

PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF DELAWARE

MERIT EMPLOYEE UNIT 2 BARGAINING UNIT	:	
COALITION, INCLUDING AFSCME	:	
COUNCIL 81, LIUNA LOCAL 1029, AND	:	
PUBLIC HEALTH NURSES COUNCIL,	:	
DSEA/NEA,	:	Probable Cause Determination
	:	
Charging Party,	:	Unfair Labor Practice Charge and Counterclaim
	:	
v.	:	
	:	<u>ULP 12-12-882</u>
STATE OF DELAWARE, DEPARTMENTS OF	:	
AGRICULTURE; HEALTH AND SOCIAL	:	
SERVICES; SERVICES FOR CHILDREN,	:	
YOUTH AND FAMILIES; NATURAL	:	
RESOURCES AND ENVIRONMENTAL	:	
CONTROL; AND STATE,	:	
	:	
Respondents.	:	

The State of Delaware (“the State”) is a public employer within the meaning of §1302(p) of the Public Employment Relations Act (19 Del.C. Chapter 13, “PERA”). The Departments of Agriculture; Health and Social Services; Services for Children, Youth and Families; Natural Resources and Environmental Control; and State are agencies of the State of Delaware.

The American Federation of State, County and Municipal Employees, Council 81, AFL-CIO (“AFSCME”) is an employee organization within the meaning of 19 Del.C. 1302(i). Through its affiliated local unions, AFSCME is the certified exclusive bargaining representative of certain State of Delaware merit employees employed in the Departments of Agriculture; Health and Social Services; Services for Children, Youth and Families; Natural Resources and Environmental Control; and State.

Laborers International Union of North America (“LIUNA”) is an employee organization within the meaning of 19 Del.C. 1302(i). Through its affiliated Local 1029, LIUNA is the certified exclusive bargaining representative of certain State of Delaware merit employees employed in the Department of Health and Social Services.

Public Health Nurses Council, an affiliate of Delaware State Education Association and the National Education Association (“PHNC”) is an employee organization within the meaning of 19 Del.C. 1302(i) and is the certified exclusive bargaining representative of certain State of Delaware merit employees employed in the Department of Health and Social Services.

The PERA provides at §1311A (a):

Notwithstanding any other provision of this Code, exclusive representatives of state merit employees, who are in the classified service and not working in higher education, shall collectively bargain in the units provided pursuant to subsection (b) of this section.

Subsection (b) of 19 Del.C. §1311A defines the unit at issue in this charge and countercharge:

(b) For purposes of bargaining pursuant to this section, employees shall be classified in the following bargaining units, each of which shall independently bargain compensation:

...(2) Nonprofessional patient care workers which is composed of institutional care classes, including licensed practical nurses, nursing assistants, active treatment assistants, technicians, therapy aides and similar classes.

On or about April 29, 2008, the Public Employment Relations Board (“PERB”) certified AFSCME, LIUNA and PHNC to join together in a bargaining coalition to bargain collectively, pursuant to §1311A, for the unit identified in 19 Del.C. §1311A(b)(2) (hereinafter “Unit 2”). This coalition of bargaining representatives shall be hereinafter referred to as the “Unit 2 Coalition”.

Thereafter, on or about June 22, 2010, the Unit 2 Coalition and the State entered into negotiations for an initial §1311A agreement for Unit 2. Over the next two years, the parties conducted at least twenty-two bargaining sessions but were unable to reach a mutually acceptable agreement.

The parties unsuccessfully participated in PERB sponsored mediation during August and September, 2011. The impasse was submitted to PERB for binding interest arbitration in September, 2012.

On or about December 28, 2012, AFSCME Council 81, on behalf of the Unit 2 Coalition, filed an unfair labor practice charge alleging the State had and continued to violate its obligations under the PERA at §1304¹, §1307(a)(5) and (6)², §1311³ and §1311A⁴. Specifically, the Charge alleges:

¹19 Del.C.§1304. Employee organization as exclusive representative.

- (a) The employee organization designated or selected for the purpose of collective bargaining by the majority of the employees in an appropriate collective bargaining unit shall be the exclusive representative of all the employees in the unit for such purpose and shall have the duty to represent all unit employees without discrimination. Where an exclusive representative has been certified, a public employer shall not bargain in regard to matters covered by this chapter with any employee, group of employees or other employee organization.
- (b) Nothing contained in this section shall prevent employees individually, or as a group, from presenting complaints to a public employer and from having such complaints adjusted without the intervention of the exclusive representative for the bargaining unit of which they are a part, as long as the representative is given an opportunity to be present at such adjustment and to make its view known, and as long as the adjustment is not inconsistent with the terms of an agreement between the public employer and the exclusive representative which is then in effect. The right of the exclusive representative shall not apply where the complaint involves matters of personal, embarrassing and confidential nature, and the complainant specifically requests, in writing, that the exclusive representative not be present.
- (c) Upon the written authorization of any public employee within a bargaining unit, the public employer shall deduct from the payroll of the public employee the monthly amount of dues or service fee as certified by the secretary of the exclusive bargaining representative and shall deliver the same to the treasurer of the exclusive bargaining representative. Such authorization is revocable at the employee's written request. Such deduction shall commence upon the exclusive representative's written request to the employer. Such right to deduction shall be in force for so long as the employee organization remains the exclusive bargaining representative for the employees in the unit. The public employer is expressly prohibited from any involvement on the collection of fines, penalties or special assessments levied on members by the exclusive representative.

² 19 Del.C.§1307. Unfair labor practices.

- (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:

- (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.
- (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.

³ 19 Del.C.§1311. Determination and certification of exclusive representative.

- (a) Any employee organization seeking certification as exclusive representative in a designated appropriate bargaining unit shall file a petition with the Board. The petition must contain the uncoerced signatures of at least 30 percent of the employees within the designated appropriate bargaining unit. If the designated appropriate bargaining unit is sufficiently similar to the bargaining unit claimed to be appropriate in the petition filed pursuant to § 1310(a) of this title, such that the signatures submitted at that time represent 30 percent of the employees within the designated appropriate bargaining unit, those signatures shall be deemed sufficient for the purpose of this subsection. If the designated bargaining unit is not sufficiently similar to the bargaining unit claimed to be appropriate, the employee organization may continue to rely on the previously submitted uncoerced signatures of the employees who are in the designated bargaining unit and must supplement these signatures with uncoerced signatures of other employees within the designated appropriate bargaining unit, such that the signatures submitted represent at least 30 percent of the employees within the designated appropriate bargaining unit. No signature shall be considered valid if it was signed more than 12 months prior to the date on which the petition is filed.
- (b) Where an employee organization has been certified as the exclusive representative, a group of employees within the bargaining unit may file a petition with the Board for decertification of the exclusive bargaining representative. The petition must contain the uncoerced signatures of at least 30 percent of the employees within the bargaining unit and allege that the employee organization presently certified is no longer the choice of the majority of the employees in the bargaining unit. If a lawful collective bargaining agreement of no more than 3 years' duration is in effect, no petition shall be entertained unless filed not more than 180 days nor less than 120 days prior to the expiration of such agreement. A decertification petition also may be filed if more than 1 year has elapsed from the date of certification of an exclusive bargaining representative and no collective bargaining agreement has been executed, and the procedures for mediation and fact-finding have been invoked and completed as provided in this chapter.
- (c) If the Board determines that a petition is properly supported, timely filed and covers the designated appropriate bargaining unit, the Board shall cause an election of all eligible employees to be held within a reasonable time after the unit determination has been made, in accordance with procedures adopted by the Board, to determine if and by whom the employees wish to be represented. The election ballot shall contain, as choices to be made by the voter, the name of the petitioning employee organization and the certified employee organization, the name or names of any other employee organization showing written proof of at least 10 percent representation of the public employees within the designated appropriate bargaining unit, in accordance with rules and procedures adopted by the Board, and a choice that the public employee does not desire to be represented by any of the named employee organization(s).
- (d) The employee organization, if any, which receives the majority of the votes cast in an election shall be certified by the Board as the exclusive representative. In any election where there are more than 2 choices on the ballot and none of the choices receives a majority of the votes cast, a run-off election shall be conducted. The ballot in the run-off election shall contain the 2 choices on the original ballot that received the largest number of votes.
- (e) No election shall be held pursuant to this section within 12 months from the date of a preceding valid election.

⁴ 19 Del.C.§1311A. Collective bargaining in state service.

- (a) Notwithstanding any other provision in this Code, exclusive representatives of state merit employees, who are in the classified service and not working in higher education, shall collectively bargain in the units provided pursuant to subsection (b) of this section. The scope of bargaining shall include:
 - (1) Compensation, which shall be defined as the payment of money in the form of hourly or annual salary, and any cash allowance or items in lieu of a cash allowance to a public employee by reason of said employee's employment by a public employer, as defined in this chapter, whether the amount is fixed or determined by time, task or other basis of calculations. Position classification, health care and other benefit programs established pursuant to Chapters 52 and 96 of Title 29, workers compensation,

disability programs and pension programs shall not be deemed to be compensation for purposes of this section; and

(2) Any items negotiable for state merit employees pursuant to § 5938 of Title 29.

To the extent or where any of these items are covered by existing collective bargaining agreements, the provisions negotiated pursuant to subsection (c) of this section shall supersede those agreements.

(b) For purposes of bargaining pursuant to this section, employees shall be classified in the following bargaining units, each of which shall independently bargain compensation:

(1) Labor, maintenance, trade and service workers which is composed of generally recognized blue collar and service classes including mechanics, highway, building and natural resource maintenance, skilled craft, equipment operators, toll collectors, food service, custodial, laundry, laborers, security officers and similar classes;

(2) Nonprofessional patient care workers which is composed of institutional care classes including licensed practical nurses, nursing assistants, active treatment assistants, technicians, therapy aides and similar classes;

(3) Social services, human services, and counseling which is composed of social workers, social service specialists, family therapists, youth counselors, teacher aides, activity aides, job service personnel, income maintenance personnel, eligibility specialists, vocational counselors, correctional counselors, child support enforcement personnel and similar classes;

(4) Administrative support, technical and clerical which is composed of administrative specialists, clerks, account technicians, computer operators, office service personnel, officer workers, paralegals and similar nonprofessional classes;

(5) Engineers, and administrative professionals which is composed of civil, environmental and other engineers, accountants, management analysts, fiscal officers, program managers, business professionals, auditors and similar professionals classes exempt from the Fair Labor Standards Act [29 U.S.C. § 201, et seq.];

(6) Professional patient care which is composed of registered nurses, public health nurses, psychiatric nurses, therapists, dietitians and similar professional classes;

(7) Professional education and library science which is composed of state agency teachers, counselors and librarians;

(8) Regulatory licensing and inspectors which is composed of employees empowered to review certain public and business activities including fire marshals, regulatory inspectors, field auditors, motor vehicle inspectors and similar classes;

(9) Law-enforcement and investigative agents which is composed of agency police officers, natural resource and environmental control officers, parole and probation officers of the Department of Correction, alcoholic beverage control officers, investigators and similar occupations;

(10) Correctional officers and similar correctional occupations;

(11) Correctional supervisors which is composed of correctional lieutenants, staff lieutenants, correctional captains and similar occupations.

(12) Scientists and medical professionals which is composed of biologists, chemists, agricultural specialists, pharmacists, psychologists, psychiatrists, physicians, pathologists and similar occupations.

The Board shall determine the proper assignment of job classifications to bargaining units and the bargaining unit status of individual employees and shall provide for certified bargaining representatives to combine bargaining units or portions of bargaining units of employees they represent within the bargaining units defined in this section based upon the job classifications of the employees represented.

(c) The exclusive bargaining representatives of all of the employees in each individual bargaining unit identified above shall join together in a bargaining coalition to bargain collectively for that unit. Employee organizations that are part of the coalition shall exercise authority over decisions of the coalition proportional to the number of employees exclusively represented in the coalition by the employee organization. To the extent a finalized agreement on compensation items requires legislative approval or the appropriation of funds, the Governor shall recommend the same to the General Assembly for the ensuing fiscal years and the agreement provision requiring such appropriation shall be contingent on the specific appropriation of funds by the General Assembly. In the event the General Assembly fails to appropriate the funds necessary to implement the provision of an agreement, that provision shall be returned to the parties for negotiation or the provision may be implemented to the extent consistent with or limited by appropriations from the General

The State refuses to agree to a compensation agreement that does not include non-mandatory subjects of bargaining, as defined in paragraphs 10 A-D [of the Charge] and included in its last, best and final proposal, in violation of §1307(a)(5) and (6). *Charge ¶12*

The State has declared an impasse in compensation bargaining because the coalition unions refuse to collectively bargain on subjects that are outside the exclusive bargaining agent's status granted under 19 Del.C. §1311 in violation of 19 Del.C. §§1311, 1311A and 1307(a)(5) and (6). *Charge ¶13.*

The State continues to insist on forcing non-mandatory subjects to impasse by the inclusion in its last, best and final offer of non-mandatory subjects over which the coalition unions have refused to bargain. *Charge ¶15.*

Assembly, at the discretion of the General Assembly. Contracts shall be timed to become effective in accordance with the State's fiscal year.

- (d) Coalition compensation agreements shall not constitute a bar to an election in accordance with § 1311(b) of this title. Such bar shall be established by the noncompensation agreement covering employees in an appropriate unit.
- (e) Notwithstanding any other provision in this Code to the contrary, where no employee organization is certified to represent some or all of the employees in a bargaining unit defined in subsection (b) of this section, an employee organization desiring to be certified as the exclusive representative of the unrepresented employees in such unit shall file a petition with the Board, accompanied by a combination of the un-coerced signatures of at least 30% of the unrepresented state employees in a unit described in said subsection (b) of this section. Alternatively, an employee organization may file a petition with the Board, accompanied by the uncoerced signatures of at least 30% of the combined total of unrepresented state employees and state employees currently represented by the petitioning employee organization in a unit described in said subsection (b) of this section. The Board or its designee shall act on such petition in accordance with §§ 1310 and 1311 of this title. Nothing contained herein shall be deemed to prevent a public employer from voluntarily recognizing an employee organization as the exclusive bargaining representative for a specified bargaining unit without an election so long as the following conditions have been met:
 - (1) A petition shall have been filed with the Board by an employee or group of employees or employee organization acting in their behalf alleging that a majority of employees in a unit identified in subsection (b) of this section above wish to be represented by an employee organization for such purposes; and
 - (2) The Board verifies that a majority of the employees in such unit have, within 12 months of the submission of the petition to the Board, signed authorizations designating the employee organization specified in the petition as their exclusive bargaining representative and that no other employee organization is currently certified or recognized as the exclusive bargaining representative of any of the employees in the unit; and
 - (3) The Board determines that notices have been posted, where notices to affected employees are normally posted, for a period of at least 10 calendar days, advising that exclusive recognition will be granted without an election to a named employee organization for such unit.
- (f) Notwithstanding any provision in this Code to the contrary, collective bargaining pursuant to this section shall commence at least 150 days prior to the expiration date of any current collective bargaining agreement or in the case of a newly certified representative within a reasonable time after certification.
- (g) Notwithstanding anything in this section to the contrary, a bargaining unit created pursuant to the provisions of subsection (b) of this section, shall not bargain for compensation as defined herein until all of the eligible employees in such unit are represented by an exclusive bargaining representative. Nothing contained in this subsection shall be interpreted to deny bargaining for any items negotiable for state merit employees pursuant to § 5938 of Title 29.

The State's persistent violation of 19 Del.C. §1304 and 1307(a)(5) and (6) and 19 Del.C. §§1311 and 1311A constitutes a violation of the above-quoted section that continues beyond the date of the filing of this ULP.⁵ *Charge ¶16.*

The Coalition requests PERB find the State has taken non-mandatory subjects of bargaining to impasse and engaged in a conspiracy to violate the PERA; order the State to cease and desist and to remove Article 5 (Employee Accountability) and Article 7 (Non-Compensation Agreements) from its last, best and final offer; issue a stay in the interest arbitration proceeding currently pending or subsequently filed after the date of the filing of the charge; award attorney's fees and costs, pre-judgment and post-judgment interest on all compensation items required to be negotiated between the coalition and the state and/or in any of the State agencies that the State represents in coalition bargaining; and such other relief as the PERB deems appropriate.

On or about January 9, 2013, the State filed its Answer to the Charge with New Matter and Counterclaim, wherein it denied some of the facts and all of the allegations made by the Unit 2 Coalition. Specifically, the State denies that it has made any proposal for a non-mandatory subject of bargaining and further denies the Unit 2 Coalition's assertion as to the appropriate and legal scope of bargaining under 19 Del.C. §1311A or any other provision of the PERA or applicable law. It specifically denies it has bargained a non-mandatory subject of bargaining to impasse.

Under New Matter, the State asserts the Unit 2 Coalition has violated its duty to bargain in good faith and 19 Del.C. §1307(b)(2) and (b)(3)⁶, §1311A(a), §1313(c)⁷, §1302(e), and

⁵ ULP: Unfair labor practice

⁶ 19 Del.C. §1307. Unfair labor practices.

(b) It is an unfair labor practice for public employee or for an employee organization or its designated representative to do any of the following:

(2) Refuse to bargain collectively in good faith with the public employer or its designated representative if the employee organization is an exclusive representative.

§1302(t)⁸ by continuing to refuse to bargain over terms other than compensation. It further alleges the Unit 2 Coalition has failed or refused to bargain in good faith in violation of 19 Del.C. §1307(b)(2) and (b)(3) and committed a *per se* unfair labor practice by unilaterally disavowing a Tentative Agreement reached in the course of the negotiations and subsequently refusing to negotiate over the matter included therein.

The State requests PERB confirm the scope of bargaining for 19 Del.C. §1311A bargaining units includes “such appropriate subjects of bargaining as those terms and conditions normally, traditionally and legally defined as mandatory, non-discretionary subjects of bargaining” for State merit employees as set forth in the PERA; find that a bargaining coalition may not assert it has no duty to bargain over terms other than compensation; find the Unit 2 Coalition has violated the PERA as alleged by failing and refusing to negotiate in good faith with respect to mandatory and otherwise appropriate subjects of bargaining; order the Unit 2 Coalition to cease and desist from refusing to bargain over mandatory and otherwise appropriate subjects of bargaining, and engage in good faith negotiations with respect to such subjects on behalf of

(3) 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.

⁷ 19 Del.C. §1313. Collective bargaining agreements.

(c) The public employer and the exclusive bargaining representative shall negotiate written grievance procedures by means of which bargaining unit employees, through their collective bargaining representatives, may appeal the interpretation or application of any term or terms of an existing collective bargaining agreement; such grievance procedures shall be included in any agreement entered into between the public employer and the exclusive bargaining representative.

⁸ 19 Del.C. §1302. Definitions.

(e) "Collective bargaining" means the performance of the mutual obligation of a public employer through its designated representatives and the exclusive bargaining representative to confer and negotiate in good faith with respect to terms and conditions of employment, and to execute a written contract incorporating any agreements reached. However, this obligation does not compel either party to agree to a proposal or require the making of a concession.

(t) "Terms and conditions of employment" means 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.

Unit 2 employees; and direct the Unit 2 Coalition to reaffirm the June 14, 2011 Tentative Agreement.

The Unit 2 Coalition filed its Answers to the New Matter and Counterclaim on or about January 23, 2013 in which it denied the State's new matter and counterclaim.

DISCUSSION

Rule 5.6 of the Rules and Regulations of the Delaware Public Employment Relations Board provides:

- (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 charge, 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).

The purpose of the PERA is set forth in §1301:

19 Del.C. §1301. Statement of policy.

It is the declared policy of the State and the purpose of this chapter to promote harmonious and cooperative relationships between public employers and their employees and to protect the public by assuring the orderly and uninterrupted operations and functions of the public employer. These policies are best effectuated by:

- (1) Granting to public employees the right of organization and representation;
- (2) Obligating public employers and public employee organizations which have been certified as representing their public employees to enter into collective bargaining negotiations with the willingness to resolve disputes relating to terms and conditions of employment and to reduce to writing any agreements reached through such negotiations; and
- (3) Empowering the Public Employment Relations Board to assist in resolving disputes between public employees and public employers and to administer this chapter.

In order to accomplish this policy and purpose, the statute imposes upon both public employers and certified employee representatives the duty to enter into negotiations with the willingness to resolve disputes concerning terms and conditions of employment. The statute defines “collective bargaining” to mean:

... the performance of the mutual obligation of a public employer through its designated representatives and the exclusive bargaining representative to confer and negotiate in good faith with respect to terms and conditions of employment, and to execute a written contract incorporating any agreements reached. However, this obligation does not compel either party to agree to a proposal or require the making of a concession. 19 Del.C.§1302(e).

The Charge and Counterclaim raise for the first time a question concerning the scope of bargaining for state merit employee units established by 19 Del.C. §1311A and the obligation of the State and the coalition of bargaining representatives in negotiating thereunder.

DETERMINATION

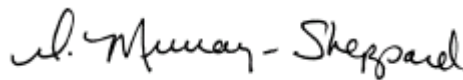
Considered in a light most favorable to Charging Party, the pleadings support a determination that there exists probable cause to believe that unfair labor practices, as alleged, may have occurred.

Each of the parties has denied the majority of the allegations asserted by the other party in the pleadings, and has disputed factual as well as legal assertions. A hearing will be promptly convened for the purpose of receiving evidence on which argument can be made concerning the scope of bargaining and the bargaining obligations of the parties under 19 Del.C. §1311A, Collective bargaining in the state service. Evidence will also be received in support of the allegations by each party that the opposing party has failed and/or refused to bargain in good faith and has otherwise failed and/or refused to comply with the PERA and PERB regulations.

Following creation of the factual record, argument will be received and considered.

As this matter involves already lengthy and extended negotiations between the parties, the processing of the Charge and Counterclaim will be expedited.

DATE: February 20, 2013



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