

**STATE OF DELAWARE**  
**PUBLIC EMPLOYMENT RELATIONS BOARD**

AMERICAN FEDERATION OF STATE, COUNTY,	)	
& MUNICIPAL EMPLOYEES, AFL-CIO,	)	
COUNCIL 81 AND ITS LOCAL UNION NOS.	)	
1007, 1267 and 2888,	)	
	)	
Charging Party,	)	<b><u>ULP No. 10-04-739</u></b>
	)	
v.	)	Probable Cause Determination
	)	and Denial of Motion to
DELAWARE STATE UNIVERSITY,	)	Consolidate Charges
	)	
Respondents.	)	

**BACKGROUND**

Delaware State University (“DSU” or “University”) is a public employer within the meaning of §1302 (p) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (“PERA” or “Act”).

The American Federation of State, County & Municipal Employees, AFL-CIO, Council 81, through its affiliated Locals Nos. 1007, 1267 and 2888 (“AFSCME” or “Union”), is an employee organization within the meaning of §1302(i), of the Act and the exclusive bargaining representative of a bargaining unit of Clerical/Technical employees as defined in DOL Case 167, Plant Maintenance employees as defined in DOL Case 44, and Security employees as defined in DOL Case 61, respectively, within the meaning of §1302(j), of the Act.

On April 20, 2010, AFSCME filed an unfair labor practice charge in which it alleges DSU has engaged in conduct which violates 19 Del.C. §1307 (a)(5), (6) and (7), which provide:

- §1307 (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
- (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.
  - (7) Refuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting contract.

Specifically, the Charge alleges:

On or about March 23, 2010, a letter was sent to Dr. Harry L. Williams, President of DSU requesting certain information be made available to the Union by virtue of rights granted under FOIA as well as under 19 Del.C. Chapter 13. The Union requires the information in order to administer its collective bargaining agreement with DSU and to be prepared for bargaining a successor agreement.

On April 5, 2010, Lance Toron Houston [*Assistant Vice President for Legal Affairs, DSU*], responded to the March 23, 2010 letter conveying DSU's refusal to provide the information alleging that the request was only made under FOIA and ignoring the duty to provide information as part of DSU's obligation to bargaining in good faith. *AFSCME v. DSU*, Unfair Labor Practice Charge 10-04-739, ¶¶ 3, 4.

On or about April 30, 2010, DSU filed its Answer to the Charge, denying the material allegations of the Charge. Additionally, DSU included five affirmative defenses to the Charge which include: 1) Some or all of the information sought by the Union is improper and untimely as a basis for a claimed unfair labor practice charge because the information

requested dates back four years, well beyond the 180 day period for filing an unfair labor practice charge, as set forth in 19 Del.C. §1308; 2) The information sought by the Union is not “public record” and is protected from disclosure under FOIA because it pertains to pending or potential litigation; 3) None of the collective bargaining agreements between these parties require DSU to provide the Union with the documents and information it seeks; 4) The Charge fails to state a claim on which relief can be granted; and 5) The claims contained in the Charge are barred by the doctrines of waiver and estoppel.

AFSCME filed its Response to New Matter on May 7, 2010, denying all of the affirmative defenses.

On or about April 30, 2010, DSU filed a Motion to Consolidate the Charge with a separate pending Charge 09-12-725, involving these parties asserting:

¶3 The University believes the two ULP charges should be combined in the interests of justice and economy of this tribunal. The sole basis for the second ULP filed by the Union is the University’s refusal to agree to a circumvention of PERB’s process for resolving unfair labor practice charges. The documents sought by the Union contain information (albeit overly broad, untimely and unduly burdensome) that would support the allegations contained in Count IV of the Union’s original ULP Charge [09-12-725]. Specifically, Count IV of the original ULP charge asserts that “DSU has subcontracted and intends to continue to subcontract work performed by bargaining unit members”. While that ULP charge remained pending, the Union wrote to the University on March 23, 2010 demanding documents dating back over four years that would evidence the University’s use of subcontractors. The University objected to the document demand on the grounds that the original ULP remains pending and any requests for information in support of that charge should be exchanged within the confines of PERB’s procedures.

¶4 The University should not be forced to defend its actions twice and this tribunal should not be asked to expend its limited time and resources resolving the same dispute between the same parties twice. A resolution of the first ULP charge will

necessarily resolve the second as well. In addition to being the most just and efficient course of action, consolidation of the two ULP charges will not prejudice the Union's ability to receive any information to which it is entitled, or to have its concerns resolved by this tribunal.

On or about May 3, 2010, AFSCME responded to the University's Motion to Consolidate its Unfair Labor Practice Charges, requesting that the Motion be denied.

This Probable Cause Determination and consideration of the University's Motion is based upon a review of the pleading and the positions of the parties as further defined in a prehearing conference convened by the Public Employment Relations Board on May 12, 2010.

### **DISCUSSION**

The Rules and Regulations of the Delaware PERB require that upon completion of the pleadings in an unfair labor practice proceeding, a determination shall be issued as to whether those pleadings establish probable cause to believe the conduct or incidents alleged therein may have violated the Public Employment Relations Act, 19 Del.C. Chapter 13. DE PERB Rule 5.6.

For the purpose of this review, factual disputes established by the pleadings are considered in a light most favorable to the Charging Party in order to avoid dismissing what may prove to be a valid charge without the benefit of receiving evidence concerning that factual dispute. *Richard Flowers v. State of Delaware, Department of Transportation, Delaware Transit Corporation*, Probable Cause Determination, ULP No. 04-10-453,V PERB 3179 (2004).

The Public Employment Relations Act provides that it is an unfair labor practice for a public employer or its designated representative to refuse to disclose any public record as defined by Chapter 100 of Title 29. 19 Del.C. §1307(a)(8). It is well established through PERB case law that the duty to bargain in good faith under the Public Employment Relations Act (“PERA”) obligates public employers to provide information to exclusive bargaining representatives that is necessary and relevant to those organizations in performing their representation duties. This obligation has been recognized by Delaware’s Public Employment Relations Board, Court of Chancery, and Supreme Court. *Bd. of Education of Colonial School District v. Colonial Education Association, DSEA/NEA*, Del.Chan., CA 14383, II PERB 1343 (1996), *affirmed Colonial Education Assn. v. Bd. of Education*, Del.Supr., Case 129, 1996, 152 LRRM 2575, III PERB 1519 (1996), (citing *Brandywine Affiliate, NCCEA/DSEA/NEA, v. Brandywine School District*, Del.PERB, ULP 85-06-005, I PERB 131, 149 (1986)); *AAUP v. DSU*, Del. PERB., Decision on Remand, ULP 95-10-159, III PERB 2177 (2001); *Delaware Correctional Officers Association v. Delaware Department of Correction*, ULP No. 00-07-286, III PERB 2209, 2214 (2001).

The allegations contained in the Charge, if proven, may support the conclusion that the PERA has been violated. It will be AFSCME’s burden to establish both the factual and legal support for such a finding.

During the prehearing conference AFSCME asserted that resolution of the issue concerning the University’s duty to provide any or all of the requested information may facilitate resolution of some of the allegations contained in ULP 09-12-725. For this reason, the University’s Motion to Consolidate the charges is denied. The instant charge will be processed forthwith, while scheduling of hearing on the second Charge is proceeding.

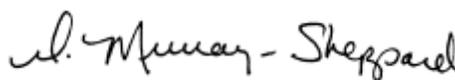
**DETERMINATION**

Considered in a light most favorable to Charging Parties, the pleadings provide a sufficient basis for finding probable cause to believe that an unfair labor practice in violations of 19 Del.C. §1307(a)(5), (a)(6) and/or (a)(7) may have occurred.

In order to expedite the processing of this Charge, the parties agreed to attempt to develop a stipulated record and will submit the same with a briefing schedule to address the legal issues raised in this Charge.

**IT IS SO ORDERED.**

DATE: May 23, 2010



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