

violation of 19 Del. C. §1307(a)(1), (a)(5), (a)(6) and (a)(7), 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.
 - (7) Refuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting contract.

The Charge alleges DVH failed or refused to reduce the terms of the tentative agreement reached between the parties on or about August 11, 2021 with the help of a PERB appointed mediator. At that session, the parties finalized their agreement to move to a 12-hour shift for certified nursing assistants (“CNAs”) who did not work on the Dementia Unit. *Charge Exhibit C, Addendum B, p. 17.* AFSCME asserts that by email dated August 13, 2021, the State’s Chief Negotiator attempted to insert a provision into the tentative agreement which had not been discussed or negotiated, namely, “The implementation of the agreed upon schedule will be implement [*sic*] upon the operational ability of the facility.” AFSCME’s Chief Negotiator objected to the new language and requested to be advised of DVH’s estimated time frame for implementing the 12-hour shift, which it alleges the State was unable or unwilling to provide. *Charge Exhibit D.* It further asserts the State’s Chief Negotiator declined to sign the tentative agreement without indefinite delay in implementation language. *Charge Exhibit G.*

On November 10, 2021, the State filed its Answer to the Charge admitting most facts but denying the assertion that it has repudiated its commitment to implementing a 12-hour shift for CNAs. In new matter included in its Answer, the State asserts 1) it did bargain in good faith; 2) that the staffing structure is a permissive subject of bargaining over which it could not have committed an unfair labor practice; and 3) that its request to consult with AFSCME over the implementation of the new schedule cannot be the basis for finding it committed an unfair labor practice. It requests the Charge be dismissed in its entirety.

AFSCME filed its response to the New Matter on November 17, 2021, in which it denied the legal defenses and conclusions asserted by the State therein.

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 a 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).

This is not an issue of first impression before the Delaware Public Employment Relations Board. There have been multiple cases and decisions issued where one party has challenged the other side with failing to reduce an agreement reached as a result of collective bargaining to writing and/or to implement provisions according to agreements reached during good faith negotiations. *See City of Lewes v. FOP Lodge 2*, ULP 07-06-575, VI PERB 3925 (Decision on the Merits, 1/25/08); *Laurel Education Association v. Laurel School District*, ULP 11-11-835, VII PERB 5453 (Decision on the Pleadings, 3/26/12); *General Teamsters Local 326 v. City of Milford*, ULP 15-04-995, IX PERB 6647 (Decision on the Merits, 1/26/16); *DOC and Unit 9 Coalition and FOP Lodge 10*, ULP 19-11-1214, IX PERB 8357 (Decision on the Merits, 4/14/21). All of these decisions rely to some extent on the decision of the Chancery Court of Delaware in *Colonial Food Service Workers Association v. Board of Education*, CA 8269, 1987 Del. Ch. LEXIS 493 (VC Harnett, 10/8/87).

The pleadings in this matter are sufficient to establish probable cause to believe an unfair labor practice may have occurred. The issue raised by the pleadings concerns the status of the tentative agreement relating to implementation of the 12-hour shift for CNAs and the impact, if any, of the State's effort to modify the timing of implementation. It will

ultimately be AFSCME's burden to establish by a preponderance of the evidence that the State violated the PERA as it alleges.

DETERMINATION

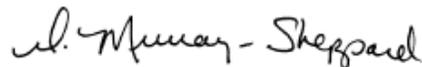
Considered in a light most favorable to the Charging Party, the pleadings are sufficient to establish that the State may have violated 19 Del. C. §1307 (a)(1), (a)(5), (a)(6) and/or (a)(7), as alleged. The pleadings raise questions of fact and law which can only be resolved following the creation of a complete evidentiary record and the consideration of argument.

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

WHETHER THE STATE INTERFERED WITH THE PROTECTED RIGHTS OF EMPLOYEES; FAILED TO BARGAIN IN GOOD FAITH; REFUSED OR FAILED TO COMPLY WITH THE STATUTE, OR PERB REGULATIONS; AND/OR REFUSED TO REDUCE AN AGREEMENT REACHED THROUGH COLLECTIVE BARGAINING TO WRITING AND TO SIGN THE RESULTING AGREEMENT BY PROPOSING NEW TERMS CONCERNING IMPLEMENTATION OF A 12-HOUR SCHEDULE FOR CERTIFIED NURSING ASSISTANTS, IN VIOLATION OF 19 DEL. C. §1307 (A)(1), (A)(5), (A)(6) AND/OR (A)(7).

A prehearing conference will be convened forthwith to identify a hearing date, to establish the scope of the hearing and the manner in which argument will be presented.

DATE: December 9, 2021



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