

PUBLIC EMPLOYMENT RELATIONS BOARD
STATE OF DELAWARE

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|----------------------------------------------|---|-------------------------------------|
| ALICIA A. BROOKS, | : | |
| Charging Party, | : | |
| | : | |
| v | : | <u>ULP No. 09-08-701</u> |
| | : | Probable Cause Determination |
| AMERICAN FEDERATION OF STATE, COUNTY, | : | |
| AND MUNICIPAL EMPLOYEES, COUNCIL 81, | : | |
| LOCAL 640, | : | |
| Respondent. | : | |

BACKGROUND

Alicia Brooks (“Charging Party”) was a public employee within the meaning of 19 Del.C. Chapter 13, Public Employment Relations Act (“PERA”), Section 1302(o), who was employed by the State, Department of Health and Social Services (“DHSS”), at the time of her termination on or about April 21, 2009.

The American Federation of State, County and Municipal Employees, Local 641, Council 81, AFL-CIO (“AFSCME”) is an exclusive bargaining representative of the bargaining unit of DHSS employees working at the Delaware Psychiatric Center within the meaning of 19 Del.C. §1302(j). Charging Party’s position is represented by AFSCME Local 640.

On or about August 28, 2009, Charging Party filed an unfair labor practice charge alleging that AFSCME violated §1303, §1304(a) and §1307(b)(1), of the PERA, which provide:

§1303. Public Employee Rights

Public employees shall have the right to:

- (1) Organize, form, join or assist any employee organization except to the extent that such right shall be affected by a collectively bargained agreement requiring the payment of a service fee as a condition of employment.
- (2) Negotiate collectively or grieve through representatives of their own choosing.
- (3) Engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection insofar as any such activity is not prohibited by this chapter or any other law of this State.
- (4) Be represented by their exclusive representative, if any, without discrimination.

§1304. Employee organization as exclusive representative.

- (a) The employee organization designated or selected for the purpose of collective bargaining by the majority of the employees in an appropriate collective bargaining unit shall be the exclusive representative of all the employees in the unit for such purpose and shall have the duty to represent all unit employees without discrimination. Where an exclusive representative has been certified, a public employer shall not bargain in regard to matters covered by this chapter with any employee, group of employees or other employee organization.

§1307. Unfair labor practices.

- (b) It is an unfair labor practice for a public employee or for an employee organization 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 under this chapter.

Charging Party alleges that following her termination on or about April 21, 2009, she repeatedly attempted to secure representation from AFSCME to challenge her

termination. AFSCME neither responded to her requests for assistance nor provided the requested representation.

On or about September 16, 2009, AFSCME filed its Answer denying the material allegations set forth in the Charge. On or about September 17, 2009, AFSCME filed an amended answer which likewise denied the material allegations set forth in the Charge.

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

On its face, the Charge does not allege facts sufficient to support a charge that AFSCME violated §1303 (1) and/or (3). Consequently, those allegations are dismissed.

The essence of the Charge is twofold: 1) that AFSCME did not respond to Charging Party's requests for representation, and 2), that AFSCME failed to provide the requested representation.

14 Del.C. Chapter 40, the Public Schools Employment Relations Act, provides in relevant part:

4006. Public Employment Relations Board.

(h) To accomplish the objectives and to carry out the duties prescribed in this chapter, the Board shall have the following powers:

(3) To conduct in any part of this State any proceeding, hearing, *investigation*, inquiry or election necessary to the performance of its functions. (*emphasis added*)¹

Pursuant to PERB's investigative powers, a copy of the grievance referenced in paragraph 4 of AFSCME's Amended Answer was requested and provided by AFSCME. The grievance form AFSCME provided indicates the "Date of Occurrence" is January 6, 2009. The form also indicates it was received by "DPC Human Resources" on February 19, 2009, more than six weeks later. That grievance contests the "letter of termination recommendation" as unjust and does not address Charging Party's subsequent termination.

The purpose of a probable cause determination is to establish that the facts alleged by Charging Party are sufficient to support the conclusion that an unfair labor practice may have occurred. If the answer is in the affirmative, the decision of whether an unfair

¹ 40 Del.C. Chapter 40, §4006, Public Employment Relations Board, is incorporated by reference into 19 Del.C. Chapter 13, Public Employment Relations Act, and 19 Del.C. Chapter 16, Police Officers' and Firefighters' Employment Relations Act.

labor practice has, in fact, occurred is a function of the evidence presented at a hearing, where it is the Charging Party's responsibility to present sufficient, credible evidence to support the charge.

In this case, AFSCME has not provided any support for its denial of the charges that it failed to provide fair representation to the Charging Party in grieving her termination, and/or that it responded appropriately to her requests for representation and assistance.

DETERMINATION

Considered in a light most favorable to Charging Party, the pleadings constitute probable cause to believe that an unfair labor practice may have occurred. Specifically, the issue is whether by its conduct AFSCME violated 19 Del.C. §1303(2) and (4), §1304(a) and/or §1307(b)(1).

There is no probable cause to believe that AFSCME's conduct, even if proven, violated 19 Del.C. §1303 (1) or (3).

The pleadings raise multiple factual and legal issues which can only be resolved following development of a factual record and receipt of argument. Consequently, a hearing will be convened forthwith for this purpose.

IT IS SO ORDERED

Date: October 12, 2009



CHARLES D. LONG, JR., Hearing Officer
Del. Public Employment Relations Bd.