

PUBLIC EMPLOYMENT RELATIONS BOARD
FOR THE STATE OF DELAWARE

JOSEPH F. POLI, JR.,	:	
Charging Party	:	
	:	
v.	:	<u>ULP No. 09-03-669</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.

Joseph Poli, (“Charging Party”) is employed by DTC and is a public employee 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 at all times relevant to this Charge.

On or about March 18, 2009, the 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) of the PERA, which provide:

§1301. Statement of Policy.

- (1) Granting to public employees the right of organization and representation.¹

§1303. Public Employee Rights

Public employees shall have the right to:

- 1) Organize, form, join or assist any employee organization except to the extent that such right may be affected by a collectively bargained agreement requiring the payment of a service fee as a condition of employment.
- 2) Negotiate collectively or grieve through representatives of their own choosing.
- 3) Engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection insofar as such activity is not prohibited by this chapter or any other law of the state.
- 4) Be represented by their exclusive representative, if any, without discrimination.

§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.
- 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 organization which is the exclusive representative of an appropriate unit, except with respect to a discretionary subject.

¹ Charging Party alleges a violation of §1301(a). However, there is no such section. Based upon the verbiage of paragraph 10, of the Charge, it is apparent that Charging Party was referring to §1301(1).

- 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.
- 7) Refuse to reduce an agreement, reached as a result of collective bargaining to writing and sign the resulting contract.

The essence of the Charge is 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.

On or about March 30, 2009, the State filed its Answer in which contends the individual 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 allegations do not constitute a violation of the PERA. To the extent a further answer is required, each allegation is denied. Under a section entitled New Matter, the State maintains the unfair labor practice charge should be deferred to the contractual arbitration procedure for resolution.

On or about April 6, 2009, Charging Party filed his Response to New Matter objecting to the State's request that the matter be deferred to the contractual arbitration procedure.

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 twenty-one (21) count Charge alleges a myriad of incidents and conduct by DTC in retaliation for the grievant's involvement in protected activity in violation of the above-referenced statutory provisions.

Considered individually, the allegations contained in the Charge may violate provisions of the collective bargaining agreement. The resolution of these issues is a proper subject for the contractual grievance and arbitration procedure. The statutory unfair labor practice provisions are not a substitute for the contractual grievance and arbitration procedure. Standing alone, these allegations do not, even if proven, establish probable cause to believe that DTC violated 19 Del.C. §1301(1), §1303 (1), (2), (3) and (4) and § 1307(a)(1), (2), (3), (4), (5) and (7) has occurred.

However, considered in light of Charging Party's allegation of retaliation, if proven, the allegations constitute probable cause to believe that a violation of 19 Del.C. §1303(3): and/or §1307(a)(1), (3), (4) and (6), of the PERA, may have occurred.

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 for resolution of the charge of retaliation is denied.

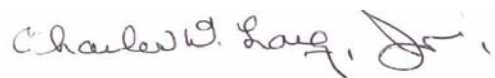
DETERMINATION

Considered in a light most favorable to Charging Party, the pleadings establish probable cause to believe that an unfair labor practice may have occurred. Specifically, the issue is whether DTC has violated 19 Del.C. §1303(3): and/or §1307(a)(1), (a)(3), (a)(4) and (a)(6), by retaliating against Charging Party for engaging in protected activity.

The pleadings raise multiple factual and legal issues which can only be resolved following development of a factual record and receipt of argument. Consequently, a hearing will be convened forthwith for this purpose.

IT IS SO ORDERED.

Date: September 1, 2009



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