

PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF DELAWARE

AMERICAN FEDERATION OF STATE, COUNTY,)
AND MUNICIPAL EMPLOYEES COUNCIL 81,)
LOCAL 2305,)
)
Charging Party,)
)
v.) **ULP No. 08-04-619**
)
STATE OF DELAWARE, DEPARTMENT OF HEALTH)
AND SOCIAL SERVICES, DELAWARE)
PSYCHIATRIC CENTER,)
)
Respondent.)

Appearances

Perry F. Goldlust, Esq., on behalf of AFSCME Local 2305

Aaron Shapiro, SLREP, on behalf of the State

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 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 which 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).¹ The Charge also alleged the Union President was suspended in March, 2008, based upon allegedly intimidating statements he made to potential arbitration witnesses between June 2006, and July 2007. AFSCME alleged the State violated 19 Del.C. §1307(a)(5) and (a)(8)² by failing or refusing to provide information it requested in order to represent the President at his pre-suspension hearing.

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.

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

A Probable Cause Determination was issued on August 4, 2008, wherein the Executive Director found the allegations set forth in the Charge raised valid questions concerning whether the State interfered with or intended to interfere with bargaining unit members and/or the internal administration of the union in violation of the 19 Del.C. §1307(a)(1) and/or (a)(2). The charge that the State violated 19 Del.C. §1307(a)(5) and/or (a)(8) by not providing all documents or other evidence used as a basis for the disciplinary action against the Union President was deferred to the parties negotiated arbitration process.

¹ 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.

² 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; and (8) Refuse to disclose any public record as defined by Chapter 100 of Title 29.

A hearing was conducted before the Executive Director on October 8, 2008, during which documentary evidence and testimony were received into the record. The parties were afforded the opportunity (after receipt of the hearing transcript) to file simultaneous written argument. The final brief was received on December 5, 2008.

This decision results from the record thus created by the parties.

FACTS

The facts as recited herein are based upon the testimony and documentary evidence of record:

AFSCME Local 2305 and DHSS/Division of Substance Abuse and Mental Health/Delaware Psychiatric Center are parties to a collective bargaining agreement which has a term of May 6, 2005 through May 6, 2008, and which has been in effect at all times relevant to this Charge. E. David Saxton (“Saxton”) has been the President of Local 2305 at all times relevant to this Charge. He is employed as a Nurse Supervisor at the Delaware Psychiatric Center.

Prior to the events which are at issue in this Charge, a long-term RN (David) was terminated for allegedly shoving a patient and a second RN (Juba) was disciplined for undisclosed reasons which related to the shoving incident.³ Both the termination and the discipline were grieved and the termination was processed to arbitration in accordance with the contractual provisions. The employer relied on the testimony of two witnesses to support the disciplinary actions, specifically Rogers (an RN assigned to the Performance Improvement Dept.

³ The alleged shoving incident occurred on or about January 23, 2006. *DHSS and AFSCME Local 2305, AAA Case 14 390 00206 06 CNN, (Jaffe, 5/12/2008), p. 7.*

at DPC) and Jenkins (a second RN). Both Rogers and Jenkins were initially employed at DPC in January, 2006.⁴

At some point prior to October 11, 2007, Rogers raised a complaint against Union President E. David Saxton by providing a written document to DHSS Labor Relations staff.⁵ On or about October 11, 2007, two DHSS Labor Relations specialists (Ross and Niessen) interviewed Rogers concerning her complaint. Niessen⁶ noted the following events as recounted by Rogers in his typed notes from this interview:

- * On June 6, 2006, Saxton and Rogers had a discussion wherein she revealed she had not previously worked in a union environment. Saxton told her “union employees have a lot more protection and we [the union] are able to assist them in keeping their jobs.” Saxton also told her that he was confident the nurses in the pending grievance arbitrations [David and Juba] would win. “From his tone of voice, and his smirks and posture, I knew the message he was conveying – i.e. this will be over soon.”
- * Rogers injured her ankle the day before the David arbitration hearing, at which she was to be a primary witness. Saxton told her it would be OK if she did not attend the hearing. The interview notes state, “I felt intimidated and irritated by his comment about not having to attend the hearing – implying I could use my injury as an excuse for not attending the meetings.”
- * Rogers related that details of the pending grievances were discussed in Union meetings between the fall of 2006 and the winter of 2007. Rogers and a second nurse, Jenkins, attended these meetings, and Rogers stated, “it was obvious from the looks we received from other members that everyone knew who the witnesses were.”

⁴ *Supra*, p. 7

⁵ The written complaint provided by Rogers was not entered into the record in this case and was not provided to the Union. *Jt. Ex. I.*

⁶ Investigation of Rogers’ complaint was handled by Niessen, as Ross left the DHSS Labor Relations Department shortly after the complaint was received.

* Rogers also stated that in June 2006 Saxton made the following comment, “With my experience (as a probation officer) I can hide a body and no one would ever find it.” *Jt. Exhibit 1, p.1*

Niessen had a follow-up telephone conversation with Rogers on November 9, 2007, at which time she reported that Saxton had spoken to one of the other nurses after Niessen had interviewed her. *Jt. Exhibit 1, p. 13.*

On or about October 22, 2007, Niessen interviewed another RN (Coyle) who responded “Yes” when asked if Saxton had ever “made a comment in her presence about bringing in a disassembled gun/weapon and reassembling it at DPC.” The witness responded that RN Nourie had been present when Saxton made the comment. It is not clear from the record why Niessen asked this question as it was not noted that this allegation was made by Rogers in her initial interview. *Jt. Exhibit 1, p. 3.* Niessen conducted a follow-up (undated) interview with Coyle in which he asked questions about how Saxton made her feel. Coyle responded, “Uneasy. Creepy.” *Jt. Exhibit 1, p. 6.*

A third RN (Owens) was also interviewed by Niessen on October 22, 2007, who stated, “I have no first hand knowledge about any statements made by Saxton regarding guns or burying bodies.” The interviewee went on to state that “... the problem here is union members like Saxton, holding supervisory positions. We are harassed by supervisors who are union members/officers.” *Jt. Exhibit 1, p. 4.*

On October 24, 2007, Niessen interviewed a fourth nurse (Jenkins) who “stated she had no first hand knowledge of anything said by Saxton in regards to (1) burying bodies where they can not be found; (2) bringing in an unassembled gun into the workplace.” *Jt. Exhibit 1, p. 7.* Niessen again interviewed Jenkins on November 16, 2007, when she stated (in response to a question as to whether she could recall any comments made by Saxton concerning the David arbitration), that Saxton had discussed the David case at three Union meetings. She also stated

that in August, 2007, Saxton said to her “You know we’re going to bring in an arbitrator from a large school who will rip your testimony apart. I just want you to know.” *Jt. Exhibit 1, p. 16.*

Niessen interviewed Saxton on October 26, 2007, who responded “No” to Niessen’s question, “Did you make the following statements to any DPC employee: (1) With my background and experience I could a) bury a body where no one could find it; or b) bring a gun/weapon disassembled and reassemble it at work?” He also responded “No” when asked if he had ever attempted to influence any DPC employee regarding testifying in a grievance situation. *Jt. Exhibit 1, p. 8-9.*

Nourie was interviewed on November 2, 2007. According to the interview notes taken by Niessen, she responded that Saxton was a good supervisor and union president and that she had nothing bad to say about him. She responded “no” when asked if 1) she had ever observed, overheard or witnessed any form of intimidation by Saxton; 2) she had heard anyone ever attempt to intimidate employees regarding (but not limited to) the David arbitration or discipline; or 3) heard Saxton make a statement about bringing a weapon to work. *Jt. Exhibit 1, p. 10-11.*

Nourie testified at the unfair labor practice hearing that Niessen asked more questions than those indicated in Niessen’s interview notes. She summarized the interview, as she recalled it, in an e-mail the following morning (November 3, 2007), including:

... He [*Niessen*] then said again that my name had come up during an investigation and that he had some questions for me. He went on to explain that Joanne David, a nurse on S-2, had been fired for shoving a patient and that she was currently undergoing arbitration. She had stated that she felt intimidated by Dave Saxton. He asked if I knew anything about the situation. I replied that since I do not know Joanne David, I knew nothing about the situation.

He [*Niessen*] then asked if I had ever felt intimidated by Dave Saxton. I replied no. We work together, he’s my supervisor and we have a good relationship. I said that we joke with each other, we pick on each other, kiddingly, but I have never felt intimidated by him. He [*Niessen*] said that it was strange – having a Supervisor as the Union President. He said that he had never heard of such a thing. I said I didn’t see anything strange about it. He thanked me for my time and then left the unit. *Union Exhibit 1.*

Niessen also interviewed another employee (Truitt) and a Long-Term Care Investigator. His notes from these conversations do not lend any significant understanding to either the scope or the purpose of the investigation.

Niessen testified that he prepared a report (following completion of the investigation) and provided it to his supervisor in January, 2008. *Tr. p. 37*. He testified that his conclusion was that the harassment allegations against Saxton, although believable, could not be substantiated. He recommended Saxton be counseled for inappropriate comments. He testified that he did not know who changed his recommended counseling to a five day disciplinary suspension and that that decision was “made upstairs”. *Tr. p. 16 – 18*.

By letter dated March 10, 2008, Saxton was advised by DPC Hospital Director Abdallah that he was recommending a five day suspension without pay for threatening to bring a weapon onto the Herman Holloway Campus. The letter states, in relevant part:

... The following information summarizes the basis for this action.

During the months of October 2007 through February 2008, an investigation was conducted into allegations made by Ms. Dawn Rogers, Clinical Compliance Nurse, that you attempted to intimidate fellow employees (Ms. Rogers and Ms. Jenkins, Nurse Recruiter) from testifying in the Joanne David arbitration case. The various allegations spanned in time from June 2006 through July 2007. Only one allegation out of many could be corroborated by independent witnesses. In June 2006, according to Ms. Rogers, you stated to her that, “as a former New Castle County police officer, I know how to bring a weapon into work disassembled and reassemble it.” (*sic*)

Ms. Rogers stated that this conversation was overheard by Dana Coyle, RN III, stationed on Sussex Unit 3. Ms. Coyle was interviewed in the course of the above referenced investigation and confirmed Ms. Rogers’ allegation. You were also interviewed during the investigation. You denied making the statement.

Based on the corroborated statement you made in June 2006 regarding bringing a weapon onto the campus, and the egregiousness of the statement, the recommended disciplinary action is a five (5) day suspension. This conduct is a violation of the State’s zero tolerance Workplace Violence policy, which defines workplace violence, in part, as “threats or acts of

violence including conduct against persons or property that is sufficiently severe, offensive, or intimidating to alter the conditions of state employment, or to create a hostile, abusive or intimidating work environment for one or more employees, customers, or business partners.”

As a supervisor at DPC, you are held to a higher standard of professional behavior and need to understand the impact of your statements and behavior on other employees and your subordinates. I am advising you in the strongest possible terms, that any further misconduct will result in more severe discipline, up to and including dismissal from your position at DPC. *Exhibit B to the Unfair Fair Labor Practice Charge.*

Saxton grieved the proposed 5-day suspension. Following the April 24, 2008, hospital level grievance hearing, the designated hearing officer sustained the grievance in a letter opinion dated May 5, 2008, wherein she found:

...After considering the testimony and witness statements presented at the grievance hearing, I conclude that, because Rogers stated that you did not directly make to her the specific statement giving rise to the proposed discipline, the discipline proposed by the Hospital cannot be sustained. Accordingly, your appeal of the discipline is upheld. I make no findings or conclusions concerning the other events and statements that were the subject of testimony at the hearing, as they were not provided as a basis for the discipline proposed. *Joint Exhibit 2.*

ISSUE

WHETHER THE STATE INTERFERED WITH OR INTENDED TO INTERFERE WITH BARGAINING UNIT MEMBERS IN THE EXERCISE OF THEIR STATUTORY RIGHTS AND/OR WITH THE INTERNAL ADMINISTRATION OF THE UNION IN VIOLATION OF 19 DEL.C. §1307(A)(1) AND/OR (A)(2), AS ALLEGED?

PRINCIPAL POSITIONS OF THE PARTIES

AFSCME Local 2305:

AFSCME asserts the question presented by this Charge is whether the investigation conducted by DHSS Labor Relations was for the purpose of investigating an allegation of workplace violence or motivated by anti-union animus. It argues the timing and progression of

the investigation, the subjects covered in the complaint filed against the Union President, the manner in which the complaint was investigated (including the questions which related to Union affairs) and the timing of the Notice of Intent to Discipline are all important in understanding the State's intent.

AFSCME argues that the materials presented to the Union and offered into evidence in this proceeding fail to support the workplace violence allegation which the State invoked to justify its investigation of the Union President. It asserts that the allegations made by the complainant (Rogers) were neither corroborated nor supported in the interview notes, and were not consistent with the basis for the proposed discipline in the March 10, 2008 letter to Saxton. Rogers never alleged she heard the comment concerning the bringing of a disassembled weapon onto the DHSS campus and reassembling it, nor that she felt intimidated by any of the comments she allegedly heard.

If there was real, clear and present danger of workplace violence, it is illogical that the State could "sit on its hands" for five months from the date of the allegation until a notice of intent to discipline was issued. Further, it is inconsistent to assert there was a clear and present danger when the comments which were alleged to be the basis for the complaint were made approximately 16 months prior to being reported by Rogers.

AFSCME argues DHSS' real intent in interviewing employees and in disciplining the Union President was to undermine member confidence in the Union and its leadership. There was no reason for DHSS Labor Relations to ask questions about the relationship between individuals and the Union President, or concerning their satisfaction with the Union which included supervisors as members and as officers.

AFSCME requests the Charge be sustained and that DHSS be ordered not to try to influence or disrupt the internal affairs of the Union.

State:

The State argues AFSCME has failed to meet its evidentiary burden to support its charge that the investigation of a workplace violence complaint was a ruse. It has made no demonstration of any conduct that reasonably tended to interfere with protected activity or administration of the union. There is no evidence of any threats of reprisal or promise of benefit made to any employee for engaging in or refraining from the exercise of protected rights during the investigation. There is no testimony or documentary evidence that any employee thought or felt they were being threatened or influenced. There were no witnesses or documents offered to support the allegation of bias, animus or other improper intent by DHSS. In fact, there is nothing in this record, the State argues, which supports any conclusion other than that the Union President was the subject of a workplace violence investigation.

AFSCME cannot demonstrate that any of its allegations involve legitimate representation activities or interference by the State in such activities. Its Charge amounts to nothing more than complaints about the employer's exercise of free speech. The ultimate question is not whether the workplace violence complaint was ultimately substantiated, but whether DHSS acted in good faith and without animus in investigating a complaint

The State also argues that it did not have any discretion in its decision to investigate the written and verbal complaints made by Rogers against Saxton. Had it chosen not to conduct a thorough investigation, it would have been “derelict in its duties to promote employee safety in the workplace.”

The State notes that at the conclusion of the investigation, DHSS determined that Saxton made inappropriate comments and recommended he be suspended and required to take a communications training course. The proposed discipline was later overturned through the contractual grievance procedure. No evidence was offered in this proceeding that this

investigation was a ruse to remove Saxton from office or to interfere with enforcement of the collective bargaining agreement.

The State also argues that a civil action filed by Saxton against Rogers for libel and slander alleges facts and conclusions that contradict the basis for this unfair labor practice charge. Specifically, the civil action alleges Rogers initiated her complaints against Saxton, which then caused DHSS to conduct its investigation. In contrast, AFSCME's unfair labor practice charge alleges the complaint and investigation were initiated by DHSS, motivated by its desire to remove Saxton from office. The State argues that because the civil action "completely contradicts" this charge, it should be considered in resolving the charge.⁷

DISCUSSION

The Charge alleges DHSS has engaged in conduct which interferes with, restrains or coerces employees in the exercise of their statutory rights, and/or which interferes with the administration of AFSCME Local 2305, a labor organization under the Act. 19 Del.C. 1308(a)(1) and (a)(2). The burden is on AFSCME to factually support its allegations. 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*, Del.PERB, ULP 88-01-021, I PERB 287, (1988).

The National Labor Relations Board has established a well settled test for alleged (a)(1)⁸ violations:

⁷ This argument was not deemed material to this proceeding and was not relied upon in reaching the conclusion herein.

⁸ To the extent that precedent and case law established under the National Labor Relations Act are based upon statutory provisions which are identical to those in Delaware law, those decisions and standards will be considered

[I]nterference, restraint and coercion under 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the exercise of employee rights under the Act. *American Firefighters Co*, 44 LRRM 1302 (1959).

In order for employer speech or conduct to constitute an (a)(1) and/or (1)(2) violation, it must either on its fact or through surrounding circumstances reasonably tend to exert undue influence and/or coerce employees or the labor organization. *WFFA Local 1590 v. City of Wilmington*, ULP 93-06-085, II PERB 937, 976 (1994).

Employee rights are defined at 1303, and include the right to:

- (1) Organize, form, join or assist any labor organization except to the extent that such right may be affected by a collectively bargained agreement requiring the payment of a service fee as a condition of employment.
- (2) Negotiate collectively or grieve through representatives of their choosing.
- (3) Engage in other concerted activities for the purpose of collectively bargaining or other mutual aid or protection insofar as any such activity is not prohibited by this chapter or any other law of the State.
- (4) Be represented by their exclusive representative, if any without discrimination. *19 Del.C. §1303*.

The incidents which are the basis of this Charge are a series of interviews conducted pursuant to an employee complaint of harassment. Only eight individuals were interviewed, of which one (Rogers) was the complainant, a second (Coyle) left employment at DPC shortly after the interview, one was a Long-Term Care Investigator who was not part of the bargaining unit, and a fourth (Truitt) was not identified as being in the bargaining unit. Of the four remaining interviewees, two (Saxton and Nourie) testified in this unfair labor practice proceeding. Neither testified they felt intimidated or coerced in the interviews. Nor was there any documentary evidence from interviews of Rogers, Jenkins or Owens which supports an allegation of interference in or because of the exercise of any of the §1303 employee rights. For this reason,

as guidance by the Delaware PERB. *CoFrancesco v. City of Wilmington*, 419 F.Supp. 109 [93 LRRM 2387] (D.Del., 1976); *Sussex County, Delaware v. Communication Workers of America, AFL-CIO*, Rep. Pet. No. 07-02-557 VI PERB 3949, 3957 (2008).

the allegation that DHSS/DPC violated 19 Del.C. §1307(a)(1) is determined to be unsupported and is therefore dismissed.

The essence of AFSCME's charge is that by and through its investigation of Saxton (based on Rogers' harassment complaint), DHSS/DPC interfered with the existence and administration of the Union by discrediting its president during the interview process. The record supports the conclusion that Rogers' complaint triggered an investigation by DHSS which extended beyond the initial allegation that Saxton tried to intimidate and harass her because she testified at a grievance hearing. The questions asked concerning whether other individuals felt intimidated by Saxton were asked within the context of Rogers' harassment complaint.

The essence of case appears to be that although Niessen concluded that Rogers' complaint could not be substantiated and recommended that Saxton be counseled, somewhere between his level and that of the Hospital Director a decision was made to change the proposed counseling to a five (5) day suspension. AFSCME is correct that the investigative notes and testimony of the witnesses in this proceeding are not consistent with the basis for the proposed discipline set forth in Dr. Abdallah's March 3, 2008 letter.

What the record does not support, however, is that this leap from the investigation to the proposed discipline was based on union animus, or that the questions asked of the six bargaining unit employees during the investigation undermined member confidence in the union or its leadership. No nexus has been identified between the discipline of an individual (who happened to be the Union President) and purported interference with administration of the union. There is nothing in the record to suggest that the discipline was broadcast or used to intimidate other bargaining unit employees or Union officials. Indeed, it is not clear that Saxton felt or believed the discipline affected his or any other Union official's effectiveness or willingness to serve. He was not hindered in his effective use of the contractual grievance procedure to challenge whether the proposed discipline was for just cause.

AFSCME also alleges that by failing or refusing to provide all of the documents on which Saxton's proposed discipline was based in a timely manner, DHSS interfered with the Union's ability to effectively represent its member. Whether DHSS was required to provide the information requested was deferred to arbitration when the Probable Cause Determination was issued in this case.

The record indicates that the grievance procedure did, in fact, operate as an effective arbiter on the terms of the collective bargaining agreement, as Saxton's grievance was sustained at the hospital level, where the hearing officer found "the discipline proposed by the Hospital cannot be sustained." Consequently, this issue is now moot.

This is not a free speech case, as the State argues. There is no evidence of public comment or any speech relating to the effectiveness or necessity of the union and its leadership. The comment Niessen made to Nourie that, in his experience, it was unusual for a supervisor to be a union president and in the same bargaining unit was ill-advised, but does not rise to the level of interference with the Union. Nourie's summary of her interview by Niessen⁹ does not indicate she was influenced or concerned about the question. She testified she sent her e-mail to Saxton but did not discuss the issue further with anyone.

The record is insufficient to conclude that by and through its investigation of the harassment complaint against Saxton that the State violated 19 Del.C. 1307(a)(2).

CONCLUSIONS OF LAW

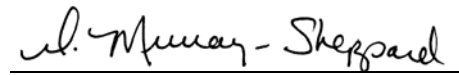
For the reasons set forth above, this unfair labor practice charge is dismissed because the evidence presented does not support the allegation that DHSS/DPC interfered with or intended to

⁹ *Union Exhibit 1*

interfere with bargaining unit members in the exercise of their statutory rights and/or with the internal administration of the Union in violation of 19 Del.C. §1307(a)(1) and/or (a)(2).

WHEREFORE, the charge is hereby DISMISSED.

DATE: 22 January 2009



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

