

**PUBLIC EMPLOYMENT RELATIONS BOARD
FOR THE STATE OF DELAWARE**

AMERICAN FEDERATION OF STATE, COUNTY, & MUNICIPAL EMPLOYEES, COUNCIL 81, LOCALS 879, 1036, AND 1143,	:	
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	:	
Charging Parties,	:	<u>ULP No. 09-07-694</u>
	:	
v.	:	
	:	
	:	
STATE OF DELAWARE OFFICE OF MANAGEMENT AND BUDGET AND STATE OF DELAWARE DEPARTMENT OF TRANSPORTATION,	:	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 Office of Management and Budget and the Department of Transportation (“Departments”) are agencies of the State of Delaware.

The American Federation of State, County, & Municipal Employees, Council 81, AFL-CIO, (“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). AFSCME, through its affiliated Locals 879, 1036 and 1443, is the certified exclusive bargaining representative of Department of Transportation employees who work in the Division of Maintenance and Operations in New Castle, Kent and Sussex Counties within the meaning of 19 Del.C. 1302(j).

The State of Delaware, Department of Transportation, Division of Maintenance and Operations and AFSCME (by and through its affiliated Locals 879, 1079, 1443) are parties to a single collective bargaining agreement which has a term of December 14, 2006 through December 13, 2010. Article 15, Training, of that agreement is attached to the Charge as Exhibit 1.

On or about July 17, 2009, AFSCME filed an unfair labor practice charge alleging the State 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:
 - (2) Dominate, interfere with or assist in the formation, existence or administration of any labor organization.
 - (3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.
 - (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.
 - (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 on or about May 12, 2009, without consultation with Council 81 or the Locals, DOT communicated directly with bargaining unit employees through a Career Ladder Memorandum which is alleged to make significant and unilateral changes to the administration of Article 15. The Charge further alleges that Training is a mandatory subject of bargaining under the PERA. AFSCME charges that OMB and DOT:

- Took the complained of action without consultation or bargaining with AFSCME;
- By sending the Memo directly to bargaining unit members OMB and DOT intended to unilaterally change terms and conditions of employment by circumventing Council 81 and the Locals in order to undermine bargaining

unit employees' perception of the union in protecting the collective bargaining agreement and to cause confusion and distrust between the Union and its members.

- The announcement of the change being sent directly to bargaining unit members was not based on any law or right given to either OMB or to the Secretary of DOT. 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 28, 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 alleged 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 Branch of government under the law. It asserts that Section 70(a)¹ of the 2010 State Appropriations Act provides that 29 Del.C. 6529² provides OMB with authority which "... includes but is not limited to, the authority to implement a Hiring Freeze and/or extend that Hiring Freeze to include Career Ladder Promotions."

¹ Section 70. (a) For Fiscal Year 2010, 29 Del. C. § 6529 is interpreted to include the ability to implement a hiring review process. All State agencies with the exception of Legislative, Judicial, Higher Education and school districts shall be subject to the provisions of 29 Del. C. § 6529 as interpreted by this section. Implementation of a hiring review process shall require all positions to be reviewed and approved by the Director of the Office of Management and Budget prior to filling. All non-cabinet agency hiring requests shall also require the review and approval of the Controller General prior to filling.

(b) In the event the authority granted in subsection (a) of this section is implemented, Chapters 3.0000 and 13.0000 of the Merit Rules notwithstanding, the Director of the Office of Management and Budget shall have the authority to extend temporary promotions based on agency need until the hiring review process has ended. At the time the hiring review process has ended, those temporary promotions granted during the hiring review process shall be subject to the limitations identified in the Merit Rules governing the duration of temporary promotions.

² § 6529. Control of agency expenditures. The Director of the Office of Management and Budget is hereby empowered and directed to exercise, subject to the approval of the Governor, such control over the monthly and/or quarterly rates of agency expenditures of funds appropriated to such agency as the Director of the Office of Management and Budget may deem necessary to assure the effective and continuous operation of the various agencies during the fiscal year. The authority of the Director of the Office of Management and Budget under this section shall apply to local and special school districts insofar as they administer funds supplied by the State, but not with regard to funds raised locally.

- The Charge fails to state a claim for which relief can be granted because improper unilateral changes must affect mandatorily negotiable subjects of bargaining under the PERA. “Compensation” is only included in the scope of bargaining after PERB has authorized compensation bargaining under 1311A of the Act. AFSCME has not been authorized to bargain compensation for the employees at issue in this Charge.
- 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 asserts in its New Matter that PERB lacks jurisdiction to consider the Charge because the acts complained of in the Charge "... are within the exclusive authority of the executive branch of government as provided for under law" and the authority vested in OMB "supersedes any provision of the Delaware Code or the collective bargaining agreement to the contrary." *Answer*, ¶15, 16.

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. 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.

(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:

- a. Any order providing for binding interest arbitration on any or all issues arising in collective bargaining between the parties involved; or
- 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.

(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.

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

The Charge alleges the DOT and OMB violated the PERA by 1) unilaterally ceasing to advance compensation to employees who achieved defined milestones in training and/or experience (i.e., suspending career ladder advancement), and 2) by announcing that change to bargaining unit employees in a manner which intentionally misled those employees and circumvented AFSCME's role as exclusive bargaining representatives.

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 training and career ladder advancement constitute terms and conditions 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)³ are “discretionary” and therefore excluded from the mandatory scope of bargaining for State Merit employees. *Supra*, p. 1433. Whether training and career ladder advancement, which unquestionably relate to wages in this case, 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 70(a) of the 2010 State Appropriations Act provides OMB with extraordinary authority which supersedes any negotiated collective bargaining agreement. Resolution of these issues requires consideration of both an established factual record and the arguments of 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 AFSCME asserts, the existing collective bargaining agreement provides for salary advancement within a career ladder, those provisions may be invalid or unenforceable if they are inconsistent or contrary to law. Again, the Charge and Answer raises a legal question as to the applicability of §1313(a) to the facts of this case.

Finally, AFSCME asserts that the method by which the Department announced or notified bargaining unit employees of the changes to career ladder provisions was intended to circumvent the union and to create confusion and distrust, and that the announcement of

³ 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.

“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

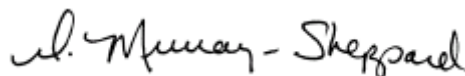
Consistent with the foregoing discussion, PERB has exclusive authority under 19 Del.C. §1301 to administer the unfair labor practice provisions of the PERA, consistent with the statutory mandates of §1308 of the Act.

Considered in a light most favorable to Charging Party, the pleadings provide a sufficient basis for finding probable cause to believe that an unfair labor practice in violations of 19 Del.C. §1307(a)(2), (a)(3), (a)(5) and/or (a)(6) may have occurred.

WHEREFORE, a hearing shall be scheduled forthwith to establish a record on which a determination can be made as to whether DOT and/or OMB violated 19 Del.C. §1307 (a)(2), (a)(3), (a)(5) and/or (a)(6) by instituting changes in training and/or career ladder advancement for bargaining unit employees and/or in the manner and method by which those changes were announced and implemented.

IT IS SO ORDERED.

DATE: December 14, 2009



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