STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 81, LOCAL UNION 1670-001,	)	
	)	ULP No. 10-06-747
Petitioner,	)	
	)	**Probable Cause Determination**
and	)	
	)	
TOWN OF SMYRNA, DELAWARE,	)	
	)	
Respondent.	)	

BACKGROUND

The Town of Smyrna, Delaware ("Town") is a public employer within the meaning of §1302(p) of the 19 Del.C. Chapter 13, the Public Employment Relations Act ("PERA").

The American Federation of State, County and Municipal Employees, Council 81, ("AFSCME") is an employee organization which admits to membership public employees and has as a purpose the representation of those employees in collective bargaining, within the meaning of 19 Del.C. §1302(i), AFSCME, by and through its affiliated Local Union 1670-001, is the exclusive bargaining representative of a unit of Smyrna Electrical Department employees as defined in DOL Case 1000.

On or about March 3, 2010, AFSCME filed a petition seeking to modify the existing bargaining unit to include employees of the Smyrna Department of Public Works. The Town objected to the inclusion of two positions (i.e., Water System Foreman/Manager and the Public Works Foreman), asserting they were supervisory

employees within the meaning of 19 Del.C. §1302(s), and therefore ineligible to be represented in a bargaining unit.

During the representation hearing conducted by the PERB on May 3, 2010, for the purpose of determining whether the positions of Water System Foreman/Manager and Public Works Foreman, Employees Mark Gede and Jason McNatt testified as to the scope of their job duties. If the Modification Petition is successful, both Gede and McNatt could be included in the existing bargaining unit and represented by AFSCME. In attendance at the May 3, 2010 hearing were, *inter alia*, Smyrna Town Councilmen William Raynor ("Raynor") and Robert Riddaugh ("Riddaugh").

On June 9, 2010, AFSCME filed an unfair labor practice charge alleging conduct by the Town in violation of 19 Del.C. §1307, (a)(1), (2), (3), and (4), which state:

> § 1307. Unfair labor practices
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> (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
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> (1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this Chapter.
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> (2) Dominate, interfere with or assist in the formation, existence or administration of any labor organization.
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> (3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.
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> (4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition or complaint or has given information or testimony under this chapter.

The Charge alleges that at the June 7, 2010 meeting of Smyrna's Town Council, Councilmen Raynor and Riddaugh proposed a reorganization of the Town's employees

which included the elimination of the positions of Water System Foreman/Manager and the Public Works Foreman. Employees Gede and McNatt were informed on the morning of June 8th that Friday, June 11, 2010, would be their last day of work. The Charge also includes an e-mail from Councilman Riddaugh which characterizes Gede's and McNatt's testimony during the May 3 representation hearing as "embarrassing" and references the need to discuss reorganization and layoffs.

AFSCME asserts the elimination of the positions of Water System Foreman/Manager and Public Works Foreman, and the resulting termination of Gede and McNatt were in retaliation for the employees' testimony on May 3, 2010, in support of AFSCME's representation petition.

AFSCME requested the Town be enjoined from effectuating the terminations until its Charge could be heard and resolved. Upon receipt of the unfair labor practice petition, the PERB directed AFSCME's request for preliminary injunctive relief be processed on an expedited basis.

On June 10, 2010, the Town filed its Answer denying the material allegations set forth in the petition, alleging the reorganization which resulted in the terminations was passed, "... due to the current economy and declining revenues" and was not based upon retaliation. Under New Matter, the Town asserted 1) the Charge may become moot as a result of a Special Meeting of the Town Council which was scheduled for the evening of June 10, for the purpose of reviewing and reconsidering the Council's action of June 7 which eliminated eleven positions; and 2) if the two positions are determined to be supervisory (and therefore are not subject to PERB regulation under the PERA), the Charge is moot.

AFSCME filed its response to New Matter included in the Town's Answer on or about June 10, 2010, denying all factual allegations included therein.

By letter dated June 11, 2010, the Town advised PERB that, "at a special meeting of the Town Council of the Town of Smyrna held last evening, the Town Council voted unanimously to rescind the vote and action it took on Monday, June 7th which would have eliminated 11 employment positions from the Town's employment rolls, including the two employees who filed the above unfair labor practice charge." The Town asserted that "as a result of that action, the unfair labor practice charge has become moot."

AFSCME responded on June 11, 2010, by letter,

> This is in response to the e-mail and letter of June 11, 2010 sent by Mr. Jaywork, the attorney for the Town of Smyrna. The Union is in agreement that the immediate need for a temporary restraining order has abated. However, the Union still believes that a hearing should be scheduled expeditiously on the underlying unfair labor practice.
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> Testifying before the Public Employment Relations Board (PERB) at the May 3, 2010 hearing, the Town's witnesses spoke as to the critical supervisory functions performed by Mark Gede and Jason McNatt and the Town's complete reliance on these functions. Subsequently, on June 7, 2010, the Town's Council voted to eliminate both of these positions by removing them entirely from the Town's organizational charges.
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> It is the Union's belief that the testimony given during the May 3, 2010 hearing as to the critical supervisory functions of the jobs at issue was contradicted by the June 7, 2010 vote of the Town's Council, meaning that either the testimony was false or that a new understanding of the supervisory nature of these job functions and the critical operating needs have been reached. In any event, the motivation for the layoffs was the testimony before the PERB and the retaliation against the witnesses as well as the chilling affect such layoffs would have on all Town employees seeking to enforce their rights.

The Town objected by letter dated June 15 to AFSCME's effort to "insert

additional argument with regard to Representation Petition 10-03-730", asserting further argument in that matter was improper because the record is closed at the end of the May 3 PERB hearing.

On June 11, 2010, PERB advised the parties that consideration of AFSCME's motion for a temporary restraining order was unnecessary, as a result of the Town Council's rescission of its reorganization plan and resulting terminations of Employees Gede and McNatt.

This Probable Cause Determination is based upon an expedited review of the pleadings.

DISCUSSION

The Rules and Regulations of the Delaware PERB require that upon completion of the pleadings in an unfair labor practice proceeding, a determination shall be issued as to whether those pleadings establish probable cause to believe the conduct or incidents alleged may have violated the Public Employment Relations Act, 19 Del.C. Chapter 13. *DE PERB Rule 5.6.* For the purpose of this review, factual disputes established by the pleadings are considered in a light most favorable to the Charging Party in order to avoid dismissing what may prove to be a valid charge without the benefit of receiving evidence concerning that factual dispute. *Richard Flowers v. State of Delaware, Department of Transportation, Delaware Transit Corporation,* Probable Cause Determination, ULP No. 04-10-453,V PERB 3179 (2004).

The Charge alleges that the Town has engaged in conduct which interfered with, restrained or coerced employees in the exercise of their rights under the PERA;

encouraged or discouraged membership in the union through discrimination in regard to terms and conditions of employment; discriminated against employees because they had given testimony under the PERA; and/or dominated or interfered with the formation, existence or administration of the union. While the Town Council's action in rescinding its June 7 reorganization plan and the termination notices may moot the charge of discriminatory discharge, it does not moot the remaining charges.

It is well established that the Charging Party bears the burden to support its allegations of unfair practice with evidence and argument. The test for whether conduct reasonably tended to interfere with the exercise of rights by employee or the creation, existence or administration of the union, is objective and based upon consideration of the surrounding circumstances. *Sussex Co. Vo-Tech Teachers Assn. v. Bd. of Education,* ULP 88-01-021, I PERB 287, 297 (Del.PERB, 1988).

Although there appears to be no factual dispute that the Town Council approved (and subsequently rescinded) a reorganization plan which resulted in the elimination of eleven positions, the pleadings (including exhibits attached thereto) raise concern as to the intent and impact of that action, particularly when considered in light of the on-going representation campaign.

Considered in a light most favorable to the Charging Party, the pleadings are sufficient to establish probable cause to believe that an unfair labor practice may have occurred.

In response to the Town's concerns, the processing of this unfair labor practice charge will not impact the decision in the precedent representation petition (REP 10-03-730) in which Employees Gede and McNatt testified. That record closed on May 3,

2010, and a decision on that petition will be issued within the next thirty days.

DETERMINATION

When considered in a light most favorable to the Charging Party, review of the pleadings supports the determination that there is probable cause to believe that there may have been violations of 19 Del.C. 1307(a)(1), (a)(2), (a)(3) and/or (a)(4.).

WHEREFORE, a hearing will be promptly scheduled for the purpose of receiving evidence and argument to establish a record on which a determination can be made as to whether the Town, by and through its actions, has violated the statute as alleged.

IT IS SO ORDERED.

DATE: June 18, 2010

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