

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 81, LOCAL 3936, AFL-CIO,	:	
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	:	
Charging Party,	:	
	:	
v.	:	<u>ULP No. 18-10-1162</u>
	:	
STATE OF DELAWARE, DEPARTMENT OF STATE, DELAWARE VETERANS HOME,	:	Probable Cause Determination
	:	
	:	
Respondent.	:	

The State of Delaware (“State”) is a public employer within the meaning of 19 Del.C. §1302(p) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (PERA). The Department of State (“DOS”) is an agency of the State. The Delaware Veterans Home (“DVH”) is a division of DOS.

American Federation of State, County and Municipal Employees, AFL-CIO, (“AFSCME”) Council 81 is an employee organization within the meaning of 19 Del.C. §1302(i). By and through its affiliated Local 3936, it is the exclusive bargaining representative of State employees at the Delaware Veterans Home which includes Dietician Assistants, Certified Nursing Assistants, Licensed Practical Nurses I, II, and III, Activity Aides, Advance Practice Nurses, and Registered Nurses I, II, and III, as defined in DOL Case 176.

At all times relevant to this Charge, LaKeisha McKeithan (“McKeithan”) was employed as a Certified Nursing Assistant at DVH. Since approximately October, 2017, McKeithan has served as the Local President of AFSCME Local 3936.

On October 8, 2018, AFSCME filed an unfair labor practice charge with the

Delaware Public Employment Relations Board (“PERB”) alleging conduct by the DVH in violation of 19 Del.C. §1307(a)(1) and (a)(3), 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 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.

The Charge alleges the State violated McKeithan’s rights under the PERA when it recommended and disciplined her for representing a bargaining unit employee following the employee’s confrontation with a supervisor and also for disciplining her based upon a “surreptitious recording”. It also asserts the State denied McKeithan overtime opportunities during the pendency of an investigation and that it applied stricter enforcement of attendance rules and policies to her because she engaged in concerted protected activities in her capacity as the Local President. Finally, the Charge alleges the State unilaterally ceased deducting union dues from McKeithan’s wages in or around July/August 2018 and failed and/or refused to honor a new dues checkoff authorization form which she subsequently submitted on three separate occasions.

On October 30, 2018, the State filed an Answer to the Charge on behalf of DVH, in which it admits McKeithan received both a 1-day and a 10-day suspension for the incidents summarized in the Charge, admits she was precluded from access to overtime opportunities during an investigation when she was assigned administrative duties, and admit she was required to work up a “make-up” weekend because she “called off” on a scheduled weekend assignment. In its Answer, the State denies other factual allegations asserted in the Charge and also denies its actions with respect to the deduction of union

dues constitutes a violation of the PERA. The State denies DVH violated the PERA as AFSCME alleges.

In New Matter contained in the Answer, the State asserts the Charge fails to state a claim for which relief can be granted under the PERA and asserts the Charge should be dismissed. The State also asserts the alleged violations which relate to discipline issued to McKeithan, the denial of overtime opportunities, and the allegation that she was discriminated against by DVH because of her status as Local President are all subject to resolution through the parties' negotiated grievance procedure which is contained in their collective bargaining agreement. The State asserts PERB should defer these Charges for resolution to the grievance procedure, consistent with PERB's deferral precedent.

On November 9, 2018, AFSCME filed a Response to New Matter in which it denied the State's new matter and defenses. In response to the State's deferral assertion, AFSCME responded:

It is admitted that the collective bargaining agreement addresses the issue of discipline for just cause, and overtime assignments, but the allegations set forth in the unfair labor practice charge also include the State's retaliatory intent because of McKeithan's Unions activity, and the State's failure to timely process authorization cards, and the quelling impact that may have on Union membership, a topic not squarely addressed by the arbitration clause.

This probable cause determination is based on review of the pleadings submitted by the parties.

DISCUSSION

Rule 5.6 of the Rules and Regulations of the Delaware Public Employment Relations Board provides:

- (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 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 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*, ULP 04-10-453, V PERB 3179, 3182 (Probable Cause Determination, 2004).

PERB has held that the test for determining if an employer's unilateral action interfered with the rights of the employees and/or the exclusive bargaining representative is an objective, reasonable tendency standard.

...[T]he test is not whether any employee was actively intimidated, coerced or restrained, but whether the conduct reasonably tended to interfere with either the free exercise of employee rights or the administration of the union.¹

The pleadings in this matter are sufficient to establish probable cause to believe an unfair labor practice may have occurred.

The Delaware PERB has adopted a shifting burden analysis for evaluating allegations of union animus.² Under this shifting burden analysis, the charging party must establish that an employee engaged in activity which is protected under the PERA, that the

¹ *AFSCME 3936 v. DOS/DVH* (*Supra*, p. 5330), citing, *Sussex County Vo-Tech Teachers Assn. v. Bd. of Education*, ULP 88-01-021, I PERB 287 (1988).

² *Wilmington Firefighters Association, Local 1590 v. City of Wilmington*. ULP 93-06-085, II PERB 937, 957 (1994).

employer is/was aware that the employee engaged in that protected activity, and that the protected conduct was a substantial or motivating factor in the adverse employment action taken by the employer against the employee. Once the employee meets this prima facie standard, the burden shifts to the employer to either establish that prohibited motives played no part in its decision to take action against the employee or demonstrate that the same action would have been taken for a legitimate business reason, regardless of the whether the employee had engaged in protected activity.³

This Board has also held that where resolution of alleged statutory violations directly relate to a contractual issue which is subject to resolution through the parties' negotiated grievance and arbitration procedure, PERB may invoke a discretionary, limited deferral policy:

When parties have contractually committed themselves to agreeable procedures for resolving contractual disputes, it is prudent and reasonable for this Board to afford those procedures the full opportunity to function.⁴

The question of whether PERB should withhold its processes arises only when a charge presents a set of facts which not only allege statutory violations but also allege a breach of the collective bargaining agreement which is subject to resolution through the grievance procedure.

In the present case, AFSCME admits the collective bargaining agreement⁵ specifically addresses just cause for discipline (Article 8, Employee Accountability) and overtime assignments (Article 13, Overtime Distribution). The collective bargaining

³ *International Union of Electronic, Salaried and Machine Workers, AFL-CIO v. Kent County*, ULP 95-01-113, II PERB 1091, 1093 (1995).

⁴ *Fraternal Order of Police Lodge No. 1 v. City of Wilmington*, ULP 89-08-040, I PERB 449 (PERB, 1989), citing *Collyer Insulated Wire*, NLRB, 129 NLRB 837 (1971); *FOP Lodge 1 v. City of Wilmington*, ULP 10-11-773, VII PERB 4935 (2011)

⁵ Exhibit A to the Charge.

agreement also includes a non-discrimination provision at Article 14, which states:

The parties agree the provisions of this Agreement shall be applied to all employees without discrimination as to race, color, national origin, marital status, age, gender, sexual orientation, religion, disability, Union activity, lawful political activity, or any other protected class of individual within state or federal law.

The parties' collective bargaining agreement defines a grievance "as a dispute limited to the application or interpretation of this Agreement..." The negotiated grievance procedure culminates in submission of disputes to an arbitrator for a final and binding decision concerning application of the terms of the Agreement to the grievance.

There is unity in the issues raised in the charge which relate to the issuance of discipline to McKeithan, the application of overtime distribution, and whether the State discriminated against her based on her union activity in applying its attendance policies. The purpose of the PERA to promote collective bargaining is supported by requiring parties to abide by the process to which they have agreed to resolve disputes covered by their collective bargaining agreement. For this reason, further processing of the alleged statutory violations is stayed with respect to the issues enumerated above, pending the outcome of the pending grievances.

PERB's deferral policy is not unconditional. PERB will not defer resolution of a legitimate unfair labor practice claim unless the matter will be placed before the arbitrator for resolution. Consequently, should this agency be advised that the substance of the underlying grievances are not being resolved at arbitration, the deferral order will be rescinded and a hearing will be convened forthwith to consider the merits of the charge.

Deferral of a charge to processing through the negotiated grievance and arbitration process does not constitute a final resolution of the pending unfair labor practice charge nor deprive PERB of jurisdiction or responsibility to resolve the charge. Where deferral is ordered, the PERB retains jurisdiction over the unfair labor practice charge for the express

purpose of reconsidering the matter upon application of either party for any of the following reasons:

- 1) that the arbitration award failed to resolve the statutory claim;
- 2) that the arbitration has resulted in an award which is repugnant to the applicable statute;
- 3) that the arbitral process has been unfair; and/or
- 4) that the dispute is not being resolved by arbitration with reasonable promptness.

The charge also alleges the State interfered with McKeithan's rights and/or encouraged or discouraged membership in the unit by unilaterally stopping the deduction of union dues from her paychecks in July or August, 2018, and thereafter failing or refusing to honor a dues checkoff authorization she repeatedly submitted. The State answered that its action "was legitimate and in response to the United States Supreme Court decision in *Janus v. State of Illinois*." It further asserts its actions were taken with the full knowledge and consent of AFSCME Council 81.

This portion of the charge is purely statutory in nature and raises both factual and legal issues. When considered in a light most favorable to the charging party, the pleadings are sufficient to establish that an unfair labor practice may have occurred. Consequently, an evidentiary record must be created on which facts may be determined and arguments considered. A hearing will be scheduled for this purpose.

DETERMINATION

Considered in a light most favorable to the Charging Party, the pleadings are sufficient to establish that the State may have violated 19 Del.C. §1307 (a)(1), and/or (a)(3), as alleged. Because the resolution of the allegations which related to the issuance of discipline to McKeithan, the application of overtime distribution, and whether the State

discriminated against her based on her union activity in applying its attendance policies turn on application of the parties' collective bargaining agreement, these portions of the Charge are deferred to the negotiated grievance and arbitration procedure.

Without prejudice to either party and without deciding the merits of the controversy, PERB retains jurisdiction over these portions of the Charge for the limited purpose of entertaining a timely and appropriate motion for further consideration that:

- 1) the arbitration award failed to resolve the statutory claim;
- 2) the arbitration resulted in an award which is repugnant to the applicable statute;
- 3) the arbitral process has been unfair; and/or
- 4) the dispute is not being resolved by arbitration with reasonable promptness.

The parties are directed to notify the Public Employment Relations Board within sixty (60) days from the date of this decision as to the status of the arbitration of the underlying grievance.

The charge also alleges the State interfered with McKeithan's rights and/or encouraged or discouraged membership in the unit by unilaterally stopping the deduction of union dues from her paychecks in July or August, 2018, and thereafter failing or refusing to honor a dues checkoff authorization she repeatedly submitted. This portion of the raises both questions of fact and law which require the creation of a complete evidentiary record and the consideration of argument.

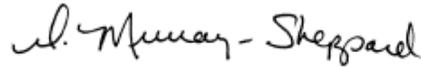
WHEREFORE, a hearing will be scheduled for the purpose of developing a full and complete factual record upon which as decision can be rendered concerning:

WHETHER THE DOS/DVH INTERFERED WITH THE PROTECTED RIGHTS OF EMPLOYEES BECAUSE OF THE EXERCISE OF ANY RIGHT GUARANTEED BY THE PERA OR ENCOURAGED OR DISCOURAGED MEMBERSHIP IN THE UNION BY DISCRIMINATION IN VIOLATION OF 19 DEL.C. §1307(A)(1)

AND/OR (1)(3) WHEN IT DISCONTINUED THE DEDUCTION OF UNION DUES FROM THE LOCAL PRESIDENT'S WAGES AND FAILED OR REFUSED TO HONOR A DUES CHECKOFF AUTHORIZATION WHICH WAS SUBMITTED TO DVH MULTIPLE TIMES, AS ALLEGED.

Having found probable cause based on the pleadings, the State's assertion that the charge fails to state a claim upon which relief can be granted is denied.

DATE: December 31, 2018



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