STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 81, LOCAL 1007, AFL-CIO	:	
	:	**ULP No. 18-10-1163**
Charging Party,	:	
v.	:	**Probable Cause Determination**
DELAWARE STATE UNIVERSITY,	:	
Respondent.	:	

Delaware State University ("DSU" or "University") 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 American Federation of State, County and Municipal Employees, Council 81, AFL-CIO, through its affiliated Local 1007 ("AFSCME" or "Union") is an employee organization within the meaning of 19 Del.C. §1302(i). AFSCME is the exclusive bargaining representative of a unit of DSU Clerical/Technical employees as defined in DOL Case 116, within the meaning of 19 Del.C.§1302(j).

DSU and AFSCME are parties to a collective bargaining agreement which has a term of July 1, 2008 through June 30, 2012. There is no dispute that the terms of this agreement are and were applicable at all times relevant to this unfair labor practice proceeding.

On or about October 11, 2018, AFSCME filed an unfair labor practice charge ("Charge") which alleged DSU violated 19 Del.C. §1307 (a)(1), (3), (5), and/or (6), Unfair

labor practices. Those sections of the PERA 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.
>
> (3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.
>
> (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.

The Charge alleges DSU reclassified bargaining unit positions and required incumbent employees to apply for the new positions in violation of the employees' rights to engage in protected activity without interference or coercion. Further, the Charge alleges DSU also removed the reclassified positions from the bargaining unit, in violation of its duty to bargain in good faith and in a manner which discourages membership in the union.

AFSCME also charges DSU, through direct communication with bargaining unit employees, instructed union members as to how to revoke their union membership. By these actions, AFSCME alleges DSU interfered with employees' protected rights under the PERA.

On November 7, 2018, DSU filed its Answer in which it admitted many of the facts but denied the allegations in the Charge that it had violated its statutory obligations. DSU denies the parties have been in negotiations for a successor agreement, asserting AFSCME had only agreed to meet intermittently and "has made no serious effort to come to an agreement with respect to a new collective bargaining agreement". It alleges the University

advised AFSCME on multiple occasions of the need to reclassify positions in its Financial Aid Office in order to comply with federal standards; AFSCME, however, declined to provide a timely response. It also asserts the language in its letter to bargaining unit members concerning "Union Security Dues Check-off Requirements" was reviewed and agreed to by AFSCME's representatives during a September 12, 2018 meeting.

DSU's Answer included affirmative defenses, including that the management rights clause (Article II) of the parties' collective bargaining agreement specifically reserves to the University the right to create new positions. The collective bargaining agreement also recognizes the University's right to create new positions in Article XXVI, Classification Changes and New Jobs, in which §26.2 limits the union's opportunity to bargain the wage rate for new positions.

The University also asserts that the October 5, 2018 Memorandum to union employees was simply an effort to advise employees of the impact of the U.S. Supreme Court's decision in *Janus v. AFSCME Council 31*[1], because it created a conflict with §1.2 and §1.3 of the parties' collective bargaining agreement. It alleges the communication, "… informs the employees of their rights under the new legal regime, and how DSU would act to honor those rights." The University avers the content of the memorandum was discussed with AFSCME representatives before it was sent.

On November 19, 2018, AFSCME filed a response to the University's New Matter in which it denied all of the affirmative defenses asserted by the University. It does admit that the fair share fee provisions of the collective bargaining agreement are no longer enforceable.

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

[1] 138 S. Ct. 2448

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).

The PERA requires a Charging Party to allege facts in the Charge with sufficient specificity so as to first, allow the Respondent(s) to provide an appropriate answer and second, to provide facts on which the PERB can conclude there is a sufficient basis on which to continue to process the charge. The Charge must also explicitly link the factual allegations to the specific statutory provisions alleged to have been violated. The burden initially rests on the Charging Party to provide facts which support the charge. *Sonja*

Taylor-Bray v. DSCYF, ULP 09-11-716, VIII PERB 4633, 4636 (2010).

AFSCME asserts the University violated 19 Del.C. §1307(a)(1), (3), (5), and/or (6) by reclassifying bargaining unit positions without negotiations, by requiring incumbents in the positions which were reclassified to apply for the new positions, and by not including the new positions in the bargaining unit. Although AFSCME makes no specific allegations to support its charge that the University violated §1307(a)(6) of the PERA, it is essentially a derivative charge that the employer has failed or refused to comply with a provision of the statute or with a PERB rule or regulation.

In order to find a potential violation of §1307(a)(5), the charge must allege the employer has failed or refused to negotiate with respect to a mandatory subject of bargaining. Public employer rights, 19 Del.C. §1305, states, "A public employer is not required to engage in collective bargaining on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion or policy as … its standards of services… the organizational structure and staffing levels and the selection and direction of personnel." Creating, classifying and/or reclassifying positions relate directly to the employer's right to control its organizational structure and staffing levels.

On its face, the Charge fails to provide a factual basis on which it might be concluded that the University has failed or refused to bargain in good faith concerning a mandatory subject of bargaining or that it has interfered with employee rights or encouraged or discouraged membership in AFSCME by exercising its rights to reclassify bargaining unit positions.

The parties have negotiated procedures to be followed when the University exercises its inherent managerial right to change or consolidate job classifications and/or to create new classifications in Article XXVI, Classification Changes and New Jobs. This

negotiated provision establishes AFSCME's limited role in negotiating wage rates for new positions which fall within the bargaining unit. The negotiated grievance procedure is the appropriate forum for resolving disputes concerning the application or interpretation of the collective bargaining agreement.[2] If AFSCME believes the University has violated Article XXVI of the collective bargaining agreement, its recourse is to file a grievance. The fact that this provision is included in the collective bargaining agreement does not convert the creation of new positions (through reclassification or other means) to a mandatory subject of bargaining under the PERA.

The collective bargaining agreement also includes provisions related to the filling of position vacancies in Articles VI and VIII. These provisions are also enforceable through the negotiated grievance procedure. The unfair labor practice forum is not an alternative to the negotiated grievance procedure for resolving disputes which have their genesis in the provisions of the collective bargaining agreement.

The unfair labor practice forum is also not an alternative to representation proceedings under the PERA. Where a new position is created which the exclusive bargaining representative believes is or should be included in the existing bargaining unit, the union may file either a clarification or a modification petition to determine whether the new position fits within the existing bargaining unit definition or shares a community of interest with other bargaining unit positions, respectively.

For these reasons, the pleadings are not sufficient to establish probable cause to believe the University may have violated 19 Del.C. §1307(a)(1), (3), (5), and/or (6) as alleged, by reclassifying bargaining unit positions, requiring incumbents to apply for new positions, and/or not including the new position(s) in the bargaining unit.

[2] *IAFF Local 1590 v. City of Wilmington*, ULP 13-04-895, VIII PERB 6109, 6114 (2014).

The charge also alleges the University interfered with rights of bargaining unit employees and AFSCME as the exclusive bargaining representative, and/or encouraged or discouraged membership in the union by communicating directly with bargaining unit employees, instructing them on how to revoke their union membership. The University responded that its action was legitimate and in response to the United States Supreme Court decision in *Janus* and that its communication was discussed with AFSCME before it was sent.

This portion of the charge is purely statutory in nature and raises both factual and legal questions. 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.

To prevail, AFSCME must establish by a preponderance of the evidence that the University violated the statute, as alleged, when it issued the "Union Security Dues Check-off Requirements" memorandum to all bargaining unit employees on October 5, 2018.

DETERMINATION

Considered in a light most favorable to the Charging Party, the pleadings are not sufficient to establish that the University may have violated 19 Del.C. §1307 (a)(1), (3), (5), and/or (6) as alleged, by reclassifying bargaining unit positions; requiring incumbents from the prior positions to apply for the new, reclassified positions; and/or not including the new, reclassified positions in the existing bargaining unit. Those allegations are dismissed.

The charge also alleges the University interfered with bargaining unit employees'

rights and/or encouraged or discouraged membership in the unit by communicating directly with bargaining unit employees, instructing them as to how to revoke their union membership. This portion of the charge 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 DELAWARE STATE UNIVERSITY 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), (A)(3) AND/OR (A)(6) WHEN IT ISSUED A MEMORANDUM TO ALL BARGAINING UNIT EMPLOYEES ENTITLED, "UNION SECURITY DUES CHECK-OFF REQUIREMENTS".

DATE: January 29, 2019

D. Murray-Sheppard

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