

**PUBLIC EMPLOYMENT RELATIONS BOARD**

**FOR THE STATE OF DELAWARE**

<b>HARRY BRUCKNER,</b>	:	
<b>Charging Party</b>	:	
	:	
<b>v.</b>	:	<b><u>ULP No. 09-03-663</u></b>
	:	<b>Probable Cause Determination</b>
<b>STATE OF DELAWARE, DELAWARE TRANSIT</b>	:	
<b>CORPORATION,</b>	:	
<b>Respondent</b>	:	

**BACKGROUND**

The State of Delaware (“State”) is a public employer within the meaning of §1302(p) of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13 (1994). The Delaware Transit Corporation (“DTC”) is an agency of the State.

The Charging Party, Henry Bruckner is employed by DTC and is or was a public employee at all times relevant to this Charge within the meaning of 19 Del.C. §1302(o). The Charging Party is a member of the bargaining unit represented by the Amalgamated Transit Union, Local 842, (“ATU”) which represents a bargaining unit of DTC employees for purposes of collective bargaining and is certified as the exclusive bargaining representative of that unit pursuant to 19 Del.C. §1302(j).

ATU and DTC are parties to a collective bargaining agreement which has an expiration date of November 30, 2008, but which remained in full force and effect during at all times relevant to this Charge.

On or about February 13, 2009, the Charging Party filed an unfair labor practice charge alleging that DTC violated 19 Del.C. §1307(a)(1), (3), (6), §1304(b) and §1305, of the PERA, which provide:

§1307(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.
- 3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.
- 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.

§1304. Employee organization as exclusive representative.

- (b) Nothing contained in this section shall prevent employees individually, or as a group, from presenting complaints to a public employer and from having such complaints adjusted without the intervention of the exclusive representative for the bargaining unit of which they are a part, as long as the representative is given the opportunity to be present at such adjustment and to make its view known, and as long as the adjustment is not inconsistent with the terms of an agreement between the public employer and the exclusive representative which is then in effect. The right of the exclusive representative shall not apply where the complaint involves matters of personal, embarrassing and confidential nature, and the complainant specifically requests, in writing, that the exclusive representative not be present.

§1305. Public employer rights.

A public employer is not required to engage in collective bargaining on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion or policy as the function and programs of the public employer, its standards of services, overall budget, utilization of technology, the organizational structure and staffing levels and the selection and direction of personnel.

According to the Charge, August 7, 2008, was Charging Party's seventh day of absence in a rolling twelve month period. His absences were caused by a personal hardship resulting in childcare issues. On or about August 28, 2008, he was informed that he would receive a three day suspension and referral to a Labor Relations Specialist.

He claims he was never referred to a Labor Relations Specialist and was told that it was his responsibility to obtain a referral from a Labor Relations Specialist.

He was subsequently terminated on or about September 18, 2008. He alleges that his request to file a complaint and resolve it without the participation of the Union was denied.

Charging Party alleges that:

By these actions, the respondent has violated 1307(a)(1), (3), (6), 1304(b) and 1305. 1307(a)(1) In that DTC had interfered with my rights guaranteed under this chapter, in not allowing me to present a complaint, and have it adjusted in a meeting with a labor relations specialist. 1307(a)(3) In that DTC has discouraged my membership in our union by discriminating against me in the conditions of employment, because they have given others in my situation, not only a referral to labor relations, but allow others in my situation to transfer shifts and save their employment. This discharge will end my membership in the union. In 1307(a)(6) in that DTC has refused, and or failed to comply with a provision of this chapter, and or rules and regulations established by the board, pursuant to it's responsibility to regulate the conduct of collective bargaining under this chapter, in that DTC is not honoring the ruling in ULP #05-02-468. 1304(b) in that DTC violated my rights to present a complaint in a meeting with labor relations, and have that complaint adjusted without the union. (Charge, ¶5)

On March 11, 2009, the State filed its Answer in which it denied the substantive allegations set forth in the charge for the reasons that the allegations fail to provide a clear and detailed statement of facts constituting an unfair labor practice as required by 19 Del.C.§1307(a) and PERB Rule 5.2(c)(3); and/or, the allegations constitute legal conclusions to which no response is necessary; and, if a further response is necessary, the allegation is denied; and/or the State has not violated the provisions of the Act, as claimed by the Charging Party.

Under a section of its Answer entitled New Matter, the State maintains that the unfair labor practice charge should be deferred to the contractual arbitration procedure.

On March 30, 2008, Charging Party filed his Response to New Matter objecting to the State's request that the matter be deferred to arbitration.

### DISCUSSION

Regulation 5.6 of the Rules of the Delaware Public Employment Relations Board requires:

- (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 shall 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*, Del. PERB Probable Cause Determination, ULP 04-10-453 V PERB 3179, 3182 (2004).

The essence of Charging Party's complaint is that: 1) DTC management failed to refer him to a Labor Relations Specialist telling him it was his responsibility to obtain a referral from a Labor Relations Specialist; and 2) his request to file a complaint and attempt to resolve his attendance/disciplinary issues without the participation of the Union was denied.

Charging Party first alleges that DTC management failed to refer him to a Labor Relations Specialist telling him it was his responsibility to schedule the appointment. Even if proven, this allegation does not establish a basis for finding probable cause to believe that a violation of 19 Del.C. §§1307(a)(1), (a)(3), (a)(6) or §1304(b) or §1305, as alleged, may have occurred; consequently, this portion of the Charge is dismissed.

The second allegation by Charging Party that he was denied the opportunity to resolve his disciplinary issue without participation by the Union raises a statutory issue.

Although it asserts that this issue should be deferred to the parties' contractual arbitration procedure, the State has failed to cite the specific contractual provision(s) which it alleges controls the resolution of this issue. Nor does the State allege that a grievance was filed by the charging party or that the grievance has been properly appealed to arbitration. There is no statutory authority requiring the filing of a grievance as a condition precedent to the filing of an unfair labor practice charge and the PERB has no authority to require that Charging Party do so. For these reasons, the State's request for deferral to contractual arbitration has no merit.

The allegation concerning the processing of the grievant's complaint without the intervention of the Union does not provide a basis for finding probable cause to believe that DTC may have violated 19 Del.C. §1305, and/or §1307(a)(3); consequently, these alleged violations are dismissed. If proven, however, it could be the basis for finding a violation of 19 Del.C. §1304(b), §1307(a)(1) and/or (a)(6).

### **DETERMINATION**

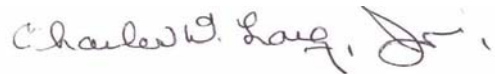
Consistent with the foregoing discussion, considered in a light most favorable to Charging Party, the pleadings constitute probable cause to believe that an unfair labor practice may have occurred. Specifically, the issue is whether DTC has violated 19 Del.C.

§1304(b) and §1307(a)(6) by refusing to permit the Charging Party to file a complaint and attempt to resolve his disciplinary issue without the intervention of the Union.

An informal conference will be scheduled forthwith for the purpose of attempting to resolve the issue concerning whether the Charging Party was denied the opportunity to resolve his disciplinary issue without participation by the Union and, in the alternative, to arrange for the further processing of the Charge.

**IT IS SO ORDERED.**

Date: September 1, 2009



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Charles D. Long, Jr.,  
Hearing Officer  
Del. Public Employment Relations Board