STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 81, AFL-CIO,	:	
Charging Party,	:	**Unfair Labor Practice Charge No. 17-08-1114**
v.	:	**PROBABLE CAUSE DETERMINATION**
WILMINGTON INSTITUTE LIBRARY,	:	
Respondent.	:	

The American Federation of State, County and Municipal Employees, Council 81, AFL-CIO, (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).

The Wilmington Institute Library (the Library), the Respondent to this Charge, operates branches of a public library in Wilmington, Delaware. AFSCME asserts it is a public employer within the meaning of 19 Del.C. §1302(p). The Library asserts it is a private, non-profit employer which does not meet the criteria of a public employer under the PERA.

On August 1, 2017, AFSCME filed an unfair labor practice charge alleging conduct by the Library in violation of 19 Del.C. §1307(a)(1) and (a)(5), 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.
>
> (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.

Specifically, the Charge alleges that the Library has violated its obligations under the statute and

interfered with employee rights by refusing to bargain with AFSCME over the terms and conditions of a successor agreement; by unilaterally ceasing to deduct dues from the wages of bargaining unit employees; and by withdrawing recognition of AFSCME as the exclusive bargaining representative of Library employees. AFSCME requests the Library be directed to recognize it as the exclusive bargaining representative, refrain from making unilateral changes, make AFSCME and bargaining unit employees whole for any unilateral changes, and negotiate a successor collective bargaining agreement.

On or about August 11, 2017, the Library filed its Answer and New Matter in response to the Charge. While admitting most of the historical events in the Charge and providing documentation relating thereto, it denies the Library is a public employer and specifically denied the governing structure and funding assertions set forth in ¶15 and ¶16 of the Charge. The Library also denies the legal conclusions put forth by AFSCME, including that it violated the PERA.

Under New Matter, the Library avers employees in the bargaining unit at the Library "… are not public employees, but rather are private sector employees, employed by a non-profit employer." It asserts the certification of AFSCME as the exclusive bargaining representative of Library Assistants I, II, and III, issued by the Delaware Dept. of Labor in 1976 is invalid "… because Library employees are not now, and never have been, public employees under the applicable Delaware law." The Library requests the Charge be dismissed in its entirety arguing:

> The Public Employment Relations Board lacks authority to certify the Union as the collective bargaining representative of a bargaining unit including Respondent's employees because Library employees are not public employees within the meaning of the applicable Delaware law, and/or to find that the Library committed an unfair labor practice. *New Matter ¶10.*

On or about August 22, 2017, AFSCME filed its Response to the New Matter included in the Library's Answer. It admits that the PERA applies only to "public employees" under the statutes administered by PERB. It denies all the legal conclusions set forth in the Library's New Matter.

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.
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> (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 pleadings contain a documentary record which is not disputed. There are a few factual issues which may be relevant to the decision in this matter on which the parties do not agree. They include the governing and financial structure of the Library, and the source(s) of compensation and benefits of its employees.

The preliminary issue raised by this Charge is whether the Library is a public employer and thereby covered by the Public Employment Relations Act. If not, the Charge must be

dismissed in its entirety. Otherwise, upon determination that this Board has jurisdiction, the Charge can proceed to a consideration on the merits.

There are two prior cases in which the scope of the term "public employer" under the PERA has been considered. An extensive analysis, including the legislative and legal history of the PERA, is set forth in *Brotherhood of Railroad Signalmen v. Delaware Administration for Specialized Transit* (REP 95-04-125, II PERB 1139, Decision on Motion to Dismiss (1995)). In that case, PERB's Executive Director found bus drivers employed by the Delaware Administration for Specialized Transportation (DAST) were "public employees" within PERB's jurisdiction. In affirming the decision on review, the full Board opined:

> We agree, especially, with the Executive Director in his assertions that the legislative history shows that the Public Employment Relations Act was intended to expand the rights of public sector employees, that to accept DAST's argument that State agencies are removed from the scope of the PERA would remove from PERA jurisdiction the great majority of State employees, and that such removal would deprive the latter of both the expanded rights that the PERA has afforded other public sector employees and the more limited rights assured them by the PERA's predecessor since neither the latter nor the Governor's Council on Labor any longer exists.
>
> We also find highly persuasive that portion of 19 Del.C. Chapter 58 that defines the term "State" as "The State of Delaware and includes any State agency." *Brotherhood of Railroad Signalmen v. Delaware Administration for Specialized Transportation*, REP 95-04-125, II PERB 1187, Decision of the Board on Review of the Hearing Officer's Decision, 1995.

The meaning of "public employer" was also considered on review by the Chancery Court in 2000. In *Delaware State University v. AAUP, DSU Chapter*[1], then Vice-Chancellor Strine opined on the meaning of "public employer" under the PERA:

> … I find that the PERB correctly concluded that DSU is a "public employer" within the meaning of PERA. Apart from the plain English meaning of the term "public employer," several other considerations support this conclusion. First, DSU's highly subsidized status as a public university run by a board dominated by gubernatorial appointees and subject to legislative control favors characterizing DSU as a "state agency" – and thus a "public employer" – under PERA. In addition, it is undisputed that DSU functioned as a "public

[1] C.A. 1389-K, ULP 95-10-1159, 2000 Del.Ch. LEXIS 83, 165 LRRM 2084, III PERB 1971, 1972 (2000)

> employer" for the purpose of PERA's predecessor statute. Nothing in the PERA's legislative history indicates that the General Assembly intended to remove DSU from the coverage of Delaware's public employment relations scheme when it enacted the current Chapter 13 of Title 19. Finally, a finding that DSU was not covered by PERA would likely leave DSU and its employees outside any system of labor regulation, whether state or federal. Such a result would conflict with Delaware public policy as forcefully expressed by the General Assembly in PERA and its sister statutes – Chapter 40 of Title 14, the "Public School Employment Relations Act" (the "PSERA"), and Chapter 16 of Title 19, the "Police Officers and Firefighters Employment Relations Act" (the "POFERA").

The PERA defines a "public employer" to mean "… the State, any county of the State or any agency thereof, and/or any municipal corporation, municipality, city or town located within the State or any agency thereof, which upon the affirmative legislative act of its common council or other governing body has elected to come within the former Chapter 13 of this title or which hereafter elects to come within this chapter, or which employs 100 or more full-time employees." Whether the Library is a public employer within the meaning of 19 Del.C. §1302(p) will be determined as a preliminary matter.

DETERMINATION

For the reasons set forth herein, the question of whether the Wilmington Institute Library is a public employer within the meaning of 19 Del.C. §1302(p) will be determined as a preliminary matter. A prehearing conference will be promptly convened to discuss the method by which material factual issues may be resolved and argument received on which this determination can be made.

DATE: August 28, 2018

D. Murray-Sheppard

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