PUBLIC EMPLOYMENT RELATIONS BOARD

FOR THE STATE OF DELAWARE

RICHARD FLOWERS,	:	
	:	
Charging Party,	:	
	:	**ULP No. 09-02-664**
v.	:	
	:	**ORDER OF DISMISSAL**
STATE OF DELAWARE, DELAWARE TRANSIT CORPORATION,	:	
	:	
Respondent.	:	

Appearances

Richard Flowers, Charging Party, Pro Se
Thomas J. Smith, SLREP/HRM/OMB, for DTC

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.

Charging Party, Richard Flowers ("Charging Party"), is employed by DTC and is a public employee within the meaning of 19 Del.C. §1302(o). 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 at all

times relevant to this Charge.

On or about February 18, 2009, Charging Party filed an unfair labor practice charge alleging that DTC violated 19 Del.C. § 1303(2) and §1307(a)(1), (5) and (6) of the PERA, which provide:

> §1303. Public Employee Rights
>
> Public employees shall have the right to:
>
> (2) Negotiate collectively or grieve through representatives of their own choosing.
>
> §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.
>
> 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 authority to regulate the conduct of collective bargaining under this chapter.

On or about March 16, 2009, the State filed its Answer in which it denied the substantive allegations set forth in the Charge. Under New Matter, the State maintains the unfair labor practice charge should be deferred to the contractual arbitration procedure for resolution.

On or about March 26, 2009, Charging Party filed his Response to New Matter objecting to the State's request that the matter be deferred to arbitration.

The Probable Cause Determination issued on September 1, 2009, provides, in relevant part:

> The pleadings fail to establish probable cause to believe that the alleged failure to schedule a Step 4 grievance hearing, even if proven, violated of 19 Del.C. §1307(a)(6); consequently, this allegation is dismissed. The allegation concerning management's failure to schedule a Step 4 grievance hearing could, however, be the basis for finding a violation of 19 Del.C. §1303(2) and/or §1307(a)(1) and (a)(5). The State's denial places this allegation in issue.
>
> Concerning this portion of the Charge, the State cites no specific contractual provision which it alleges controls the resolution of this issue. Nor does the State allege that a grievance is pending or that a grievance, if active, 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 of the Charge that failed or refused to schedule a Step 4 grievance hearing is denied.
>
> …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. §1303(2) and/or §1307(a)(1) and (5) by refusing to schedule the Step 4 grievance hearing allegedly requested by Charging Party.

Following the issuance of the Probable Cause Determination, an informal conference was held on Tuesday, October 27, 2009, for the purpose of exploring a mutually acceptable settlement and, in the event those efforts proved to be unsuccessful, to arrange for the further processing of the unfair labor practice charge. Unfortunately, the informal conference failed to produce a mutually acceptable settlement agreement.

A hearing was scheduled and convened on November 19, 2009, to establish a factual record to serve as the basis for a formal decision resolving the underlying substantive issue as set forth in the Probable Cause Determination.

At the conclusion of Charging Party's case, the State moved for dismissal of the Charge asserting Charging Party had failed to establish that a proper grievance had ever been filed; thus, the collective bargaining agreement was not violated and there has been no statutory violation of the statute as alleged.

PRINCIPAL POSITIONS OF THE PARTIES

The focus of Charging Party's charge is that, despite his written request of February 3, 2009, DTC management failed to schedule the Step 4 grievance meeting to discuss his job status, including his unsuccessful attempts to schedule a return to work physical which was required for his return to work from medical leave of absence.

Charging Party agues that DTC's failure to inform him of the agreement it reached with the Union not to schedule a Step 4 hearing does not conform to DTC's practice of notifying employees of the disposition of their grievances.

DTC argues that the grievance at issue was improperly filed by Charging Party and did not, therefore, constitute a valid grievance. More importantly, the subject of the Step 4 meeting requested by Charging Party was discussed by Supervisor Moulds and the Local Union President who agreed that the reinstatement procedure, including scheduling a return-to-work physical for Charging Party, was proceeding and, therefore, no Step 4 meeting was necessary.

SUMMARY OF RELEVANT TESTIMONY

James McGinnis, DTC Director of Operations, testified, *inter alia*, that in his capacity of Director of Operations, he is familiar with the terms of the collective bargaining agreement including the grievance procedure. He neither scheduled a Step 4 grievance hearing nor did he inform Charging Party of the final resolution of his grievance. As is his practice, Mr. McGinnis delegated the processing of Charging Party's grievance to a member of his administration, in this case Supervisor Charles Moulds.

Supervisor Moulds testified that he considered the matter to be a complaint rather

than a formal grievance because it was never filed on the designated grievance form and no contractual violation was alleged. He also testified that he spoke with the Local Union President, Wali Rushdan, concerning Charging Party's request for a Step 4 grievance meeting and they agreed that, because the reinstatement procedure was progressing, no Step 4 meeting was necessary.

Armond Walden and Joseph F. Poli (fellow DTC bargaining unit employees) also testified on behalf of the grievant. Mr. Walden was appointed Acting President of ATU Local 842 during an earlier period when the Local was placed in Trusteeship by the International Union. Much of Mr. Walden's and Mr. Poli's testimony was rejected for the reason that neither possessed first-hand knowledge of facts related to the underlying issue.

Mr. Walden did testify, however, that grievances are routinely filed in a variety of ways and it is customary for a grievant to be advised of the final disposition of his/her grievance. This notification is sometimes provided by DTC and sometimes by the Union.

DISCUSSION

The Union is the certified exclusive bargaining representative of all of the bargaining unit employees employed by DTC. At all times material to this matter the Local Union and DTC were parties to a collective bargaining agreement, which provided, in relevant part:

> Section 7, DISAGREEMENTS, DISPUTES, and GRIEVANCE PROCEDURE
>
> STEP 4. A sincere endeavor will be made by the ADMIN-ISTRATION and the UNION to dispose of any difference arising out of the application of this AGREEMENT through conferences

> between the ADMINISTRATION and the UNION. If the grievance is still not resolved at this stage, a meeting shall be held between the Union and the State Deputy Director for Employee Relations ("Deputy Director")/ Administration within 10 days of the written response at Step 3. If still not resolved at that meeting, the dispute or grievance may be referred to arbitration on request in writing by the Union. Such request for arbitration shall be made no later than 45 days following the completion of the last applicable Step.

Supervisor Moulds was a credible witness who testified (without contradiction or challenge) that pursuant to the applicable provisions of the collective bargaining agreement, Charging Party's request for a Step 4 grievance meeting was discussed by Mr. Moulds and the Local Union President. As a result of that discussion, it was agreed that the reinstatement procedure was progressing and therefore, no Step 4 meeting was required. Supervisor Moulds believed at that time that the resolution of the matter was thus accomplished to the mutual satisfaction of the parties by the manner prescribed by Section 7 of the Agreement.

The Local Union President did not testify nor was he issued a subpoena to do so. The unrebutted and uncontradicted testimony of Supervisor Moulds is dispositive of this matter.

The discussion between Supervisor Moulds and the Local Union President was consistent with the Step 4 provision of the collective bargaining agreement and resolved the issue concerning the scheduling of the Step 4 grievance meeting to the satisfaction of management and the Union.

DECISION

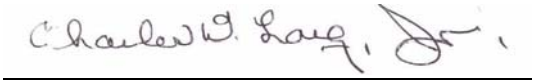
Consistent with the foregoing discussion, at the conclusion of his case, Charging

Party had failed to establish a violation of 19 Del.C. §1303(2) or § 1307(a)(1), (a)(5) or (a)(6), as alleged.

WHEREFORE, this unfair labor practice charge is dismissed.

IT IS SO ORDERED.

Dated: December 28, 2009.



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