

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

KYNDAL MALONE,	:	
Charging Party,	:	
	:	
v.	:	<u>ULP No. 09-10-712</u>
	:	Probable Cause Determination
STATE OF DELAWARE, DELAWARE TRANSIT	:	and Order of Dismissal
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.

The Charging Party, Kyndal Malone, was employed by DTC and is or was a public employee at all times relevant to this Charge 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 October 28, 2009, Charging Party filed an unfair labor practice charge alleging that DTC has engaged in conduct which violates 19 Del.C. §1301(1) and (2); §1303 (2), (3), and (4); §1304 (b); §1307 (a) (1), (2), (3), (5), and (6) which provide:

§ 1301. Statement of policy.

It is the declared policy of the State and the purpose of this chapter to promote harmonious and cooperative relationships between public employers and their employees and to protect the public by assuring the orderly and uninterrupted operations and functions of the public employer. These policies are best effectuated by:

- 1) Granting to public employees the right of organization and representation;
- 2) Obligating public employers and public employee organizations which have been certified as representing their public employees to enter into collective bargaining negotiations with the willingness to resolve disputes relating to terms and conditions of employment and to reduce to writing any agreements reached through such negotiations.

§ 1303. Public employee rights.

Public employees shall have the right to:

- 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 any 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.

§1304. Employee organization as exclusive representative

- (b) Nothing contained in this section shall prevent employees individually, or as a group, from presenting complaints to a public employer and from having such complaints adjusted without the intervention of the exclusive representative for the bargaining unit of which they are a part, as long as the representative is given an opportunity to be present at such adjustment and to make its view known, and as long as the adjustment is not inconsistent with the terms of an agreement between the public employer and the exclusive representative which is then in effect. The right of the exclusive representative shall not apply where the complaint involves matters of personal, embarrassing and confidential nature,

and the complainant specifically requests, in writing, that the exclusive representative not be present.

§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.
- 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.

Specifically, the Charge is based on the following factual allegations (contained in Paragraphs 3 and 4):

The facts, on April 30, 2009, I attended a pre-termination hearing ... where I was falsely accused of complicity in fraudulently represented company information to the Wilmington Housing Authority. In late June, 2009, I received exhibit #2 where DTC is determining in error that I violated DTC code of conduct by falsely representing my confidential employee information, and conspiring with another employee to disclose this information to a government agency in an attempt to defraud them. On July 10, 2009, a step 4 hearing was attended by myself and the union at the beginning of which DTC reported they did not have documentation and certain proof that they need to proceed and would have to postpone. That was over 10 weeks ago and I have had no word from DTC, despite constant inquiries. Pursuant to the contract ... when the union waives the lower steps and goes to step 4 hearing, it will be held within 10 days, this is vastly over the time requirements and I am being ignored.

Background, according to DTC, I was fired for conspiring with another employee to defraud another agency, their code of conduct, cites unauthorized disclosure of confidential information... I did no such thing. Wilmington Housing Authority requested employment information from me and I passed on this request to DTC, and its representative prepared this information for me in an envelope, and I forwarded it to the Wilmington Housing Authority. I had no part in preparing this information and did not review it before sending it. If this disclosure was unauthorized DTC should not have disclosed it. Further DTC claims their only proof of this fraud against me is the alleged statement, which I have not seen, of this employee whom they have also fired for this same act. Further to this date there is no federal, state or local governmental investigation, or charges of any kind. DTC's sole motivation in this wrongful discharge is because I used FMLA when I was pregnant and used workmen's compensation when I was injured on the job. I am not the first employee they have tried to discharge for this and not the first to be denied my rights under PERB to have a hearing, other members of our union have also been denied hearings and filed complaints with you... *[references to exhibits and other charges excluded from quote]*

On November 9, 2009, the State filed its Answer to the Charge, denying the material allegations set forth in the Charge. Under New Matter, the State asserted the unfair labor practice charge should be deferred until the conclusion of the grievance procedure and that the Charge fails to allege facts which, even if true, would constitute any of the statutory violations alleged.

Charging Party filed a Response to New Matter on November 17, 2009, denying all of the New Matter.

This Probable Cause Determination is based upon a review of the pleadings.

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).

Essentially Charging Party alleges she was terminated without cause and based upon a retaliatory motive for her use of FMLA and worker's compensation during the period of her pregnancy and unrelated work injury. The jurisdiction of the PERB is limited by the Public Employment Relations Act and relates to the collective bargaining relationship between public employers, their employee and the labor organizations which are or seek to represent those employees.

PERB has previously addressed the question of the sufficiency of an unfair labor practice charge for the purpose of the probable cause determination. In *American Federation of State, County, and Municipal Employees, Council 81, Local 3911. v. New*

Castle County, Delaware (Del. PERB, ULP No. 09-07-695, VI PERB (2009) 4445) the full PERB held:

PERB Rule 5.2 (c)(3), requires “a clear and detailed statement of the facts constituting the alleged unfair labor practice...” Sufficient information must be included in pleadings to allow a preliminary assessment of the procedural and substantive viability of the charge, i.e., the probability that there is a sufficient cause to continue to process the charge.

On its face, the instant Charge fails to allege any facts which would establish that DTC has engaged in conduct which tended to interfere with, restrain or coerce the Charging Party in the exercise of any rights guaranteed by the statute, in violation of 19 Del.C. §1307(a)(1), §1301, and/or §1303.

The statutory unfair labor practices defined in §§1307(a)(2), (a)(3), and (a)(5) related to prohibitions on the public employer in terms of its relationship with and conduct toward the exclusive bargaining representative of a bargaining unit of employees. These provisions do not relate rights of individual employees. The Charge does not allege any facts which relate to interference with organizational rights and the Charging Party does not have standing to raise a failure or refusal to bargain in good faith charge.

19 Del.C.§1307(a)(6) is a derivative charge that an employer has failed or refused to comply with “any provision of this chapter or with rules and regulations established by the Board...” Again, the pleadings fail to establish a basis for this charge. §1304(b) provides employees with the right to present a complaint to the employer and to have those complaints adjusted without union intervention. Again, nothing in the pleadings suggests that this provision of the statute was violated. Charging Party admits she has had ATU representation during the grievance process.

The other element of this Charge involves the Step 4 grievance hearing. Originally scheduled on August 12, 2009, the meeting was ultimately held on November 12, 2009. Although the circumstances resulting in the November 12, 2009 meeting are unknown, there is no allegation in the Charge (much less any documentation) indicating the processing of the grievance protesting Charging Party's discharge was conducted in a discriminatory manner.

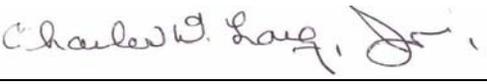
It is clear that the Charging Party believes that her termination was not for just cause and is dissatisfied with the speed at which her grievance is being processed. Her right to just cause for termination arises exclusively from the collective bargaining agreement and must be enforced through the negotiated grievance procedure. The Charge, however, fails to allege any facts in connection with the processing of her grievance or the basis of her termination which rises to the level of a possible violation of the Public Employment Relations Act.

DETERMINATION

Considered in a light most favorable to Charging Party, the pleadings provide no basis upon which to conclude that a violation of 19 Del.C. §1307 (a)(1), (2), (3), (5) and/or (6) may have occurred.

WHEREFORE, the Charge is dismissed.

June 29, 2010
(Date)



Charles D. Long, Jr.,
Delaware Public Employment Relations Bd.