PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF DELAWARE

ALICIA A. BROOKS,	)	
	)	
Charging Party,	)	
	)	**ULP No. 09-08-701**
v.	)	
	)	
AMERICAN FEDERATION OF STATE,	)	**HEARING OFFICER'S**
COUNTY AND MUNICIPAL EMPLOYEES,	)	**DECISION & DEFERRAL**
COUNCIL 81, LOCAL UNION 640,	)	**ORDER**
	)	
Respondent.	)	

APPEARANCES

Alicia A Brooks,	*Charging Party, Pro Se*
Perry F. Goldlust, Esq.	*For AFSCME Local 640*

BACKGROUND

The American Federation of State, County and Municipal Employees ("AFSCME"), is an employee organization within the meaning of ("PERA"), §1302(i) of the Public Employment Relations Act, (19 Del.C. Chapter 13) ("PERA"). Through its affiliated Local 640, AFSCME is the exclusive bargaining representative of certain employees of the State of Delaware ("State"), Department of Health and Social Services ("DHSS"), employed at the Delaware Psychiatric Center within the meaning of §1302(j), of the PERA.

Charging Party, Alicia A. Brooks ("Charging Party"), was an employee of DHSS

and a public employee within the meaning of 19 Del.C. §1302(o). During the period of her employment at the Delaware Psychiatric Center, Charging Party was a member of the bargaining unit represented by AFSCME, Local 640.

AFSCME and DHSS are parties to a collective bargaining agreement with an expiration date of March 31, 2011, which was in effect at all times relevant to this Charge.

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 the termination of her employment on or about April 21, 2009, she repeatedly attempted to secure representation from AFSCME to challenge her discharge. AFSCME failed to respond to her requests for assistance or provide information concerning her employment status.

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.

In a Probable Cause Determination issued on or about October 12, 2009, the Hearing Officer concluded that, when considered in a light most favorable to Charging Party, the pleadings constituted probable cause to believe that an unfair labor practice may have occurred. Specifically, the Hearing Officer found that by its conduct AFSCME may have violated 19 Del.C. §1303(2) and (4), §1304(a) and/or §1307(b)(1). He also concluded there was no probable cause to believe that AFSCME's conduct, even if proven, may have violated 19 Del.C. §1303(1) or (3), as alleged.

A hearing was held on December 9, 2009, for the purpose of establishing a factual record upon which a decision could be rendered. The parties presented testimony, documentary evidence and oral argument in support of their respective positions. The

following discussion and decision result from the record thus compiled.

FACTS

The following facts were derived from the pleadings and the testimony of the witnesses and the exhibits entered into evidence at the December 9, 2009, hearing.

Prior to and at the time of her discharge, Charging Party was employed by DHSS as a Certified Nursing Assistant at the Delaware Psychiatric Center. By letter dated February 2, 2009, Charging Party and AFSCME were notified of DHSS's intent to terminate Charging Party. On February 19, 2009, the President of Local 640 filed the following grievance:

> Ms. Brooks was presented this letter in untimely fashion and a month after management received same from Div. Long Term Care's results. This matter is unjust because Ms. Brooks was a victim and has followed the law in this matter. A letter of recommendation is unjust and [an] unfair labor practice.
>
> SETTLEMENT DESIRED: Employee Made Whole

At the request of Charging Party a pre-decision meeting was held on February 20, 2009. The Agency's response dated April 21, 2009, provides, in relevant part:

> On October 29, 2008, you signed a DHSS Terms and Conditions of Employment (Statement). In this statement you acknowledged through your signature that, *"I understand that my employment, (or continued employment, if hired on a conditional basis) is contingent upon receipt of a fully completed and satisfactory Service Letter, Adult Abuse Registry Check, Child Abuse Registry Check, Criminal History Record Review and Drug Testing Results."*
>
> You transferred from a casual/seasonal position to a merit position on November 5, 2008. On or about January 6, 2009, a letter from DHSS's Long Care Residents Protection was received at DHSS's New Castle County Human Relations

> Office. Based on the totality of offenses listed on your report, you are considered unsuitable for employment, due to your unsatisfactory criminal background check.
>
> In addition to the above, you were asked the following question on your employment Application, "Have you ever been convicted of a Class A Misdemeanor?" You answered this question in the negative. However, there are two (2) Class A Misdemeanors listed on your criminal background check for which you were found or plead guilty to. I must affirm that I support the decision for your dismissal.

Charging Party subsequently requested and was placed on a maternity leave of absence.

By letter dated May 15, 2009, Charging Party was advised in a letter from the DHSS Human Resources Manager of the following:

> By letter dated February 2, 2009, you were advised by Husam Abdallah, Hospital Director, that he was recommending your dismissal from the position of Certified Nursing Assistant at the Delaware Psychiatric Center (DPC). You requested a pre-decision meeting, which was held on February 20, 2009.Subsequently, a final termination letter was sent by letter dated April 21, 2009. To date, our office has not been in receipt of a grievance filed on your behalf.
>
> Please be advised that your employment ends at the close of business today. Please make arrangements to turn in all keys, ID Badge and all other State-issued equipment.

Phil Williams of AFSCME, Council 81, was copied on this letter.

Thereafter, Charging Party attempted on several occasions, including e-mails to Mr. Williams, dated June 5, June 21, and July, 5, 2009, to contact her AFSCME representatives at both the Local and District levels, without success.

Ultimately, a Step Three Grievance Hearing and a Step four Grievance Hearing were held on October 28, 2009, and November 16, 2009, respectively. The grievance was denied at both steps and on or about December 9, 2009, was appealed to Step Five, the

final step before arbitration,.

SUMMARY POSITIONS OF THE PARTIES

Charging Party argues that the grievance which AFSCME filed on February 19, 2009, was premature and sloppily written. AFSCME failed to file a grievance protesting her termination after she was discharged effective April 21, 2009, despite her numerous requests that it do so. Furthermore, AFSCME failed to contact her and/or to provide any information concerning her employment status and/or the action taken, if any, to protest her discharge. Only after she filed the instant unfair labor practice charge did AFSCME contact her. She considers the period from the date of her discharge on April 21, 2009, until the date of the Step Three grievance meeting on October 21, 2009, during which she received no contact from the Union, excessive.

Charging Party further agues that the collective bargaining agreement in effect at all times relevant to this matter provides that in a discharge matter the affected employee shall not be separated from employment until after the third-step hearing of the grievance procedure. This did not happen here. [1]

AFSCME agues that it filed a grievance at the time DHSS notified Charging Party and the Union of its intent to terminate Charging Party's employment for falsification of her application and her criminal record. The issue of whether that grievance was timely filed, as AFSCME maintains, is a question for resolution through the contractual grievance procedure and possibly, arbitration. The Union is actively processing the grievance through the contractual grievance and arbitration procedure where it currently

[1] Article 4.11 of the collective bargaining agreement provides: In the case of suspension or discharge, except for serious incidents, the employees shall not be sparated from employment until after the third-step hearing of the grievance procedure if a grievance is filed within 10 work days after the decision to suspend or discharge is sent to the employee and the Union. The 10 day work period shall be based on State work days.

awaits a Step Five hearing which is the step just prior to binding grievance arbitration. The Union contends that the decision of whether or not to arbitrate the grievance will depend upon the result of the step-five grievance hearing and AFSCME's consideration of the probability of success at arbitration.

The Union argues that because Charging Party continued to receive medical benefits during her medical leave of absence she suffered no financial loss until her maternity leave expired in mid-June, 2009.

AFSCME contends that Charging Party's situation is not unique and she received appropriate representation from a long-term experienced AFSCME representative following her discharge Although Charging Party may be unhappy with the length of time to process her grievance to step-five of the grievance procedure, the open status of the grievance her unfair labor practice charge not only unfounded but also premature.

ISSUE

Whether AFSCME, Council 81, Local 640 failed to provide fair representation to Charging Party in grieving her termination and/or to respond appropriately to her request for representation in violation of 19 Del.C. §1302 (2) and (4), §1304 (a) and/or §1307 (b) (1)?

DISCUSSION

The duty of fair representation was the subject of a prior unfair labor practice decision. In *Gloria B. Williams v. Rudy Norton, DSEA and Jo A. Callison*, (Del.PERB,

ULP 85-10-006, I PERB 159 (1986), the PERB held that 14 Del.C. §4004(a)[2] establishes the duty of fair representation. The PERB further held: " . . . in order to meet its statutory obligation to represent its members without discrimination an exclusive employee representative has a duty to act honestly, in good faith and in a non-arbitrary manner. These factors form the basis for every fair representation case . . ." Although a collective bargaining representative is afforded significant latitude in fulfilling its statutory duty to represent all members of the bargaining unit without discrimination, these factors constitute the standard by which complaints alleging a breach of the duty of fair representation will be resolved.[3]

The record establishes Charging Party made numerous inquiries to various Union officials requesting information concerning whether a grievance had been filed protesting her discharge and information concerning the status of the Union's efforts on her behalf, without success. The Union's failure to communicate with Charging Party, while questionable, does not rise to the level of an unfair labor practice in that Charging Party has failed to establish that, as to this element of her Charge, the Union acted dishonestly, in bad-faith or arbitrarily.

Concerning her allegation that the grievance filed by the Union on February 19, 2009, was sloppily written, the ultimate determination as to the sufficiency of the February 19th grievance is an issue within the exclusive province of the contractual grievance and arbitration procedure and possibly arbitration.

Charging Party's initial course of action to express her overall displeasure with

[2] §4004(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 employees in the unit for such purpose and shall have the duty to represent all unit employees without discrimination." 19 Del.C. §1304(a) is identical to 14 Del.C. §4004(a).

[3] 14 Del.C. §4004(a) is identical to 19 Del.C. §1305(a), which is at issue in this Charge.

the Union's involvement in her case was to pursue her available administrative remedy by filing a formal protest with the Union. Based upon her experience in attempting to obtain information concerning the status of the grievance protesting her discharge, if any, the attention a formal complaint to the Union would have received is suspect; regardless, a formal protest to the Union was her first step in attempting to address her frustration.

Regardless of Charging Party's dissatisfaction with the Union's overall involvement on her behalf, there is no evidence that she has suffered irreparable harm. A grievance was filed by the Union protesting the Agency's intent to discharge Charging Party. Although unresolved, the grievance has been processed to the final step of the grievance procedure prior to arbitration and the Union has represented Charging Party at every step along the way.

Several critical issues remain unresolved: 1) whether the grievance filed by the Union on February 19, 2009, constitutes a valid grievance; 2) whether Charging Party's discharge is supported by just cause; and 3) if that question is answered in the negative, what is the appropriate remedy when considering all of the surrounding relevant circumstances including related contract provisions.

Each of these issues requires the interpretation an application of the collective bargaining agreement which is a proper subject for the contractual grievance procedure and possibly arbitration. "According to established Delaware case law, the PERB's jurisdiction is limited to resolving statutory issues which does not include issues involving the interpretation and application of contract language." *Caesar Rodney Education Assn., DSEA/NEA v. Board of Ed.,* (Del. PERB, ULP No. 96-01-165 (9/9/98). For this reason, I agree with the Union's contention that until the contractual issues are

resolved, the instant unfair labor practice charge alleging statutory violations is premature.

Where, as here, the resolution of alleged statutory violations turns upon the resolution of contractual issues, the PERB has, adopted a discretionary and limited deferral policy: "When the parties have contractually committed themselves to mutually agreeable procedures for resolving contractual disputes, it is prudent and reasonable for this Board to afford those procedures the full opportunity to function." *Fraternal Order of Police Lodge No. 1 v. City of Wilmington,* ULP 89-08-040, (Del.PERB), I PERB 44912/18/89), citing *Collyer Insulated Wire,* NLRB, 129 NLRB837 (1971).

AFSCME and DHSS have negotiated a grievance procedure which culminates in the submission of unresolved issues to final and binding arbitration before an impartial arbitrator. Accordingly this unfair labor practice charge is stayed pending the exhaustion of that contractual grievance and arbitration procedure.

The Board's deferral policy is not, however, unconditional, in that it does not constitute a final resolution of the pending unfair labor practice charge. Where deferral is authorized, the PERB will retain jurisdiction over the initial unfair labor practice charge for the express purpose of reconsidering the matter, on application of either party, for any of the following reasons:

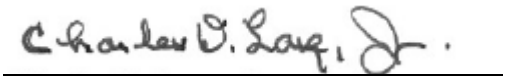
1) that the arbitration award failed to resolve the statutory claim;
2) the arbitration has resulted in an award which is repugnant to the applicable statute;
3) that the arbitral process has been unfair;
4) that the dispute is not being resolved by arbitration with reasonable promptness.

DECISION

WHEREFORE, this unfair labor practice charge is deferred to the parties' contractually agreed upon grievance/arbitration procedure. The parties are to notify the Pubic Employment Relations Board within sixty (60) days from the date of this decision of the status of this matter.

IT IS SO ORDERD.

Date: February 8, 2010



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