

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

Joseph F. Poli, Jr.,)	PERB Review of Hearing
)	Officer's Decision on the
Appellant,)	Pleadings
)	
v.)	
)	<u>ULP No. 13-09-923</u>
STATE OF DELAWARE, DELAWARE TRANSIT)	
CORPORATION,)	
)	
Appellee.)	

APPEARANCES

Joseph F. Poli, Jr., Appellant, pro se
Aaron Shapiro, SLREP/HRM/OMB, for the Appellee, DTC

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 Appellant, Joseph F. Poli, Jr. (Poli), is employed by DTC and is a public employee within the meaning of 19 Del.C. §1302(o). Poli 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 September 20, 2013, Poli filed an unfair labor practice charge with the Delaware Public Employment Relations Board (PERB) alleging conduct by DTC in violation of 19 DeL.C. §1301(1) and (2), §1303(1) – (4), and §1307(a)(1) - (a)(6).¹ The Charge alleged Poli was targeted for termination by DTC because of his involvement in

¹ § 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.

protected concerted activities.

On November 13, 2013, DTC filed its Answer denying the allegations set forth in the Charge. DTC denied it had initiated any disciplinary action because of Poli's alleged involvement in protected activities. It asserted Poli's employment status was placed in issue by Poli's failure or refusal to comply with contractual reinstatement procedures to return to work after a medical leave of absence. DTC also included New Matter in its Answer, asserting the charge failed to state a statutory claim.

On November 15, 2013, Poli filed his Response to New Matter denying the allegations set forth therein.

Upon review of the pleadings, the Hearing Officer concluded they failed to establish probable cause to believe that the violations alleged in the Charge may have occurred. Consequently, the Charge was dismissed in its entirety on December 6, 2013.

By letter received on December 9, 2013, the Appellant requested the full Public Employment Relations Board review the Hearing Officer's decision, asserting the decision sets a bad precedent for public employers and employees because the Board did not hold DTC responsible for its failure to comply with its timelines for filing pleadings.

DTC filed a response to the request for review on December 11, 2013, asserting the Hearing Officer's decision is correct, supported by substantial record evidence, and is consistent with the law.

A copy of the complete record in this matter was provided to each member of the Public Employment Relations Board. A public hearing was convened on December 18, 2013, at which time the full Board met in public session to hear and consider this request for review. The parties were provided the opportunity to present oral argument. The Appellant

advised the Board by email on the morning of the hearing² that he would not be present at the hearing and attached to his email a written statement in support of his request for review. A copy of the Appellant's email and statement was provided to DTC's representative and to each member of the Board for review prior to the commencement of the hearing.

The decision reached herein is based upon consideration of the record and the arguments presented to the Board.

DISCUSSION

The Board's scope of review is limited to the record created by the parties and consideration of whether the decision is arbitrary, capricious, contrary to law, or unsupported by the record. After consideration of the record and the arguments of the parties on appeal, the Board must vote to either affirm, overturn, or remand the decision to the Executive Director for further action.

PERB Rule 5.6 requires the designated Hearing Officer to review the pleadings to determine whether they are sufficient to establish probable cause to believe that an unfair labor practice may have occurred. The Rule also requires that when the pleadings reveal no probable cause to believe an unfair labor practice may have occurred, the charge shall be dismissed. A decision on the pleadings is subject to the same review by the full Public Employment Relations Board as any other final decision rendered by the Executive Director or her designee.

The Appellant argues on appeal that the Hearing Officer's decision to dismiss the

² The time stamp on the email (which was addressed only to the PERB Executive Director) indicates it was sent at 1:26 a.m. The email states: "Ms. Sheppard please forward this to the PERB board for today's hearing , this is my written statement to them , I am unable to attend, this hearing , between my return to work hours, continual physical therapy and hospital visitation for my wife , I have over done it and must get some rest if I am to make it to work later today."

Charge is improper, in part because DTC failed or refused to provide confirmation that the Appellant was not suspended pending termination, which was a condition upon which an extension in the time was granted to the employer for filing its Answer to the Charge. Consequently, he asserts the Answer was not timely filed and he was entitled, as a matter of law, to prevail on the merits of his Charge.

The Appellant's presumption that the alleged procedural error entitles him to judgment in his favor is in error. The Board's rules specifically require: "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..." PERB Rule 5.6. In reviewing the sufficiency of a Charge for purposes of determining probable cause, this Board has held:

Sufficient information must be included in the pleadings to allow a preliminary assessment of the procedural and substantive viability of the charge, i.e., the probability that there is sufficient cause to continue to process the charge. *AFSCME Council 81, Local 3911 v. New Castle County, Delaware*, ULP 09-07-695, VI PERB 4445 (2009).

Helene Ross v. Christina Education Association, ULP No. 10-12-779, VII PERB 4951, 4953 (PERB Decision on Review, 2011).

In order to prevail in his assertion that DTC violated his protected rights under the Public Employment Relations Act, the Appellant must meet the initial burden to establish that he was, in fact, involved in protected activity; that the employer had knowledge of and was aware of his involvement in protected activity; and that his protected activity was a substantial or motivating factor in an adverse employment action. *Poli v. DTC*, ULP 09-03-669, PERB 4395, 4396 (2009). Failure to establish any one of these criteria results in finding the Charging Party has failed to establish a *prima facie* animus case.

In the pending matter, the Appellant has not suffered an adverse employment action. The disputed physical exam was conducted by a third physician (during the period of extension for filing the Answer to the Charge) who also certified Poli was fit to return to duty after a work related injury. The Appellant confirmed in his email the morning of the appeal hearing that he has returned to duty. There is no evidence in this record that Appellant suffered any adverse employment action.

Upon review of the record and consideration of the arguments of the parties, the Board finds the Hearing Officer's decision was not arbitrary, capricious or contrary to law, and that it is soundly supported by the pleadings.

Finally, this Appellant has brought charges against his employer on four prior occasions.³ He is familiar with the procedures and protocols of this Board. He has been repeatedly cautioned by the Executive Director in the current matter for failing or refusing to provide service to DTC's designated representative of documents and correspondence relating to this matter. PERB Rules 1.3 and 1.5 require "every document filed with the Board shall be served by the filing party upon all other parties to proceedings, and shall include an affidavit of service naming all other parties and attorneys or representatives, if any, upon whom concurrent service is made." Service upon an attorney or representative of record constitutes service upon the party. Upon designation of the employer's representative (customarily by filing a pleading or motion on behalf of the respondent), the Appellant must direct all future correspondence and pleadings in that matter to that designated representative. The Appellant is cautioned that continuing conduct in violation of a clear directive from this Board or its staff may result in the rejection of correspondence or pleadings which are not properly served.

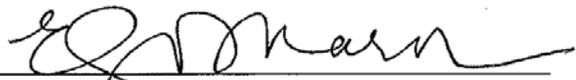
³ ULPs 07-04-567; 09-06-669; 11-05-805, and 12-03-857.

DECISION

After reviewing the record, hearing and considering the arguments of the parties, the Board unanimously affirms the decision of the Hearing Officer dismissing the Charge as unsupported by substantial evidence.

Wherefore, the appeal of the dismissal of the Charge is denied.

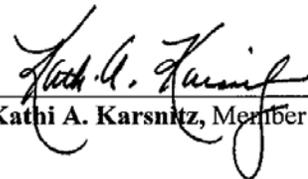
IT IS SO ORDERED.



Elizabeth D. Maron, Chairperson



R. Robert Currie, Jr., Member



Kathi A. Karsnitz, Member

DATE: December 30, 2013