

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

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| AMALGAMATED TRANSIT UNION, LOCAL 842 |) | |
| |) | |
| Charging Party, |) | |
| |) | |
| v. |) | <u>ULP No. 12-04-860</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 (7), of the Act.¹ Specifically, the ATU alleges DTC violated the PERA by refusing to implement an arbitrator’s award in a timely manner and by unnecessarily delaying the grievant’s return to work for more than four months. The ATU asserts DTC delayed in reinstating the grievant because it was purportedly considering an appeal of the arbitrator’s award. No appeal was ever taken. As a result of the delay, the grievant lost 94 days of pay. The ATU further alleges that the grievant is entitled to sick pay, vacation days and personal days earned outside the period of his suspension.

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. The State asserts that the allegation concerning vacation days, sick time and personal

¹¹ §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.
- (7) Refuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting contract.

days misinterprets the arbitrator's award as well as §15(C)(7)² and §15(C)(11)³ of the parties' collective bargaining agreement. The State maintains the grievant was reinstated as soon as was practicable and received payment to which he was entitled under the terms of the collective bargaining agreement.

Included within its Answer, the State asserts two issues of new matter: 1) the Charge fails to state a claim for relief under 19 Del. C. §1307(a); and 2) the Charge should be deferred to contractual grievance and arbitration procedure set forth in §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.

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

² §15(C)(7): Employees eligible for vacation pay who are dismissed (except for dishonesty or drinking intoxicants on duty) or leave the service before their next vacation date will receive vacation pay prorated on the time they have worked from January 1st of the year they leave the service. This shall also apply to employees who have been with the ADMINISTRATION for a period of 6 months or more; or, who are drafted into or enlist in the Armed Forces of the United States.

³ §15(C)(11): In order to be eligible for full vacation, an employee must have worked 1400 hours during the period September 1 through August 31 in the prior year. The term "worked" shall include Vacation, Holidays, Jury Duty, Bereavement Leave and Union Business. An employee who does not work the full 1400 hours will be entitled to vacation on the following scale:

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|----------------------------------|----------------------|
| 1400 or more hours worked..... | full vacation |
| 1200 to 1399 hours worked..... | 75% of full vacation |
| 1000 to 1199 hours worked..... | 50% of full vacation |
| less than 1000 hours worked..... | no vacation |

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 facts underlying the grievance and the arbitrator's award are undisputed. A grievance contesting the discharge of bargaining unit employee Brian Green ("Green") was heard at arbitration on June 27, 2011. The arbitrator's decision dated September 22, 2011, mitigated the Grievant's discharge to a disciplinary suspension and directed the Employer to "reinstatement Green as soon as practicable to his former position with no loss of seniority. Grievant's request for back pay or any other 'make whole' remedy is specifically denied." The arbitrator did not retain jurisdiction. Green was returned to work on January 31, 2012.

The State asserts the Charge makes allegations which require interpretation and application of sections of the collective bargaining agreement, and which also require interpretation of the arbitration award which was issued pursuant to §7 of that agreement.

Consequently, it argues, the underlying dispute should be subject to post-arbitral deferral and that the PERB should adopt the standards set forth by the National Labor Relations Board in *Spielberg Manufacturing Co.*⁴ It also asserts the ATU should have sought enforcement of the arbitrator's award in the Court of Chancery, under that Court's equitable jurisdiction, rather than filing an unfair labor practice charge with PERB.

The Public Employment Relations Board previously addressed the argument that Chancery Court's discretionary exercise of equitable jurisdiction may deprive a party of the right to seek enforcement of the negotiated grievance procedure before PERB in *Diamond State Port Corporation v. ILA 1694-1*:⁵

There is nothing in the contractual language negotiated by these parties [to support the State's assertion that the negotiated grievance and arbitration procedure inherently includes the requirement that a party seek judicial review of an arbitration award, either through a motion to vacate or a motion to enforce filed in the Court of Chancery] or in the PERA to support this assertion. The General Assembly did not choose to include in the PERA a provision to allow for suits for the violation of collective bargaining agreements to be filed in court, as is provided in Article 301 of the National Labor Relations Act. Delaware's Uniform Arbitration Act explicitly excludes collective bargaining agreements from its coverage. To accept the State's argument would defeat the purpose of the negotiated grievance procedure to resolve disputes arising under the agreement in a timely, efficient and effective manner. As argued by the State, an employer could fail or refuse to implement an arbitration award, without taking any affirmative action to challenge the validity of that award, and wait for the union to file a motion for enforcement before raising a defense that the arbitrator exceeded his authority or that the award did not draw its essence from the agreement. This argument flies in the face of the good faith obligations imposed by the PERA.

The instant Charge is differentiated from the case presented in *DSPC v. ILA 1694-1* (Supra.) because the dispute presented here concerns the application of the arbitrator's

⁴ 112 NLRB 108, 36 LRRM 1152 (1955). The Delaware PERB has not, to this point, adopted a *Spielberg* policy concerning post-arbitral deferral

⁵ ULP 11-02-787, VII PERB 5069, 5075 (Del.PERB, 2011).

remedy. The award is clear on its face. The arbitrator found “just cause under the agreement to discipline, but not discharge the grievant” and he therefore converted the termination to a lengthy suspension. The ATU’s contention that the grievant was entitled to be credited for vacation days, sick leave and personal days earned outside the period of his suspension is in dispute. That dispute is not resolved simply by reviewing either the arbitrator’s award or the pleadings in this matter.

The issue raised by this Charge is not currently pending before any other tribunal nor is it currently pending in the grievance procedure. In considering the just cause issue before him, the arbitrator did not consider the impact (if any) of either §15(c)(7) or §15(c)(11) when mitigating the discharge to a suspension. Consequently, the “unity of issue”⁶ required under the NLRB’s *Spielberg* policy is not present in this case.

For this reason, the State’s contention that this Charge should be subject to post-arbitral deferral is denied as a preliminary defense to the Charge.

There is an alternative method by which the parties might resolve this issue, i.e., by mutually requesting the arbitrator to clarify the intended scope of his award. The PERB, however, does not have authority to compel these parties to agree to re-engage the arbitrator, nor to require the arbitrator to agree to reconsider this issue if mutually requested to do so by the parties. 19 Del.C. §1308(b)(1)(b).

For these reasons, the record is sufficient to support a finding of probable cause to believe that an unfair labor practice may have occurred in violation of 19 Del.C. §1307(a)(1) and/or (a)(5). This charge will forthwith be scheduled for hearing.

⁶ Under *Spielberg*, the contractual issue considered by the arbitrator must be factually parallel to the unfair labor practice issue raised before the NLRB and the arbitrator must have been “presented generally with the facts relevant to resolving the unfair labor practice.”

DETERMINATION

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 refusal to fully implement the arbitration award may have violated 19 Del.C. §1307(a)(2), (4), (6) and/or (7), as alleged. Those charges are therefore dismissed.

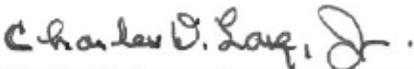
Considered in a light most favorable to the ATU, the pleadings support a determination that there is probable cause to believe a violation of 19 Del.C. §1307(a)(1) and/or (5) may have occurred. The pleadings raise questions of fact which can only be resolved following submission of a complete evidentiary record upon which a decision may 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:

Whether DTC violated its duty to bargain in good faith and 19 Del.C. §1307(a)(1) and/or (5) as alleged, by unilaterally modifying the terms of the negotiated grievance procedure and/or by failing or refusing to implement a final and binding arbitration award in a timely manner, consistent with the arbitrator's remedy.

Having found probable cause based on the pleadings, DTC's claim that the charge fails to state a claim upon which relief can be granted is denied. DTC's deferral defense is also denied as there is no unity of issue.

August 6, 2012
(Date)



CHARLES D. LONG, JR., Hearing Officer
Delaware Public Employment Relations Board