PUBLIC EMPLOYMENT RELATIONS BOARD

FOR THE STATE OF DELAWARE

AMERICAN FEDERATION OF STATE, COUNTY, & MUNICIPAL EMPLOYEES, COUNCIL 81, LOCAL 247, LOCAL 516, LOCAL 640, LOCAL 837, LOCAL 879, LOCAL 936, LOCAL1036, LOCAL1443, LOCAL 1525, LOCAL 1832, LOCAL 2030, LOCAL 2031, LOCAL 2072, LOCAL 2305, LOCAL 2362, LOCAL 3514,	:	
Charging Parties,	:	**ULP No. 09-07-693**
v.	:	
STATE OF DELAWARE DEPARTMENT OF HEALTH AND SOCIAL SERVICES, STATE OF DELAWARE DEPARTMENT OF CORRECTION, AND STATE OF DELAWARE DEPARTMENT OF TRANS-- PORTATION,	:	**PROBABLE CAUSE DETERMINATION**
Respondents.	:	

BACKGROUND

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 (1995). The State Departments of Health and Social Services, Corrections, and Transportation ("Departments") are all cabinet departments of the State of Delaware.

The American Federation of State, County, & Municipal Employees ("AFSCME") is an employee organization which admits public employees to membership and has as a purpose the representation of those employees in collective bargaining pursuant to 19 Del.C. §1302(i). Council 81 and its affiliated Locals enumerated in the caption of this Charge are certified

exclusive bargaining representatives of State employees who work in the Departments of Health and Social Services, Corrections, and Transportation, within the meaning of 19 Del.C. 1302(j).

The Charge asserts that each of the Local Unions named in the caption have collective bargaining agreements with the State and the named departments. *Charge ¶1.* It also asserts that each of those collective bargaining agreements have "provisions for the eligibility and method of computing overtime that are all based on a standard 37.5 hour work week." *Charge ¶5.*

The State denies (in its Answer to the Charge) that AFSCME or any of the named Local Unions represent public employees in compensation units that have collective bargaining agreements in any of the Departments identified in the Charge. *Answer ¶1.* It also denies AFSCME's assertion that each of the existing collective bargaining agreements contains overtime provisions as asserted. *Answer ¶5.*

On or about July 15, 2009, AFSCME and its affiliated Locals filed an unfair labor practice charge alleging the State had violated 19 Del.C. §1307(a)(2), (3), (5), and (6):

> (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
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> (2) Dominate, interfere with or assist in the formation, existence or administration of any labor organization.
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> (3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.
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> (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.
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> (6) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

The Charge alleges in early July, 2009, without consultation with Council 81 or the affiliated Local Unions, each Department (DHSS, DOT and DOC) communicated directly with

bargaining unit employees its intention to unilaterally change the method of computing overtime payments. The Charge alleges each Department:

- Unilaterally implemented a new method for calculating overtime which results in employees receiving overtime at time and one-half their regular hourly rate after working 40 hours in a work week instead of 37.5 hours. Hours worked only includes hours actually worked but does not include the hours paid for vacation time, sick time, holiday time, or other benefit time for purposes of calculating overtime, as it had prior to July, 2009.

- The announcement of the change being sent directly to bargaining unit members was intentionally done to circumvent Council 81 and the Local Unions for the purpose of creating confusion and distrust between the Union members and Council 81 and its Local Unions.

- The announcement of the change being sent directly to bargaining unit members was not based on any law or right given to either the authors of the individual agency memoranda or to the Secretary of the Department. The action was taken to intentionally mislead bargaining unit members and was done with reckless disregard for the confusion and anger the distribution of the knowingly false information would have on bargaining unit employees.

On or about July 27, 2009, the State filed its Answer to the Unfair Labor Practice Charge, denying all material allegations contained therein. The Answer also included New Matter in which the State alleges the Charge should be dismissed because:

- PERB does not have jurisdiction over the alleged unfair labor practice charge because the acts complained of in the Charge are within the exclusive authority of the Executive and Legislative Branches of government under constitutional, common and case law, as well as otherwise.

- The Charge fails to state a claim for which relief can be granted because improper unilateral changes must affected mandatorily negotiable subjects of bargaining under the PERA. "Pay for Overtime Service" is excluded from the scope of mandatory bargaining by Section 18 of the Fiscal Year 2010 Appropriate Act.

- The Charge fails to state a claim for which relief can be granted under §1307(a)(2) because AFSCME does not allege any conduct which tends to "dominate, interfere with or assist in the formation, existence or administration of any labor organization."

- The Charge fails to state a claim for which relief can be granted under §1307(a)(3) because AFSCME does not allege any conduct which tends to

"encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment."

- The Charge fails to state a claim for which relief can be granted under §1307(a)(5) because AFSCME does not allege any conduct which would support the conclusion that the State failed or refused to bargain collectively in good faith with the exclusive representative of represented employees.

- The Charge fails to state a claim for which relief can be granted under §1307(a)(6) because AFSCME does not allege any conduct which would support the allegation that the State failed or refused to comply with any provision of the PERA or with PERB rules.

On or about August 4, 2009, AFSCME filed its Response to New Matter denying all material allegations contained therein.

This Probable Cause Determination is based upon a review of the pleadings.

DISCUSSION

The Rules and Regulations of the Delaware PERB require that upon completion of the pleadings in an unfair labor practice proceeding, a determination shall be issued as to whether those pleadings establish probable cause to believe the conduct or incidents alleged could have violated the Public Employment Relations Act, 19 Del.C. Chapter 13. DE PERB Rule 5.6. For the purpose of this review, factual disputes established by the pleadings are considered in a light most favorable to the Charging Party in order to avoid dismissing what may prove to be a valid charge without the benefit of receiving evidence concerning that factual dispute. *Richard Flowers v. State of Delaware, Department of Transportation, Delaware Transit Corporation***,** Probable Cause Determination, ULP No. 04-10-453,V PERB 3179 (2004).

The State makes an initial assertion in its New Matter that PERB lacks jurisdiction to consider the Charge because, "the acts complained by the Charging Parties in their Charge are within the exclusive authority of the Executive and Legislative Branches of government under

the constitutional law, common law, case law and otherwise." *State's New Matter I* ¶*23.* The assertion does not cite any supporting constitutional, statutory or case law to support this legal conclusion.

The Public Employment Relations Board was created by an act of the General Assembly and signed into law by the Governor in 1982. PERB is, by statute, a neutral, independent agency which is not subject to the control or supervision of any cabinet agency or officer thereof. 14 Del.C. 4006. The Board is expressly charged with administering the PERA. 19 Del.C. §1301(3). Its powers and responsibilities with respect to the administration of the unfair labor practice provisions of the statute are set forth in §1308, Disposition of Complaints:

> (a) The Board is empowered and directed to prevent any unfair labor practice described in § 1307 (a) and (b) of this title and to issue appropriate remedial orders. Whenever it is charged that anyone has engaged or is engaging in any unfair practice as described in § 1307(a) and (b) of this title, the Board or any designated agent thereof shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice charge and including a notice of hearing containing the date and place of hearing before the Board or any designated agent thereof. Evidence shall be taken and filed with the Board; provided, that no complaint shall issue based on any unfair labor practice occurring more than 180 days prior to the filing of the charge with the Board.
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> (b)(1) If, upon all the evidence taken, the Board shall determine that any party charged has engaged or is engaging in any such unfair practice, the Board shall state its findings of fact and conclusions of law and issue and cause to be served on such party an order requiring such party to cease and desist from such unfair practice, and to take such reasonable affirmative action as will effectuate the policies of this chapter, such as payment of damages and/or the reinstatement of an employee; provided however, that the Board shall not issue:
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> a. Any order providing for binding interest arbitration on any or all issues arising in collective bargaining between the parties involved; or
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> b. Any order, the effect of which is to compel concessions on any items arising in collective bargaining between the parties involved.
>
> (2) If, upon the evidence taken, the Board shall determine that any party charged has not engaged or is not engaging in any such unfair practice, the

> Board shall state, in writing, its findings of fact and conclusions of law and issues and dismiss the complaint.
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> (c) In addition to the powers granted by this section, the Board shall have the power, at any time during proceedings authorized by this section, to issue orders providing such temporary or preliminary relief as the Board deems just and proper subject to the limitations of subsection (b) of this section.

The PERA explicitly defines the State to be a public employer to which the Act applies:

> "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 has elected to come within this chapter, or which employs 100 or more full-time employees. *19 Del.C. 1302(p)*

Accordingly, the State's assertion that PERB is without jurisdiction to consider this unfair labor practice charge is without basis, and is therefore dismissed.

The Charge alleges the three named Departments (DHSS, DOT and DOC) violated the PERA by 1) unilaterally modifying the method for calculating overtime payments, and 2) by announcing that change to bargaining unit employees in a manner which intentionally misled those employees and which circumvented the unions' role as exclusive bargaining representatives.

The Charge does not include any information to support the allegation that the State or any of the named Departments engaged in conduct which discriminated in regard to hiring, tenure, or other terms and conditions of employment in any manner, or that specifically encouraged or discouraged membership in a union. For this reason, Charging Parties' assertion that 19 Del.C. §1307(a)(3) was violated is dismissed.

The Charge also does not provide a sufficient basis or reference to any manner in which the State may have refused or failed to comply with any provision of the Public Employment Relations Act or with rules and regulations established by the PERB pursuant to its

responsibility to regulate the conduct of collective bargaining under the statute. Charging Parties' assertion that 19 Del.C. §1307(a)(2) was violated is also dismissed.

In order to prevail on the allegation that the State instituted a unilateral change in violation of the duty to bargain in good faith, it must first be determined whether the method of payment for overtime constitutes a "term and condition of employment" within the meaning of §1302(t) of the PERA, on which there is a mandatory obligation on the State and the exclusive representatives to negotiate. 19 Del.C. §1301(2); 1302(e); §1304(a). A unilateral change in a mandatory subject of bargaining constitutes a *per se* violation of the duty to bargain in good faith. *AFSCME Local 2004 v. State of Delaware/DSCYF & PERB, CA 14869, (VC Jacobs, 1996), II PERB 1425, 1432.*

There is no question that matters covered by the Merit Rules pursuant to 29 Del.C. §5938(c)[1] are "discretionary" and therefore excluded from the mandatory scope of bargaining for State Merit employees. *Supra*, p. 1433. Whether overtime provisions, while unquestionably a matter relating to wages, are outside of the scope of bargaining for State Merit employees has not been previously addressed by PERB. Additionally, the State has asserted that Section 18 of the 2010 State Appropriations Act[2] further limits the scope of

[1] 29 Del.C. §5938, Collective Bargaining: (c) The rules adopted or amended by the Board under the following sections shall apply to any employee in the classified service represented by an exclusive bargaining representative or covered by a collective bargaining agreement under Chapter 13 of Title 19, except in the case of collective bargaining agreements reached pursuant to § 1311A of Title 19: §§ 5915 through 5921, 5933, 5935 and 5937 of this title.

[2] Section 18: Notwithstanding Merit Rules 4.4.2 and 4.4.3, an agency that requests approval of a starting rate higher than 85 percent of midpoint, or that requests that incumbents be leveled up to a newly-hired employee, shall provide documentation showing that sufficient funds exist within the agency's base budget to fund such actions. An agency that requests approval of a starting pay rate higher than 85 percent of midpoint shall also indicate if approval of such starting rate will result in a request to level up the salary of the existing employees, and shall indicate if sufficient funds exist within the agency's base budget to fund such a leveling up action. Notwithstanding any provision of this Act or the Delaware Code to the contrary, no provision of Chapter 4.0 of the Merit Rules shall be considered compensation for the purpose of collective bargaining and leveling up can only occur with the concurrence of the Director of the Office of Management and Budget and the Controller General. The Director of the Office of Management and Budget and Controller General, with concurrence of the co-chairs of the Joint Finance Committee shall promulgate polices and procedures to implement this section. {*Emphasis added to reflect the portion of Section 18 cited in ¶28 of the State's New Matter.}*

bargaining. Resolution of these issues requires an established factual record and argument by the parties.

Section 1313(a) of the PERA provides that "no collective bargaining agreement shall be valid or enforceable if its implementation would be inconsistent with any statutory limitation on the public employer's funds, spending or budget, or would otherwise be contrary to law." If, as the unions assert, the existing collective bargaining agreements contain provisions which address the eligibility and method of computing overtime, those provisions may be invalid or unenforceable if they are inconsistent or contrary to law. The Charge and Answer raises a legal question concerning the applicability of §1313(a) to the facts of this case.

Finally, AFSCME asserts that the method by which the Departments announced or notified bargaining unit employees of the changes to the overtime procedure was intended to circumvent the union and to create confusion and distrust, and that the announcement of "knowingly false information" was done with reckless disregard. Considered in a light most favorable to the charging party, this allegation, if proven, may support the conclusion that§1307(a)(2) was violated. It will be AFSCME's burden to establish both the factual and legal support for such a finding.

DETERMINATION

Consistent with the foregoing discussion, PERB has exclusive authority under 19 Del.C. §1301 to administer the unfair labor practice provisions of the PERA, consistent with the statutory mandates of §1308 of the Act.

The pleadings are insufficient to support a finding of probable cause to believe that there may have been a violation of 19 Del.C. §1307(a)(3) and/or (a)(6). Those charges are,

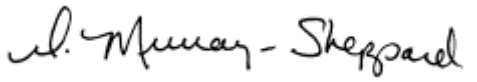
therefore, dismissed.

The pleadings do, however, provide a sufficient basis for finding probable cause to believe that an unfair labor practice in violations of 19 Del.C. §1307(a)(2) and/or (a)(5) may have occurred.

WHEREFORE, a hearing shall be scheduled forthwith to establish a record on which a determination can be made as to whether either the State and/or the named Departments failed to bargain good faith in violation of 19 Del.C. §1307(a)(5) and/or dominated, interfered with or assisted in the existence or administration of AFSCME and the Local Unions in violation of 19 Del.C. §1307(a)(2).

IT IS SO ORDERED.

DATE: October 5, 2009



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