

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

DELAWARE STATE AND FEDERAL EMPLOYEES,	:	
LOCAL 1029, LiUNA,	:	
	:	
Charging Party,	:	
	:	<u>ULP No. 21-11-1291</u>
v.	:	
	:	Probable Cause Determination
STATE OF DELAWARE, DEPARTMENT OF	:	and Order of Dismissal
SERVICES FOR CHILDREN, YOUTH AND	:	
THEIR FAMILIES,	:	
	:	
Respondent.	:	

Appearances

Gurvis Miner, Business Manager, LiUNA Local 1029

Paul Muller, 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:

Psychiatric Social Workers III
Family Service Assistants I, II
Adolescent Treatment Services Coordinator
Administrative Specialists I, II, III

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 November 22, 2021, 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.
 - (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.

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...”

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. It also asserts that by its failure to abide by the negotiated grievance procedure, DSCYF has interfered with, restrained and coerced bargaining unit employees in the exercise of their right to organize, join, form or assist the union, as set forth in 19 Del. C. §1303. LiUNA Local 1029 requests DSCYF be directed to bargain in good faith, to cease requiring the Union to process grievances through the Division of Human Resources prior to the pre-arbitration step of the grievance procedure, and to make the Union whole by processing the grievance at issue in this case.

On December 13, 2021, 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.

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.

- (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.

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).

The Charge alleges that LiUNA Local 1029 filed a timely grievance on behalf of a bargaining unit employee on October 15, 2021 concerning the employee's Performance Improvement Plan and the denial of her request to telework. The State admits the facts as set forth in ¶13 of the Charge:

On October 20, 2021, in the absence of any designation by the Respondent's Regional Supervisor, Respondent, through Human Resources Specialist Madeline Stevens of the Division of Human Resources, responded to the Step 1 grievance, by agreeing to schedule a meeting under Section 17.4,² while objecting to the grievance as substantively defective.

It is undisputed that a Step 1 grievance meeting was conducted by the Regional Supervisor who denied the grievance on November 1, 2021. LiUNA Local 1029 advanced the grievance to Step 2 with the Director of the Division of Prevention and Behavioral Health Services. The Director designated her Deputy Director to hear the grievance pursuant to Section 17.5³ of the negotiated grievance procedure. It is undisputed that the

² 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.

³ 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

Union was “directed to schedule the Step 2 grievance through the Division of Human Resources.”⁴

LiUNA Local 1029 asserts that DPBHS has violated the explicit terms of the negotiated grievance procedure by requiring the union to schedule grievance hearings through Human Resource Specialists. It notes (and the State admits) that the collective bargaining agreement does not provide a role in the grievance process for Human Resources until after an appeal from a Step 3 decision to Pre-Arbitration as set forth in Article 18:

If the Step 3 decision is unsatisfactory, such grievance may be submitted to the State’s Director of Human Resource Management (“Director”). Such appeal shall be made in writing 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 the appeal. If the Grievance is not resolved at that meeting, the Director shall issue a non-resolution letter within 5 calendar days. The Union may request Arbitration if the grievance involves a provision of this Agreement.

LiUNA Local 1029 asserts that by requiring that scheduling proceed through the Agency’s Human Resources staff, the State has violated and acted in contempt of the PERB’s ruling in *Delaware State and Federal Employees, Local 1029, LiUNA v. Delaware Department of Services for Children Youth and Their Families*, ULP 20-04-1227 (PERB, 2020). The facts, as set forth in the 2020 decision, are substantively differentiable from those alleged in the instant Charge:

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:

discuss grievance [*sic*]. Following the meeting, the Director shall have 10 calendar days to issue a written decision to the employee and the Union.

⁴ Charge ¶16(a) which is admitted in the State’s Answer to the Charge.

LR⁵ 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 CBA⁶ 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...

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 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. ⁷

On review, the full Public Employment Relations Board affirmed the hearing officer’s decision, finding the State unilaterally modified a mandatory subject of bargaining and interfered with the rights of the employees to grieve through representatives of their choosing by refusing to convene the grievance hearings before the identified decision makers at Steps 2 and 3, as required in Article 17,

... Article 17 clearly and explicitly requires that a meeting be scheduled at Step 2 and again at Step 3, that the meeting be convened by identified management representatives (or their designees) at each step, and that a decision be issued within ten (10) calendar days following the meeting. The management

⁵ LR is presumed to be an abbreviation for the DSCYF Labor Relations Office.

⁶ CBA is presumed to be an abbreviation for collective bargaining agreement.

⁷ *LiUNA Local 1029 v. DSCYF*, ULP 20-04 1227, IX PERB 8267, 8274 (Decision on the Pleadings, 2020); as affirmed by the full PERB, on review, IX PERB 8291 (9-18-2020)

representative responsible for hearing the grievance at any step could deny the grievance if she or he decided the grievance was procedurally deficient or on its merits, but that decision must follow a required meeting with the grievant and the union representative to discuss the grievance.

In this case, there was no opportunity for the decision-maker at Step 2 or Step 3 to hear and consider the evidence and arguments of the grievant and LiUNA because the meetings were neither scheduled nor held. Identification of the applicable trigger for determining timeliness was at issue in the underlying grievance. The pleadings establish that a human resources specialist unilaterally determined the grievance was procedurally deficient (based on her determination of the appropriate trigger date). Based on this determination, DSCYF then declined and refused to schedule the meetings required for Steps 2 and 3 by Article 17 of the negotiated collective bargaining agreement.

There is no dispute in the instant matter that the Step 1 meeting was convened on October 22, 2021 and the grievance was denied on November 1, 2021 by the Regional Supervisor. It is also uncontested that, upon advancing the grievance to Step 2, the Director of the Division of Prevention and Behavioral Health Services designated her Deputy Director to hear the grievance at Step 2, but directed LiUNA Local 1029 to schedule the hearing through a Human Resources Specialist. There is no information provided which would support the conclusion that the Step 2 hearing was not held as required.

As pled, the Charge does not support the conclusion that the State failed or refused to process the grievance, or that it has deviated from the terms of the grievance procedure as memorialized in the parties' collective bargaining agreement. Neither is it apparent from the pleadings that LiUNA Local 1029 has been precluded from representing the interests of bargaining unit employees in hearings or meetings required by the negotiated grievance procedure. On its face, it appears that DSCYF assigned responsibility to administratively process grievances and schedule hearings to its Human Resources staff. The Charge does not allege that grievance hearings were not held by the agreed-upon decision-makers. For

these reasons, the Charge is not sufficient to establish probable cause to believe that the statute may have been violated as alleged.

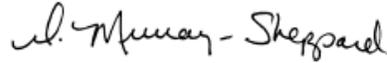
DETERMINATION

Considered in a light most favorable to the Charging Party, the pleadings are not sufficient to establish that DSCYF may have violated 19 Del. C. §1307 (a)(1) and/or (a)(5), as alleged.

WHEREFORE, this Charge is dismissed, without prejudice, and the requested relief is denied.

IT IS SO ORDERED.

DATE: February 4, 2022



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