

State of Maryland
State Labor Relations Board

In the matter of:)	
<i>American Federation of State,</i>)	
<i>County & Municipal Employees,</i>)	
<i>Council 3 ("AFSCME Council 3"),</i>)	
)	
)	
Petitioner)	
)	SLRB Case No. 2018-U-10
v.)	
)	
<i>Warden Ricky Foxwell,</i>)	
)	
Respondent)	
)	

Executive Director's Investigative Report & Recommended Determinations

On February 14, 2018, the American Federation of State, County & Municipal Employees Council 3 (AFSCME, Council 3) filed an Unfair Labor Practice (ULP) against Warden Ricky Foxwell of the Eastern Correctional Institution (ECI). ECI is part of the Division of Corrections (DOC) under the Department of Public Safety and Correctional Services (DPSCS). This ULP was filed pursuant to State Labor Relations Board (SLRB) regulations at COMAR 14.32.05, and after receipt of the ULP, the Executive Director notified the respondent of the complaint, and requested that a response be filed on March 8, 2018. On March 6, 2018, the respondent, via DPSCS agency counsel, requested a two week extension on the response deadline, as the complaint was served on Warden Foxwell while he was out of town which delayed forwarding of this complaint to agency counsel. Upon communicating with the parties to this matter, the Executive Director granted the extension request, and a response was filed on March 19, 2018.

Pursuant to SLRB Regulations at COMAR §14.32.05.02G - H, the Executive Director must investigate allegations contained in a properly filed ULP petition to determine whether probable cause exists for the SLRB to proceed on the case. After having reviewed the pleadings, exhibits and documentary evidence from both parties, in addition to conducting my own investigation, I hereby find and recommend to the full membership of the SLRB that this matter is appropriately filed, and that probable cause exists for it to proceed for further SLRB review and decision.

Undisputed Facts

AFSCME is a certified exclusive representative of certain employees assigned to ECI. ECI is a correctional institution which is part of the DOC. The DOC falls under the umbrella of DPSCS.

AFSCME and DPSCS negotiated an Overtime Policy for correctional staff, which governs the distribution of overtime at all of the DPSCS correctional facilities across the state. This policy has been in existence since early 2012.

Major Kevin King sent an electronic mail message on January 9, 2018, per the attachment to AFSCME's ULP petition.

AFSCME sent a letter on February 2, 2018, objecting to ECI's implementation of the change given in Major King's message.

Disputed Items

The following items/topics appear to be in dispute between the parties, based on their submissions:

- Categorization of how the ECI facility is organized and functions.
- Current practice of overtime drafting between the different sections of ECI; who is drafted to work overtime at what locations in ECI.
- Meaning and application of the current overtime policy at ECI.

Petitioner's Position/Information

AFSCME states that there is currently a negotiated "Overtime Policy for Correctional Staff" (attached to the ULP petition), which was executed in early 2012 and has been in effect since that time. AFSCME states that this policy applies to all DOC facilities including ECI, and the policy directs "when and how correctional staff are to be drafted for overtime, *i.e.* ordered to fill unscheduled employee absences." (ULP Petition, p. 2) AFSCME states that within this policy, and "as a matter of long standing practice" (ULP Petition, p. 2), each unit keeps a separate overtime list, so employees are not routinely drafted into overtime in different and unfamiliar DOC facilities.

AFSCME alleges that on January 9, 2018, Major Kevin King, Assistant Facility Administrator, announced via electronic mail that: "Effective 1/17/18 there will be one draft list with all the officers' names combined and they will be drafted to work at the Annex and the East Compound. The Annex officers will be drafted to work on the East Compound and the East Compound officers will be drafted to work at the Annex." (ULP Petition, p. 2) AFSCME submitted a copy of this electronic mail message with its ULP petition. AFSCME argues that the result of this announcement was a "material change" in overtime and work assignments. (ULP Petition, p. 2). AFSCME alleges that this change was not negotiated with AFSCME, and that the changes were not proposed and not agreed upon, and were unilaterally imposed by ECI.

Via a letter dated February 2, 2018, AFSCME objected to ECI's implementation of this change. AFSCME submitted a copy of this letter with its ULP petition. In this letter, AFSCME demanded that the change be rescinded, and that any such change be negotiated. AFSCME alleges that ECI has not rescinded this change, and further, that ECI has failed and refused to bargain about it. (ULP Petition, p. 2)

AFSCME alleges that DPSCS has violated State Personnel & Pension Article, Section 3-306(a)(8) and requests as remedy that the SLRB investigate this matter, orders ECI to cease and desist from such unfair labor practices, and provides any further relief as the cause may require. (ULP Petition, p. 3)

Respondents' Position/Information

DPSCS challenges AFSCME's categorization of how the ECI facility is organized and functions. DPSCS states that ECI operates under a "single unified command structure." (Response to ULP petition, p. 2) Further, DPSCS states that there are no ECI officers that are designated as one area only and that correctional officers may be transferred between ECI's west and east compounds, or to the Annex, at management discretion. DPSCS states that the correctional officers at each area receive the same training.

DPSCS disagrees with AFSCME's statement that it is long standing practice to not draft offers from the East Compound to work overtime hours in the West Compound and vice versa. (Response to ULP Petition p. 2). In reality, notes DPSCS, this has been done, but it's not always possible because the East and West Compounds work staggered shifts. Further, DPSCS denies that offers who are assigned to the Annex are not drafted to work overtime in the in the East Compound. DPSCS argues that under current overtime policy "the distribution of overtime is to be determined by the officer's assigned shift, not physical units within the correctional facility". (Response to ULP petition, p. 3)

DPSCS disagrees with AFSCME in that the department communicated to its employees that effective January 17, 2018, "Annex officers will be drafted to work on the East Compound and the East Compound officers will be drafted to work at the Annex." (Response to ULP petition, p. 3) DPSCS states that there will be overtime lists for each shift, day, evening, and night.

Contrary to AFSCME's presentation, DPSCS argues that Major King's electronic mail message brings the practice of overtime drafting at ECI "into compliance with the overtime policy" that was negotiated between the parties. (Response to ULP petition, p. 3)

DPSCS denies the need to negotiate with AFSCME, as DPSCS states that the change at issue in AFSCME's ULP petition is an effort to bring ECI into compliance with the current overtime policy negotiated by the parties.

Analysis

COMAR §14.32.05.02G – H authorizes various actions undertaken by the Executive


Director regarding unfair labor practices filed before the SLRB. Under these sections, the Executive Director shall, subject to SLRB review, consider properly filed complaints, and investigate the facts. Further, the Executive Director should recommend SLRB dismissal of the matter if a petitioner fails to state an actionable claim under SPP Sections 3-101 through 3-602, or appropriate COMAR regulations; or determines that the SLRB has no jurisdiction over the claims presented. Regarding these COMAR provisions, this matter was properly filed as a violation of SPP Section 3-306(a)(8), with appropriate service to the respondents, and AFSCME has alleged violations of statutory provisions committed by a state employer over which the SLRB has jurisdiction. As to an investigation of the facts, based on the presentation of DPSCS, much of what AFSCME alleges has happened (electronic mail with certain information being sent, and an objection by AFSCME being sent in response), DPSCS agrees with, and further factual investigation beyond what the filings provide, is not warranted.

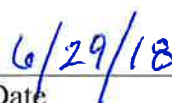
COMAR 14.32.05.02H authorizes the Executive Director to set forth a written report as to whether probable cause exists to believe that the unfair labor practice has occurred. In this matter, AFSCME alleges that, based on the existence of a current overtime policy, an unfair labor practice has occurred. DPSCS agrees that the correspondence has been sent per AFSCME's presentation. The disagreement (and thus DPSCS's defense) is whether or not the correspondence from Major King was a change to current policy (hence AFSCME's argument about there being an obligation to bargain) or merely an attempt by DPSCS to come into compliance with current policy (which may not bring an obligation to bargain). AFSCME has sufficient probable cause to allege an unfair labor practice—the fact that DPSCS has raised defenses and policy application questions regarding AFSCME's allegations, does not in and of itself indicate a lack of probable cause. The response that DPSCS raises would be appropriate for the full Board to consider in a further proceeding.

Recommendation

Based on the evaluation of the evidence gathered during the course of this investigation, and discussed in the above analysis, the Executive Director finds and recommends that the SLRB either hold a hearing in this matter, or delegate this matter to the Office of Administrative Hearings for findings of fact, proposed conclusions of law, and a proposed order.

Pursuant to SLRB Regulations at COMAR §14.32.05.02G - H, this report will be sent to the full membership of the SLRB as well as to the parties. Any party aggrieved by the Executive Director's Report and Recommended Determinations is permitted to request reconsideration by the full board **no later than fifteen days** after the issuance of this report.


Erica L. Snipes, Executive Director
State Labor Relations Board


Date