

PUBLIC EMPLOYMENT RELATIONS BOARD
FOR THE STATE OF DELAWARE

JOSEPH F. POLI, JR.,)	
)	
Appellant,)	PERB Review of the
)	Hearing Officer's Order
v.)	of Dismissal
)	
)	<u>ULP 09-06-669</u>
STATE OF DELAWARE, DELAWARE)	
TRANSIT CORPORATION,)	
)	
Appellee.)	

Appearances

Joseph F. Poli, Jr., Pro Se
Thomas J. Smith, SLREP, for DTC

BACKGROUND

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

Joseph Poli, (“Charging Party”) is employed by DTC and is a public employee within the meaning of 19 Del.C. §1302(o). The Charging Party is a member of the bargaining unit represented by the Amalgamated Transit Union, Local 842, (“ATU”) which represents a bargaining unit of DTC employees for purposes of collective bargaining and is certified as the exclusive bargaining representative of that unit pursuant to 19 Del.C. 1302(j).

On or about March 18, 2009, the Charging Party filed an unfair labor practice charge alleging that DTC violated 19 Del.C. §1301(a), §1303(1), (2), (3), (4), §1307(a)(1), (2), (3), (4), (5), (6) and (7) of the PERA. The essence of the Charge is that

DTC retaliated against Charging Party for his involvement in protected activity, specifically, filing charges with the PERB and counseling and representing other employees in the filing of grievances and unfair labor practice charges.

On or about March 30, 2009, the State filed its Answer in which it contends the individual allegations fail to provide a clear and detailed statement of the facts constituting the alleged unfair labor practice as required by 19 Del.C. §1307(a) and PERB Rule 5.2(c); and/or the allegations constitute legal conclusions to which no response is necessary; and/or the allegations do not constitute a violation of the PERA. To the extent a further answer is required, each allegation is denied. Under a section entitled New Matter, the State maintains the unfair labor practice charge should be deferred to the contractual arbitration procedure for resolution.

On or about April 6, 2009, Charging Party filed his Response to New Matter objecting to the State's request that the matter be deferred to the contractual arbitration procedure.

A probable cause determination was issued and a hearing was conducted. Upon review of the pleadings and consideration of the evidence and argument presented by the parties, the Hearing Officer dismissed the Charge finding "...the record created by the Charging Party fails to establish he was involved in protected activity and/or that the employer engaged in conduct in violation of 19 Del.C. §1303(3), and/or §1307(a)(1) (a)(3), (a)(3), (a)(4) and (a)(6)." Specifically, the Hearing Officer found Charging Party failed to establish a prima facie case that he was involved in protected activity of which the employer was aware, and that the protected activity was a substantial or motivating factor in the employer's decision to discipline him.

On or about November 19, 2009, Charging Party requested review of the Hearing Officer's decision, asserting:

... DTC is admittedly and continually selecting union steward *[sic]* for ATU members to the exclusion of available and preferred stewards (stewards requested by the members), in violation of the supreme court rulings of Weingarten and NLRB v. Anheuser-bush *[sic]* (cases enclosed).

DTC responded to the Request for Review on December 2, 2009, requesting the appeal be denied and the Hearing Officer's decision be affirmed because it was based on substantial evidence and was neither arbitrary, capricious nor contrary to law. DTC specifically objected to Charging Party's inclusion of new arguments and his attempt to introduce new evidence into the record in the Request for Review.

A copy of the complete record in this matter was provided to each member of the Public Employment Relations Board. At Charging Party's request, the hearing on this matter was postponed until January 20, 2010, at which time the full PERB met in public session to consider Charging Party's request for review.

DISCUSSION

Attached to Charging Party's Request for Review were a number of documents relating to unfair labor practice charges made by employees against DTC, which were not included in the record created before the Hearing Officer. This Board has delegated to the Office of the Executive Director the authority to conduct hearings and rendered decisions. The Board reviews these decisions, upon request or upon its own motion, based upon the record created before the Hearing Officer. The record may not be supplemented on request for review. For this reason, the pleadings relating to other unfair labor practice proceedings submitted by Charging Party with his request for review were stricken from the record.

Upon review of the record and consideration of the arguments of the parties, the Board finds the Hearing Officer's decision was not arbitrary, capricious or contrary to

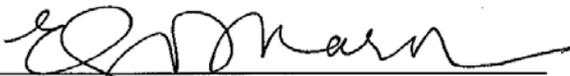
law, and that it is based on the record before him. The Hearing Officer correctly found that the record did not support Charging Party's charge that either the proposed discipline or the alleged refusal by the employer to provide the preferred shop steward were motivated by union animus. Other than Charging Party's assertions, the record does not include evidence sufficient to establish either that the Charging Party was engaged in protected, concerted activity under the Public Employment Relations Act, and/or that the employer was aware of such protected activity and that the employer's knowledge was a substantial or motivating factor in a negative employment action.

DECISION

After reviewing the record, hearing and considering the arguments of the parties, the Board unanimously affirms the decision of the Hearing Officer dismissing the Charge as unsupported by substantial evidence.

Wherefore, the appeal of the dismissal of the Charge is denied.

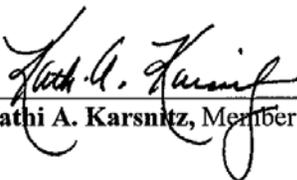
IT IS SO ORDERED.



Elizabeth D. Maron, Chairperson



R. Robert Currie, Jr., Member



Kathi A. Karsnitz, Member

DATED: FEBRUARY 17, 2010