

**PUBLIC EMPLOYMENT RELATIONS BOARD**

**STATE OF DELAWARE**

NEAL EASTBURN,	)	
	)	
Appellant,	)	<b>PERB Review of the</b>
	)	<b>Hearing Officer's</b>
v.	)	<b>Decision</b>
	)	
STATE OF DELAWARE, JUSTICE OF THE	)	<b><u>ULP. No. 09-05-673</u></b>
PEACE COURT,	)	
	)	
Appellee.	)	

**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 Court violated 19 Del.C. §1307a)(4), when he was terminated from his employment as a Constable in retaliation for his involvement in the filing and processing of a petition on behalf of all Constables before the PERB.

The Court filed its Answer to the Charge on or about May 28, 2009, in which it

denied all material allegations of the Charge and included New Matter on which it relied to request the Charge be dismissed.

Charging Party filed a Response to New Matter on or about June 10, 2009, denying the allegations of the Court's defenses.

A Probable Cause Determination was issued on September 4, 2009 finding probable cause existed to believe that an unfair labor practice may have occurred. The Hearing Officer conducted a hearing on November 23, 2009, and the record closed following receipt of written argument on February 8, 2010. The Hearing Officer issued his decision on March 10, 2010, finding the Court "established the presence of a legitimate business reason, which despite the employee's protected activity, justified his termination." The Charge was dismissed in its entirety.

By letter dated March 15, 2010, Charging Party requested the full PERB review and reverse the Hearing Officer's decision, asserting it was arbitrary, capricious and not supported by law. The State submitted its response on March 19, 2010, requesting Charging Party's appeal be denied and the decision of the Hearing Officer be affirmed.

A copy of the complete record in this matter was provided to each member of the Public Employment Relations Board. A public hearing was held on June 16, 2010, at which time the full PERB met in public session to consider the request for review. The parties were provided the opportunity to present oral argument and the decision reached herein is based upon consideration of the record and arguments presented to this Board.

### **DISCUSSION**

Section 1307(a)(4) prohibits a public employer or its designated representative from discharging or otherwise discriminating against an employee because that employee

has signed or filed an affidavit, petition or complaint or has given information or testimony under the Public Employment Relations Act. This appeal asserts the Hearing Officer failed to correctly consider either the record and/or the law in concluding that the Court did not interfere with Charging Party's rights under the statute when the Court terminated him shortly after he acted on behalf of other Constables in a representation proceeding before PERB.

The test for animus is well established under both NLRB and PERB case law.<sup>1</sup> The Charging Party bears the burden of establishing a *prima facie* case with three key components: 1) the employee was involved in protected activity as defined by statute; 2) the employer was aware of the employee's protected activity; and 3) that activity was a substantial or motivating reason for the employer's subsequent adverse employment action. Upon establishing this *prima facie* case, the burden shifts to the employer to establish a legitimate business reason which supported its action, despite the employee's protected activity.

The record establishes that the Charging Party was engaged in protected activity when he filed an objection, testified and presented argument before PERB in a representation proceeding which affected all Justice of the Peace Court Constables, and also successfully argued before this Board that the decision in that matter should be affirmed. It is undisputed that the Court and the State were aware of his highly visible and engaged role in those proceedings.

Resolution of this charge, therefore, rests on whether Charging Party's role in the representation proceeding was a substantial or motivating reason for the Court's decision

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<sup>1</sup> *DCOA v. State of Delaware, Department of Correction* (Del. PERB, ULP No. 00-02-275, III PERB 2059 (2000)). See also *Colonial Education Assn. v. Capital School District*, Del. PERB, ULP No. 93-11-095, II PERB 1071 (1994); *WFFA Local 1590 v. City of Wilmington*, Del. PERB, ULP 93-06-085, II PERB 1050 (1994).

to terminate him. Motive is a difficult element to establish by direct evidence and often must be deduced from the totality of circumstances established by the record. Charging Party argues five factors should be considered in evaluating the totality of circumstances: 1) the timing of the adverse action; 2) the employer's general knowledge of the employee's protected activity; 3) evidence of animus; 4) delay between the cited conduct and the discipline; and 5) the baseless nature of the purported reason for the discipline.

The Hearing Officer found, except for the timing of the investigation and termination, the record does not support the conclusion that the employer's decision was baseless or unsupported. Charging Party was terminated as a result of an extensive investigation which included comprehensive review of his usage of a State vehicle, his whereabouts during the work day (including personal observation over a six day period), review of his work product, and direct complaints from landlords concerning the timeliness and effectiveness of his work. Charging Party had previously been counseled and disciplined for failing to return the State vehicle on time, for failing to produce daily work logs and for taking shortcuts in performing service of writs.

The indicia of prohibited motive is limited to the proximity of his termination to his public involvement in protected activity as a representative of the interests of JP Court Constables in the PERB representation proceeding. However, as the Hearing Officer noted, three additional Constables were involved and testified during the hearing. There is no evidence of record that any of these individuals was disciplined or suffered any adverse employment action following his testimony.

The Board finds the record supports the Hearing Officer's decision that the "attenuating circumstances, when considered together, negate any inference that the Court's concerns concerning Charging Party's job performance were unjustified... The

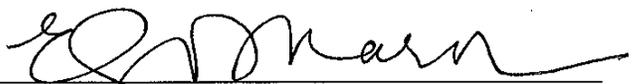
State has established the presence of a legitimate business interest which, despite Charging Party's protected activity, would have resulted in some adverse employment action." *Eastburn v. JP Court*, ULP 09-05-673, VII PERB 4549, 4559 (2010, PERB H.O.)

The Board finds the Hearing Officer's decision was not arbitrary, that he properly interpreted and applied the law to the facts presented, and that the decision was supported by the record.

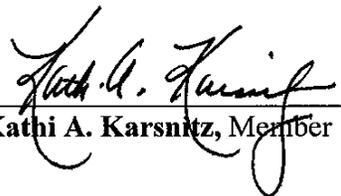
**DECISION**

After reviewing the record and considering the arguments of the parties, the Board unanimously affirms the decision of the Hearing Officer dismissing the Charge.

**WHEREFORE**, the appeal is denied.

  
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**Elizabeth D. Maron, Chairperson**

  
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**R. Robert Currie, Jr., Member**

  
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**Kathi A. Karsnitz, Member**

**DATED:** JULY 7, 2010