

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

RICHARD FLOWERS,	:	
	:	
Charging Party,	:	<u>ULP 14-09-973</u>
	:	
v.	:	
	:	Probable Cause Determination
DELAWARE TRANSIT CORPORATION,	:	and Order of Dismissal
	:	
	:	
Respondent.	:	

Appearances

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

BACKGROUND

The State of Delaware 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.

Charging Party Richard Flowers (Flowers) is an employee of DTC, a public employee within the meaning 19 Del.C. §1302(o) and a member of the bargaining unit represented by the Amalgamated Transit Union, Local 842 (ATU) for purposes of collective bargaining.

On September 16, 2014, Flowers filed an unfair labor practice charge (Charge) with the Delaware Public Employment Relations Board (PERB), alleging DTC violated 19 Del.C. §1301(1) and (3); §1303(1), (2), (3) and (4); and §1307(a)(1), (2), (3), (4) and (6), which state:

§ 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.
- (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.

§ 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.

Specifically, Flowers alleges he received a letter from DTC management dated July 31, 2014, which directed him to attend a meeting on August 6, 2014. The letter did not specify the purpose of the meeting; however, the ATU President was listed as having been sent a copy of this letter. *Charge, Exhibit 1*. Flowers asserts he contacted the ATU President who told him the union knew nothing about the August 6 meeting. Flowers acknowledges he later learned the meeting concerned his leave of absence status. He alleges that because he was not informed in advance of the content of the meeting, he was denied his right to have the ATU present at the meeting as well as the attorney he had retained to represent him in his worker's compensation claim. Consequently, neither he nor the ATU attended the August 6 meeting.

Flowers further alleges that in retaliation for his not attending the August 6 meeting, he was informed by letter dated August 8, 2014, of his suspension without pay pending the outcome of a pre-termination meeting scheduled for August 18, 2014. A copy of this letter was also provided to the ATU President. *Charge, Exhibit 2*. Flowers maintains his discharge resulted from his "substantial work in filing and testifying in my unfair labor practice charges . . . and assisting/consulting, of other members file charges . . ."

On September 23, 2014, the State filed its Answer to the Charge denying the material allegations set forth therein. The State maintains it has no responsibility for Charging Party's or the Union's decision not to attend the August 6, 2014, meeting of which Charging Party admittedly had prior knowledge, including the subject matter to be discussed, and which he had discussed with the ATU President. At no time did either Flowers or the ATU President request to reschedule the meeting. DTC maintains it did not cause and cannot be held responsible for Flowers' and the ATU's voluntary choice not to attend the August 6 meeting or Flowers' asserted lack of representation. Under New Matter, DTC contends that the Charge fails to state a

claim for which relief may be granted.

Flowers filed his Response to New Matter on October 2, 2014, in which he denied the contentions of New 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).

All of the allegations of this Charge concern events related to Flowers' leave of absence status and/or his suspension pending termination for job abandonment. It is undisputed there is a currently pending grievance contesting his termination. Included in the just-cause standard is proof that Flowers received the "due process" protections to which he is entitled under the collective bargaining agreement.

Public employers and the exclusive representative of employees are required by the PERA to enter into collective bargaining in order to reach agreement which includes “written grievance procedures by means of which bargaining unit employees, through their collective bargaining representatives, may appeal the application or interpretation of any term or terms of an existing collective bargaining agreement; such grievance procedures shall be included in any agreement entered into between the public employer and the collective bargaining representative.” *Sussex Tech Education Assn, DSEA/NEA v. Sussex Technical School District*, ULP 14-08-970, VII PERB 6247, 6261 (2014).

DTC and ATU Local 842 have a long-standing collective bargaining relationship and have negotiated a comprehensive collective bargaining agreement which includes a grievance procedure for resolving issues involving the interpretation or application of the collective bargaining agreement. The grievance procedure lies at the heart of the continuing collective bargaining obligation and constitutes the vehicle by which the parties’ Agreement is defined and refined during its term. For the agreement as a whole to have real meaning, it is incumbent upon the parties to administer the grievance process in accordance with the negotiated contractual terms. *Indian River Education Association v. Board of Education of Indian River School District*, ULP 90-09-053, I PERB 667, 675 (1991); *Sussex Tech Ed. Assn. (Supra.)*

The purpose of the grievance procedure is to resolve disputes concerning the terms and conditions of employment contained in the collective bargaining agreement. The purpose of an unfair labor practice, on the other hand, is to resolve statutory issues. The unfair labor practice forum is not an alternative to the contractual grievance procedure.

The allegations contained in the Charge do not, even when considered in a light most favorable to the Charging Party, establish probable cause to believe that §1301 and/or §1303 of the PERA may have been violated. Consequently, this portion of the Charge is dismissed.

Concerning the alleged violations of §1307(a)(1) and (4), mere involvement in alleged “protected activity” is insufficient to sustain a charge of retaliation or union animus. *Flowers v. State of Delaware, Delaware Transit Corporation*, ULP No. 14-06-958, VII PERB 6197 (2014). In this case, Flowers has simply asserted a broad unsubstantiated claim that he has engaged in “substantial work in filing and testifying in my unfair labor practice charges ... further assisting/consulting, of other members file charges and testifying in some of these cases.” Except for cases in which it was a named party, there is no allegation DTC was aware of Flowers alleged involvement in any of the listed actions.

The alleged violations of §1307(a) (2), (3) and (6) are unsupported by any factual allegations contained in the Charge.

Since 2004, Flowers has filed eight (8) unfair labor practice charges (not including the current charge), each of which has been dismissed. The disposition of these charges indicates a pattern of filing unsubstantiated charges. Each charge which is filed with PERB is fully considered independently on its merits. Seven of the eight charges he has filed allege Flowers was treated in a discriminatory manner because of his involvement in asserted protected activity. None of those charges were sustained.

Flowers has been repeatedly advised through PERB decisions and by the full PERB during a hearing on an appeal of a prior decision that the unfair labor practice process is not a substitute for the grievance procedure and that issues which raise a question as to whether a contractual right or provision has been appropriately and fairly applied must be processed exclusively through the negotiated grievance procedure. *Flowers v. DTC*, (*Supra*, p. 6200).

Like the prior charges, this Charge fails to assert facts, even when viewed liberally in a light most favorable to the charging party, which would support a finding of probable cause to believe that an unfair labor practice may have occurred.

DETERMINATION

Considered in a light most favorable to the 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, for failing to state a legitimate claim under the Public Employment Relations Act.

Dated: October 27, 2014



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