

PUBLIC EMPLOYMENT RELATIONS BOARD
FOR THE STATE OF DELAWARE

WILLIAM FETTERS,	:	
Charging Party	:	
	:	
v.	:	<u>ULP No. 09-10-713</u>
	:	Probable Cause Determination
STATE OF DELAWARE, DELAWARE TRANSIT	:	
CORPORATION,	:	
Respondent	:	

BACKGROUND

The State of Delaware (“State”) is a public employer within the meaning of §1302(p) of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13 (1994). The Delaware Transit Corporation (“DTC”) is an agency of the State.

The Charging Party, William Fetters, was employed by DTC and is or was a public employee at all times relevant to this Charge 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).

ATU and DTC are parties to a collective bargaining agreement which has an expiration date of November 30, 2008, but which remained in full force and effect at all times relevant to this Charge.

On or about October 30, 2009, the Charging Party filed an unfair labor practice charge alleging that DTC violated 19 Del.C. §1301(2), §1303(3), §1304(b), §1305, §1307(a)(1), (3), and (6), of the PERA, which provide:

§ 1301. Statement of policy.

It is the declared policy of the State and the purpose of this chapter to promote harmonious and cooperative relationships between public employers and their employees and to protect the public by assuring the orderly and uninterrupted operations and functions of the public employer. These policies are best effectuated by:

- (2) Obligating public employers and public employee organizations which have been certified as representing their public employees to enter into collective bargaining negotiations with the willingness to resolve disputes relating to terms and conditions of employment and to reduce to writing any agreements reached through such negotiations;

§ 1303. Public employee rights.

Public employees shall have the right to:

- (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.

§1304. Employee organization as exclusive representative

- (b) Nothing contained in this section shall prevent employees individually, or as a group, from presenting complaints to a public employer and from having such complaints adjusted without the intervention of the exclusive representative for the bargaining unit of which they are a part, as long as the representative is given an opportunity to be present at such adjustment and to make its view known, and as long as the adjustment is not inconsistent with the terms of an agreement between the public employer and the exclusive representative which is then in effect. The right of the exclusive representative shall not apply where the complaint involves matters of personal, embarrassing and confidential nature, and the complainant specifically requests, in writing, that the exclusive representative not be present.

§1305. Public employer rights.

A public employer is not required to engage in collective bargaining on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion or policy as the functions and programs of the public employer, its standards of services, overall budget, utilization of technology, the organizational structure and staffing levels and the selection and direction of personnel.

§1307(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.
- 6) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

According to the Charge, Charging Party was terminated at the end of May, 2009 after receiving his eighth miss.¹ Specifically, the Charge asserts in §3:

... The cause of some of the misses is a medical condition I have had since I was 18 years old and I have discussed this with my supervisor on many occasions over the years, and been told nothing can be done, and was told that if I get the eighth miss I am gone. As cited in the contract I was entitled to receive a referral to our labor relation department. This is a meeting that I have discovered DTC would have been contractually obligated to have and ask me why I am missing. In addition after recent research into the FMLA and the ADA I discovered that my misses qualify and cannot be legally used as discipline against me. Further I discovered in the FMLA and ADA that DTC has a legal responsibility to inform me of this when they become aware of a condition that is protected under the FMLA and has a legal responsibility to investigate a condition that may be protected under the FMLA even if the word FMLA were not brought up, and even if the employee doesn't know about the FMLA. At this meeting they are contractually required to tell ask me about the eligibility of these misses and bound bylaw to tell me about FMLA and ADA, and further investigate any possible eligibility my misses have under these laws.

The Charge alleges DTC “deliberately chose not to have this meeting.” Charging Party requests PERB find DTC violated the PERA as alleged; order DTC to cease and desist from violating the statute; reinstate Charging Party and make him whole as required by

¹ Section 13.1 of the collective bargaining agreement states: “When an employee fails to report in time for the employee’s scheduled work day or for any specified report time, it shall be counted as a ‘miss’... The ADMINISTRATION shall impose the following progressive discipline for missing scheduled report times: ... (7) Seventh miss in a floating 12 month period – 3 day suspension without pay and referral to the Labor Relations Specialist; (8) Eighth miss in a floating 12 month period – termination of employment.

the collective bargaining agreement; and provide such other relief as appropriate and reasonable.

On November 10, 2009, the State filed its Answer in which it denies the substantive allegations set forth in the Charge because the allegations fail to provide a clear and detailed statement of facts constituting an unfair labor practice as required by 19 Del.C.§1307(a) and PERB Rule 5.2(c)(3); and/or, the allegations constitute legal conclusions to which no response is necessary; and, if a further response is necessary, the allegation is denied; and/or the State has not violated the provisions of the Act, as claimed by the Charging Party.

Under a section of its Answer entitled New Matter, the State asserts the unfair labor practice charge should be deferred to the contractual arbitration procedure. It further asserts that the pleadings fail to allege facts sufficient to state a claim for relief under any of the cited provisions of the statute, namely, §1301(2), §1303(3), §1304(b), §1307(a)(1), §1307(a)(3) and/or §1307(a)(6). The State requests the charge be dismissed in its entirety and all requested relief be denied.

On November 29, 2008, Charging Party filed his Response to New Matter objecting to the State's request that the matter be deferred to arbitration and denying the pleadings fail to state a claim on which relief may be granted.

DISCUSSION

Regulation 5.6 of the Rules of the Delaware Public Employment Relations Board requires:

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

The essence of Charging Party's complaint is that DTC management failed to refer him to a Labor Relations Specialist prior to his eighth "miss", which he asserts violates DTC's obligation under §13.1 of the collective bargaining agreement. The Public Employment Relations Board is not primarily responsible for application and/or interpretation of negotiated provisions of a collective bargaining agreement; that is the province of the negotiated grievance and arbitration procedure. Attachment #6 to the Employer's Answer and New Matter evidences that a grievance was filed contesting Charging Party's dismissal and was processed at least through Step 4 of the negotiated grievance procedure. Charging Party (in his Response to New Matter) admits this to be true. There is no allegation that there has been any interference with the regular functioning of the grievance procedure.

Charging Party alleges that DTC was required to provide him with access to a Labor Relations Specialist who would be "legally responsible to investigate a condition

that may be protected under the FMLA”. Even if proven, this allegation constitutes a potential violation of the collective bargaining agreement, which is subject to resolution through the negotiated grievance and arbitration procedure. The Charge does not allege any facts sufficient to establish a basis for finding probable cause to believe that a violation of 19 Del.C. §§1307(a)(1), (a)(3), (a)(6) or any of the other provisions of the PERA cited in the Charge may have occurred; consequently, the Charge is dismissed.

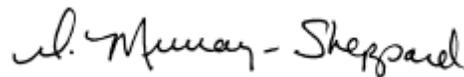
DETERMINATION

Consistent with the foregoing discussion, even when considered in a light most favorable to Charging Party, the pleadings fail to establish probable cause to believe that an unfair labor practice may have occurred.

Wherefore, the Charge is hereby dismissed in its entirety.

IT IS SO ORDERED.

Date: January 19, 2010



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