

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMALGAMATED TRANSIT UNION, LOCAL 842)	
)	
Charging Party,)	
)	
v.)	<u>ULP No. 12-04-859</u>
)	
STATE OF DELAWARE, DELAWARE TRANSIT CORPORATION,)	Probable Cause
)	Determination
)	
Respondent.)	

APPEARANCES

Roland W. Longacre, President/Business Agent, for ATU Local 842

Danielle M. Pinkston, SLREP, OMB, for DTC

The State of Delaware (“State”) is a public employer within the meaning of 19 Del. C. §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 “all hourly rated Operating and Maintenance employees” of 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. The terms of the 2008 – 2010 agreement remained in effect for all times relevant to the processing of this Charge.

On April 9, 2012, ATU filed an unfair labor practice charge with the Public Employment Relations Board (“PERB”) alleging conduct by DTC in violation of §1307 (a)(1), (2), (4), (5), (6) and (8) of the Act.¹ Specifically, the Charge alleges that the ATU grieved the termination of bargaining unit employee Mary Perkins-Gross (“Perkins”). The grievance was scheduled for arbitration on October 18, 2010, at which time a settlement agreement was reached. A formal written agreement was drafted by the State but the document was not signed until December 14, 2010. In accordance with the terms of the settlement, the parties mutually selected a physician to examine the grievant in order to determine her fitness to return to duty. The examination was conducted on February 25, 2011. Perkins’ return to work did not occur, however, until March 22, 2011, more than five months after the settlement was reached on October 18, 2010.

In November, 2011, vacation allotments for 2012 for bargaining unit members were posted by DTC. Article 15-C-11 of the parties’ collective bargaining agreement

¹ §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.
- (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.
- (5) Refuse 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.
- (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.
- (8) Refuse to disclose any public record as defined by Chapter 100 of Title 29.

bases vacation eligibility on hours worked between September 1 of one year through August 31 of the following year. An employee is required to work between 1,000 and 1,299 hours to receive 50% of the annual vacation allotment for the following year. Ms. Perkins worked 955.89 hours, leaving her 44.11 hours short of the hours needed to qualify for half of her vacation allotment. The ATU alleges DTC has violated the PERA by failing to implement the negotiated settlement with the union in a timely manner. As a result of this failure, Perkins was denied eligibility for vacation hours to which she should have been entitled in 2012.

On or about January 17, 2012, the ATU requested Perkins' payroll records for the period September 1, 2010 through August 31, 2011. DTC did not respond to the request and did not provide any information. The ATU alleges DTC has violated the statute by failing and refusing to provide information which is reasonably necessary for the union to perform its representative responsibilities.

The ATU requests DTC be held to have violated the statute as alleged, and directed to adjust Perkins 2012 vacation entitlement and to provide the requested payroll information.

On April 19, 2012, the State filed its Answer to the Charge in which it denies committing the alleged statutory violations and requests that the Charge be dismissed. Specifically, the State maintains that it complied with the settlement agreement signed by the parties on December 14, 2010 which resulted in the reinstatement of the Grievant on March 22, 2011. It asserts the information sought by Charging Party does not qualify as a public record as defined by 29 Del.C. §10002(g)(1) because it constitutes a protected "personnel record"; consequently, the State asserts it was not obligated to provide the

documents.

Included within its Answer, the State asserts three issues of new matter: 1) the Charge fails to state a claim for relief under 19 Del. C. §1307(a); 2) the Charge is untimely because the ATU was a party to the settlement agreement and knew the period that Perkins was not working would affect her eligibility for vacation when she was reinstated on March 22, 2011 (more than a year prior to the filing of this charge); and 3) the Charge should be deferred to contractual grievance and arbitration procedure set forth in Section 7 of the parties' collective bargaining agreement.

On April 27, 2012, the ATU filed its Response to New Matter denying the Charge fails to state a claim for which relief can be granted by the PERB. The ATU denies the Charge is untimely, asserting it could not calculate Perkins' loss of vacation entitlement until her hours worked in 2011 were posted by the State. In response to the State's request for deferral, the ATU maintains that it has exhausted the contractual grievance and arbitration procedure and that process resulted in the settlement agreement reached at the arbitration hearing. More importantly, rather than a contract issue, the unfair labor practice charge raises statutory issues involving the failure of the State to reinstate Perkins in a timely manner causing Perkins to lose a portion of her 2012 vacation entitlement. Consequently, deferral is inappropriate.

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).

Based on the pleadings, even when considered in a light most favorable to the ATU, there are no facts to support the claim that DTC's alleged failure or delay in implementing the grievance settlement may have violated 19 Del.C. §1307(a)(2), (a)(4) and/or (a)(6) as alleged. The pleadings also do not support a claim that DTC's alleged failure to provide the grievant's personnel records may have violated 19 Del.C. §1307 (a)(4) and/or (a)(8)². Wherefore, these portions of the Charge are dismissed.

Concerning the substantive allegations of the Charge, whether Ms. Perkins was entitled to additional paid vacation time is a function of the settlement agreement entered into by the parties. The terms of the settlement agreement were negotiated and entered

² The record does not indicate that a FOIA request was made or that a determination was made by the Dept. of Justice that the records the ATU sought are "public records as defined by Title 100 of Chapter 29".

into during the grievance procedure (which is a mandatory subject of bargaining). Unfortunately, the settlement does not set forth in its terms the manner by which disputes concerning the application of that agreement are to be resolved.

The duty to bargain in good faith is a continuing obligation for both parties under the PERA. Whether there was unilateral failure by DTC or a mutual failure by both parties to pursue timely implementation of the negotiated resolution with due diligence can only be determined by evaluating the facts of this case. It is the ATU's burden to establish the delay in implementing the settlement was unreasonable and the extent to which (if any) the State was negligent in meeting its good faith obligations under the PERA.

The State's contention that the payroll records requested by Charging Party constitute personnel records which are not public records as defined by 29 Del.C. §10002(g)1), is not dispositive of the issue involving the State's obligation under the PERA to provide the records concerning bargaining unit employees requested by Charging Party.

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 concerning the employer's failure or refusal to provide the requested documents may support a determination that the PERA has been violated. It is the ATU's burden to establish the factual and legal support for such a finding.

DETERMINATION

The pleadings do not support a finding that there is probable cause to believe that DTC violated 19 Del.C. §1307(a)(2), (a)(4) and/or (a)(6) in its implementation of the grievance settlement agreement and also do not support a finding that 19 Del.C. §1307(a)(4) and/or (a)(8) may have been violated as alleged in failing or refusing to respond to the ATU's request for information. These Charges are dismissed.

Considered in a light most favorable to Charging Party, the pleadings do support a determination that there is probable cause to believe that an unfair labor practice, as alleged, may have occurred. The pleadings raise questions of fact which can only be resolved following a hearing convened for the purpose of creating an evidentiary record upon which a decision can be rendered.

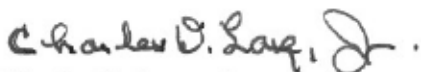
Wherefore, a hearing will be promptly scheduled for the purpose of establishing

a factual record upon which a decision can be rendered concerning:

- 1) Whether DTC violated 19 Del.C. §1307(a)(1) and/or (a)(5) as alleged, by failing or refusing to implement the terms of the settlement agreement reached by the parties to resolve the termination grievance of Mary Perkins-Gross, and thereby unlawfully deprived the grievant of vacation hours to which she would have been otherwise entitled; and
- 2) Whether DTC violated §1307(a)(1), (a)(2), (a)(5) and/or (a)(6) as alleged, by failing or refusing to provide information which is necessary for the ATU to perform its representational responsibilities.

Having found probable cause based upon the pleadings, the State's claim that the Charge fails to state a claim upon which relief can be granted is denied. The State's timeliness and deferral defenses will be considered as preliminary matters in making a determination following receipt of a complete factual record.

DATE: July 2, 2012
(Date)



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