

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.	:	DECISION ON THE PLEADINGS
	:	
CITY OF WILMINGTON, DELAWARE,	:	
	:	
Respondent.	:	

APPEARANCES

Perry F. Goldlust, Esq., for AFSCME
Martin C. Meltzer, Esq., Deputy City Solicitor, for Wilmington

The City of Wilmington, Delaware, (“City”) is a public employer within the meaning of 19 Del.C. §1302(p) of the 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 320 and 1102 (“AFSCME”), is an employee organization within the meaning of §1302(i), of the Act and the exclusive bargaining representative of two bargaining units of City employees, within the meaning of §1302(j), of the Act.

The City and AFSCME Local 320 are parties to a collective bargaining agreement with a term of January 1, 2007 through December 30, 2009. By letter dated September 9, 2009, AFSCME LU 320 advised the City of its desire and intent to open negotiations for

a successor agreement.

The City and AFSCME Local 1102 are parties to a collective bargaining agreement with a term of July 1, 2007 through June 30, 2010. By letter dated April 16, 2010, LU 1102 advised the City of its desire and intent to open negotiations for a successor agreement.

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 included a request for a temporary restraining order to prohibit the scheduled January 3, 2011, lay-off of bargaining unit employees.

On December 28, 2010, the City filed its Answer to the Charge specifically objecting to AFSCME's request for a temporary restraining order or preliminary injunction, asserting AFSCME failed to establish a likelihood of success on the merits of the charge and failed to establish that it or its members will suffer irreparable harm if the injunction was not granted. The City denied the legal assertions in the Charge.

AFSCME's response to the City's Answer to the Charge was filed on December 30, 2010, in which it denied the New Matter asserted therein.

The PERB Executive Director denied AFSCME's Motion for Temporary Restraining Order on December 30, 2010, finding no threat to the public interest or to the interests of the employees or parties sufficient to justify interim relief.

By letter dated December 30, 2010, the City requested to modify its Answer by appending a letter from its Manager of Labor Relations and Classification to the President of LU 1102 "offering temporary positions, subject to Article VI, 6.11(f) [of the collective bargaining agreement], to those Local 1102 employees who will be laid-off on January 3, 2011." AFSCME objected to the City's amendment of its Answer by letter dated January 5, 2011, and requested the attached letter be stricken from the record because it is irrelevant and immaterial. The City opposed AFSCME's objection by letter dated January 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(b) requires “If the Executive Director determines that an unfair labor practice has, or 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.”

The instant Charge (10-12-781) filed by AFSCME on behalf of its Local Unions 320 and 1102 specifically incorporates the content of two additional charges which were filed earlier against the City involving these Locals, specifically ULP 10-08-761 and ULP 10-10-767. Currently pending before PERB is a Motion for Judgment on the Pleadings in ULP 10-08-761, as well as a Motion to Consolidate that charge with ULP 10-10-767. Because those charges are at a more advanced stage in processing and resolution, their merits will not be considered herein. The scope of this determination is limited to the new allegations made in this Charge, which are referenced by AFSCME as the “Third Request for Information.”

Upon review of the pleadings concerning AFSCME’s third request for information, there is nothing included therein which relates to LU 320. Consequently, any charge that the City violated its obligations under the PERA with respect to LU 320 in failing or refusing to respond to AFSCME’s third information request is dismissed.

For the purposes of a probable cause determination, 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 pleadings and documents appended as exhibits in this case are sufficient to establish there are no material issues of

fact relating to AFSCME's third request for information and the events which occurred thereafter.

It is well-established in Delaware PERB precedent that there are two independent bases on which an exclusive bargaining representative may request information from a public employer. The right to request public information under the Freedom of Information Act ("FOIA")¹ does not arise under the PERA. Failure to provide information in response to a FOIA request, however, constitutes a statutory violation of 19 Del.C. §1307(a)(8). The City is correct in its argument that 29 *Del.C.* §10002 specifically defines "public record" under FOIA to include "information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced." Subsection (g)(2) specifically excludes from this definition "Any records involving labor negotiations or collective bargaining."

There exists, however, an independent duty to provide information that is relevant to the union in carrying out its statutory representational duties and responsibilities which arises under the employer's duty to bargain in good faith. Failure to provide information which is reasonably related to a good faith request violates the duty to bargain in good faith, and constitutes as statutory violation of §1307(a)(5) for public employers and §1307(b)(2) for exclusive representatives. The parties have an ongoing obligation to provide one another with information "requested in order to properly to administer and police a collective bargaining agreement" *Oil, Chem. & Atomic Workers v. NLRB*,

¹ 29 Del.C. Chapter 100.

711 F.2d 348, 358 (D.C. Cir. 1983). This obligation arises independent of a request for information under FOIA and may encompass documents which are not “public records” as defined by FOIA.

AFSCME LU 1102 requested information which, on its face, is relevant and reasonably related to its representational duties. In this case, a grievance was filed by LU 1102 on November 10, 2010, following the union’s notification of the scheduled layoffs of bargaining unit employees, contesting the application of Article VI, 6.11(f) of the parties’ agreement, which states:

(f) No Local 1102 Employee will be laid off while any temporary, seasonal or part-time Employee is employed to perform work which could be performed by bargaining unit Employees.

On November 11, the LU 1102 President requested from the City’s Director of Human Resources, “a list of all Temporary, Part-Time or Seasonal Employees being utilized by the City of Wilmington, as well as their function, scope of work, location and rate of pay.” *Exhibit 4 to Charge*. The Union requested this information be provided as soon as possible.

The key inquiry is whether the information sought by the Union is relevant to its duties. On its face, this is “relevant information necessary for the bargaining representative to intelligently determine facts, assess its position and decide what course of action, if any, to pursue.” *NCCEA/DSEA/NEA v. Brandywine School District*, ULP 85-06-005, I PERB 131, 149 (PERB, 1986). In order to evaluate whether the City continued to employ “temporary, seasonal or part-time employees” who were performing work which could be performed by LU 1102 employees, the union would need the information it requested.

The City responded five days later by requesting AFSCME complete a FOIA

request for this information and instructed that the request should be directed to the City Solicitor's Office, "because the request pertains to public records as defined by Chapter 100 Title 29 and similar issues are in litigation before the PERB." *Exhibit 6 to Charge*. In limiting its understanding of its obligation under the PERA to provide only "public records", the City fails to recognize the fundamental difference between AFSCME as the exclusive representative of City employees and any other person or organization requesting information from the City. Without disclosure of information which allows the union to assess the viability of the employer's actions within the context of the collective bargaining agreement, the grievance and arbitration process cannot serve its purpose of timely and effective resolution of disputes arising under the agreement. "The purpose of the statute is to facilitate effective collective bargaining relationships. The open, honest and good-faith exchange of information is a cornerstone of an effective relationship and is protected by the PERA." *AFSCME v. Delaware State University*, ULP 10-04-739, VII PERB 4693, 4705 (Decision on Motion for Summary Judgment, 2010).

AFSCME renewed its request in a December 3 letter to the City Solicitor requesting that the information be provided,

... in accordance with the City of Wilmington's obligation under the Freedom of Information Act as well as the City's obligation as a public employer under Title 19 Chapter 13 of the Delaware Code. Access to and copies of the following documents and information are being requested in connection to the lay-offs, the Union needs this information to make sure that the procedure in the upcoming layoffs is in compliance with the Collective Bargaining Agreement. *Exhibit 6 to the Charge*.

Again the City responded by requesting AFSCME submit a "formal FOIA request form" and advised the union to "make note to fill in the bottom area as to how much you are

willing to pay for these documents.” *Exhibit 7 to the Charge*. At this point, the City was indisputably on notice that the request for information was made pursuant to rights established by the PERA and that the information was being requested in order to evaluate the sufficiency of the layoff process under the collective bargaining agreement.

LU 1102’s request was specific and limited to information which was directly relevant to its representational duties under the PERA. At no point in the correspondence did the City oppose the request; rather, it repeatedly delayed responding to AFSCME’s request because it was not made to the City Solicitor and then because it was not made on a formal FOIA request form. These responses delayed the transmittal of information and also attempted to pigeonhole the union’s request under FOIA standards.

A public employer’s duty to furnish information requires a reasonable, good faith effort to respond in a timely manner to the union’s request. Absent evidence justifying an employer’s delay in furnishing a union with relevant information, such a delay will constitute a violation of §1307(a)(5) because the union is entitled to the information at the time of its initial request and it is the employer’s duty to furnish it as promptly as possible. *AFSCME v. DSU*, *Supra*, p. 4705.

The City amended its Answer to the Charge to include a letter to the President of LU 1102 in which it sought to offer specific temporary positions to the five bargaining unit employees who were to be laid-off on January 3, 2010. This document does not satisfy AFSCME’s November 11, 2011 information request. Rather it represents the City’s evaluation of which of the existing temporary, part-time and/or seasonal positions LU 1102 employees could fill. AFSCME is entitled under the law to review all of the existing temporary, part-time and/or seasonal positions which the City employs and to be provided with sufficient information to make its own determination as to which, if any,

bargaining unit employees might fill.

Finally, the City argues that it has met its obligation to provide information, in part, and therefore cannot be found to have violated the statute. The information AFSCME requested was specific and clearly relevant to the union's policing of Article V, 6.11(f) of the collective bargaining agreement. The City has failed to raise a valid defense as to why this information was not provided to the Union in a timely manner. To the extent that the information requested by AFSCME on November 11 has not been fully provided, the City is directed to provide the information now.

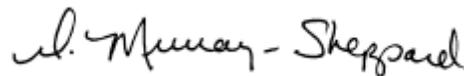
DECISION

For the reasons set forth above and consistent with PERB Rule 5.6(b), the pleadings are sufficient to establish that the City violated its duty to bargain in good faith and 19 Del.C.1307(a)(5) by failing or refusing to provide information in response to a reasonable and relevant, good faith request made by the union pursuant to its representational responsibilities to police the collective bargaining agreement.

WHEREFORE, the City is hereby directed to cease and desist from failing or refusing to provide the information requested by the union on November 11, 2010, and to provide all of the requested information within twenty (20) days of the date of this decision.

IT IS SO ORDERED.

DATE: January 14, 2010



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