

PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF DELAWARE

AMERICAN FEDERATION OF STATE, COUNTY AND	:	
MUNICIPAL EMPLOYEES, DISTRICT COUNCIL 81,	:	
LOCAL UNION 3911,	:	
Charging Party,	:	<u>ULP No. 09-07-695</u>
	:	
v.	:	Probable Cause Determination
	:	and Order of Dismissal
NEW CASTLE COUNTY, DELAWARE	:	
Respondent.	:	

Appearances

Perry F. Goldlust, Esq., for AFSCME Council 81
Julie Sebring, Esq., Sr. Assistant County Attorney, for New Castle County

BACKGROUND

New Castle County, Delaware (“County”) is a public employer within the meaning of §1302(p) of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13 (1994).

The American Federation of State, County and Municipal Employees, Council 81, Local 3911, (“AFSCME”) is an employee organization within the meaning of 19 Del.C. §1302(i) of the PERA that represents a bargaining unit of New Castle County Emergency Services Personnel for purposes of collective bargaining. AFSCME is the certified exclusive bargaining representative of the unit pursuant to §1302(j), of the PERA. DOL Case # 302.

On July 21, 2009, AFSCME filed a Request for Injunctive Relief with the Public

Employment Relations Board¹ in which it alleged the County violated 19 Del.C. §1307(a) (1), (3) and (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.
 - (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.

Specifically, AFSCME alleges on or about September 3, 2008, the County issued revisions to Administrative Policy No. 308 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*. AFSCME asserts that by unilaterally revising Policy 308, the County also violated PERB's Order in *AFSCME Council 81, LU 1607 v. New Castle County*, ULP 01-01-306, IV PERB 2609 (2002). AFSCME requests PERB find the County committed the unfair labor practices as alleged, and:

¹ Both the Charge filed by Charging Party on July 21, 2009, and the Amended Charge filed on July 23, 2009, are entitled "Request for Injunctive Relief" Because the Charge alleges violations of §1307 of the PERA, Unfair labor practices - enumerated, it is being processed as an unfair labor practice charge.

- * Order the County (under §1308(c) to cease and desist from violating PERB's decision in *AFSCME 1607 v. NCC (Supra.)* and require the County to return to the status quo ante before it issued changes in Administrative Policy 308.
- * Seek enforcement of its Order through the Court of Chancery as provided for in 19 Del.C. §1309(b).
- * Award AFSCME costs and expenses including reasonable attorney's fees incurred in processing this Charge.
- * Such other relief as the Board deems just and proper.

On August 10, 2009, the County filed its Answer admitting that changes were effected in Administrative Policy 308 on or about September 3, 2008, and denying all other material allegations set forth in the Charge. The County specifically denies it violated PERB's order and/or decision in *AFSCME Local 1607 v. NCC*.

The County also included New Matter in its Answer in which it 1) challenged the timeliness of the Charge because the revised Policy was issued more than nine months prior to filing of the Charge; 2) asserted there is no factual or legal basis support for the request for extraordinary relief; 3) alleged the filing of the Charge constitutes an unfair labor practice because the parties are currently engaged in contract negotiations and asserting AFSCME had responsibility to bring this issues to the bargaining table if it believed it to be a mandatory subject of bargaining; 4) argued the substance of the policy revisions is reserved to management under the collective bargaining agreement; 5) asserted the subject matter of the revised Policy is an inherent management right under the PERA; and 6) asserted AFSCME failed to exhaust its contractual remedies prior to filing the Charge.

On August 17, 2009, AFSCME filed its Response denying the County's New Matter. It asserts that because the County sought to revise Administrative Policy 308, it had the responsibility to present its desired changes to the Union at the bargaining table.

DISCUSSION

AFSCME bases its Request for Injunctive Relief under §1308 on PERB's decision in *AFSCME 1607 v. NCC (Supra.)*. In addressing whether the restrictions on outside employment were mandatory subjects of bargaining under the PERA, the Executive Director opined:

...It is unnecessary to reach a broad conclusion concerning whether all restrictions on outside employment constitute either a term and condition of employment (a mandatory subject of bargaining) or an inherent managerial policy (a permissive subject of bargaining). It is foreseeable that some restrictions on outside employment may be so integrally related to the mission and operation that negotiations are not required. *In re: State of New Jersey and Communications Workers of America*, Docket SN-93-11; PERC No. 93-55 (1992).

This decision is limited to the Union's primary objection to Policy No. 308, the limitation on outside employment of twenty (20) hours per week. *AFSCME 1607*, p. 2612.

The Executive Director found, "The twenty (20) hour limitation contained in Revised Policy No. 308 issued January 4, 2001, is a term and condition of employment and a mandatory subject of bargaining." He also held the County was required to bargain over limitations placed on outside employment to the extent that such limitations constitute a mandatory subject of bargaining. *AFSCME 1607*, p. 2614.

The County is correct in its contention that, in its narrowest sense, the prior decision specifically addressed the twenty (20) hour weekly limitation on outside employment. The current Charge does not involve the twenty (20) hour weekly limitation on outside employment. For this reason, Charging Party's request that PERB enforce its prior Order in that decision is without merit and therefore denied.

Further processing of AFSCME's allegations of unfair labor practices is precluded by application of PERB Rule 5.2, Filing of Charges, which provides, in relevant part:

(a) A public employer, labor organization, and/or one or more Employees may file a complaint alleging a violation of 14 Del.C. §4007, 19 Del.C. §1607, or 19 Del.C. §1307. Such complaints must be filed within one hundred and eighty (180) days of the alleged violation. This 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.

The authority of the PERB to adopt a rule requiring the prompt filing of an unfair labor practice charge is well-established. Fraternal Order of Police, Lodge 15 v. City of Dover, (Del. PERB, ULP No. 98-02-225, 3 PERB 1709, 1714-1718 (6/25/98)). The Superior Court recently held:

Board Regulation 1.9 provides that Board rules are to be liberally construed, but Regulation 1.10 states that ‘[n]otwithstanding the provisions of Regulation 1.9 . . . the Board shall strictly construe all time limitations contained in the Act or in these Regulations.’ In other words, the State had precisely five days from receiving the Executive Director’s decision to file an appeal with the Board. *AFSCME, Council 81 v. State of Delaware, OMB and PERB*, Del.Super., C.A. No. 08M-02-078-JEB, VI PERB 4079, 4081 (2008),

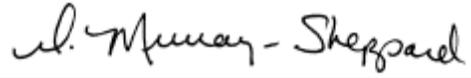
There is no dispute that Revised Policy No. 308 was issued “on or about September 3, 2008.” (Charge, para, 4, pg.2) The Charge, having been filed on July 21, 2008, ten and one-half (10 ½) months after the disputed Policy was issued, is clearly untimely. Consequently, neither Charging Party’s request for injunctive relief nor Respondent’s other affirmative defenses need be addressed.

DECISION

Consistent with the foregoing discussion, the Charge is untimely and, therefore, the pleadings fail to establish probable cause to believe that a violation of 19 Del.C. §1307(a)(1), (3) or (5) may have occurred.

WHEREFORE, the Charge is dismissed.

DATE: November 23, 2009

A handwritten signature in cursive script that reads "D. Murray-Sheppard". The signature is written in black ink and is positioned above a horizontal line.

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