

of July 1, 2015 through June 30, 2019. The current agreement includes at Section 7 a negotiated grievance procedure which culminates in final and binding arbitration conducted by a neutral arbitrator mutually selected by the parties. The collective bargaining agreement also provides in Section 6 that no employee may be disciplined or discharged without just cause. *Charge Attachment A.*

On December 1, 2016, the IBEW filed an unfair labor practice charge with the Public Employment Relations Board (“PERB”) alleging conduct by DTC in violation of 19 Del.C. §1307(a)(1), (2), (3), (4), (5) and (6), which state:

- (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.
 - (4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition or complaint or has given information or testimony under this chapter.
 - (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.
 - (6) 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.

The Charge alleges DTC violated the statute by singling out Nofftz for discharge on August 22, 2016, in retaliation for his having challenged his supervisor for directing him to install a damaged seat belt on a wheel chair lift gate in violation of DTC’s Tamper Directive, and then filing a grievance challenging the discipline which DTC issued to him

as a result. The Charge asserts there were other employees involved in the August 11 incident who were not discharged or similarly disciplined. The Charge also alleges DTC has failed or refused to provide information relating to the basis for Nofftz' discharge and has provided incomplete information in response to the IBEW's request for information which is reasonable and necessary for it to represent him.

On December 12, 2016, DTC filed its Answer to the Charge denying the legal conclusions and charges made by the IBEW. DTC included New Matter in its Answer, alleging the Charge asserts no facts which, even if proven, would violate any of the cited provisions of 19 Del.C. §1307(a); therefore, the Charge should be dismissed for failure to state a claim. DTC also asserts the Charge is subject to deferral for resolution under the negotiated grievance and arbitration proceedings included in Section 7 of the collective bargaining agreement. DTC requests the charge be dismissed or alternatively, that it be deferred for resolution through the negotiated grievance and arbitration proceedings.

On December 19, 2016, the IBEW filed a Response to New Matter denying the New Matter contained in DTC's Answer.

This probable cause determination is based upon a review of the pleadings submitted in this matter.

DISCUSSION

Rule 5.6 of the Rules and Regulations of the Delaware Public Employment Relations Board provides:

- (a) Upon review of the Complaint, the Answer and the Response the Executive Director shall determine whether there is probable cause to believe that an unfair labor practice may have occurred. If the Executive Director determines that there is no probable cause to believe that an unfair labor practice

has occurred, the party filing the charge may request that the Board review the Executive Director's decision in accord with the provisions set forth in Regulation 7.4. The Board will decide such appeals following a review of the record, and, if the Board deems necessary, a hearing and/or submission of briefs.

- (b) If the Executive Director determines that an unfair labor practice may have occurred, he shall where possible, issue a decision based upon the pleadings; otherwise, he shall issue a probable cause determination setting forth the specific unfair labor practice which may have occurred.

For purposes of reviewing the pleadings to determine whether probable cause exists to support the charge, factual disputes revealed by the pleadings are considered in a light most favorable to the Charging Party in order to avoid dismissing a valid charge without the benefit of receiving evidence in order to resolve factual differences. *Flowers v. DART/DTC*, ULP 04-10-453, V PERB 3179, 3182 (Probable Cause Determination, 2004).

The grievance procedure lies at the heart of the continuing collective bargaining obligation and constitutes the vehicle by which the parties' Agreement is defined and refined during its term. For the agreement as a whole to have real meaning, it is incumbent upon the parties to administer the grievance process in accordance with the negotiated contractual terms. *Indian River Education Association v. Board of Education of Indian River School District*, ULP 90-09-053, I PERB 667, 675 (1991); *Sussex Tech Ed. Assn. (Supra.)*

The purpose of the grievance procedure is to resolve disputes concerning the terms and conditions of employment contained in the collective bargaining agreement. The purpose of an unfair labor practice, on the other hand, is to resolve statutory issues. The unfair labor practice forum is not an alternative to the contractual grievance

procedure.

The Charge asserts Nofftz was retaliated against when he was terminated because he had filed a grievance related to a prior discipline in which he challenged his supervisor (resulting in a twenty day suspension). There is no dispute that the grievance concerning his suspension was submitted to and is currently pending arbitration or that the discharge has also been grieved and processed through the negotiated grievance procedure at least through the Step 4 pre-arbitration meeting.

The Charge fails to assert any facts which would support a finding that either discipline issued to Nofftz or the grievances related thereto have been processed in a manner which violates any statutory rights. The simple fact that an employee has been disciplined raises a question of just cause under the terms of the negotiated agreement.

On its face, the Charge does not provide adequate support to conclude there is probable cause that a violation of either §1307(a)(1), (3) and/or (4) may have occurred. Even when considered in a light most favorable to the Charging Party, the pleadings are insufficient to support the IBEW's allegations that Nofftz was subject to retaliation for exercising his right to file a grievance when he was terminated.¹ Consequently, the portion of the charge asserting a statutory violation for disciplining Nofftz is dismissed with prejudice.

The pleadings are also insufficient to support a finding that probable cause exists to believe that either 19 Del.C. §1307(a)(2) and/or (a)(6) may have been violated. Those charges are also dismissed with prejudice.

¹ The determination that there is not an adequate basis on which to conclude a statutory violation may have occurred does not, however, preclude the possibility that it may be determined in the grievance arbitration proceeding that the employer did not have just cause to discipline him based on the terms of the parties' negotiated agreement.

The IBEW also charges DTC has failed or refused to comply with its request to provide information which is necessary and reasonably related to its statutory duty to provide representation to its member and to enforce the collective bargaining agreement. PERB case law concerning the employer's duty to provide information is well settled. Where requested information relates to a potential grievance, the test for relevance is liberal. *AFSCME Locals v. DSU*, ULP 10-04-739, VII PERB 4693, 4704 (2010). The PERA requires the public employer to act in good faith to provide "access to relevant information necessary for the bargaining representative to intelligently determine facts, assess its position and decide what course of action, if any, to pursue." *NCCEA/DSEA/NEA v. Brandywine School District*, ULP 85-06-005, 131, 149 (1986). This obligation has been recognized by Delaware's Public Employment Relations Board, Court of Chancery, and Supreme Court. *Bd. of Education of Colonial School District v. Colonial Education Association, DSEA/NEA*, Del.Chan., CA 14383, II PERB 1343 (1996), *affirmed Colonial Education Assn. v. Bd. of Education*, Del.Supr., Case 129, 1996, 152 LRRM 2575, III PERB 1519 (1996); *AAUP v. DSU*, Del. PERB., Decision on Remand, ULP 95-10-159, III PERB 2177 (2001); *Delaware Correctional Officers Association v. Delaware Department of Correction*, ULP No. 00-07-286, III PERB 2209, 2214 (2001), *AFSCME Locals v. DSU*, Del.PERB, ULP 10-04-739, VII PERB 4693, 4705 (2010).

The IBEW asserts it requested information pertaining to the charges against Nofftz, including surveillance video and copies of discipline and personnel files of employees disciplined for similar incidents between July 2013 and July 2016. Although DTC did respond by providing some information and promised to provide additional information, the Charge alleges DTC has failed to adequately respond to the IBEW's necessary and reasonable request for information.

The allegations relating to DTC's failure or refusal to provide information, if proven, may support the conclusion that the PERA has been violated. It will be the IBEW's burden to establish both the factual and legal support for such a finding. A hearing will be promptly scheduled for the purpose of establishing a factual record on which argument can be considered in order to render a determination on this portion of the Charge.

DETERMINATION

For the reasons set forth above, the Charge as it relates to the discipline assessed against Nofftz are not sufficient to support a determination that there is probable cause to believe that a violation of 19 Del.C. §1307 (a)(1), (3) and/or (4) may have occurred. Similarly, the pleadings are insufficient to determine that a violation of 19 Del.C. §1307(a)(2) and/or (6) may have occurred. These allegations are, therefore, dismissed with prejudice.

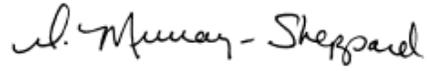
Concerning the allegation that DTC failed or refused to provide information which is necessary for the IBEW to perform its representational responsibilities, considered in a light most favorable to the Charging Party, the pleadings are sufficient to establish probable cause to believe that an unfair labor practice in violation of 19 Del.C. §1307(a)(1) and/or (a)(5) may have occurred.

WHEREFORE, a hearing will be promptly scheduled for the purpose of establishing a factual record upon which a decision can be rendered concerning:

WHETHER DTC VIOLATED ITS DUTY TO BARGAIN IN GOOD FAITH AND 19
DEL.C. §1307 (A)(1) AND/OR (A)(5) BY FAILING OR REFUSING TO
PROVIDE INFORMATION WHICH IS NECESSARY AND REASONABLY
RELATED TO THE PERFORMANCE OF THE IBEW'S REPRESENTATIONAL
RESPONSIBILITIES, AS ALLEGED?

Having found probable cause based on the pleadings, DTC's assertion that the charge fails to state a claim upon which relief can be granted is denied. For the reasons set forth above, DTC's request for deferral is also denied.

Dated: February 21, 2017



DEBORAH L. MURRAY-SHEPPARD
Executive Director
Del. Public Employment Relations Bd.