**STATE OF DELAWARE**

**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| **AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 81, LOCAL 3911, AFL-CIO,** | : | |
| Charging Party, | : | Unfair Labor Practice Charge **No. 17-07-1113** |
| **V.** | : | **DECISION ON MOTION FOR PRELIMINARY INJUNCTION** |
| **NEW CASTLE COUNTY, DELAWARE,** | : | |
| Respondent. | : | |

**Appearances**

Claiborne S. Newlin, Esq., Markowitz & Richman, for AFSCME

Laura T. Hay, Esq., Assistant County Solicitor, for New Castle County

The American Federation of State, County and Municipal Employees, Council 81, (AFSCME), the Charging Party, is an employee organization within the meaning of §1302(i) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (PERA). By and though its affiliated Local 3911, it is the exclusive bargaining representative of a unit of emergency services personnel employed by New Castle County, within the meaning of 19 Del.C. 1302(j). New Castle County, Delaware, (the County), the Respondent to this Charge, is a public employer within the meaning of 19 Del.C. §1302(p).

On July 31, 2017, AFSCME filed an unfair labor practice charge alleging conduct by the County in violation of 19 Del.C. §1307(a)(1), (a)(2) and (a)(5).[1] The County filed its Answer to

[1] (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:

the Charge on or about August 21, 2017. Thereafter, AFSCME amended its Charge on August 25, 2017, and the County filed its Amended Answer (including affirmative defenses and new matter) on September 27, 2017. AFSCME filed its response to the new matter on October 9, 2017.

The Charge, as amended, alleges the County bargained in bad faith over an employee return to work agreement by attempting to add new conditions after executing a Last Chance Agreement with AFSCME, then by-passing AFSCME and engaging in direct dealing with the employee, coercing the employee to enter into a second memorandum of understanding under which the employee gives up statutory and contractual rights, and by refusing to provide AFSCME with information which is necessary and relevant to processing the related grievance.

The County denies the substantive allegations of the Charge. The pleadings are currently being reviewed to determine whether probable cause exists to believe that the alleged unfair labor practice(s) was committed.

As part of its remedy, AFSCME requested preliminary relief under §1308 (c) of the PERA, which states:

> (c) In addition to the powers granted by this section, the Board shall have the power, at any time during proceedings authorized by this section, to issue orders providing such temporary or preliminary relief as the Board deems just and proper subject to the limitations of subsection (b) of this section.

Specifically, AFSCME asserts:

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*(cont.)* (1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.

(2) Dominate, interfere with or assist in the formation, existence or administration of any labor organization.

(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.

> Paragraph 10 of the Memorandum of Agreement *(MOA)*[2] prevents X[3] from being "involved in" the unfair labor practice proceedings over the MOA. Under threat of possible discipline or other adverse action for violating the MOA, X is barred from consulting with union representatives, providing documents and/or testifying in a hearing. Consequently Local 3911 requests that PERB declare Paragraph 10 of the MOA void and unenforceable and prohibit NCC from taking any action to enforce it or to retaliate against X if he violates it.

Paragraph 10 of the executed Memorandum of Agreement between the County and Bargaining Unit Member X, states, "X agrees not to file or be involved in any grievances or legal actions against the County or its representatives with respect to this Memorandum of Agreement."

The parties were requested and provided expedited written argument concerning AFSCME's request for preliminary injunctive relief. This interim decision is limited to consideration of that request.

**DISCUSSION**

It is well established Delaware law that to be successful a request for preliminary injunctive relief must satisfy two requirements. First, the charging party must establish that there is a reasonable probability that it will ultimately prevail on the merits of the dispute; and, secondly, that it will suffer irreparable harm if the requested injunctive relief is not granted prior to a final determination on the merits. *Gimbel v. Signal Companies, Inc.*, 316 A.2d 599, (Del.Ch., 1974). Failure to establish either element precludes the granting of the relief requested. *New Castle County Vocational Technical Education Assn. v. New Castle County Vocational Technical School*

[2] Both parties refer to the document executed by the County and Employee X on May 19, 2017, as a Memorandum of Agreement or an "MOA". The document itself, however, is entitled, "Memorandum of Understanding between X, Paramedic, and New Castle County", which would normally be referred to as an "MOU". *NCC Answer to Amended Charge,* Exhibit A. For purposes of this decision, I will adopt the parties' shorthand of referring to the document as an "MOA".

[3] The bargaining unit employee has been identified by the parties as "X" for purposes of these proceedings.

*District*, ULP 85-05-025, I PERB 257, 260 (1988).

AFSCME requests PERB enjoin the County from enforcing ¶10 of the Memorandum of Agreement because it precludes employee X from any "involvement" in the two grievances the union has filed over the MOA and the instant unfair labor practice charge. It further argues that ¶10 violates X's statutory rights to "organize, join, form or assist any labor organization" and to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection…" 19 Del.C. §1303 (1) and (3).

AFSCME asserts it is likely to prevail on the merits of the charge because the MOA is an unlawful agreement and because ¶10 illegally intrudes upon X's protected right to engage in concerted activity. AFSCME also argues ¶10 causes irreparable harm because the union is unable to investigate and prosecute the two pending grievances filed which contest the validity of the MOA, as well as this unfair labor practice charge.

The County argues AFSCME has failed to meet either requirement for the granting of preliminary injunctive relief. It asserts AFSCME's claim that it is likely to prevail on the merits of the charge is speculative and based only on conclusory statements without basis in fact. It also argues AFSCME has failed to establish what, if any, irreparable harm will result if the injunction is not granted. It notes the two grievances AFSCME argues it is unable to prosecute have already been heard and processed through Step 2 of the grievance procedure. Further it notes that AFSCME did not request injunctive relief until more than three months after the grievances were filed.

AFSCME is correct in its assertions that the National Labor Relations Board has long held that employer interference with the protected rights of employees to engage in concerted activity for their mutual protection, including creating impediments to using the grievance procedure,

constitutes statutory violation(s). The Delaware PERB has followed the guidance of this decisional law. *Donahue v. City of Wilmington,* ULP 08-11-637, VI PERB 4123, 4128 (2008); *Caesar Rodney Education Assn. v. Bd. of Education*, ULP 02-06-360, IV PERB 2729, 2733 (PERB Decision on Review, 2002); affirmed C.A. No. 1549-K, IV PERB 2933 (Chan.Ct., 2003); *AFSCME Local 3109 v. New Castle County*, ULP 11-07-819, VII PERB 5141, 5145 (2011). Delaware Courts and the PERB have also established a substantial line of decisions under the PERA concerning an employer's duty to provide information to the union which is reasonably related to the union's role as the exclusive bargaining representative to investigate and process grievances. *NCCEA/DSEA/NEA v. Brandywine School District*, ULP 85-06-005, I PERB 131, 149 (1986); *Bd. of Education of Colonial School District v. Colonial Education Assn., DSEA/NEA*, CA No. 14383, II PERB 1343 (Del.Chan.,1996), *aff'd Colonial Education Assn. v. Bd. of Education*, 685 A.2d 361, III PERB 1519 (Del., 1996); *AAUP v. DSU*, Del. PERB., ULP 95-10-159, III PERB 2177 (Decision on Remand, 2001); *Delaware Correctional Officers Association v. Delaware Dept. of Correction*, ULP No. 00-07-286, III PERB 2209, 2214 (2001), *AFSCME Locals 1007, 1267 and 2888 v. DSU*, ULP 10-04-739, VII PERB 4693, 4705 (2010).

The parameters of irreparable harm are also well established and circumscribed by guidance provided by the Delaware Court of Chancery:

> Substantial and positive injury must also be made to appear to the satisfaction of a court of equity before it will grant an injunction. An injunction, being the strong arm of equity, should never be granted except in a clear case of irreparable injury, and with full conviction on the part of the court of its urgent necessity. *State v. DSEA*, 326 A.2d 868, 872, 1974 Del.Ch.
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> …
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> A preliminary injunction will issue when the Court of Chancery is convinced that, without it, serious injury of a nature calling for equitable relief will probably be suffered by the plaintiffs before final judgment can be entered. *Bayard v. Martin*, 101 A.2d 334. Relief will not be granted merely to allay the fears or apprehension of the plaintiff where there is no showing or reasonable ground for believing that the defendant is about to commit the wrongs

> complained of or where it appears that he is without the opportunity or the intention of so doing. High on Injunctions, § 22, p. 37… The present absence of an imminent threat as shown on the record also means a preliminary injunction is not necessary to prevent irreparable harm. *State v. Delaware State Educational Assn.,* 326 A.2d 868, 876, 1974 Del. Ch.

As in *State v. DSEA* (Supra.), on the face of the record before me, there does not appear to be any imminent threat of irreparable. The County explicitly states in its Answer to ¶129 of the Amended Charge, "… [T]he MOU does not address X's authority to provide Charging Party with documents, nor does it contain any reference to discipline." On its face, this statement provides access to the information and protection of X which AFSCME seeks. Further, if AFSCME believes X's testimony is necessary to establish the facts underlying its charge, it may subpoena him to testify before PERB. AFSCME has also, in the past, evidenced its knowledge and effective use of PERB's subpoena powers to secure documents.

Should the County consider disciplining X for cooperating with his exclusive bargaining representative in preparing for and prosecuting this charge, or the grievances it will be well served to review the statute. The statute explicitly protects the rights of public employees to organize, join, form or assist an employee organization[4] and to grieve through representatives of their choosing. 19 Del.C. §1303. Public employers are specifically prohibited from interfering with, restraining or coercing employees in the exercise of these and other statutory rights. The employer is also prohibited from discharging or otherwise discriminating against an employee because the employee has signed or filed an affidavit, petition or complaint or has given information or testimony under this chapter. 19 Del.C. §1307 (a)(1) and (4).

Consideration of irreparable harm requires a balancing of the reasonable probability the

[4] "Employee organization" means an organization which admits to membership employees of a public employer and which has as a purpose the representation of such employees in collective bargaining, and includes any person acting as an officer, representative or agent of said organization. 19 Del.C. §1302(i).

harm that will be suffered by the charging party during the period in which the charge is being processed (should the charging party prevail) against the harm which would accrue to the respondent if the relief is granted preliminarily and the charging party then fails to prevail. *Appoquinimink Education Assn. v. Bd. of Education*, ULP 98-09-243, III PERB 1781, 1783 (Interim Decision on Request for Temporary and Injunctive Relief, 1998).

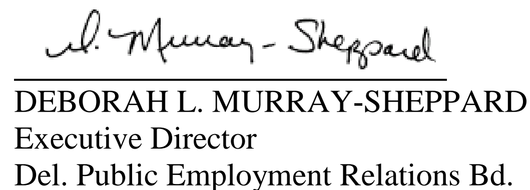
Based on the facts asserted in the pleadings and considering the arguments of the parties as they relate to the request for injunctive relief, I am unable to conclude that AFSCME has met the requisite standard to establish there is an imminent threat of irreparable injury to either X or to the union. Having so determined, it is unnecessary to consider the probability of success on the merits of the charge, as both conditions must be met.

For these reasons, the request for preliminary relief is denied.

**WHEREFORE,** AFSCME's request for injunctive relief is denied.

**IT IS SO ORDERED.**

DATE: October 10, 2017



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