

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

RICHARD FLOWERS,	:	
Charging Party,	:	
	:	
v.	:	<u>ULP No. 09-02-664</u>
	:	Probable Cause Determination
STATE OF DELAWARE, DELAWARE TRANSIT	:	
CORPORATION,	:	
Respondent.	:	

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.

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.

The Charge alleges that on or about January 31, 2008, a pre-termination hearing was held concerning Charging Party's employment status. At the time, Charging Party was on a long-term disability leave of absence. Following the hearing, in lieu of termination, Charging Party was required to comply with Section 17, Benefits, §B Insurance, sub-section C, of the current collective bargaining agreement, which provides: "The Union agrees that it is the obligation of the Employee to promptly contact both the Administration and the Union regarding such claims. Further, the employee is required to maintain contact with the Administration no less than weekly and to provide the Administration with a status report." (Charge, Exhibit #1) Charging party alleges the

requirement to report on a weekly basis applies only to short-term disability leaves of absence.

On or about March 16, 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 the facts constituting the alleged unfair labor practice as required by 19 Del.C. §1307(a) and PERB Rule 5.2(c); and/or the allegations constitute legal conclusions to which no response is necessary; and/or, the referenced contract language does not support Charging Party's position.

Specifically, the State contends the requirement that an employee make weekly contact while on disability leave is not limited to short-term disability but that the contractual requirement applies to long-term disability leave, as well.

Under a section of the Answer entitled 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.

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 alleged statutory violations by DTC is: 1) the contractual requirement to contact management on a weekly basis applies only to short-term disability leaves of absence; 2) there is no section on the collective bargaining agreement requiring that he submit to a psychological evaluation as a condition precedent to his reinstatement; and 3), management failed to schedule either a reinstatement physical or the step 4 grievance hearing he requested.

Concerning the first two (2) allegations, the resolution of contractual issues is a proper subject for the contractual grievance an arbitration procedure. The unfair labor practice provisions are not a substitute for the contractual grievance and arbitration procedure. Even if proven, these allegations do not establish probable cause to believe that DTC violated 19 Del.C. § 1303(2) and §1307(a)(1), (5) and (6), as alleged. The same

is true for the allegation in item 4 concerning the scheduling of the reinstatement physical. Consequently, these allegations are dismissed.

The third allegation by Charging Party does, however, raise a statutory issue; specifically, was Charging Party improperly denied access to step 4 of the grievance procedure. 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.

DETERMINATION

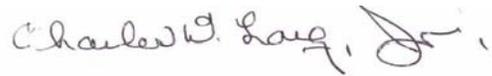
Consistent with the foregoing discussion, considered in a light most favorable to Charging Party, the pleadings constitute probable cause to believe that an unfair labor practice may have occurred. Specifically, the issue is whether DTC has violated 19

Del.C. §1303(2) and/or §1307(a)(1) and (5) by refusing to schedule the step 4 grievance hearing allegedly requested by Charging Party.

An informal conference will be scheduled forthwith for the purpose of attempting to resolve the issue concerning the scheduling of the step 4 grievance hearing and, in the alternative, to arrange for the further processing of the Charge.

IT IS SO ORDERED

Date: September 1, 2009



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