEREFORE**, a hearing will be promptly scheduled for the purpose of receiving evidence and argument to establish a record on which a determination can be made as to whether the State has violated 19 Del.C. §1307(a)(1) and (a)(2), as alleged.

**IT IS SO ORDERED**

DATE: 4 August 2008



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

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<sup>3</sup> *FOP Lodge 1 v. City of Wilmington*, Del. PERB, ULP 89-08-040, I PERB 449, 455 (1989)