

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY,	:	
AND MUNICIPAL EMPLOYEES, COUNCIL 81,	:	
LOCAL 439,	:	
	:	
Charging Party,	:	
	:	
v.	:	<u>U.L.P. No. 95-08-150</u>
	:	
UNIVERSITY OF DELAWARE,	:	
	:	
Respondent.	:	

*Perry F. Goldlust, Esq., Heiman, Aber & Goldlust, for AFSCME Local 439
Kwame Satchell, Esq., Morgan, Lewis & Bockius, for the University of Delaware*

PROBABLE CAUSE DETERMINATION

The Petitioner is an employee organization within the meaning of §1302(h) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (hereinafter “Act”). The Respondent is a public employer within the meaning of §1302(n) of the Act.

On April 19, 1995, the Petitioner filed a representation petition with the Public Employment Relations Board (hereinafter “PERB”) seeking to amend the certification of an existing bargaining unit represented by AFSCME Local 439 to include all classifications of bus drivers employed by the Respondent.

On August 3, 1995, the instant unfair labor practice Complaint was filed alleging that by its actions involving essentially two (2) bus drivers in the representation effort, the Respondent has violated §1307, Unfair Labor Practices, subsection (a)(1), of the Act, which provides:

- (a) It is an unfair labor practice for a public employer 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.

On August 17, 1995, the Respondent filed its Answer to the Complaint denying the allegations set forth therein.

DISCUSSION

Article V of the Rules and Regulations of the Public Employment Relations Board provides, in relevant part:

5.6 Decision or Probable Cause Determination

- (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.

The Complaint alleges that Mr. Fentress L. Truxon, Manager of Transportation Services for the Respondent, made expressed and implied threats to employee Maureen Canale, a bus driver active in the representation effort, and to others concerning the possible discontinuation of benefits and privatization of transportation services, if the union organizing drive is successful. (Complaint, ¶5).

The Complaint further alleges that employee Canale and JoAnn Barnett, another bus driver active in the union organizing campaign, received warning notices for excessive absenteeism while similarly situated employees did not. (Complaint, ¶6). Allegedly, Mr. Truxon also held a one-on-one conversation with employee Canale concerning her organizing efforts while she was driving a bus, a task requiring her complete concentration. (Complaint, ¶7). Employees Canale and Barnett each received only a three percent (3%) wage increase rather than the four percent (4%) average despite the fact that each was rated “at expectation”. (Complaint, ¶8).

Paragraph 5 of the Complaint provides:

The Employer’s representative, Mr. Fentress Truxon (“Truxon”), Manager Transportation Services, has made expressed and implied threats to Canale and others of the discontinuation of benefits and even termination of employment by privatization of the bus service as reprisal for employees voting for the union.

Details of these threats are set forth in the attached affidavit of Canale and are incorporated herein by reference. (Emphasis added.)

The Canale affidavit establishes the following: (1) the alleged conversations between Mr. Truxon and employee Canale occurred “... in March, 1995” (Affidavit, ¶4) and the “... first week of April, 1995” (Affidavit, ¶5); (2) the alleged conversation between Mr. Truxon and the employee Canale occurring while she was driving a bus occurred “... during the first week of April, 1995” (Affidavit, ¶6); (3) the written warning to employee Canale for unsatisfactory attendance was issued on or about March 15, 1995 (Affidavit, ¶8); and (4) she was advised in May, 1995, that increases would be distributed based upon merit (Affidavit, ¶10).¹

Regulation 5, Unfair Labor Practice Proceedings, of the PERB’s Rules and Regulations provides, in relevant part:

5.2 Filing of Charges

- (a) ... Such complaints must be filed within ninety (90) days of the alleged violation.

Regulation 1, General Provisions, of the PERB’s Rules and Regulations provides, in relevant part:

1:10 Timeliness

Notwithstanding the provisions of Regulation 1.9, and so that the Act may be efficiently enforced and disputes thereunder swiftly resolved, the Board shall strictly construe all time limitations contained in the Act and in these Regulations.

Except for the annual increases to employees Canale and Barnett, all of the alleged incidents set forth in the petition fall outside the ninety (90) day filing period. Incidents occurring outside the ninety (90) day statutory period cannot constitute the basis for an unfair labor practice. Their only relevance is that they may be cited as evidence of a predisposition for or a continuing pattern of union animus existing prior to events occurring within the ninety (90)

¹ The Complaint establishes no dates or time frames other than those set forth in the Affidavit from employee Canale.

day period. Lake Forest Education Assn. v. Bd. of Education, Del.PERB, ULP 92-07-076 (1992).

Paragraph 8 of the Respondent's Answer, including Exhibit 1 ¶7 and Exhibit 7, establish that the raises for all eligible bus drivers, including employees Canale and Barnett, were based upon relative merit and resulted from the application of a pre-determined formula. The average increase for all drivers was four percent (4%). Canale Affidavit, ¶10. The merit raises of 3.5% and 3.51% to employees Canale and Barnett, respectively, are consistent with raises received by the other drivers, as determined by the formula.

Because the pleadings fail to establish probable cause to believe that the increases received by employees Canale and Barnett resulted from union animus or were in retaliation for their union activity, the alleged incidents occurring outside the ninety (90) day filing period have no bearing on this matter.

DECISION

Based upon the foregoing discussion, there is no probable cause to believe that an unfair labor practice may have occurred.

The petition is, therefore, dismissed.

/s/ Charles D. Long, Jr.
Charles D. Long, Jr.
Executive Director
Delaware PERB

/s/ Deborah L. Murray-Sheppard
Deborah L. Murray-Sheppard
Principal Assistant
Delaware PERB

Dated: September 29, 1995