

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

SHARON GRAHAM,	:	
	:	
Charging Party,	:	
	:	<u>ULP No. 21-10-1285</u>
v.	:	Probable Cause Determination
	:	and Order of Dismissal
DELAWARE TRANSIT CORPORATION,	:	
	:	
Respondent.	:	

APPEARANCES

Sharon Graham, Charging Party, Pro Se
Greta Muirhead, DHR/SLREP for DTC

BACKGROUND

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

Charging Party Sharon Graham (“Graham”) was employed by DTC and was a public employee within the meaning of 19 Del. C. §1302(o) at all times relevant to the processing of this Charge. Ms. Graham is a member of the bargaining unit represented by the International Brotherhood of Electrical Workers, Local 2270.

The International Brotherhood of Electrical Workers (“IBEW”) is an employee organization within the meaning of §1302(i) of the PERA. By and through its affiliated Local 2270, the IBEW is the exclusive representative of a bargaining unit of Paratransit Automotive Technicians, Service Technicians, and Automotive Parts/Inventory Control

Specialists statewide (excluding supervisory employees and employees represented by OPEIU Local 32) employed by DTC. 19 Del. C. §1302(j); DOL Case 213.

On October 20, 2021, Ms. Graham 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, §1303, and/or §1307 (a)(1), (2), (4) and (5), 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;
- (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, in 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.
- (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.

Specifically, the Charge alleges that as a result of a contentious meeting with her supervisor concerning what she perceived to be an unfair denial of a personal day, Ms. Graham was suspended without pay and recommended for termination in violation of her statutory rights.

On or about November 8, 2021, DTC filed its Answer denying it had violated the PERA as alleged in the Charge. While admitting that an incident occurred in her supervisor's office on September 28, 2021 and that Ms. Graham was suspended and then recommended for termination following an investigation of the incident, it specifically denies the factual allegations as set forth in the Charge.

DTC also included New Matter in its Answer in which it asserts the Charge fails to state a claim under the PERA. Alternatively, the State asserts the Charge should be deferred to the negotiated grievance and arbitration procedures included in the collective bargaining agreement between IBEW Local 2270 and DTC, as it essentially asserts Ms. Graham was disciplined without just cause.

Ms. Graham filed a response to the new matter on November 16, 2021, in which she denied the legal defenses asserted by DTC.

DISCUSSION

Rule 5.6 of the Rules and Regulations of the Delaware Public Employment

Relations Board provides:

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.

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).

Preliminarily, whether Ms. Graham was disciplined for just cause or provided the due process protections set forth in the collective bargaining agreement between DTC and IBEW Local 2270 are not before this agency for resolution. In order to establish probable cause to believe that DTC violated her statutory rights, Ms. Graham must set forth facts in the Charge which, if true, could result in a finding that the alleged violations had been committed. PERB Rule 5.2 (c)(3) requires a Charging Party to include sufficient information in its Charge to allow a preliminary assessment of the procedural and

substantive viability of that charge. PERB has previously held:

The Charging Party must allege facts in the complaint with sufficient specificity so as to, first, allow the Respondent to provide an appropriate answer, and second, to provide facts on which the PERB can conclude there is a sufficient basis for the charge. The Charge must also explicitly link the factual allegations to the “specific provisions of the statute alleged to have been violated.” PERB Rule 5.2. The initial burden rests on the Charging Party to allege facts that support the charge that §1307 of the PERA has been violated. *Sonja Taylor-Bray v. State of Delaware, Department of Services for Children, Youth and Their Families*, ULP 09-11-716, VII PERB 4633, 4636 (2010); *Flowers v. Amalgamated Transit Union, Local 842*, ULP 10-07-752, VII PERB 4749, 4754 (2010); *Jamell Harkins v. State of Delaware, Delaware Transit Corporation*, ULP No. 11-12-842, VII PERB 5393, 5396 (2012)

In this case, the Charge fails to allege conduct by DTC sufficient to establish probable cause to believe that any violation of 19 Del. C. §1301 may have occurred. Section 1301 is the statement of the policy underlying the PERA. It grants public employees the right to organize and be represented. It is undisputed that Ms. Graham is part of the bargaining unit that is represented by IBEW Local 2270, which has been certified as the exclusive representative and has the right and responsibility to be her collective bargaining agent. 19 Del. C. §1302(j). Section 1301 also obligates DTC and IBEW Local 2270 to enter into negotiations with a willingness to resolve disputes and to reduce to writing any agreements reached through collective bargaining. That obligation has been met as evidenced by the current collective bargaining agreement between DTC and IBEW Local 2270 which has a term of July 1, 2019 through June 30, 2023. *Answer Exhibit 1.*

The pleadings are also insufficient to establish that DTC has violated 19 Del. C. §1303, which sets forth the rights of public employees to organize, form, join or assist a union, to negotiate and grieve through a union, to engage in concerted activities, and to be represented by their union without discrimination. Ms. Graham’s allegations that she has

been denied the right to assist in her own defense, to grieve the discipline she received and to be represented by the IBEW are not supported by any asserted facts, nor are these assertions consistent with violations of the employee rights set forth in §1303. Appended to the Answer to the Charge is copy of the grievance filed on her behalf by the IBEW on October 21, 2021. *Answer Exhibit 13.*

Concerning the alleged violation of 19 Del. C. §1307(a)(1) and/or (a)(2), there is no factual allegation of DTC conduct which could reasonably be considered to have violated either prohibition. In order for employer conduct to constitute an (a)(1) and/or (a)(2) violation, it must either on its face or through surrounding circumstances reasonably tend to exert undue influence and/or coerce employees or the labor organization in the exercise of protected rights. *WFFA Local 1590 v. City of Wilmington*, ULP 93-06-085, II PERB 937, 976 (1994).

The Charge also fails to assert substantive factual allegations that Ms. Graham was discharged or discriminated against because she had "... signed or filed an affidavit, petition or complaint or has given information or testimony under this chapter" in violation of 19 Del. C. §1307(a)(4). Ms. Graham states in the Charge, "... by these action [*sic*] the respondent [*sic*] actions against me are discriminatory because I have filed complaint before citing the recent NTSSA charge against DTC from myself." (*underlining in the original*) There is no factual support for her conclusion that she has been discriminated against because she exercised her protected right to sign or file an affidavit, petition or complaint or given information or testimony under the PERA. When a Charging Party chooses not to include specific information in compliance with PERB Rule 5.2(c)(3), it acts at its peril.¹

¹ *AFSCME Council 81, Local 3911 v. New Castle County*, ULP 09-07-695, VII PERB 4445, 4450 (PERB, 2009)

Consequently, this allegation must also be dismissed.

It is well established in Delaware that “the unfair labor practice forum is not a substitute for the negotiated grievance procedure and PERB has no jurisdiction to resolve grievances through interpretation of contractual language.”²

The Public Employment Relations Board has consistently and repeatedly held that resolution of disputes which arise concerning application or interpretation of the terms of a collective bargaining agreement, i.e., a grievance, are reserved for resolution through the parties’ negotiated grievance and arbitration procedures. PERB is not a substitute for the grievance procedure and its jurisdiction is limited to consideration of charges that the statute has been violated and that an unfair labor practice (as defined at 19 Del. C. §1307) has been committed. *AFSCME Council 81, LU 218 v. Red Clay Consolidated School District*, ULP 09-11-720, VII PERB 4675, 4677 (2010).

The complaint which is the basis for this Charge is that Ms. Graham was unjustly or harshly disciplined. The presence or absence of “just cause” raises a question of contract interpretation rather than a statutory question under the PERA. Whether DTC complied with procedural requirements must be resolved by application of the negotiated terms of the collective bargaining agreement between DTC and IBEW Local 2270. Disputes concerning compliance with contractual obligations are proper subject matter for resolution through the negotiated grievance procedure.

This Charge, on its face, fails to allege facts which may be reasonably construed, even when considered in a light most favorable to the Charging Party, to have violated the PERA, as alleged.

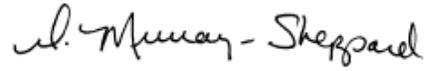
DETERMINATION

The Charge is insufficient to establish probable cause to believe that the alleged

² *Brandywine Affiliate, NCCEA/DSEA/NEA v. Brandywine Bd. of Education*, ULP 85-06-005, I PERB 131, 142 (1986, Del. PERB).

violations of the Public Employment Relations Act may have occurred. Consequently, the Charge is dismissed in its entirety.

DATE: December 30, 2021



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