STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 81, LOCALS 1832, 2030, 2031, AFL-CIO,	:	
Charging Party,	:	
v.	:	**ULP No. 18-09-1160**
STATE OF DELAWARE, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DIVISION OF SERVICES FOR AGING AND ADULTS WITH PHYSICAL DISABILITIES,	:	**Probable Cause Determination**
Respondent.	:	

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 Health and Social Services ("DHSS") is an agency of the State. The Division of Services for Aging and Adults with Physical Disabilities ("DSAAPD") is a division of DHSS.

American Federation of State, County and Municipal Employees, AFL-CIO, ("AFSCME") Council 81 is an employee organization within the meaning of 19 Del.C. §1302(i). By and through its affiliated locals 1832, 2030, and 2031, it is the exclusive bargaining representative of State employees in DHSS/DSAAPD, as defined in DOL Case 47.

On September 6, 2018, AFSCME filed an unfair labor practice charge with the Delaware Public Employment Relations Board ("PERB") alleging conduct by the DSAAPD in violation of 19 Del.C. §1307(a)(1), (a)(5), and (a)(6), 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 because of the exercise of any right guaranteed under this chapter…
>
> (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with 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 DHSS/DSAAPD violated the rights of bargaining unit employees and its obligations under the statute by failing and refusing to bargain in good faith by unilaterally implementing a modified Dress Code, and disciplining employees under that new Code.

On September 26, 2018, the State filed its Answer to the Charge, admitting it had issued draft revisions to the Dress Code on April 9, 2018, to be effective May 15, 2018. The State denies the substance of many of the changes outlined in the Charge and also denies changes were implemented. It denies any discipline has been imposed under the revised Dress Code but admits that it has declined to negotiate concerning the Dress Code Policy.

In New Matter contained in the Answer, the State asserts the Charge is not ripe and/or the Dress Code Policy is not a mandatory subject of bargaining; consequently, the Charge should be dismissed.

On October 8, 2018, AFSCME filed a Response to New Matter in which it admitted the "Standards for Appropriate and Professional Dress" had existed for several years and that the parties' collective bargaining agreement does not contain a dress code policy. It

denied the policy had not changed as of the date of the State's Answer to the Charge. AFSCME also denies any knowledge of a modified September draft of the policy. It specifically denies the State's assertion that the Dress Code Policy is a permissive subject of bargaining.

This probable cause determination is based on review of the pleadings submitted by the parties.

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, 2004).

The Public Employment Relations Board upheld the decision of its Executive

Director who found changes to a dress code to be a mandatory subject of bargaining.[1] Affirming the application of the balancing test, the Board held:

> The *Appoquinimink*[2] test on its face favors a finding of negotiability and sets the standard for removing issues from the scope of mandatory negotiations. It requires that "the probable effect on the school system as a whole clearly outweighs the direct impact on teachers." (*emphasis added*) In order to apply the test, there must be support on the record for both the probable effect on operations and the direct impact on employees. It is clear that a dress code that prohibits specific types of clothing that have previously been acceptable will have a direct economic impact on staff who may be required to purchase new clothing and shoes in order to comply with the policy.
>
> The probable effect on operations is not clear in this case. Other than the District's assertion that it is common sense that better dressed teachers improve the learning environment, there is nothing in the record that supports that conclusion. The District argues that it was not required to prove a problem existed or that the dress code would further its educational mission and improve the quality of its operation. By not providing such support, the District acted at its peril.[3]

These pleadings raise legal issues concerning the mandatory scope of bargaining under the PERA and whether this matter is ripe for adjudication. It also raises a number of factual issues, including whether unilateral changes were implemented, whether employees have been disciplined under a revised policy, and whether the Dress Code has been substantively modified. To prevail in this matter, AFCME must establish by a preponderance of the evidence that DHSS/DSAAPD has implemented a unilateral change in a mandatory subject of bargaining, without negotiation, in violation of its statutory obligations.

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[1] *Red Clay Consolidated School District v. Red Clay Education Association, DSEA/NEA*, DS/ULP 06-06-524, V PERB 3751 (2007); affirming the decision below found at V PERB 3715 (2006). See also, *Laurel Education Association, DSEA/NEA v. Laurel School District*, ULP 17-09-1120, IX PERB 6955, 6958 (2017).

[2] *Appoquinimink Education Association v. Bd. of Education of Appoquinimink School District*, ULP 1-3-84-3-2A, I PERB 35 (1984). Also known as the "Appoquinimink Balancing Test", this decision is often cited and applied to questions of scope of negotiability questions under the Public Employment Relations Act, the Public School Employment Relations Act, and the Police Officers and Firefighters Employment Relations Act.

[3] *Red Clay*, Ibid @ p. 3753

DETERMINATION

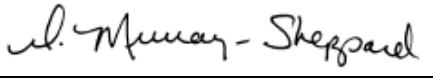
Considered in a light most favorable to the Charging Party, the pleadings are sufficient to establish that the State may have violated 19 Del.C. §1307 (a)(1), (a)(5), and/or (a)(6), as alleged. The pleadings raise both questions of fact and law which can only be resolved following the creation of a complete evidentiary record and the consideration of argument.

WHEREFORE, a hearing will be scheduled for the purpose of developing a full and complete factual record upon which as decision can be rendered concerning:

> WHETHER THE DHSS/DSAAPD INTERFERED WITH THE PROTECTED RIGHTS OF EMPLOYEES, REFUSED TO BARGAIN COLLECTIVELY IN GOOD FAITH, AND/OR REFUSED OR FAILED TO COMPLY WITH ANY PROVISIONS OF THE PERA BY UNILATERALLY IMPLEMENTING MODIFICATIONS TO THE DRESS CODE POLICY, IN VIOLATION OF 19 DEL.C. §1307 (A)(1), (A)(5) AND/OR (A)(6).

Prior to hearing, a prehearing conference will be convened to determine whether any of the issues raised by the Charge may be resolved by agreement of the parties.

DATE: October 22, 2018



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