

**STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD**

RICHARD FLOWERS,	:	
	:	
Charging Party,	:	
	:	
v.	:	<u>ULP 04-10-453</u>
	:	
STATE OF DELAWARE DEPARTMENT OF TRANSPORTATION,	:	Probable Cause
DELAWARE TRANSIT CORPORATION,	;	Determination
	:	
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).

Richard Flowers (“Charging Party” or “Flowers”) was a Fixed Route Operator in New Castle County, Delaware, employed by Delaware Transit Corporation. At issue in this matter is the processing of grievances including one concerning the Charging Party’s termination. At all times relevant to this charge, Flowers was a member of ATU Local 842, the exclusive bargaining representative of Fixed Route Drivers within the meaning of 19 Del.C. §1302(j).

DTC and ATU Local 842 are parties to a collective bargaining agreement which extends from December 1, 2002 through November 30, 2007. This agreement was in effect for all times relevant to this charge.

On or about October 4, 2004, the Charging Party filed an unfair labor practice complaint pursuant to Regulation 5.2 of the Rules and Regulations of the Public

Employment Relations Board (“PERB”), in which it is alleged that DTC violated 19

Del.C. §1307(a)(1) through (8):

- (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 bargaining unit, except with respect to a discretionary subject.
 - (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.
 - (7) Refuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting contract.
 - (8) Refuse to disclose any public record as defined by Chapter 100 of Title 29.

The complaint alleges that DTC has refused to process grievances filed by the Charging Party and that DTC managers threatened and subsequently terminated Charging Party in retaliation for attempting to file grievances protesting working conditions.

DTC filed its Answer, including New Matter, on or about October 8, 2004, in which it denied the allegations and requested the Complaint be dismissed. In its New Matter, DTC asserts:

- (1) The Complaint should be deferred to arbitration because the underlying issue concerns whether Charging Party was terminated for just cause under the collective bargaining agreement.
- (2) The Complaint should be dismissed because the Charging Party refused to participate in the grievance process. DTC asserts it made repeated attempts to schedule meetings on Charging Party's numerous grievances but that Mr. Flowers refused to return to telephone calls. When a meeting was convened on October 6, Mr. Flowers refused to discuss anything other than his termination.
- (3) The individuals named by the Charging Party on his initial filing¹ should be dismissed from the proceeding because the Charging Party failed to allege any facts supporting a conclusion that the named persons have individually violated Charging Party's rights under the PERA.

Charging Party filed his Response to New Matter on or about October 18, 2004 in which he denies the State's New Matter. The response requests that DTC be found in violation of 19 Del.C. §1307(a)(1) through (a)(8); that DTC be directed to rescind the termination and make Charging Party whole. In the alternative, the Charging Party asks that PERB either schedule an expedited hearing in this matter or issue a temporary restraining order to compel DTC to reinstate Mr. Flowers and that he "be awarded any necessary attorney's fees because of the Respondent's blatant attempt to discourage, undermine and punish the employee in retaliation for using the protections guaranteed by collective bargaining."

¹ In addition to DTC, the original filing named in the caption: Nathan Hayward III, Secretary; Raymond C. Miller, Executive Director; Jerry M. Cutler, Manager of Labor Relations; William B. Hickox, Director; Margaret M. Failing, Director of Human Resources; and Michael J. Svaby, Executive Assistant.

DISCUSSION

The Rules and Regulations of the Delaware PERB require that upon completion of the pleadings in an unfair labor practice proceeding, a determination shall be issued as to whether those pleadings establish probable cause to believe the conduct or incidents alleged could have violated the Public Employment Relations Act, 19 Del.C. Chapter 16. DE PERB Rule 5.6. For purpose of this review, factual disputes revealed through the pleadings are considered in a light most favorable to the Charging Party in order to avoid dismissing what may prove to be a valid charge without the benefit of receiving evidence concerning that factual dispute.

The process does require that the Charging Party allege facts in the complaint with sufficient specificity so as to, first, allow the Respondent to provide an appropriate answer and second, to allow the reviewing PERB officer to determine that there is a sufficient factual basis for the charge. The Charge must also explicitly link the factual allegations to the “specific provision of the statute alleged to have been violated.” DE PERB Rule 5.2. Consequently, the initial burden rests on the Charging Party to allege facts (including dates, identification of persons involved, and a description of specific actions or incidents) that support the charge that §1307 of the PERA has been violated.

In this case, the Charging Party has alleged that DTC has violated all eight statutory prohibitions on employer conduct. After carefully reviewing the pleadings, including the attached documentation, I find no specific incidents or conduct which support the charge that the complained of conduct interfered with the formation, existence or administration of a labor organization. Nor do the facts alleged support a charge that DTC has failed to bargain collectively in good faith with ATU Local 842. There is also no conduct or incidents alleged that indicate that DTC refused to reduce a

collectively bargained agreement to writing, or that it has refused to disclose public records. For this reason, the charge that DTC has violated 19 Del.C. §1307 (a)(2), (a)(5), (a)(7), or (a)(8) is dismissed as there is no probable cause to believe, based upon the pleadings, that DTC has violated any of these provisions of the statute.

The essence of the charge is that DTC has violated the statute by refusing to process the Charging Party's grievances and that it has acted on prohibited motives by discriminating, threatening and ultimately terminating him in retaliation for protected activity. The protected activity alleged by the Charging Party includes the filing of grievances and advocating for safe working conditions.

Attached to the pleadings were numerous documents including both grievances and correspondence relating thereto. In particular there were two letters which originated from DTC representatives that notified the Charging Party that the grievances he had filed would not be processed unless he first secured the "signature of an elected Union official." Section 1304 (b) of the PERA provides:

- (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 or which they are a part, as long as the representative is given the 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 the 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 complaint specifically requests, in writing, that the exclusive representative not be presents.

The pleadings provide a sufficient basis to question whether DTC violated 19 Del.C. §1307(a)(6) in refusing to process the grievances absent Union consent.

There is also probable cause based upon the dates on the documents to question whether the grievances were processed in a timely manner according to the negotiated grievance procedure.

Finally, Charging Party asserts that prior to his termination he was directed by Acting Chief Transportation Supervisor to “to stop making waves” and that the Director of Operations threatened that if he did not drop his grievances, “there would be problems.” Although DTC denies these allegations, they raise both factual and legal issues which, if resolved in the Charging Party’s favor, could support a finding of a 1307(a)(1), (a)(3) and/or (a)(4) violation.

It is important as well to note what is not in issue in this case. Whether the Charging Party was terminated for just cause is not before the Public Employment Relations Board. “Just cause” for termination is required under the negotiated terms of the collective bargaining agreement and is subject to resolution through the parties’ grievance procedure, which culminates in binding arbitration. Similarly, any allegations that DTC has violated Delaware or federal labor laws (other than the PERA) must be resolved by the agencies responsible for administering those particular statutes. Resolution of this charge will also not consider whether DTC has fairly and appropriately administered its No-Fault attendance policy or whether it met the terms of stipulated order of dismissal in ULP 03-06-394. While all of these matters may be of concern to the Charging Party, they are not appropriately raised before the PERB by this unfair labor practice charge.

Finally, DTC has requested that the individuals specifically named in the caption of the Complaint be released. Charging Party has opposed DTC’s motion by responding, “. . . all of the people [on the] list should be at the hearing because they were contacted,

via fax and phone calls. . . [T]hey need to stand before PERB and explain what happened.”

It is not necessary for individuals to be named as Respondents in order to compel their attendance and testimony at a PERB proceeding. PERB has authority under its enumerated powers to subpoena witnesses, administer oaths, take testimony and require the production of documents in connection with hearings. 19 Del.C. §1306, incorporating by reference 14 Del.C. §4006. There is nothing in these pleading to support a finding that any of the named individuals acted as other than an agent of DTC in their role in the alleged incidents. Charging Party will have the opportunity to subpoena individuals who may have information relating to this charge prior to any hearing which may be held. For this reason, all of the individually named persons are released as individual respondents in this matter.

PROBABLE CAUSE DETERMINATION

1. There is no probable cause to support a charge that the complained of actions violate 19 Del.C. §1307(a)(2), (a)(5), (a)(7) or (a)(8) and all charges relating thereto are hereby dismissed.

2. The pleadings do not support a finding that any of the following named individuals acted in their individual capacities in the complained of actions and they are therefore released as individual respondents in this matter: Nathan Hayward, III, Secretary of Transportation; Raymond C. Miller, DTC Director of Operations; Jerry M. Cutler, Esq., Manager of Labor Relations; William B. Hickox, Director of Operations;

Margaret M. Failing, DTC Director of Human Resources; and Michael J. Svaby, Executive Assistant to the Secretary of Transportation.

3. 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)(3), (a)(4), and/or (a)(6).

WHEREFORE, an informal conference will be convened for 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.

DATED: 14 December 2004

/s/Deborah L. Murray-Sheppard
DEBORAH L. MURRAY-SHEPPARD
Hearing Officer, Delaware PERB