PUBLIC EMPLOYMENT RELATIONS BOARD

FOR THE STATE OF DELAWARE

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 81, LOCAL 3911,	)	
Appellant,	)	**PERB Review of the Executive Director's Order of Dismissal**
v.	)	
	)	**ULP 09-07-695**
NEW CASTLE COUNTY, DELAWARE,	)	
Appellee.	)	

Appearances

Perry F. Goldlust, Esq, Aber, Goldlust, Baker & Over, for AFSCME LU 3911

Julie M. Sebring, Sr. Asst. County Attorney, for New Castle County

BACKGROUND

New Castle County, Delaware ("County") is public employer within the meaning of §1302(p) of the Public Employment Relations Act, 19 Del.C. Chapter 13 ("PERA").

AFSCME Council 81 ("AFSCME"), is an employee organization within the meaning of §1302(i) of the PERA and, through the affiliated Local Union 3911, is the exclusive bargaining representative of New Castle County Emergency Services personnel for the purposes of collective bargaining. AFSCME is the appellant in this request for review of the Executive Director's dismissal of this charge.

On July 21, 2009, AFSCME filed a Request for Injunctive Relief with the Public Employment Relations Board ("PERB") in which it alleged that by unilaterally issuing

revisions to Administrative Policy No. 308 the County had violated 19 Del.C. §1307(a)(1), (a)(3) and (a)(5)[1] and violated the PERB's order issued in *AFSCME Council 81, LU 1607 v. New Castle County*, ULP 01-01-306, IV PERB 2609 (2002). Specifically, AFSCME alleged that the County issued revisions to Policy 308 on September 3, 2008, which included "… new, restrictive and vaguely defined requirements, including but not limited to requiring prior permission before any outside employment (changed from merely *[sic]* notification of outside employment to permission with no standards of approval), verification of no conflict (not defined), prohibiting outside employment if it involves participation in a labor dispute (freedom of speech and right to association), and restricting self employment or employment in less physically demanding job that *[sic]* when such employment is not contrary to law, etc." *Charge ¶4.*

On August 10, 2009, the County filed its Answer to the Charge in which it admitted that changes were effected in Administrative Policy No. 308 on September 3, 2008; consequently, the Charge should be dismissed as untimely because it was filed well beyond the statutory time frame of 180 days to file an unfair labor practice charge. 19 Del.C. §1308(a). The County denied its action violated either the PERA or the prior PERB decision in *AFSCME LU 1607 v. New Castle County*.

AFSCME filed its Response on August 17, 2009, denying the material allegations raised by the County in its New Matter.

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[1] (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.
(3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure, or other terms and conditions 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.

Upon review of the pleadings, the Executive Director dismissed the Charge as untimely, finding,

> There is no dispute that Revised Policy No. 308 was issued "on or about September 3, 2008." (Charge ¶4, p. 2) The Charge, having been filed on July 21, 2008, ten and one-half (10 ½) months after the disputed Policy was issued, is clearly untimely. Consequently, neither Charging Party's request for injunctive relief nor Respondent's other affirmative defenses need to be addressed. *AFSCME LU 3911 v. New Castle County*, Probable Cause Determination and Order of Dismissal, ULP 09-07-695, VII PERB 4401, 4405 (2009).

On or about November 25, 2009, AFSCME requested review of the Executive Director's decision, asserting:

> The Executive Director's dismissal of the charge is the equivalent of granting a motion to dismiss. The standard to be applied is whether the facts viewed in a light most favorable to the plaintiff be sufficient to establish a prima facie unfair labor practice ("ULP") charge. The Union need only provide notice form of pleading and not set forth all of the details supporting its charge. The allegations of change in terms and conditions of employment require the development of a factual record as to the limitations placed on the employees of New Castle County ("County") every day by the existence of the policy. With the recession economy of Delaware and the County's efforts to curtail work, the ability of bargaining unit members to supplement their County pay has become very important.
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> While the decision in ULP No. 01-01-306 referred to in the Executive Director's Decision turned on only one of the conditions placed on outside employment, it was not limited to just one issue. To get to the issue, the PERB had to conclude that the general subject of limitation on outside employment was a mandatory subject of bargaining and that the County had to show overriding necessity each and every time it attempted to restrict outside employment. The issue raised and the Decision were broader in the protection of working conditions than merely the 20-hour limit.
>
> If PERB has once found the employer (County) to have violated its duty of good faith bargaining and prohibited unilateral changes in the right of employees to outside employment, the Union has the right to rely upon PERB's Order as continuing and not having a 6-month limitation. Having made one effort at unilateral changes in

> outside employment and having found the County did not bargain in good faith, the burden should be on the County to establish a fact base as to why it is not bound by the original Order of the PERB. To rule otherwise would require litigation of the same issue over and over resulting, as in this case, in conflicting interpretations of the law without a basis in law or in fact.
>
> The ULP should not be dismissed as being insufficient on its face to support a dismissal on the pleadings. The ULP should not be dismissed, and the matter should be allowed to proceed to a factual hearing. The PERB, unlike the NLRB, does not do a factual investigation to determine if a prima facie case exists by taking statements or other independent investigation. Therefore, the PERB is obligated to proceed to a fact-finding hearing.

The County responded to AFSCME's Request for Review on December 8, 2009, requesting the appeal be denied and the Executive Director's decision be affirmed without the need for further hearing.

A copy of the complete record in this matter was provided to each member of the Public Employment Relations Board. The full Board met in public session on December 16, 2009 to consider AFSCME's request for review.

DISCUSSION

AFSCME argues the Executive Director's dismissal of the Charge was premature. It asserts that once it established a prima facie case that the County had instituted a unilateral change to a mandatory subject of bargaining, AFSCME should have been provided an opportunity to develop a full factual record and should not have been precluded from that opportunity by a procedural determination that the Charge was not timely filed. It argues the Executive Director did not have enough information (based solely on the pleadings) to determine whether the Charge was, in fact, timely.

The County argues that establishment of a prima facie case is irrelevant to the preliminary determination as to whether the Charge is properly filed in conformance with

the statute and the Board's rules. The facts are clear in the pleadings that Administrative Policy No. 308 was revised effective September 3, 2008. It is also undisputed that AFSCME filed the instant charge on July 21, 2009. There are no other facts necessary to determine whether the Charge was timely filed.

The PERA states in §1308, Disposition of complaints:

> (a) The Board is empowered and directed to prevent any unfair labor practice described in § 1307 (a) and (b) of this title and to issue appropriate remedial orders. Whenever it is charged that anyone has engaged or is engaging in any unfair practice as described in § 1307(a) and (b) of this title, the Board or any designated agent thereof shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice charge and including a notice of hearing containing the date and place of hearing before the Board or any designated agent thereof. Evidence shall be taken and filed with the Board; provided, that no complaint shall issue based on any unfair labor practice occurring more than 180 days prior to the filing of the charge with the Board. *(emphasis added).*

The statutory requirement is incorporated into the Board's rules at 5.2 which requires that an unfair labor practice complaint "… must be filed within one hundred and eighty (180) days of the alleged violation." Rule 5.2 further states that the limitation "shall not be construed to prohibit introduction of evidence of conduct or activity occurring outside the statutory period, provided the Board or its agent finds it relevant to the question of commission of an unfair labor practice within the limitations period".

AFSCME argues that under the principle of "notice pleadings" it was not required to provide all of the details in support of its charge in the pleadings. It must, however, provide sufficient information to support a finding that an unfair labor practice may have been committed. This includes relevant information on which it might be concluded that the statute of limitations has been tolled where a charge, on its face, appears to have been filed outside of the limitations period. This charge does not include such information.

PERB Rule 5.2(c)(3) clearly states that a Charge must include "a clear and detailed statement of the facts constituting the alleged unfair labor practice, including the names of the individuals involved in the alleged unfair labor practice, the time, place of occurrence and nature of each particular act alleged, and reference to the specific provisions of the statute alleged to have been violated." The Rule also requires the submission of supporting documentation, where applicable. When a Charging Party chooses not to include specific information which addresses this requirement in its Charge, it acts at its peril. Sufficient information must be included in pleadings to allow a preliminary assessment of the procedural and substantive viability of the charge, i.e., the probability that there is sufficient cause to continue to process the charge.

AFSCME argued it was hoping to resolve the issue with the County through discussion and compromise. Timely filing of an unfair labor practice charge does not preclude parties from continuing to attempt to resolve their differences without litigation, but it does preserve the right of the charging party to pursue its claim in the event that those discussions do not result in resolution of the dispute.

Finally, the Board's Rules (specifically Rule 1.10) require strict construction of all time limitations contained in the Act or the PERB Regulations. *AFSCME Council 81 v. State of Delaware,* 2008 WL 4348884 (Del.Super., 2008). There is no dispute in this case that AFSCME's cause of action arose with the revision of Administrative Policy No. 308, Outside Employment, on September 3, 2008. It was incumbent on the union to file a unfair labor practice charge on or before March 4, 2009. The Charge was not filed until July 21, 2009 and contained no information as to why it was not filed in compliance with the 180 day statute of limitations and/or what, if any, actions by the parties may have tolled that filing limitation. Under these circumstances, the Board affirms the Executive

Director's decision dismissing this Charge as procedurally defective, in that it was not filed within the statutorily mandated time period required for expeditious processing of complaints arising under the PERA.

DECISION

After reviewing the record, hearing and considering the arguments of the parties, the Board unanimously affirms the decision of the Executive Director dismissing the Charge as untimely, consistent with the statutory direction "… that no complaint shall issue based on any unfair labor practice occurring more than 180 days prior to the filing of the charge with the Board." 19 Del.C. §1308(a).

Wherefore, AFSCME's appeal of the dismissal of the Charge is denied.

IT IS SO ORDERED.

Elizabeth D. Maron, Chairperson

R. Robert Currie, Jr., Member

Kathi A. Karsnitz, Member

DATED: December 29, 2009