

PUBLIC EMPLOYMENT RELATIONS BOARD
STATE OF DELAWARE

AMERICAN FEDERATION OF STATE, COUNTY AND	:	
MUNICIPAL EMPLOYEES, COUNCIL 81,	:	
LOCAL UNION 879,	:	
Charging Party,	:	<u>ULP No. 09-07-697</u>
	:	
v.	:	Probable Cause Determination
	:	
STATE OF DELAWARE, DEPARTMENT OF	:	
TRANSPORTATION,	:	
Respondent.	:	

Appearances

Perry F. Goldlust, Esq., for AFSCME Council 81
Aaron Shapiro, SLREP/HRM/OMB, for DOT

BACKGROUND

The State of Delaware (“State”) is a public employer within the meaning of §1302(p) of the Public Employment Relations Act (“PERA”). 19 Del.C. Chapter 13 (1994). The Department of Transportation (“DOT”) is an agency of the State.

The American Federation of State, County and Municipal Employees, Council 81, (“AFSCME”) is an employee organization within the meaning of §1302(i) and its affiliated Local 879 is the exclusive bargaining representative within the meaning of 19 Del.C. §1302(j) of the bargaining unit of DOT employees defined by DOL Case 12.

On or about August 3, 2009, AFSME filed an unfair labor practice charge alleging that the State violated 19 Del.C. §1307(a)(1), (2), (3), (5), (6) and §1319, which

provide, in relevant part:

- §1307 (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.
 - 2) Dominate, interfere with or assist in the formation, existence or administration of any labor organization.
 - 3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and condition of employment.
 - 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 to reduce an agreement, reached as the result of collective bargaining, to writing and sign the resulting contract.

§1319. Fair Share fees.

- 4) Where the provisions of a collective bargaining agreement so provide, a public employer shall deduct a fair share fee from each nonmember's salary or wages and promptly transmit this amount to the exclusive representative.

AFSCME alleges that the parties are signatory to a collective bargaining agreement ("Agreement") which contains provisions "that the ... employer shall deduct a fair share fee from each nonmember's salary or wages and promptly transmit this amount to the exclusive representative." On November 3, 2007, AFSCME requested the State commence deducting a fair share fee from bargaining unit employees employed at the DOT Chapman Road Facility ("CRF") who refused to join the Union. The Charge alleges the State has failed to comply with the Union's request.

In support of its position, AFSCME relies on a decision of the Executive Director of the PERB issued on August 28, 2008, which held "all Division of Highway

Maintenance and Operations positions, including those assigned to the Chapman Road Facility are included within the bargaining unit defined by DOL Case 12, as currently represented by AFSCME Local 879.” AFSCME, Council 81, Local 879 v. State of Delaware, Dep’t. of Transportation, Rep. Pet, 07-12-609, Del. PERB, VI PERB 4053, 4065 (2008), aff’d. VI Del. PERB, 4011 (2008).

On August 12, 2009, the State filed its Answer to the AFSCME’s Charge in which it essentially denies the material allegations set forth therein. Under “New Matter,” the State contends AFSCME is obligated to honor a valid Memorandum of Agreement (“MOA”) with the State applicable to the employees concerning their Union status, most specifically, their fair share obligation. The MOA provides:

MEMORANDUM OF AGREEMENT

Between

American Federation of State, County and Municipal Employees, Delaware Public Employees – Council 81, (“the Union”) and the State of Delaware, Department of Transportation (“the State”), collectively referred to herein as “the Parties”. The Parties hereby agree as follows, this 31st day of July, 2003.

1. This Memorandum of Agreement (MOA) is designed to resolve all issues relating to the bargaining unit status and union security obligations of employees affected by the reorganization of Maintenance and Operation Districts within the Division of Maintenance and Operations.
2. For purposes of this MOA, the terms set forth below shall be defined as follows:
 - a. Chapman Road Facility (CRF): the maintenance facility formerly designated as Expressways District and presently part of the North District.
 - b. Bargaining Unit: a group of employees certified by the Public Employment Relations Board, or its predecessor, and represented by the Union in Local 837 or 879, which ever is appropriate.
 - c. CRF Employees: employees working at the Chapman Road facility as of the date of this MOA.
3. CRF employees who accept a voluntary transfer (as that term is defined in the collective bargaining agreement) into any bargaining unit position shall, as a consequence of that transfer, be covered by the union security

provisions of the collective bargaining agreement for any permanent transfer.

4. CRF employees who accept a voluntary transfer (as that term is defined in the collective bargaining agreement) into any bargaining unit position shall not, as a consequence of that transfer, be covered by the union security provisions of the collective bargaining agreement for any temporary transfer.
5. CRF employees who are promoted into any bargaining unit position shall, as a consequence of that promotion, be covered by the union security provisions of the collective bargaining agreement.
6. CRF employees who progress through a career ladder within CRF shall not, as a consequence of that career ladder progression, be covered by the union security provisions of the collective bargaining agreement.
7. CRF employees who are permanently demoted within a career ladder shall not, as a consequence of that demotion, be covered by the union security provisions of the collective bargaining agreement.
8. The State agrees that, prior to effecting an involuntary transfer (as that term is defined in the collective bargaining agreement) that may result in a CRF employee being covered by the union security provisions of the collective bargaining agreement, it shall first meet with the Union and discuss the proposed involuntary transfer.

For the Union:
/s/ Michael A. Begatto

Dated: July 31, 2003

For the State:
/s/ Thomas LoFaro

State Exhibit 4.

On August 24, 2009, AFCME filed its Reply to New Matter in which it denies the material allegations set forth in the State's New Matter and asserts:

The purpose of the MOU was to keep certain positions out of the Union's bargaining unit. The MOU purports to cover the movement of employees from the position they held at the time of the MOU to another position and the affect of the transfer on their bargaining unit status. The MOU does not cover the situation when the position of the employees covered by the MOU has changed by operation of law. The MOU does not speak to employees holding a bargaining unit position and their not being subject to the Union security clause.

DISCUSSION

Regulation 5.6 of the Rules of the Delaware Public Employment Relations Board provides, in relevant part:

- (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 shall 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. DART/DTC, Del. PERB Probable Cause Determination, ULP 04-10-453, v. PERB 3179, 3182 (2004).

The pleadings raise two fundamental issues: 1) the impact, if any, of the Executive Director's decision in AFSCME, Council 81, Local 879 v. State of DE, Dep't. of Transportation, (Supra.); and 2) the impact, if any, of the Memorandum of Agreement signed by the parties on July 31, 2003.

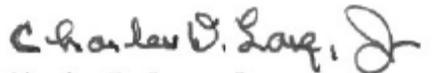
DECISION

Considered in a light most favorable to Charging Party, the pleadings establish probable cause to believe that a violation of 19 Del.C. §1307(a)(1), (2), (3), (5), (6) and §1319, may have occurred.

In order to resolve the aforementioned issues, it is necessary to hold a hearing to establish a factual record upon which a decision can be issued. The purpose of the hearing will be to establish a factual record on which a determination may be made as to whether DOT, by failing or refusing to deduct Fair Share Fees from certain DOT employees at its Chapman Road Facility has violated 19 Del.C. §1307(a)(1), (2), (3), (5), (6) and §1319, as alleged.

Wherefore, it is so ordered.

Date: December 9, 2009



Charles D. Long, Jr.,
Charles D. Long, Jr.,
Hearing Officer
Del. Public Employment Relations Bd.