

**PUBLIC EMPLOYMENT RELATIONS BOARD
FOR THE STATE OF DELAWARE**

RICHARD SCHAFFE,)	
)	
Petitioner,)	
)	<u>ULP No. 06-11-547</u>
STATE OF DELAWARE, DELAWARE TRANSIT)	
CORPORATION)	Probable Cause Determination
)	
Respondent.)	

BACKGROUND

The State of Delaware ("State") is a public employer within the meaning of §1302(p) of the Public Employment Relations Act ("PERA"), 19 Del.C. Chapter 13 (1986). The Delaware Transit Corporation ("DTC") is an agency of the State.

Amalgamated Transit Union, Local 842, AFL-CIO ("ATU") is an employee organization which admits to membership DTC employees and has as a purpose the representation of those employees in collective bargaining, pursuant to 19 Del.C. §1302(i). ATU, by and through its Local 842, represents a bargaining unit of DTC employees for purposes of collective bargaining and is certified as the exclusive bargaining representative of that unit. 19 Del.C. §1302(j).

ATU Local 842 and DTC are parties to a collective bargaining agreement which has an expiration date of November 30, 2007.

The Charging Party, Richard Schaffe, is employed by DTC as a mechanics' helper and is a public employee within the meaning of 19 Del.C. §1302(o). The Charging Party is also a

member of ATU Local 842. At all times relevant to this Charge, Mr. Schaffe performed his job duties during the midnight to 8:30 a.m. shift.

On or about December 14, 2006, the Charging Party filed an unfair labor practice charge alleging that DTC violated 19 Del.C. §1307(a)(1), (a)(6) and (a)(8), which provide:

- (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.
 - (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.
 - (8) Refuse to disclose any public record as defined by Chapter 100 of Title 29.

On or about July 14, 2006, the Charging Party received a disciplinary suspension of two days based on alleged substandard work performance. The discipline was grieved and a Step 1 meeting was scheduled and held. During the Step 1 hearing, ATU requested from the Assistant Maintenance Manager maintenance records for the vehicle in question, which the charge alleges were not provided. The grievance was subsequently denied at Step 1 and ATU appealed to Step 2. The Charge alleges that by failing to provide the requested maintenance records for the bus (a bus which is publicly owned, operated and financed by tax dollars), DTC has committed an unfair labor practice by refusing to disclose a public record.

The charge alleges that more than two weeks elapsed before DTC attempted to schedule the Step 2 meeting, and that when scheduled for August 23, 2006, notice was not provided until the day before and it was scheduled for 3:00 p.m., a time the employer knew the grievant was not available due to family obligations. There were two subsequent attempts to schedule the Step 2 hearing, again at 3:00 p.m. on both September 7 and September 21, 2006. The notice of the September 21 meeting from the Acting Maintenance Manager and addressed to the ATU Trustee

(with copies provided to four management officials and one to the ATU Assistant Trustee)

stated:

At the request of the union I am scheduling the above referenced hearing for the third and final time. This hearing will be held on Thursday, September 21, 2006 at 3:00 p.m. in the Pearl Room (maintenance training room) located at 1 S. Monroe St. It is not imperative that the employee be present. Failure to show up for this hearing will result in this matter being closed. (ULP, Exhibit #3).

Despite this warning, the Step 2 hearing was scheduled a fourth time for Wednesday, September 20 at 9:00 a.m. The ATU was assured that the maintenance Shop Steward would be released from his work assignment in order to attend the hearing. The charge alleges, however, that when the Shop Steward arrived at work on September 20, he was denied permission to attend the Step 2 hearing by his Shift Supervisor, in violation of the collective bargaining agreement. The hearing was again cancelled when the ATU was notified the Shop Steward was not available.

The Charge alleges DTC committed unfair labor practices by interfering with the Charging Party's rights and refusing or failing to comply with the PERA and the rules promulgated thereunder by 1) delaying the initial scheduling of the Step 2 hearing; 2) repeatedly rescheduling the hearing for a time the employer knew the employee could not be present due to family obligations; 3) threatening that if the union did not show up for third scheduled meeting the grievance would be closed; and 4) refusing to allow the Shop Steward to attend the Step 2 hearing.

Charging Party further alleges that DTC violated 19 Del.C. §1303 (1), (2), and (4) when it refused to allow the only available Union representative to attend the scheduled Step 2 hearing on September 20, 2006. The cited sections of that salutatory provision state:

§ 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.
- (4) Be represented by their exclusive representative, if any, without discrimination.

DTC filed its Answer to the Charge on or about January 9, 2007, in which it denied all material allegations of the Charge. It asserts the maintenance history for a single bus cannot be printed because of limited computer capabilities, but the Fleet and Equipment Foreman offered to allow ATU and the Charging Party access to view job records relating to the grievance in his office. Neither ATU nor the Charging Party responded to the offer. It also alleges PERB has no jurisdiction over alleged violations of the Freedom of Information Act (29 Del.C. Chapter 100).

DTC also denies that its Acting Maintenance Manager had any knowledge of the Charging Party's family obligations or his inability to attend meetings scheduled to be held in the afternoon. It asserts that four attempts were made to schedule the Step 2 grievance and that when the fourth attempt proved unsuccessful, the ATU advised that it was moving the grievance to Step 4. The statement by the Acting Maintenance Manager in the September 7 letter that the "matter would be closed" if the union did not attend the September 21 hearing is immaterial as DTC did, in fact, reschedule that hearing for September 20 in consultation with the ATU. It asserts that all attempts to reschedule the Step 2 hearing "were made to accommodate the Charging Party's work schedule (midnight to 8:30 a.m.)."

DTC denies all of the Charging Party's allegations regarding the availability of the Shop Steward for the September 20 hearing, specifically stating:

The Union requested that ... the Union Shop Steward be released from this shift (midnight to 8:30 AM) so that he could attend the Charging Party's Hearing. The request to mark [the Shop Steward] off was denied because of manpower shortages in General Services. The Union cancelled the Step 2 Hearing and proceeded to move the grievance to a Step 4 hearing on September 20, 2006. *Answer ¶11.*

[The Acting Maintenance Manager] did not approve [the Union Shop Steward's] time off for the Step 2 Hearing scheduled for September 20, 2006. The State denies that a violation of the collective bargaining agreement occurred as a result of [the Union Shop Steward] not being released because for the Hearing because of manpower shortage. *Answer ¶13.*

DTC's Answer did not include any new matter. This Probable Cause Determination is based upon a review of the Charge and the Answer.

DISCUSSION

Regulation 5.6 of the Rules of the Delaware Public Employment Relations Board requires:

- (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.

The allegations set forth in the Charge raise valid questions under the statute relating to the processing of the disciplinary grievance of the Charging Party. DTC's denial of those allegations places their accuracy in issue. However, when considered in a light most favorable to the Charging Party, the factual issues raised by the pleadings are sufficient to constitute probable cause to believe that an unfair labor practice may have occurred.

The resolution of the Charge, however, turns on the interpretation and/or application of the terms of the ATU Local 842 and Delaware Transit Center collective bargaining agreement; specifically as it relates to the duty of the employer to provide relevant information necessary to

investigate and process a grievance, the scheduling of grievance meetings and the availability of Shop Stewards to process grievances on behalf of the ATU during working hours.

The mere presence of a common factual basis underlying an unfair labor practice charge (which alleges statutory violations) and a grievance (which alleges contractual violations) does not require the dismissal of the unfair labor practice charge. FOP Lodge #1 v. Wilmington, Del. PERB, ULP 98-02-226, III PERB, 1695, 1696 (1998).

The Delaware PERB has adopted a limited deferral policy based upon the premise that where the parties have committed themselves to mutually agreeable procedures for the resolution of contractual disputes, it is prudent and reasonable for PERB to afford those procedures the full opportunity to function. PERB extended its discretionary deferral policy to include pre-arbitral deferral under the following conditions:

- (1) A decision on the unfair labor practice charge turns on the interpretation or application of a provision of the parties' collective bargaining agreement;
- (2) The parties have a long-standing and well established collective bargaining relationship; and
- (3) The employer has clearly indicated its willingness to submit the contractual issue to arbitration. FOP Lodge 1, Supra @ 1697

In this case, the substance of the underlying grievance (i.e., the two day disciplinary suspension of the Charging Party) is not the subject of the unfair labor practice charge. However, the procedural irregularities alleged in the Charge would normally be considered by an arbitrator in resolving the substantive grievance. Resolution of the unfair labor practice charge is facilitated by the consideration of an arbitrator's award wherein the purpose and meaning of the procedural conditions of the negotiated grievance procedure and the obligation to provide the requested information are addressed.

DECISION

Consistent with the foregoing discussion, the pleadings establish probable cause to believe that the employer may have committed an unfair labor practice. Because the determination as to whether there has been a violation of the statute turns upon the resolution of a pending grievance, the matter is deferred to the parties' contractual grievance process. This deferral is conditioned, however, upon the parties' agreement to advance the grievance to arbitration as provided in their collective bargaining agreement.

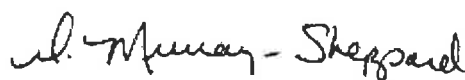
PERB retains jurisdiction to reconsider the Charge, upon application of either party, for any of the following reasons:

- (1) The arbitration award which is rendered fails to resolve the statutory claim;
- (2) Either party refuses to abide by the arbitrator's decision;
- (3) The arbitral process is unfair; and/or
- (4) The dispute is not being resolved by arbitration with reasonable promptness.

The parties are hereby ordered to advise PERB as to the scheduling and resolution of this matter through their grievance and arbitration proceedings.

IT IS SO ORDERED.

DATE: 15 February 2007



DEBORAH L. MURRAY-SHEPPARD
Hearing Officer
Del. Public Employment Relations Bd.