

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

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| AMERICAN FEDERATION OF STATE, COUNTY, | : | |
| & MUNICIPAL EMPLOYEES, COUNCIL 81, | : | |
| LOCAL 2004, and CAMERON HENRY, | : | |
| | : | |
| Charging Parties, | : | <u>ULP 11-05-806</u> |
| | : | |
| v. | : | Probable Cause |
| | : | Determination |
| STATE OF DELAWARE, DEPARTMENT OF SERVICES | : | |
| FOR CHILDREN, YOUTH AND THEIR FAMILIES, | : | |
| | : | |
| Respondent. | : | |

BACKGROUND

The State of Delaware (“State”) is a public employer within the meaning of section 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 agency of the State.

The American Federation of State, County and Municipal Employees, Council 81, (“AFSCME”) is an employee organization within the meaning of 19 Del.C. §1302(i). By and through its affiliated Local 2004, AFSCME is the exclusive bargaining representative of a unit of State merit employees employed by the State and holding positions with DSCYF, within the meaning of 19 Del.C. §1302(j). Cameron Henry (“Henry”) is employed by DSCYF as a Youth Rehabilitation Counselor and was the President of Local 2004.

On May 31, 2011, AFSCME and Henry (“Charging Parties”) filed an unfair labor practice charge with the Public Employment Relations Board (“PERB”) against the State alleging conduct in violation of 19 DeI.C §1307 (a)(1), (2) and/or (5), which provide:

- (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.
 - (5) Refuse to bargain collectively in good faith with an employer representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.

Specifically, the Charge alleges in response to allegations made in complaints at the New Castle County Detention Center that he was creating a hostile work environment, Henry was subject to investigation by DSCYF. On December 4, 2010, Henry was placed on Administrative Leave with pay, pending the outcome of the investigation. On December 10, 2010, Henry was ordered to submit to a psychological fitness for duty evaluation, after which he was determined to be “not fit for duty” as a Youth Rehabilitation Counselor. Thereafter, Henry’s leave status was changed to Family Medical Leave of Absence and he was required to file a short-term disability claim.

Charging Party contends that DSCYF’s actions were made in bad faith and designed to humiliate Henry and hold him up to public ridicule, thereby attacking his credibility and reducing his effectiveness as a Union official. AFSCME also alleges DSCYF’s actions were intended to intimidate other bargaining unit members from taking leadership positions in the Union and/or to discourage complaints against DSCYF

management.

The Charge alleges that despite a written request from Henry accompanied by an executed written release, DSCYF declined to provide, “all of the medical documentation, psychological testing, reports, evaluations, and recommendations as well as the data provided by DSCYF upon which the mental evaluation of Mr. Henry was made” to AFSCME’s staff representative and attorney. By refusing to provide the requested documents, the State has acted in bad faith, has interfered with AFSCME’s ability to enforce the terms and conditions of the collective bargaining agreement, and has undermined AFSCME’s efforts to defend a bargaining unit employee, in violation of its statutory obligations.

The Charge requests the documents be provided and that Henry be reinstated to his former position and made whole for all lost wages and benefits; that his record be purged of all references to the incident; that he be compensated for all related expenses including attorney’s fees; the payment for all costs and fees related to the enforcement of the requested order; and that DSCYF issue a written apology to Henry and all bargaining unit members.

On June 13, 2011, the State filed its Answer to the Charge denying that its actions were related to Henry’s activity or position with the union. The State asserts his attorneys were present when DSCYF met with Henry on December 10, 2010, and that Henry was provided with the opportunity to respond to the charges against him. The State declined to divulge the names of the complainants because those employees’ expressed fear of retaliation. In response to the serious charges made in the complaints, Henry was required to undergo a fitness for duty evaluation by a licensed psychologist, who declared

Henry unfit for work at that time.

In New Matter included in its Answer, the State alleges the Charge fails to allege facts sufficient to state a claim for relief under 19 Del.C. §1307(a)(1), (a)(2), and/or (a)(5). The State requests that the Charge be dismissed in its entirety and that Charging Parties reimburse the State all costs incurred in the processing of this Charge.

On or about June 13, 2011, Charging Parties filed a Response denying all new matter set forth in the State's Answer.

This Probable Cause Determination is based upon a 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 test is well established under Delaware case law concerning allegations of interference with employee rights and/or unlawful interference, domination, or assistance in the formation, existence or administration of the union. The test is not whether any

employee was actually intimidated, coerced or restrained, but whether the conduct reasonably tended to interfere with either the free exercise of employee rights or administration of the union. An objective standard is required to evaluate that “reasonable tendency.” *Sussex County Vo-Tech Teachers’ Assn. v. Bd. of Education*, ULP 88-01-021, I PERB 287, (Del.PERB, 1988).

The test for union animus is also well established in case law under the PERA. AFSCME has the burden to establish a prima facie case that 1) the employee was engaged in protected activity; 2) the employer was aware of the employee’s activities; and 3) the protected activity was a substantial or motivating factor in the employer’s action. Once that is established, the burden shifts to the employer to establish the presence of a legitimate business interest which, despite the protected activity, would have resulted in the same employment decision. *Colonial E.A. v. Colonial School District*, ULP 93-11-095, II PERB 1071, 1077 (Del.PERB, 1994), citing *Wilmington Firefighters Assn. v. City of Wilmington*, ULP 93-06-085, II PERB 935, 954 (Del. PERB, 1994).

DSCYF’s refusal to turn over to Henry and/or the Union the requested documentation which the Union considers necessary to the performance of its statutory responsibilities as Henry’s exclusive representative. The key inquiry when a question concerning the duty to provide information arises is whether the information requested “is relevant information necessary for the bargaining representative to intelligently determine facts, assess its position and decide what course of action, if any, to pursue.” *NCCEA/DSEA/NEA v Brandywine School District*, ULP No. 85-06-005, I PERB 131, 149 (1986). The State did not contest that the information requested by Charging Parties

is not relevant to the union's representational responsibilities. Rather, it maintains that the identity of Henry's accusers and other requested information is privileged.

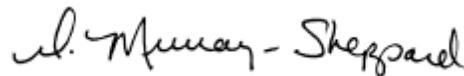
DETERMINATION

Considered in a light most favorable to the Charging Parties, the pleadings support the determination that there is probable cause to believe that the complained of actions may constitute a violation of 19 Del.C. §1307 (a)(1), (a)(2), and (a)(5), as alleged.

The pleadings raise questions of fact which can only be resolved following a hearing convened for the purpose of creating an evidentiary record upon which a decision can be rendered. The pleadings also raise legal issues on which the parties will be permitted to present argument, based upon the evidentiary record.

A hearing will be scheduled in order to receive evidence concerning whether the State violated 19 Del.C. §1307 (a)(1), (a)(2), and (a)(5), as alleged.

Date: August 3, 2011



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