

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

SHARON GRAHAM,	:	
	:	
Charging Party,	:	
	:	<u>ULP No. 21-10-1286</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.

DTC and IBEW Local 2270 are parties to a current collective bargaining agreement which has a term of July 1, 2019 through June 30, 2023.¹

On October 28, 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 (3), and/or §1307 (a)(1), (2), (4), (5), (7) and (8), 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;
- (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:

- (4) 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

¹ Answer Exhibit 3.

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.
- (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.

Specifically, the Charge alleges that DTC scheduled and conducted a pre-termination hearing on October 26, 2021, after which DTC offered Ms. Graham an option (through IBEW Local 2270) to meet certain conditions to avoid termination. The settlement offer required her to withdraw a pending unfair labor practice charge filed with PERB, to withdraw any and all other charges and/or to not file future charges of any kind related to the circumstances giving rise to her proposed termination, to attend and pass anger management training before returning to work, and to sign both a last chance agreement and a non-disclosure agreement. Ms. Graham was given until October 28, 2021 to notify DTC of her decision. Ms. Graham alleges the settlement offer was not made in good faith, was intended to bully her in order to cover up DTC's missteps in attempting to terminate her, and was intended to coerce both her and IBEW Local 2270 from filing unfair labor practice charges. She alleges the inclusion of a non-disclosure agreement as a condition of retaining her employment is illegal.

On or about November 8, 2021, DTC filed its Answer denying it had violated the

PERA as alleged in the Charge. It admitted that a pre-termination hearing was conducted on October 26, 2021 and that both IBEW 2270 and DTC representatives were present at that meeting, in addition to Ms. Graham. It admits that Ms. Graham was offered a standard, global last chance agreement but denies there was anything illegal, immoral, unethical or contrary to its statutory obligations under the PERA included in the offer. It further denies all of the allegations made that DTC was attempting to bully Ms. Graham and/or to cover up alleged missteps.

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.

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).

In order to establish probable cause to believe that DTC violated her statutory rights, Ms. Graham must set forth facts in the instant Charge which, if true, could result in a finding that the PERA has been violated, as alleged. PERB Rule 5.2 (c)(3) requires the 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)

Ms. Graham asserts that the offer made by DTC to resolve her proposed termination required that she withdraw her pending unfair labor practice charge (“ULP 1285”) and any

other charges or petitions relating to the incident on which the proposed termination was based and that she sign both a non-disclosure and a last chance agreement in order to retain her employment, among other conditions. She acknowledges that she had the option to reject the settlement offer and to proceed with the processing of her grievance. In fact, she did not withdraw Charge 1285.² Consequently, she suffered no change in her status or harm which affected either the processing of her grievance or ULP 1285.

There is also an insufficient basis on which to conclude that DTC interfered with, restrained or coerced Ms. Graham in the exercise of her statutory rights to organize, join, form or assist IBEW Local 2270, to grieve through her exclusive representative, or to engage in any other lawful concerted activity for her aid or protection. Wherefore, the allegations that DTC violated 19 Del. C. §1307 (a)(1) and §1303 (3) are also dismissed.

The Charge does not include any substantive factual allegations that DTC's intent in making its settlement offer was to discharge Ms. Graham for filing ULP 1285. When a Charging Party fails to include specific information in compliance with PERB Rule 5.2(c)(3), it acts at its peril.³ The allegation that DTC violated 19 Del. C. §1307(a)(4) is dismissed because there is no basis for this assertion in the charge.

This Charge indicates a fundamental misunderstanding of the purpose and protections afforded by the PERA. The Public Employment Relations Act is intended to promote harmonious and cooperative relationships between public employers and their employees as well as to protect the public by ensuring the orderly and uninterrupted

² In ULP 1285, Ms. Graham alleged she had been unjustly or harshly disciplined when DTC notified her it intended to terminate her for unprofessional and insubordinate behavior during a meeting with her supervisor concerning an attendance dispute. ULP 1285 was dismissed for failing to state a claim under the PERA on December 30, 2021. *Sharon Graham v. DTC*, ULP 21-10-1285, IX PERB 8541 (Probable Cause Determination and Order of Dismissal, 2021)

³ *AFSCME Council 81, Local 3911 v. New Castle County*, ULP 09-07-695, VII PERB 4445, 4450 (PERB, 2009).

delivery of government services. The Public Employment Relations Board is specifically empowered to assist in resolving disputes as well as to administer the PERA. 19 Del. C. §1301(3). The parties are notified in the letter transmitting this and all unfair labor practice charges that “voluntary adjustment of the complaint is permissible and encouraged.” PERB has throughout its thirty-eight year history consistently advised parties that settlements and resolutions mutually created by the parties are preferable to adjudication, consistent with precedent under the National Labor Relations Board, to which PERB looks for guidance.⁴

Section 1307(a)(2), (a)(5), and (a)(7) all involved the rights of IBEW Local 2270 as the exclusive bargaining representative of the bargaining unit of DTC employees in which Ms. Graham’s position is included. As an individual employee, regardless of her bargaining unit status, she does not have standing to allege unfair labor practices on behalf of IBEW Local 2270. Consequently, these charges are dismissed.

There is nothing in the charge which factually supports the assertion that DTC has violated its duty to disclose a public record as defined by Delaware’s Freedom of Information Act, 19 Del. C. Chapter 100. The allegation that DTC has violated 19 Del. C. §1307(a)(8) is, therefore, dismissed.

DTC and IBEW Local 2270 have agreed in their collective bargaining agreement to engage in “a sincere effort” to dispose of any differences arising out of application of their Agreement.⁵ PERB held in an earlier case raising similar allegations:

... Collective bargaining agreements are negotiated between

⁴ The Delaware PERB looks to federal law under the National Labor Relations Board for guidance, recognizing that there are differences between the private and public sectors. *Seaford Education Association v. Bd. of Education*, ULP 2-2-84S, 1 PERB 1, 5 (Decision, 1984)

⁵ Answer Exhibit 3, 7/1/19 – 6/30/23 collective bargaining agreement, Section 7 – Grievance Procedure, p. 6.

the public employer and the exclusive representative ... They are the only parties to such agreement, although bargaining unit employees are the beneficiaries of the agreement. *Charles Harris v. DSPC & ILA 1694-1*, ULP 11-10-827, VII PERB 5407, 5411 (Bd. Review of Executive Director's Decision, 2/13/12). ... Grievance resolutions do not, however, constitute negotiated terms and do not modify the terms of the Agreement itself. In fact, grievance resolutions and arbitration awards are generally understood to have application only to the specific grievance.

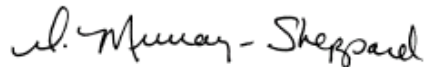
There is no statutory requirement that grievance resolutions be reduced to writing or published. Any such requirement would find its genesis in the collective bargaining agreement, not the statute...⁶

This Charge alleges facts which are consistent with the contractual agreement between DTC and IBEW Local 2270 to engage in a sincere effort to resolve the union's claim that Ms. Graham's proposed termination violated the collective bargaining agreement.⁷ It does not assert any facts which support the conclusion that the settlement offer violated the Public Employment Relations Act, as alleged.

DETERMINATION

The Charge is insufficient to establish probable cause to believe that violations of §1301, §1303 (3), and/or §1307 (a)(1), (2), (4), (5), (7) and/or (8) of the Public Employment Relations Act may have occurred. Consequently, the Charge is dismissed in its entirety.

DATE: January 4, 2022



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

⁶ *Joseph F. Poli, Jr., v. ATU Local 842*, ULP 12-03-857, VII PERB 5479, 5483 (Probable Cause Determination & Order of Dismissal, 2012)

⁷ Answer Exhibit 2, October 21, 2021 grievance filed by IBEW Local 2270 asserting violations of Section 6, Discipline, and Section 21, Personal Days.