

**STATE OF DELAWARE**  
**PUBLIC EMPLOYMENT RELATIONS BOARD**

<b>EDWARD A. JOHNSON, JR.,</b>	)	
<b>Charging Party,</b>	)	
	)	
<b>v.</b>	)	<b><u>ULP No. 05-03-473</u></b>
	)	<b>Probable Cause Determination</b>
<b>JACKIE HERBERT, PRESIDENT,</b>	)	
<b>ATU, LOCAL 842</b>	)	
<b>Respondent.</b>	)	

**BACKGROUND**

Edward Johnson, Jr. (“Johnson” 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 of his resignation and subsequent termination on or about August 20, 2004.

At all times relevant to this Charge, Charging Party was a member of the Amalgamated Transit Union, Local 842, (“ATU”) the exclusive bargaining representative of the Fixed Route Drivers 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 are parties to a collective bargaining agreement for the period December 1, 2002 through November 30, 2007.

On March 2, 2005, Charging Party filed this unfair labor practice charge alleging violations by the Respondent of 19 Del.C. §1307(b)(1), (b)(2), (b)(3) and (b)(4) which provide:

§1307, Unfair Labor Practices

(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.

Charging Party alleges that on August 20, 2004, he was called into a DTC office and accused by management of being responsible for \$15,000 of all day passes being missing. Both management and Union representatives were present at the meeting. Charging Party maintains he was given the choice between being terminated and arrested or resigning. After initially choosing to resign, he (later that day) informed DTC of his desire to rescind his 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 he was permitted to rescind his initial resignation. However, he alleges he was then denied access to the contractual grievance procedure in violation of 19 Del.C. §1303, Employee Rights, paragraph (2), which provides, in relevant part:

Public employees shall have the right to:

- (2) Negotiate collectively or grieve through representatives of their own choosing.

Charging Party accuses ATU of collaborating with DTC against him. He contends that if the unfair labor practices he alleges in his Complaint had not been committed he would not have been terminated.

Charging Party further alleges that at an ATU meeting on October 12, 2004, Respondent Herbert was instrumental in convincing the general membership to not authorize the processing of Charging Party’s grievance protesting his termination to arbitration.

On March 14, 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 failure 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 sufficient facts to place the Respondent on notice regarding the underlying incidents 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 occurring on August 20, 2004, as required by PERB Rule 5.2, Filing of Charges.

Under New Matter III, Respondent contends that this unfair labor practice charge should be deferred to the arbitration of Charging Party's grievance protesting his termination. Respondent maintains that, "When a CBA specifically addresses the mechanism of resolving a specific dispute and that dispute has long been settled, there is no utility to nor advancement of sound public policy by having the PERB review the underlying circumstances in the context of an ULP." Delaware State University Chapter of the American Association of University Professors v. Delaware State University, 813 A. 2d 1133, 1139. (De. 2002).

On March 28, 2005, Charging Party filed his Response to New Matter. As to New Matter I, he 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 March 2, 2005, and is, therefore timely filed within the 180 day limitations period.

As to New Matter III, Charging Party contends that the unfair labor practice charge should not be deferred to arbitration.

### **DISCUSSION**

If Charging Party can establish that his right to grieve was breached, a violation of 19 Del.C. §1303(2) and 19 Del.C. §1307(b)(3) would have occurred. When construed in a

light most favorable to Charging Party, the pleadings also constitute probable cause to believe that a violation of 19 Del.C. §1307(b)(1), may have occurred. Charging Party should have the opportunity to present his evidence as to these two (2) alleged violations.

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 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.

Concerning New Matter I, the Union’s contention that the pleadings are vague and, therefore, fail to state a claim upon which relief may be granted is unpersuasive. Although at times imprecisely drafted, the Complaint is sufficient to reasonably place the Respondent on notice of the circumstances underlying the charges alleged in the Complaint.

As to New Matter II, 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 March 2, 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 March 2, 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.

As to New Matter III, ATU, Local 842's contention that the unfair labor practice should be deferred to the pending grievance arbitration is unpersuasive. The essence of the Complaint filed by Charging Party alleges, inter alia, coercion and the refusal by the Union to process Charging Party's grievances. The alleged violations go to the heart of the Public Employment Relations Act, that being the right of employees to organize, be represented fairly and without discrimination 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 are at issue here. The issue before the PERB is not whether there has been a violation of a contractual provision or the merits of Charging Party's termination. Rather, the issue involves fundamental rights 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 establish probable cause to believe that a violation of 19 Del.C. §1303(2) and 19 Del.C. §1307(b)(1) and/or (b)(3) may have occurred.
2. The pleadings fail to establish probable cause to believe that a violation of 19 Del.C. §1307(b)(2) or (4) may have occurred.

3. 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.*

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

**Dated: April 20, 2005**