

PUBLIC EMPLOYMENT RELATIONS BOARD
FOR THE STATE OF DELAWARE

AMERICAN FEDERATION OF STATE, COUNTY,	:	
AND MUNICIPAL EMPLOYEES, COUNCIL 81,	:	
LOCAL UNIONS 320 AND 1102,	:	
	:	ULP 10-12-781
Petitioners,	:	
	:	
v.	:	INTERIM DECISION ON AFSCME’S
	:	REQUEST FOR TEMPORARY
CITY OF WILMINGTON, DELAWARE,	:	RESTRAINING ORDER
	:	
Respondent.	:	

APPEARANCES

Perry F. Goldlust, Esq., for AFSCME

Martin C. Meltzer, Esq., Deputy City Solicitor, for Wilmington

AFSCME Council 81 (“AFSCME”) is an employee organization within the meaning of 19 Del.C.1302(i) which, by and through its affiliated Locals 320 and 1102, is the exclusive bargaining representative of two units of employees of the City of Wilmington which are defined in certifications referenced in the Recognition clauses of the applicable collective bargaining agreements.

The City of Wilmington, Delaware (“City”) is a public employer within the meaning of 19 Del.C. 1302(p). The City and AFSCME Local 320 are parties to a collective bargaining agreement with a term of January 1, 2007 through December 30, 2009. The City and AFSCME Local 1102 are parties to a collective bargaining agreement with a term of July 1, 2007 through June 30, 2010.

On or about December 16, 2010, AFSCME filed an unfair labor practice charge,

alleging the City had violated 19 Del.C. §1307 (a)(5), (a)(6), and (a)(8) 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.
- (8) Refuse to disclose any public record as defined by Chapter 100 of Title 29.

Specifically, the Charge alleges the City has “persistently refused to provide information” to AFSCME which it asserts will “show the waste of public funds”, attempted to convert the unions’ requests for information under the Public Employment Relations Act (“PERA”) into Freedom of Information Act (“FOIA”) requests, and that the City’s refusal to provide the requested information is motivated by anti-union animus. AFSCME asserts that “by starving the Union of necessary information, [the City] seeks to destroy the effectiveness of the Union,” and alleges that the City’s bad faith has resulted in end of the year lay-offs which AFSCME alleges (based on its information and belief) are not needed.

The Charge includes a request that PERB issue a temporary restraining order requiring the City to maintain the *status quo ante*, and “not allow any lay-offs by the City a) until the resolution of the three unfair labor practice charges so that the need for information can be resolved; b) until there is sufficient time after the City produces the information for the Union to have the opportunity to request and/or ask additional questions (a reasonable time in which to review the information, to come back to the PERB for other relief, or indicate it believes it has sufficient information to proceed), c)

until completion of the Grievance and Arbitration procedure provided for in the CBA.”

On December 28, 2010, the City filed its Answer to the Charge and specifically objected to AFSCME’s request for a temporary restraining or preliminary injunction, asserting AFSCME has failed to establish that it has a likelihood of success on the merits of its Charge and has failed to establish that it or its members will suffer irreparable harm if the injunction is not granted. The City denied many of the facts and assertions of the Charge.

AFSCME’s response to New Matter included in the City’s Answer to the Charge was filed on December 30, 2010.

The interim decision reached herein results from consideration of the arguments and assertions put forth by the parties in the pleadings and is limited to consideration of AFSCME’s request for interim relief.

DISCUSSION

Section 1308, Disposition of Complaints, of the Public Employment Relations Act (“PERA”, 19 Del.C. Chapter 13) provides, in relevant part:

- (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...
- (c) In addition to the powers granted by this section, the Board shall have the power, at any time during proceedings authorized by this section, to issue orders providing such temporary or preliminary relief **as the Board deems just and proper** subject to the limitations of subsection (b) of this section. (*emphasis added*).

In a prior decision, the PERB established that in considering a motion for preliminary injunction, “...the burden is with the moving party to clearly demonstrate both irreparable harm

and the reasonable probability that it will prevail on the merits of the underlying substantive issue.” *New Castle County Vo-Tech Education Assn. v. New Castle County Vo-Tech School District*, ULP 85-05-025, I PERB 257, 261 (PERB Ex. Director, 1988). PERB also adopted the dual-pronged standard of *Gimbel v. Signal Companies, Inc.* (316 A.2d 599 (Del.Chan., 1974)) for evaluating motions for preliminary injunctions and stated that “failure to establish either element precludes the granting of the requested relief.” *New Castle County Vo-Tech Education Assn.*, p. 260. That standard has been consistently applied by this Board to both grant and deny preliminary relief in numerous subsequent cases. *Ramon Tayler v. DE Correctional Officers Assn.*, ULP 96-10-197, III PERB 1511, 1513 (PERB, 1996); *Appoquinimino Education Assn., DSEA/NEA v. Appoquinimink School District*, ULP 98-09-243, III PERB 1775 (PERB, 1998); *AFSCME v. New Castle County*, ULP 01-01-306, III PERB 2149, 2151 (PERB, 2001); *International Assn. of Firefighters Local 1590 v. City of Wilmington*, ULP 09-06-686, VI PERB 4259 (PERB, 2009); *AFSCME Council 81, LU 1007, 1267 & 2888 v. Delaware State University*, ULP 09-12-725, VII PERB 4611 (PERB, 2010).

ASFCME argues PERB should redefine its standard for consideration of requests for interim relief to follow the standards established under the National Labor Relations Act [“NLRA”]. Under section 10(j)¹, the National Labor Relations Board [“NLRB”] is authorized to seek temporary injunctions against employers and unions in federal district courts to stop unfair labor practices while the case is being litigated before administrative law judges and the NLRB. This authority is limited to situations “where, due to the passage of time, the normal adjudicative

¹ The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the Court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

processes of the Board likely will be inadequate to effectively remedy the alleged violations.”

Section 10(j) Manual User's Guide, NLRB Office of General Counsel (2002).

For a federal district court to determine a §10(j) injunction is “just and proper,”

... The circumstances of the case must demonstrate that there exists a probability that the purposes of the Act will be frustrated unless temporary relief is granted. Administration of the Act is vested by Congress in the [NLRB], and when the circumstances of a case create a reasonable apprehension that the efficacy of the Board's final order may be nullified, or the administrative procedures will be rendered meaningless, temporary relief may be granted under section 10(j). Preservation and restoration of the status quo are then appropriate considerations in granting temporary relief pending determination of the issues by the Board. *Angle v. Sacks for and on Behalf of NLRB*, 382 F.2d 655, 660 (C.A.Kan, 1967).

Section 1308(c) of the PERA provides PERB with authority “to issue orders providing such temporary or preliminary relief as the Board deems just and proper.” The “just and proper” standard articulated by the courts under section §10(j) of the NLRA is entitled to consideration in Delaware under the Delaware District Court’s decision in *Cofrancesco v. City of Wilmington* (419 F.Supp 109, 93 LRRM 2387 (1976)). In determining such just and proper cause, a threat to the collective bargaining process and the ultimate effectiveness of a remedy imposed by PERB due to the length of time required to fully process the charge is consistent and should be understood to be included within the potential irreparable harm of actions which violate the PERA. The public interest in promoting and protecting public sector collective bargaining is an appropriate consideration (above and beyond the interests of individual employees and/or parties) when considering a request for interim relief during the processing of an unfair labor practice charge.

In this case, however, the pleadings do not reveal a threat to the public interest or

to the interests of the employees or parties sufficient to justify interim relief at this time. The action complained of in this Charge is an alleged failure by the City to provide information which the union asserts is necessary to effectively challenge scheduled lay-offs of bargaining unit employees. It is well established that monetary damages (such as the loss of wages and/or benefits) do not constitute irreparable harm because these types of damages can be recompensed following resolution of the Charge. *IAFF Local 1590*, p. 4263.

In paragraph 35 of its Charge, AFSCME alleges that the City's refusal to provide the requested information is "motivated by an anti-union animus", that "by starving the Union of necessary information, it seeks to destroy the effectiveness of the Union," and that "the City's bad faith is the cause of this end-of-year lay-off when such lay-offs, based on the Union's information and belief, are not needed." What is critically missing from the Charge is a nexus between the alleged failure to provide information and any violation of the PERA as it relates to the decision to lay-off employees. In fact, the pleadings establish that a grievance was filed by Local 1102 on or about November 11, 2010, protesting the announced lay-offs of bargaining unit employees as being in violation of the "Reduction in Force" provisions of the collective bargaining agreement.

It is well established under PERB case law that a violation of the collective bargaining agreement is subject to resolution under the parties' negotiated grievance and arbitration procedure. A contractual violation does not, as a general rule, impugn statutory rights unless it involves a unilateral change in a mandatory subject of bargaining.

Such is not the case here. Section 1305 of the statute states “a public employer is not required to engage in collective bargaining on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion or policy as the functions and programs of the public employer, its standards of services, overall budget, utilization of technology, the organizational structure and staffing levels and the selection and direction of personnel.” The staffing level and programs provided by the City are, at best, permissive subjects of bargaining.

DECISION

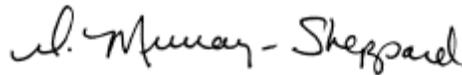
AFSCME’s Request for a Temporary Restraining Order is denied.

In the interest of expeditiously resolving the underlying dispute in this charge, a probable cause determination will be issued on or before January 15, 2011.

A decision on AFSCME’s Motion for Judgment on the Pleadings in corollary unfair labor practice charge 10-08-761 will be issued on or before January 30, 2011.

IT IS SO ORDERED.

DATE: December 30, 2010



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