

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

<b>AMERICAN FEDERATION OF STATE, COUNTY AND</b>	:	
<b>MUNICIPAL EMPLOYEES, COUNCIL 81, LOCAL 247,</b>	:	
	:	
v.	:	<b><u>ULP No. 16-05-1047</u></b>
	:	
<b>STATE OF DELAWARE, DEPARTMENT OF</b>	:	<b>Probable Cause Determination</b>
<b>CORRECTION,</b>	:	
	:	
Respondent.	:	

APPEARANCES

*Lance Geren, Esq., Freedman & Lorry, P.C., for AFSCME Local 247*  
*Aaron M. Shapiro, SLREP/HRM/OMB, for Department of Correction*

**BACKGROUND**

The State of Delaware (State) is a public employer as defined in §1302(p) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (PERA). The Department of Correction (DOC) is an agency of the State.

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). By and through its affiliated Local 247 (Local 247), AFSCME is the exclusive representative of certain non-uniformed and supervisory DOC employees as defined in DOL Case No. 123, within the meaning of 19 Del.C. 1302(j).

AFSCME Local 247 is a member of the bargaining coalition (Bargaining Unit Coalition

#11) which represents State merit employee correctional supervisors in Merit Unit 11<sup>1</sup> and as defined in DOL Case 1011.<sup>2</sup> Merit Unit 11 includes a subset of the bargaining unit represented by AFSCME Local 247.

On May 17, 2016, the Union filed an unfair labor practice alleging that the State's action violated §§1307(a)(5) and (a)(6), which provide:

§1307. Unfair labor practices.

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.

Specifically, the Charge alleges that by unilaterally implementing and refusing to bargain over revisions to the Code of Conduct for bargaining unit employees, the State has violated its obligations under the PERA

On May 26, 2016, the State filed its Answer denying the alleged violations and asserting affirmative defenses to the Charge in new matter. Specifically, the State asserts the Charge is untimely because it was not filed within 180 days of June 12, 2015 when the revised Code of Conduct was provided to AFSCME Local 247's President for his review prior to implementation. It also asserts AFSCME Local 247 waived any right it may have had to demand bargaining by failing to respond to the June 12, 2015 letter despite the fact that the correspondence clearly 1) stated the Code of Conduct was being revised; 2) identified the sections of the Code which were modified; and 3) notified the President that the revised Code was being provided for his review

---

<sup>1</sup> For purposes of bargaining pursuant to this section, employees shall be classified in the following bargaining units, each of which shall independently bargain compensation...

(11) Correctional supervisors which is composed of correctional lieutenants, staff lieutenants, correctional captains and similar occupations... *19 Del.C. §1311A(b)*

<sup>2</sup> PERB Representation Case 07-08-588.

prior to Department-wide distribution and implementation. Finally, the State asserted the Charge fails to state a claim for which relief can be granted because the Code of Conduct does not constitute a mandatory subject of bargaining about which the State is required to negotiate.

On June 6, 2016, AFSCME filed its Response essentially denying the New Matter alleged by the State.

This probable cause determination results from a review of the pleadings.

### **FACTUAL DETERMINATIONS BASED UPON THE PLEADINGS**

The State and Bargaining Unit Coalition #11 successfully negotiated a first collective bargaining agreement which had a term of July 1, 2012 through June 30, 2014. By operation of Article 32<sup>3</sup> of the agreement, it was automatically renewed for a two year period, through June 30, 2016. Article 22, Disciplinary Action and Employee Rights, of the agreement stated in §22.13: “The ‘Code of Conduct’ now existing will not be cited as a basis for disciplinary action.”<sup>4</sup>

The State and Bargaining Unit Coalition #11 entered into negotiations and reached tentative agreement on the terms of a successor agreement on or about December 30, 2014.<sup>5</sup> The successor agreement would not become effective until July 1, 2016 (eighteen months later) and would be effective through June 30, 2018. The successor agreement specifically deleted, in its entirety, the terms of §22.13 of the predecessor agreement.

By email dated June 12, 2015, DOC’s Chief of the Bureau of Administrative Services provided to the Local 247 President a copy of the Department’s revised Code of Conduct. The

---

<sup>3</sup> Article 32: Termination, Change or Amendment: This Agreement shall become effective on July 1, 2012, and shall remain in full force and effect until June 30, 2014. It shall be automatically renewed from year to year thereafter, with the exception of wage or other compensation standard, unless either party gives the other party written notice of its desire to terminate, modify or amend (“reopen”) this Agreement. Such notice shall be given to the other party in writing at least 60 days prior to March 31 of the year it desires to reopen the Agreement... *Charge Exhibit B, p. 24.*

<sup>4</sup> *Charge Exhibit B, p. 15.*

<sup>5</sup> *Charge Exhibit C.*

cover email summarized the substantive changes to the Code, and also explained formatting changes. The e-mail stated: “[*The revised Code of Conduct*] is ready to be sent via e-mail to all DOC employees. The Commissioner asked that it be sent to you for review prior to Department-wide distribution.”<sup>6</sup>

On or about January 15, 2016, AFSCME Local 247’s counsel sent a letter to the Director of the State Labor Relations Service, which stated in relevant part:

.. The Union has carefully reviewed the newly implemented Code of Conduct. During the most recent negotiations, which concluded just months before the implementation of the new Code of Conduct, the Union agreed to remove language from its contract that prohibited the Department from relying on the Code of Conduct as a basis for discipline. The State presented its proposal as a housekeeping issue, and withheld the fact that it planned to implement a revised Code of Conduct just months later. This lack of candor will be noted for all future negotiations and the Union will evaluate each State proposal as if it is being made with a devious motive and purpose.

In terms of the newly unilaterally implemented Code of Conduct, the Union notes that many of the changes are stylistic in nature, or reflect current practices. The Union notes some exceptions and objects to two areas. Section 1.5 – Unbecoming Staff Conduct, violations of federal or Delaware statutes or regulations was expanded to include violations of DOC policies. The Union does not believe that any violation of DOC policy necessitates a finding of unbecoming staff conduct. Further, in Section 3.10 – Staff Arrests, Convictions or Police Contact, the State added, “In addition, any staff questioned by an official concerning an alleged involvement in any criminal or traffic offense shall report such questioning to their immediate supervisor. Also, any staff served with notice of a Protection from Abuse (PFA) Hearing shall promptly report the notice to their immediate supervisor.” This language is far too broad.

Second, in Section 2.8 Staff Availability and Timely Performance of Duties, the State changed, “Staff may be required to come to or stay at work beyond the hours of the assigned shift,” to “staff may be required during non-work hours to report early or stay at work beyond the normal hours of the assigned shift.” The Union does not agree that officers may be required to report to work during non-work hours without compensation.

The Union reserves the right to challenge any discipline that may arise out of these changes or in the event that the State relies on an adverse interpretation or application of this unilaterally implemented language. Further, the Union requests that the State negotiate with the Union over

---

<sup>6</sup> Answer, Exhibit 3

these changes to the Code of Conduct. Please contact me to discuss the State's availability to meet...<sup>7</sup>

The State admits there were no formal negotiations over the terms of the revised Code of Conduct, either prior to its implementation or after AFSCME's letter of January 15, 2016.

### **DISCUSSION**

Regulation 5.6 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 there is no probable cause to believe that an unfair labor practice may have 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 shall 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 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*, PERB Probable Cause Determination, ULP 04-10-453, V PERB 3179, 3182 (2004).

Unilateral changes by an employer during the course of the collective bargaining relationship concerning matters that are mandatory subjects of bargaining are, in the absence of good faith negotiations or explicit waiver, generally constitute *per se* refusals to bargain in violation of the employer's statutory good faith obligation. In order to find such a violation, however, it must first be established that the matter constitutes a mandatory subject of bargaining.

---

<sup>7</sup> Charge Exhibit D.

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).

The Charge does not set forth a basis on which it can be concluded that the Code of Conduct constitutes a mandatory subject of bargaining. The fact that the parties agreed in their last negotiations to eliminate the negotiated prohibition on using the Code of Conduct as a basis for discipline did not transform the Code into a mandatory subject of bargaining. Any reliance on the Code of Conduct for discipline assessed by the State on a bargaining unit employee must be for just cause and the grievance procedure provides a mechanism by which the discipline may be challenged. These rights are protected by the collective bargaining agreement. Both discipline and the grievance procedure are mandatory subjects of bargaining. The Charge does not allege a unilateral change in the terms of either negotiated provision.

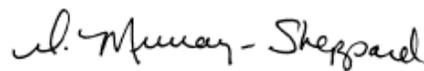
For these reasons, the Charge is dismissed as it fails to establish probable cause to believe the State failed or refused to negotiate with respect to a mandatory subject of bargaining.

### **DETERMINATION**

Consistent with the foregoing discussion, the pleadings fail to constitute probable cause to believe that an unfair labor practice may have occurred. Accordingly the Charge is dismissed.

**IT IS SO ORDERED.**

DATE: November 3, 2016



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