**STATE OF DELAWARE**

**PUBLIC EMPLOYMENT RELATIONS BOARD**

| | | |
|---|---|---|
| **AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 81, LOCAL 3936, AFL-CIO,** | : | |
| **Charging Party,** | : | |
| **v.** | : | **ULP No. 18-08-1154** |
| **STATE OF DELAWARE, DEPARTMENT OF STATE, DELAWARE VETERANS HOME,** | : | **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 State ("DOS") is an agency of the State. The Delaware Veterans Home ("DVH") is a division of DOS.

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 Local 3936, it is the exclusive bargaining representative of State employees at the Delaware Veterans Home which includes Dietician Assistants, Certified Nursing Assistants, Licensed Practical Nurses I, II, and III, Activity Aides, Advance Practice Nurses, and Registered Nurses I, II, and III, as defined in DOL Case 176.

On August 8, 2018, AFSCME filed an unfair labor practice charge with the Delaware Public Employment Relations Board ("PERB") alleging conduct by the DVH in violation of 19 Del.C. §1307(a)(1), (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:
>
> (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 DVH unilaterally implemented a scheduling and staffing policy for bargaining unit employees working in the nursing department on or about May 4, 2018, without providing prior notification or the opportunity to bargain to AFSCME. AFSCME asserts the policy specifically violates provisions of the collective bargaining agreement related to seniority for vacation and overtime scheduling and special duty assignments and the provision for fair and equitable distribution of overtime to all bargaining unit employees. AFSCME further alleges that upon notification to DVH that the changes in the policy were mandatory subjects of bargaining over which the employer was required to negotiate, DVH refused to bargain in violation of its obligations under the collective bargaining agreement.

On September 4, 2018, the State filed an Answer to the Charge on behalf of DVH, in which it admits DVH drafted the Nursing Department Protocol for Scheduling and Staffing on or about May 4 and that "the Protocol was also communicated to employees shortly thereafter." *State Answer ¶6.* It also admits to receiving a letter from AFSCME requesting to "discuss" the Protocol. *State Answer ¶11.* The State asserts DVH's Administrator met with the AFSCME Representative and later confirmed that the policy

had been revoked and not enforced since June 26, 2018. *State Answer ¶12.* The State denies the DVH violated the PERA as alleged.

In New Matter contained in the Answer, the State asserts the Charge fails to state a claim for which relief can be granted under the PERA and that the Charge is moot; consequently, it argues, the Charge should be dismissed.

On September 14, 2018, AFSCME filed a Response to New Matter in which it denied the State's new matter and defenses. It asserts "… the State implemented and enforced the policy even after the Union requested bargaining and bargaining unit employees' terms and conditions of employment were altered as a result of the State's implementation of the policy." *AFSCME Answer to New Matter, ¶20.*

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).

Unilateral disruptions of the *status quo* have been held to violate the duty to bargain in good faith because they frustrate the statutory objective of establishing terms and conditions of employment through the collective bargaining process. The *status quo* of a mandatory subject of bargaining is subject to change only through the collective bargaining process. *New Castle County Vo-Tech Education Assn. v. Bd. of Education*, ULP 88-05-025, I PERB 257, 259 (1988); *Christina Education Assn., Inc. v. Bd. of Education*, ULP 88-09-026, I PERB 359, 366 (1988).

The Charge alleges DVH unilaterally implemented changes in its scheduling and staffing policy, which affected vacation and overtime scheduling, as well as the negotiated benefit of seniority on overtime availability and special duty assignments. The State denies DVH made a unilateral change in mandatory subjects of bargaining, but also avers that AFSCME was notified on June 29, 2018 that the policy had been revoked and not enforced since June 26, 2018. This Board held in an unfair labor practice proceeding involving these parties that the subsequent revision of a change in a mandatory subject of bargaining does not "clear the slate"[1] and an employer may be found to have violated its obligations under the PERA even when the offending change is later revoked or reversed.

PERB has also held that the test for determining if an employer's unilateral action interfered with the rights of the employees and/or the exclusive bargaining representative

[1] *AFSCME 3936 v. DOS/DVH,* ULP 10-09-765, VII PERB 5313 (2012).

is an objective, reasonable tendency standard.

> …[T]he test is not whether any employee was actively intimidated, coerced or restrained, but whether the conduct reasonably tended to interfere with either the free exercise of employee rights or the administration of the union.[2]

The pleadings in this matter are sufficient to establish probable cause to believe an unfair labor practice may have occurred. To prevail in this matter, AFSCME must establish by a preponderance of the evidence that DVH implemented a unilateral change in a mandatory subject of bargaining, without providing notice and/or the opportunity to negotiate, in violation of its statutory duties, and that this action violated the protected rights of bargaining unit employees. A hearing will be promptly scheduled for the purpose of establishing a factual record on which argument can be considered in order to render a determination on this Charge.

## 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 require 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 DOS/DVH 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 A NURSING DEPARTMENT

[2] *AFSCME 3936 v. DOS/DVH* (Supra., p. 5330), *citing, Sussex County Vo-Tech Teachers Assn. v. Bd. of Education*, ULP 88-01-021, I PERB 287 (1988).

PROTOCOL FOR SCHEDULING AND STAFFING ON MAY 4, 2018, IN VIOLATION OF 19 DEL.C. §1307 (A)(1), (A)(5) AND/OR (A)(6).

Having found probable cause based on the pleadings, the State's assertion that the charge fails to state a claim upon which relief can be granted is denied.

DATE: October 25, 2018

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