

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

RICHARD FLOWERS,)	
Charging Party,)	
)	
v.)	<u>ULP No. 05-02-468</u>
)	Probable Cause Determination
JACKIE HERBERT, PRESIDENT,)	
ATU, LOCAL 842)	
Respondent.)	

BACKGROUND

Richard Flowers (“Flowers” or “Charging Party”) was a public employee within the meaning of 19 Del.C. §1302(o) of the Public Employment Relations Act (“Act” or “PERA”) who was employed by the Delaware Transit Corporation (“DTC”), a public employer within the meaning of 19 Del. C. §1302(p), as a Fixed Route Driver at the time his employment was terminated on or about September 28, 2004. At all times relevant to this Charge, Charging Party was a member of the Amalgamated Transit Union, Local 842 (“ATU).

ATU is the exclusive bargaining representative of the Fixed Route Drivers employed by DTC 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. Jackie Herbert, President, ATU, Local 842, (“Herbert” or

“Respondent”) is a designated representative of an employee organization within the meaning of §1302(i) of the PERA.

On February 16, 2005, Charging Party filed this unfair labor practice charge against Herbert alleging violations of 19 Del.C. Chapter 13, the Public Employment Relations Act (“PERA” or “Act”), specifically §1307(a)(1) through (8) and §1307(b)(1) through (6).

The Complaint alleges that DTC management refused to process Charging Party’s grievances, primarily because they were not signed by “an elected Union official.” Although Charging Party made numerous attempts to contact Union President Herbert, Herbert did not respond to Charging Party’s telephone calls or faxes.¹

On March 9, 2005, Respondent filed its Answer denying the material allegations in the Complaint. Under New Matter I, the Respondent requests that the alleged violations of §1307(b) be dismissed for failing to state a claim upon which relief may be granted due to Charging Party’s failure to sufficiently articulate facts which, even if proven, would constitute the alleged violations.

Under New Matter II, Respondent maintains that, pursuant to the Delaware Supreme Court’s decision in Delaware State University Chapter of the American Association of University Professors v. Delaware State University, 813 A. 2d 1133, 1139 (DE 2002), the PERB should defer to the arbitration of the grievance protesting Charging Party’s termination. ATU, Local 842, contends there is no utility to nor advancement of

¹ Paragraphs one (1) and two (2) of the Complaint address jurisdictional requirements. The allegations contained in paragraphs five (5) through eight (8) and ten (10) through twelve (12) of the Complaint allege conduct by DTC which has no bearing on the resolution of this matter where the sole Respondent is the President of ATU, Local 842.

sound public policy by having the PERB review the underlying circumstances of the pending arbitration in the context of a ULP.

On March 21, 2005, Charging Party filed its Response to the New Matter set forth in Respondent's Answer. Charging Party denies the allegations in New Matter I claiming that the facts underlying the allegations set forth in the Complaint are sufficient to sustain the alleged statutory violations.

As to New Matter II, Charging Party objects to deferral claiming that PERB's intervention would serve the advancement of public policy when the negotiated mechanisms that are put in place do not work correctly or members are not given equal access to such mechanism, either by discrimination, unfair treatment, or unfair labor practices, which is the case here.

DISCUSSION

The alleged violations of 19 Del.C. §1307(a)(1) through (a)(8) are dismissed because they can only be committed by a public employer. The sole respondent in this matter is the President of ATU, Local 842.

Section 1307, Unfair Labor Practices, provides, in relevant part:

(b) It is an unfair labor practice for a public employee or for an employee organization 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) Refuse to bargain collectively in good faith with the public employer or its designated representative if the

employee organization is an exclusive representative.

(3) 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.

(4) Refuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting contract.

(5) Distribute organizational literature or otherwise solicit public employees during working hours in areas where the actual work of public employees is being performed in such a way as to hinder or interfere with the operation of the public employer. This paragraph shall not be construed to prohibit the distribution of literature during the employee's meal period or duty-free periods or in such areas not specifically devoted to the performance of the employee's official duties.

(6) Hinder or prevent, by threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment by any person, or interfere with the entrance to or egress from any place of employment.

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(b)(2) or (b)(4), as alleged.

Nor do the pleadings allege any conduct constituting probable cause to believe that a violation of 1307(b)(5) or (b)(6), may have occurred.

As to the alleged violations of 1307(b)(1) and (b)(3), the pleadings do raise issues concerning whether ATU, Local 842, through its President, breached its statutory duty to represent Charging Party by processing legitimate grievances on his behalf.

ATU, Local 842's contention that the current matter should be deferred to arbitration pursuant to the provisions of the current collective bargaining agreement is unpersuasive. The essence of the Complaint filed by Charging Party in the current matter alleges the refusal by the Union to process grievances. The alleged conduct attributed to Local 842 goes to the heart of the Public Employment Relations Act, the right of employees to organize and have their grievances processed in a timely and equitable manner.

While the PERB has adopted a discretionary deferral policy, that policy does not remove from the PERB the authority to adjudicate alleged statutory violations such as that which is at issue here. The underlying issue here is not whether there has been a violation of a specific contractual provision or the merits of Charging Party's termination. Rather, the issue is one of a fundamental right conferred upon employees by the PERA. For this reason, deferral to arbitration in this instance is inappropriate.

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. §1307(a)(1) through (a)(8), as alleged, may have

occurred.

2. The pleadings fail to establish probable cause to believe that a violation of 19 Del.C. §1307 (b)(2), (b)(4), (b)(5) or (b)(6), may have occurred.

2. The pleadings establish probable cause to believe that a violation of 19 Del.C. §1307(b)(1) and/or (b)(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. §1307(b)(1) and/or (b)(3) has occurred.

IT IS SO ORDERED

/s/Charles D. Long, Jr.

Charles D. Long, Jr.
Executive Director

Dated: April 15, 2005