

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMALGAMATED TRANSIT UNION, LOCAL 842,	:	
	:	
Charging Party,	:	
	:	
v.	:	<u>ULP No. 12-04-861</u>
	:	
STATE OF DELAWARE, DELAWARE TRANSIT CORPORATION,	:	Decision on the Pleadings
	:	
Respondent.	:	

APPEARANCES

Roland W. Longacre, President/Business Agent, for ATU Local 842
Gerard Ross, III, 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), (7) and/or (8), of the Act.¹ Specifically, the ATU alleges DTC violated the PERA by failing or refusing to provide information concerning the calculation of back pay which was necessary for the union to determine whether the employer had fully complied with an arbitration award. The ATU asserts that by ignoring the union’s repeated requests for information concerning income offsets and tax withholding, DTC prevented the union from effectively meeting its representational responsibilities.

On April 19, 2012, the State filed its Answer to the Charge in which it denied committing the alleged statutory violations and requested that the Charge be dismissed. Included within its Answer, the State asserted 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; and 3) the Charge should be deferred to contractual grievance and arbitration procedure set forth in §7 of the parties’ collective bargaining agreement.

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.
- (8) Refuse to disclose any public record as defined by Chapter 10 of Title 29.

On April 27, 2012, the ATU filed its Response denying the New Matter set forth in DTC's Answer.

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 material facts as set forth in the ATU's Charge are not disputed and are admitted by DTC in its Answer. The background facts set forth below are derived from the pleadings.

The Grievant, Kyndal Malone, was reinstated to her Cleaner position by an arbitration award rendered on April 10, 2011. She returned to work on or about July 31, 2011. In response to DTC's request, the Grievant provided information concerning her income and taxes for the period she was not working for DTC during the pendency of her grievance.

On or about September 26, 2011, the Grievant met with the ATU President to discuss concerns she had about her back pay award. After reviewing the information the Grievant had supplied to DTC, the ATU President emailed an individual in the DTC Payroll Office on September 26, 2011:

I am having a conversation with Kyndal going over the documentation accompanying her check and we are confused on a few items.

1. We acknowledge that the total hours lost was 4664 equaling an initial amount before deductions of \$71,289.20.

From which is deducted 1543.44 for Union dues and 3817.35 for her pension arrears which I hope DART is matching since this is a make whole award with no lost time or seniority and is exempt from restriction in the pension document.

Our first concern is the amount deducted for outside income.

From what I gathered when I looked at her tax returns she earned nothing from her termination in 2009 and backed that up with the receipts she provided showing her income from cutting hair was earned prior to her termination. She was in school after that and had been married and supported by her husband. This we believe amounted to about \$6000.00. I do not have that information in front of me as I am writing and going off my notes and memory. Her income for 2010 we believe was \$11,285.00 and nothing for 2011.

We also believe that she was taxed based on the \$71,359.20 and not on what she would be getting minus earned income from outside which would be about \$60,074.20. This would lower her tax burden and add about \$10,000 to her check.

Now I know I am not an accountant but it just doesn't seem quite right.

If you have any questions, please call me...

Also could we have an itemized statement of the totals deducted to make things a little simpler for us. Thank you.

When he did not receive a response, the Union President renewed his request for the information in a follow-up email on October 3, 2011, to which he received the following response, "Management is looking into this." When he did not receive further response, the Union President forwarded the email string to DTC's Chief Financial Officer on October 11, 2011, and then to DTC's Acting Executive Director/Director of Operations on November 2, 2011. The Charge alleges the Union President:

... continued to communicate my concerns to both Mr. McGinnis and Mr. Hillis. In January 2012 when the Harry Bruckner award came out by comparing his award to Ms. Malone's I felt we had resolved the tax issue, but that still left the wage offset issue. On January 9, 2012, I emailed by Mr. Hillis and Mr. McGinnis. My final email to Mr. McGinnis was on March 19, 2012. I have yet to have the question answered about the offset of outside income earned by Ms. Malone during her termination. We originally asked for an itemized statement with totals deducted. So far, the Administration has refused this request numerous times by trying to put us off and neither provide us with the requested information or discuss the issue. At issue is about \$6,000.00.

In its Answer DTC "does not deny that the Union attempted to obtain additional payroll information on Malone." It asserts DTC's Finance Department has a policy "not to discuss, disseminate or share confidential employee payroll records with anyone but the employee." DTC denies the Grievant ever requested additional information; consequently, it did not refuse or fail to respond to any request from the Grievant.

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 provide information concerning the back pay award may have violated 19 Del.C. §1307(a)(4), (6) and/or (7), as alleged. Those charges are therefore dismissed.

DTC's contention that the payroll records requested by the ATU constitute "personnel records" which are not public records as defined by 29 Del.C. §10002(g)(1), is irrelevant to the issue involving the State's obligation under the Public Employment Relations Act to provide information to the exclusive bargaining representative of a certified bargaining unit employee.

The duty to provide information is well-settled under PERB case law and the information which must be provided to an exclusive bargaining representative under the PERA is broader than the information which must be produced in response to a public request for information under the state's Freedom of Information Act ("FOIA").² The ATU has a statutory duty to represent all bargaining unit employees fairly and to the best of its ability. This includes the obligation to conduct reasonable investigations (including seeking relevant information from the employer) in order to make informed judgments concerning potential issues for grievances and/or negotiations. *AFSCME Council 81, Locals 1007, 1267 and 2888 v. Delaware State University*, ULP 10-04-739, VII PERB 4693,4702 (Decision on Motion for Summary Judgment, 2010).

A public employer, on request must provide an exclusive bargaining representative with information that is relevant to its carrying out its statutory duties and responsibilities in representing employees, both in contract administration and in negotiations. The PERA requires an employer to "provide information that includes access to relevant information necessary for the bargaining representative to intelligently determine facts, assess its position and decide what course of action, if any to pursue." *NCCEA/DSEA/NEA v. Brandywine School District*, ULP 85-06-005, I PERB 131, 149 (1986).

² 29 Del.C. Chapter 100.

When the requested information concerns terms and conditions of employment of employees within the bargaining unit, that information is presumptively relevant and the employer has the burden of proving lack of relevance. *AFSCME v. DSU* (Supra @ 4703). The ATU requested information necessary to determine whether the Grievant's back pay was properly calculated. It is hard to imagine a more relevant piece of information necessary to an exclusive bargaining representative in performing its duty of fair representation to a grievant than to insure that the back pay award has been properly calculated.

The State asserts the Charge makes allegations which require interpretation and application of section 7 D³ 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 deferred for resolution to the negotiated grievance procedure, noting DTC "has not attempted to preclude the Charging Party from exercising its grievance rights under Section 7 of the collective bargaining agreement." The Charge raises a statutory claim that the employer has failed to provide information to which the union is entitled under the PERA. It does not allege DTC has violated the parties' collective bargaining agreement. This is not a matter which is properly subject to deferral.

The State also asserts the Charge is untimely because the question concerning the calculation of back pay arose on or about September 26, 2012, when ATU's President met with the Grievant to discuss her concerns. It argues that the Charge was not filed

³ D. In grievances involving discharge or suspension, if the arbitration award provides for reinstatement the arbitrator shall have the power, according to the equities, to decide whether reinstatement shall be with full back-pay, partial back-pay, no back-pay, or full back-pay minus wages earned or unemployment benefits paid during the discharge. Should the arbitrator award reinstatement, there shall be no loss of seniority and seniority shall accrue from the date of discharge or suspension.

until 196 days after that date (when the union became aware of the Grievant's concerns), which exceeds the 180 day statute of limitations for filing an unfair labor practice charge. 19 Del.C. §1308(a).

The Charge concerns the employer's failure or refusal to provide information to the union which is reasonable related to its representational duties. The record is sufficient to establish the ATU made repeated requests to successively higher DTC officials between September 26, 2011 and March 19, 2012. The majority of those requests were made within 180 days prior to the filing of the charge. The employer's failure or refusal to respond to the repeated requests constitutes a continuing violation.

Finally, DTC's assertion that the Grievant herself did not request additional information and that its Finance Department has a policy of not providing payroll information to anyone other than the identified employee is immaterial to this matter. ATU Local 842 is the Grievant's sole and exclusive bargaining representative and has authority and responsibility to advocate for her rights under the collective bargaining agreement and the PERA.

For these reasons, the record is sufficient to support a finding that DTC interfered with the Grievant's rights to be represented by her exclusive bargaining representative, in violation of 19 Del.C.§1307(a)(1); interfered with the administration of ATU Local 842 by failing or refusing to provide information which was reasonably related to its representational responsibilities in violation of 19 Del.C.§1307(a)(2); and that DTC violated its good faith obligation to respond in a timely manner to the ATU's reasonable, good faith request for information in violation of 19 Del.C.§1307(a)(5).

Having found the employer has an obligation under the statute to produce the requested information, it is unnecessary to make a determination as to whether that

information may also be subject to disclosure under the Freedom of Information Act.

CONCLUSIONS OF LAW

1. The State of Delaware is a public employer within the meaning of 19 Del.C. §1302(p). The Delaware Transit Corporation (“DTC”) is an agency of the State of Delaware.

2. 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.

3. The pleadings are sufficient to support a finding that DTC failed or refused to provide information requested by ATU Local 842 which is relevant to its statutory duties and responsibilities in representing bargaining unit employees, in violation of 19 Del.C. §1307(a)(1), (2), and (5).

4. There is insufficient evidence on the record to support the claim that DTC’s alleged failure or refusal to provide information to the ATU concerning the back-pay calculation pursuant to an arbitration award may have violated 19 Del.C. §1307(a)(4), (6) and/or (7), as alleged. Those charges are therefore dismissed.

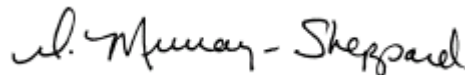
5. It is unnecessary at this time to determine whether the requested information was subject to disclosure under 29 Del.C. Chapter 100 (“FOIA”). Consequently no finding is made concerning whether DTC violated 19 Del.C. §1307 (a)(8).

WHEREFORE, DTC IS HEREBY ORDERED TO TAKE THE FOLLOWING AFFIRMATIVE STEPS:

- A) Cease and desist immediately from violating §1307 (a)(1), (a)(2) and (a)(5) of the Public Employment Relations Act;
- B) Within twenty (20) days of the date of this decision, provide ATU Local 842 with the requested information which is reasonably necessary for the union to fulfill its representational responsibilities to the Grievant.
- C) Immediately post the Notice of Determination in all areas where notices affecting employees in the bargaining unit represented by ATU Local 842 are normally posted and in the agency's administrative offices. These Notices must remain posted for at least thirty (30) days in order to provide notice to all affected employees of the decision in this matter.
- D) Notify the Public Employment Relations Board in writing within thirty (30) calendar days of the date of this decision of all steps taken to comply with this Order.

IT IS SO ORDERED.

DATE: August 15, 2012



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