

**PUBLIC EMPLOYMENT RELATIONS BOARD**

**STATE OF DELAWARE**

<b>RICHARD FLOWERS,</b>	:	
	:	
Charging Party,	:	
	:	<b><u>ULP 13-10-927</u></b>
v.	:	
	:	<b>Probable Cause Determination</b>
<b>STATE OF DELAWARE, DELAWARE</b>	:	<b>and Order of Dismissal</b>
<b>TRANSIT CORPORATION,</b>	:	
	:	
Respondent.	:	

Appearances

*Richard Flowers, Charging Party, pro se*  
*Aaron M. Shapiro, SLREP/HRM/OMB, for DTC*

The State of Delaware (State) is a public employer within the meaning of §1302(p) of the Public Employment Relations Act (PERA), 19 Del.C. Chapter 13 (1994). The Delaware Transit Corporation (DTC) is an agency of the State.

Richard Flowers (Charging Party) 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 the Amalgamated Transit Union, Local 842, (ATU) which represents a unit of DTC employees for purposes of collective bargaining and is certified as the exclusive bargaining representative of that unit pursuant to 19 Del.C. 1302(j).

On or about October 24, 2013, Charging Party filed an unfair labor practice charge (“Charge”) alleging that DTC violated 19 Del.C. §1301(1), §1303(1) and (3), and §1307(a)(1), (2), (3), (4) and (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;

§ 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.

(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.

§ 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.
- (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 Charging Party alleges that he requested one day off with pay and notified his supervisor that he would be off for the next seven days without pay, as stipulated in the collective bargaining agreement. He asserts he received a "Written Warning or Verbal

Counseling” and was advised that he must call off on a daily basis or report for work, or receive a “miss report” for each day of unreported absence. Charging Party claims that no one else is required to report off daily. According to Charging Party, the collective bargaining agreement and past practice establish that once an employee marks off, he/she is off until they return to work resulting in only one occurrence being charged for one continuous absence. Charging Party claims his treatment constitutes discrimination and retaliation for his “substantial union work”.

On or about November 1, 2013, the State filed its Answer essentially denying the factual allegations set forth in the Charge. Included in the State’s Answer is a form which it claims, along with the process which the form initiates, has been used statewide for years by DTC employees to request time off with pay. The form contains no option to request time off without pay and was not designed for that use. The State notes in its answer that no grievance was filed concerning any aspect of this alleged incident.

Under a section of the Answer entitled, “New Matter I,” the State alleges that the Charge fails to state a claim for which relief may be provided under the PERA in that it does not comply with the requirements of PERB Rule 5.2(c)(3), which states:

#### 5.2 Filing of Charges

(c) The charge shall include the following:

- (3) A clear and detailed statement of the facts constituting the alleged unfair labor practice, including the names of the individuals involved in the alleged unfair labor practice, the time, place of occurrence and nature of each particular act alleged, and reference to the specific provisions of the statute alleged to have been violated. Each fact shall be alleged in a separate paragraph with supporting documentation where applicable.

On or about November 12, 2013, Charging Party filed its Answer to New Matter denying the allegations 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 activity. *WFFA Local 1590 v. City of Wilmington*, ULP 93-06-085, II PERB 937, 976 (1994). Such is clearly not the case here.

This Charge identifies no connection between Charging Party's request for paid and

unpaid leave on a form used exclusively for requesting paid day(s) off, the employer's denial and issuance of a "written warning of verbal counseling", and Charging Party's alleged participation in "substantial union work" or other protected activity. Five (5) unfair labor practice charges filed by Charging Party on his own behalf over an eight (8) year period (2004-2012), two of which were filed against the Union, and one (1) arbitration in which he was represented by the Union, constitute neither "substantial union work" by Charging Party nor a basis to support an alleged violation of either Section 1301 or Section 1307(a) of the PERA, as alleged.

The purpose of the unfair labor practice procedure is to resolve legitimate concerns of a public employee, public employer or an exclusive bargaining representative under the statutory provisions of the Public Employment Relations Act, 19 Del.C. Chapter 13. An unfair labor practice charge is not intended as a forum in which to air every concern an employee has about his/her employment status.

A question concerning the proper procedure for obtaining a negotiated benefit is properly resolved through the contractual grievance procedure. The pleadings do not establish or assert that a grievance was filed in this matter by either Charging Party or the exclusive bargaining representative on his behalf.

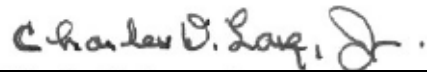
Unfair labor practice charges which have no basis in fact or law serve no purpose other than to clog an already overloaded unfair labor practice docket and may constitute an abuse of process.

### **DETERMINATION**

Considered in a light most favorable to Charging Party, the Charge, on its face, fails to establish probable cause to believe that an unfair labor practice, as alleged, may have occurred.

**WHEREFORE**, the Charge is dismissed in its entirety, with prejudice.

DATE: December 27, 2013

Handwritten signature of Charles D. Long, Jr. in cursive script.

Charles D. Long, Jr., Hearing Officer  
Del. Public Employment Relations Board