

**PUBLIC EMPLOYMENT RELATIONS BOARD  
FOR THE STATE OF DELAWARE**

<b>DELAWARE PUBLIC EMPLOYEES LOCAL 837,</b>	)	
<b>JOSEPH O’NEAL, JASON CHADICK,</b>	)	
<b>AND KENNY RAMIREZ,</b>	)	
	)	<b>UNFAIR LABOR PRACTICE CHARGE</b>
<b>Charging Parties,</b>	)	
	)	<b><u>No. 23-02-1344</u></b>
<b>v.</b>	)	
	)	
<b>STATE OF DELAWARE, DEPARTMENT OF</b>	)	<b>Probable Cause Determination</b>
<b>TRANSPORTATION,</b>	)	
	)	
<b>Respondent.</b>	)	

**BACKGROUND**

The State of Delaware (“State”) is a public employer within the meaning of 19 Del. C. Section 1302(p) of the Public Employment Relations Act, 19 Del. C. Chapter 13 (“PERA” or “Act”). The Department of Transportation (“DOT”) is an agency of the State in which the Division of Transportation Solutions/Division of Maintenance and Operations is organizationally located.

Delaware Public Employees Council 81, AFSCME, AFL-CIO (“AFSCME”) is an employee organization within the meaning of 19 Del. C. §1302(i) of the PERA. AFSCME Local 837 is the certified representative of DOT employees (as defined by DOL Case No. 13) within the meaning of §1302(j) of the Act.

Joseph O’Neal, Jason Chadick and Kenny Ramirez (collectively “Charging Parties”) are employed by DOT in the Division of Transportation Solutions/Division of Maintenance and Operations. The Charging Parties are represented for purposes of

collective bargaining by AFSCME Local 837. At the time of the incident underlying this Charge, Mr. Ramirez was a union shop steward and Mr. Chadick was the Vice President of AFSCME Local 837.

At all times relevant to this Charge, AFSCME Local 837 and the State were parties to a collective bargaining agreement which has a term of July 1, 2022 through June 30, 2025.

On February 13, 2023, the Charging Parties filed an unfair labor practice charge (“Charge”) with the Public Employment Relations Board (“PERB”) alleging DOT had engaged in conduct which violates 19 Del. C. §1307 (a)(1), (a)(3), (a)(5) and (a)(8) 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 in or 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) 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.
  - (8) Refuse to disclose any public record as defined by Chapter 100 of Title 29.

Specifically, the Charge alleges that the State failed to afford Mr. O’Neal with adequate Union representation during an investigatory meeting which resulted in the imposition of discipline, failed to bargain in good faith when it unilaterally modified the terms of the negotiated grievance procedure, and that it failed or refused to provide information relevant to a pending disciplinary grievance.

Thereafter, on February 24, 2023, the Charge was held in abeyance at the Charging Parties' request, pending settlement efforts. By email dated May 30, 2023, the Charging Parties requested the abeyance be lifted as the settlement efforts had been unsuccessful.

On or about June 9, 2023, the State filed its Answer denying the Charge. The State asserted in New Matter included in its Answer that the Charge failed to state a claim under 19 Del. C. §1307 (a)(1); that it failed to state a claim that the State had interfered with the Charging Parties' protected rights; and that the Charge should be deferred for resolution to the parties' negotiated grievance procedure because it essentially asserts that the State erred in its application and interpretation of the negotiated collective bargaining agreement.

The Charging Parties responded to the State's New Matter on June 20, 2023, denying the State's asserted defenses.

### **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. DOT/DTC*, ULP 04-10-453, V PERB 3179, 3182 (Probable Cause Determination, 2004).

The issue raised by this Charge is not whether there was just cause, under the terms of the negotiated collective bargaining agreement, to discipline Mr. O'Neal. The *Weingarten*<sup>1</sup> rule establishes that where an employee reasonably believes that discipline may result from an investigatory interview, that employee has a right to request Union representation during the interview. A determination as to whether an employee's *Weingarten* rights have been violated is fact-bound by the specific circumstances giving rise to the unfair labor practice charge. The pleadings include disputed facts as to the involvement of Mr. O'Neal's union representative during the investigatory interview and as to DOT's reliance on that interview as a basis for discipline. The legal scope of Mr. O'Neal's rights is also in dispute.

It is well established through Delaware PERB caselaw that the duty to bargain in good faith under the Public Employment Relations Act obligates a public employer to

<sup>1</sup> *NLRB v. J. Weingarten, Inc.* 420 U.S. 251, 88 LRRM 2689 (1975). The Delaware PERB has adopted and applied the *Weingarten* rule in *J. Poli v. State of Delaware, Delaware Transit Corp.*, ULP 09-03-669, VII PERB 4395 (2009); *CWA Local 13101 v. State of Delaware, Dept. of Safety and Homeland Security*, ULP 12-01-848, VIII PERB 5847 (2013); *CWA Local 13101 v. State of Delaware, Dept. of Safety and Homeland Security*, ULP 18-10-1165, IX PERB 8131, 8133 (PCD, 2019).

provide information to an exclusive bargaining representative which is necessary and relevant to the performance of its representational duties.<sup>2</sup> The Charging Parties' allegations relating to the failure or refusal of the State to provide requested documents and whether those requested documents were, in fact, public records within the meaning of Chapter 100 of Title 29, may support a determination that §1307(a)(5) and/or (a)(8) has been violated. The pleadings include factual and legal disputes on this portion of the charge.

The pleadings in this matter are sufficient to establish probable cause to believe that an unfair labor practice may have occurred. It will ultimately be the Charging Parties' burden to establish by a preponderance of the evidence that the State violated the Public Employment Relations Act, as alleged.

### **DETERMINATION**

Considered in a light most favorable to the Charging Parties, the pleadings are sufficient to establish that the State may have violated 19 Del. C. §1307(a)(1), (a)(3), (a)(5) and/or (a)(8), as alleged. The pleadings raise 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

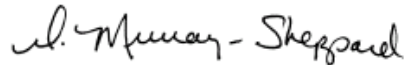
<sup>2</sup> *AAUP v. DSU*, ULP 95-10-159, III PERB 2177 (Del. PERB, 2001); *Delaware Correctional Officers Association v. Delaware Dept. of Correction*, ULP 00-07-286, III PERB 2209, 2214 (2001); *AFSCME Locals v. DSU*, ULP 10-04-739, VII PERB 4693, 4705 (2010); *AFSCME Locals 320 & 1102 v. City of Wilmington*, ULP 10-08-761, VII PERB 4757, 4760 (Probable Cause Determination, 2010); *Amalgamated Transit Union, Local 842 v. State of Delaware, Delaware Transit Corp.*, ULP 12-02-850, VIII PERB 5493 (Probable Cause Determination, 2012). The obligation has also been recognized by the Court of Chancery and the Delaware Supreme Court. *Bd. of Education of Colonial School District v. Colonial Education Assn., DSEA/NEA*, CA 14383, II PERB 1343 (Del. Chan., 1996), *affirmed Colonial EA v. Bd. of Education*, Case 129, 1996, III PERB 1519 (Del. Supr., 1996).

developing a full and complete factual record upon which a decision can be rendered concerning:

WHETHER THE STATE, BY AND THROUGH THE DEPARTMENT OF TRANSPORTATION, INTERFERED WITH THE PROTECTED RIGHTS OF EMPLOYEES, AND/OR ENCOURAGED OR DISCOURAGED MEMBERSHIP IN AFSCME LOCAL 837, AND/OR FAILED OR REFUSED TO BARGAIN IN GOOD FAITH, AND/OR REFUSED TO DISCLOSE A PUBLIC RECORD IN THE INVESTIGATION OF AND SUBSEQUENT PROCESSING OF A DISCIPLINARY GRIEVANCE IN VIOLATION OF 19 *DEL. C.* §1307(A)(1), (A)(3), (A)(5) AND/OR (A)(8), AS ALLEGED.

Having found probable cause based on the pleadings, the State's asserted defenses will be considered following creation of the evidentiary and legal record.

DATE: December 7, 2023



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