PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF DELAWARE

RICHARD FLOWERS,	:	
	:	
Charging Party,	:	
	:	**ULP 11-12-837**
v.	:	
	:	**Probable Cause Determination**
STATE OF DELAWARE, DELAWARE TRANSIT CORPORATION, MARGARET FAILING, MAUREEN ALEXANDER AND AL HILLIS,	:	**and Order of Dismissal**
	:	
Respondents.	:	

Appearances

Richard Flowers, Charging Party, pro se
Danielle M. Pinkston, SLREP/HRM/OMB, for DTC, et al.

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. Documents attached to the pleadings establish Margaret Failing and Maureen Alexander are employed in DTC's Human Resources Office. There is no documentation or reference which establishes who Al Hillis is or his relationship to this Charge.

Charging Party, Richard Flowers ("Charging Party"), is employed by DTC and is a public employee within the meaning of 19 Del.C. §1302(o). Charging Party is a member of the bargaining unit represented by the Amalgamated Transit Union, Local 842, ("ATU") which represents a 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 December 2, 2011, Charging Party filed an unfair labor practice charge ("Charge") alleging that DTC violated 19 Del.C. §1307(a)(1), (a)(2), (a)(4), (a)(5) and (a)(7),[1] which provide:

> 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:
>
> 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;
>
> 4. Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit or complaint or has given information or testimony under this chapter.
>
> 5. Refused to bargain collectively in good faith with an employer representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.
>
> 7. Refuse to reduce an agreement, reached as a result collective bargaining, to writing and sign the resulting contract.

The Charge alleges that on or about May 31, 2011, Charging Party was informed by DTC Benefits Specialist Maureen Alexander that because he did not contact the Human Resources Office within thirty (30) days following his return to work from an authorized leave of absence or within the open enrollment period for benefit changes, he could not renew his medical benefits until the next open enrollment period in one (1) year.

[1] It is unclear whether Charging Party is alleging a violation of §1307(a)(7) or §1307(a)(8). Regardless, the allegations set forth in the Charge do not constitute a violation of either §1307(a)(7) or §1307(a)(8).

Charging Party explained that when he contacted the Human Resource Office, he was told that since he was not requesting any changes to his coverage he did not need to re-enroll. He told Ms. Alexander that he believed he had until July 2, 2011 *[sic]*, to re-enroll but she stated that the June 2[2] date applied exclusively to the spousal coverage requirements of the Plan. When Charging Party appealed to Ms. Alexander's supervisor, Margaret Failing, her response was the same as that of Ms. Alexander.

Charging Party contends that he properly complied with the requirements necessary to reinstate his benefits following his return from an authorized leave of absence.

The Charge further alleges that after he returned to work, DTC improperly deducted earned sick days from his accrual and $1,050.00 from his paycheck which it forwarded directly to ATU Local 842, without prior notice to him or his authorization.

On or about December 14, 2011, the State filed its Answer to the Charge. The State asserts it is the only proper "Respondent" to the Charge. The State argues Charging Party has failed to allege any improper action by DTC or relevant standard to support the Charge. It notes Charging Party failed to identify any provision of the collective bargaining agreement that has been violated and asserts no grievance has been filed on Charging Party's behalf by the ATU. The State alleges Charging Party failed to comply with the requirements for maintaining his benefit coverage while on leave of absence and to take the steps necessary to reactivate his benefits upon his return to work.

In a section of its Answer entitled "New Matter," the State asserts Charging Party failed to allege any actionable violation under the PERA or PERB's Rules and, thus, failed to state a

[2] Ms. Failing's response to Charging Party's request by email dated April 25, 2011 (which was attached to both the Charge and the Answer) includes information about the Benefits Reenrollment Process. It includes the following information on page 5 of 7: "Confirmation Statements will be mailed out to employee's home address on May 26, 2011. Confirmation statements are to be signed and returned to the Benefits Specialist. If the form is not signed and returned, you are acknowledging it is correct. The employee deadline to contact their Benefits Specialist with enrollment errors will be June 2, 2011. **No changes will be made after June 2, 2011.**" (emphasis in the original)

claim for relief under 19 Del.C. §1307(a); and that the Charge is untimely. The State requested the Charge be dismissed and that Charging Party be ordered to "pay the fees and costs incurred by the State in defending against this claim."

On or about December 22, 2011, Charging Party filed his Response denying the New Matter set forth in the State's Answer.

The State then filed a Motion to Dismiss on or about December 30, 2011, asserting Charging Party had improperly attempted to modify the Charge.

The determination reached herein is based upon a review of the pleadings.

DISCUSSION

Rule 5.6 of the Rules and Regulations of the Delaware Public Employment Relations Board provides:

> (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 will 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,* ULP 04-

10-453, V PERB 3179, 3182 (Probable Cause Determination, 2004).

The State's Motion to Dismiss is denied. PERB Rule 5.8 provides this agency with discretion to allow any complaint to be amended in a manner PERB or its agent deems just and proper, at any time prior to the issuance of the final decision and order, "as long as no new cause of action is added after the statute of limitations has run." The information provided in Charging Party's Response to New Matter set forth no new cause of action and essentially only added narrative to the allegations made in the Charge. The attachments to the Response did not provide any further substantiation to the Charge. The State is reminded PERB has defined the primary purpose of pleadings to be the formation of issues. Rule 5.1 directs that "all rules pertaining to pleadings shall be liberally construed towards effecting that end."

Prior to a consideration of the merits of the Charge, it is necessary to make a preliminary determination as to whether the Charge is timely. The PERA states, "… no complaint shall issue based on any unfair labor practice occurring more than 180 days prior to the filing of the charge with the Board." *19 Del.C. §1308(a).* PERB Rule 5.2 states (in relevant part):

> (a) A public employer, labor organization, and/or one or more employees may file a complaint alleging a violation of ... 19 Del.C. §1307. Such complaints must be filed within one hundred and 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 agents finds it relevant to the question of commission of an unfair labor practice within the limitations period.

The authority of PERB to adopt a rule requiring the prompt filing of unfair labor practice charges is well established. *FOP Lodge 15 v. City of Dover* (ULP 98-02-225, III PERB 1709, 1714, 1718 (PERB, 1998); *AFSCME Local 3911 v. New Castle County,* ULP 09-07-695, VII PERB 4401, 4405 (PERB, 2009).

Board Regulation 1.9 provides the Board rules are to be

> liberally construed, but Regulation 1.10 states that "[n]otwithstanding the provisions of Regulation 1.9 … the Board shall strictly construe all time limitations contained in the Act or these Regulations." In other words, the State had precisely five days from receiving the Executive Director's decision to file an appeal with the Board. *AFSCME Council 81 v. State of Delaware, OMB and PERB*, CA 08M-02-078-JEB, VI PERB 4079, 4081 (J. Babiarz, 2008).

Statutory time lines are to be strictly applied, unless the Board or its agents finds introduction of evidence of conduct or activity occurring outside the statutory period to be relevant to the question of commission of an unfair labor practice within the limitations period.

Charging Party alleges "… On or about May 31, 2011, I had been informed that I had no health benefits." In his Response to New Matter, Charging Party alters that assertion, claiming that the correct date of the incident giving rise to the unfair labor practice charge was June 2, 2011. Regardless of which date is used, neither May 31, 2011 nor June 2, 2011 brings the filing of the Charge within the required 180 day filing period set forth in PERB Regulation 5.2. There is no supported assertion made in the pleadings to any conduct within the 180 day period which would violate the statute, so conduct occurring prior to that period cannot be considered. Consequently, the Charge is untimely and must be dismissed.

Finally, the State's request that the Charging Party be ordered "to pay the fees and costs incurred by the State in defending against this claim" is denied. Awarding fees is an extraordinary remedy reserved for situations in which a party engages in egregious misconduct which clearly amounts to bad faith. *AFSCME Council 81, Local 3936 v. State of Delaware, DOS/DVH*, ULP 10-09-765, VII PERB 5313, 5333 (PERB, 2012).

> … The type of bad faith which justifies fee shifting, however, is not to be found in so facile a manner, or else every successful unfair labor practice complaint would bring with it attorneys fees:
>
> > This Court has suggested that in certain egregious circumstances, a party's fraudulent behavior that underlies or forms the basis of the action may justify an award of attorney's fees against that party.

> The Court has recognized, however, that an award of attorney's fees is "unusual relief," and that the American Rule would be eviscerated if every decision holding the defendant liable for fraud and the like also awarded attorney's fees. For that reason this quite narrow exception is applied only in the most egregious instances of fraud or overreaching. *Arbitrium Handels AG v. Johnston*, Del.Ch., 705 A.2d 225, 231 (1997).

> In order to find that the State's initial action was taken in bad faith requiring the shifting of fees, I must find more than that the State breached a contract with the Union or decided to argue a position which ultimately is found to be unsuccessful. I must find that the motives of the State in abrogating the Agreement were to act in a way which was fraudulent or inequitable, in a callous disregard of its obligations and for an improper purpose. *Dept of Corrections, State of Delaware v. Delaware Correctional Officers Association*, Chancery Court, Glasscock, Master, ULP 00-07-286 (C.A. 19115 IV PERB 2909, 2916 (8/28/03)

The Charging Party's actions in filing this unfair labor practice charge do not rise to the level of being "fraudulent or inequitable, in a callous disregard of his obligations and for an improper purpose".

DECISION

Consistent with the foregoing discussion, the Charge is untimely and, therefore, the pleadings fail to establish probable cause to believe that a violation of 19 Del.C. §1307(a)(1), (a)(2), (a)(4), (a)(5), and/or (a)(7), as alleged.

WHEREFORE, the Charge is dismissed in its entirety.

DATE: January 31, 2012

Charles D. Long, Jr.

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