**PUBLIC EMPLOYMENT RELATIONS BOARD**

**FOR THE STATE OF DELAWARE**

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| AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 81, LOCAL UNION 3936, | : | |
| Charging Party, | : | **ULP 10-09-765** |
| v. | : | **DECISION ON THE MERITS** |
| STATE OF DELAWARE, DEPARTMENT OF STATE, DELAWARE VETERANS HOME, | : | |
| Respondent. | : | |

APPEARANCES

*Perry F. Goldlust, Esq., for AFSCME*

*Thomas J. Smith, Labor Relations Specialist, SLREP/HRM/OMB, for the State*

## BACKGROUND

The State of Delaware ("State") is a public employer within the meaning of section 1302(p) of the Public Employment Relations Act, 19 Del.C. Chapter 13. The Department of State ("DOS") is an agency of the State and the Delaware Veterans Home ("DVH") is a facility operated by DOS.

The American Federation of State, County and Municipal Employees, Council 81, Local Union 3936, ("AFSCME") is an employee organization within the meaning of 19 Del.C. §1302(i). It is the exclusive bargaining representative, within the meaning of 19 Del.C. §1302(j), of certain State employees working at DVH, including Dieticians, Certified Nursing Assistants ("CNA"), Licensed Practical Nurses ("LPN"), Activity

Aides, Advance Practice Nurses and Registered Nurses ("RN").[1]

On September 8, 2010 AFSCME filed an unfair labor practice charge with the Public Employment Relations Board ("PERB") alleging conduct by the State in violation of 19 Del.C. §1307(a)(1), (a)(2), (a)(3) and/or (a)(5), which provide:

> (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.
>
> (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.

Specifically, the charge alleges that when DVH announced a new shift schedule which included changes to the hours of work of bargaining unit employees, the State unilaterally altered the status quo of a mandatory subject of bargaining. DVH circumvented AFSCME by announcing the changes directly to bargaining unit employees without first negotiating with the union and by ignoring AFSCME's requests to initiate negotiations. By these actions, DVH "fomented discord and undermined the union's support and

[1] AFSCME was certified as the exclusive bargaining representative of State Merit Unit 2 (non-professional patient care positions) under 19 Del.C. §1311A on April 29, 2008. AFSCME was certified as the exclusive bargaining representative of State Merit Unit 6 (professional patient care positions) under 19 Del.C.§1311A on July 10, 2010. A "terms and conditions" bargaining unit of Professional and Non-professional Patient Care employees at the Delaware Veterans Home was certified under 19 Del.C. §1310 on October 1, 2010.

credibility" with the bargaining unit.

The Charge alleges that one member of the bargaining unit, an RN who worked a compressed work schedule would have to resign if the announced change was implemented. AFSCME alleges the new schedule would result in the constructive discharge of this RN, a union supporter, who was active in the organizing effort.

By letter dated September 9, 2010, the State responded DVH had voluntarily elected to stay implementation of the planned September 12, 2010 schedule change. The State also requested an extension of time in which to file its Answer to the Charge "in order to allow and encourage the parties to seek a mutual resolution of AFSCME's claims." Thereafter, the parties engaged in unsuccessful settlement efforts. The State ultimately filed its Answer to the Charge on November 8, 2010.

In its Answer, the State denied many of the factual and legal assertions of the Charge. It asserted in ¶18,

> …[W]ithout waiving any denial, the State denies AFSCME had any authority as an exclusive representative of RN positions at DVH at any time relevant and material to the Charge. Further answering and without waiving any denial, at all times relevant and material to the Charge the State denies AFSCME secured any separate or independent right or authority to represent and negotiate on behalf of any position at DVH outside of the context of coalition bargaining authorized by 19 Del.C. §1311A. Further answering and without waiving any denial, the State does not assert that AFSCME is presently without any authority as an exclusive representative, but does assert that it has initiated efforts with AFSCME to resolve any concerns with scheduling practices, and that the parties are now progressing to general negotiations with the non-compensation bargaining unit representing RNs, LPNs and CNAs, which was certified after the initial Charge was filed.

The State requested the Charge be dismissed and that the requested relief be denied. No new matter was alleged to which a response was permitted.

A Probable Cause Determination was issued on November 22, 2010, which denied the State's request for dismissal and found probable cause to believe that the change in hours announced by the State may constitute a violation of 19 Del.C. §1307 (a)(1), (a)(2), (a)(3), and (a)(5), as alleged. Three days of hearing[2] were held for the purpose of receiving evidence. During the hearing the parties entered testimony and documentary evidence into the record. The record closed following receipt of written argument from both parties.

## FACTS

The following facts are derived from the testimony and documentary evidence contained in the record created by the parties to this Charge:

The Delaware Veterans Home provides long-term residential care to Delaware veterans. DVH opened to residents in June, 2007. It operates 24 hours a day, seven days a week, every day of the year. In the summer of 2011, DVH employed approximately 196 staff.

DVH's nursing staff[3] work a combination of 7.5 hours shifts (7 a.m. – 3 p.m.; 3 p.m. – 11 p.m.; 11 p.m. – 7 a.m.) and 12.5 hour shifts[4] (6 a.m. – 7 p.m.; 6 p.m. – 7 a.m.). The normal work week for all nursing staff is 37.5 hours per week, exclusive of a 30 minute meal period. Most nurses have a "patterned" two week work schedule which includes regular days off. Nurses are assigned to a fixed shift (i.e., they are not normally scheduled to rotate between shifts) and normally work on a single wing of the hospital. Alternative and compressed work schedules are also available at DVH's discretion in

[2] The hearing was conducted on June 10, June 30, and July 18, 2011.

[3] "Nursing staff" or "nurses" as used herein include Registered Nurses (RN's), Licensed Practical Nurses (LPN's) and Certified Nursing Assistants (CAN's).

[4] 12.5 hour shifts were only made available to RN's effective July 5, 2009.

order to accommodate school and personal schedules. DVH also employs part-time, casual/seasonal and agency nurses as necessary.

All nursing staff are required to sign "Work Schedule Agreements" which set forth their normal, regular work schedules for the two week scheduling period. The Agreements (although not all identical) establish the effective date of the agreement and schedule and state:

> 2. This schedule may be modified or cancelled in accordance with the needs of the Delaware Veterans Home.
> 3. If you call out for a weekend shift, Nursing Management reserves the right to schedule a make-up shift on a future weekend within 30 days at their discretion.
> 4. Permanent schedules of more than 7.50 hours per day or 37.50 hours a week are not eligible under the overtime/compensatory time rules. In order to be eligible for shift differential, you must meet the requirements set forth per Merit Rule 4.15.2.[5]

Work Schedule Agreements are signed by the employee, a nursing supervisor or manager, and the Director of Nursing (or Assistant Director of Nursing).

DVH is required by state and federal law to meet minimum staffing standards at all times in order to maintain its certification. When an employee is unavailable to work due to a planned absence (annual leave, extended sick leave or disability leave), overtime opportunities are made available to nursing staff. When a nurse calls out with limited notice, other nurses may volunteer to remain beyond their shift and/or to come in early, nurses may be temporarily reassigned from other wings, or casual/seasonal or agency nurses may be used to meet the minimum staffing requirements. Nurses may also be "mandated" to remain at work until a replacement can be found. The combination of 7.5 hour and 12.5 hour shifts for nurses poses scheduling difficulties in filing "holes" because

[5] The last sentence of #4 concerning eligibility for shift differential does not appear in all of the Work Schedule Agreements entered into the record.

nurses are limited by law to working no more than 16 hours in a 24 hour period.

On or about April 29, 2008, AFSCME was certified as the exclusive bargaining representative of State Merit Unit 2[6] (non-professional patient care positions) under 19 Del.C. §1311A. Notices of the Election Results were posted at DVH which stated: "AFSCME Council 81 received a majority of the valid ballots cast in this election. Consequently, previously unrepresented State Merit employees holding positions in the following classifications are now represented for purposes of collective bargaining as defined in 19 Del.C. §1311A." Unit 2 specifically included the following DVH positions: Activity Aides I and II; Certified Nursing Assistants; Dietician's Assistants; and Licensed Practical Nurses. *Union Exhibits 1 & 2.*

On or about April 27, 2010, AFSCME Council 81 filed a Certification Petition with PERB seeking to represent all unrepresented employees in State Merit Unit 6, "Professional Patient Care."[7] The bargaining unit was defined, an election order was issued by PERB on May 24, 2010, and notices were posted at DVH. The Notices specifically listed the following DVH positions as unrepresented and eligible to vote in the election: Advance Practice Nurses; Nurse Supervisors; and Registered Nurses. The Notice stated, "A secret ballot election will be conducted by the Public Employment Relations Board among State Merit employees holding the positions listed above to determine whether they desire to be represented for purposes of collective bargaining."

By email dated June 18, 2010, DVH Human Resources Specialist Barbara Crosier advised DVH staff, "All, here are the dates and times for the rest of June when there will be Union representative in the facility. They will be located either in the Consult Room or the Break room. Supervisors, please post this notice." The email indicated Union representatives would be in the facility on June 18, 19, and 20, 2010 between 1 p.m. and 8 p.m.; on June 19 from 12 – 1

[6] Nonprofessional patient care workers are defined as "institutional care classes including licensed practical nurses, nursing assistants, active treatment assistants, technicians, therapy aides and similar classes." *19 Del.C. §1311A(b)(2).*

[7] Professional patient care workers are defined as "registered nurses, public health nurses, psychiatric nurses, therapists, dietitians and similar professional classes." *19 Del.C. §1311A(b)(6).*

a.m.; on June 29 from 12 – 1 a.m.; and on June 30 from 5 – 8 p.m. *Union Exhibit 18.*

The Unit 6 election concluded on July 29, 2010. A second notice was posted at DVH (as well as all other State facilities and agencies where employees holding affected positions worked) announcing the election results, "AFSCME Council 81 received a majority of the valid ballots cast in this election. Consequently, previously unrepresented State Merit employees holding positions in the following classifications are now represented for purposes of collective bargaining as defined in 19 Del.C. §1311A." *Union Exhibit 5.*

On or about August 19, 2010, AFSCME filed a Petition that sought to create and certify a "terms and conditions" bargaining unit of DVH employees, pursuant to 19 Del.C. §1310. That bargaining unit of "Professional and Non-professional Patient Care employees at the Delaware Veterans Home" was certified under 19 Del.C. §1310 on October 1, 2010.

By correspondence dated September 4, 2008 to Jerry Cutler (State Director of Labor Relations and Employment Practices), AFSCME Staff Representative Hanks requested to open "…negotiations over the terms and conditions of bargaining for those people employed at the Veteran's Home who are part of Unit 2 Non-professional Healthcare Workers…" Mr. Hanks requested to begin negotiations by September 15, 2008. Mr. Hanks sent a second letter to Mr. Cutler dated January 7, 2010 to follow up his September 4, 2008 request to negotiate, in which he stated, "To date we have not received any information in regard to the above-referenced matter. Please let me know when the State is available to start the negotiation process." *Union Exhibit 15.* Mr. Hanks sent a third letter to Mr. Cutler dated September 10, 2010, in which he again requested the State advise him as to "… when the State and Veteran's Home will be

available to start the negotiation process." *State Exhibit 10.*

In an email dated September 13, 2010, Mr. Cutler responded:

> When AFSCME requested to initiate bargaining for a "terms and conditions" contract at the Veterans Home, we responded by email dated September 25, 2008, as follows:
>
> > It seems to me that in order for us to bargain a "terms and conditions" contract covering employees of the Delaware Veterans Home (DVH), the Public Employment Relations Act requires that PERB first: (1) designate a bargaining unit as appropriate in accordance with 19 Del.C. Section 1310; and (2) certify AFSCME as the exclusive representative for these employees in accordance with 19 Del.C. Section 1311.
> >
> > Though AFSCME represents certain DVH employees by virtue of the Unit 2 representation election, the PERB has not designated a bargaining unit specifically for employees at that facility, and has not certified AFSCME as the exclusive representative of those employees.
> >
> > Alternatively, you may wish to consider filing a Petition for Declaratory Statement with the PERB to determine whether bargaining is permitted in absence *[sic]* of a designated bargaining unit and exclusive representative certification.
>
> AFSCME did not respond to this email.
>
> On January 14, 2010, we again forwarded the email of September 25 to AFSCME and reasserted the issue of whether a "terms and conditions" contract at DVH could be negotiated in the absence of a bargaining unit corresponding to the employees represented by AFSCME as a result of the Unit 2 representation election. Again, no response to this email until your letter from Friday.
>
> I have copied the PERB on this email to the extent it wishes to weigh in on the issue you have raised. *Union Exhibit 15.*

In October, 2008, Karen Monahan was hired by DVH as an RN III. When she was hired, she was offered and agreed to work a compressed schedule that included double shifts (3 p.m. – 7 a.m.) on Saturday and Sunday the first week, and double shifts (3 p.m. – 7 a.m.) on Sunday and Monday the second week of her two week rotation. Ms. Monahan

testified this schedule accommodated her personal needs as well as the needs of DVH for experienced nurses on the weekends. She signed a Work Schedule Agreement which reflected the agreed upon compressed schedule. *Union Exhibit 3*

On or about late June, 2010, Patricia Hildebrand was hired by DVH to be its Director of Nursing ("DON"). Prior to Ms. Hildebrand, DVH had approximately six DON's and/or Assistant DON's since the facility opened three years prior. Ms. Hildebrand testified she was directed when she was hired to get the nursing schedule organized, to control overtime expenses and to limit the use of casual/seasonal and agency nurses. She testified when she arrived at DVH, the staffing was "mind-boggling" and inconsistent. Excessive amounts of overtime were being worked by some nurses, some casual seasonal employees were working more than 40 hours per week, agency nurses were being brought in frequently to cover "holes" in the schedule, and staff nurses were routinely pulled off of their units to cover staff shortages in other units. Although DVH had sufficient staffing, absenteeism and shift "swaps" between nurses caused many of the problems.

By email dated July 22, 2010, all DVH nurses were invited to a meeting (to be held on July 27, 2010) to meet DON Hildebrand and to discuss upcoming changes. A separate email was sent to CNA's, announcing a meeting or about July 29, 2010. During this meeting, DON Hildebrand discussed the need for changes to the schedule. She told the staff there would be no more compressed schedules, that the facility would do away with 12.5 hours shifts and that shift overlap would be extended from five to fifteen minutes at the start and end of each shift, effective September 12, 2010. She asked all nursing staff to fill out a survey to express their preference for 7.5 hour shifts, which stated:

Name:_____ Unit: _____
Title: RN LPN CAN *Please circle one*

Shift Preference:
_____ 6:45 a.m. – 3:15 p.m. (1st Shift)
_____ 2:45 p.m. – 11:15 p.m. (2nd Shift)
_____ 10:45 p.m. – 7:15 a.m. (3rd Shift)

There is no guarantee of shift or unit. Past performance and seniority will be reviewed.

If there are any vacation requests for September 12th thru October 9th, please list your dates of request (You must continue to follow the current procedure for requesting time off).

Do you currently go to school and want to work with your school schedule? Yes or No (please circle)
*All staff with school schedules will need to bring in copies of their schedules from school.

Please list the days that you attend school: _____
_____

PLEASE RETURN THIS FORM TO THE D.O.N's BASKET ON YOUR UNIT NO LATER THAN AUGUST 6, 2010. IF YOU DO NOT RETURN BY THE DUE DATE, YOU WILL BE OFFERED SHIFTS THAT ARE LEFT AVAILABLE. *State Exhibit 8.*

On September 8, 2010, AFSCME filed the instant unfair labor practice charge and requested DVH be enjoined from implementing the announced schedule changes. By email dated September 10, 2010, DON Hildebrand advised "All Nursing Staff":

> Please be advised that we have agreed to voluntarily postpone on implementation of the new schedule and the change in shift times until further notice.
>
> This means that all staff will revert back to their previous schedules. A new schedule with the previous shifts will be posted on the Blue Wing no later than Saturday, September 11, 2010. You will need to check the schedule for your next scheduled shift. For those of you that we have worked with in regards to school schedules, we will continue to run your same schedule for school purposes. Those of you that have vacation approved for the next schedule will need to re-submit your requests as you will need to deduct more time from your vacation balance with the different shifts.

> Any questions or concerns need to be directed to your union representatives. *Union Exhibit 14.*

Following DVH's notice that the schedule changes would not be implemented as planned on September 12, 2010, DVH representatives met with AFSCME representatives in an effort to resolve schedule related issues related to the charge. Following the meeting, DOS Human Resources Manager Martina Johnson sent the following e-mail to AFSCME Staff Representative Hanks (also providing a copy to DVH Administrator Bill Peterson):

> Dear Eugene:
>
> Thanks to you and your team for meeting with us yesterday in an effort to resolve DVH Nursing schedule issues related to the ULP charge filed by AFSCME. I would like to confirm our meeting discussion yesterday. You presented four (4) concerns in our meeting yesterday which are listed below with the outcome of the discussion.
>
> 1. Change in start and end time (i.e. 15 minutes before and after the start of the shift.
>
>    DVH will not implement the additional 15 minutes before and after the start of the shift. The current schedule with 5 minutes before and after the start of the shift will remain.
>
> 2. Elimination of 12.5 hour shifts and 3. Schedule Patterns (i.e., consistent days of the week off for employees)
>
>    DVH will review schedules again, draft a few schedules to present to the group that met yesterday for review. There was no final decision made regarding the elimination of the 12.5 hour shifts or scheduled patterns. Mr. Peterson hopes to have an answer regarding the 12.5 hours by Friday, October 8, 2010. We will meet again to review draft schedules within the next 30 days.
>
> 4. Karen Monahan's schedule
>
>    Ms. Monahan is currently scheduled to work 32 hours in a 40 hour period. DVH feels this is an unsafe work practice that puts Ms. Monahan as well as the residents at risk. DVH is unable to approve any unsafe schedules however DVH and AFSCME have agreed

> that there will be no change in schedules at DVH prior to January 1, 2011.
>
> We would like to schedule a follow up meeting to review the draft schedules for Wednesday, November 3rd, 2010 at 10:00 a.m. Please let me know if that works for you. Thanks! *Union Exhibit 29.*

## PRINCIPAL POSITIONS OF THE PARTIES

AFSCME:

AFSCME argues the PERA does not support the State's argument that it had no obligation to enter into negotiations with AFSCME concerning terms and conditions of employment for DVH employees it had the right and duty to represent. The actions taken by DVH to unilaterally impose its shift schedule changes had a reasonable tendency to interfere with, restrain or coerce represented employees in exercising their rights under the PERA. The employer's actions "resulted in fomenting discord and undermined the Union's support and credibility as an effective bargaining representative when management could so easily avoid collective bargaining on such an important issue as shift scheduling." *AFSCME Opening Brief, p. 3.*

AFSCME argues it has met its burden to establish DVH announced a unilateral change to a mandatory subject of bargaining (hours of work and scheduling) and that the State unquestionably had a duty to negotiate pursuant to 19 Del.C. §1307(a)(5). PERB has previously held that "unilateral disruptions of the status quo are unlawful because they frustrate the statutory objective of establishing working conditions through the collective bargaining process."[8] There is no question that had DVH continued with its implementation of its schedule changes, that action would have a significant frustrating

[8] *Appoquinimink Education Assn. v. Bd. of Education*, ULP 1-2-84A, 1 PERB 23 (Del.PERB, 1984).

effect on negotiations. It unequivocally rejects the State' assertion that an actual change to the status quo must occur before PERB can find a statutory violation.

AFSCME argues evidence of bad faith by DVH is abundant. DVH knew or should have known that unilateral implementation of a change in terms and conditions of employment after PERB certification of the exclusive bargaining representative would constitute an unfair labor practice. The State, however, chose a path of direct confrontation with the union and sought "to make a preemptory strike by imposing its scheduling scheme just before collective bargaining was to begin." The State understood that by the time the unfair labor practice charge was heard or negotiations completed, the shift scheme it intended to impose would be entrenched and that it would be extremely difficult to reverse, even if DVH was ordered to do so. AFSCME asserts that by announcing the schedule change and requiring employees to choose a new shift during the organizing period for its professional nursing staff, DVH was issuing a dare to the union to "stop us if you can."

Karen Monahan was the voice of the union in a local radio ad. She had escorted visiting Union organizers at DVH. The employer targeted her for constructive discharge because of her union-related activities. By limiting Ms. Monahan's ability to work the compressed schedule to which she had agreed, Ms. Monahan would lose her State benefits because she would fall below an 80% schedule.

AFSCME requests PERB find DVH violated 19 Del.C. §1307(a)(1), (2), (3), and (5) as alleged. It requests PERB order DVH to pay the Union's attorneys fees in bringing and supporting this charge because DVH's intention was clearly to frustrate negotiations and undermine the Union.

STATE:

The State argued an actual change in the status quo is required to establish a prima facie violation of the duty to bargain in good faith. There has been no change to the status quo because DVH voluntarily stayed implementation of any changes after the unfair labor practice charge was filed. The parties are currently engaged in bargaining over terms and conditions of employment for the AFSCME Local 3936 bargaining unit, including working hours.

DVH has had inconsistent scheduling practices since it opened in June, 2007, well before AFSCME was certified as the representative of Unit 2 employees in April, 2008. Numerous alternative shift schedules were tried, but they failed to correct staffing shortfalls that caused high overtime and per diem staffing expenses. DVH had a succession of at least five DON's between June, 2007 and July, 2010. Because many were short-term replacements, none were in a position to establish consistent staffing practices. Consequently, it argues, AFSCME cannot maintain that the status quo was altered, because a status quo was never established.

Each bargaining unit employee was required to sign a Work Schedule Agreement, which explicitly stated work schedules could be modified or cancelled in accordance with the facility's needs. This policy was adopted pursuant to the State Merit Rules and was never negotiated with AFSCME; therefore, AFSCME cannot argue that rescinding Work Schedule Agreements constitutes a change to the status quo.

The State also asserts its obligation to negotiate with AFSCME concerning DVH employees was unclear. The State placed AFSCME on notice (in response to AFSCME's request to bargain) that it did not believe AFSCME had authority under the PERA to negotiate on behalf of DVH employees, separately and independently from the Unit 2

negotiations. AFSCME did not respond to the State's position. The State reasonably requested AFSCME clarify and secure bargaining authority to negotiate terms and conditions for DVH employees. Until AFSCME did this, the State was under no duty to bargain with AFSCME.

AFSCME's allegations that the State constructively discharged Karen Monahan based on her protected activity are moot because Ms. Monahan voluntarily resigned her employment with DVH. Consequently, there is no possible remedy PERB may grant concerning her claims, and these allegations should be dismissed. Alternatively, AFSCME has failed to establish that anyone in DVH management was aware Ms. Monahan had engaged in any sort of protected activity. It has also failed to establish that the announced changes to Ms. Monahan's schedule was motivated by any consideration of her engagement in protected activity.

## DISCUSSION

The Public Employment Relations Act defines an exclusive bargaining representative as the employee organization which, as a result of certification by the PERB, has the right and responsibility to be the exclusive collective bargaining agent of all employees in a bargaining unit. *19 Del.C. §1302(j).* The public employer and the exclusive bargaining representative have a mutual obligation to confer and negotiate in good faith with respect to terms and conditions of employment and to reduce their agreements to writing. *19 Del.C. §1302(t).* Public employers are prohibited from bargaining in regards to terms and conditions of employment with any employee, group of employees or an employee organization other than the certified exclusive bargaining representative. *19 Del.C. §1304(a).* Once an exclusive representative is certified, that

representative can only be removed by a successful decertification election. *19 Del.C. §1311(b).*

The record establishes that AFSCME was the certified representative of DVH Activity Aides, Dietician's Assistants, Certified Nursing Assistants, and Licensed Practical Nurses, effective April 29, 2008, and of DVH Advance Practice Nurses and Registered Nurses effective July 29, 2010. Further, the State (through its Office of Labor Relations and Employment Practice) was clearly on notice that AFSCME sought to negotiate with respect to the terms and conditions of employment for DVH employees it represented as early as September, 2008, and that AFSCME sought to initiate negotiations on a number of occasions. Whether there was an affirmative duty to negotiate an independent "terms and conditions" agreement for the Unit 6 and Unit 2 positions at DVH is not material to the issue presented in this charge, and the differentiation between the duty to bargain pursuant to §1311A and §1310 will not be addressed herein.

The issue raised by this charge is whether DVH had a right under the PERA to unilaterally alter the work schedules of employees represented by AFSCME without providing prior notice and the opportunity to bargain to the exclusive bargaining representative of the affected employees.

The Public Employment Relations Board has ruled that efforts to unilaterally alter the status quo of a mandatory subject of bargaining constitutes a *per se* violation of the duty to bargain in good faith and 19 Del.C. §1307(a)(5). This prohibition on unilateral alteration of the status quo without first meeting the bargaining obligation applies whether the status quo is established by a collective bargaining agreement or whether it exists by operation of the relationship which exists between the parties at the time that the

union is certified as the exclusive representative.

This Board has also held that efforts to effect unilateral changes during the insular period between the filing of a representation petition and the completion of the election procedure violates the PERA, as it tends to interfere with the rights of the employees under the statute.

The duty to bargain and the corollary obligation to refrain from unilaterally altering the status quo, applies to mandatory subjects of bargaining, which are defined to include, "…matters concerning or related to wages, salaries, hours, grievance procedures and working conditions; provided however, that such term shall not include those matters determined by this chapter or any other law of the State to be within the exclusive prerogative of the public employer." *19 Del.C. §1302(t).* This Board has determined that work schedule is a matter concerning or related to hours, and therefore constitutes a mandatory subject of bargaining.[9]

It is undisputed that DVH had announced its intention to change work schedules for bargaining unit employees and that these changes were to be implemented on September 12, 2010. DVH acknowledged it did not directly contact AFSCME, its representatives or agents to place the union on notice of its intent to make scheduling changes. Upon learning of the intended changes from bargaining unit employees, AFSCME Staff Representative Eugene Hanks contacted DOS and DVH by email dated August 2, 2010, raising a number of questions and requesting to "sit down and discuss this before it gets out of control." DOS Human Resources Director Martina Johnson responded by email on August 4, 2010, recommending Mr. Hanks direct his concerns to

[9] *Christina Education Association, Inc., v. Board of Education of Christina School District*, ULP 88-09-026, I PERB 359,367 (Del.PERB, 1988).

the DVH Human Resources Representative, noting, "… she can explain to you why the Home decided to make schedule changes." Ms. Johnson also suggested it would be a good time for Mr. Hanks "to explain the concerns of Union employees."

In its Answer to the Charge, DVH admitted that it "… consulted with the nursing employees to determine the individual scheduling preferences and choice, including direct meetings with employees to confirm their choice of shifts and days off. Those choices were then compiled and posted on September 3, 2010 for RNs/LPNs and on September 7, 2010 for CNAs."

By failing to notify AFSCME and to provide the opportunity to negotiate concerning changes to work schedules, DVH violated its duty to bargain in good faith and 19 Del.C. §1307(a)(5).

The test for determining whether the public employer's actions interfered with the rights of employees or with the rights of the union requires application of a objective standard to determine the "reasonable tendency" of the action to interfere. PERB has held "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." [10]

The announced changes to the structure of the shift schedule and its impact on the individual schedules of bargaining unit employees had a reasonable tendency to cause affected employees to question whether the union was acting in their interest or effective in protecting their rights under the statute. The fact that the announced change was not actually implemented does not mitigate its effect on either the employees or the union, nor does it negate the fact that DVH did not honor its duties and obligations under the

[10] Sussex Vo-Tech Teachers' Assn. v. Bd. of Education, ULP 88-01-021, I PERB 287 (Del.PERB, 1988).

PERA.

By engaging in direct meetings with bargaining unit employees to discuss changes to work schedules (a mandatory subject of bargaining) without first meeting with their certified exclusive bargaining representative, DVH interfered with the rights of the employees to be represented by their certified representative and interfered with the formation, existence and/or administration of the union, in violation of 19 Del.C. §1307 (a)(1) and (a)(2).

DVH management testified they were unaware of their bargaining obligations and AFSCME's role as the representative of DVH employees. The record establishes that the State Office of Labor Relations and Employment Practices was well aware of AFSCME's role as the exclusive bargaining representative and of its desire to negotiate, as reflected in the correspondence between Mr. Hanks and Mr. Cutler. If there was a breakdown in communications between that office and DVH management, it is not the fault of the union, nor does it excuse the employer from its obligations. Additionally, the State stipulated that AFSCME Staff Representative Hanks regularly represented DVH bargaining unit employees in disciplinary matters prior to the hire of the new DON and/or the attempt to implement schedule changes. The collective bargaining rights of public employees under the PERA are set forth at §1304, and include the right to both negotiate collectively and to grieve through representatives of their choosing. The employer does not have the right to choose how and when it is convenient for the exclusive representative to be involved in either of these processes.

While not dispositive of the underlying issue, the record establishes there were legitimate and serious concerns with maintaining the existing scheduling system for its nursing staff. There were operational issues concerning the notification and use of leave

which needed immediate attention. It is undisputed that changes were necessary and that the concerns with 12.5 hour shifts had been expressed to the staff as early as January, 2010 (just six months after they were implemented in July, 2009). *State Exhibit 2*

The error made by the employer was in not notifying AFSCME directly and providing the union with the opportunity to discuss options to address the problem as it impacted employees AFSCME had a duty and right to represent. Although such notice and discussion may have delayed implementation of changes in the summer of 2010, it would have avoided this charge and the subsequent fifteen month delay.

The parties are, however, right where they should have been in July and August, 2010. They are under a continuing obligation to negotiate concerning the work hours and any systemic changes to the schedule. Both parties are reminded that the duty to bargain does not require either party to agree to a proposal or require the making of a concession. 19 Del.C. §1302(e). These parties are currently engaged in negotiations for a terms and conditions agreement; should their continuing efforts not be successful, impasse resolution procedures are provided for under the PERA. The parties have an affirmative duty under the statute to advise PERB as to the status of their negotiations 60 days after the commencement of negotiations. Mediation may be initiated by a request to PERB from either party 90 days after negotiations have commenced, if no agreement has been reached.

Concerning DVH's announcement that it would no longer allow for compressed schedules and specifically that Ms. Monahan would not be permitted to work two back-to-back doubles with an eight hour break in between, AFSCME asserts DVH engaged in prohibited union animus in violation of 19 Del.C. §1307(a)(3). In considering a charge of union animus, the union has the burden to establish that the employee engaged in

protected activity, that the employer was aware of the employee's protected activity and that this protected activity was a substantial or motivating factor in the employer's negative employment action.[11]

AFSCME has failed to meet its burden to establish that Ms. Monahan had a visible role in either its organizational efforts or the administration or operation of the union prior to the July 27, 2010 announcement of the proposed shift schedule changes. While Ms. Monahan may have assisted the union during its organizing efforts, the evidence of record is insufficient to conclude that she played a public role of which DVH management or any other representative of the State was made aware, either by AFSCME, other employees or Ms. Monahan herself. There is also insufficient evidence to conclude that Ms. Monahan was "singled out" or treated differently from any other similarly situated bargaining unit employee working compressed schedules.

For these reasons, the charge that DVH engaged in union animus in violation of 19 Del.C. §1307(a)(1) and/or (a)(3) when it told Ms. Monahan she would no longer be permitted to maintain her compressed work schedule is dismissed.

AFSCME requests PERB order DVH to pay for the Union's attorney's fees, asserting it was the clear intention of the DVH to frustrate and undermine the Union. Awarding attorney's fees is an extraordinary remedy reserved for situations in which a party engages in egregious misconduct amounting to bad faith. In such cases, equity may require a party to pay the litigation expenses of its opponent. *American Specialty Retailing Group, Inc.,* Del.Chan., No 19239, Lamb, V.C. (July 25, 2003)(Mem.Op.) at p. 13. In applying this standard to an unfair labor practice proceeding in which attorney's

[11] Wilmington Firefighters Association v. City of Wilmington, ULP 93-06-085, II PERB 935, 954 (Del.PERB, 1994).

fees were requested by the union, which asserted the State terminated an agreement in bad faith and then engaged in bad faith litigation tactics to defend its actions, Chancery Master Glasscock opined:

> … The type of bad faith which justifies fee shifting, however, is not to be found in so facile a manner, or else every successful unfair labor practice complaint would bring with it attorneys fees:
>
> > This Court has suggested that in certain egregious circumstances, a party's fraudulent behavior that underlies or forms the basis of the action may justify an award of attorney's fees against that party. The Court has recognized, however, that an award of attorney's fees is "unusual relief," and that the American Rule would be eviscerated if every decision holding the defendant liable for fraud and the like also awarded attorney's fees. For that reason this quite narrow exception is applied only in the most egregious instances of fraud or overreaching. *Arbitrium Handels AG v. Johnston*, Del.Ch., 705 A.2d 225, 231 (1997).
>
> In order to find that the State's initial action was taken in bad faith requiring the shifting of fees, I must find more than that the State breached a contract with the Union or decided to argue a position which ultimately is found to be unsuccessful. I must find that the motives of the State in abrogating the Agreement were to act in a way which was fraudulent or inequitable, in a callous disregard of its obligations and for an improper purpose. Dept of Corrections, State of Delaware v. Delaware Correctional Officers Association, Chancery Court, Glasscock, Master, ULP 00-07-286 ( C.A. 19115 IV PERB 2909, 2916 ( 8/28/03 )

The State's actions in this unfair labor practice charge do not rise to the level of being "fraudulent or inequitable, in a callous disregard of its obligations and for an improper purpose". Accordingly, AFSCME's request for attorney's fees is denied.

## CONCLUSIONS OF LAW

1. The State of Delaware is a public employer within the meaning of 19 Del.C. §1302(p). The Department of State is an agency of the State of Delaware and the

Delaware Veterans Home is a State residential long-term care facility operated by DOS.

2. The American Federation of State, County and Municipal Employees, Council 81 is the exclusive bargaining representative of DVH employees, including Dieticians, Certified Nursing Assistants, Licensed Practical Nurses, Activity Aides, Advance Practice Nurses, and Registered Nurses, within the meaning of 19 Del.C. §1302(j).

3. By unilaterally announcing its intention to implement significant changes to the work schedules of its nursing staff effective September 12, 2010, and by failing to provide prior notice to the exclusive bargaining representative of those employees and the opportunity to bargain, DVH violated its duty to bargain in good faith and 19 Del.C. §1307(a)(5).

4. By engaging in discussion and negotiations with individual bargaining unit employees concerning changes to their work schedules, without first providing notice and the opportunity to negotiate concerning these changes to AFSCME, DVH interfered with the rights of the employees to be represented by their certified exclusive representative and interfered with the formation, existence and/or administration of the union, in violation of 19 Del.C. §1307 (a)(1) and (a)(2).

5. There is insufficient evidence on the record to establish DVH engaged in union animus or violated the rights of Karen Monahan when she was advised that she would not be permitted to continue to work a compressed schedule; consequently the charge that DVH violated 19 Del.C.§1307(a)(1) and/or (a)(3) are dismissed.

WHEREFORE, THE STATE IS HEREBY ORDERED TO TAKE THE FOLLOWING AFFIRMATIVE STEPS:

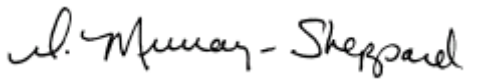
A) Immediately post the Notice of Determination in all areas where notices affecting employees in the bargaining unit represented by AFSCME 3936 are normally posted in the Department of State and at DVH. These Notices must remain posted for at least 30 days in order to provide notice to all affected employees of the decision in this matter.

B) Notify AFSCME of any proposed changes to the systemic work schedules of bargaining unit employees and provide the opportunity to negotiate concerning such changes.

C) Notify the Public Employment Relations Board in writing within sixty (60) calendar days of the steps taken to comply with this Order.

**IT IS SO ORDERED**.

DATE: January 3, 2012



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