

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

ANDRE CHESTNUT,	:	
	:	
Charging Party,	:	
	:	
v.	:	<u>ULP No. 18-10-1164</u>
	:	
STATE OF DELAWARE, DELAWARE TRANSIT	:	Probable Cause Determination
CORPORATION,	:	and Order of Dismissal
	:	
Respondent.	:	

Appearances

Andre Chestnut, Charging Party, *pro se*

Khrishna Hawkins, DHR/SLREP, *for the Respondent, State of Delaware, DTC*

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

Andre Chestnut (“Charging Party”) was employed by DTC as a General Service Cleaner until his termination on or about October 9, 2018.

Amalgamated Transit Union Local 842 (“ATU”) is an employee organization within the meaning of 19 Del.C. §1302(i) and is the exclusive bargaining representative of the bargaining unit in which Charging Party held a bargaining unit position. 19 Del.C. §1302(j).

DTC and ATU are parties to a collective bargaining agreement which has a term of September 1, 2016 through August 31, 2019.

On or about October 16, 2018, Charging Party filed an unfair labor practice charge

(“Charge”) which alleged DTC violated §1301, Statement of Policy; §1303, Public employee rights; §1304 (a) and (b), Employee Organization as exclusive representative; and §1307 (a)(1) through (8), Unfair labor practices, of the PERA. Those sections of the statute 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;
- (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; and
- (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 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 view 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.

- (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.
 - (7) Refuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting contract.
 - (8) Refuse to disclose any public record as defined by Chapter 100 of Title 29.

The Charge alleges the State has failed or refused to provide to him information on which it based his termination for violation of DTC's Sexual and Other Unlawful

Harassment Policy. He requests PERB find DTC has violated the PERA as he has alleged and,

... Order the Respondent to reinstate me/make whole or in the alternative provide to myself *[sic]* and the union the entire case file against me including but not limited to all items in Exhibit #4, and any item in the file of any kind whether *[sic]* they were used or not in the decision to discipline myself *[sic]*, and to properly *[sic]* provide me with all grievance hearing/steps required.

Attached to the Charge as Exhibit #1 is an email dated October 15, 2018, which states:

The follow *[sic]* in *[sic]* a demand for all information in the case of myself, Andre Chestnut, including but not limited to all reports, investigations, evidence of any kind, that was a part of this investigation, whether *[sic]* it was used to make the determination to discharge myself *[sic]* or not.

This is to include but not limited to any recording, of any kind, notes of any kind of anyone involved in my case's investigation reports of any kind, whether *[sic]* it was used to make the determination to discharge myself *[sic]* or not. This is to include the contact information of anyone involved in this case, full legal name, address, mailing and e mail *[sic]*, and phone numbers.

I am making this demand, as this information as *[sic]* it is legally necessary and proper to mount a defense and my right to have this information now is well established in PERA.

... Please forward information to my personal contact information directly above and contact me with any concerns, regarding authenticity of this request, as I am using Mr. Poli's computer for this work.

On November 7, 2018, the State filed its Answer on behalf of DTC, in which it denied the allegations of the Charge. The State also included responsive information, including that the Charging Party had union representatives present at his investigatory interviews and during the pre-termination hearing conducted on September 19, 2018. A grievance was filed by the ATU contesting the termination of the Charging Party, and DTC and the ATU agreed to waive the Step 3 grievance hearing and to proceed directly to Step 4, a pre-arbitration meeting with the State Office of Labor Relations and Employment Practices. That meeting was scheduled to be conducted on November 29, 2018.

The State's Answer also included new matter, in which it asserts the Charge fails to allege facts sufficient to state a claim for relief under §1301, §1303, §1304, §1307 (a)(1), (2), (3), (5) and/or (6) of the PERA. The State avers, in the alternative, the charge should be deferred to the parties' negotiated grievance and arbitration procedure, where a Step 4 meeting was scheduled and pending.

On November 16, 2018, Charging Party filed a response to the State's New Matter in which he denied all of the affirmative defenses asserted by the State.

This probable cause determination is based on review of the pleadings submitted by the parties.

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 the 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 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).

The PERA requires a Charging Party to allege facts in the Charge with sufficient specificity so as to first, allow the Respondent(s) to provide an appropriate answer and second, to provide facts on which the PERB can conclude there is a sufficient basis on which to continue to process the charge. The Charge must also explicitly link the factual allegations to the specific statutory provisions alleged to have been violated. The burden initially rests on the Charging Party to provide facts which support the charge. *Sonja Taylor-Bray v. DSCYF*, ULP 09-11-716, VIII PERB 4633, 4636 (2010).

The Charging Party is not an employee organization nor an exclusive bargaining representative as those terms are defined in §1302 (i) and (j), respectively, of the PERA. Consequently, the Charging Party lacks standing to assert a violation of 19 Del.C. §1304 and/or §1307(a)(2); wherefore, those charges are dismissed.

The Charge also does not include facts sufficient to support a claim against DTC for interfering with Charging Party's statutory rights to organize, join, form, or assist an employee organization; that there has been any interference with his right to negotiate and grieve through his union; and/or that he has been prohibited or limited in the exercise of a concerted, protected activity. The Charge does not allege that he has been discriminated against by his union. Therefore, the Charge is insufficient to establish that DTC has violated his rights under §1303 of the PERA or §1307(a)(5).

Even when considered in a light most favorable to the Charging Party, the Charge fails to assert any facts which could reasonably be construed to violate 19 Del.C. §1301, §1307 (a) (3), (4), (6), (7) and/or (8). Consequently, these charges are all dismissed.

Although Charging Party asserts this Charge is based, at least in part, on DTC's

alleged failure to respond to his request for information, the documentation provided in the State's Answer establishes DTC appropriately responded to Mr. Chestnut by redirecting him to his union because his grievance was in process. The State's assertion is supported both by the ATU's request for a pre-arbitration meeting consistent with Step 4 of the negotiated grievance procedure (which was dated before Mr. Chestnut's information request) and the confirmation of the scheduling of that meeting after DTC's response to him.

In the Charge and Response to DTC's new matter, the Charging Party challenges the basis upon which he was terminated. A grievance has been filed protesting his termination under the applicable collective bargaining agreement. It is undisputed that his exclusive bargaining representative is actively representing him in the process. Complaints which raise a question as to whether a contractual right (including just cause for termination) has been appropriately and fairly applied must be processed through the grievance procedure. *Flowers v. DTC*, ULP 14-06-958, VII PERB 6197, 6200 (2014).

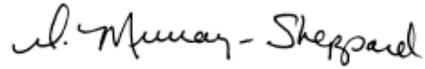
Consistent with long-standing PERB precedent, the purposes of the PERA are best promoted by encouraging parties to use their negotiated processes to resolve disputes arising under their collective bargaining agreement. The pleadings in this matter do not establish a sufficient basis upon which to conclude that, even when considered in a light most favorable to the Charging Party, DTC has engaged in any conduct which violates Mr. Chestnut's statutory rights or the PERA.

DECISION

For the reasons set forth above, the Charge fails to establish a sufficient factual basis on which it might be concluded that there is probable cause to believe that an unfair labor practice may have occurred.

WHEREFORE, the Charge is hereby dismissed in its entirety.

DATE: January 10, 2019



DEBORAH L. MURRAY-SHEPPARD
Executive Director
Del. Public Employment Relations Bd.