

PUBLIC EMPLOYMENT RELATONS BOARD
FOR THE STATE OF DELAWARE

AMALGAMATED TRANSIT UNION, LOCAL 842 ,	:	
	:	
Charging Party,	:	
	:	<u>ULP 12-02-850</u>
v.	:	
	:	Probable Cause Determination
STATE OF DELAWARE, DELAWARE TRANSIT	:	
CORPORATION,	:	
	:	
Respondent.	:	

The State of Delaware (“State”) is a public employer within the meaning of 19 Del. C. Section 1302(p) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (“PERA”). The Delaware Transit Corporation (“DTC”) is an agency of the State.

The Amalgamated Transit Union (“ATU”) is an employee representative within the meaning of §1302(i) of the PERA. By and through its affiliated Local 842, the ATU is the exclusive bargaining representative of Paratransit Drivers employed by DTC, within the meaning of §1302(j), of the Act.

The ATU and DTC are parties to a collective bargaining agreement with a term of July 1, 2008 through August 31, 2010. They are currently engaged in a binding interest arbitration proceeding for the purpose of establishing the terms of a successor agreement; however, the terms of the 2008 – 2010 agreement remained in effect for all times relevant to the processing of this Charge.

On February 6, 2012, ATU filed an unfair labor practice charge with the

Delaware Public Employment Relations Board (“PERB” or “Board”). The Charge alleges “in early September, 2011,” a dispute arose over the assignment of work and jury duty pay under Section 24 of the collective bargaining agreement. ATU filed a grievance which proceeded to Step 4 of the negotiated grievance and arbitration process (Article 8 of the collective bargaining agreement). ATU claims that DTC failed to comply with the applicable contract provision (Article 24) and in so doing unilaterally altered a mandatory subject of bargaining in violation of §1307(a)(5) and/or (a)(6), of the PERA, 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:
 - (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.

The Charge also alleges DTC failed or refused to respond to the ATU’s October 6, 2011, request for “payroll and work schedule information for all Local 842 members who have been on Jury Duty since March 14, 2005.” By ignoring a valid request for information, the ATU charges DTC violated 19 Del.C. §1307(a)(5) and/or (a)(6).

On February 15, 2012, the State filed its Answer denying the material allegations set forth in the Charge. Under New Matter the State argued the Charge fails to allege any conduct that could be construed as a violation of §1307(a)(5) and/or §1306(a)(6); the

Charge is untimely; and the issue should be deferred for resolution to the contractual grievance and arbitration procedure.

On February 23, 2012, Charging Party filed its response to New Matter. ATU denies the new matter set forth in the State's Answer, asserting that the allegations set forth in the Charge, "are clear and detailed" and that the actions complained of violate §1307(a)(5) and (a)(6) of the Act, as alleged.

This probable cause determination is based upon review of the pleadings submitted by the parties.

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).

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).

The ATU assert in its Charge that the dispute concerning payment for jury duty arose "in early September, 2011." The State provided documentary evidence in its Answer that the underlying incident actually occurred on or about July 27, 2011. In its Response, the ATU "concede(s) to the State's timeline." Contrary to the ATU's assertion, the conduct at issue in this unfair labor practice charge is the grievant's entitlement to jury duty pay on July 27, 2011, not the date of receipt of the Step 4 answer denying the

grievance on January 6, 2012.

The Charge was filed on February 6, 2012; the preceding 180 day period would have commenced on August 9, 2011. Consequently, the Charge as it relates to any potential violation of the statute for failure to compensate an employee for jury duty pay on July 27, 2011, is untimely. There is, therefore, no viable unfair labor practice charge in this regard to defer to the contractual grievance procedure.

Concerning DTC's duty to provide information, the ATU alleges at Paragraph 5 of its Charge:

The Union sent the DART Administration a letter dated October 6 by email requesting information about Para Transit Workers concerning payroll records for employees who have served on Jury duty back to March 15, 2004 to determine if this so called policy has been unilaterally enforced by DART. DART never responded to this request.

The State denied this paragraph in its Answer and did not provide any further information. In its response to New Matter, the ATU further states that in the grievance procedure, the State claimed that the contractual application of jury duty pay was changed effective March 14, 2005, as the result of an agreement reached between a Sussex County Shop Steward and a South District Paratransit Supervisor. The ATU asserts its request for information was in response to this DTC claim in the grievance procedure, and that, "This [*the request for information referenced above*] was brought up at the Step 4 hearing and was never complied with."

It is well established through PERB case law that the duty to bargain in good faith under the Public Employment Relations Act obligates a public employer to provide information to an exclusive bargaining representative that is necessary and relevant to that organization in performing its representational duty. *AFSCME 320 & 1102 v. City of*

Wilmington, ULP 10-08-761, VII PERB 4757, 4760 (Probable Cause Determination, 2010). This obligation has been recognized by this Board, the Court of Chancery and the Delaware Supreme Court. *Bd. of Education of Colonial School District v. Colonial Education Association, DSEA/NEA*, Del.Chan., CA 14383, II PERB 1343 (1996), *affirmed Colonial Education Assn. v. Bd. of Education*, Del.Supr., Case 129, 1996, 152 LRRM 2575, III PERB 1519 (1996), (citing *Brandywine Affiliate, NCCEA/DSEA/NEA, v. Brandywine School District*, Del.PERB, ULP 85-06-005, I PERB 131, 149 (1986)); *AAUP v. DSU*, Del. PERB., Decision on Remand, ULP 95-10-159, III PERB 2177 (2001); *Delaware Correctional Officers Association v. Delaware Department of Correction*, ULP No. 00-07-286, III PERB 2209, 2214 (2001), *AFSCME Locals v. DSU*, Del.PERB, ULP 10-04-739, VII PERB 4693, 4705 (2010).

The allegations relating to the employer's failure or refusal to provide requested documents supporting the employer's allegation of a past practice during the grievance procedure may support a determination that the PERA has been violated. It will be the ATU's burden to establish the factual and legal support for such a finding.

Because the underlying incident for this portion of the Charge occurred on or about October 6, 2011, the charge is timely filed with respect thereto. There is no information provided in the Answer to the Charge that this particular issue is currently subject to a pending grievance; consequently this is not a deferrable issue.

DECISION

For the reasons set forth above, the Charge as it relates to an alleged unilateral change in jury duty pay is untimely and therefore dismissed with prejudice.

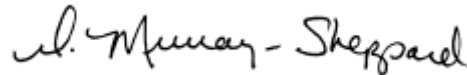
Concerning the allegation that DTC failed or refused to provide information

which is necessary for the ATU to perform its representational responsibilities, considered in a light most favorable to the Charging Party, the pleadings are sufficient to establish probable cause to believe that an unfair labor practice in violation of 19 Del.C. §1307(a)(5) and/or (a)(6) may have occurred.

WHEREFORE, a hearing will be scheduled forthwith for the purpose of creating an evidentiary record upon which a decision can be rendered.

IT IS SO ORDERED.

DATE: May 8, 2012



DEBORAH L. MURRAY-SHEPPARD
Executive Director
Del. Public Employment Relations Bd.