

STATE OF DELAWARE
DELAWARE PUBLIC EMPLOYMENT RELATIONS BOARD

ARMOND D. WALDEN,)	
)	
Charging Party,)	
)	
v.)	<u>ULP No. 04-12-460</u>
)	Probable Cause Determination
STATE OF DELAWARE, DEPT. OF)	
TRANSPORTATION, DELAWARE)	
TRANSIT CORPORATION,)	
)	
Respondent.)	

BACKGROUND

The State of Delaware, Department of Transportation, Delaware Transit Corporation (“DTC”) is a public employer within the meaning of § 1302(p), of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13 (1986).

Armond D. Walden (“Walden” or “Charging Party”) was a public employee within the meaning of 19 Del.C. §1302(o) of the PERA who was employed by DTC as a Fixed Route Driver at the time of his termination earlier in 2004.

At all times relevant to this Charge, Charging Party was a member of ATU, Local 842, the exclusive bargaining representative of the Fixed Route Drivers within the meaning of 19 Del.C. §1302(j). DTC and ATU, Local 842 are parties to a collective bargaining agreement for the period December 1, 2002, through November 30, 2007.

This unfair labor practice charge was filed by Charging Party with the PERB on December 15, 2004. The charge alleges conduct by the State in retaliation for Charging Party's engaging in Union activity and otherwise exercising his protected rights under 19 Del.C. Chapter 13. Charging Party alleges violations of 19 Del.C. §1307(a)(1), (2), (3), (4), (5),(7), which provide:

1307. Unfair Labor Practices

(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.
- (2) Dominate, interfere with or assist in the formation, existence or administration of any labor organization.
- (3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.
- (4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition or complaint or has given information or testimony 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.
- (7) Refuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting contract.

Charging Party also alleges violations of 19 Del.C. Chapter 8, Protection of Employees' Rights, specifically §802, Requirements before any public authority may take over and operate privately owned mass transit systems, sub-sections (3) and (4) and §803, Required contract provisions.¹

In paragraph 3 of the Complaint the Charging Party alleges that at the time of his termination he was denied access to the contractual grievance procedure. He also contests the validity of his pre-termination hearing because it is non-contractual and, therefore, violates 19 Del.C. §1607(a)(5) and (a)(7).

In paragraph 4 of the Complaint Charging Party alleges that he was denied access to his Union representative before being questioned by management about the incident resulting in his suspension and ultimate termination.

In paragraph 5 of the Complaint Charging Party alleges that he was terminated for engaging in union matters rather than the reasons stated by management. In paragraph 6, the Charging Party alleges that management engaged in conduct intended to control the union and the recent election held on December 8, 2004. He also alleges that management attempted to render him ineligible to run for union office and that he was forced to decline a place on the ballot because of interference by management.

On December 22, 2004, the State filed its Answer to the Complaint in which it denied committing any of the alleged statutory violations. The State denies the allegations in paragraph 3 of the Complaint contending that the termination letter from the Department Secretary expressly notified Charging Party of his right to contest the discipline through the contractual grievance procedure.

¹ The interpretation, application and/or enforcement of the provisions of 19 Del.C. Chapter 8, Protection Of Employee's Rights, are not within the jurisdiction of the PERB and are not, therefore, considered in this Probable Cause Determination.

The State likewise denies the material allegations set forth in paragraph 4 of the Complaint contending that at the time Charging Party was suspended pending a pre-termination hearing he became loud and abusive refusing to leave the Employer's property. He was provided with a Union representative who convinced Charging Party to leave the premises.

The State denies the allegations contained in paragraph 5.

The State denies the allegations in paragraph 6 of the Complaint contending that the State attempted to arrange for a meeting to discuss access to the Employer's property for campaigning but that Charging Party declined to attend stating that he was too busy.

Under New Matter I the State accuses Charging Party of abusing the PERB's processes by repeating and realleging claims which were made or could have been made in prior charges made by him. Specifically, the State cites paragraphs 3, 4, 5, and 6 of the Complaint.

Under New Matter II the State contends that the PERB should defer the unfair labor practice charge to the arbitration procedure set forth in the collective bargaining agreement between ATU Local 842 and the State.

On December 30, 2004, Charging Party filed a Response to New Matter denying the State's claim that the Charge abuses the PERB's processes and requesting that the matter not be deferred to the contractual arbitration procedure.

DISCUSSION

Charging Party filed ULP No. 04-11-456 on November 9, 2004. alleging similar conduct by the State in violation of §1307(a) of the PERA. On December 16, 2004, the

decision by the Executive Director declining to issue a finding of probable cause provides, in relevant part:

. . . the Complaint is deficient in several respects. Paragraphs 1, 2, the majority of paragraph 3, and 4, 5, 6, and 8 of Charging Party's Complaint are identical to paragraphs 1, 2, 3, the majority of paragraph 4, and 5, 6, 7, and 8, of a complaint filed by DART employee Timothy Joynes on January 5, 2004. Whether the specific conduct by management complained of by Charging Party is the same or similar to the conduct complained of by Joynes is unclear. If the former, this Complaint filed on November 9, 2004, does not comply with the 180 day filing period required by PERB Rule 5.2.

The Charge is deficient because it does not meet the requirements of PERB Rule 5 (c). It fails to include facts which, if proven, would support a conclusion 1) that Charging Party was engaged in activity that is protected under PERA; 2) that DTC had knowledge of his protected activity; 3) that DTC engaged in conduct that interfered with, retaliated against, coerced or restrained Charging Party in the exercise of his protected rights.

Facts to support allegations, including the names of individuals involved, date and place of occurrence and the nature of the conduct involved which are alleged to have violated the PERA, must be set forth with enough specificity to allow PERB to evaluate whether there is probable cause to believe that an unfair labor practice may have occurred. This Charge sets forth only the Charging Party's conclusion that the law has been violated but does not define the incidents or actions on which those conclusions are based.

As a result, the Complaint fails to provide a sufficient basis for

making an informed determination concerning whether the charge is timely filed and/or whether there are specific acts or conduct sufficient to establish probable cause to believe that an unfair labor practice may have occurred.

DECISION

. . . the Complaint fails to establish probable cause to believe that the alleged violations of 19 Del.C. §1307, may have occurred. The Charge is, therefore, dismissed without prejudice. Charging Party may amend his Complaint to include specific acts or conduct upon which a determination as to timeliness and an informed probable cause determination concerning the underlying substantive allegations can be made. (Probable Cause Determination, ULP 04-11-456 pgs. 5-7)

It is within the context of the prior dismissal that the content and sufficiency of the instant complaint must be considered.

The instant Complaint is more specific than the Complaint in ULP No. 04-11-456 and raises factual issues resulting in probable cause to believe that an unfair labor practice may have occurred. The fact that the allegations in the Complaint in ULP No. 04-12-460 may, to some extent, be duplicative of the allegations in the complaint in ULP No. 04-11-056, is irrelevant since ULP No. 456 was dismissed without prejudice with leave to refile consistent with the dismissal decision.

The State's contention that the current matter should be deferred to arbitration pursuant to the provisions of the current collective bargaining agreement is unpersuasive. The essence of the Complaint filed by Charging Party in the current matter alleges retaliation for union activity. The question of whether the alleged conduct occurred goes

to the very heart of the Public Employment Relations Act, the right of employees to organize and participate in union activity without the fear of retaliation. The responsibility to administer the PERA is found in §1301 (3), of the PERA. While the PERB has adopted a discretionary deferral policy, that policy does not remove from the PERB the authority to adjudicate alleged statutory violations such as those at issue here where probable cause is present. The underlying issue here is not whether there has been a violation of a specific contractual provision or provisions.² Rather, the issue is one of a fundamental right conferred upon employees by the PERA. For this reason, deferral to arbitration in this instance is inappropriate.

PROBABLE CAUSE DETERMINATION

1. There is no probable cause to support a charge that the complained of actions violate 19 Del.C. §1307 (a) (5) or (a)(7) and all charges relating thereto are dismissed.

2. The pleadings identify and support factual and legal issues sufficient to establish probable cause to believe that DTC may have violated 19 Del.C. §1307(a)(1), (a)(2), (a)(3), and/or (a)(4).

WHEREFORE, an informal conference will be convened for the purposes of discussing the further processing of this charge, including the method by which the factual and legal issues raised will be presented for resolution.

² Issues requiring the interpretation of contract language are not normally within the PERB's jurisdiction and will not be resolved by the PERB in the processing of this Complaint.

IT IS SO ORDERED

/s/Charles D. Long, Jr.

**Charles D. Long, Jr.,
Executive Director**

Dated: January 12, 2005