

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

CARON JENKINS,)	
)	
Charging Party,)	
)	
v.)	
)	
LILLIAN SHAVERS AND AMALGAMATED)	ULP No. 14-02-948
TRANSIT UNION, LOCAL 842)	Decision on the Merits
)	
Respondents.)	

APPEARANCES

CaRon Jenkins, pro se, Charging Party
Lauren M. Hoye, Esq., Willing, Williams, & Davidson, for the ATU Local 842

BACKGROUND

At the time of his discharge, Charging Party, CaRon Jenkins (Jenkins), was an employee of the Delaware Transit Corporation (DTC), an agency of the State of Delaware and a public employer within the meaning of §1302 (p) of the Public Employment Relations Act (PERA). Jenkins held a position in the maintenance department at the time of his discharge.

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 two separate bargaining units of Delaware Transit Corporation employees. 19 Del.C. §1302(j). Each bargaining unit has its own collective bargaining agreement. Jenkins was covered by the fixed route and maintenance collective bargaining agreement during the relevant period of his employment.

Lillian Shavers (Shavers) is and was at all times relevant to the processing of this Charge the President of ATU Local 842.

On or about February 28, 2014, Jenkins filed an unfair labor practice charge with the Delaware Public Employment Relations Board (PERB) alleging conduct by ATU and President Shavers in violation of §1301 (1), (2) and (3); §1303 (1), (2), (3) and (4); §1304(a) and (b); and §1307(b)(1), (2), (3) and (6).¹

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;
- (3) Empowering the Public Employment Relations Board to assist in resolving disputes between public employees and public employers and to administer this chapter.

§ 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.

§ 1304. Employee organization as exclusive representative.

- (a) The employee organization designated or selected for the purpose of collective bargaining by the majority of the employees in an appropriate collective bargaining unit shall be the exclusive representative of all the employees in the unit for such purpose and shall have the duty to represent all unit employees without discrimination. Where an exclusive representative has been certified, a public employer shall not bargain in regard to matters covered by this chapter with any employee, group of employees or other employee organization.
- (b) Nothing contained in this section shall prevent employees individually, or as a group, from presenting complaints to a public employer and from having such complaints adjusted without the intervention of the exclusive representative for

Shavers and the ATU filed an Answer to the Charge denying the allegations contained therein on or about March 18, 2014.

A probable cause determination was issued on May 27, 2014, dismissing the allegations of violations of 19 Del.C. §1301 (1), (2) and (3); §1303 (1), (2), (3) and (4); §1304 (a) and (b); and §1307(b)(1), (2), (3) and (6), because they were unsupported by the pleadings.

A hearing was conducted on July 14, 2014 for the purpose of creating a record on which a determination could be made as to whether Shavers and/or ATU Local 842 failed or refused to provide representation to Jenkins by not challenging his termination. Jenkins alleged Shavers violated 19 Del.C. §1307(b)(1) by announcing during a union general membership meeting on February 11, 2014, the ATU would not pursue his grievance because he had filed an unfair labor practice complaint with PERB.²

Following the close of the evidentiary record, argument was received from both parties.

the bargaining unit of which they are a part, as long as the representative is given an opportunity to be present at such adjustment and to make its views known, and as long as the adjustment is not inconsistent with the terms of an agreement between the public employer and the exclusive representative which is then in effect. The right of the exclusive representative shall not apply where the complaint involves matters of personal, embarrassing and confidential nature, and the complainant specifically requests, in writing, that the exclusive representative not be present.

§ 1307. Unfair labor practices, enumerated.

- (b) It is unfair labor practice for a public employee or for an employee organization 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) Refuse to bargain collectively in good faith with the public employer or its designated representative if the employee organization is an exclusive representative.
 - (3) 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.
 - (6) Hinder or prevent, by threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment by any person, or interfere with the entrance to or egress from any place of employment.

² Jenkins filed an unfair labor practice charge against DTC on January 21, 2014. The Charge was dismissed in its entirety on February 14, 2014, for failure to establish probable cause to believe an unfair labor practice may have occurred. *Jenkins v. DTC*, ULP 14-01-938, VIII PERB 5965, 5970 (2014).

This decision results from review and consideration of the record thus created by the parties.

ISSUE

WHETHER ATU LOCAL 842 AND/OR ITS PRESIDENT VIOLATED 19 DEL.C. §1307 (B)(1) AS ALLEGED, BY INTERFERING WITH, RESTRAINING OR COERCING THE CHARGING PARTY BECAUSE HE EXERCISED HIS STATUTORY RIGHT TO FILE AN UNFAIR LABOR PRACTICE CHARGE.

PRINCIPAL POSITIONS OF THE PARTIES

Charging Party:

Jenkins argues the issue before PERB is whether ATU Local 842, by and through its President, failed to meet its duty of fair representation to him (a bargaining unit member) under the PERA. He alleges the President's testimony during the hearing was untrue and that her stated reason for not pursuing his grievance (i.e., that he was a probationary employee) is pretextual. He asserts that regardless of his tenure or seniority, he is entitled to be represented by the union. He concludes his argument,

PERB is not here to decide if DTC can discharge probationary employees, or even non-probationary employees due to the CBA. The question before you is did ATU 842 violate its duty to provide fair representation as stated in [*the PERA*].

Jenkins asserts he was a member of the ATU for eight months and that as such, he was entitled to union representation at least through Step 4 of the grievance procedure. He requests ATU Local 842 be ordered to provide him with "full union representation."

Finally, Jenkins included with his closing argument an affidavit from another bargaining unit member who he alleges was present at the February 11, 2014 general membership meeting. The affiant states he "... did hear president Lillian Shavers clearly say that member Caron Jenkins would not be receiving union representation because he filed a PERB complaint against

DTC and you cannot have both a PERB and a grievance at the same time.” Jenkins states the affiant was present on the day of the hearing and prepared to testify, but Jenkins did not call him as a witness because Jenkins was inexperienced and made a mistake. He requests his inexperience be taken into account and that the affidavit be afforded as much weight as possible, “in the interest of justice.”

ATU Local 842:

The ATU presented three witnesses who were present at the February 11, 2014 general membership meeting, each of whom testified Jenkins was not present at that meeting, a fact which he also admitted. Jenkins failed to provide any evidence (testimonial or documentary) to refute the testimony of the ATU’s witnesses that President Shavers never stated the union would not pursue Jenkins grievance because he had filed an unfair labor practice charge against DTC. Consequently, there is no evidence that ATU Local 842 has engaged in any conduct in violation of its obligations under the PERA.

It asserts the union had a good faith reason to withdraw the grievance it had filed on Jenkins behalf. It is undisputed that Jenkins initially worked as a paratransit operator and then applied for and was hired into a maintenance position. At the time of his discharge, he had been employed less than six months in the maintenance position and was, therefore, not subject to the just cause provision of the applicable collective bargaining agreement.

The union is not required to pursue a grievance for every bargaining unit member in order to satisfy its duty of fair representation. Upon investigation, after initially filing a grievance on Jenkins behalf, the President determined he was not covered by the just cause provision because he had been employed in the maintenance position for less than six months. Consequently, there was a valid, good faith reason supporting the decision not to pursue the

grievance. That decision was not arbitrary or discriminatory and was fully in compliance with the union's duties under the PERA.

In response to Jenkins' request that the affidavit attached to his closing argument be considered, the ATU notes the procedural impropriety of this filing. It notes the transcript clearly reflects that the charging party was provided with numerous opportunities to present testimony and/or witnesses to support his claims. The union is unable to cross-examine or question the affiant and the hearing officer has no opportunity to assess his credibility. Additionally, it asserts the affidavit is comprised primarily of hearsay and should be accorded no weight.

DISCUSSION

The duty of fair representation requires an exclusive bargaining representative to act honestly, in good faith, and in a non-arbitrary manner in representing any individual bargaining unit member. *Harris v. DSPC & ILA 1694-1*, ULP 11-10-827, VII PERB 5407, 5412 (2012, PERB). The United States Supreme Court held a union may not act either arbitrarily or in a discriminatory manner to ignore a meritorious grievance or in processing it in a perfunctory manner.³ This does not, however, mean that an individual employee has an absolute right to have every complaint or concern processed as a grievance. *Issa v. AAUP-DSU*, ULP 13-02-887, VIII PERB 5825, 5838 (2013). A union is afforded significant latitude in fulfilling its statutory duties and may decline to take a grievance for many reasons, but it may not refuse to process a grievance for a discriminatory, arbitrary or bad faith reason. *Brooks v. AFSCME Local 640*, ULP 09-08-701, VII PERB 4483, 4489 (PERB, 2010). The test is essentially one of good faith.

Jenkins alleges that during a meeting of the general membership of ATU Local 842 on

³ *Vaca v. Sipes*, 386 US 171, 195 (1967).

February 11, 2014, ATU President Shavers stated the ATU would not represent him in a grievance contesting his termination because he had filed an unfair labor practice charge against DTC. Jenkins testified he did not personally attend the Union meeting on February 11, 2014, but claimed that someone told him what had transpired during the meeting. His charge also alleges ATU's President repeated this comment to him in a telephone conversation.

Jenkins offered no testimony or other evidence to corroborate his charge concerning President Shavers' alleged comments during the February 11, 2014 meeting. In defense of the affidavit he supplied with his closing argument, Jenkins argues he was "unclear on when I was to call witnesses" and that his inexperience caused him to make a mistake. He admits the affiant was present at the hearing and that he did not call him as a witness.

The hearing record does not support Jenkins assertion of confusion. The Hearing Officer provided instruction to Jenkins at the opening of the hearing and inquired of him twice during the course of the hearing (both following his personal testimony and at the close of the ATU's presentation) as to whether he wished to call additional witnesses. At the close of his personal testimony, Jenkins was asked "Do you have any additional witnesses?", to which Jenkins replied "No". *Transcript p. 13*. The Hearing Officer explained to Jenkins after the presentation of the ATU's witnesses:

Ok, now, Mr. Jenkins you have the opportunity, sir, to present any testimony that you would like to present which contradicts or is in opposition to any of the witnesses that testified for the Union. In other words, if you disagree with things they said you may, as you did before, may present any testimony you wish to contradict their testimony."
Transcript p. 34.

Mr. Jenkins again replied no.

A charging party may not choose to represent himself and subsequently contest an adverse decision based on his claimed ignorance of the process. In this case, the charging party was provided with ample instruction and multiple opportunities to present witnesses and

testimony. Indeed, probable cause determination clearly sets forth the protocol for decision and the respective burdens of the parties:

It will be the Charging Party's initial burden to establish that the facts he alleges are true, specifically that the ATU's President announced at a general membership meeting and reiterated in a telephone conversation that Jenkins would not be receiving union representation, "...because and only because [he] had filed a PERB complaint...". Upon providing sufficient evidence to establish these facts, the burden then shifts to the ATU to establish a legitimate legally sufficient basis for its action. The burden then shifts back to Jenkins to establish that the union's asserted reason(s) is pretextual. *Jenkins v. Shavers, et al.*, ULP 14-02-948, VIII PERB 6065, 6070 (2014)

The affidavit submitted with charging party's closing argument is not a valid substitute for testimony and is entitled to no weight in these proceedings. The record created by the parties is not sufficient to support Jenkins' assertion that the ATU Local 842 President announced at the February 11, 2014 general membership meeting that the union would not pursue his grievance because he had filed an unfair labor practice charge against DTC.

The remaining portion of the Charge concerns whether the ATU President specifically told Jenkins his grievance would not be pursued because he had filed a charge against DTC in a telephone conversation. Jenkins provided no testimony concerning this telephone conversation during the hearing.

It is undisputed that President Shavers did not ignore Jenkins' request for assistance. After being informed by Charging Party sometime in January, 2014, of his discharge, the newly elected President Shavers promptly filed a grievance on his behalf. She then initiated an investigation which included her speaking with both Union and management personnel.

President Shavers testified that when she confirmed during her investigation that Jenkins had only been employed in the maintenance position for approximately three months and therefore was a probationary employee, she called him and explained:

I told Mr. Jenkins that I was sorry that he was on probation and under the contract, the bargaining agreement with the Union and DTC he was on probation for six months. That when you work for Paratransit that was a different contract from the Fixed Route. And I, also, went on to explain to him that several people had left Paratransit and came over to Fixed Route and they had done their six month probation, that this was not a practice just against him. This was the practice.
Transcript, p 24.

She testified that at the time of her only telephone conversation with Jenkins she did not know that he had filed an unfair labor practice charge against DTC. She specifically denied ever telling him that the union was not pursuing his grievance because he had filed a charge. Jenkins did not cross-examine President Shavers and did not provide any rebuttal to her testimony concerning the telephone conversation.

Jenkins has failed to provide evidence to support his charge. The record establishes that when Jenkins contacted President Shavers in January and told her he had been discharged in late 2013, she promptly filed a grievance on his behalf. She then conducted a thorough investigation and considered both the longstanding prior practice and the controlling contract language. Rather than a failure to represent, her conduct reflects a good-faith effort by a responsible union official to effectively represent a bargaining unit member.

CONCLUSIONS OF LAW

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

2. 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 two separate bargaining units of Delaware Transit Corporation employees. 19 Del.C. §1302(j).

3. Lillian Shavers was at all times relevant to the processing of this charge as the President of ATU Local 842.

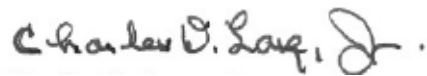
4. Charging Party, CaRon Jenkins, was an employee of the Delaware Transit Corporation and a public employer within the meaning of 19 Del.C. §1302 (p).

5. The record is insufficient to establish that ATU Local 842 and/or its President violated its duty to fairly represent a bargaining unit employee or that it interfered with, restrained or coerced the charging party because he exercised his statutory right to file an unfair labor practice charge.

6. ATU Local 842 and/or its President did not violate 19 Del.C. §1307(b)(1) as alleged.

WHEREFORE, THE CHARGE IS DISMISSED IN ITS ENTIRETY.

Dated: October 7, 2014



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