

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY :
AND MUNICIPAL EMPLOYEES, COUNCIL 81, :
LOCAL 1926, AFL-CIO, :
Charging Party, : **Unfair Labor Practice Charge**
v. : **No. 21-11-1289**
SUSSEX COUNTY, DELAWARE, : **PROBABLE CAUSE DETERMINATION**
Respondent. : **AND ORDER OF DISMISSAL**

Sussex County, Delaware (County) 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 1926, it is the exclusive bargaining representative of a bargaining unit of Sussex County employees within the meaning of 19 Del. C. §1602(h). DOL Case 509.

On November 17, 2021, AFSCME filed an unfair labor practice charge with the Delaware Public Employment Relations Board (“PERB”) alleging conduct by the County in 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 the County excluded unionized employees from wage increases granted to non-union employees. AFSCME asserts the County has violated the employees' rights to engage in concerted activities for the purpose of collective 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 and to be represented by their exclusive representative, if any, without discrimination. 19 Del. C. §1303 (3) and (4).

On December 7, 2021, the County filed its Answer to the Charge admitting some facts but denying knowledge of many of the facts asserted in the Charge. The County denies the legal conclusions and assertions included in the Charge and requests the Charge be dismissed in its entirety.

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

FACTS

The following facts are uncontested in the pleadings.

AFSCME Local 1926 and Sussex County are parties to a current collective bargaining agreement which covers the period of November 15, 2019 through June 30, 2022.¹ Included in that Agreement, is Article XXX, Wages. Section 3 of Article XXX states:

For Fiscal Year 22,² the County will provide full-time employees covered by this Agreement a one and one-half percent (1.5%) COLA

¹ Charge Exhibit A at page 33.

² Fiscal Year 2022 begins on July 1, 2021 and extends through June 30, 2022.

(cost of living adjustment). Full-time employees covered by this Agreement shall also receive a general wage increase of one and four-tenths percent (1.4%).

Article XXXVII, Entire Agreement, states, in relevant part:

Section 1. The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunities are set forth in this Agreement...

Section 2. Therefore the parties agree that for the duration of this Agreement, neither party shall be obligated to reopen collective bargaining with respect to any subject or matter referred to, or not referred to herein, unless specifically required to do so by law or by the terms of this Agreement.

Section. 3. This Agreement may be amended only by the mutual written agreement of the parties.³

By letter dated August 31, 2021, the County Administrator advised all County employees:

On behalf of the County Council and Administration, we are pleased to inform you that all non-union employees will receive a 3 percent base pay increase starting in your next paycheck.

As you are keenly aware, the County is experiencing a significant level of activity in all facets of our operations. And even during this strenuous time, County employees continue to provide exceptional service to both the residents and visitors of Sussex County. For that, we are grateful and thank you for your dedication.

Looking at the job environment around us, we understand that there are other employment opportunities available for you to explore. We recognize it is important that we retain our great staff while also recruiting new staff to work for the organization. It is our hope that this pay increase will allow us to continue to retain and attract dedicated employees such as yourself.

Concurrent with the pay increase, we have initiated a comprehensive compensation study to analyze the County's salaries and benefits within the regional market. We hope to complete the study as soon as possible. We will then consider making additional adjustments to salaries to

³ Charge Exhibit A at page 40.

ensure we are competitive with our total compensation package.

Again, thank you for everything you do for our county and this organization.⁴

By letter dated September 22, 2021, AFSCME Local 1926 responded:

As you know, I am a Staff Representative for Delaware Public Employees, Council 81, Local 1926, AFSCME, AFL-CIO, which represents the wastewater treatment employees employed by Sussex County. The Union has received the County's August 31, 2021, notice ("Wage Increase Notice") which grants a three percent (3%) base pay increase to "**all non-union employees**" effective the next paycheck. According to the terms of the Wage Increase Notice, a County employee's eligibility for the wage increase hinges on their union membership status.

It has come to the Union's attention that the County has advised the Union that it cannot grant this discretionary wage increase to bargaining unit employees because of the current collective bargaining agreement. Please accept this letter as the Union's consent to the wage increase being applied to its members. As such, the Union urges the County to expand the application of the three percent (3%) discretionary wage increase to all County employees, including those represented by the Union. The County's failure to apply the wage increase to all County employees would constitute conduct that is inherently destructive to collective bargaining, and the Union is prepared to take legal action if the County fails to do so.

The Union agrees with the sentiments expressed in the Wage Increase Notice, and we are equally as proud of our unionized workforce providing exceptional service during these trying times.

Please do not hesitate to contact me for further confirmation of the Union's consent to the application of market adjustment to Union employees. Thank you for your attention to this matter, and we look forward to building a mutually advantageous and harmonious relationship between the County and the Union.⁵

DISCUSSION

Rule 5.6 of the Rules and Regulations of the Delaware Public Employment

⁴ Charge Exhibit D.

⁵ Charge Exhibit E.

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 a 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).

There is nothing on the face of the Charge which alleges that the County has failed or refused to abide by negotiated terms of the parties' collective bargaining agreement for Fiscal Year 2022. The wage increase guaranteed and provided to bargaining unit employees for Fiscal year 2022 (effective July 1, 2021) included a 1.5% cost of living increase coupled with a 1.4% general wage increase.

The Charge fails to set forth in sufficient detail how the granting of discretionary three percent (3%) base pay increases to all other County employees at some point after August 31, 2021 interfered with, restrained or coerced any bargaining unit employee in the

exercise of his or her rights under the PERA. It also fails to explain how the base pay increase given to other employees more than two months after the negotiated wage increase was granted to bargaining unit employees encourages or discourages union membership or constitutes discrimination in hiring, tenure or other term and condition of employment.

Finally, the 2019-2022 collective bargaining agreement explicitly states neither party would be obligated to reopen the terms of the Agreement with respect to any matter covered therein. Wages are set forth in Article XXX of the Agreement. The parties further agreed that the terms of their Agreement could only be amended through a mutual written agreement. The pleadings do not establish that such mutual agreement was reached.

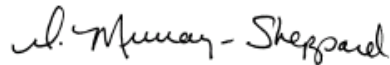
DETERMINATION

Considered in a light most favorable to the Charging Party, the pleadings are not sufficient to establish that Sussex County may have violated 19 Del. C. §1307 (a)(1) and/or (a)(3), as alleged.

WHEREFORE, this Charge is dismissed, without prejudice, and the requested relief is denied.

IT IS SO ORDERED.

DATE: February 28, 2022



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