

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY)	
AND MUNICIPAL EMPLOYEES,)	
COUNCIL 81, LOCAL 218, AFL-CIO,)	
)	
Charging Party,)	<u>ULP No. 15-03-994</u>
)	
v.)	Probable Cause Determination
)	
CHRISTINA SCHOOL DISTRICT,)	
)	
Respondent.)	

BACKGROUND

Christina School District (District) is a public school employer within the meaning of §4002(q) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (PERA).

The American Federation of State, County and Municipal Employees, Council 81, AFL-CIO, (AFSCME) is an employee organization within the meaning of 19 Del.C. §1302(i). By and through its affiliated Local 218, AFSCME is the exclusive representative of a bargaining unit of certain public school employees of the District, within the meaning of §1302(j). DOL Case 144.

At all times relevant to this charge, the District and AFSCME were parties to a collective bargaining agreement. The current agreement has a term of July 1, 2013 through June 30, 2016.

On or about March 25, 2015, AFCME filed the instant unfair labor practice charge alleging that the District violated §1307(a)(1), (a)(5) and (a)(6), which state:

§1307. Unfair Labor Practices

- (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.
 - (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 or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

AFSCME alleges that on or about February 9, 2015, the District unilaterally imposed a new policy requiring any bargaining unit employee who was on a medical/workman's compensation leave of absence for a physical ailment for fifteen or more calendar days to submit to a Fitness for Duty test and be authorized to return to duty by the District's designated provider. AFSCME asserts that by unilaterally implementing the policy, the District failed or refused to bargain collectively concerning a mandatory subject of bargaining, in violation of its obligations under the statute.

The charge was transmitted to the District for response. By letter dated April 1, 2015, the parties advised the Public Employment Relations Board (PERB) that they had mutually agreed to hold the matter in abeyance in order to attempt to resolve the underlying dispute. The period of abeyance was twice extended by mutual agreement; however, by letter dated October 16, 2015, AFSCME requested the abeyance be lifted and the charge processed as the parties had not reached agreement on resolution.

Thereafter, on November 2, 2015, the District filed its Answer to the Charge, including new matter. The District denies it unilaterally implemented a change to a mandatory subject of bargaining. It asserts that requiring employees to be fit to perform

their job functions is a customary and reasonable policy. It argues the District is permitted to implement a fitness for duty policy because Article 6.12 of the collective bargaining agreement reserves to management the right to determine an employee's qualifications and the conditions for his or her continued employment. The District also asserts that (contrary to the provisions of the February 3, 2015 memo sent to bargaining unit employees), the policy has only been applied to bargaining unit employees who have exhausted their FMLA leave, have been out of work for more than twelve weeks and who then seek to return to work.

AFSCME filed its response to the District's new matter on November 12, 2015, denying the assertions contained therein.

This probable cause determination results from a review of the pleadings.

DISCUSSION

Regulation 5.6 of the Rules of the Delaware Public Employment Relations Board requires:

- (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*, PERB Probable Cause Determination, ULP 04-10-453, V PERB 3179, 3182 (2004).

On their face, the pleadings provide a sufficient basis to conclude that an unfair labor practice may have occurred. The pleadings identify issues of fact, including whether the policy was implemented without affording AFSCME the opportunity to negotiate; whether the policy has, in fact, been implemented consistent with the memorandum issued on February 3, 2015; and whether the policy requires bargaining unit employees to remain on annual or unpaid leave until they undergo the fitness for duty test.

The pleadings also raise legal issues, including whether the terms and/or implementation of the Fitness for Duty test constitute mandatory subjects of bargaining under the statute and/or whether AFSCME waived its right to negotiate with respect thereto by entering into a collective bargaining agreement with a management rights provision.

The pleadings raise both factual and legal issues. To prevail in this matter, AFSCME must establish by a preponderance of the evidence that the District has implemented a unilateral change in a mandatory subject of bargaining, without notice and the opportunity to negotiate, in violation of its statutory obligations. A hearing will be promptly scheduled for the purpose of establishing a factual record on which argument can be considered in order to render a determination on this Charge.

DETERMINATION

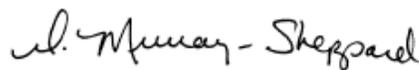
Consistent with the foregoing discussion, the pleadings constitute reasonable cause to believe that an unfair labor practice may have occurred, when considered in a light most

favorable to the Charging Party.

A hearing will be scheduled for the purpose of creating a record on which argument can be made and a determination reached as to whether the District engaged in conduct in violation of its statutory bargaining obligations by unilaterally implementing a mandatory fitness for duty test in order to return to work after a medical/workman's compensation leave of absence, in violation of 19 Del.C. §1307(a)(1), (a)(5), and/or (a)(6) as alleged.

IT IS SO ORDERED.

DATE: February 12, 2016



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