STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 81, LOCAL 3615, AFL-CIO,	:	
Charging Party,	:	**Unfair Labor Practice Charge No. 18-11-1168**
v.	:	**DECISION ON THE MERITS**
CITY OF NEW CASTLE, DELAWARE,	:	
Respondent.	:	

Appearances

Lance Geren, Esq., O'Donoghue & O'Donoghue, for AFSCME Local 3615

Jennifer Gimler Brady, Esq., Potter Anderson & Corroon, for the City of New Castle

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

AFSCME and the City were parties to a collective bargaining agreement with a term of August 18, 2015 through June 30, 2018.[2] The parties enter into negotiations for a successor agreement which was effective July 9, 2018 through June 30, 2022.[3]

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 violation of 19 Del. C. §1307(a)(1) and (a)(3).[4] The Charge alleged the City terminated a bargaining unit employee (identified for purposes of this proceeding as "KM") because AFSCME filed a grievance challenging her rate of pay in July, 2018. AFSCME requested the City be found to have violated the PERA as alleged and that KM be made whole.[5]

On December 5, 2018, the City filed its Answer to the Charge admitting the facts as they relate to KM's employment but asserting KM was dismissed for performance related reasons prior to the completion of her probationary period. The City's Answer included New Matter.

On December 19, 2018, AFSCME filed a Response to New Matter in which it denied the legal conclusions and affirmative defenses asserted by the City. It argues the City's alleged reasons for dismissing KM are pretextual.

A Probable Cause Determination was issued on February 5, 2019, finding the

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

[2] Joint Exhibit 2.

[3] Joint Exhibit 1.

[4] (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.

[5] Unfair Labor Practice Charge ¶15.

pleadings were sufficient to establish that the City may have violated 19 Del. C. §1307 (a)(1) and/or (a)(3), as alleged.

A hearing was held on April 24, 2019. At the close of AFSCME's presentation, the City moved to dismiss the charge, asserting AFSCME had failed to establish sufficient facts to find the statute had been violated as alleged. AFSCME opposed the motion. The hearing officer declined to grant the motion at that time, but advised the parties that the City's motion would be considered as a preliminary matter in this decision.

The parties were afforded the opportunity to provide written argument in support of their positions. The record closed following receipt of responsive written argument submitted by the parties on August 5, 2019.[6]

This decision is based upon review and consideration of the record created by the parties, their arguments and relevant case law.

FACTS

The facts included herein are derived from the documentary and testimonial evidence presented by the parties.

KM began working for the City as a temporary employee who was hired through a staffing agency (as a "temp") in April, 2017. She performed secretarial and clerical work for the City's Building Inspector, Violations Officer, and Public Works Department. During this period, she had to enter transactions into the Edmunds system, i.e., the accounting software the City used. Kathy Walls was the City's Finance Coordinator at all times relevant to this Charge and was directly responsible for oversight of the Edmunds

[6] This decision was delayed due to staffing limitations and the difficulties experienced during the pandemic. The delay is not a function of disregard for the rights of the parties, but rather the necessity to triage resources during a difficult operational period.

system.

On October 9, 2018, KM was hired by the City into a full-time, hourly compensated Secretary II position. Her compensation was $20.30/hour consistent with the negotiated wage rate for July 1, 2017 – June 30, 2018 which was included in Appendix E of the parties 2015-2018 collective bargaining agreement.[7] It is unusual for the City to hire a temporary employee into a full-time position, but KM was an exception because she had shown promise when while working as a temp. As a City employee, KM reported directly to William Barthel, the City Administrator. She performed many of the same duties she had previously performed as a temp. She was also assigned some additional responsibilities including taking minutes or notes at some committee meetings. Most of her work required that she enter data into the Edmunds system, process licenses (applications and renewals), receive and process payments and fees, and coordinate requests for City services. All of her work in the Edmunds system was reviewed by the City's Finance Coordinator.

Article 5, Union Recognition, of the 2015-2018 Collective Bargaining Agreement states:

> The City recognizes the Union as the sole and exclusive collective bargaining agent for all employees covered by this Agreement for the purpose of collective bargaining with respect to wages, rates of pay, hours of employment, and other conditions of employment. The term "employees" as used in this Agreement shall include all regular, non-supervisory City of New Castle employees as listed in Appendix A hereto <u>who have successfully completed their initial probationary period</u>, but shall not include any uniformed police officers, or temporary or seasonal employees. [8] *(emphasis added)*

Article 14 of that Agreement, Probationary Employment Period, states:

> (a) Newly hired employees shall be subject to a one (1) year initial probationary period. During such initial probationary period, said

[7] Joint Exhibit 2 at Appendix E-5.

[8] Joint Exhibit 2 at p. 2.

employee may be discharged or disciplined by the City without such action causing a breach of this Agreement…[9]

Article 30, Performance Evaluations, states, in relevant part:

(a) In the event the performance evaluation of any employee is not rated as "meets expectations" or above (or equivalent), the employee shall not be eligible for promotion or to receive the regularly scheduled salary increment…

(d) Performance evaluations shall be completed for all employees by April 30 of each year. The Union shall notify the City within fifteen (15) working days of any performance evaluations not received by the due date. The City shall provide the employee(s) in question with his/her annual evaluation(s) within fifteen (15) working days of receiving such notification from the Union. Failure to comply with the deadlines set forth herein shall be excused for good cause.[10]

At some point prior to May, 2018, the parties initiated negotiations for a successor collective bargaining agreement. They reached a tentative agreement in mid-June 2018, which was ultimately reduced to writing, ratified by AFSCME, approved by the City Council, and executed on July 9, 2018 by signature of AFSCME LU 3615 President Clifford Reaume, AFSCME Council 81 Staff Representative Katherine Caudle and Executive Director Michael A. Begatto, as well as by the City's Mayor Jimmy Gambacorta, President of the City Council Linda Ratchford and City Administrator William J. Barthel.[11]

The 2018 – 2022 collective bargaining agreement between AFSCME and the City[12] did not modify the language of Articles 5, 14, and 30 nor did it modify the negotiated grievance procedure found in Appendix B. The new agreement did, however, make significant changes to Article 40. Wage Administration Plan. It states, in relevant part:

(a) The City agrees to pay staring wages to newly hired employees during the term of this agreement as set forth in Appendix E.

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[9] Joint Exhibit 2 at p. 7.

[10] Joint Exhibit 2 at p. 13.

[11] Joint Exhibit 1 at p. 31-32.

[12] Joint Exhibit 1.

(b) All employees in the bargaining unit shall be paid on an hourly basis unless other payment terms are specifically set forth in this Agreement.

(c) Effective July 1, 2018, ongoing employees who currently are rated as meeting expectations but have not yet attained Level C for their position classification shall be paid the rates following below …

… Secretary II $22.44 …

(d) Effective July 1, 2018, those employees who achieved Level C prior to the date of this Agreement and are currently rated as meeting expectations shall receive a wage increase of $.40/hour.

(e) Effective July 1, 2018, after the wage adjustments provided for in paragraphs 40(c) and (d) have been made, A, B, and C Levels within position classifications shall cease to exist.

(f) Effective July 1, 2019, ongoing employees who receive an overall rating of "meets expectations" (or equivalent) or better on their annual performance reviews shall receive a wage increase as follows:

7/01/2019	**7/01/2020**	**7/01/2021**
$ 0.40	$ 0.45	$0.50

(g) On or after July 1, 2018, any employee who did not or does not receive an overall rating of "meets expectations" (or equivalent) or better on his/her annual performance review shall not be eligible for the annual wage increase and/or the wage adjustments set forth in paragraph 40(c).[13]

On May 24, 2018 (prior to the new collective bargaining agreement), KM emailed the City Human Resources Coordinator inquiring as to whether she (KM) was supposed to be reviewed at her six month anniversary of City employment.[14] The HR Coordinator responded shortly thereafter:

> According to the contract (please see below) you are not entitled for [*sic*] a 6 month review; however, Mr. Barthel will meet with you and I [*sic*] shortly to conduct your review.[15]

[13] Joint Exhibit 1 at p. 17.

[14] City Exhibit 1.

[15] Supra.

The promised meeting occurred on the morning of June 18, 2018. Although KM was not contemporaneously provided with the notes taken at this meeting by the HR Coordinator, her testimony corroborated the following topics were discussed:

- The City Administrator clarified that the purpose of the meeting was not an official performance review, but to unofficially provide her with feedback on her performance to date, including his concerns.
- She would receive a $0.40/hour increase under the new collective bargaining agreement. She would not be eligible for the "bump" to $22.44/hour to be included in the 2018-2022 collective bargaining agreement[16] because she was still a probationary employee. The City Administrator said she would be formally reviewed at the end of her probationary period.
- The City Administrator expressed concern about "too much chatter" between the women in the front office, where KM worked.
- He also expressed concern that she was often tardy and was not using the correct procedure to log into the ADP time-keeping system on her computer. He reminded her the office hours were 8:00 – 4:30 on weekdays.
- The City Administrator also addressed concerns the Finance Coordinator had with the manner in which KM was processing batches. He stressed the importance of the financial system and said they should have a meeting with the Finance Coordinator.

KM testified that she understood that the City Administrator had concerns with her work but did not think he indicated that she was not meeting his expectations.

[16] Joint Exhibit 1 at p. 17.

The City provided numerous documents, supported by the unrefuted testimony of the City's Administrator, Finance Coordinator and Human Resources Coordinator, which document a history of tardiness and failure or refusal to use the City's timekeeping software. The HR Coordinator testified, without refute, that she met with KM to provide guidance and retraining on the City's time keeping system. Her efforts were largely unsuccessful as KM continued to manually enter her time and to add notes to her record indicating how she intended to make up lost work hours, most without advanced approval by the City Administrator.[17]

The record also documents KM's numerous errors in the processing of fees, licenses and permits in the Edmunds system.[18] The Finance Coordinator testified:

> I monitor Edmunds on a daily basis, which is the bookkeeping software to make sure that all the data that's inputted is done properly. I report monthly to the mayor and council and also to the City Administrator, and also more often during budget times. I'm involved in the audit with our third party audit company. I'm the Administrator in Edmunds, so I assign ID's for people and I also give them their level of authority, what they can and cannot do in the system…[19]

She also testified that she monitors the work of everyone who inputs or otherwise accesses information in the Edmunds system, explaining:

> [S]o I'm not necessarily anyone's supervisor, but anybody who has a role and an I.D. in Edmunds I monitor that whatever they're doing is done correctly and that it's not throwing the general ledger out of balance, it's coded to the correct general ledger line, whether it's revenue or expenses just to make sure everything is accurate as far as the books are concerned.[20]

The Finance Coordinator also describes KM's responsibilities in the Edmunds system:

> If she's developing permits, the business licenses, rental licenses,

[17] City Exhibits 7 and 8.

[18] City Exhibits 9 and 10.

[19] Transcript ("TR") p. 130 – 131.

[20] TR p. 131.

> invoicing. All of those things are things that need to be entered into Edmunds. If someone is applying for a permit, that needs to be… the whole procedure starts in Edmunds. The payment is collected and that's posted in Edmunds. The permit or the business license is printed out of Edmunds, and then it's all verified and posted, and then it ends up… that data flows over to the general ledger.

The Finance Coordinator explained the process for getting or renewing a business license and a major error KM made in January, 2018:

> [I]f you need a business license you come in with your payment or you send in your application with your payment. So the whole process starts… first, I create the business license, then I create the invoice, then I post your payment that offsets the invoice, so it's an in and an out all in one time, and then it's collected and then all those payments are in a batch, and then that gets posted to the system. So there should never be business licenses that haven't been paid for. They're not created until the person is standing there with their payment, but in the system… and actually I believe KM may have brought it to my attention that for whatever reason she created over 1,000 business licenses for everybody who had had a business license in the past, which was a major mistake.[21]

When questioned as to how this large mistake was made, KM responded she didn't really know. Because the mistake could not be automatically reversed in the Edmunds system, each erroneous entry had to be manually deleted. The Finance Coordinator testified, without refute, that KM questioned her about whether there was an easier way, e.g., just leave the entries in the system until they were needed.

> I gave her a list of all the licenses that had been created erroneously and said you need to start going in… I showed her how to delete them… going in and delete them. About a week later, I could see the range because I could do a look up and see what the last license was, that last license that was created was still there. The first license that was created was still there, so I kept on waiting and then I sent her an e-mail saying how's it going, and her response was "plugging away," but my response after that was, I don't understand because no licenses have been deleted yet, and she said well, as people come in and they get their license she'll look up the one that she did wrong and just mark "no renewal," which actually wasn't one of the resolutions that we had discussed even, so I don't know why she was doing that instead, so basically I said no, you have to go in and delete them. And because by now it was like two

[21] TR p. 132-133.

> weeks after, … the Finance Clerk and myself actually started from the opposite end that she was deleting just because it was going to take… I felt like it was going to take much too long to fix this error if we didn't help.[22]

The Finance Coordinator also described a second instance in which KM unilaterally and without prior consultation went into the Edmunds system and removed the street addresses of all business licensees for businesses located within the City and simply replaced it with "New Castle".[23] The Finance Coordinator explained the address is needed in the system to print the actual licenses, a fact with which KM should have been familiar (having performed this type of work for the City since April, 2017). The records again had to be manually modified to replace the information KM had removed without authorization.

Following the implementation of the July 1, 2018 wage rate increases under the new collective bargaining agreement, AFSCME Local 3615 President Clifford Reaume visited the City's administrative office.[24] He asked the three clerks (of which KM was one) if they were happy with the increases in their wags. One clerk reported she did not get the bump, but explained it was because she had a negative performance evaluation. KM responded that she only received $0.40/hour and did not get the anticipated "bump".

The AFSCME Local 3615 President testified he did not believe that KM's probationary status should have affected her wage increase. He testified:

> To be honest with you, I didn't see that as an issue because she was a dues paying member of the union. In my opinion, she had every right to everything everybody else got. She pays for the services of the union. She gets the service of the union. That was my opinion on it. When we were going the negotiations, I was told that everybody would be getting this raise that was a current employee. To me she was a current

[22] TR p. 134-135.

[23] TR p. 135.

[24] TR p. 28 – 29.

employee, so to me she was entitled to that increase.[25]

The AFSCME Local 3615 President asked KM if she wanted to grieve her wage increase, to which she responded she didn't know.[26] KM testified she never asked the Union President to do anything to challenge her wage increase.[27]

On or about July 26, 2018, the AFSCME Local 3615 President delivered a Step 1 grievance to the Human Resources Coordinator, which stated:

> STATEMENT OF GRIEVANCE:
>
> List applicable violation: Local 3615 would like to grieve the fact that a [*sic*] employee of the Local Union (KM) was not given the raise in pay that was promised in contract negotiations.
>
> Adjustment Required: KM should be moved up to $22.11 an hour.[28]

The AFSCME Local 3615 President listed himself as the employee and signed the grievance form as both the Employee and the Union Representative.

The City Administrator responded on July 30, 2018, Sections 5, 14 and 30 of the negotiated collective bargaining agreement to deny the grievance:

> [KM] has not yet met her one year anniversary and does not have grievance rights under the contract. The fact that Mr. Reume [*sic*] has filed the grievance on her behalf is nothing more than a matter of semantics.
>
> Because [KM] has not had a formal review, which is not required until her one year anniversary, and thus has not been "rated", she does not meet the requirements necessary for her to get the increase in question. I note also that, prior to the time the grievance was filed, [KM] was provided with informal feedback on her performance, and was advised that there were several areas of concern.
>
> The City, for its part, has ensured that [KM] is not being paid a starting wage less than that for a newly hired employee.

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[25] TR p. 28.

[26] TR p. 31.

[27] TR p. 13.

[28] Joint Exhibit 5.

We reject this grievance based on the above.[29]

On August 16, 2018, the AFSCME Local 3615 President filed what he titled as a Step 2 grievance. This grievance stated:

> STATEMENT OF GRIEVANCE:
>
> List applicable violation: An employee or employees were not given the raises promised during the contract negotiations between the City of Newcastle [*sic*] and ASFME [*sic*] local 3615. Both the citys [*sic*] lawyer and Mr. Barthel stated that if the union agreed to give up the [*sic*] career ladder that the city would promote ALL union employees to the highest pay rate in their classification.
>
> Adjustment Required: The Union requests that the female employees that work in the city tax office pay be increased to 22.44 an hour as stated in the wage administration plan. [30]

In a memorandum appended to the grievance, the AFSCME Local 3615 President stated, in relevant part:

> This memorandum is in response to the memorandum sent by Mr. Barthel stating that [KM] did not have the right to the grievance process. In the contract in Appendix B-2 [*sic*]
>
> **2. Grievance Procedure: General Provisions**
>
> (c) The Union agrees that it shall represent all members of the bargaining unit.
>
> (d) It shall be the firm policy of the City to assure every employee in the bargaining unit an unobstructed use of the grievance procedure without fear of reprisal or without prejudice in any manner concerning his/her job status.
>
> As [KM] is a dues paying member of our bargaining unit she has full rights to the grievance process.
>
> However, this grievance is not about [KM]. This grievance is about a violation of "bargaining in good faith". When this contract was presented to the Union members it was the understanding of the bargaining committee that **All** the Union members would be moved to the top of their rate, because thats [*sic*] how it was presented to us by the City. Had we known that some members were to be excluded there would have been a good chance that this contract would not have passed.
>
> Mr. Bartthel [*sic*] you also bring up "performance evaluations" frequently in your argument [*sic*] against giving the negotiated raises.

[29] Joint Exhibit 6.

[30] Joint Exhibit 3.

> The Union would like to argue that the performance reviews given to the Union member females that work in the tax office may have been done improperly.[31]

Again, the grievance was signed by the AFSCME Local 3615 President as both the Employee and the Union Representative.

The City Administrator responded to the AFSCME Local 3615 President on August 22, 2018:

> This memorandum is in response to your submission regarding Step 2 of the grievance concerning a salary increase for [KM].
>
> First, let's be clear, according to [the Human Resources Coordinator], you missed the deadline for responding to our response concerning your initial grievance. In addition, it appears that you have changed the reason for the grievance to a claim that the City was "not bargaining in good faith" when the current CBA was agreed upon.
>
> I wish to point out that "not bargaining in good faith" is not a proper subject for a grievance. Therefore, I reject your response outright.
>
> With that said, I would like to respond to your accusation.
>
> 1) The City's attorney attended only one bargaining session, well before final agreement was reached. Any comments made prior to that final agreement are irrelevant, given that the parties' agreement was reduced to writing, both in an MOU (concerning specific changes to the then-existing CBA) and in the final CBA, and both sides had ample time to review that document for accuracy. Regardless, I do not agree that anyone representing the City made the statements you allege. The City's position was always that employee's [*sic*] had to be rated as meeting standards to receive a pay adjustment or raise.
> 2) During the negotiation, you, as the President of your union, along with your Vice President, made specific statements that were untrue and misleading. You had led us to believe that you had unanimity from your group when we first came to an agreement; it wasn't until after your members voted down our believed to be mutually agreed upon contract, and at our next meeting, that your attorney pointed out that that was not in fact true.
> 3) The Vice President of your Union sent the following email [dated May 17, 2018, RE: Contract vote]
>
>   *Good morning Mr. Barthel and Theresa. Cliff asked me to send this email. After our vote last night the contract was narrowly defeated*

[31] Joint Exhibit 3.

by "no" votes.

That being said, we need to schedule some more negotiation meetings. Please let us know what dates you won't be available so we can work around that.

As you may recall, we brought this up to you and your team, noting that we believed that we were not that far apart in our negotiations, and reentered the negotiations under false pre-tense [*sic*], we were unprepared for the fact that it was pretty much rejected by all of your members; again, as pointed out by your attorney.

4) Finally, we put IN WRITING, on page 18 under section 40 WAGE ADMINISTRATION PLAN, the following:

   (g) On or after July 1, 2018, any employee who did not or does not receive an overall rating of "meets expectations" (or equivalent) or better on his/her annual performance review shall not be eligible for the annual wage increase and/or the wage adjustment set forth in paragraph 40(c).

I am sympathetic to the fact that you clearly did not understand what it was you agreed to, despite the fact that the union had an attorney present at all of our negotiating sessions. However, the basis for the Second Step submission is not factually accurate, and, even if it were, discussions held prior to reaching final agreement are not binding.

As far as I am concerned, we hold no ill feelings to your inaccurate and misleading statements, and wish to move on. We believe that the agreement we have is fair to both the Union and the City. [32]

There is no evidence in the record that the wage rates of the office staff were grieved in any other way beyond the two documents provided as Joint Exhibits 3 and 5.

Just prior to the end of the work day on Tuesday, October 8, 2018, KM met with the City Administrator at which time he notified her that she had not successfully completed her probationary period. He provided her with a Summary for Termination:

1) June 18th meeting we discussed some of the concerns I had regarding your job performance. One concern was your use of the time clock, and being on time for work. I specifically stated that the work day was from 8:00 to 4:30.

   Since July 1, you have been late 4 times, indicating to me that this pattern has continued.

[32] Joint Exhibit 4. Joint Exhibit 3, p.2 is a single page acknowledging receipt of the City's response by AFSCME Local 3615 President dated August 22, 2018.

2) Another area for concern that we discussed was how you do your batch reports, and more importantly, the need to work with finance.

I informed you of a meeting that had taken place prior to your hiring, where staff gathered and where I emphasized the importance of the finance roll [*sic*] within our daily work lives. We further discussed the importance of working with the Finance Coordinator Kathy Walls. You assured me that you understood this and that you would work to improve this part of your job function.

In addition to you continuing to have problems with your batches, you have made numerous errors including, but not limited to, on August 22 you made procedural changes for licenses, which included the removal of property locations, without input from either Jeff Bergstrom or Kathy Walls; creating a major issue that needed immediate attention. Despite having assistance from other employees to help remedy the situation, when told by Ms. Walls to help fix the problem, your response was you were too busy with permits; despite having only processed 11 permits in that month, to that date.

On August 29th I instructed you to talk to Kathy about how to account for a refund of a rental fee, the next day. You never spoke to Kathy as I had instructed and it wasn't until the resident came in on September 5th and requested her refund that the issue was resolved – by Diane and Kathy.

On September 7, it was discovered that 46 business licenses had the wrong effective date and expiration date; and you needed to be told to correct the errors.[33]

ISSUE

WHETHER THE CITY OF NEW CASTLE INTERFERED WITH THE PROTECTED RIGHTS OF EMPLOYEE KM AND/OR ENCOURAGED OR DISCOURAGED MEMBERSHIP IN AFSCME LOCAL 3615 BY DISCRIMINATION WHEN IT TERMINATED KM 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).

[33] City Exhibit 6.

DISCUSSION

It is important to make clear what is not in issue in this proceeding. This charge does not concern whether KM was properly paid in July, 2018 under the terms of the 2018-2022 collective bargaining agreement. Questions concerning application and/or interpretation of the negotiated agreement are subject to resolution by and through the negotiated grievance procedure. The Charge does not allege the City failed or refused to implement the negotiated grievance procedure or that it otherwise unilaterally implemented a change to terms and conditions of employment.

AFSCME alleges the City terminated KM is response to her filing a grievance and challenging her rate of pay, thereby interfering with, restraining and coercing KM in the exercise of her right to engage in union and protected concerted activity, in violation of 19 Del. C. §1307(a)(1). AFSCME further alleges that KM's termination discouraged membership in the union, in violation of 19 Del. C. §1307(a)(3).

The Charging Party ultimately bears the burden of proving its charge by a preponderance of the evidence presented. This Board first adopted the NLRB's *Wright Line*[34] analysis to determine whether an employer had violated §1307(a)(1) based on an employee's protected right to engage in concerted activity under the PERA in 1994.[35] In order to resolve this Charge, "it must be determined, *inter alia*, whether an employee's employment conditions were adversely affected by his or her engaging in union or other protected activity and, if so, whether the employer's action was motivated by such employee activities."[36]

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[34] *NLRB v. Wright Line*, 251 NLRB 1083, 105 LRRM 1169 (1980).

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

[36] Id., LRRM p. 1169.

In order to prevail, AFSCME must first establish the three elements of a *prima facie* case of discrimination, by a preponderance of the evidence presented, including:

1) That KM engaged in protected activity prior to her dismissal;

2) That the City's management had knowledge of her protected activity; and

3) That retaliation based on that protected activity was a substantial or motivating factor in the City's decision to dismiss KW.

Simply stated, ASFCME must make an initial showing that protected activities played a role in the City's decision to terminate KM.

The rights of public employees are set forth in §1303, Public Employee Rights:

> Public employees shall have the right to:
>
> (1) Organize, form, join or assist any employee 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 own choosing.
>
> (3) Engage in other 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.
>
> (4) Be represented by their exclusive representative, if any, without discrimination.

The Delaware PERB has looked to decisions rendered under the federal National Labor Relations Act ("NLRA", 29 U.S.C. §141) to the extent that Delaware's public sector collective bargaining statutes are similar. Section 7 of the NLRA[37] states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition

[37] 29 U.S.C.S. §157.

of employment as authorized in section 8(a)(3).

Section 1303(3) of the PERA protects the right of a public employee to engage in concerted activity. It confines the scope of the protected activity to action(s) which are "for the purpose of collective bargaining or other mutual aid or protection insofar as such activity is not prohibited by this chapter or any other law of the State." In order for an employee's conduct to be protected it must be a concerted activity. The statutory language also signals that not all concerted activity is protected. The NLRB has held that "an employee may engage in concerted activity in such an abusive manner that he loses the statutory protection…"[38]

In its decision in *Meyers Industries, Inc.,*[39] the NLRB examined the concept of concerted activity for employees who were not represented by a collective bargaining representative:

> Although the legislative history of Section 7 does not specifically define "concerted activity" it does reveal that Congress considered the concept in terms of individuals united in pursuit of a common goal. …
>
> In general, to find an employee's activity to be 'concerted', we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment at issue (e.g., discharge) was motivated by the employee's protected concerted activity.
>
> …[O]ur … standard of concerted activity places on the [*charging party*] the burden of proving the elements of a violation as set forth herein. It will no longer be sufficient for the [*charging party*] to set out the subject matter that is of alleged concern to a theoretical group and expect to establish a concert of action thereby.
>
> We also emphasize that, under the standard we now adopt, the question of whether an employee engaged in concerted activity is, at its heart, a factual one, the fate of a particular case rising or falling on the record

[38] *Crown Central Petroleum Corp. v. NLRB,* 430 F. 2d 724, 729 (ca5 1970).

[39] 268 NLRB 493 (1984).

> evidence. It is, therefore, imperative that the parties present as full and complete a record as possible.

In *NLRB v. City Disposal System, Inc.*[40] the United States Supreme Court provided the background of Section 7 rights:

> Section 7 of the NLRA provides that "employees shall have the right to … join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. 29 U. S. C. §157. The NLRB's decision in this case applied the Board's longstanding "*Interboro* doctrine" under which an individual's assertion of a right grounded in a collective bargaining agreement is recognized as "concerted activity" and therefore afforded the protection of §7. See *Interboro Contractors, Inc.*, 157 N.L.R.B 1295, 1298 (1966) enf'd, 388 F. 2d 495 (CA2 1967); *Bunney Bros. Construction Co.*, 139 N.L.R.B. 1516, 1519 (1962). The Board has relied on two justifications for the doctrine: First, the assertion of a right contained in a collective bargaining agreement is an extension of the concerted action that produced that agreement, *Bunney Bros. Construction*, supra, at 1519; and second, the assertion of such a right affects the rights of all employees covered by the collective bargaining agreement. *Interboro Contractors*, supra, at 1298.

The Supreme Court further opined in *City Disposal Systems* to apply this standard to employees who were represented by an exclusive bargaining representative under a negotiated collective bargaining agreement:

> … the principal tool by which an employee invokes the rights granted him in a collective bargaining agreement is the processing of a grievance according to whatever procedures his collective bargaining agreement establishes. No one doubts that the processing of a grievance in such a manner is concerted activity within the scope of §7. Indeed, it would make little sense to cover an employee's conduct while negotiating a collective bargaining agreement, including a grievance mechanism by which to protect the rights created by the agreement, but not to cover an employee's attempt to utilize that mechanism to enforce the agreement.[41]

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[40] 465 US 822, 829 (1984).

[41] Supra. at 836.

In the present case, however, KM did not initiate or sign either grievance purportedly filed on her behalf. She testified she did not request that a grievance be filed but that she merely responded affirmatively when the Union President asked if he could file a grievance. She did not participate in any meetings or conversations between AFSCME and the City about her wage rate under the newly negotiated wage scale.[42] In response to the question on direct examination, "Did you ask [the Union President] to do anything for you?", KM responded, "I don't believe so. No."[43]

AFSCME President Reaume testified that he was upset when he learned that two office employees (including KM) did not receive the wage increase (referred to by the parties as "the bump") he expected them to receive. He further testified that he believed that anyone who was currently a City employee in the bargaining unit would receive the bump. He corroborated KM's testimony that she did not request that he file a grievance on her behalf and that she did not participate in the grievance process. But for the President coming into the office to ask if everyone received the anticipated wage increase, there would have been no discussion or grievance concerning KM's wage increase.

The AFSCME President testified he did not believe the City was applying the new contractual wage rates consistent with what had been negotiated and which was the basis on which the parties had ratified that agreement. Appendix B-2 of the collective bargaining agreement states, "Any grievance or dispute which may arise between the parties concerning the wages, hours and working conditions and/or the application or interpretation of this Agreement shall be taken up in accordance with the procedure

[42] TR p. 23.

[43] TR p. 13.

outlined below."[44]

AFSCME's President did, in fact file both a Step 1grievance on July 25, 2018 which specifically stated the grievance was being filed by Local 3615 on behalf of KM asserting she "was not given the raise in pay that was promised in contract negotiations."[45] The City Administrator denied the grievance on July 30, 2018 because KM had not received a formal review because she was still in her probationary period and was, therefore, not eligible for the negotiated bump.[46]

The AFSCME President then filed a Step 2 grievance on August 16, 2018, this time explicitly asserting the grievance was not about KM:

> This grievance is not about KM. This grievance is about a violation of 'bargaining in good faith'. When this contract was presented to the Union members it was the understanding of the bargaining committee that **All** the Union members would be moved to the top of their rate, because that's how it was presented to us by the City. Had we known that some members were to be excluded there would have been a good chance that this contract would not have passed.[47]

The City Administrator treated this filing as a new Step 1 grievance because it changed the basis of the original grievance to a bad faith claim (which the City concluded was not subject to the grievance procedure).[48] The City Administrator rejected the second grievance on August 22, 2018 on the basis that it was not timely filed.[49]

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[44] Joint Exhibit 1.

[45] Joint Exhibit 5.

[46] Joint Exhibit 6.

[47] Joint Exhibit 3.

[48] Joint Exhibit 4.

[49] "Grievance Step One: City Administrator

> (a) No later than ten (10) working days after an event or ten (10) working days after an employee becomes aware of an event (provided this is a reasonable period of time) which leads to a grievance, the employee or one designated member of a group having a grievance shall, with the assistance of the area Steward, present the grievance to the City Administrator or his or her designee. Such grievance shall be reduced to writing as set forth herein and signed by the employee(s) involved and the area Steward. The

AFSCME concedes there were no additional grievances filed or advanced to either Step 2 (under which a Council person hears the grievance)[50] or to Step 3 for arbitration.[51]

The Charge clearly and specifically alleges that KM's protected activity under the PERA was the filing of the grievance. The mutually developed grievance procedure requires a Step 1 grievance "…be reduced to writing … and signed by the employee involved and the area Steward". The record is clear that KM did not file nor seek to file the grievance(s), nor did she actively engage at any point in the processing of the grievances. While the City was aware of the Union's concern that the City had incorrectly applied the terms of the 2018 – 2022 Agreement as it related to KM's new wage rate, it did not have any knowledge that KM was involved in any protected activity.

The third criteria for establishing a *prima facie* case requires finding that the employer retaliated against the employee based on the employee's protected activity. There is no question that termination is an adverse employment action. AFSCME placed heavy emphasis on the timing of KM's October 8, 2018 termination to assert that its charge was supported by circumstantial evidence. But having found KM did not engage in any

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City shall promptly but not later than five (5) working days after being presented with the grievance schedule a conference for adjustment of the grievance." *Joint Exhibit 1, Appendix B-2.*

[50] "Grievance Step Two: Appeal Hearing

If the decision of the City Administrator shall be unsatisfactory, the Union or the aggrieved employee shall have the right, through the Grievance Committee member, to appeal the decision to a designated member of the City Council for a hearing of the grievance…" *Joint Exhibit 1, Appendix B-3.*

[51] "Grievance Step Three: Arbitration

In the event the Step II decision of the City Council member following the appeal hearing is unsatisfactory to either party it may be appealed to arbitration. Demand for Arbitration shall be filed with the other party and the American Arbitration Association within thirty (30) days after the final decision has been given in writing by the City Council in Step II of this grievance procedure; otherwise, the case shall be considered settled on the basis of the decision so given." Joint Exhibit 1, Appendix B-4.

concerted activity which was protected by the PERA and that she never made her employer aware that she was dissatisfied with her new wage rate, her separation just prior to the conclusion of her probationary employment period is not sufficient, on its own, to establish the required *prima facie* case.

AFSCME also argues that KM emailed the City Administrator and the Human Resources Coordinator on May 24, 2018 to request a six month performance review, alleging that she requested the review because of the possibility that she would not be eligible for the full "bump" if she had not been reviewed. KM's May 24, 2018 email simply asked, "Is there supposed to be review on my six month anniversary?"[52] The HR Coordinator responded by providing KM with the language of Article 14(a) of the 2015-2018 collective bargaining agreement which states:

> Newly hired employees shall be subject to a one (1) year initial probationary period. During such initial probationary period, said employee may be discharged or disciplined by the City without such action causing a breach of this Agreement or constituting a grievance.[53]

At the June 8, 2018 meeting, the City Administrator made it clear early in the meeting that KM would be receiving a $0.40/hour increase in her wages, because she would not complete her probationary period before July 1, 2018. Consequently, KM would not receive a formal performance evaluation until the end of the probationary period.

While the establishment of a *prima facie* case may not be a high standard, there must be some basis in fact to establish that the employee suffered an adverse employment action because she had engaged in concerted conduct which is protected under §1303 of the PERA. The record created by the parties fails to provide a factual basis for concluding

[52] City Exhibit 1.

[53] Joint Exhibit 2, p. 7.

KM was engaged in concerted activity of which the City was aware. While KM was terminated approximately three months after the wage rates under the new collective bargaining agreement were implemented, the record is devoid of evidence, direct or circumstantial, which in any way establishes her termination was retaliatory or otherwise linked to any concerted activity.

The record establishes that concerns about KM's performance and ability to successfully complete her probationary period were in issue well before the wage rate increase on July 1, 2018. Beginning in January, 2018, she had numerous interactions with the Finance Coordinator concerning her work and with the Human Resources Coordinator concerning her tardiness issues and failure or refusal to use the City's timekeeping software. Many of these issues were documented in emails to KM which were produced (but not challenged) at the hearing. At the June 18, 2018 meeting the concerns were reiterated by the City Administrator, who was her direct supervisor. According to the unrefuted testimony of the City's witnesses, her work performance did not significantly improve between June 18 and her ultimate termination on October 8, 2018 for failure to successfully complete her probationary employment period.

AFSCME has relied upon the timing of the termination, on the last day of KM's probationary employment period, to assert a suspicion of the City's motives. In fact, the City Administrator testified (and his testimony was corroborated by the other two City witnesses) that he would have issued the termination earlier except for the fact that he knew that KM was scheduled to be on vacation from October 1 through October 5, 2018. The timecard report received as City Exhibit 7 confirms KM was on vacation on these dates. The City Administrator testified he did not want to ruin her vacation. He also testified he waited until the end of the work day to notify KM that her employment was terminated in

order not to embarrass her in front of her co-workers. The City Administrator was a credible witness and his testimony reflected a genuine concern for KM's dignity.

Considering the record as a whole, AFSCME's charge that the City violated 19 Del. C. §1307(a)(1) must be dismissed as it is unsupported by the record.

AFSCME also alleges that the City encouraged or discouraged membership in the union when it terminated KM's employment in violation of 19 Del. C. §1307(a)(3). The US Supreme Court defined the scope of §8(a)(3),[54] which is substantively identical to §1307(a)(3) of the PERA, in 1954:

> The language of §8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited…
>
> The relevance of the motivation of the employer in such discrimination has been consistently recognized…[55]

The NLRB has consistently required that "upon scrutiny of all the facts in a particular case, the Board must determine whether or not the employer's treatment of the employee was motivated by a desire to encourage or discourage union membership or other activities protected by the statute."[56]

The record in this case does not support a substantiated finding of discrimination against KM or other bargaining unit employee. Nor does it support a finding that the City terminated KM's employment in order to discourage union membership or other activities protected by the statute.

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[54] 29 USC §158 (a)(3) provides that "it shall be an unfair labor practice for an employer … by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization…"

[55] Radio Officers' Union of Commercial Telegraphers Union v. NLRB, 347 U.S. 17, 43 (1954).

[56] N. L. R. B., 16th Annual Report 162 (as cited in Radio Officers decision).

Wherefore, AFSCME's charge that the City violated 19 Del. C. §1307(a)(3) is also dismissed because it is unsupported by the record.

CONCLUSIONS OF LAW

1. 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).

2. 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)[57]

3. Employee KM was hired into a full-time Secretary II position by the City of New Castle on October 9, 2017. Her employment was terminated on October 8, 2018.

4. The record is insufficient to support a finding that the City interfered with, restrained or coerced KM in the exercise of her protected right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection in violation of 19 Del. C. §1307(a)(1).

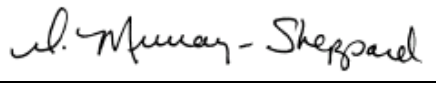
5. The record also fails to establish that the City encouraged or discouraged membership in an employee organization in regard to hiring, tenure or other terms and conditions of employment in violation of 19 Del. C. §1307(a)(3).

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

WHEREFORE, this Charge is hereby dismissed, with prejudice.

IT IS SO ORDERED.

DATE: April 6, 2023



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