

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

<b>AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 81, LOCAL 1443A,</b>	:	
	:	
Charging Party,	:	
	:	<b><u>ULP 15-05-998</u></b>
<b>v.</b>	:	<b>Probable Cause Determination</b>
	:	
<b>STATE OF DELAWARE, DEPARTMENT OF OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL,</b>	:	
	:	
Respondent.	:	

**BACKGROUND**

The State of Delaware (State) is a public employer within the meaning of 19 Del.C. §1302(p) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (PERA). The Department of Natural Resources and Environmental Control (DNREC) is a Department of the State.

The American Federation of State, County and Municipal Employees, Council 81 (AFSCME), is an employee organization within the meaning of 19 Del.C. §1302(i). By and through its affiliated Local 1443A, AFSCME is an exclusive bargaining representative, within the meaning of 19 Del.C. §1302(j). AFSCME Local 1443A represents a bargaining unit of DNREC employees which includes the following positions:

Parks and Recreation/Maintenance and Operations Section  
Conservation Technician I, II, III, IV  
Conservation Technician Manager

Physical Plant Maintenance/Trades Mechanic I, II, III

Fish & Wildlife/Mosquito Control Section

Conservation Technician I, II, III, IV, V

Master Mechanic

Physical Plant Maintenance/Trades Mechanic I, II, III

Administrative Specialist II *Charge ¶1.*

On May 13, 2015, AFSCME filed an unfair labor practice charge (Charge) alleging conduct by DNREC in violation of 19 Del.C. §1307(a)(5) and (a)(6), which state:

- (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.

The Charge alleges that, on or about December 17, 2014, DNREC informed bargaining unit employees who had been provided uniforms that they would be responsible to pay taxes associated with receiving the uniforms as a fringe benefit of employment.<sup>1</sup> On or about December 18, 2014, AFSCME requested to bargain this asserted unilateral change in terms and conditions of employment. On or about March 9, 2015, the State notified the Union that it would not engage in bargaining over the payment of taxes by the affected employees.

On May 22, 2015, the State filed its Answer to the Charge in which it denies it implemented a unilateral change to a mandatory subject of bargaining. The State further denies that it has refused to provide notice or the opportunity to bargain over a mandatory subject of

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<sup>1</sup> The State subsequently withheld taxes from affected employees' December 24, 2014 wages.

bargaining. It included in its Answer New Matter asserting the Charge fails to state a claim for which relief can be granted under the PERA and that the Charge is untimely.

AFSCME filed its Response to New Matter on June 1, 2015, denying the State's asserted legal defenses and specifically denying that it was informed of any change to the manner in which uniforms were to be provided to bargaining unit employees prior to December 17, 2014.

This probable cause determination is based upon a review of the pleadings submitted in this matter.

### **DISCUSSION**

Regulation 5.6 of the Rules of the Public Employment Relations Board provides, in relevant part:

- (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 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 has, or 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 determining whether probable cause exists to support an unfair labor practice 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. *Flowers v. DART/DTC*, ULP 04-10-453, V PERB 3179, 3182 (DE. PERB, 2004).

AFSCME asserts DNREC made a unilateral change to the working conditions of bargaining unit employees (i.e., a mandatory subject of bargaining) by modifying the terms under which the employees receive uniforms which they are required to wear for purposes of performing their job duties. The State argues that regardless of whether the provision of uniforms is a mandatory subject of bargaining, the obligation of the employer to withhold federal taxes due on taxable fringe benefits from employees' wages is beyond the scope of bargaining under the PERA. It asserts that, "any attempt to demand bargaining and negotiate terms with respect to controlling or modifying the definition, application, or timing of federal tax standards or withholding of that tax is pre-empted and prohibited by 19 Del.C. §1313(e) as these attempts would be contrary to federal tax law and other state law." *Answer ¶21.*

The duty to bargain concerning terms and conditions of employment is the fundamental premise of the PERA. 19 Del.C. §1301. The good-faith obligation is reiterated in the statutory definition of "collective bargaining":

"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... 19 Del.C. 1302(e).

The PERA defines "terms and conditions of employment to mean "...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). Public employers are not required to engage in collective bargaining on matters of inherent managerial policy, which includes but is not limited to "such areas of discretion or policy as the functions and the programs of the public employer,

its standards of services, overall budget, utilization of technology, the organizational structure and staffing levels, and the selection and direction of personnel.” 19 Del.C. §1305. This reservation on the obligation to bargain does not, however, prohibit an employer from choosing to negotiate concerning permissive subjects of bargaining.

The scope of mandatory collective bargaining does not and cannot include those matters determined by the PERA or any other law of the State to be within the exclusive prerogative of the public employer. *Superior Court of the State of Delaware v. UFCW Local 27*, Rep. Pet. 08-10-634, VI PERB 4211, 4214 (Bd. decision on review, 2009). These matters are illegal subjects of bargaining. Section 1313(e) specifically states that any provision of a collectively bargained agreement which is determined to be contrary to law shall be void and unenforceable.

PERB established the test for defining the scope of negotiations and determining whether an issue is either a mandatory, permissive or illegal subject of bargaining:

The application of the balancing test … was addressed in *Woodbridge Ed. Assn. v. Bd. of Ed.*, Del. PERB, ULP No. 90-02-048, I PERB 537, 546 (1990). There, the PERB concluded that where a subject does not fall within a specific statutory exception thereby removing it from the duty to bargain, it must be determined whether the subject falls within the statutory definition of terms and conditions of employment under 19 Del.C. §1302(q) and/or involves a matter of inherent managerial policy as defined under Employer rights at 19 Del.C. §1305.

If the answer to either question is yes, the subject is mandatory or permissive respectively. If both questions are answered affirmatively, the balancing test adopted by PERB in *Appoquinimink*<sup>2</sup> must be applied so that the critical question becomes “does the impact of the matter on the employer’s operation as a whole clearly outweigh the direct impact on the individual employees?”

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<sup>2</sup> *Appoquinimink Education Association v. Bd. of Education*, ULP 1-3-84-3-2A, I PERB 35 (1984).

The Charge raises a legal issue concerning the scope of bargaining under the PERA. The resolution of this dispute requires a determination as to whether the means and method of providing uniforms to bargaining unit employees constitute mandatory subjects of bargaining under the PERA. When viewed in a light most favorable to the charging party, the pleadings are sufficient to support a determination that an unfair labor practice may have occurred.

To prevail in this matter, AFSCME 1443A must establish by a preponderance of the evidence that DNREC has implemented a unilateral change in a mandatory subject of bargaining, without notice and the opportunity to negotiate, in violation of its statutory duties.

The State also argues the unfair labor practice charge was not filed within the statutory 180 day time period set forth in 19 Del.C. §1308(a). In support of its position, the State attached to its Answer an email string between an AFSCME staff representative and an unidentified DNREC employee which occurred between September 17 and October 2, 2014. The last email appears to be a request by the AFSCME representative for proposed meeting dates from the DNREC contact. On its face, this document does not unequivocally establish either the context of or the actions taken subsequent to this correspondence. Should the issue be determined to be a mandatory subject of bargaining, in order to prevail on a timeliness defense, the State must establish DNREC did, in fact, provide notice and the opportunity to negotiate to AFSCME more than 180 days prior to the filing of the instant charge in order to establish that the Charge was not timely filed.

The pleadings raise both factual and legal questions, which require an evidentiary record and consideration of the arguments of the parties to resolve.

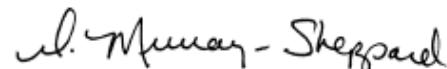
## **DETERMINATION**

Considered in a light most favorable to the Charging Party, the pleadings support a determination that there is probable cause to believe a violation of 19 Del.C. §1307(a)(5) and/or (a)(6) may have occurred. The pleadings raise questions of fact which can only be resolved following submission of a complete evidentiary record upon which the legal issues may be considered and a decision may be rendered.

**WHEREFORE**, a hearing will be promptly scheduled for the purpose of establishing a factual record upon which a decision can be rendered concerning:

**WHETHER DNREC VIOLATED ITS DUTY TO BARGAIN IN GOOD FAITH  
AND 19 DEL.C. §1307(A)(5) AND/OR (A)(6) BY UNILATERALLY  
MODIFYING THE MEANS OR METHOD BY WHICH UNIFORMS ARE  
PROVIDED TO BARGAINING UNIT EMPLOYEES WITHOUT FIRST  
PROVIDING TO THE EXCLUSIVE BARGAINING REPRESENTATIVE  
(AFSCME LOCAL 1443A) NOTICE AND THE OPPORTUNITY TO  
BARGAIN OVER THE CHANGES OR THE EFFECTS OF THE CHANGES  
ON THOSE EMPLOYEES.**

DATE: August 4, 2015



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