STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

DORESE SCOTT,	)	
Charging Party,	)	
	)	
v.	)	**ULP No. 05-02-469**
	)	**Probable Cause Determination**
JACKIE HERBERT, PRESIDENT,	)	
ATU, LOCAL 842,	)	
Respondent.	)	

BACKGROUND

Dorese Scott ("Scott" 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 her employment was terminated on or about August 20, 2004.

At all times relevant to this Charge, Charging Party was a member of Amalgamated Transit Union, Local 842, ("ATU") the exclusive bargaining representative of the Fixed Route Drivers employed by DTC within the meaning of 19 Del.C. §1302(j). Jackie Herbert ("Herbert"), President of ATU, is a designated representative of an employee organization within the meaning of §1302(i) of the PERA. DTC and ATU, Local 842, are parties to a collective bargaining agreement for the period December 1, 2002 through November 30, 2007.

On February 23, 2005, Charging Party filed this unfair labor practice charge alleging violations by the Respondent of 19 Del.C. Chapter 13, specifically §1307(b)(1), (b)(2), (b)(3) and (b)(4). Except for substituting alleged union violations for alleged management violations, the Complaint is essentially the same as the complaint filed in Scott v. DTC, ULP No. 05-02-467.

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.

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). 19 Del.C. §1303, Public Employee Rights, provides, in relevant part:

> Public employees shall have the right to:
>
> > (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 the ATU of collaborating with DTC 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 March 9, 2005, ATU filed its Answer denying the material allegations set forth in the Complaint. Under New Matter I, the ATU contends that the Charge should be dismissed for failing to state a claim upon which relief may be granted. The Respondent argues that PERB Rule 5.2(c)(3) requires that an unfair labor practice charge contain "[a] clear and detailed statement of facts constituting the alleged unfair labor practice". Charging Party has failed to articulate facts to adequately place the Respondent on notice regarding the underlying incident which, if proven, might constitute a violation of 19 Del.C. §1307(b)(1), (b)(2), (b)(3) or (b)(4), as alleged.

Under New Matter II Respondent contends that the Charge must be dismissed because it was not filed within 180 days of the alleged violation, as required by PERB Rule 5.2, Filing of Charges.

Also on March 9, 2005, ATU, Local 842, filed a Motion to Consolidate ULP No. 05-02-467 and ULP No. 05-02-069. ATU contends that the allegations and the facts underlying each charge are similar, if not identical. Consolidation will prejudice neither the Charging Party, the State nor the ATU. Failure to consolidate will result in the unnecessary bifurcation of the proceedings and thereby create the opportunity for inconsistent results involving the same or similar facts and issues.

On March 21, 2005, Charging Party filed her Response to New Matter. She maintains that the Complaint contains a sufficiently detailed statement of the underlying facts to create probable cause to believe that the statutory violations alleged may have occurred.

Concerning New Matter II, Charging Party maintains the Complaint was filed on February 18, 2005, and is, therefore timely filed within the 180 day limitations period.

On March 21, 2005, Charging Party also filed a Motion opposing the consolidation of ULP No. 05-02-467 and ULP No. 05-02-469. Charging Party maintains that consolidating these matters will cause irreparable harm to the Union and prevent a fair and equitable hearing.

DISCUSSION

The pleadings fail to establish probable cause to believe that a violation of 19 Del.C. 1303(2) may have occurred insofar as the phrase "representative of their own choosing." As used in subsection (2), "representative of their own choosing" 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 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.

Nor do the pleadings establish probable cause to believe that a violation of 19 Del.C. §1303(3) may have occurred. The Charge includes no facts which, if proven,

would support a conclusion that Charging Party was engaged in activity that is protected under the PERA.

19 Del.C. §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.

The pleadings do not establish probable cause to believe that a violation of §1307(b)(2) or (b)(4) 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 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.

Construed in a light most favorable to the Charging Party, the pleadings do establish probable cause to believe that a violation of §1307(b)(1) and/or (b)(3) may have occurred. What transpired during the meeting of September 9, 2004, including the position of DTC, the ATU and the grievant, is in dispute. A clear set of facts concerning what actually occurred is necessary to determine whether ATU violated 19 Del.C. §1307(b)(1) and (b)(3), as alleged. 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 as guaranteed in §1303(2) and/or treated differently from other similarly situated employees in violation of 19 Del.C. §1303(4).

Concerning New Matter I, the Union's contention that the pleadings are sufficiently vague that they fail to state a claim upon which relief may be granted is unpersuasive. Although at times vague and imprecisely drafted, the Complaint is sufficient to support a finding of probable cause to believe that a violation of 19 Del.C. §1307(b)(1) and/or (b)(3), may have occurred.

As to New Matter II, PERB Rule 5.2(a), provides:

> 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.

At the time Charging Party initially filed her Charge on February 18, 2005, she alleged only management violations. She was afforded the opportunity to rehabilitate her Complaint by amending the alleged violations to those involving an exclusive representative or its duly authorized agent. The Complaint was corrected and refiled on February 23, 2005.

The timeliness of Charging Party's Complaint is a non-issue. From the date of the initial meeting on August 20, 2004, until the filing date of either February 18, 2005, or February 23, 2005, the Charge exceeds the limitations period of 180 days. From the date of the second meeting on September 9, 2004, until the filing date of either February 18, 2005, or February 23, 2005, the Charge is timely filed. Pursuant to PERB Rule 5.2(a), only the events occurring on September 9, 2005, can serve as the basis for a finding that an unfair labor practice did, in fact, occur. Evidence of conduct during the initial meeting of August 20, 2004, can be presented to the extent it is deemed relevant to the commission of an unfair labor practice within the limitations period.

The Union's Motion to Consolidate Scott v. DTC,ULP No. 05-02-467 and Scott v. Herbert, ULP No. 05-02-469 has merit and is granted. As alleged in the two (2) Complaints, the underlying facts and the issues presented are essentially the same. Charging Party provides no support for her position that consolidation would harm the Union and preclude the opportunity for a fair and equitable hearing. As to the former, the Charging Party has no standing to raise prejudice to the Union as a reason for denying the

requested consolidation, especially since it is the Union which moved for the consolidation. ATU, Local 842, and its President are adequately represented by competent counsel. Furthermore, the PERB is capable of assuring a fair and equitable hearing without prejudice to any of the parties involved. To bifurcate these matters would serve no valid purpose other than to duplicate the time and effort required to resolve the charges separately.

PROBABLE CAUSE DETERMINATION

1. Consistent with the foregoing discussion, the pleadings establish probable cause to believe that a violation of 19 Del.C. §1303(2) and/or (4) and/or 19 Del.C. §1307(b(1) or (b)(3), may have occurred, specifically concerning the meeting of September 9, 2004.
2. The pleadings fail to establish probable cause to believe that a violation of 19 Del.C. §1303(3), may have occurred.
3. The pleadings fail to establish probable cause to believe that a violation of 19 Del.C. §1307(b)(2) or (b)(4), may have occurred.
4. Scott v. DTC, ULP No. 5-02-467 and Scott v. Herbert, ULP No. 05-02-469 are consolidated and will be processed together.
5. An informal conference will be promptly scheduled for the purpose of discussing the further processing of this matter.

IT IS SO ORDERED.

Charles D. Long, Jr.

Charles D. Long, Jr.,
Executive Director

Dated: April 20, 2005