

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

VICTORIA L. HENRY,)	
Charging Party,)	
)	
v.)	<u>ULP No. 05-01-462</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 (“State” or “DTC”) is a public employer within the meaning of §1302(p), of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13 (1986).

Victoria L. Henry (“Henry” 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 her termination in approximately June, 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 with the Public Employment Relations Board (“PERB”) on January 11, 2005. The Charge alleges conduct by the State in violation of 19 Del.C. §1307(a)(1), (2), (5), (7) and (8), 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.
 - (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 the 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.

Charging Party also alleges violations of 19 Del.C. Chapter 8, Protection of Employees' Rights.¹

The Charge filed on January 11, 2005, alleges that Charging Party was unjustly terminated and denied access to the contractual grievance procedure which apparently stems from the fact that at the time of her termination she was working under a last chance agreement.

On January 11, 2005, the State filed its Answer to the Complaint in which it denied the material allegations set forth therein. Under New Matter I the State argues that all of the acts complained of in the charge occurred after Charging Party's termination

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

from employment on June 26, 2004. Because the filing of the charge on January 11, 2005, occurred more than one hundred eighty (180) days after Charging Party's termination the charge should be dismissed.

On January 21, 2005, Charging Party filed her Response to New Matter in which she contends that a grievance was filed and that in response to which a two-party arbitration was held on September 22, 2004. It is apparently this date upon which Charging Party relies for her position that the Charge was timely since it was filed prior to March 24, 2005.

DISCUSSION

PERB Rule 5.2 provides, in relevant part:

5.2 Filing of Charges

(a) A public employer, labor organization, and/or one or more employees may file a complaint alleging a violation of 14 Del.C. §4007, 19 Del.C. §1607, or 19 Del.C. §1307. Such complaints must be filed within one hundred and eighty (180) days of the alleged violation. This limitation shall not be construed to prohibit introduction of evidence of conduct or activity occurring outside the statutory period, provided the Board or its agent finds it relevant to the question of commission of an unfair labor practice within the limitations period.

If this statutory requirement is not satisfied the Public Employment Relations Board has no jurisdiction to process an unfair labor practice charge.

Charging Party's contention that the 180 day filing requirement did not expire until March 24, 2005, is without merit. The filing period began to run at the time the complained of conduct occurred. The State's contention that the filing period started to toll on June 26, 2004, the date of Charging Party's termination, is likewise unpersuasive. The Complaint fails to identify when the alleged denial to the contractual grievance procedure occurred. Consequently, it is impossible to ascertain whether or not the critical incident occurred, if at all, within the 180 day period immediately preceding the filing of the Charge.

Resolution of the timeliness issue however, is unnecessary. It is undisputed that a grievance protesting Charging Party's termination as being without "just cause" is currently pending binding grievance arbitration provided for in the contractual grievance procedure. Consequently, the pleadings do not support Charging Party's contention that she was denied access to the grievance procedure.

It is well established that the unfair labor practice forum is not a substitute or alternative for the resolution of contractual disputes which are subject to grievance arbitration pursuant to the collective bargaining agreement.

The PERB has held:

While an unfair labor practice is statutory in origin and by the Public Employment Relations Board, an alleged contract violation is proper subject matter only for the negotiated grievance procedure. The unfair labor practice forum is not a substitute for the grievance procedure and the Public Employment Relations Board has no jurisdiction to resolve grievances through the interpretation of contract language. Brandywine Affiliate, NCCEA/DSEA/NEA v. Brandywine Bd. of Ed. Del.PERB, ULP No. 85-06-005, I PERB 131, 142-43 (1986).

There is no substantive allegation in the Complaint which, if proven, would constitute a violation of 19 Del.C. §1307(a)(1), (a)(2), (a)(5), (a)(7) or (a)(8). This does not, however, deprive Charging Party of a forum in which to process her complaint. The focus of the underlying complaint is that Charging Party was unjustly disciplined. The presence or absence of “just cause”, the standard by which her termination will be judged at arbitration, raises a question of contract interpretation rather than a statutory question to be resolved by the PERB under the Public Employment Relations Act. Thus, the PERB is without jurisdiction to rule on the merits of Charging Party’s termination. Charging Party’s sole recourse is the contractual grievance procedure where her grievance is currently awaiting binding arbitration.

PROBABLE CAUSE DETERMINATION

Consistent with the foregoing discussion, it is determined that there is no probable cause to believe that a violation of 19 Del.C. §1307 (a)(1), (a)(2), (a)(5), (a)(7) or (a)(8) has occurred.

WHEREFORE, the Charge is dismissed.

IT IS SO ORDERED

/s/Charles D. Long, Jr. _____

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

Dated: January 28, 2005