

PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF DELAWARE

DELAWARE STATE AND FEDERAL EMPLOYEES)
LOCAL UNION NO. 1029, A/W LABORERS)
INTERNATIONAL UNION OF NORTH AMERICA,)
)
Charging Party,)
) **ULP No. 08-08-628**
v.)
)
STATE OF DELAWARE, DEPARTMENT OF HEALTH)
AND SOCIAL SERVICES, DIVISION OF DEVELOP-)
MENTAL DISABILITY SERVICES, STOCKLEY)
CENTER,)
)
Respondent.)

Appearances

Stephen C. Richman, Esq., Markowitz & Richman, on behalf of LIUNA Local 1029

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 Stockley Center (“Stockley”) is a facility operated by the Division of Developmental Disability Services, a department of DHSS.

The Delaware State and Federal Employees Local Union No. 1029, a/w Laborers International Union of North America, (“LIUNA”) 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 of certain non-supervisory employees of the Stockley Center, within the meaning of 19 Del.C. §1302(j), as certified in DOL Case No. 4.

On August 5, 2008, LIUNA filed an unfair labor practice charge alleging the State violated 19 Del.C. §1307(a) (5)¹. Specifically, the Charge alleges the State refused to engage in negotiations for a successor agreement by failing or refusing to respond to LIUNA's March 3, 2008 notice to reopen negotiations.

On August 13, 2008, the State filed its Answer denying the material allegations and charge. 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 August 14, 2008, LIUNA filed its Response denying the New Matter set forth in the State's Answer to the Charge.

A Probable Cause Determination was issued on September 11, 2008, wherein the Executive Director found the allegations set forth in the Charge raised a valid question concerning whether the State violated its duty to bargain in good faith by failing or refusing to enter into negotiations for a successor agreement with the exclusive bargaining representative of an appropriate bargaining unit, in violation of 19 Del.C. §1307(a)(5).

A hearing was conducted before the Executive Director on November 12, 2008, during which documentary evidence and testimony were received into the record. The

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:

(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.

parties were afforded the opportunity to file written argument. The final brief was received on December 19, 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:

LIUNA and the State are parties to a collective bargaining agreement which had a term of June 8, 2004 through June 8, 2007. *Union Exhibit 1*. Article 31, Termination, Change or Amendment, states at section 31.1

This Agreement shall be effective as of June 8, 2004, and shall continue in full force and effect until June 8, 2007. It shall be automatically renewed from year to year thereafter, unless either party gives the other party notice of its desire to terminate, modify or amend (“reopen”) this Agreement. Such notice shall be given to the other party in writing by certified mail at least 60 days prior to June 8 of the year it desires to reopen the Agreement. Any such notice by the Union shall be sent to the State Deputy Director for Employee Relations.

The opening paragraph of the collective bargaining agreement states that the Agreement is between “the State of Delaware, Delaware Health and Social Services, Division of Developmental Disabilities Services, Stockley Center, hereafter referred to as the ‘State’; and the Laborers International Union of North America, AFL-CIO, Local 1029, and hereafter referred to as the ‘Union’”. The Agreement was witnessed and signed for the State by a designee of the Secretary of DHSS, the Director of the Division of Developmental Disabilities Services, and the negotiating team including LaTonya B. Ashley (Chief Negotiator), Karen Varuolo (Human Resources Specialist IV) and David W. Wesley, Jr. (Human Resources Specialist IV). Additionally, included at the bottom of these signatures (separated from those of the State

Negotiating Team) was the signature that of Thomas LoFaro, State Deputy Director for Employee Relations. On a separate page (p. 21) additional signatures of the Stockley Center administration were appended, including the signature of the Executive Director, Director of Residential Services, Assistant Director of Residential Services, Resource Management Administrator, and the Physical Plant Maintenance Superintendent. Signatories for the Union included Bernard Jackson (Business Manager for LIUNA District Council #37), Sheila Littleton (Business Manager, LIUNA Local 1029) and Kim Hall (identified under the heading “Negotiating Team”). *Union Exhibit 1.*

Sheila Littleton (“Littleton”) is and has been at all times relevant to this Charge the Business Manager for LIUNA Local 1029, which is the exclusive bargaining representative of two bargaining units, the Stockley unit at issue in this case, and a bargaining unit of federal employees. The Stockley unit consists of approximately 257 members. Littleton is responsible for managing the day-to-day operations of Local 1029. She also directs the offices and Executive Board of the Local. *Tr. p. 6.*

Littleton was also appointed by then-Governor Minner to serve as a Labor Representative on the Governor’s statewide Labor-Management Committee. Thomas LoFaro (“LoFaro”) was a management appointee to this committee, and had been listed on the contact sheet as “Deputy Director for Employee Relations”. LoFaro conducted the meetings until some time in the fall of 2007. At that point, his name was removed from the contact sheet and he ceased attending meetings. When the contact sheet was reissued, it included Jerry Cutler (“Cutler”) under the title “Director of Labor Relations and Employment Practices”. There was no one listed on the LMC contact list as the “Deputy Director for Employee Relations”. Littleton testified that no information was

provided at the LMC meeting or in any other context as to whether LoFaro still worked for the State or whether Cutler was his replacement. *TR. 10, 16 – 17.*

At some point in February, 2008, Littleton contacted Karen Varuolo (“Varuolo”) concerning reopening the collective bargaining agreement. Varuolo was the Human Resource Manager for the Stockley Center, a signatory to the 2004-2007 collective bargaining agreement, and had been a member of the State negotiating team for that Agreement. Littleton asked Varuolo who she should contact in order to initiate successor negotiations, and specifically inquired as to whether Cutler was now the appropriate party. Varuolo responded “absolutely not” and advised Littleton to send notice to David Wesley, Amy Bonner and John Mooney, and “they will take care of it.”² *TR. p 9, 10, 17.* Littleton testified that she knew Wesley from prior negotiations and grievance matters, assumed he worked for DHSS Labor Relations, but had no knowledge of where his office was located. She did not personally know either Bonner or Mooney. *TR. p. 20.*

By letters dated March 3, 2008, Littleton advised Wesley, Bonner, and Mooney (with a courtesy copy of each letter also provided to LIUNA District Council):

Laborers’ International Union of North America Local 1029 located at Stockley Center, hereby notifies the State of Delaware of our intent to open the current contract between the Laborers’ International Union of North America Local 1029 and the State of Delaware, Department [*sic*] of Developmental Disabilities Services, Stockley Center for negotiation. The current contract expires on June 8, 2008. Please inform us of open dates for negotiations.

² This testimony was not refuted by the State, which called no witnesses at hearing.

Individual letters were sent by certified mail through the U.S. Postal Service to Wesley, Bonner and Mooney. *Union Exhibit 2.* All three letters were addressed to the 10th Floor of the Carvel State Office Building, 820 N. French Street, in Wilmington, DE.

Littleton received signed return receipts from the Post Office for all three letters, which were dated stamped by the Wilmington Post Office on March 5, 2008, indicating the date on which the receipts were received by the Post office to return to Sender. Two of the receipts were signed by “K. Jacobs (LR)” and the third was signed by “Carolyn Kane”.³ None of the receipts were dated by the signatories, nor were the forms completed by either Jacobs or Kane to indicate the letters were incorrectly addressed.⁴ *Union Exhibit 3.*

In late June 2008, Littleton attended a meeting at which Cutler was present. She spoke to Cutler in the hallway and asked about the scheduling of negotiations. Mr. Cutler responded, “What are you talking about?” She responded she was referring to contract negotiations at Stockley Center, to which Cutler responded, “You didn’t notify me.” Littleton responded by explaining that Varuolo had told her not to notify Cutler. *Tr. 14-15.*

Littleton formally followed up on her conversation with Cutler in a letter to him dated June 24, 2008:

At this time, I am renewing my request to open the current contract between the Laborers’ International Union of North America Local 1029 and the State of Delaware, Department *[sic]*

³

⁴ The Receipt Form directs the receiver to complete sections A – D on the right side of the form. Section A requires the signatory to print his/her name, Section B requires the delivery date be supplied, Section C is for signature (and requires designation as either “Agent” or “Addressee”) and Section D states, “Is delivery address different from Item 1? If YES, enter delivery address below.” Sections A and C were completed on the receipts for Wesley’s letter (received by “K. Jacobs (LR)”). “Carolyn Kane” only signed at Section C on the receipts for Bonner and Mooney.

of Developmental Disabilities Services, Stockley Center for negotiation as soon as possible.

On June 20, 2008, you and I had a conversation regarding negotiations and you informed me that you were not notified. I was told by Karen Varuolo, Human Resource Manager who has retired to send notification to Dave Wesley, Amy Bonner and John Mooney which I did on March 3, 2008. Enclosed you will find copies of the notification letters and certified mail receipts of acceptance.

Thanking [*sic*] you in advance for your attention to this matter. *Union Exhibit 4.*⁵

Cutler's office responded by letter dated July 7, 2008:

Your letter states that a Department of Health and Social Services (DHSS) Human Resource representative suggested that you send notice of the Union's request to three specific DHSS employees – Amy Bonner, David Wesley and John Mooney. You also attached copies of a March 3, 2008 letter addressed to each of these DHSS representatives, as well as certified mail receipts for the letters. For the reasons set forth below, your March 3 letter does not comport with the requirements set forth in the collective bargaining agreement, and is therefore not sufficient to constitute appropriate notice to reopen the agreement for negotiations.

First the collective bargaining agreement requires the notice of the intent by either party to negotiate the contract must be given "at least 60 days prior to June 8 of the year it desires to reopen the Agreement." Second the Agreement specifically requires that notice by the Union must be "sent to the Deputy Director for Employee Relations." On Page 21 of the agreement, Thomas LoFaro is identified as the Deputy Director and is a signatory to the agreement, as are you. Mr. LoFaro continues to work in the same office as in 2004, and the location of the office has not changed.

The certified mail receipts indicate that you did not send the request to reopen the agreement to Mr. LoFaro, but to Ms. Bonner, Mr. Wesley and Mr. Mooney. Moreover, you did not send the letters to their actual offices, but to the Carvel State Office Building in Wilmington.

All three of these individuals work at the DHSS Herman H. Holloway campus in New Castle, Delaware. Based on the

⁵ A courtesy copy of this letter was also provided to PERB.

signatures on the delivery receipts, it appears that the letters were eventually delivered to the Holloway campus and were signed for by DHSS employees at the campus. However, since none of the delivery receipts provide a date of delivery, we do not know when they were delivered. What we can confirm is that no request was sent to this office in accordance with the requirements set forth in the collective bargaining agreement.

As noted above, the collective bargaining agreement is quite clear on who is to be notified on behalf of the State, and how that notice is to be communicated, when a request to reopen negotiations is submitted. These are not new requirements but have been in successive collective bargaining agreements for a number of years. Moreover, the notice requirements have not changed in any material way over the years, nor have they ever provided that a request to reopen the contract is satisfied simply by notifying DHSS.

Consequently, we do not believe that the notice requirements have been satisfied. *Union Exhibit 5.*

The State placed into evidence a letter dated May 8, 2007, from Littleton to LoFaro concerning LIUNA's effort to reopen negotiations in 2007. The letter states, in relevant part:

I am notifying you of Laborers' International Union of North America Local 1029's request to reopen the negotiated agreement between the Department of Health and Social Services, Department [*sic*] of Developmental Disabilities Services, Stockley Center and Laborers' International Union of North America Local 1029 for new contract negotiations. The current agreement expires on June 8, 2007.

I apologize for the lateness of the letter as I incorrectly sent the request to Carl Wexler and in following up I found my mistake. *State Exhibit 1.*

Littleton testified she never received a response from LoFaro to this letter.

ISSUE

WHETHER THE STATE VIOLATED ITS DUTY TO BARGAIN IN GOOD FAITH BY FAILING OR REFUSING TO ENTER INTO NEGOTIATIONS FOR A SUCCESSOR COLLECTIVE BARGAINING AGREEMENT WITH THE

EXCLUSIVE BARGAINING REPRESENTATIVE OF AN APPROPRIATE
BARGAINING UNIT, IN VIOLATION OF 19 DEL.C. §1307(A)(5)?

PRINCIPAL POSITIONS OF THE PARTIES

LIUNA Local 1029:

LIUNA argues that the State's refusal to engage in good faith negotiations for a successor collective bargaining agreement violates 19 Del.C. 1307(a)(5). LIUNA's Business Manager recognized the contractual notice requirements of Article 31.1, but sought information from the Human Resources Manager because she had a reasonable and legitimate concern as to who should receive notice. They discussed LIUNA's desire to reopen the contract in February (more than two months prior to the contractual notice date) and Littleton followed the instructions she received in providing three individuals notice of LIUNA's intent (by certified mail) on March 3, 2008, well in advance of the notice window set forth in Article 31.1. None of the three individuals upon whom notice was served in March, 2008, ever responded.

The State has not argued that it was injured or prejudiced by the Union's notice. It provided no evidence that the notices were not received by the addressees but relies only on the assertion that they were not provide to the Deputy Director for Employee Relations.

LIUNA argues this matter should not be deferred to the contractual arbitration process because it has not waived its statutory right to negotiate by agreeing to a notice process. A determination by an arbitrator as to whether LIUNA complied with the contractual provision will not resolve the underlying charge. This issue raised in this

charge is not one of contractual interpretation but rather a question of whether the State has fulfilled its statutory obligation to bargain.

LIUNA requests the State be ordered to cease and desist from failing or refusing to bargain in good faith and that it be ordered to immediately engage in good-faith negotiations with LIUNA for a successor agreement.

STATE:

The State argues the notice requirements for reopening negotiations were negotiated by the parties and are incorporated in the 2004-2007 collective bargaining agreement at Article 31.1. Because the Agreement also includes a grievance procedure which culminates in binding arbitration, it argues resolution of this Charge should be deferred to that procedure. It argues that to do otherwise is inconsistent with the direction provided by Delaware Courts (citing *City of Wilmington v. WFFA Local 1590*, 385 A. 2d 720 (1987)) and would discourage the parties from honoring their contractual commitments. It asserts that the State is “unnecessarily and unduly burdened by concurrent, duplicative, statutory adjudication and arbitration proceedings.”

Alternatively, the State argues that LIUNA did not serve notice as required by Article 31.1 of the Agreement. It asserts Littleton did not offer a credible reason as to why she chose to disregard the notice requirements and has therefore failed to meet the evidentiary burden necessary to sustain the Charge.

DISCUSSION

This case tests the fundamental concept of good faith and is an example of a misguided attempt to place form over substance, procedure over obligation. The Public Employment Relations Act is premised on the principle that the policy of assuring

orderly and uninterrupted public operations and functions through the promotion of harmonious and cooperative relationships between public employers and their employees is best effectuated through:

- (2) Obligating public employers and public employee organizations which have been certified as representing their public employees to enter into collective bargaining negotiations with the willingness to resolve disputes relating to terms and conditions of employment and to reduce to writing any agreements reached through such negotiations. 19 Del.C. 1301, *Statement of Policy*.

The statute reinforces this basic tenet by declaring that it is an unfair labor practice for either a public employer or the exclusive representative of a bargaining unit of public employees to “refuse to bargain in good faith.” 19 Del.C. §1307 (a)(5) and (b)(2).

The good-faith obligation is again reiterated in the statutory definition of “collective bargaining”:

“Collective bargaining” means the performance of the mutual obligation of a public employer through its designated representatives and the exclusive bargaining representative to confer and negotiate in good faith with respect to terms and conditions of employment and to execute a written contract incorporating any agreements reached...” 19 Del.C. 1302(e).

It is beyond dispute that the three statutes administered by PERB were created and designed to encourage, support and promote collective bargaining between public employers and the exclusive representatives of their employees.

The State argues that the negotiated notice provision in the parties’ collective bargaining agreement should supersede and limit the State’s statutory obligation and that PERB should adopt a pre-arbitral deferral approach to resolving this Charge. The statutory mandate to bargain in good faith is not conditioned on a specific notice

requirement in order to initiate bargaining nor does it mandate that such an initiation procedure be negotiated.

It is well-established that an unfair labor practice charge is only subject to deferral where resolution of that charge is dependent upon a question of contractual interpretation. There must be identity of issue. The issue in this case is whether the employer failed or refused to meet its statutory obligation to bargain in good faith. While resolution of the contractual question of compliance with the notice provision may be a basis for argument, it does not resolve the question of the scope of the employer's statutory obligation to negotiate in good faith.

To defer this case would be an inappropriate and irresponsible exercise of the PERB's responsibility under the facts presented in this case.

In reviewing the record, the testimony of LIUNA's witness – Local 1029's Business Manager – was unrefuted by the State. In fact, the State offered no witnesses and only one document in its defense, and that document related to efforts to reopen negotiations in 2007.

Based on the record before me, LIUNA has established a credible and logical basis for questioning to whom notice should have been provided. Article 31.1 of the 2004-2007 collective bargaining agreement states that notice should be provided to the Deputy Director for Employee Relations, but neither identifies that individual nor provides an address or other means of contact.

Based upon his signature on the contract and his participation in the statewide Labor-Management Committee, Littleton knew the Deputy Director for Employee Relations to be LoFaro. The record is undisputed that in November, 2007, LoFaro was removed from the Labor-Management Committee contact list and he ceased attending

meetings. At the same time, Cutler was added to the list and began to attend to meetings. Cutler, however, had a different and distinct title, i.e., “Director of Labor Relations and Employment Practices.”

It was logical and reasonable that LIUNA’s Business Manager, having a reasonable question in her mind as to who notice should be served upon, would contact the Human Resources Manager (Varuolo) at the facility where the bargaining unit employees worked. Varuolo was a management member of the State’s negotiating team and was a signatory of the 2004-2007 collective bargaining agreement.

At Varuolo’s instruction, Littleton sent letters by certified mail to three management representatives, including Wesley, who had also served on the management negotiating team and was a signatory of the 2004-2007 collective bargaining agreement. These letters were mailed on March 3, 2008, a full ninety-seven days prior to the June 8 contractual expiration date and thirty-seven days prior to the notification date set forth in Article 31.1.

The State did not dispute nor provide any evidence that these letters were not received or discredit Littleton’s testimony that she had discussed LIUNA’s desire to enter into negotiations for a successor agreement with Varuolo. The State’s letter of July 7, 2008 (*Union Ex. 5*) states, “The letters were eventually delivered to the Holloway campus and were signed for by DHSS employees at the campus.” Littleton received signed receipts for the notification letters she sent to Wesley, Bonner and Mooney which were placed in return mail to her on March 5, 2008.

It is undisputed that LIUNA received no response from any of the three individuals to whom the notices were provided by certified mail. It is also undisputed

that Littleton relied, in good faith, on Varuolo's instruction to send notice to these individuals.

The evidence supports the conclusion that as of early March, 2008, at least two members of the DHSS staff who had been members of the management team in the prior negotiations (and who were signatories to the Agreement) were on notice that LIUNA desired to initiate negotiations. At that point, the State had a good faith obligation to respond to LIUNA's request. Specifically, these individuals should have responded to LIUNA's request by either forwarding it to the appropriate management contact (and advising LIUNA of its action) or by contacting Littleton directly, in a timely manner, to advise her to redirect her request to the proper person.

At no point in this proceeding did the State establish that LoFaro was or remained the Deputy Director for Employee Relations in March, 2008, nor did it provide any evidence as to whether the position continued to exist. If there had been a change in circumstances (such as a reorganization or vacation of the position), the State had a good faith obligation to advise the unions, like LIUNA, who had a contractual provision similar to Article 31.1 in their collective bargaining agreements.

Collective bargaining is not a "gotcha" process. The procedural requirement of Article 31.1 does not indicate a waiver by LIUNA of its right to negotiate nor does it provide an escape for the State from its duty to bargain in good faith. The record clearly establishes that management was on notice well before the contractual sixty days of LIUNA's desire to initiate negotiations. In fact, DHSS representatives were on notice prior to the ninety day statutory requirement for the initiation of negotiations.⁶

⁶ "Collective bargaining shall commence at least 90 days prior to the expiration date of any current collective bargaining agreement ..." 19 Del.C. §1313(a).

By failing to respond, the State violated its good faith obligation and thereby violated the statute.

CONCLUSIONS OF LAW

1. 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 Stockley Center (“Stockley”) is a facility operated by the Division of Developmental Disability Services, a department of DHSS.

2. The Delaware State and Federal Employees Local Union No. 1029, a/w Laborers International Union of North America, (“LIUNA”) 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).

3. The State and LIUNA were parties to a collective bargaining agreement which was effective June 8, 2004 through June 8, 2007.

4. On or about March 3, 2008, LIUNA provided documented notice to DHSS representatives who had served on the State’s negotiating team for the 2004-2007 Agreement, specifically requesting to reopen negotiations. LIUNA did not receive a response to its request from any of the three individuals to whom they were sent.

5. On or about June 24, 2008, LIUNA renewed its request to begin negotiations by contacting the State’s Director of Labor Relations and Employment Practices. The State refused to enter into negotiations on the basis that the contractual notice requirement had not been satisfied.

6. LIUNA has provided sufficient evidence in this matter to support its contention that it had a reasonable question as to who notice should be provided to

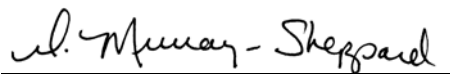
reopen negotiations. LIUNA made a good faith attempt to have its question answered and faithfully followed the instruction it received by mailing certified notices to three DHSS Human Resources contacts. There is no dispute that these letters were received.

7. By failing to respond to the March 3, 2008, notices and/or failing to advise LIUNA in a timely manner to redirect the notice of its intent to reopen negotiations, the State violated its duty to bargain in good faith and 19 Del.C. §1307(a)(5).

WHEREFORE, the State is hereby ordered to immediately enter into negotiations with LIUNA Local 1029 with the commitment to expedite those negotiations. It is further ordered to advise the Public Employment Relations Board of the status of these negotiations not later than sixty days after the date of this decision.⁷

IT IS SO ORDERED.

DATE: 4 February 2009



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

⁷ Consistent with the statutory notice requirement of 19 Del.C. §1314.