

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

COMMUNICATIONS WORKERS OF AMERICA,	:	
AFL-CIO, LOCAL 13101,	:	
	:	Unfair Labor Practice Charge
Charging Party,	:	<u>No. 18-10-1165</u>
	:	
v.	:	PROBABLE CAUSE DETERMINATION
	:	
STATE OF DELAWARE, DEPARTMENT OF SAFETY	:	
AND HOMELAND SECURITY, DIVISION OF STATE	:	
POLICE,	:	
	:	
Respondent.	:	

BACKGROUND

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 Safety and Homeland Security (“DSHS”), Division of State Police (“DSP”) is an agency of the State.

The Communications Workers of America, AFL-CIO (“CWA”), is an employee organization within the meaning of 19 Del.C. §1302(i). By and through its affiliated Local 13101, the CWA is an exclusive bargaining representative, within the meaning of 19 Del.C. §1302(j) of a bargaining unit of Non-Uniformed Support Staff. *DOL Case 261.*

DSP and CWA Local 13101 are parties to a collective bargaining agreement which has a term of July 1, 2016 through June 30, 2019.

On October 19, 2018, CWA Local 13101 filed an unfair labor practice charge alleging the State engaged in conduct which violates 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 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.

The Charge alleges DSP violated the protected rights of a bargaining unit employee when it refused to allow her to consult with a CWA representative before signing a performance improvement plan prepared by her supervisor. When she refused to sign the document, the charge alleges her supervisor threatened to discipline her. It further alleges DSP denied the same bargaining unit employee's repeated requests for union representation at a subsequent meeting she was directed to attend, again concerning a performance improvement plan. A senior member of DSP staff, responding to a CWA Vice President, advised her, "Union representation will not be permitted."

On November 8, 2018, the State filed its Answer to the Charge, admitting many of the facts alleged in the Charge. The State denied the legal conclusions that it violated the employee's protected rights, as alleged. Under New Matter, the State asserts the Charge fails to state a claim under the PERA. It specifically asserts that the rights to representation which CWA claims were violated relate only to "investigatory interviews that the employee reasonably believed would result in disciplinary action." It also specifically denies that the employee requested union representation before or during the first meeting, which was convened to discuss the performance improvement plan.

On November 13, 2018, CWA Local 13101 filed its Response to the new matter contained in the State's Answer, denying the assertions contained therein.

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

DISCUSSION

Regulation 5.6 of the Rules of the Public Employment Relations Board requires:

(b) 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.

(c) 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 Parties 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).

The Delaware Public Employment Relations Board first adopted the standards set forth by the United States Supreme Court in *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 88 LRRM 2689 (1975) in 2010.¹ It further refined the explicit adoption of the Weingarten standards in 2013 in an unfair labor practice proceeding involving these same parties.² In that decision, it was acknowledged that a determination as to whether an employee's Weingarten rights have been violated are fact-bound by the specific circumstances giving rise to the unfair labor practice charge.

The pleadings raise a number of factual and legal issues. Whether the employee reasonably believed the initial meeting concerning the performance evaluation plan might result in disciplinary action is a legal question under the Weingarten standard, as is the question of whether DSP properly denied union representation at the one or both meeting. Whether the employee requested union

¹ *Poli v. DTC*, ULP 09-06-669, VII PERB 4395, 4399 (Order of Dismissal, 2009); *affirmed* VII PERB 4523 (2010).

² *CWA Local 13101 v. DSHS, DSP*, ULP 12-01-848, VIII PERB 5847, 5854 (2013)

representation at the initial meeting is a factual question. The pleadings also raise a factual question as to whether the supervisor threatened or recommended the employee be disciplined following the initial PIP meeting.

The pleadings are sufficient to meet the minimum standard of establishing that a violation of the PERA may have occurred. It will ultimately be CWA Local 13101's burden to establish that the employee was entitled to Weingarten protections under the circumstances and that the State violated its duties under the PERA not to interfere with the protected rights of bargaining unit employees or the union, as alleged.

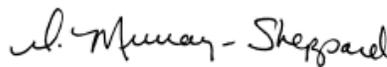
DETERMINATION

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)(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 consideration of argument based on that record.

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

WHETHER THE STATE, BY AND THROUGH THE DEPARTMENT OF SAFETY AND HOMELAND SECURITY, DIVISION OF STATE POLICE, INTERFERED WITH THE PROTECTED RIGHTS OF A BARGAINING UNIT EMPLOYEE OR CWA LOCAL 13101 WHEN IT DENIED THE EMPLOYEE ACCESS TO AND/OR SUPPORT FROM THE UNION, IN VIOLATION OF 19 DEL.C. §1307(A)(1) AND/OR (A)(5), AS ALLEGED.

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



DATE: June 19, 2019

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