



this chapter.

- (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 regard to a discretionary subject.

The Charge alleges that, without first meeting with the union, DSHS informed a bargaining unit employee of its intent to terminate her unless she agreed to sign a last-chance agreement. DSHS also told the employee that it was her responsibility to secure CWA's agreement to the agreement and provided a deadline to do so before its offer to retain the employee under the terms of that agreement would be rescinded.

The Charge further alleges that DSHS denied CWA's request to provide the documentation relied upon by the employer to support its decision to terminate the employee. In response to CWA's request, DSHS informed the union that the request must be more specific in identifying the specific information it desired and conditioned release of any information to the union upon receipt of a signed waiver and release from the affected employee.

On January 25, 2011, DSHS filed its Answer to the Charge asserting that it advised the employee to consult with the union concerning the terms of the last chance agreement. After the employee signed the written release required by DSHS, the information DSHS believed relevant to the employee's pending termination was provided to CWA. The Answer also included New Matter in which DSHS alleged the Charge failed to allege facts sufficient to sustain a claim that either 19 Del.C. §1307(a)(1) or (a)(5) had been violated, and alternatively asserted the Charge should be deferred to the negotiated grievance and arbitration procedure for resolution.

On February 3, 2011, CWA responded to the New Matter denying the Charge was insufficient. CWA also asserted the current dispute is not properly postured for

arbitration because DSHS has continually failed to process grievances in accordance with the contractual grievance procedure.

On December 21, 2010, CWA filed a second unfair labor practice charge (ULP No.10-12-783) in which it asserts that, “by unilaterally presenting and seeking to impose the last chance agreement on the affected employee, DSHS violated 19 Del.C. §§ 1307(a)(1) and (a)(5)”.

On January 25, 2011, DSHS filed its Answer denying the material allegations set forth in the Charge and asserting that the employee initially waived her right to union representation but that both she and DSHS subsequently attempted to involve the Union. Under New Matter, the Respondent alleges the Charge should be deferred to the negotiated arbitration procedure for resolution.

On February 3, 2011, CWA filed its Response to New Matter objecting to the deferral proposed by the Respondent, again asserting DSHS has failed to process grievances in accord with the procedures set forth in the mutually negotiated collective bargaining agreement and is not, therefore, entitled to have this dispute deferred to arbitration.

On December 21, 2010, CWA filed a third unfair labor practice charge (ULP No. 110-12-784) alleging violations by DSHS of 19 Del.C. §§1307(a)(1) and (a)(5). The third Charge alleges that DSHS “interfered with, restrained and coerced employees represented by Charging Party by seeking to deal directly with an employee in the Charging Party’s bargaining unit and to negotiate terms and conditions with said employee without communicating with, or contacting” the exclusive bargaining representative, CWA Local 13101

On January 25, 2011, DSHS filed its Answer in which it denied the allegations set

forth in the Charge. In New Matter, DSHS asserted that the charge should be deferred to contractual arbitration provision.

On February 3, 2011, CWA filed its Response to New Matter objecting to DSHS' request that the matter be deferred to the contractual arbitration procedure for the same reason set forth in the union's responses to the prior charges.

### **DISCUSSION**

Article 1.8, of the PERB's Rules and Regulations states, in relevant part:

#### **Consolidation or Severance**

- (a) Any two or more proceedings may be consolidated by the Board in its discretion, or upon the motion of either party, with the approval of the Board.

The alleged statutory violations of each of the three Charges filed by CWA have their genesis in the same incident. Numerous allegations and supporting factual averments in the pleadings are repetitive. Consequently, the three (3) charges are hereby consolidated into a single charge which is docketed and will be processed as Charge 10-12-778.

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

- (a) Upon review of the Complaint, the Answer and the Response the Executive Director shall determine whether there is probable cause to believe that an unfair labor practice may have occurred. If the Executive Director determines that there is no probable cause to believe that an unfair labor practice has occurred, the party filing the charge may request that the Board review the Executive Director's decision in accord with the provisions set forth in Regulation 7.4. The Board will decide such appeals following a review of the record, and, if the Board deems necessary, a hearing and/or submission of briefs.

- (b) If the Executive Director determines that an unfair labor practice may have occurred, he shall where possible, issue a decision based upon the pleadings; otherwise, he shall issue a probable cause determination setting forth the specific unfair labor practice which may have occurred.

For purposes of reviewing the pleadings to determine whether probable cause exists to support the violations alleged, factual disputes revealed by the pleadings are considered in a light most favorable to the Charging Party in order to avoid dismissing a valid charge without the benefit of receiving evidence in order to resolve factual differences. *Flowers v. DART/DTC*, ULP 04-10-453, V PERB 3179, 3182 (Probable Cause Determination, 2004).

DSHS' assertion that the Charge(s) fails to state facts which, even if proven, would support a claim upon which relief can be granted under 19 Del.C. §1307(a)(1) and/or (a)(5) is without merit. The pleadings are sufficient to satisfy CWA's responsibility to place the State on notice as to the underlying facts upon which the union relies for its allegations.

The State's request for deferral to the contractual arbitration procedure is also without merit and likewise dismissed. The purpose of the PERB's discretionary deferral policy is to assure that issues of contractual interpretation and/or administration are resolved by the grievance and arbitration procedures contained in the parties' negotiated collective bargaining agreement. The State alleges in its new matter that the contractual grievance and arbitration provisions encompass disputes of the type raised in this Charge, specifically "the standards and procedures for employee discipline and procedures for challenging any such discipline."

The State misstates the nature of the issue raised by the Charge and fails to cite any specific contractual provision which it alleges controls or materially impacts the

resolution of CWA's charge. The violations alleged in the Charge are purely statutory and their resolution does not turn upon application or interpretation of a contractual term. Whether there was just cause for the underlying discharge is not in issue in this Charge. Therefore, the question of whether DSHS has engaged in conduct in violation of 19 Del.C. §§1307(a)(1) and (a)(5), as alleged, is within the exclusive jurisdiction of the PERB and is not subject to deferral to the negotiated grievance procedure. *Sussex County Vo-Tech Teachers Assn. and Jo-Ann Atkinson v. Sussex Vo-Tech School District*, ULP No. 96-07-183, II PERB 1481 (1996).

There are two substantive issues raised in the Charge. The first concerns the employer's duty to provide information upon union request, which relates to enforcement of rights arising under the collective bargaining agreement. This issue has been considered by the PERB in numerous prior decisions. The statutory duty to provide information requires an employer to produce information which is necessary and reasonably related to the exclusive representative's duty to provide informed representation to the bargaining unit members.

A public employer's duty to provide information requires a reasonable, good faith effort to respond in a timely manner to the Union's request. Absent evidence justifying an employer's delay in furnishing a union with relevant information, such a delay will constitute a violation of §1307(a)(1) and(a)(5) because the union is entitled to the information at the time of its initial request and it is the employer's duty to furnish it as promptly as possible. *AFSCME, Council 81, Local Unions 320 and 1102 v. City of Wilmington*, ULP No. 10-12-781, VII PERB 4849, 4856 (2010).

In response to CWA's request for "all documentation that the State is using to support the action it plans to take" against the bargaining unit employee, DSHS responded:

... it is our intention to cooperate providing information to support Ms. McIntosh. And, I articulated on those four occasions, having a written

request to offer parameters of what you are requesting is needed in order to limit the volume of review for both parties. As I also clarified on at least three of those four occasions, prior to releasing any records, our agency must have the employee's consent to release information, as the contents of one's personnel records are confidential...

Inasmuch as [*sic*] the CWA 13101 has not yet requested such a waiver from the employee as of today's date, we have developed a waiver for her signature and have reached out to her on your behalf to get her permission. (We acknowledge that you do not concur that such a waiver is needed, despite our prior conversations)...

The key inquiry when a question concerning the duty to provide information arises is whether the information requested "is relevant information necessary for the bargaining representative to intelligently determine facts, assess its position and decide what course of action, if any, to pursue." *NCCEA/DSEA/NEA v Brandywine School District*, ULP No. 85-06-005, I PERB 131, 149 (1986). The State did not contest that the information requested by CWA is relevant to the union's representational responsibilities. CWA's request was limited to the documentation DSHS was relying upon to support its decision to terminate the employee. Only the employer knows what information it relied upon to reach its decision to discharge the employee. On its face, the request was reasonably limited and further clarification was not justified. There is no statutory support in the PERA for conditioning release to an exclusive bargaining representative for information concerning discipline upon receipt of a signed waiver from an employee.

Wherefore, by failing or refusing to respond in a timely manner to the Union's request for information specifically related to a disciplinary matter, and by conditioning the release of any information related thereto upon receipt of a waiver, DSHS violated its obligations under the PERA.

The second allegation concerns the employer's duty to confer with the union concerning the applicability and terms of a last-chance agreement. While the bargaining

status of a last chance agreement *vis-à-vis* the duty to bargain its terms has not been previously considered by the PERB, it raises a legitimate issue which is subject to resolution through the unfair labor practice process.

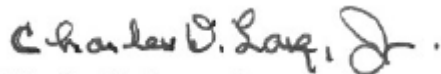
### **DECISION**

Considered in a light most favorable to the Charging Party, the pleadings support a finding of probable cause to believe that a violation of 19 Del.C. §1307(a)(1) and (a)(5) may have occurred with regard to the processing of the last-chance agreement.

DSHS is found to have violated 19 Del.C. §1307(1) and (a)(5) when it failed to provide the information requested by the Union in a manner consistent with its good faith obligations under the PERA.

A hearing will be promptly scheduled for the purpose of developing a factual record upon which a decision can be rendered concerning the circumstances and terms of a last-chance agreement which is at issue in this Charge.

Date: April 20, 2011



---

Charles D. Long, Jr.,  
Hearing Officer  
Del. Public Employment Relations Bd.