

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNITED FOOD AND COMMERCIAL WORKERS	:	
UNION, LOCAL 27,	:	
	:	
Charging Party,	:	
	:	ULP 12-09-875
v.	:	
	:	Probable Cause Determination
STATE OF DELAWARE, THE FAMILY COURT	:	
OF THE STATE OF DELAWARE,	:	
	:	
Respondent.	:	

The State of Delaware (“State”) is a public employer within the meaning of §1302(p) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (“PERA”). The Family Court of the State of Delaware (“Family Court”) is an agency of the State.

The United Food and Commercial Workers Union, Local 27 (“UFCW”) is an employee organization within the meaning of §1302(i) of the PERA and is the exclusive bargaining representative of certain employees of the Family Court within the meaning of 19 Del.C. §1302(j).

UFCW and Family Court are parties to a collective bargaining agreement which had a term of June 5, 2007 through June 4, 2010. The parties do not dispute that this agreement remains in effect and that it covers terms and conditions of employment for bargaining unit members.

On September 19, 2012, the UFCW filed an unfair labor practice charge (“Charge”) alleging conduct by Family Court in violation of 19 Del.C. §1307(a)(5), (a)(6) and (a)(8), which state:

- §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.

The Charge also alleges a general violation of 19 Del.C. §1311A, Collective bargaining in the state service.

Specifically the Charge alleges that in early 2012 the UFCW became aware that Family Court management was utilizing employee badge-in records to monitor employees' time and attendance. The UFCW requested access to badge-in information on numerous occasions from early 2012 through April, 2012. The Court responded by providing limited information on or about May 1, 2012, in which it declined to provide some information and redacted identifying information concerning bargaining unit employees. The UFCW asserts Family Court has failed or refused to provide it with employee time and attendance data and unique identifying information which are necessary to the UFCW for it to perform its representational responsibilities. It alleges the Court's failure to provide information about the administration of a term or condition of employment precluded the union from exercising its responsibility for grievance investigation and adjustment and interfered with its obligation to bargain over changed terms or conditions of employment, which constitute unfair labor practices under the PERA.

On or about September 28, 2012, the State filed an Answer to the Charge on behalf of Family Court denying any statutory violations were committed. The State asserts using badge-in

records to monitor employee's attendance is a managerial prerogative reserved exclusively to the discretion of the public employer to which no duty to bargain attaches. The State admits the Court provided the requested information to the UFCW in a May 1, 2012 communication. The Court declined to provide some of the requested information because it deemed it to be confidential under Merit Rule 16.0¹, irrelevant, and/or the request was overly broad and unduly burdensome. The State argues that although its transmittal letter invited the UFCW to narrow its request, the Union did not respond. The State asserts the union's right to fairly represent bargaining unit employees does not obligate the Court to provide the union with information relating to non-bargaining unit employees. It further argues that it could not have violated 19 Del.C. §1307(a)(8) as personnel records are explicitly excluded from the definition of public records under the state's Freedom of Information Act, 29 Del.C. Ch. 100.

Under New Matter included with its Answer, the State alleges that the Charge fails to state a claim for relief under 19 Del.C. §1307(a) as alleged and is untimely.

On or about October 9, 2012, the UFCW filed its Response to New Matter contending that the allegations constitute legal conclusions to which no response is required and otherwise, denying all of the assertions contained in the new matter.

DISCUSSION

Rule 5.6 of the Rules and Regulations of the Delaware Public Employment Relations

¹ MR 16.0: "Master Personnel Records. A master personnel record for each employee shall be established and maintained by each agency. The records shall include copies of: application for employment; each Human Resource transaction; attendance and leave records; employee Performance Review documents; grievance records; verification of education and employment and any other records or information considered appropriate. At the discretion of the Director, these records may be either physical (hard) copies or computer-stored data. Personnel records are confidential and shall be maintained as necessary to ensure their confidentiality. These and other employee records shall be readily available for review by the Director or the Director's designee. Unauthorized disclosure of any portion of a State employee's records shall be grounds for dismissal."

Board 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).

The United Food and Commercial Workers, Local 27 was certified as the exclusive bargaining representative of the bargaining unit of Family Court employees on or about September 13, 2006. At no time after enactment of the modifications to the PERA which include §1311A (on or about August 2, 2007), was this bargaining unit or any portion thereof certified as a "compensation" unit nor was the UFCW determined to be part of a union coalition under §1311A of the PERA. Consequently, that provision of the statute is inapplicable to this bargaining unit and the UFCW's charge that the State has violated 19 Del.C. §1311A is dismissed.

It is well established through PERB case law that the duty to bargain in good faith under the Public Employment Relations Act obligates a public employer to provide information to an exclusive bargaining representative that is necessary and relevant to that organization in performing its representational duty. *AFSCME 320 & 1102 v. City of Wilmington*, ULP 10-08-761, VII PERB 4757, 4760 (Probable Cause Determination, 2010). This obligation has been recognized by this Board, the Court of Chancery and the Delaware 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), *AFSCME Locals v. DSU*, Del.PERB, ULP 10-04-739, VII PERB 4693, 4705 (2010); *ATU Local 842 v. DTC*, ULP 12-02-850, VII PERB 5493, 5497 (Probable Cause Determination, 2012).

This Board has previously held that where requested information relates to a potential grievance, the test for relevance is liberal. *AFSCME Locals v. DSU* (Supra., p. 4704). The statute imposes upon public employers the duty to provide information which is not otherwise privileged, including “relevant information necessary for the bargaining representative to intelligently determine facts, assess its position and decide what course of action, if any, to take.” *NCCEA/DSEA/NEA v. Brandywine School District* (Supra., p. 149).

The State’s contention that the records requested by the UFCW constitute personnel records which are not public records as defined by 29 Del.C. §10002(g)(1) is not dispositive of

the issue of whether the employer is required to provide the information pursuant to its good faith obligations under the PERA.

The State argues that the Charge is untimely because the UFCW avers in the Charge that it first discovered information in early 2012 regarding the Court's use of time and attendance data and filed a grievance on this issue on March 8, 2012. It asserts that because the Charge was not filed until September 19, 2012 and because §1308(a) requires that a Charge must be filed within 180 days of the alleged violation, the Charge is untimely as the 180 day period would have closed on March 23, 2012, two weeks after the grievance was filed.

The pleadings establish that the UFCW made a formal request for information to Family Court by letter dated April 20, 2012, and that the Court responded by correspondence dated May 1, 2012. The Charge is premised on that May 1, 2012 response. Both the date of request and the date of response are within the 180 day time period for filing a charge as set forth in the statute. Consequently, the Charge is timely filed.

DETERMINATION

The pleadings do not support a finding that there is probable cause to believe that the State violated 19 Del.C. §1311A. Consequently, that portion of the Charge is dismissed.

Considered in a light most favorable to the UFCW, the pleadings do support a determination that there is probable cause to believe that an unfair labor practice, in violation of 19 Del.C. §1307(a)(5), (a)(6) and/or (a)(8), may have occurred.

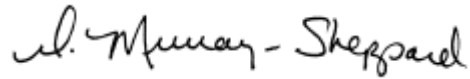
WHEREFORE, a hearing will be promptly scheduled for the purpose of establishing a factual record upon which argument can be made and decision rendered concerning:

WHETHER FAMILY COURT VIOLATED 19 DEL.C. §1307(A)(5), (A)(6)
AND/OR (A)(8) AS ALLEGED, BY FAILING OR REFUSING TO PROVIDE

INFORMATION NECESSARY TO UFCW LOCAL 27 TO PERFORM ITS
REPRESENTATIONAL RESPONSIBILITIES.

Having found probable cause based upon the pleadings, the State's claim that the Charge fails to state a claim upon which relief can be granted is denied. For the reasons set forth above, the State's assertion that the Charge is not timely filed is also dismissed.

DATE: December 3, 2012



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