STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 81, LOCAL UNIONS 1102 AND 320,	)	
Charging Party,	)	**ULP No. 12-08-872**
v.	)	Probable Cause Determination
CITY OF WILMINGTON,	)	
Respondent.	)	

BACKGROUND

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").

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 PERA and the exclusive bargaining representative of two bargaining units of City employees, within the meaning of §1302(j), of the statute.

On August 6, 2012, Charging Party filed an unfair labor practice charge with the Delaware Public Employment Relations Board ("PERB") alleging conduct by the City in violation of 19 Del.C. §1307(a)(1), (a)(5) and (a)(6), which provides:

§1307 (a) It is an unfair labor practice for a public employer 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 guaranteed under this chapter.

(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.

Specifically, the Charge alleges that on or about July 10, 2012, the City issued Policy #108.1, entitled Social Media, which materially altered the terms and conditions of employment for bargaining unit employees without affording the Union its right to bargain concerning either the policy itself or the impact. AFSCME asserts both are mandatory subjects of bargaining, and argues " Policy #108.1 is overly broad and expressly restrains, and has the effect of restraining, employees in the exercise of protected concerted activity." AFSCME requests PERB enjoin the City from implementing the policy until such time as the Charge is resolved and also requests the Charge be heard on an expedited basis.

On or about August 13, 2012, the City filed its Answer to the Charge denying it engaged in conduct in violation of §1307(a)(1), (a)(5) or (a)(6), of the PERA. Specifically, the City denies Policy #108.1 concerns a mandatory subject of bargaining over which it has an obligation to bargain. The City also denies the policy interferes with employee concerted and/or protected rights under the PERA.

Under New Matter, the City asserts Policy 108.1 constitutes an "inherent managerial prerogative as defined in §1305 of the PERA which grants to a public employer discretion to establish policies pertaining to "technology" and the "direction of

personnel". The City concludes that because the policy falls within the exclusive prerogative of the pubic employer, it is not a condition of employment as defined in §1302(t) of the PERA and consequently there is no duty to bargain concerning its content. The City also argues Charge is not ripe for adjudication because the policy is facially neutral and the Charge contains no allegation that the policy has been implemented in a manner which violates any concerted labor activity. The City requests that the Charge be dismissed.

The City also asserts there is no legal basis for AFSCME's request for a preliminary injunction because the Charge fails to present any facts to support a finding of irreparable harm.

On or about August 23, 2012, AFSCME filed its Response to New Matter asserting the City's New Matter constitutes legal conclusions to which no response is required. To the extent that a response was required, AFSCME denied the allegations in their entirety.

DISCUSSION

Rule 5.6 of the Rules and Regulations of the Delaware Public Employment Relations Board ("PERB") provides:

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

In this case there are no material factual disputes concerning the development or implementation of Policy 108.1. The policy was attached to the Charge and the City does not dispute that it is a true and accurate copy of the policy. The written policy speaks for itself. The City admits in its Answer that the policy was implemented on July 10, 2012, and does not dispute that the City and AFSCME never met or negotiated concerning either the terms of the policy or its potential impact on bargaining unit employees.

The pleadings raise legal issues concerning whether Policy 108.1 or its impact constitutes a mandatory subject of bargaining under the PERA which the City had an obligation to bargain with AFSCME, and/or whether the policy violates the employees' protected rights. The record is sufficient to support a determination that these issues are of significant import and support a finding of probable cause to believe an unfair labor practice may have occurred, as alleged.

Concerning Charging Party's request for preliminary injunctive relief, "a

preliminary injunction constitutes extraordinary injunctive relief and should only be issued in clear cases of irreparable injury and where the granting body is convinced of its urgent necessity. *State v. DSEA,* 326 A.2d 868 (1974, Del.Chan.); *Appoquinimink Ed. Assn. v. Bd. of Ed.,* ULP 98-09-243, III PERB 1781, 1783 (1998, Del. PERB). It is well-established Delaware law that a successful request for preliminary injunctive relief must satisfy two requirements: 1) The Charging Party must establish that there is a reasonable probability that it will ultimately prevail on the merits of the dispute; and 2)must establish that the Charging Party will suffer irreparable injury if its request for injunctive relief is denied. *Gimbel v. Signal Companies, Inc.,* Del. Ch. 316 A.2d 599 (1974, Del.Chan.); *AFSCME, District Council 81, et al., v. Del. State Univ.,* Del. PERB, ULP No. 09-12-725, VII PERB 4611, 4614 (2012, Del.PERB) Failure to establish either element precludes the granting of the requested relief. *New Castle County Vo-Tech. E. Assn. v. NCCVT School District*, ULP No. 85-05-025 (1998, Del.PERB).

The pleadings in this matter fail to establish the presence of either condition.

DETERMINATION

Considered in a light most favorable to Charging Party, the pleadings are sufficient to establish probable cause to believe that an unfair labor practice, as alleged, may have occurred.

In the absence of dispute as to material fact, there is no need to hold an evidentiary hearing. An informal conference will be promptly scheduled with the parties, to arrange for the submission of argument concerning the legal issues raised, namely:

1) Whether Policy 108.1 (or the impact of its implementation) constitutes a mandatory subject of bargaining under the PERA

2) Whether the policy interferes with or restrains employees in the exercise of their rights to engage in protected and/or concerted activity under the PERA.

Consistent with the foregoing discussion, AFSCME's request for preliminary injunctive relief is denied, as the pleadings fail to establish either urgent necessity or clear irreparable harm.

The City's allegation that the Charge is not ripe is without merit and is, therefore, dismissed.

Dated: October 17, 2012

Charles D. Long, Jr., Hearing Officer
Del. Public Employment Relations Board