STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 81, LOCAL 218, AFL-CIO,	)	
Charging Party,	)	**ULP No. 16-06-1068**
v.	)	**Probable Cause Determination**
COLONIAL SCHOOL DISTRICT,	)	
Respondent.	)	

BACKGROUND

Colonial School District (District) is a public school employer within the meaning of §1302(p) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (PERA).[1]

The American Federation of State, County and Municipal Employees, Council 81, AFL-CIO, (AFSCME) is an employee organization within the meaning of 19 Del.C. §1302(i). By and through its affiliated Local 218, AFSCME is the exclusive representative of a bargaining unit of custodial, maintenance, grounds and courier employees of the District, within the meaning of §1302(j). DOL Case 143.

At all times relevant to this charge, the District and AFSCME were parties to a

[1] PERB takes administrative notice that at no time did AFSCME, as the certified exclusive representative of a designated appropriate bargaining unit of District employees, inform the Secretary of Labor, the Executive Director of this Board, and the public school employer in writing, by certified mail, that it elected coverage under the Public School Employment Relations Act, consistent with the requirements of 14 Del.C. §4002(p). Consistent with the holding *AFSCME Local 218 v. Christina School District* (ULP 15-03-994, IX PERB 7031, 7035 (2018)), this case will be decided under the Public Employment Relations Act (19 Del.C. Chapter 13), and not under the Public School Employment Relations Act (14 Del.C. Chapter 40).

collective bargaining agreement. The applicable agreement had a term of July 1, 2014 through July 1, 2017.

On or about June 13, 2016, AFCME filed the instant unfair labor practice charge alleging that the District violated §1307(a)(1), (a)(5) and (a)(6), which state:

§1307. Unfair Labor Practices

> (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.

AFSCME alleges that in December, 2015, the District closed for a two week period around the Christmas holiday and required bargaining unit employees to use four (4) days of accrued vacation during the period. AFSCME requested to bargain concerning this change, but the District declined. AFSCME concludes that by unilaterally changing the method by which bargaining unit employees select vacation, the District has failed or refused to bargain collectively concerning a mandatory subject of bargaining, in violation of its obligations under the statute. It requests PERB direct the District to "make the employees whole who suffered a loss as a result of the District's unilateral action and repudiation of the collective bargaining agreement."

On or about June 27, 2016, the District filed its Answer to the Charge, in which it states it was closed for six (6) working days around the Christmas holiday in 2015. It admits that bargaining unit employees were required to use four (4) vacation days during this period. The District asserts bargaining unit employees were notified in writing that

they would be required to use four vacation days over the holiday period on August 17 and 27, 2015, and again on December 11, 2015. It denies AFSCME requested to bargain, until one of its representatives telephoned the District on December 16, 2015, just two days prior to the holiday break.

Under New Matter, the District asserts 1) AFSCME failed to follow the negotiated grievance procedure found in Article 4 of the parties' collective bargaining agreement; 2) the management rights provisions of the negotiated agreement found in §6:12 and §6:13 "permit[s] the District to require the members of the Union to take vacation in lieu of working days"; and 3) Article 10, Vacations, does not address the use of vacation leave on days the District is closed.

AFSCME filed its response to the District's new matter on July 8, 2016, denying the assertions contained therein.

This probable cause determination results from a review of the pleadings.

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 shall 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).

On their face, the pleadings provide a sufficient basis to conclude that an unfair labor practice may have occurred as the issue raised concerns both compensation (i.e., paid time off) and hours of work. The pleadings identify issues of fact, including the actual number of days involved, prior notification of the change to AFSCME and the employees, the specifics of AFSCME's request to negotiate, and the alleged refusal by the District to engage in negotiations.

The pleadings also raise legal issues, including whether the District failed or refused to bargain with AFSCME over a mandatory subject of bargaining; whether the District's requirement that bargaining unit employees use four (4) days of their earned paid time off (vacation time) could or should have been submitted in whole or in part to the parties' negotiated grievance procedure for resolution; and/or whether AFSCME waived any right to negotiate concerning the mandated use of accrued vacation days by agreeing to include §6:12 and §6:13 in the collective bargaining agreement.

The pleadings raise both factual and legal issues. To prevail in this matter, AFSCME must establish by a preponderance of the evidence that the District has implemented a unilateral change in a mandatory subject of bargaining, without notice and the opportunity to negotiate, in violation of its statutory obligations.

DETERMINATION

Consistent with the foregoing discussion, the pleadings constitute reasonable cause to believe that an unfair labor practice may have occurred, when considered in a light most favorable to the Charging Party.

A prehearing conference will be promptly scheduled to discuss the next steps in processing this Charge.

IT IS SO ORDERED.

DATE: August 23, 2018

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