

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY	:	
AND MUNICIPAL EMPLOYEES, COUNCIL 81,	:	
LOCAL 3615, AFL-CIO,	:	
	:	Unfair Labor Practice Charge
Charging Party,	:	<u>No. 18-11-1168</u>
	:	
v.	:	PROBABLE CAUSE DETERMINATION
	:	
CITY OF NEW CASTLE, DELAWARE,	:	
	:	
Respondent.	:	

The City of New Castle, Delaware (“City”) 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).

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 3615, it is the exclusive bargaining representative of a bargaining unit of City of New Castle employees which is defined to include all full-time and part-time clerical, fiscal, administrative and public works employees (excluding supervisory and confidential positions within the meaning of 19 Del.C. Chapter 13))¹ as certified on April 27, 1999. DOL Case 212

On November 27, 2018, AFSCME filed an unfair labor practice charge with the Delaware Public Employment Relations Board (“PERB”) alleging conduct by the City in

¹ *City of New Castle, Delaware & AFSCME Council 81*, REP. 98-12-250, III PERB 1843 (1999).

violation of 19 Del.C. §1307(a)(1) and (a)(3), which provide:

- (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 that the City terminated a bargaining unit employee (identified for purposes of this Probable Cause Determination as “KM”) because she, through AFSCME, filed a grievance challenging her rate of pay in August, 2018. AFSCME is seeking KM’s reinstatement to her prior position and that she be made whole for all lost wages and benefits.

On December 5, 2018, the City filed its Answer to the Charge admitting the facts as they relate to KM’s employment. In new matter included in its Answer, the City asserts facts and legal positions concerning whether KM was a bargaining unit employee covered by the collective bargaining agreement and whether she was entitled to a wage increase, thereunder. The City also asserts affirmative defenses including that KM’s termination was performance based and occurred during the probationary period of her City employment; that AFSCME denied during the processing of the grievance that it was based on KM; denying that the City in any way retaliated against KM when it terminated her; and asserting the termination was an exercise of the City’s managerial rights both under the collective bargaining agreement and 19 Del.C. §1305, Employer rights. For these reasons, the City requests PERB dismiss the Charge.

AFSCME filed its response to the City’s New Matter on December 19, 2018, in

which it denied the new substantive facts and legal conclusions included therein.

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).

The Charge alleges the City engaged in conduct which interfered with, restrained or coerced KM because she exercised her right to engage in protected concerted activity and/or encouraged or discouraged membership in AFSCME LU 3615 by discrimination in regard to hiring, tenure or other terms and conditions of employment when she was

terminated.

Employee rights under the PERA are defined in §1303 and include the right to:

- (1) Organize, form, join or assist any labor organization except to the extent that such right may be affected by a collectively bargained agreement requiring the payment of a service fee as a condition of employment.
- (2) Negotiate collectively or grieve through representatives of their choosing.
- (3) Engage in other concerted activities for the purpose of collectively bargaining or other mutual aid or protection insofar as any such activity is not prohibited by this chapter or any other law of the State.
- (4) Be represented by their exclusive representative, if any, without discrimination. 19 *Del.C.* §1303.

The Delaware PERB has adopted a shifting burden analysis for evaluating allegations of animus in *Wilmington Firefighters Association, Local 1590 v. City of Wilmington*.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 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 charging party 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 whether the employee had engaged in protected activity.³

The pleadings in this matter are sufficient to establish probable cause to believe an

² ULP 93-06-085, II PERB 937, 957 (1994).

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

unfair labor practice may have occurred. It will ultimately be AFSCME's burden to establish by a preponderance of the evidence that the City violated the Public Employment Relations Act, as alleged.

DETERMINATION

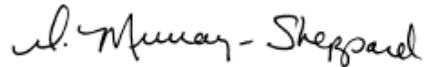
Considered in a light most favorable to the Charging Party, the pleadings are sufficient to establish that the City may have violated 19 Del.C. §1307 (a)(1) and/or (a)(3), as alleged. The pleadings raise both questions of fact and law which can only be resolved following the creation of a complete evidentiary 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 as decision can be rendered concerning:

WHETHER THE CITY OF NEW CASTLE INTERFERED WITH THE PROTECTED RIGHTS OF EMPLOYEES AND/OR ENCOURAGED OR DISCOURAGED MEMBERSHIP IN AFSCME LOCAL 3615 BY DISCRIMINATION WHEN IT TERMINATED AN EMPLOYEE FOLLOWING THE FILING OF A GRIEVANCE PROTESTING HER RATE OF PAY UNDER A SUCCESSOR COLLECTIVE BARGAINING AGREEMENT, IN VIOLATION OF 19 DEL.C. §1307 (A)(1) AND/OR (A)(3).

Having found probable cause based on the pleadings, the City's asserted defenses will be considered following creation of the factual record.

DATE: February 5, 2019



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