STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 81, LOCAL 3615, AFL-CIO,	:	
Appellant,	:	**Unfair Labor Practice Charge No. 18-11-1168**
v.	:	**DECISION ON REVIEW OF EXECUTIVE DIRECTOR'S**
CITY OF NEW CASTLE, DELAWARE,	:	**DECISION ON THE MERITS**
APPELLEE.	:	

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) as certified on April 27, 1999. DOL Case 212

On November 27, 2018, AFSCME filed an unfair labor practice charge alleging conduct by the City in violation of 19 Del. C. §1307(a)(1) and (a)(3) by allegedly terminating a bargaining unit employee because AFSCME filed a grievance challenging her rate of pay in July, 2018.

The City filed its Answer to the Charge, including new matter, on December 5, 2018; AFSCME filed a Response to the City's New Matter on December 19, 2018,

A Probable Cause Determination was issued on February 5, 2019, and a hearing was held on April 24, 2019. Subsequently, 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 on August 5, 2019.

A decision on the merits was issued by the Executive Director on April 6, 2023[1] finding the evidence produced at the April 24, 2019 hearing was insufficient to support a conclusion that the City had violated 19 Del. C. §1307(a)(1) and (a)(3) as alleged. The Charge was dismissed. AFSCME filed a request for review on April 10, 2023, to which the City filed a written response.

A copy of the complete record in this matter was provided to each member of the Public Employment Relations Board. A hearing was convened on May 8, 2023, at which a quorum of the Board met in public session to hear and consider AFSCME Local 3615's request for review. The parties were provided the opportunity to present oral argument and to answer questions from the Board. This decision is based on consideration of the record and the arguments presented by the parties.

[1] The decision on the merits was delayed due to operational limitations imposed by staffing shortages experienced during the Covid-19 pandemic period.

DISCUSSION

The Board's scope of review is limited to the record created by the parties and consideration of whether the Executive Director's decision is arbitrary, capricious, contrary to law, or unsupported by the record. After consideration of the record and the arguments of the parties on appeal, the Board must vote to either affirm or reverse the Executive Director's decision or remand the case to the Executive Director for further action.

The Executive Director dismissed the Charge finding the record did not support a finding that the City of New Castle had violated either 19 *Del. C.* §1307(a)(1) or (a)(3) when it terminated a probationary employee on the last day of her probationary period. AFSCME argued this case is different from a standard separation for failure to successfully complete a probationary period, as the City contends, because the employee had lodged a complaint about her wage rate in the months just prior to her termination and was engaged in protected activity when she did so. AFSCME asserts that the City was motivated to terminate the employee when it did *because* she was viewed as someone who would complain about her wage rate.

The parties do not dispute that the proper legal analysis was articulated and applied in this case. Nor is there a substantial dispute about the facts. The bone of contention is the application of the law to the facts deduced at the hearing. It was AFSCME's burden initially to establish a *prima facie* case of employer animus based on protected activity. In order to do so, AFSCME was required to establish that: 1) Ms. McAneney engaged in concerted activity protected by the statute; 2) the City was aware of her protected activity; and 3) that there is a causal link between the protected activity and her termination. *Wilmington Firefighters' Association, Local 1590 v. City of Wilmington.*[2] Once a *prima*

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

facie case is established, the burden shifts to the City to establish that it had a legitimate, non-discriminatory basis for terminating her employment. AFSCME has the final burden to establish that the reasons offered by the City are, in fact, pretextual. Ultimately, AFSCME bears the burden to establish the City violated the PERA, as alleged.

AFSCME argues that the Executive Director improperly applied the law in finding that the employee had not engaged in protected activity and that it was illogical to find that the City was not aware of her protected activity. AFSCME relies on case decisions issued under the federal National Labor Relations Act to assert that a grievance filed by the union on behalf of an employee is a *per se* exercise of protected activity and because the City responded to the grievance, it knew that the grievance was filed on her behalf.

The Executive Director found that the record failed to establish that Ms. McAneney was engaged in concerted activity. The record establishes no connection between the grievances filed by the Union contesting the implementation of the negotiated wage rates in July to Ms. McAneney's termination in October. AFSCME concludes that the two events must be linked because of their temporal proximity. The record is clear, however, that Ms. McAneney, by her own testimony, did not initiate and did not engage in any of the grievance proceedings. At the time of her termination, she did not assert she was being terminated because AFSCME filed a grievance on her behalf, but surmised that she was terminated because the Finance Director did not like her (nor did she like the Finance Director).[3]

[3] The facts in this case stand in stark contrast to *Brad Snodgrass, Inc. and Local Union No. 20, Sheet Metal Workers International Association,* 2003 NLRB LEXIS 157 (2003) where the employer expressly stated that employees were being laid off because of 'the stacks of grievances' over pay (*19-20).

AFSCME is required by its duty of fair representation to be involved in the processing of grievances under the terms of its collective bargaining agreement with the City. Despite AFSCME's protestations, the decision in this case presents no threat to its role as the exclusive representative of bargaining unit employees.[4] The facts in this case are that AFSCME pursued the grievances despite Ms. McAneney's lack of interest and support. The motivating force behind the grievance was the Union President's interest in pursuing a grievance "to which he had a right."[5] Absent evidence that individuals were actively engaged in and publicly supported the grievance filed through and by its President, there is no presumption that all affected employees are part and parcel of protected, concerted activity. These cases must fall on the specific facts of the case. In this case, there are no facts to support AFSCME's conclusions.

The Executive Director properly concluded that AFSCME did not meet its burden to establish a *prima facie* case of animus. She did, however, proceed to analyze the City's proffered business reasons for separating Ms. McAneney at the end of her probationary period. The record is replete with evidence that the City had many concerns about the employee's performance, that it made Ms. McAneney aware of its concerns, and offered her assistance to support her improvement. Unfortunately, she was ultimately unable to meet the articulated performance expectations. Her mistakes, tardiness and attendance issues, and failure to improve despite efforts to reform her performance are well-documented.

AFSCME provided no evidence to support the conclusion that the City's reasons for terminating her employment were pretextul. It is the burden of the Charging Party to

[4] In fact, it is less than clear that Ms. McAneney would be a bargaining unit employee until she completed her probationary employment period.

[5] April 24, 2019 hearing transcript at page 41.

establish the City violated 19 Del. C. §1307(a)(1) and (a)(3). This record supports the Executive Director's conclusion that AFSCME failed to meet that burden.

DECISION

After reviewing the record and hearing and considering the arguments of the parties, the Board unanimously finds the Executive Director correctly applied the law to the facts presented, that her decision was supported by the record, and that the decision is neither arbitrary nor capricious.

WHEREFORE, the decision is affirmed.

Dated: June 2, 2023