



- (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.

The Charge, as amended<sup>1</sup>, 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 (“LCA”), then by-passing AFSCME and engaging in direct dealing with Employee X, coercing Employee X to enter into a second memorandum of agreement (“MOA”) under which he 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 filed its Answer to the Amended Charge on September 27, 2017, in which it denied the allegations of the Charge. The County’s Answer also contained New Matter, including affirmative defenses. The County asserts in its new matter:

- The petition fails to state a claim for which relief can be granted.
- The rights of the exclusive representative (AFSCME Local 3911) do not apply to a May 15, 2017 discussion between Employee X and the Chief of Emergency Medical Services because it involved a matter of a personal and confidential nature, and Employee X signed a written waiver of representation.
- AFSCME lacks standing to seek relief because there was no injury to any member of the bargaining unit, nor is there any injury to the bargaining unit as a whole arising from the MOA.
- Employee X voluntarily agreed to the terms set forth in the MOA and is the only affected party.
- All of the County’s actions were performed in good faith and for legitimate business purposes.
- This charge is subject to dismissal or stay because it involves a matter of contract interpretation, which is subject to resolution under the negotiated grievance and arbitration provision of the parties’ collective bargaining agreement.

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<sup>1</sup> The Charge was amended to include additional allegations on August 25, 2017.

AFSCME filed its Response to New Matter on October 9, 2017, in which it denied this Charge is subject to dismissal or stay.

In its Amended Charge, AFSCME requested PERB grant preliminary relief under §1308 (c) of the PERA. In an interim decision issued on October 10, 2017<sup>2</sup>, the injunctive relief was denied based on the determination that AFSCME did not meet the requisite standard to establish there was an imminent threat of irreparable injury to either employee X or to the union.

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 (2004).

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<sup>2</sup> *AFSCME Local 3911 v. New Castle County*, ULP No. 17-07-1113, IX PERB 6929, 6935 (Decision on Motion for Preliminary Relief, 2017). <https://perb.delaware.gov/wp-content/uploads/sites/127/2017/07/2017-1113-ULP-Interim-decision-on-Request-for-Prelim-Relief.pdf>

The pleadings establish that AFSCME Employee X, Local 3911 and the County executed a Last Chance Agreement, in lieu of termination, for Employee X, on April 4, 2017. That agreement provided:

1. Employee X agrees that he has been afforded due process.
2. Employee X agrees that he has had or has been offered Union representation throughout the entire disciplinary process, and in connection with the execution of this Agreement.
3. Employee X acknowledges that he violated EMS General Order 2.1.3, as well as Discipline Policy #1.00, Work Rule #37.
4. Employee X understands this document constitutes a binding Last Chance Agreement for his continued County employment; and therefore, any additional violations of work rules, general orders, or policies related to the use of alcoholic beverages that warrant suspension with review for dismissal and/or dismissal will result in immediate termination with no appeal rights.
5. Employee X agrees to undergo a fitness for duty examination, to include psychological testing. Employee X understands that he must be cleared by the medical professional conducting the fitness for duty examination before he can be returned to his regular duties as a Paramedic.
6. Employee X accepts a fifteen (15) day suspension without pay for violation of Work Rule #37 and Departmental General Order 2.1.3. The suspension shall be effective March 7, 2017, through March 27, 2017; and therefore, Employee X will be paid for the days covering his absence from work between Tuesday, March 28, 2017 and Monday, April 3, 2017.
7. Employee X understands that when he returns to work on Tuesday, April 4, 2017, he will be assigned to the Emergency Medical Services Division Headquarters until he is cleared for duty by the medical professional conducting the fitness for duty examination.
8. Employee X shall submit to random alcohol-testing for a period of two (2) years until March 31, 2019. Any justifiable positive tests shall be grounds for immediate dismissal of Employee X. Said dismissal shall be non-grievable.
9. Employee X acknowledges that this Last Chance Agreement shall remain in effect and in his personnel file for a period of two (2) years from the date of execution.
10. Employee X and the Union agree that all action taken by the County with respect to the investigation and resolution of this matter was warranted, justified, non-discriminatory and lawful; therefore Employee X and the Union will not file a grievance or take any legal action against the County with respect to this matter.
11. This Agreement is in full settlement of Employee X's discipline,

grievances, claims, demands, suits, charges, causes of action, etc. against the County. Employee X and the Union hereby individually and severally release the County, it's *[sic]* officers and employees from any and all such grievances, claims, demands, suits, charges, causes of action, etc. that have been or could be brought for actions and circumstances associated to the matters relating to Employee X's discipline, dismissal, and basis thereof. The County and the Union further agree that this Agreement represents their full and complete Agreement with respect to the underlying disciplinary action, and that neither the Union nor Employee X shall seek further arbitral or judicial review of this disciplinary action or this Agreement. The Union further agrees to immediately withdraw any and all pending claims upon executing this Agreement.

12. Employee X certifies that he has carefully read, fully understands, and will comply with all provisions of this Last Chance Agreement.
13. Employee X acknowledges that he has entered into this agreement voluntarily and without compulsion, coercion, or duress from New Castle County and/or any of its representatives.
14. This settlement is made without prejudice to, and shall have no precedential effect upon the contractual rights of either party. *Exhibit A to the Charge.*

The LCA was signed by Employee X, the County's Chief Human Resources Officer ("CHRO"), the President of AFSCME Local 3911, and an AFSCME Council 81 Representative.

A fitness for duty examination was conducted by a physician on April 11, 2017. There is no dispute that the physician recommended Employee X's overtime should be monitored and that this was the only restriction placed upon Employee X's return to full duty. Employee X and AFSCME agreed that he would submit to monthly therapy sessions, which the physician also recommended.

On or about May 2, 2017, the County proposed a new Memorandum of Agreement which included additional restrictions on Employee X's employment. It is undisputed that AFSCME and Employee X filed a grievance on May 5, 2017, and that the grievance was signed by the President of AFSCME Local 3911. The grievance asserts the County failed to implement the terms of the April 4, 2017 last chance agreement when it required Employee X to continue to work a 35 hour week after he had been cleared to return to full duty on April 11, 2017. *Charge Exhibit C.*

The new MOA was signed on May 19, 2017, by Employee X, the County CHRO, and the

County Chief of Emergency Medical Services. It states, in relevant part:

5. In accordance with the medical recommendations, Employee X may return to work subject to the following: Employee X shall engage in monthly therapy sessions for the next six (6) months. Written documentation of attendance must be provided to the Chief Human Resources Officer, after each session...
6. Employee X agrees to attend follow-up fitness for duty evaluations at two (2), four (4) and six (6) months from the date of his last evaluation. The County will schedule the appointments for Employee X.
7. Until further notice by the Office of Human Resources, Employee X agrees to only work one overtime assignment during each tour of duty. This overtime limitation may be modified by EMS Chief Lawrence Tan or his designee after the first follow-up fitness for duty evaluation.
8. Employee X certifies he has carefully read, fully understands, and will comply with all provisions of this Memorandum of Agreement.
9. Employee X acknowledges that he has entered into this agreement voluntarily and without compulsion, coercion, or duress from New Castle County and/or any of its representatives.
10. Employee 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.
11. This Memorandum of Agreement is made without prejudice to, and shall have no precedential effect upon the contractual rights of either party. *NCC Answer to the Charge, Exhibit A.*

The MOA also stated in ¶4 that Employee X "... has voluntarily requested to waive his right to union representation with respect to the results of the fitness for duty examination and this Memorandum of Agreement." Following his signing of the new MOA, it is undisputed that Employee X was returned to full duty, pursuant to the limitations included in the MOA.

AFSCME was not a signatory to the May 19 MOA. It avers it was not provided with a copy of that agreement. On June 1, 2017, AFSCME file as second grievance alleging the County violated Sections 1 and 3 of the parties' collective bargaining agreement "... by seeking to bypass the union and engaging in direct dealing with the membership." The grievance demanded the rescission of agreements reached without the union's approval. *Charge Exhibit D.*

AFSCME asserts the County has violated its statutory obligations in multiple ways. Specifically it charges the County has:

- 1) Bargained in bad faith in violation of 19 Del.C. §1307(a)(1) and (a)(5) by unilaterally imposing additional conditions on Employee X's return to duty without union agreement.
- 2) Bypassed the exclusive bargaining agent in violation of 19 Del.C. §1307(a)(1) and (a)(5) by threatening Employee X with discharge if he did not sign the May MOA after the union had rejected the terms of that proposed agreement with required additional fitness for duty examinations and other non-negotiated restrictions on his right to volunteer to work overtime.
- 3) Dealt directly with a bargaining unit employee in violation of 19 Del.C. §1307(a)(1), (a)(2), and (a)(5) by requiring Employee X to limit his overtime hours in violation of the provision of the collective bargaining agreement which states overtime "shall be divided and rotated as equally as possible among other employees in the bargaining unit, in seniority order, among those qualified to perform the work." By limiting Employee X's overtime eligibility without AFSCME authorization, it asserts the County has entered into an individual agreement which conflicts with the terms of the negotiated collective bargaining agreement, interferes with the union's administration of that agreement, and violates the County's obligation to bargain in good faith.
- 4) Restrained and coerced Employee X in violation of 19 Del.C. §1307(a)(1) and his rights under the PERB by threatening to discharge him if he did not enter into a binding MOA without the consent of his exclusive bargaining representative, and coerced him to agree not to be involved in any grievances or legal actions against the County resulting from the MOA, in violation of his statutory rights.
- 5) Refused to bargain in good faith in violation of 19 Del.C. §1307(a)(1) and (a)(5) by failing and/or refusing to provide information to AFSCME which was necessary to it to adequately perform its representational obligations, specifically as those duties relate to investigating and processing grievances. AFSCME asserts the County has failed to respond to numerous

requests for information since May 4, 2017.

- 6) Interfered with an employee's protected rights under the PERA in violation of 19 Del.C. §1307(a)(1) by requiring Employee X to agree not to file or be involved in any grievances or legal actions against the County or its representatives with respect to the May 19, 2017, MOA. AFSCME asserts the County has interfered with the union's ability to prosecute grievances and unfair labor practice charges alleging the County violated the LCA, acted in bad faith, and by-passed the union by directly dealing with an employee by restricting Employee X from being involved. It also alleges the County has restricted Employee X's protected right to engage in concerted activity and participate with his exclusive bargaining representative in the filing and processing of grievances and charges.
- 7) Refused or failed to provide information to AFSCME which was necessary to investigate and process a possible grievance concerning the Employee X's return to clinical duties in violation of 19 Del.C. §1307(a)(1) and (a)(5). The Charge alleges that in response to AFSCME's June 1, 2017 request for documents relating to the negotiation of the May 19, 2017 MOA, the County directed the union to seek the documents from Employee X. AFSCME asserts the County's CHRO did so knowing that the MOA prohibited Employee X from any involvement in grievances or charges, and fully aware that providing documents to the union could subject Employee X to discipline.

The pleadings are sufficient to establish that an unfair labor practice or practices may have occurred. They raise many factual and legal questions. In order to resolve these questions, an evidentiary record must be created on which argument can be made and evaluated in order to render a decision on the merits. In order to prevail in this matter, AFSCME must establish by a preponderance of the evidence that New Castle County has engaged in conduct which violates 19 Del.C. §1307(a)(1), (a)(2), and/or (a)(5), as alleged.

**DECISION**

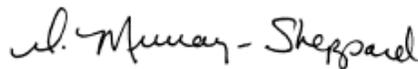
Considered in a light most favorable to the Charging Party, the pleadings are sufficient to establish that the County may have violated 19 Del.C. §1307 (a)(1), (a)(2), and/or (a)(5), as alleged. The pleadings raise both questions of fact and law which can only be resolved following the creation of a complete evidentiary record and the consideration of argument.

**WHEREFORE**, a hearing will be promptly scheduled for the purpose of developing a full and complete factual record upon which a decision can be rendered concerning:

WHETHER NEW CASTLE COUNTY INTERFERED WITH THE PROTECTED RIGHTS OF BARGAINING UNIT EMPLOYEES OR AFSCME LOCAL 3911, AND/OR VIOLATED ITS DUTY TO BARGAIN IN GOOD FAITH BY BY-PASSING THE UNION IN MODIFYING THE TERMS OF AN EMPLOYEE'S RETURN TO WORK WITHOUT UNION INVOLVEMENT, COERCING AN EMPLOYEE TO FORGO UNION REPRESENTATION AND OTHER PROTECTED RIGHTS IN ORDER TO MAINTAIN HIS EMPLOYMENT, INTERFERING WITH THE UNION'S ABILITY TO EFFECTIVELY REPRESENT THE INTEREST OF ITS MEMBERS, AND/OR BY FAILING OR REFUSING TO PROVIDE INFORMATION WHICH WAS REASONABLY RELEVANT AND NECESSARY TO THE UNION IN PERFORMING ITS REPRESENTATIONAL OBLIGATIONS IN VIOLATION OF 19 DEL.C. §1307(A)(1), (A)(2), AND/OR (A)(5).

Having found probable cause based on the pleadings, the County's assertion that the charge fails to state a claim upon which relief can be granted is denied. For the reasons set forth above, the County's request for stay of further processing or deferral of the Charge to resolution through the negotiated grievance procedure is also denied.

DATE: October 24, 2018



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