STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

DELAWARE STATE AND FEDERAL EMPLOYEES, LOCAL 1029, LiUNA,	:	
Charging Party,	:	
v.	:	**ULP No. 20-04-1227**
STATE OF DELAWARE, DEPARTMENT OF SERVICES FOR CHILDREN, YOUTH AND THEIR FAMILIES,	:	**Decision on the Pleadings**
Respondent.	:	

Appearances

Gurvis Miner, Business Manager, LiUNA Local 1029

Khrishna Hawkins, State Labor Relations & Employment Practices, for DSCYF

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 Services for Children, Youth and Their Families ("DSCYF") is an executive branch department of the State. The Division of Prevention and Behavioral Health Services ("DPBHS") is an agency of DSCYF.

The Delaware State and Federal Employees Local 1029, Laborers International Union of North America, AFL-CIO ("LiUNA Local 1029"), is an employee organization within the meaning of 19 Del. C. §1302(i). LiUNA Local 1029 is the exclusive bargaining

representative, within the meaning of 19 Del. C. §1302(j), of a bargaining unit which includes:

> All regular Full-Time and Part-Time Non-Supervisory DSCYF/DPBHS Child and Family Care Coordination Unit employees, including the following titles:
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> Psychiatric Social Workers III
> Family Service Assistants I, II
> Adolescent Treatment Services Coordinator
> Administrative Specialists I, II, III
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> as certified by the Delaware Public Employment Relations Board in Rep. Pet. No. 16-09-1080, effective September 18, 2017. All supervisory positions are excluded from the unit. *DOL Case 236.*

LiUNA Local 1029 and the State of Delaware, Department of Services for Children, Youth and Their Families, Division of Prevention and Behavioral Health Services, Child and Family Care Coordination Unit are parties to a current collective bargaining agreement which has a term of April 18, 2018 through April 30, 2021.[1]

On or about April 27, 2020, LiUNA Local 1029 filed an Unfair Labor Practice Charge with the Public Employment Relations Board ("PERB") alleging that DSCYF has refused to bargain collectively in good faith and interfered with the rights of bargaining unit employees, in violation of 19 Del. C. §1307(a)(1) and (a)(5), which state:

> §1307. Unfair Labor Practices – Enumerated
>
> (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 in or because of the exercise of any right guaranteed under this chapter.

[1] *State Exhibit 1.* Although the cover page of the collective bargaining agreement reflects a March 2018 – March 2021 term, Article 26 and the signature page of the document states, "This Agreement shall become effective April 18, 2018 and shall continue in full force and effect until April 30, 2021…"

> (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.

Specifically, LiUNA alleges DSCYF failed and refused to abide by the grievance procedure negotiated by the parties and memorialized in their collective bargaining agreement, thereby unilaterally modifying a mandatory subject of bargaining. LiUNA Local 1029 requests DSCYF be directed to bargain in good faith, to cease refusing to process grievances, to make the union whole by processing the grievance at issue in this case, and that PERB provide such other relief as may be just and proper to remedy the unfair labor practices.

On May 8, 2020, the State filed an Answer to the Charge on behalf of DSCYF in which it admitted material facts and denied the legal conclusions asserted in the Charge. The Answer includes New Matters in which the State asserts the Charge fails to state a claim for which relief can be granted under 19 Del. C. §1303, §1307(a)(1), (a)(2), (a)(3) and/or (a)(5); that the Charge should be deferred to arbitration; and that the remedy requested by LiUNA Local 1029 is "beyond the statutory authority of the PERB and would undermine the collective bargaining process."

On May 26, 2020, LiUNA Local 1029 filed its Response to the New Matter raised in the State's Answer, denying the new matter contained therein.

This determination results from a review of the pleadings submitted by the parties, pursuant to PERB Rule 5.6(b).

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.
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> (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. DOT/DTC***, PERB Probable Cause Determination, ULP 04-10-453, V PERB 3179, 3182 (2004). In this case, the material underlying facts are documented and/or uncontested.

The Charge does not allege the State violated either 19 Del. C. §1307(a)(2) or (a)(3). Section 1303 of the PERA is referenced in the Charge as support for LiUNA Local 1029's allegation that §1307(a)(1) was violated. The State's argument that the Charge should be dismissed because it fails to assert facts which are sufficient to state a claim for relief

under §1303, §1307(a)(2) and/or §1307(a)(3) is denied and dismissed, as the Charge does not assert a claim under these sections of the statute.

The Charge alleges DSCYF failed or refused to process a grievance and that this failure constitutes both a unilateral change in a mandatory subject of bargaining and interference with employee rights guaranteed by the PERA. The merits of the underlying grievance itself is not in issue and there is nothing to defer to the grievance procedure.

The State's argument that LiUNA Local 1029's requested remedy would require an *ultra vires* exercise of power by PERB is similarly without merit. The Charge does not request that PERB grant the grievance and ignore the timelines for filing a grievance under the terms of the negotiated grievance procedure. It does just the opposite – it requests PERB direct DSCYF to comply with the procedural aspects of the negotiated grievance process. For this reason, this affirmative defense is also dismissed because it lacks merit.

It is well established in Delaware case law that the "grievance procedure is a mandatory subject of bargaining, and as such, may not be unilaterally changed by either party, either overtly or by inaction." *Donahue v. City of Wilmington*, ULP 08-11-637, VI PERB 4123, 4128 (2008). The grievance procedure lies at the heart of the continuous collective bargaining process and is the vehicle through which the negotiated collective bargaining agreement is defined and refined during the life of the agreement. *Cape Henlopen Education Assn. v. CHSD*, ULP 01-05-319, III PERB 2239, 2245 (2001).

For the collective bargaining process to have meaning, the parties have a statutory good faith obligation to follow the negotiated grievance procedure consistently and strictly in accordance with the contractual terms. *Indian River EA v. Bd. of Education*, ULP 99-09-053, I PERB 667, 674 (1991). The negotiated grievance procedure may not be modified

or ignored unless the parties have mutually agreed to do so. *Caesar Rodney Education Assn. v. Bd. of Education*, ULP 02-06-360, IV PERB 2729, 2733 (PERB Decision on Review, 2002); affirmed C.A. No. 1549-K, IV PERB 2933 (Chan. Ct., 2003).

Article 17, Grievance Procedure, of the 2018 – 2021 collective bargaining agreement negotiated by the parties states, in relevant part:

> 17.1 The purpose of this grievance procedure is to provide an orderly method for the settlement of grievances, defined as a dispute between the parties over the interpretation, application, or claimed violation of any of the provisions of this Agreement, or the unjust application of the rules and regulations of the Department, Division or facility, except that complaints which allege a violation of the State Merit Rules may be processed under this procedure through Step 3.
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> 17.2 The time limits set forth herein may be extended by mutual agreement of the parties in writing. Grievances which are not initiated and/or processed within the specified time limits shall be considered terminated, unless a time extension has been granted. If a grievance response is not made within the time limits, the grievance may be appealed to the next step. All parties will make every effort to expedite the processing of grievances.
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> 17.3 Forms: All grievances shall be submitted on a form agreed to by both parties.
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> 17.3.1 Forwarding of the grievance or appeal will be the responsibility of the Union.
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> 17.4 Step 1. The employee or one or more designated members of a group of employees having a grievance shall within 15 calendar days of the date of the occurrence of the grievance or within 15 calendar days of the date the employee(s) should have been reasonably aware of an event which leads to a complaint or dispute, who may be accompanied by the steward, shall discuss the problem with his/her supervisor. If this fails to resolve the grievance, the employee shall submit the matter in writing on the appropriate grievance form to the Regional Supervisor within 10 calendar days. The Regional Supervisor shall within 7 calendar days of receipt of the grievance meet with the employee to discuss the grievance. The Regional Supervisor shall give a decision in writing to the Employee and Union within 10 calendar days following the meeting.
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> 17.5 Step 2: If the grievance is still not resolved at Step 1, it may be

> appealed in writing within 10 calendar days of receipt of the Step 1 decision to the Director of Prevention and Behavioral Health Services or designee (who shall not have been previously involved in the grievance), who shall set a meeting within 10 calendar days from receipt of the grievance with the employee, representatives from the Union Grievance Committee, which shall not exceed two employee representatives and witnesses to discuss grievance [*sic*]. Following the meeting, the Director shall have 10 calendar days to issue a written decision to the employee and the Union.
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> 17.6 Step 3: If no satisfactory solution is reached at Step 2, the grievance may be appealed in writing within 10 calendar days of receipt of the Step 2 decision to the Secretary of DSCYF or designee who shall schedule a meeting within 10 calendar days from receipt of the grievance with the employee, Facility representative, the Union Grievance Committee and/or the Union attorney. At the meeting, the Secretary may be accompanied by other State representatives. The Secretary or designee shall issue a written decision within 10 calendar days following the meeting.
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> 17.7 All grievance meetings will be held during the employee's regularly scheduled working hours. Employees (including the Union Grievance Committee) required to attend grievance meetings, including arbitration, shall be given time off from duty, without loss of pay, to appear at the meeting.
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> 17.8 If the Union and DSCYF mutually agree that the grievance is of such a nature that the State representative at the first and/or second steps would not have the power to grant the requested action, the grievance shall be heard at the next higher step… *Exhibit 1 to the State's Answer.*

The pleadings establish that a casual seasonal Adolescent Treatment Services Coordinator was "suspended from work without pay pending the completion of an internal investigation" by letter dated March 13, 2020 which was sent by the DPBHS Deputy Division Director. *State Exhibit 5.*

On March 19, 2020, the DPBHS Regional Manager directed the employee to return to work on March 20, 2020, which the employee did. *State Answer ¶10.* By email to the Regional Director, the employee requested to be paid for the time she was suspended from work between March 13 and March 19, inclusively. The Regional Director responded by

email dated March 25, 2020, denying the employee's request to be paid. *State Exhibit 8.*

It is undisputed that the Union filed a written grievance with the DPBHS Director contesting the unpaid suspension.[2] The Director acknowledged receipt by his signature on the grievance form on March 31, 2020. *Union Exhibit 3; State Exhibit 12.*

On April 3, 2020 at 5:54 p.m., a Human Resource Specialist sent an email "on behalf of DSCYF_Labor_Relations", to LiUNA Local 1029 denying the grievance, stating:

> LR[3] is in receipt of Local 1029 request [*sic*] for a Step 1 Grievance Hearing Request [*sic*] on behalf of *[the employee]* re alleged violation of CBA[4] Article #16 – Discipline – 16.1, 16.4, 16.7. Your request for a Step 1 Grievance Hearing is hereby denied in accordance with CBA Article 17 – Grievance Procedure - #17.2, 17.3, #17.3.1, #17.4 *Exhibit 11 to the State's Answer.*

It is undisputed that there was no discussion, correspondence, or grievance hearing convened between the March 31 filing of the grievance with the DPBHS Director and the denial of the grievance on April 3. Although the State asserts in its Answer that the denial was intended to place LIUNA 1029 on notice that the grievance was defective because it stated the date of the incident was March 13, 2019 (rather than 2020), the plain language of the email that the grievance is "hereby denied" does not make any reference to a technical or typographical error.

The email denying the grievance is not in conformance with the clear and unambiguous language of 17.5 which states the DPBHS Director or his designee "shall set

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[2] §16.8 of the collective bargaining agreement states: "Appeals of suspensions and dismissals will commence at Step 2 of the grievance procedure."

[3] LR is presumed to be an abbreviation for the DSCYF Labor Relations Office.

[4] CBA is presumed to be an abbreviation for collective bargaining agreement.

a meeting within 10 calendar days from receipt of the grievance…" and, following that meeting, shall have 10 calendar days in which to issue a written decision. Whether or not the HR Specialist who sent the email was the Director's designee, DSCYF abrogated the mutually established procedure in that no meeting was set or held and, therefore, no written decision could be issued resulting from that meeting. An email from the DPBHS Director dated April 10 states that he takes his "guidance from DHR, thus they are involved in the process" and he needs "to take their advice." *State Exhibit 13.* This communication does not indicate he designated DHR to conduct the Step 2 procedure.

On April 16, 2020, LiUNA Local 1029 filed a Step 3 grievance with the Cabinet Secretary. *State Exhibit 14.* The State admits the Secretary forwarded the grievance to DSCYF Labor Relations, which "schedules hearings and ensures the appropriate offices [*sic*] and parties attend the hearings." The State in its Answer simply states the grievance was rejected at Step 3. *State Answer ¶15.* Neither party asserts a Step 3 meeting was scheduled or held as required by §17.6 and neither party includes a document which indicates how and by whom the Step 3 grievance was rejected.

The State included in its Answer LiUNA Local 1029's appeal of the grievance to pre-arbitration.[5] *State Exhibit 15.* That document states, in relevant part:

> On or about April 16, 2020, in harmony with the provisions set forth in Article 17.5, the Union submitted a timely filed grievance to the Secretary of DSCYF. On that same day, the Union received a e-mailed response from Cabinet Secretary Josette Manning, stating, "I have received this and forwarded it to our HR unit, as they handle and process these requests." In a subsequent email on April 17, 2020,

[5] §18.1 If the Step 3 decision is unsatisfactory, such grievance may be submitted to the State's Director of Human Resources Management ("Director"). Such appeal shall be made within 15 calendar days of receipt of the Step 3 decision, and the Director shall schedule a meeting with the Union within 10 calendar days of receiving this appeal. If the Grievance is not resolved at that meeting, the Director shall issue a non-resolution letter within 5 calendar days…

> Secretary Manning replied, "It should be noted, however, that DSCYF/HR/LR is not my designee in this matter." On April 22, 2019, [*sic*] the Union received a Step 3 response from Human Resources Specialist, Crystal Fritz[6] stating, "the Department is denying Local 1029's request for a Step 3 Grievance Hearing…"

The mutually agreed-upon procedure for a Step 3 grievance states the Secretary or her designee "… shall schedule a meeting within 10 calendar days from the receipt of the grievance…" and "… shall issue a written decision within 10 days following the meeting." §17.6. There is nothing optional or discretionary about the word "shall". Both parties are entitled to rely upon and must implement the provisions of their negotiated agreement consistently and in good faith.

The burden to process grievances in accordance with the negotiated procedures falls upon both parties in scheduling and participating in the grievance meetings. The employer's representative can certainly argue that a grievance is procedurally deficient and/or that it does not meet the negotiated definition of a grievance during the processing of a grievance. What this Board has repeatedly held is that a party may not fail or refuse to schedule or participate in the negotiated grievance process based on its objection to either the procedural or substantive grievability of the matter.

In *AFSCME Local 3109 v. New Castle County*[7], a similar set of circumstances was in issue:

> Absent agreement to the contrary, the parties are bound by the clear and unambiguous terms of their negotiated agreement which dictates the manner and schedule for processing grievances at Step III. When the County chooses to unilaterally ignore its obligation to process grievances through the negotiated procedure, it violates its duties and obligations under the PERA.

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[6] Ms. Fritz is also the Human Resource Specialist who sent the April 3, 2020 email denying the grievance at Step 2.

[7] ULP 11-07-819, VII PERB 5141, 5146 (2011).

This issue was also addressed directly in 1991 *Indian River Education Assn. v. Board of Education*, (Supra., at p. 675):

> By issuing decisions without affording the grievants and their representatives the hearings which are required by the negotiated grievance procedure, the District unilaterally altered the status quo of the grievance procedure. This decision does not depend upon the intent or motivations of the District, but rather results from the employer's misunderstanding as to its basic obligations under the Act.

Simply stated, where parties have mutually agreed to a grievance procedure which requires that meetings be held and decisions be issued by identified individuals or their designees, that process must be adhered to according to the explicit terms of that agreement. Because the grievance procedure is a mandatory subject of bargaining, any deviation from the explicit terms of procedure memorialized in the collective bargaining agreement must be jointly agreed to by the parties. Failure to properly and consistently administer and abide by the terms of the grievance procedure constitutes a unilateral change in a mandatory subject of bargaining and is a *per se* violation of the duty to bargain in good faith. Where, as here, the union is precluded from representing the interest of its members in the enforcement and application of the collective bargaining agreement according to the terms of the mutually agreed process for grievances, the failure to abide by the grievance procedure also interferes with the rights of public employees to negotiate collectively and grieve through representatives of their choosing and to engage in concerted activities for mutual aid and protection. 19 Del. C. §1303.

Based on the uncontested facts admitted by the State and the precedent of this Board, it is determined that the DSCYF has unilaterally modified the terms and conditions of employment and a mandatory subject of bargaining by failing and refusing to process the grievance at issue in this Charge through the contractual procedure set forth in Section

17 of the current collective bargaining agreement. For these reasons, the State is found to have committed a *per se* violation of 19 Del. C. §1307(a)(1) and (a)(5), as alleged.

CONCLUSIONS OF LAW

1. The State of Delaware is a public employer within the meaning of 19 Del. C. §1302(p). The Department of Services for Children, Youth and Their Families is an executive branch state agency of which the Division of Prevention and Behavioral Health Services is division. The Child and Family Care Coordination Unit is a subdivision.

2. The Delaware State and Federal Employees Local 1029, LiUNA, is an employee organization within the meaning of 19 Del. C. §1302(i). LiUNA Local 1029 is the exclusive bargaining representative, within the meaning of 19 Del. C. §1302(j) of a bargaining unit of DPBHS/CFCCU employees as defined in DOL Case 236.

3. LiUNA Local 1029 and the State of Delaware, Department of Services for Children, Youth and Their Families, Division of Prevention and Behavioral Health Services, Child and Family Care Coordination Unit are parties to a current collective bargaining agreement which has a term of April 18, 2018 through April 30, 2021.

4. The grievance procedure is a mandatory subject of bargaining. Unilateral changes to the status quo of a mandatory subject of bargaining constitutes a *per se* violation of the Public Employment Relations Act.

5. The State, by and through the actions of DSCYF, unilaterally modified the negotiated terms of the grievance procedure by failing or refusing to comply with the procedure memorialized in Article 17 of the parties' collective bargaining agreement, in violation of its duty to bargain in good faith and 19 Del. C. §1307 (a)(5).

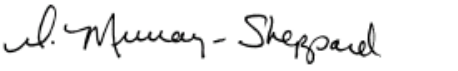
6. By this action, the State has also interfered with the rights guaranteed to employees by the Public Employment Relations Act, in violation of 19 Del. C. §1307(a)(1).

WHEREFORE, the State and DSCYF are directed to cease and desist from failing or refusing to abide by the terms of the negotiated grievance procedure and to immediately process the grievance at issue in this Charge and all future grievances in accordance with Article 17 of the collective bargaining agreement.

FURTHER, the State is directed to advise the Public Employment Relations Board within thirty (30) days of the date of this decision of its compliance with this Order.

IT IS SO ORDERED.

DATE: July 10, 2020



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