PUBLIC EMPLOYMENT RELATIONS BOARD

FOR THE STATE OF DELAWARE

JOSEPH F. POLI, JR.,	:	
	:	
Charging Party,	:	
	:	
v.	:	**ULP No. 09-03-669**
	:	
STATE OF DELAWARE, DELAWARE TRANSIT CORPORATION,	:	**ORDER OF DISMISSAL**
	:	
	:	
Respondent.	:	

Appearances

Joseph F. Poli, Charging Party, Pro Se

Thomas J. Smith, Labor Relations Specialist, SLREP/HRM/OMB, for DART/DTC

BACKGROUND

On or about March 18, 2009, Charging Party filed an unfair labor practice charge alleging that DTC violated 19 Del.C. §1301(a), §1303(1), (2), (3), (4), §1307 (a)(1), (2), (3), (4), (5), (6) and (7).

In a Probable Cause Determination issued on September 1, 2009, the Hearing Officer dismissed all of the alleged violations except for 19 Del.C. §1303(3), and/or §1307(a)(1) (a)(3), (a)(3), (a)(4) and (a)(6). The basis for these alleged violations was that DTC retaliated against Charging Party for his involvement in protected activity, specifically, filing charges with the PERB and counseling and representing other employees in the filing of grievances and unfair labor practice charges.

A hearing was convened on October 29, 2009, during which testimony was received. The decision reached herein results from consideration of the record created by the parties.

DISCUSSION

The Public Employment Relations Act provides that public employees "shall have the right to …organize, form, join, or assist any employee organization" and to "[e]ngage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection insofar as any such activity is not prohibited by this chapter or any other law of the State." 19 Del.C. §1303. It is an unfair labor practice for a public employer to "interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter." 19 Del.C. §1307(a)(1).

The test for union animus is well established in federal and Delaware PERB case law:

> [T]he Charging Party has the burden to establish that the employee's protected conduct was a substantial or motivating factor in the employer's adverse employment action. Once established, the burden shifts to the employer to establish the presence of a legitimate business interest which, despite the employee's protected activity would have resulted in the same employment decision.
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> To satisfy its initial burden, the Charging Party must establish: (1) the employee engaged in protected activity; (2) the employer was aware of the employee's activity; and (3) the protected activity was a substantial or motivating factor for the employer's action. *Colonial Education Assn v. Colonial School District Board of Education,* ULP 93-11-095, II PERB 1071, 1077 (1994).

Charging Party assumed the initial burden in this case to establish that he was, in fact, involved in protected activity; that the employer had knowledge of and was aware of

his involvement in protected activity; and that his protected activity was a substantial or motivating factor in the assessed disciplined.

Charging Party (who was unrepresented) testified that on numerous occasions he drafted unfair labor practice charges for bargaining unit employees at their request. Charging Party did not subpoena nor did he call as witnesses the individual employees with whom he was allegedly involved in protected activity. Nor did he offer an explanation for his not doing so. He neither identified the employees involved nor offered any independent corroborating evidence documenting his role.

In addition to his limited testimony, Charging Party called as witnesses two (2) other bargaining unit employees, Richard Flowers and Armond Walden. Both Mr. Flowers and Mr. Walden acknowledged they had no first-hand knowledge concerning the substance the Charge but intended only to relate what they had heard from other employees about Charging Party's involvement in protected activity. The testimony of both Mr. Flowers and Mr. Walden was ruled inadmissible because of its purely hearsay nature.

Charging Party further testified he was denied his personal choice of the specific Union representative he wished to represent him at a meeting convened by the employer to discuss accusations that Charging Party released a cat from his personal vehicle onto DTC property. There is no dispute that DTC intended to question him at this meeting concerning an on-going criminal investigation into the cat incident. Charging Party believed the employer's denial of his choice of a Union representative violated his *Weingarten* right to representation and that demanding he answer questions concerning an on-going criminal investigation concerning the cat incident violated his freedom from

self-incrimination under the Bill-of-Rights of both the United States Constitution and the State of Delaware Constitution.

Charging Party's contention that he was denied the Union representative of his choosing in violation of his Weingarten rights is unfounded. The decision by the United States Supreme Court in the case of *NLRB v. J. Weingarten, Inc.* 420 U.S. 251, 88 LRRM 2689 (1975) assures Union representation under the limited circumstances set forth therein, but does not guarantee access to a specific Union representative of choice.

Insofar as the constitutional issues raised by Charging Party, the PERB's limited jurisdiction is to administer the Public School Employment Relations Act, 14 Del.C. Chapter 40; the Police Officers and Firefighters Employment Relations Act, 19 Del.C. Chapter 16; and, the Public Employment Relations Act, 19 Del. C. Chapter 13, and does not extend to constitutional issues raised under either the United States Constitution or the Delaware State Constitution.

Charging Party rested and the State moved to dismiss the unfair labor practice charge asserting that Charging Party had failed to establish a prima facie case that the Charging Party was involved in protected activity of which the employer was aware, and that the protected activity was a substantial or motivating factor in the employer's decision to discipline him.

DECISION

Consistent with the foregoing discussion, the record created by the Charging Party fails to establish he was involved in protected activity and/or that the employer engaged

in conduct in violation of 19 Del.C. §1303(3), and/or §1307(a)(1) (a)(3), (a)(3), (a)(4) and (a)(6).

WHEREFORE, THE CHARGE IS HEREBY DISMISSED IN ITS ENTIRETY.

Date: November 13, 2009

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