PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF DELAWARE

NEAL EASTBURN,	)	
	)	
Charging Party	)	
	)	
v.	)	**ULP. No. 09-05-673**
	)	
STATE OF DELAWARE, JUSTICE OF THE PEACE COURT,	)	**Hearing Officer's Decision**
	)	
Respondent.	)	

Appearances

Lance Geren, Esq., Freedman & Lorry, PC, for Charging Party

Thomas J. Smith, SLREP/HRM/OMB, for Justice of the Peace Court

BACKGROUND

The State of Delaware ("State") is a "public employer" within the meaning of §1302(p) of the Public Employment Relations Act, (19 Del.C. Chapter 13) ("PERA"). The Justice of the Peace Court ("Court") is an agency of the State.

Charging Party, Neal Eastburn ("Charging Party") was at all times relevant to this charge a "public employee" within the meaning of 19 Del.C. §1302(o).

On or about May 6, 2009, Charging Party filed an unfair labor practice charge alleging that the State through the Court violated 19 Del.C. §1307a)(4), which provides:

> §1307. Unfair labor practices
>
> (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
>
> (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.

Charging Party alleges that by letter dated January 23, 2009, his employment was nominally terminated for unsatisfactory job performance. Charging Party contends that the termination, however was in retaliation for his involvement in the filing and processing of a petition on behalf of all Constables protesting before the PERB inclusion of the Constable classification into a compensation bargaining unit of labor, maintenance, trade and service employees (Unit No. 1), pursuant to 19 Del.C. §1311(A). Charging Party argued the Constables did not appropriately fall within the statutorily defined Unit No. 1. The State opposed the Constables' position. In a decision issued on April 14, 2009, the PERB sustained the Constable's position.

Charging Party further alleges that shortly after the PERB decision, the State (unbeknownst to him) commenced an investigation into his job performance resulting in his termination.

FACTS

The following facts are derived from the pleadings, the testimony of the witnesses and the exhibits entered into evidence at the November 29, 2009, hearing.

Brian Gessner, was promoted to the position of Chief Constable in approximately May, 2008. He first became concerned about Charging Party's job performance in approximately June, 2008, after he was informed that Charging Party was observed in Constable Central using a computer after scheduled working hours without the required approval. The Chief was also informed Charging Party's State owned vehicle was occasionally not returned to Constable Central until as late as 10:00 p.m., six hours after

the end of his scheduled shift. By e-mail to the Court Administrator dated June 20, 2008, Chief Gessner requested that the Court obtain a copy of the GPS print-out for Charging Party's vehicle compiled and maintained by the Office of Fleet Services, a State agency organizationally located in the Office of Management and Budget. Citing privacy concerns, his request was denied. Chief Gessner made subsequent requests for the GPS records all of which were denied until the fall of 2008.

Chief Gessner met personally with Charging Party in June 25, 2008, to discuss his concerns about after hours use of the computer and the tardy return of the State vehicle. At that meeting he informed Charging Party that his conduct was unacceptable and he should consider their discussion a verbal warning. Following the meeting the conduct the two discussed ceased until approximately the end of September or the beginning of October, 2008, at which time the conduct resumed. After approximately twelve or thirteen incidents of Charging Party returning his vehicle late in September and October, 2008, Chief Gessner again met with Charging Party on or about October 20, 2008, at which time he again cautioned Charging Party that use of the computer at night and returning his vehicle well after the end of his shift were unacceptable.

Because of the frequency of Charging Party's late return of the State vehicle, Chief Gessner again sent an e-mail to Marianne Kennedy, the Court Administrator, requesting GPS tracking information for Charging Party's vehicle. This request was approved and the GPS print-out was provided by Fleet Services. The GPS records established that Charging Party's vehicle was parked outside his home nearly everyday during September and October from roughly 12:00 noon until as late as 6:00 p.m. to 10:00 p.m. (Employer Exhibit No. 4)

Chief Gessner discussed his concerns with Court Administrator Kennedy who

contacted the Human Resources Department. The Court's attorney was also informed and he spoke with the Office of the State's Attorney General concerning independent corroboration of the GPS reports. At the recommendation if the Department of Justice, a State Police licensed investigative firm was retained to conduct surveillance of Charging Party's activity.

Also about this time, the Court received a written complaint from Michael Morton, Esquire, a private attorney who practices statewide in the Justice of the Peace Courts and represents the Delaware Apartment Association and the Manufactured Housing Association. (Union Exhibit 4) Mr. Morton 's letter to the Court and his testimony at the unfair labor practice hearing about complaints he received concerned the failure of Charging Party to properly perform his job responsibilities.

The private investigator hired by the Court conducted six days of surveillance and installed a back-up GPS unit in Charging Party's State vehicle. The investigator's final report was completed on December 12, 2008, and included a DVD documenting recurring conduct similar to that contained in the GPS records provided by the Office of Fleet Services. (Employer Exhibit No. 7)

By letter dated December 18, 2008, the Court's Operations Manager informed Charging Party that she was recommending his dismissal as a Constable with the Justice of the Peace Courts. The reasons for the dismissal, as set forth in the December 18, 2008, letter are, as follows: (Union Exhibit No. 3)

> 1. As a full-time employee you have failed to work a standard work week on multiple occasions during the period September – December, 2008. This is in violation of Merit Rule 4.2 and 15.1.
>
> 2. On multiple occasions during the period September – December, 2008 you were absent from work without prior authorization from our supervisor. This is a violation of Merit

> Rule 15.1 also in violation of the Constable Handbook, Part V, second paragraph.
>
> 3. You are inappropriately handing off your work to property managers and landlords and are not timely complying with the requirements of conducting evictions, a violation of Merit Rule 2.1 Employee Accountability. In addition, you have failed to comply with your duties of examining premises after 24 hours of posting a Writ contrary to the provision in the Constable Handbook that states "After 24 hours have passed, the Constable shall examine the premises."
>
> This is despite that in October 2006, you were disciplined for similar misconduct. You willfully disregarded your duties as a Constable when on September 15, 2006, you handed over thirteen (13) Landlord Tenant "Writs of Possessions" to the landlord to serve or post versus doing the work yourself as required as part of your job duties. Because of that you were given written discipline and a 5 day suspension for violating Merit Rules 12.0 and 12.1 – Employee Accountability.
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> 4. You continue to keep your vehicle away from the building for hours ranging from the end of your shift, which is 4 pm, until after 10 pm.
>
> This is despite the fact that on June 25, 2008 you were given an oral warning to return your State vehicle to Constable Central at the close of your shift each day.
>
> 5. You continue to fail to return your logs on a daily basis. All of your logs are missing at times. In addition, you continue to fail to complete court paperwork with the time of service included.
>
> This is despite that in June of 2008 you were given an oral warning about completing your daily logs and turning them in every day.

A pre-termination meeting was held on December 19, 2008 at which time Charging Party was suspended without pay.

At the request of Charging Party, a pre-decision meeting was held on January 16, 2009.

By letter dated January 23, 2009, the Court Administrator, affirmed the decision

to terminate Charging Party's employment as a Constable with the Justice of the Peace Court. (Union Exhibit 6)

PRINCIPAL POSITIONS OF THE PARTIES

Charging Party: The employee bears the initial burden to establish that he/she participated in protected activity. Once proven, the burden shifts to the employer to establish that the discipline at issue resulted from a legitimate business reason unrelated to the protected activity. In establishing motive, direct evidence which is not also self-serving is rarely available. In such cases, as is the case here, the trier of fact may infer motive from the totality of the circumstances. In determining motive the Board may consider: 1) the timing of the discipline; 2) the employer's knowledge of Charging Party's participation in protected activity; 3) animus on the part of the employer; 4) a delay between the cited conduct and 5) a baseless reason set forth by the employer for taking the disputed action. With regard, thereto:

1) Charging Part's termination occurred less than one month after he represented the Constables before the PERB and submitted his post-hearing argument;

2) It is undisputed that the State was aware of Charging Party's involvement in protected activity;

3) There exists a valid basis for finding animus on the part of the State as Charging Party's position on behalf of the Constables was contrary to the interests of the State and had a negative impact upon the State for two reasons. First, at the time, the Constables, were unrepresented. By removing them from Bargaining unit 1, all of the State employees remaining in the Unit were organized which entitled Unit 1 to commence compensation bargaining with the State. Second, by arguing that the

Constables were appropriate for inclusion in Unit 9, the Constables were, in effect, arguing that they should be compensated similar to the State Police and other law enforcement personnel;

4) Many of the incidents relied upon by the State to support Charging Party's discipline had existed for months;

5) The State's reasons for disciplining Charging Party are baseless in that they represent a "piling on" of charges. Valid reasons existed for Charging Party's conduct and the accusations relied upon by the State are unsupported by credible evidence.

Court: Charging Party was discharged for misconduct consisting of the following:

1) Misuse of his State vehicle and staying home during paid working hours. The State's concern in these areas first arose in approximately June, 2008, and the grievant was counseled on approximately June 25, 2008, and October 20, 2008, that his State vehicle must be returned at the end of his assigned shift. The pattern of Charging Party being at home after approximately 12:00 noon on a recurring basis arose during the investigation into his misuse of his vehicle.

2) Charging Party failed to perform his assigned duties. In 2006 Charging Party was disciplined for similar conduct.

3) Charging Party's attempts to justify his conduct were unacceptable.

The evidence of record establishes that protected activity was not a motivating factor in the Agency's decision to terminate Charging Party. Three other Constables whose performance deficiencies were similar to those of Charging Party were also terminated.

Three other Constables testified in support of the position espoused by Charging Party before the PERB in 2008. None of these individuals received any discipline.

The State also contends that the State's duty to bargain compensation applies equally to all of the statutorily defined compensation bargaining units. Consequently, the compensation unit into which the Constables are ultimately placed is irrelevant.

DISCUSSION

The issue in this case is not whether the discipline issued to the Charging Party is appropriate. The question raised by the unfair labor practice charge is whether the Court was improperly motivated when it terminated Charging Party based upon retaliation for his participation in protected activity.

19 Del.C. §1307, Unfair labor practices, (a) provides: "It is an unfair labor practice for a public employer or its designated representative to do any of the following: "(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." Retaliation by the employer violates this section of the PERA and raises a question of union animus.

There are essentially two types of cases involving questions of union animus: 1) pretextual and 2) dual motive. In a pretextual case, there is no legitimate business reason for the action taken by the employer against an employee who has engaged in protected activity, and the reason offered by the employer either did not exist or was not relied upon to support the discipline. In a dual motive case, however, the employee has the burden of establishing that his/her involvement in protected activity was a substantial or motivating factor in the employer's adverse employment action. *WFFA, Local 1590 v. City of Wilmington* (Del. PERB, ULP No. 93-06-085, II PERB 1050 (1994).

The current Charge raises a question of dual motive. In such cases,

> The charging party has the burden to establish the employee's protected conduct was a substantial or motivating factor in the employer's adverse employment action. In order to do this, the charging party must establish: (1) the employee engaged in protected activity; (2) the employer was aware of the employee's protected activities; and (3) the protected activity was a substantial or motivating factor for the employer's action. Once this *prima facie* case is 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 business decision. *DCOA v. State of Delaware, Department of Correction* (Del. PERB, ULP No. 00-02-275, III PERB 2059 (2000). See also *Colonial Education Ass'n. v. Capital School District* Del. PERB, ULP No. 93-11-095, II PERB 1071 (1994); *WFFA v. City of Wilmington*, (Supra.).

Here, the record establishes that Charging Party was involved in protected activity when he petitioned on behalf of the Constables to exclude them from compensation bargaining unit 1 and that the Court was aware of his involvement. Charging Party has, however, failed to establish that his involvement in this protected activity was a substantial or motivating factor for the employer's adverse employment action.

The mere fact that the petition filed with the PERB by Charging Party on behalf of the Constables was opposed by the Court does not establish union animus. Further, any potential impact upon the State's bargaining position is irrelevant. The State is statutorily required to bargain with all twelve compensation bargaining units after each unit is defined and bargaining representatives are certified.

Further, it is unrebutted that three other Constables who testified before the PERB in support of the Constables' petition were not disciplined nor did they suffer any other consequence adverse to their employment status.

Other arguments offered by Charging Party in his defense are unsupported by the evidence and are otherwise unpersuasive. Charging Party's contention that he was terminated less than one month after submitting his written brief supporting the

Constable's petition is insufficient to support the Charge. While the reasons for Charging Party's termination focus primarily on his misuse of his assigned State vehicle in September, October and November, 2008, the Court first learned of similar incidents three months earlier in June, 2008. The initial investigation resulted in a warning that failure to return the vehicle at the end of his shift at 4:00 p.m. was unacceptable. There is no question Charging Party was on notice that this was unacceptable behavior.

When similar incidents resurfaced in the fall of 2008, Chief Gessner again met with the Charging Party in October, 2008 and an investigation, including personal observation over a consecutive six day period, was initiated. Print-outs obtained from Fleet Management documented a pattern of behavior in which Charging Party not only regularly failed to return his vehicle to Constable Central at the end of his assigned shift but also evidenced that his car was regularly parked at his residence for large portions of the work day.

When confronted with the documentation, Charging Party did not deny the allegations concerning misuse of his vehicle. He initially claimed that his job involved a lot of downtime. He later claimed that he spent time at home because of the need to complete paperwork, testifying that Constables were not permitted to return to Constable Central before 3:00 p.m. He also testified that he could not work in his vehicle which because idling a State vehicle for more than thirty consecutive minutes was prohibited; consequently, he could not operate the heater on cold days or the air conditioning on hot days.

Concerning the late return of his vehicle to Constable Central, Charging Party testified that personal appointments after work sometimes prevented him from returning his vehicle until later in the evening. His contention that Constables are not permitted to

return to Constable Central until 3:00 p.m. is uncorroborated by testimony from any other Constable and is expressly denied by the testimony of Chief Gessner. Charging Party's justification for returning his vehicle late is also unpersuasive.

Charging Party's use of the State vehicle also raised concerns over whether Charging Party was effectively performing his assigned job responsibilities which requires that he move from location to location. Prior incidents of unsatisfactory job performance in 2006 resulted in a five day suspension subsequently mitigated to a written warning.

Supporting the Court's concern over Charging Party's performance of his job duties was a written complaint concerning Charging Party's job performance from Michael Morton, Esquire, submitted on behalf of several of the residential owners and property managers whom he represents. Whether unsatisfactory job performance in the fall of 2008 warranted discipline is not at issue here. Suffice it to say, the attenuating circumstances, when considered together, negate any inference that the Court's concerns concerning Charging Party's job performance were unjustified.

The record establishes that, as set forth in the Court's December 18, 2008, notice of intent to terminate, and supported by the hearing record, the State has established the presence of a legitimate business interest which, despite Charging Party's protected activity, would have resulted in the same adverse employment action.

CONCLUSIONS OF LAW

1. The State of Delaware ("State") is a "public employer" within the meaning of §1302(p) of the Public Employment Relations Act, (19 Del.C. Chapter 13) ("PERA"). The Justice of the Peace Court ("Court") is an agency of the State.

2. Charging Party, Neal Eastburn ("Charging Party"), was at all times relevant to this charge a public employee within the meaning of 19 Del.C. §1302(o).

3. Charging Party engaged in protected activity when he filed and processed a representation petition alleging that the Constable classification in the Justice of the Peace Court was not appropriate for inclusion in compensation bargaining unit 1.

4. The Court was aware of Charging Party's involvement in this effort.

5. The evidence of record establishes the presence of a legitimate business reason which, despite the employee's protected activity, justified his termination.

6. Consistent with the foregoing findings and opinion, it is determined that the Court did not violate 19 Del.C. §1307 (a) (4), as alleged.

WHEREFORE, the Charge is dismissed in its entirety.

IT IS SO ORDERED.

Dated: March 10, 2009

Charles D. Long, Jr.

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