

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

Dorese Scott,)
Charging Party,)
)
v.) **ULP No. 05-02-467**
) 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).

Dorese Scott (“Scott” 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 her employment was terminated on or about August 20, 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 February 11, 2005. The Charge alleges conduct by the State in violation of 19 Del.C. §1307(a)(1), (2), (3), (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.
 - (3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.
 - (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 alleges that on August 20, 2004, she was called into a DTC office and accused by management of being responsible for \$15,000 in missing cash and all day passes. Both management and Union representatives were present at the meeting. Charging Party maintains she was given the choice between being terminated and arrested or resigning. Charging Party contends that DTC Operations Manager, William

Hickox, stated the Company had been watching her for a year. She also alleges the Union President was aware of the surveillance but never told her.

After initially choosing to resign, she (later that day) unsuccessfully attempted to rescind her resignation. Charging Party alleges that DTC's action violated Section (9) Step (A), of the collective bargaining agreement.

On September 9, 2004, Charging Party attended a second meeting (a "two-party" arbitration") at which both DTC and ATU officials were present. During this meeting she was permitted to rescind her initial resignation. However, she alleges she was then denied access to the contractual grievance procedure in violation of Section (7) of the collective bargaining agreement and 19 Del.C. §1303, Employee Rights, paragraphs (2), (3) and (4), which provide:

- (2) Negotiate collectively or grieve through representatives of their own choosing.
- (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.
- (4) Be represented by their exclusive representative, if any, without discrimination.

Charging Party accuses DTC and the ATU of collaborating against her. She contends that if the unfair labor practices she alleges in her Complaint had not been committed she would not have been terminated.

On February 18, 2005, the State filed its Answer denying the material allegations set forth in the Complaint. Under New Matter I, the State alleges that the Charge should

be dismissed because Charging Party elected to withdraw the grievance she had filed seeking to rescind her resignation.

During the pre-termination meeting on August 20, 2004, Scott was presented with the charges against her and provided the opportunity to explain why she should not be terminated. Charging Party discussed the charges privately with her Union representatives before admitting to theft and voluntarily submitting the following handwritten resignation:

I Dorese Scott, agree with the charges as stated and do offer my resignation and acknowledge that the only penalty or restitution will be money due me for vacation, sick days, personal days.

Dorese Scott/sig. 8/20/04

The State alleges that at the grievance meeting of September 9, 2004, Scott again met privately with her ATU representatives. Following their discussions, Charging Party again admitted to the theft of Company property, elected not to pursue the grievance and again resigned her employment. The resulting withdrawal of the grievance was confirmed in a written communication from the State Director of Labor Relations to the ATU President. At no time thereafter did Charging Party contact the State or DTC to revive her grievance or attempt to pursue any grievance without the intervention of the ATU.

Under New Matter II-VI, the State requests that, as to the alleged violations of 19 Del.C. §1307(a)(1), (a)(3), (a)(5), (a)(7) and (a)(8), the Charge should be dismissed for failure to state a claim upon which relief should be granted.¹

¹ The State does not take a similar position concerning the alleged violation of §1307(a)(2).

Also on February 18, 2005, the State filed a Motion to join the ATU, Local 842, as a respondent in this action. The State alleges that in the Complaint Charging Party alleges a breach of the duty of fair representation which necessarily implicates the ATU rather than the State.

On March 9, 2005, Charging Party submitted a Response denying the new matter raised by the State in its Answer. On March 9, 2005, Charging Party also filed an Answer objecting to the State's motion to join the ATU, Local 842, claiming that doing so would deprive PERB of jurisdiction over the subject matter due to a conflict of interest.

Since the filing of these pleadings, Charging Party Scott has filed a separate ULP charge against ATU, Local 842 President Jackie Herbert which alleges violations of the PERA arising out of the same circumstances.

DISCUSSION

The pleadings fail to establish any basis upon which to conclude that a violation of 19 Del.C. §1307(a)(5), (a)(7) or (a)(8), may have occurred. 19 Del.C. §1302(e) defines collective bargaining as, “the performance of the mutual obligation of a public employer through its designated representatives and the exclusive bargaining representative to confer and negotiate in good faith with respect to terms and conditions of employment, and to execute a written contract incorporating any agreements reached.”

This dispute does not involve the negotiation of a collective bargaining agreement or a unilateral change in a mandatory subject of bargaining; therefore, there can be no violation of 19 Del.C. §1307(a)(5) or (a)(7), as alleged.

Nor is there probable cause to believe that a violation of 19 Del.C. §1307(a)(8), may have occurred. 29 Del.C. §10002, Definitions, provides, in relevant part:

(g) . . . For purposes of this chapter, the following records shall not be deemed public:

(1) Any personnel, medical or pupil file, the disclosure of which would constitute an invasion of personal privacy, under this legislation or under any State or federal law as it relates to personal privacy.

The records Charging Party claims were withheld from her concern the charges against her which led to her termination. Such records fall within the “personnel” exception of 29 Del.C. §10002(g)(1), and are not, therefore, public documents under 29 Del.C. 10002(g). The obligation, if any, of the State to disclose documents relating to the underlying incident arises under the terms of the collective bargaining agreement and, therefore, raise a contractual issue unrelated to the alleged violation of 19 Del.C. §1307(a)(8).

Nor do the pleadings establish a potential violation of 19 Del.C. §1303(2), or (3) as Charging Party maintains in paragraph 6, of the Complaint. The phrase “representative of their own choosing” as used in subsection (2) does not mean that any bargaining unit employee has a right to select whomever he or she may desire to be his or her representative when dealing with the Employer. The phrase “representative of their own choosing” refers to the exclusive bargaining representative selected by a majority vote of the bargaining unit employees pursuant to 19 Del.C. §1310. In this case ATU Local 842 is the certified exclusive representative of the bargaining unit of which Charging Party is a member.

The pleadings provide no support for the conclusion that Charging Party was engaged in “concerted activity,” as referenced in subsection (3). The Charge includes no facts which, if proven, would support a conclusion that: 1) Charging Party was engaged in activity that is protected under the PERA; 2) DTC had knowledge of the protected activity; and 3) DTC engaged in conduct that interfered with, retaliated against, coerced or restrained Charging Party in the exercise of her protected rights.

Concerning the alleged violations of 19 Del.C. §1307(a)(1), (a)(2) and (a)(3), the pleadings raise factual disputes which, when resolved, could constitute a violation of these statutory provisions. The factual disputes are limited to what transpired at the meeting on September 9, 2004. (See State’s Answer, New Matter I, paragraphs 19 through 24 and Scott’s Response to New Matter, paragraphs 19 through 24).

The State maintains that Scott admitted to stealing fares and, after privately consulting with her ATU representatives, agreed to resign and withdraw her grievance. Charging Party maintains that she never agreed to resign or withdraw her grievance. She maintains that her request to see the evidence against her was refused and that she requested and understood that an investigation would be conducted.

The State’s contention that there was an agreement that Scott’s grievance was resolved is documented only by an e-mail to this effect to the ATU President from the State’s Manager of Labor Relations.

What transpired during the meeting of September 9, 2004, including the position of the State, the ATU and the grievant, is in dispute. A clear set of facts concerning what actually occurred is necessary to determine whether DTC violated 19 Del.C. §1307(a)(1),

(a)(2) and/or (a)(3). Charging Party should have the opportunity to pursue these questions at a formal evidentiary hearing.

Charging Party will also be provided the opportunity at the hearing to present evidence concerning her charge that she was denied access to the contractual grievance procedure and/or treated differently from other similarly situated employees in violation of 19 Del.C. §1303(4).

PROBABLE CAUSE DETERMINATION

1. Consistent with the foregoing discussion, the pleadings fail to establish probable cause to believe that a violation of 19 Del.C. §1303(2) or (3) or §1307(a)(5), (a)(7) or (a)(8), may have occurred.
2. The pleadings are sufficient to establish probable cause to believe that a violation of 19 Del.C. §1303(4) and/or §1307 (a)(1),(a)(2) and/or (a)(3) may have occurred.
3. An evidentiary hearing will be scheduled for the purpose of establishing a factual record upon which a determination as to whether a violation of 19 Del.C. §1303(4) and/or §1307 (a)(1), and/or (a)(2) and/or (a)(3) has occurred, specifically concerning the meeting of September 9, 2004.
4. In Scott v. Herbert, President of ATU, Local 842, ULP 05-02-469, the Respondent ATU, Local 842, filed a motion to consolidate ULP 05-02-467 and ULP 05-02-469, to which

Charging Party objects but DTC does not oppose. It is, therefore, unnecessary to address the State's Motion to Join in the present case. The consolidation of these two (2) cases will be addressed in the Probable Cause Determination in ULP 05-02-469.

IT IS SO ORDERED

/s/Charles D. Long, Jr. _____

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

Dated: April 5, 2005