

PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF DELAWARE

BENNIE BROOMER,	:
	:
Charging Party,	:
	:
v.	:
	:
STATE OF DELAWARE, DEPARTMENT OF	:
TRANSPORTATION, DELAWARE TRANSIT	:
CORPORATION,	:
	:
Respondent.	:
	:

ULP No. 09-08-700

PROBABLE CAUSE DETERMINATION

AND ORDER OF DISMISSAL

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.

Bennie Broomer (“Charging Party”) is a former employee of DTC. During the period of his employment he was a public employee within the meaning of 19 Del.C. §1302(o). Charging Party is a member of the DTC bargaining unit represented by the Amalgamated Transit Union, Local 842 (“ATU”) which is the certified exclusive representative of that unit for purposes of collective bargaining, 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 August 26, 2008, Charging Party filed an unfair labor practice charge alleging that DTC violated 19 Del.C. §1307(a) (1) through (a))(7), 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.
 - (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 condition 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 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 responsibility to regulate the conduct of collective bargaining under this chapter.
 - (7) Refuse to reduce an agreement, reached as the result of collective bargaining, to writing and sign the resulting contract.

§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
- (4) Be represented by their exclusive representative, if any, without discrimination.

The essence of the charge is that Charging Party was denied a copy of prior disciplines which preceded his termination until four (4) days before the arbitration hearing on his termination, which was held on June 12, 2009. The Charge alleges both Charging Party and his Union representatives were unable to adequately prepare for the arbitration hearing protesting his August 13, 2008 termination.

On September 9, 2009, the State filed its Answer to the Charge in which it denies the material allegations set forth in the Charge. The State contends that the evidence overwhelmingly establishes that during the August 20, 2008 pre-termination hearing and the June 12, 2009 Unemployment Insurance Appeal Board hearing, the grievant was clearly aware of his prior discipline record. Further Charging Party, in fact, served the disciplinary suspensions about which he now claims ignorance.

Under a section entitled, "New Matter," the State contends that: (1) the Charge is untimely in that it was filed more than one hundred-eighty days after the events giving rise to the Charge; (2) Charging Party has failed to state a claim for which relief may be granted or to present sufficient evidence to sustain an unfair labor practice charge; and 3) alternatively, the unfair labor practice charge should be deferred to arbitration.

On September 18, 2009, Charging Party filed its Response To New Matter denying the State's position, as set forth, therein.

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).

PERB Rule 5, Unfair Labor Practice Proceedings, provides, in relevant part:

5.2. Filing of Charges,

- (a) A public employer, labor organization and/or one or more employees may file a complaint alleging a violation of 14 Del.C. §4007, 19 Del.C. §1607, or 19 Del.C. §1307. Such complaints must be filed within one hundred-eighty (180) days of the alleged violation. This limitation shall not be construed to prohibit introduction of evidence of conduct or

activity occurring outside the statutory period, provided the Board or its agent finds it relevant to the question of commission of an unfair labor practice within the limitations period.

Both Charging Party and ATU representatives participated in the pre-termination hearing on August 20, 2008, and the grievant participated in an appeal hearing before the Unemployment Insurance Appeal Board on January 14, 2009.¹ *Charge, Exhibit 6.* The decision by the Appeal Board provides, in relevant part:

Claimant also entered into evidence a series of letters relating to suspension and termination policies, including off-route policies, which in this case, the Claimant was discharged for violating company policy by driving off route five times in a one year time period and for failing to properly pick-up commuters.

. . . The Board also finds that the Claimant knew about the policy. Claimant was employed with employer for over nineteen years until he was discharged for driving off route. Employer issued a letter of warning on September 14, 2007 for an incident on September 11, 2007. Employer suspended claimant for one day without pay on December 9, 2007 as a result of a second incident. After a third incident, employer suspended Claimant for two days in January, 2008. On July 25, 2008, Employer suspended Claimant for three days for a fourth incident. This last suspension was postponed because of the fifth incident on July 29, 2008.

The Claimant contends he never received any letter of warning and was never properly notified of the discipline procedures. While the Board expresses concern over the manner in which the Employer notifies its employees, namely a written letter delivered only to the on-site mailbox of employee[s] and no guarantee of a supervisor discussion, the evidence clearly indicates the Claimant knew of the policy and repeatedly disregarded it.

Claimant was suspended twice for driving off-route. Even if he did not receive the notification letters from Employer, as he contends, he had at least constructive notice through these suspensions. Claimant's defense of ignorance is not credible and

¹ The decision of the Unemployment Insurance Appeal Board affirmed the initial decision of a UI referee who denied Charging Party's initial application for benefits.

his repeated violation of Employer's policy represents a reckless indifference to one's job duties and seriously impacts the employer's business interests. As such, the Boar agrees with the referee's determination that this type of behavior rises to the level of willful and wanton misconduct.

Although the findings of the Unemployment Insurance Appeal Board are not binding upon the PERB, there can be no doubt that as of January 23, 2009 (the date of the Insurance Appeal Board's decision) the grievant was aware of the incidents about which he now claims ignorance. For this reason alone, the Charge is untimely in that, even under the most liberal interpretation of PERB Rule 5.2, it was not filed within the required one hundred eighty day period.

DECISION

Considered in a light most favorable to Charging Party, the pleadings fail to establish probable cause that an unfair labor practice may have occurred.

Consequently, the Charge is hereby dismissed.

IT IS SO ORDERED.

Date: October 27, 2009



CHARLES D. LONG, JR., Hearing Officer
Del. Public Employment Relations Bd.