

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

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| JAH I ISSA, |) | |
| Charging Party, |) | |
| |) | |
| v. |) | |
| |) | <u>ULP No. 13-02-887</u> |
| AMERICAN ASSOCIATION OF UNIVERSITY |) | |
| PROFESSORS, DELAWARE STATE |) | PROBABLE CAUSE DETERMINATION |
| UNIVERSITY CHAPTER, |) | |
| |) | |
| Respondent. |) | |

Jahi Issa (“Dr. Issa”), the Charging Party in this matter, was an employee of Delaware State University (“DSU”) and a public employee within the meaning of §1302(o) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (“PERA”).

The American Association of University Professors, Delaware State University Chapter (“AAUP”) is an employee organization within the meaning of 19 Del.C. §1302(i) and the exclusive bargaining representative of certain employees of DSU within the meaning of 19 Del.C. §1302(j).

On February 21, 2013, Dr. Issa filed an unfair labor practice charge with the Delaware Public Employment Relations Board (“PERB”). The Charge was returned to Charging Party because it failed to conform to PERB Rule 5. Unfair Labor Practice Proceedings. 5.1(b) and 5.2(c)(3) of the Board’s Rules and Regulations.¹

¹ PERB Rule 5. Unfair Labor Practice Proceedings.
5.1. Pleadings... (b) All paragraphs of pleadings shall be individually numbered.
5.2 Filing of Charges ... (c) The charge shall include the following information:

An Amended Charge filed on February 26, 2013, alleging conduct by the AAUP in violation of §1303, §1304(a) and §1307(b)(1), of the PERA.² Specifically, the Charge alleges Dr. Issa was terminated by DSU on August 17, 2012. The Charge alleges that thereafter Dr. Issa repeatedly attempted to secure representation from the AAUP to challenge his termination but received no reply to his requests. Included with the Charge are a series of e-mails between Dr. Issa and the AAUP's President.

On March 13, 2013, the AAUP filed its Answer to the Amended Charge, denying the allegations of the Charge. It asserts the Charge is vague to the extent that the AAUP cannot form an informed answer. It specifically denies the allegation that AAUP never responded to

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- (3) A clear and detailed statement of the facts constituting the alleged unfair labor practice, including the names of the individuals involved in the alleged unfair labor practice, the time, place of occurrence and nature of each particular act alleged, and reference to the specific provisions of the statute alleged to have been violated. Each fact shall be alleged in a separate paragraph with supporting documentation where applicable.

² §1303. Public employee rights.

Public employees shall have the right to:

- (1) Organize, form, join or assist any employee organization except to the extent that such right may be affected by a collectively bargained agreement requiring the payment of a service fee as a condition of employment.
- (2) Negotiate collectively or grieve through representatives of their own choosing.
- (3) Engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection insofar as any such activity is not prohibited by this chapter or any other law of the State.
- (4) Be represented by their exclusive representative, if any, without discrimination.

§ 1304. Employee organization as exclusive representative.

- (a) The employee organization designated or selected for the purpose of collective bargaining by a majority of the employees in an appropriate collective bargaining unit shall be the exclusive representative of all the employees in the unit for such purpose and shall have the duty to represent all unit employees without discrimination. Where an exclusive representative has been certified, a public employer shall not bargain with regard to matters covered by this chapter with any employee, group of employees or other employee organization.

§1307. Unfair labor practices.

- (b) It is an unfair labor practice for a public employee or for an employee organization 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.

Dr. Issa's requests for assistance.

The AAUP included affirmative defenses with its Answer, asserting (1) the Charge fails to state a claim upon which relief can be granted because "the applicable collective bargaining agreement does not give a non-tenured professor the opportunity to arbitrate any substantive aspect of discharge from employment"; and (2) the Charge is untimely because it was filed outside of the applicable statute of limitations.

On March 21, 2013, Charging Party filed a Response to New Matter asserting (1) at all times material to this matter he was a member of the bargaining unit represented by the AAUP and was entitled to all of the rights and protections set forth in the collective bargaining agreement; and (2) the Charge is timely because AAUP's failure to represent Charging Party was a continuing action as evidenced by the e-mail from AAUP's President dated August 27, 2012, stating that Charging Party's request was to be considered by the AAUP's Executive Committee at its September, 2012, meeting.

DISCUSSION

Regulation 5.6 of the Rules of the Delaware Public Employment Relations Board requires:

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

The purpose of a probable cause determination is to establish that the facts alleged by the Charging Party are sufficient to support the conclusion that an unfair labor practice may have occurred. If the answer is in the affirmative, the decision as to whether an unfair labor practice has, in fact, occurred is a function of the evidence presented at a hearing, where it is the Charging Party's responsibility to present sufficient, credible evidence to support the charge.

The instant Charge alleges the AAUP has failed or refused to fairly represent Dr. Issa in contesting his termination. The duty of fair representation requires an exclusive bargaining representative to act honestly, in good faith and in a non-arbitrary manner. *Harris v. Diamond State Port Corporation and ILA 1694-1*, ULP 11-10-827, VII PERB 5407, 5412 (PERB, 2012). It is important to note that the issue presented for resolution under the PERA does not concern the merits of Charging Party's discharge, but whether Dr. Issa was afforded his statutory right to be represented by the exclusive bargaining representative.

There are a number of factual issues which are raised by the pleadings. Dr. Issa alleges he never received a reply to his request that a grievance be filed on his behalf and processed to arbitration. While the AAUP does not deny receiving his request, it does deny the allegation

that no response was forthcoming. Similarly, the AAUP's asserted defense that the Charging Party was not entitled to arbitrate his discharge under the terms of the applicable collective bargaining agreement is undocumented. A determination as to whether the Charge is untimely also requires a factual record on which argument by the parties may be considered.

DETERMINATION

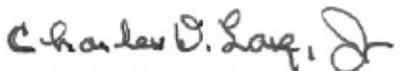
Consistent with the above discussion, the pleadings establish probable cause to believe that an unfair labor practice may have occurred. A hearing will be promptly scheduled for the purpose of developing a factual record upon which argument can be received and a determination made as to:

WHETHER THE UNFAIR LABOR PRACTICE CHARGE WAS TIMELY FILED AS
REQUIRED BY 19 DEL.C. §1308(A).

WHETHER AAUP, DSU CHAPTER FAILED OR REFUSED TO PROVIDE
REPRESENTATION TO THE CHARGING PARTY, AS ALLEGED, IN VIOLATION OF
19 DEL.C. §1303, §1304 AND/OR §1307(B)(1)?

Having found probable cause based on the pleadings, AAUP's assertion that the Charge fails to state a claim upon which relief can be granted is denied.

Dated: April 2, 2013



CHARLES D. LONG, JR.
Hearing Officer
Del. Public Employment Relations Board