

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY)	
AND MUNICIPAL EMPLOYEES, COUNCIL 81,)	
LOCAL 1102,)	
)	
Charging Party,)	
)	<u>ULP 14-02-945</u>
v.)	
)	PROBABLE CAUSE DETERMINATION
CITY OF WILMINGTON, DELAWARE,)	
)	
Respondent.)	

APPEARANCES

Lance Geren, Esq., Freedman & Lorry PC, for AFSCME Local 1102

Brenda James-Roberts, Esq., Assistant City Solicitor, for the City

BACKGROUND

The City of Wilmington (City) is a public employer within the meaning of §1302(p) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (PERA).

American Federation of State, County, and Municipal Employees, Council 81 (AFSCME) is an employee organization within the meaning of 19 Del.C. §1302(i). By and through its affiliated Local 1102, AFSCME is exclusive bargaining representative of certain employees of the City within the meaning 19 Del.C. §1302(j).

On February 20, 2014, AFSCME filed an unfair labor practice charge (Charge) with the Public Employment Relations Board (PERB) alleging the City had violated 19 Del.C. §§ 1307(a)(1), (a)(5) and (a)(6), which state:

§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 in or around January, 2014, the City began to prohibit bargaining unit employees from wearing clothing bearing AFSCME's logo. AFSCME asserts the City unilaterally and materially modified the terms and conditions of employment of bargaining unit employees by changing its interpretation and application of City SOP #6.¹ It argues the new prohibition is "overly broad and expressly restrains, and has the effect of restraining, employees in the exercise of protected concerted activity."

On March 12, 2014, the City filed its Answer to the Charge denying any change in the interpretation and/or application of City SOP #6. The City alleges employees are permitted to wear clothing bearing the AFSCME logo on casual days, but that clothing which includes large lettering such as "AFSCME", LOCAL 1102", "Tennessee" or "Eagles" has always been prohibited under SOP #6.

The City also expressly denies it has modified a mandatory subject of bargaining. It maintains SOP #6 is not a term or condition of employment which relates to "wages, salaries, hours, grievance procedures, and working conditions". It asserts any change to SPO #6 qualifies as an inherent managerial right upon which negotiation is not required. 19 Del.C. §1305.

¹ SOP #6, Attire, has been in effect since approximately April 13, 2010, and includes as an "Example of Inappropriate Attire": "Buttons or clothing containing explicit or graphic language or symbols." *Charge Exhibit A*.

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).

SOP #6 was attached to the Charge and the City does not dispute that it is a true and accurate copy of the policy. The City admits in its Answer that the policy was implemented on or about April 13, 2010. The City contends it has not implemented any changes in the interpretation or application of SOP #6. The pleadings raise factual issues concerning whether the policy, as applied to bargaining unit members, has been modified.

The pleadings also raise legal issues concerning whether SOP #6 and/or its application to bargaining unit members constitutes a mandatory subject of bargaining under the PERA over

which the City has 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 AFSCME'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.

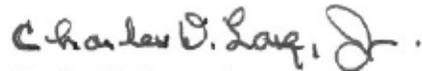
DETERMINATION

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.

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.

A hearing will be scheduled for the purpose of developing a factual record on which a determination can be made as to whether the City has violated 19 Del.C. §1307 (a)(1), (5), and/or (6), as alleged.

Dated: April 2, 2014



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