

**STATE OF DELAWARE  
PUBLIC EMPLOYMENT RELATIONS BOARD**

<b>AMALGAMATED TRANSIT UNION, LOCAL 842,</b>	:	
	:	
Charging Party,	:	
	:	
v.	:	<b>ULP No. 13-05-902</b>
	:	
<b>STATE OF DELAWARE, DELAWARE TRANSIT CORPORATION,</b>	:	<b>PROBABLE CAUSE DETERMINATION &amp; DEFERRAL ORDER</b>
	:	
	:	
Respondent.	:	

**APPEARANCES**

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

*Rebecca N Miller, SLREP/OMB, for Respondent, DTC*

**BACKGROUND**

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

The Amalgamated Transit Union, Local 842 (ATU) is an employee organization within the meaning of 19 Del.C. §1302(i) and the exclusive bargaining representative of certain employees of the DOT within the meaning of 19 Del.C. §1302(j).

On May 8, 2013, the ATU filed an unfair labor practice charge (Charge) with the Public Employment Relations Board (PERB) alleging conduct by the State in violation of 19 Del.C.

§1307(a)(1), (a)(2) and (a)(4), which provide:

- (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 any employee because the employee has signed or filed an affidavit, petition or complaint or has given information or testimony under this chapter.

The ATU alleges DTC violated the PERA when it refused to pay two union officials for the Christmas holiday because they were marked off from work on the preceding work day (December 24, 2012) for union business. The ATU filed a grievance contesting DTC's failure to pay the employees for the holiday, alleging violations of the No Fault Attendance Policy; §1, Recognition; §3, Union Security; and any other applicable provisions of the collective bargaining agreement. The ATU also claims other employees in similar circumstances have received holiday pay despite their not having worked the day preceding the holiday. It also asserts circumstances exist which are not specifically addressed in the collective bargaining agreement wherein employees receive holiday pay even though they did not work the day preceding, including paid personal days, regular days off and vacation.

On May 22, 2013, the State filed its Answer to the Charge, including New Matter. The State does not deny the factual allegations but denies that any violation of the PERA occurred. It asserts the dispute is covered by the clear language of §16(D)<sup>1</sup> of the parties' negotiated agreement. Appended to the Answer was New Matter, in which the DTC alleges the Charge fails to state a claim under the PERA for which relief can be granted and that the charge should

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<sup>1</sup> §16(D) states, in relevant part:

1. To qualify for holiday pay, an employee must work his/her regularly assigned shift preceding and following the holiday...

properly be deferred for resolution to the contractual grievance and arbitration procedure.

The ATU filed its response to DTC's New Matter on May 30, 2013, in which it denied the factual and legal positions set forth therein.

This determination is based upon a review of the pleadings submitted in this matter.

### **DISCUSSION**

Regulation 5.6 of the Rules of the Public Employment Relations Board requires:

- (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 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 has, or 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 determining 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. *Flowers v. DART/DTC*, Del.PERB, Probable Cause Determination, ULP 04-10-453, V PERB 3179, 3182 (2004).

On its face, the Charge fails to allege any facts which would establish that DTC has discharged or otherwise discriminated against any employee because the employee signed or filed an affidavit, petition or complaint or gave information or testimony under the PERA. Consequently, the Charge that DTC has violated 19 Del.C. §1307(a)(4) is dismissed.

The ATU alleges DTC interfered with employee rights and with the existence and administration of the union by denying holiday pay to union stewards who were absent from their work place on the day before a holiday for union related purposes. It notes that the employees were paid for the day (December 24, 2012) on which they were engaged in union business but not for following holiday on December 25, 2012. It asserts that these two individuals were not the first union officials to be marked off for union business on either the day before or the day after a paid holiday. DTC acknowledged in its Answer, “that within the last three years, DTC paid Holiday pay to the three Union officials named in the Charge when they marked off for union business the day before or after a holiday.” DTC argues, however, that these incidents do not create a binding practice and that §16(D) of the parties’ collective bargaining agreement is clear and unequivocal.

Considered in a light most favorable to the Charging Party, the pleadings are sufficient to establish DTC may have violated 19 Del.C. §1307(a)(1) and (a)(2) as alleged. Whether the employees’ or the union’s rights were interfered with, however, requires application and interpretation of the terms of the collective bargaining agreement, as colored by the parties’ practices, in order to determine whether DTC violated the statute as alleged.

Having so determined, the State’s assertion that the pleadings fail to state a claim for relief under the PERA is denied.

This Board has held that where resolution of an alleged statutory violation directly relates to a contractual issue subject to the parties’ negotiated grievance and arbitration procedure, PERB may apply a discretionary, limited deferral policy:

When parties have contractually committed themselves to agreeable procedures for resolving contractual disputes, it is prudent and reasonable for this Board to afford those procedures the full opportunity to function. *Fraternal Order of Police Lodge No. 1 v. City of Wilmington*, ULP 89-08-040, I PERB 449 (PERB, 1989), citing *Collyer Insulated Wire*, NLRB, 129

NLRB 837 (1971); *FOP Lodge 1 v. City of Wilmington*, ULP10-11-773, VII  
PERB 4935 (2011).

ATU Local 842 and DTC are parties' to a collective bargaining agreement which includes a negotiated grievance procedure that culminates in the submission of unresolved issues concerning the interpretation, application and/or operation of that agreement to final and binding arbitration before an arbitration panel chaired by an impartial arbitrator. It is undisputed that the ATU filed a grievance "citing several contract provisions ... being violated by DTC by not paying the Union Officials for their Holiday Pay." *Charge ¶5, Answer ¶5*, DTC asserts it has not precluded the ATU from exercising its rights under that negotiated grievance procedure. *Answer, ¶22*.

PERB's deferral policy is not unconditional and does not constitute a final resolution of the pending unfair labor practice charge. Where deferral is ordered, the PERB retains jurisdiction over the unfair labor practice charge for the express purpose of reconsidering the matter upon application of either party for any of the following reasons:

- 1) that the arbitration award failed to resolve the statutory claim;
- 2) that the arbitration has resulted in an award which is repugnant to the applicable statute;
- 3) that the arbitral process has been unfair; and/or
- 4) that the dispute is not being resolved by arbitration with reasonable promptness.

Because a determination of whether DTC violated its obligations under the PERA turns upon application of the collective bargaining agreement, this matter is deferred to the parties' negotiated grievance and arbitration procedure.

Further processing of this Charge is stayed pending the exhaustion of the contractual procedure.

## DECISION

Considered in a light most favorable the ATU, the pleadings fail to establish probable cause to believe that a violation of 19 Del.C. §1307(a)(4) may have occurred; consequently that charge is dismissed.

The pleadings are sufficient, however, to establish that DTC may have violated 19 Del.C. §1307(a)(1) and (a)(2), as alleged. For this reason the State's defense that the pleadings fail to state a claim for which relief can be granted under the PERA is denied.

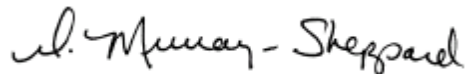
Because the resolution of the remaining allegations of this Charge turns on application of the parties' collective bargaining agreement, the Charge is deferred to the negotiated grievance and arbitration procedure.

PERB retains jurisdiction over the Charge that DTC has acted in violation of 19 Del.C. §1307(a)(1) and/or (a)(2) for the express purpose of reconsidering the matter, on application by either party, for any of the following reasons:

- 1) that the arbitration award failed to resolve the statutory claim;
- 2) that the arbitration has resulted in an award which is repugnant to the applicable statute;
- 3) that the arbitral process has been unfair; and/or
- 4) that the dispute is not being resolved by arbitration with reasonable promptness.

The parties are directed to notify the Public Employment Relations Board within sixty (60) days from the date of this decision as to the status of the grievance.

DATE: August 23, 2013



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