

**STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD**

JOSEPH F. POLI, JR.,	:	
	:	
Charging Party,	:	
	:	
v.	:	ULP No. 13-09-923
	:	
STATE OF DELAWARE, DELAWARE TRANSIT CORPORATION,	:	PROBABLE CAUSE DETERMINATION & ORDER OF DISMISSAL
	:	
Respondent.	:	

APPEARANCES

Joseph F. Poli, Jr., Pro se

Aaron M. Shapiro, 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.

Charging Party, Joseph F. Poli, Jr. (Poli), is employed by DTC and is a public employee within the meaning of 19 Del.C. §1302(o). Charging Party is a member of the bargaining unit represented by Amalgamated Transit Union, Local 842, (ATU) for purposes of collective bargaining. ATU Local 842 is certified as the exclusive bargaining representative of that bargaining unit pursuant to 19 Del.C. 1302(j).

On or about September 21, 2013, Poli filed an unfair labor practice charge (“Charge”) alleging conduct by DTC in violation of 19 Del.C. §1301(1) and (2), §1303(1) – (4), and §1307(a)(1) - (a)(6), which provide:

§ 1301. Statement of policy.

It is the declared policy of the State and the purpose of this chapter to promote harmonious and cooperative relationships between public employers and their employees and to protect the public by assuring the orderly and uninterrupted operations and functions of the public employer. These policies are best effectuated by:

- (1) Granting to public employees the right of organization and representation;
- (2) Obligating public employers and public employee organizations which have been certified as representing their public employees to enter into collective bargaining negotiations with the willingness to resolve disputes relating to terms and conditions of employment and to reduce to writing any agreements reached through such negotiations; ...

§ 1303. Public employee rights.

Public employees shall have the right to:

- (1) Organize, form, join or assist any employee organization except to the extent that such right may be affected by a collectively bargained agreement requiring the payment of a service fee as a condition of employment.
- (2) Negotiate collectively or grieve through representatives of their own choosing.
- (3) Engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection insofar as any such activity is not prohibited by this chapter or any other law of the State.
- (4) Be represented by their exclusive representative, if any, without discrimination.

§ 1307. Unfair labor practices, enumerated.

(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.
- (3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.
- (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 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 consists of numerous far-reaching allegations resulting from the Charging Party's belief that he has been targeted by DTC for termination because of his involvement in Union or other representational activities on behalf of himself and other employees. The essence of the Charge is set forth in paragraphs 3 and 4, which provide:

3. The facts: on Sept 19th, 2013 at app. 12:30 p.m., I was for the first time and by accident, informed that I was suspended pending termination, and that there was a pretermination hearing 10AM, at the DART building 119 Beach street the next morning, while on the phone with our union president Andy Longacre on another matter. For the record I have 3 phone numbers, two email addresses and a home address, all of which DART has used in the past to get in contact with me. Further I have called DART every day to notify them as per policy, that I would out of work due to my on the job injury. Date the occurred was 1/31/13. Despite this DART is deliberately trying to discharge me from service without telling me. I have received no communication from DART by any means on this matter. No phone call, no email, no letter certified or otherwise. In fact DART has communicated through my workmen compensation attorney, that they are no longer challenging my injury status, have withdrawn their petition in the industrial accident board. The industrial accident hearing scheduled for October 10, 2013 was canceled. I was promised they would provide a light duty position, in accordance with my treating doctor's return to work restrictions in October. (see exhibit #2). At the same time as this communication, they were planning to discharge me without me knowing it was happening. A letter suspending me pending termination was written and deliberately keep from me, denying me the right to union

representation, due process and in an effort to retaliate against me because of my substantial union work. This includes but not limited to

1. Union Steward, administrative assistant, during the Union's trusteeship,
2. The years of operating our union newsletter "the ATU 842 member's email dispatch, now with over 400 ATU 842 email members.
3. The years of operating our ATU member's web site **ATU members site** <http://buzz-autolocal842.intuitwebsites.com/>
4. My substantial work in PERB, including but not limited to the charging of PERB complaints under my own name, the research of PERB complaints for our union leadership and members, the writing of PERB complaints for members and testifying in numerable PERB hearings, for references see exhibit #1 and despite this ambush it is always our hope that these complaints can be resolved without further action.

Legal note: I have been informed that the letter of suspension, pending termination, list as sole reason for discharge, my failure to comply with a medical exam at defense medical with a doctor Robert Smith. This information is not true, I attended this appointment with my wife, And when directed to fill out documents for the exam I showed the secretary the letter from my Workmen's compensation attorney directing me not to complete any paperwork at this doctors office, citing my lawyer right to fill out this paperwork under Phillips vs. Pris-MD LLC T/A Damon's Grill, and contact him if there were any problems. Immediately at this point I was in front of my wife ordered to leave the office and told because I showed them this letter, the doctor would not see me. I contacted my attorney and documented this. (Frederick S. Freibott 302-633-9000) I point this out because I know the attorneys at the Delaware state office of budget and management will see this and should know that this action is not legal.

On November 13, 2013, the State filed its Answer in which it denied it had violated the provisions of the PERA, as alleged. At no time did the State initiate any discipline because of Charging Party's alleged participation in union activity. The State further contends that Charging Party's employment status was jeopardized by his failure to comply with contractual reinstatement procedures following his medical leave of absence. The State asserts Mr. Poli, "...was not and has not been separated from work for disciplinary reasons."

The State also included New Matter in its Answer, asserting the Charge fails to link any material factual allegations to the specific statutory provisions allegedly violated and fails to

provide a clear and detailed statement of facts constituting the alleged unfair labor practice” as required by PERB Rule 5.2(c) (3).

Poli filed a response to DTC’s New Matter on November 15, 2013, in which he denied the factual and legal positions set forth therein.

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

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 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 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).

In order for employer conduct to constitute an (a)(1) and/or (a)(2) violation, it must either

on its fact or through surrounding circumstances reasonably tend to exert undue influence and/or coerce employees or the labor organization in the exercise of protected rights. *WFFA Local 1590 v. City of Wilmington*, ULP 93-06-085, II PERB 937, 976 (1994). Even if proven, the State's alleged failure to notify Charging Party directly in September, 2013, concerning his suspension pending termination and the pretermination hearing scheduled for September 20, 2013, does not, standing alone, rise to the level of a potential interference with protected rights. The fact is that Mr. Poli did learn about the scheduled pretermination hearing from the union's president in sufficient time that both he and the president were able and did attend on September 20, 2013.

Further, the Charging Party did not deny the DTC's documented assertion that as a result of the September 20, 2013 pretermination hearing, he was provided another opportunity to comply with DTC's directive to be examined by an independent physician. *State Exhibit 5*. Thereafter, the Charging Party participated in the required medical examination on October 14, 2013. That the examination occurred is confirmed by the medical report of Dr. Robert A. Smith (dated October 14, 2013) which cleared Mr. Poli to return to duty. *State Exhibit 6*.

Subsequent to receiving the medical clearance from Dr. Smith, DTC sent an email to Mr. Poli on October 23, 2013, which stated, "Your return to work drug screening is complete and you have been cleared to return to work. Please report to work as normal this afternoon." It is undisputed that Mr. Poli received this email, as it is appended to the email response he sent later that afternoon. *State Exhibit 7*.

Consequently, the Charging Party was afforded the opportunity to participate in a pretermination hearing, which resulted in a medical examination, after which Mr. Poli was returned to duty. The Charge is, therefore, moot.

The Charge fails to state a claim under the PERA, as required by PERB Rule 5.2(c)(3).

The Charge simply asserts the Charging Party believes an adverse employment action may result from his alleged involvement in protected activity. Mere speculation is not sufficient support for an unfair labor practice charge. The Charge fails, on its face, to allege facts which may be reasonably construed, when considered in a light most favorable to the Charging Party, to have violated the PERA as alleged.

DETERMINATION

The pleadings fail to establish probable cause to believe that the violations alleged in the Charge may have occurred. Consequently, the Charge is dismissed in its entirety.

Dated: December 6, 2013



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