

**STATE OF DELAWARE  
PUBLIC EMPLOYMENT RELATIONS BOARD**

<b>UNIVERSITY OF DELAWARE CHAPTER OF THE</b>	:	
<b>AMERICAN ASSOCIATION OF UNIVERSITY</b>	:	
<b>PROFESSORS,</b>	:	
	:	<b>ULP No. 14-10-979</b>
Charging Party,	:	
	:	<b>PROBABLE CAUSE DETERMINATION</b>
<b>v.</b>	:	<b>AND ORDER OF DISMISSAL</b>
	:	
<b>UNIVERSITY OF DELAWARE,</b>	:	
	:	
Respondent.	:	

**BACKGROUND**

The University of Delaware Chapter of the American Association of University Professors (“AAUP”) is an employee organization within the meaning of 19 Del.C. §1302(i) and is an exclusive bargaining representative, within the meaning of 19 Del.C. §1302(j). The AAUP represents the bargaining unit of “full-time employees who are regular members of the voting faculty of the University of Delaware”. The bargaining unit does not include Deans and Department Chairpersons. *DOL Case 77.*

The University of Delaware (“University”) is a public employer within the meaning of §1302(p) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994) (“PERA”).

The AAUP and the University have a long-standing collective bargaining relationship and are parties to a current agreement which has an effective term of July 1, 2013, through June 30, 2016.

On October 17, 2014, the AAUP filed an unfair labor practice charge<sup>1</sup> with the Public Employment Relations Board (PERB) alleging conduct by the University in violation of 19 Del.C. §1307 (a)(1), (a)(3), and (a)(4), which state:

- (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.
  - (3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.
  - (4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition or complaint or has given information or testimony under this chapter.

Specifically, the Charge alleges the University, through its agents (namely the Chair of its academic Department of Finance, the Dean of the College of Business and Economics, and its General Counsel) retaliated against a tenured faculty member (a Professor of Finance and the Director of the Weinberg Center on Corporate Governance) for filing and pursuing a grievance under the negotiated collective bargaining agreement.

On November 3, 2014, the University filed its Answer to the Charge<sup>2</sup>, denying the conclusions and assertions that it had violated the PERA. The University included in its Answer New Matter asserting the Charge failed to state a claim upon which relief may be granted; that the Charge is moot because the filing of a complaint by a Department Chair against the Professor of Finance with the Faculty Senate is not an exercise of administrative or management authority by the University; that the complaint was withdrawn and Faculty Senate's inquiry closed without issuing any finding or recommendation; there was no adverse employment action taken against him; and that the allegations made against the Dean and the General Counsel fail to articulate any violation of the PERA.

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<sup>1</sup> The Charge was amended by the AAUP on December 3, 2014; and by a second amendment on January 6, 2015. This determination considers all elements of the amended charge.

<sup>2</sup> The University amended its answer and new matter in response to the AAUP's amended charges on December 12, 2014 and January 23, 2015. This determination considers all elements of the amended answers.

The AAUP filed its response to the University's New Matter on November 7, 2014 and February 19, 2015, in which it denied the factual and legal positions set forth therein.

This probable cause determination is based upon a review of the pleadings submitted in this matter.

### **DISCUSSION**

Regulation 5.6 of the Rules of the 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 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 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.

For purposes of determining whether probable cause exists to support an unfair labor practice 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. *Flowers v. DART/DTC*, ULP 04-10-453, V PERB 3179, 3182 (DE. PERB, 2004).

The standards and burdens for establishing probable cause to believe that an employer has interfered with the protected rights of an employee are well established under PERB case law:

[T]he Charging Party has the burden to establish that the employee's protected conduct was a substantial or motivating factor in the employer's adverse employment action. Once established, the burden shifts to the employer to establish the presence of a legitimate business interest which, despite the employee's protected activity would have resulted in the same employment

decision.

To satisfy its initial burden, the Charging Party must establish: (1) the employee engaged in protected activity; (2) the employer was aware of the employee's activity; and (3) the protected activity was a substantial or motivating factor for the employer's action. *Colonial Education Assn. v. Colonial School District Board of Education*, ULP 93-11-095, II PERB 1071, 1077 (1994).

The Charge alleges Professor Elson engaged in protected activity when he filed a grievance challenging his annual performance appraisal issued by the Chairperson of the Department of Finance concerning his work responsibilities.<sup>3</sup> This is the only statutorily protected activity under the PERA which is asserted in the Charge.

A Step 3 grievance decision was issued on June 13, 2014, that summarizes the grievance:

Professor Elson's grievance, filed April 21, 2014, asserts the department chair's annual appraisal violated Articles 11.3 and 11.5 of the Collective Bargaining Agreement. In particular, Professor Elson asserts that the "service" section in the chair's annual appraisal violated the Department of Finance's Merit Allocation Criteria. Professor Elson also asserts that the "teaching" section in the appraisal assigned a teaching workload that should have been assigned in the planning document, and that the teaching workload violates his letter of appointment as Director of the John L. Weinberg Center for Corporate Governance. Additionally, Professor Elson's grievance asserts that the dean inappropriately used Elson's position as Center Director and his annual appraisal to attempt to coerce him to give up his rights as a tenured faculty member. *Charge, Exhibit 1*.

The grievance was upheld in part and denied in part in the Step 3 Answer. The AAUP appealed the grievance to arbitration and it is undisputed it was scheduled to be heard on January 8, 2015.

There is nothing in the pleadings which indicates Professor Elson has been prohibited or impeded in exercising his protected right to file a grievance and to process it through the negotiated procedure. Consequently, the pleadings do not establish probable cause in support of the allegation that his right to grieve through his exclusive representative has been interfered with in any manner.

The Charge also asserts the Department Chairperson filed a complaint and a request for

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<sup>3</sup> §1303. Public employee rights.

Public employees shall have the right to:

(2) Negotiate collectively or grieve through representatives of their own choosing.

mediation with the Faculty Senate Committee on Faculty Welfare and Privileges on September 4, 2014. In her complaint, the Chairperson alleged that in his grievance, Professor Elson described her as biased because she had discussed with the University's Provost her concerns about his disruptive behavior during faculty meetings. The Chairperson requested a letter from the Provost stating there was a sound basis for her concern be placed in her and Professor Elson's personnel files and that Professor Elson be explicitly "prohibited from ever taking part, in any way, formal or informal, in any evaluation of [the Chairperson] or in any decision concerning [her] status, position or for any other reason." *Charge Exhibit 2.*

The parties agree that the Faculty Senate was created to resolve disputes between faculty members and that it has jurisdiction over complaints between faculty who hold administrative positions and those who do not. The Faculty Senate Committee can issue a decision in response to a complaint which can form the basis for imposition of discipline by the University.

The pleadings establish that Professor Elson was provided with a copy of the Department Chairperson's November 6, 2014 notification withdrawing her complaint to the Faculty Senate. *Charge Exhibit 5.* Also attached to the Charge is a copy of a November 11, 2014 confirmation to Professor Elson that the Faculty Senate Committee on Faculty Welfare and Privileges that the complaint had been withdrawn and that "the matter is now closed."

There is no assertion that a decision or recommendation was issued by the Faculty Senate Committee or that any documentation was placed in either the Chairperson's or Professor Elson's personnel files. The pleadings do not support Professor Elson's conclusion that the Department Chairperson "achieved her requested remedy", i.e., that he be precluded from participating in any future decision concerning her status or position at the University. Even when viewed in a light most favorable to Professor Elson, the pleadings do not provide probable cause to believe that the filing or subsequent dismissal of the Chairperson's complaint may have interfered with Professor Elson's rights under the PERA.

The Charge asserts that a letter issued by the University's General Counsel to the Department Chairperson on October 22, 2014 constitutes retaliation against Professor Elson for filing and pursuing a grievance alleging bias against his Department Chair. The letter issued by the General Counsel is addressed only to the Department Chairperson (with no indication that copies were provided to anyone else) and states the investigation was initiated in late 2013. The April 21, 2014 grievance that Professor Elson asserts this letter retaliates for was not filed until at least four months later. Further, the letter states that "Professor Elson was among those whom we interviewed," contrary to ¶15 of the Charge which asserts he did not have the opportunity to defend himself. There is no nexus provided which links this letter to the Department Chairperson and the AAUP's charge of retaliation or interference with protected rights under the PERA.

The Charge asserts the University "... has jeopardized the future of the Weinberg Center and Professor Elson's status as its Director in retaliation for Professor Elson's processing of his grievance." *Charge* ¶29. It alleges the Dean of the College of Business and Economics modified the budget for the Center to require a greater proportion of the Director's salary be paid by the Center and that the 2014 fundraising brochure for the College does not seek donations for the Weinberg Center.

In its Answer to the Amended Charge, the University provided documentation which clearly indicates that the process for modifying the budgeting process for the Weinberg Center was formally communicated to Professor Elson not later than December 2013 and reiterated again in February, 2014. *Answer Exhibits 3-C and 3-D*. Both of these communications predate the processing of Professor Elson's grievance, which the AAUP asserts was the basis for retaliating against him in modifying the Center's budget.

For this reason, the Charge fails to establish probable cause to believe that the University's changes in the budgeting process for the Weinberg Center constitutes retaliation

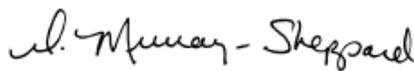
against Professor Elson for filing a grievance in April, 2014, as alleged.

**DECISION**

Considered in a light most favorable to the AAUP, the pleadings are not sufficient to establish that the University may have violated 19 Del.C. §1307 (a)(1), (a)(3) and/or (a)(4), as alleged. The pleadings are not sufficient to support the conclusion that the University's knowledge that Professor Elson had engaged in protected activity under the PERA by filing and pursuing a grievance was a substantial or motivating factor in any adverse employment action.

**WHEREFORE**, this unfair labor practice charge is dismissed in its entirety, without prejudice.

DATE: April 13, 2015



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