PUBLIC EMPLOYMENT RELATIONS BOARD

FOR THE STATE OF DELAWARE

DELAWARE PUBLIC EMPLOYEES LOCAL 837, JOSEPH O'NEAL, JASON CHADICK, AND KENNY RAMIREZ,	)	
Charging Parties,	)	**UNFAIR LABOR PRACTICE CHARGE**
	)	**No. 23-02-1344**
v.	)	
STATE OF DELAWARE, DEPARTMENT OF TRANSPORTATION,	)	**DECISION ON THE MERITS**
Respondent.	)	

Appearances

Anthony Delcollo, Esq., Offit Kurman P.A., for the Charging Parties

Thomas J. Smith, DHR/DELR, for the Dept. of Transportation

BACKGROUND

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" or "Act"). The Department of Transportation ("DOT") is an agency of the State which includes the Division of Transportation Solutions/Division of Maintenance and Operations as sub-divisions.

Delaware Public Employees Council 81, AFSCME, AFL-CIO ("AFSCME") is an employee organization within the meaning of 19 *Del. C.* §1302(i) of the PERA. AFSCME Local 837 is the certified representative of DOT employees in the Division of

Transportation Solutions/Division of Maintenance and Operations, as defined by DOL Case No. 13, within the meaning of §1302(j) of the PERA.

Joseph O'Neal, Jason Chadick and Kenny Ramirez are employed by DOT in the Division of Transportation Solutions/Division of Maintenance and Operations. They are represented for purposes of collective bargaining by AFSCME Local 837. Mr. Chadick is the current President of Local 837 and Mr. Ramirez is a Shop Steward.

For purposes of this proceeding, the term "Charging Parties" includes AFSCME Local 837, Mr. O'Neal, Mr. Chadick, and Mr. Ramirez.

The State and AFSCME Local 837 are parties to a collective bargaining agreement which has a term of July 1, 2022 through June 30, 2025.[1]

On February 13, 2023, the Charging Parties filed an unfair labor practice charge ("Charge") with the Public Employment Relations Board ("PERB") alleging DOT had engaged in conduct which violates 19 *Del. C.* §1307 (a)(1), (a)(3), (a)(5) and (a)(8).[2] The Charge alleges the State failed to afford Mr. O'Neal adequate union representation during an investigatory meeting which resulted in the imposition of discipline and that it failed or refused to provide information relevant to a pending disciplinary grievance.

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[1] Charging Parties Exhibit A.

[2] 19 *Del. C.* §1307:

(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.

(3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.

(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.

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

On June 9, 2023[3], the State filed its Answer denying the Charge. The State asserted in New Matter included in its Answer that the Charge failed to state a claim under the PERA; that it failed to state a claim that the State had interfered with the Charging Parties' protected rights; and that the Charge should be deferred for resolution to the parties' negotiated grievance procedure because it essentially asserts that the State erred in its application and interpretation of the negotiated collective bargaining agreement.

The Charging Parties responded to the State's New Matter on June 20, 2023, denying the State's asserted defenses.

A probable cause determination was issued on December 7, 2023, finding the pleadings were sufficient to establish that the State may have violated 19 *Del. C.* §1307(a)(1), (a)(3), (a)(5) and/or (a)(8), as alleged.

A hearing was convened on March 18, 2024, and concluded on March 25, 2024. During the hearing, the parties were provided the opportunity to submit documents and to elicit testimony through direct and cross examination of witnesses.

The record closed upon receipt of opening and responsive written argument from the parties. This decision is based upon review and consideration of the record created by the parties, the arguments presented and review of relevant case law.

ISSUE

WHETHER THE STATE, BY AND THROUGH THE DEPARTMENT OF TRANSPORTATION, INTERFERED WITH THE PROTECTED RIGHTS OF EMPLOYEES, AND/OR ENCOURAGED OR DISCOURAGED MEMBERSHIP IN AFSCME LOCAL 837, AND/OR FAILED OR REFUSED TO BARGAIN IN GOOD FAITH, AND/OR

[3] On February 24, 2023, the Charge was held in abeyance at the Charging Parties' request, pending settlement efforts. By email dated May 30, 2023, the Charging Parties requested the abeyance be lifted as the settlement efforts had been unsuccessful.

REFUSED TO DISCLOSE A PUBLIC RECORD IN THE INVESTIGATION OF AND SUBSEQUENT PROCESSING OF A DISCIPLINARY GRIEVANCE, IN VIOLATION OF 19 *DEL. C.* §1307(A)(1), (A)(3), (A)(5) AND/OR (A)(8), AS ALLEGED.

FACTS

Joseph O'Neal has been employed by DOT for more than 17 years. At the time of the incident giving rise to this charge, he was a Maintenance Area Supervisor for Area 14 in DOT's North District. Both Kenny Ramirez and Jason Chadick are also employed by DOT. Mr. Ramirez was an AFSCME Local 837 Shop Steward at all times relevant to this Charge. Jason Chadick (a DOT Highway Equipment Superintendent) was the Vice President of AFSCME Local 837 in August 2022. He was later elected AFSCME Local 837 President, a position he continued to hold at the time of the hearing.

The underlying incident in this matter results from a conversation between Mr. O'Neal and a subordinate employee who, upon returning to work after a disciplinary suspension, complained about being removed from a training class he was scheduled to attend on the day he was to return to work. After complaining to Mr. O'Neal, the employee made a complaint to Mr. O'Neal's manager, who directed Mr. O'Neal to schedule the employee for the next class.

Later in the week, Mr. O'Neil went to the North District office to express his frustration with the direction to reschedule the employee for the class. In expressing his frustration while standing in the Assistant Maintenance Superintendent's doorway, his comments were overheard by others who were in the offices, including the Maintenance Engineer, Assistant Maintenance Engineer and the Maintenance Superintendent for the North District, as well as by the Human Resources Manager, Michelle Daniels, who was

apparently in the North District office that day.[4] Mr. O'Neal allegedly made a comment about preferential treatment given to employees of color. The Human Resources Manager reported the comment to Human Resources.[5] At some point later in the afternoon of August 3, Mr. O'Neal was contacted by the North District Maintenance Engineer who counselled him to be mindful of what and where he expresses his frustrations because he can be overheard, and some will misunderstand what he was saying based on the language used.[6]

Thereafter, the Human Resources Manager was assigned to investigate the incident. She interviewed and was then provided statements (at her request) from the Maintenance Engineer, Assistant Maintenance Engineer and the Maintenance Superintendent on August 8, 2022.[7] After speaking with the other witnesses, the Human Resources Manager contacted Mr. O'Neal by email to schedule an interview:

> I need to schedule a meeting with you and your union representative regarding alleged comments you made regarding black men last Wednesday, August 3, 2022. This meeting needs to be held this week either on Wednesday or Thursday…[8]

Ultimately the interview was conducted on August 17, 2024.[9] Mr. O'Neal was accompanied to this meeting by Shop Steward Kenny Ramirez. At the start of the meeting,

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[4] Ms. Daniels testified she received an anonymous call about the August 3 incident. TR. at p. 218. Included in the attachments to State Exhibit 1, however, is a statement she provided which begins, "I overheard Joey O'Neal speaking to another individual in the main office of North District…"

[5] State Exhibit 1.

[6] State Exhibit 1.

[7] She later provided her own statement by email dated September 26, 2022. State Exhibit 1. Ms. Daniels also testified that she did not interview the Supervisor with whom Mr. O'Neal was speaking on August 3, 2022. TR at p. 218. She testified that the Supervisor, Mr. Garcia, informed her of the conversation he had with Mr. O'Neal.

[8] Charging Parties Exhibit G.

[9] Mr. O'Neal was on vacation during the week of August 8 and returned to the office on August 15. Charging Parties Exhibit G.

Mr. Ramirez asked permission to tape the meeting, which was denied by Ms. Daniels, who based her decision on DOT's past practice.[10] Mr. O'Neal and Mr. Ramirez testified that Ms. Daniels expressly prohibited the Shop Steward from participating in the interview in any way other than as an observer.[11] Ms. Daniels made no reference to any interaction with Mr. Ramirez in her written statement summarizing the August 17 meeting other than to acknowledge he was in attendance.[12] Ms. Daniels testified, however, that Mr. Ramirez was a willing and active participant in the meeting as Mr. O'Neal's representative.[13]

By memorandum dated September 12, 2022 from the North District Engineer, Mr. O'Neal was notified that he was being charged with violating the State of Delaware Standards of Conduct Policy and Procedure and DOT's Code of Conduct, and that he was being recommended to serve a one-day suspension. The letter further informed Mr. O'Neal of his right to request a pre-decision meeting.[14] Mr. O'Neal requested a pre-decision meeting.

By email dated September 26, 2022, AFSCME LU 837 Vice President Chadick forwarded a "Request for Information" to the DOT Human Resources addressed to Ms. Daniels and Ms. Smith George. The form stated:

> This is a request for information for the grievance of Joseph O'Neal – Local 837 Member
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> Section 17.3 of the collective bargaining agreement states: If disciplinary action is taken, the Union shall, upon request, be provided a copy of all documents, or relevant portions thereof, used as a basis for the disciplinary action. Please provide this information within two days of this request. Also, this request is a continuing request and should include all information concerning this discipline received by DelDOT

[10] TR at p. 223.

[11] Charging Parties Exhibits O and P.

[12] Charging Parties Exhibit I and State Exhibit 2.

[13] TR at p. 227-229.

[14] Charging Parties Exhibit C.

> after the date of this request…
>
> Please provide all relevant information regarding the discipline being proposed as well as all information leading up to the disciplinary action to include the list of questions asked during the investigation interview of Mr. O'Neal with his documented answers. We also request the written statements provided by other employees regarding this matter and all copies of discipline issued to other employees for similar situations used to determine Mr. O'Neal's proposed discipline.[15]

Ms. Smith-George (a DOT Human Resources Advisor) responded later in the evening of September 26 by providing copies of the statements provided by North District Maintenance Engineer, the North District Maintenance Superintendent, the North District Assistant Maintenance Engineer, and Ms. Daniels. All four of these individuals were present and heard Mr. O'Neal's comments, in whole or in part, on August 3, 2022.[16]

Vice President Chadick responded, again by email, on September 28, 2022, "…In my request for information, I also requested the list of questions Mrs. Daniels used to interview Mr. O'Neal and his answers. I also requested any previous discipline applied to employees in similar situations. In addition, if there is any other relevant information for this case, we also have that in our formal request."[17]

Ms. Daniels responded by email on the evening of September 28, 2022, attaching a copy of her notes from the August 17, 2022, investigatory interview.[18] Ms. Daniels also stated: "[L]ocal 837 is not privy to other disciplinary records of other DelDOT employees, regardless of the local affiliation. Therefore, your request to have a copy of previous discipline applied to employees in similar situations is protected by "confidentiality."[19]

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[15] Charging Parties Exhibit N, p. 89.

[16] State Exhibit 1; email cover also included in Charging Parties Exhibit N at p. 87.

[17] Charging Parties Exhibit N, p. 87.

[18] State Exhibit 2.

[19] Charging Parties Exhibit N at p. 86.

By email dated October 4, 2022, Vice President Chadick provided a lengthy response to Ms. Daniels:

> Thank you for providing us the copy of the interview between yourself and Mr. O'Neal. In regard to the rest of the information, I have previously requested for and continue to request as per Article 17, Section 17.3 of our bargaining agreement which states "*If disciplinary action is taken, the Union shall, upon request, be provided all documents, or relevant portions thereof, used as a basis for the disciplinary action."*
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> The PERB and Delaware courts have interpreted an employer's obligation with the Union to include the obligation of employers to provide a Union with information it needs to intelligently carry out its duties as the bargaining representative for its members. Under the law, the Union has the right to any information or employer documents which are "necessary and relevant" to properly represent members. Copies of the discipline issued to other employees in similar situations would be included and are "relevant" to representing the employee.
>
> The Department has made efforts to be consistent with its discipline. When deciding discipline, the Department often has referenced "previous cases" when determining the appropriate disciplinary action to take in efforts to be consistent.
>
> Local 837 is once again asking that the previous cases used to determine discipline for Mr. O'Neal be provided for our review. We understand that redacting the names of individuals will not affect the information requested or used for determination of discipline. Much the same as statements were redacted in the interview you conducted when we had a union representative present…[20]

Ms. Daniels responded in two emails later on October 4, 2022, notifying Mr. Chadick that her decision stands and that it was also based on Mr. O'Neal's admission in his written statement. She concluded her second email:

> … The department has provided you will *[sic]* all the information that was needed for determining discipline. You were provided with HIS admission statement and my interview with him admitting he made the discriminatory and racist comments regarding African American men whom he supervises on August 3, 2022…[21]

[20] Charging Parties Exhibit N at p. 86.

[21] Charging Parties Exhibit N at p. 85.

By email dated October 25, 2022, President Kwasnieski provided the DOT Director of Human Resources with documents relating to *Weingarten* rights under the NLRA for investigatory interviews as well as an unidentified decision issued by the Delaware PERB.[22] He requested the opportunity to reach an agreement to resolve the Union's concerns. The HR Director testified that she offered in a phone call with President Kwasnieski to have the interview of Mr. O'Neal conducted anew by an independent investigator with no prior knowledge of the incident, and to throw out the August 17 interview. After speaking with Mr. O'Neal, President Kwasnieski notified the HR Director that he did not want to be reinterviewed.[23]

The disciplinary pre-decision meeting was convened the next day by the Central District Maintenance Engineer (who served as DOT's designated hearing officer) on October 26, 2022.

By email dated November 1, 2022, the DOT Director of Human Resources informed the AFSCME President:

> … When we had spoken you mentioned that Mr. O'Neal and the Local had declined the offer for Mr. O'Neal to be reinterviewed by an independent investigator and the pre-decision meeting proceeded as scheduled on October 26, 2022. The Department feels strongly that Mr. O'Neal needs to be reinterviewed as a result of the allegations presented in his statement.[24]

The email further stated that, "… the pre-decision outcome and discipline is being placed on hold," until the independent interview and review of the complaint had been completed. By email dated November 9, 2022, the AFSCME Council 81 Field Representative assigned to represent LU 837 responded to the DOT Director of Human Resources, "After speaking

[22] Charging Parties Exhibit M, p. 081.

[23] TR at p. 288-289.

[24] Charging Parties Exhibit M.

with the Local Leadership who have spoken with Mr. O'Neal, I have been asked to inform you that the Local nor *[sic]* Mr. O'Neal are not in agreement *[sic]* with Mr. O'Neal being reinterviewed."[25] Mr. O'Neal was not reinterviewed.

The determination based on the pre-decision meeting was issued on December 8, 2022. The Hearing Officer upheld the proposed one-day suspension without pay for violating the State's Standards of Conduct Policy and Procedure – Management Principles and DOT's Code of Conduct.[26]

On or about January 10, 2023, Vice President Chadick sent a second information request to the DOT Labor Relations Office, this time requesting:

> …all relevant information regarding the discipline being proposed, specifically that of which [*the hearing officer*] used to make his decision to uphold the proposed one-day suspension. We would also like all relevant information discussed in the meeting immediately following the pre-decision hearing when [*the hearing officer*] and Ms. Smith-George met with Mr. O'Neal's Managers in private. We also request any other pertinent information not previously disclosed that has any relevance in Mr. O'Neal's proposed disciplinary action.[27]

Vice President Chadick sent a third information request, presumably following issuance of the Step 2 grievance decision, on or about March 6, 2023, in which he requested:

> … all relevant information regarding the discipline being imposed, specifically that of which [*the Step 2 Grievance Hearing Officer*] used to make his decision to uphold the one-day suspension including any interviews of witnesses and/or follow-up statements. We would also like all relevant information discussed in the meeting immediately following the Step 2 hearing when Mr. George Lees and Ms. Michelle Daniels met with the hearing officer… in private. We also request any other pertinent information not previously disclosed that has any

[25] Exhibit 5 included in the State's Answer to the Charge.

[26] Charging Parties Exhibit E.

[27] Charging Parties Exhibit N at p. 91.

relevance in Mr. O'Neal's disciplinary action.[28]

It is undisputed that the grievance filed by Local 837 concerning the one-day suspension issued to Mr. O'Neal is still pending. Article 4 of the parties' negotiated grievance procedure provides for a Step 3 grievance hearing before the DOT Secretary or her designee; a Step 4 Pre-arbitration before the State's Director for Labor Relations and Employment Practices; and final and binding grievance arbitration before a mutually selected arbitrator.[29]

POSITIONS OF THE PARTIES

Charging Parties:

The Charging Parties assert DOT violated its duties under the PERA by first, providing inadequate and confusing responses to the Union's request for information related to the discipline of one of its members; and secondly, by preventing the Union's Shop Steward from actively participating in the investigatory interview related to the incident on August 3, 2022.

Charging Parties allege that O'Neal engaged in protected activity (i.e., bringing a Union Shop Steward to an investigatory interview) of which DOT had knowledge and that he was retaliated against because of this protected, concerted activity in violation of 19 *Del. C.* §1307(a). They also allege that DOT interfered with Local 837's right to represent Mr. O'Neal when it prohibited the shop steward from taking an active part in the investigatory interview.

The Charging Parties allege that DOT violated its duty to bargain in good faith by

[28] Charging Parties Exhibit N at p. 92.

[29] Charging Party Exhibit A, at p. 4-5.

"refusing to bargain... with respect to O'Neal's discipline… because discipline is a mandatory subject of collective bargaining".[30] They argue that DOT failed to provide disciplinary records of other employees, in violation of its duty to provide public records.

The Charging Parties conclude that because Mr. O'Neal's protected rights were violated and the rights of Local 837 were also violated in a manner in which the investigatory interview was conducted, the one-day disciplinary suspension issued to Mr. O'Neal must be vacated and expunged and that similar conduct should be enjoined in the future. They also conclude that DOT's Human Resource Manager's failure or refusal to provide the records of other DOT employees who had been disciplined in the past for making similar comments in the workplace prevented AFSCME Local 837 from securing information which would be helpful to Mr. O'Neal's position. They argue that DOT should be compelled to provide the requested information and be barred prospectively from failing and refusing to provide the information in the future.

State:

The State denies that it took any action which could reasonably be concluded as depriving Mr. O'Neal of his statutory right to union representation during the investigatory hearing of August 17, 2022. When AFSCME Local 837 raised concerns about the alleged prohibitions placed on the Shop Steward, DOT took the affirmative step to offer to conduct a new interview, with an investigator who had no prior knowledge of the incident or the investigation. Mr. O'Neal and AFSCME declined to accept the offer and DOT proceeded to reconsider the information gathered during the investigation without the information from his interview, consistent with its *Weingarten* obligations.

[30] Charging Parties Closing Argument, p. 5.

It asserts there is no objective basis on which to conclude that DOT failed or refused to disclose information related to the investigation in violation of either its good faith duties or its obligation to produce copies of public records. DOT provided documents which were responsive to the request for information which was considered in determining the recommended discipline. The Charging Parties' repeated request for information were based on its disagreement on the substantive basis for the discipline.

Further it argues the record lacks any credible evidence that DOT engaged in any conduct on which it can reasonably be concluded that any employee was subjectively intimidated, coerced or restrained in the exercise of protected rights or that there was any discrimination in regard to hiring, tenure or terms and conditions of employment which discouraged membership in AFSCME Local 837.

For these reasons, the State requests this Charge be dismissed and all requested relief denied.

DISCUSSION

It is important to make clear what is not in issue in this proceeding. This charge does not place in issue whether Mr. O'Neal was appropriately disciplined. The collective bargaining agreement between DOT and AFSCME Local 837 requires disciplinary action be based on just cause. [31] The agreement also includes a negotiated grievance procedure for resolving disputes or differences between the parties, "… limited to the interpretation or application of the specific terms of this Agreement."[32] The presence or absence of just cause is a question of contract interpretation which must be resolved through the grievance

[31] Charging Parties Ex. A, Article 17, Employee Rights, at p. 13.

[32] Supra., Article 4, Grievances and Arbitration Procedure, at p. 3.

procedure.[33] Because this Charge raises statutory issues concerning the sufficiency of the investigation and the duty to provide information, these issues were not deferred for resolution in the grievance procedure.

There is no evidence on the record that either Mr. Chadick or Mr. Ramirez suffered any harm individually or in their positions as an officer and a shop steward of AFSCME Local 837, respectively. Any charge which is limited to these individuals is, therefore, dismissed.

Charging Parties raise two claims which they assert constitute violations of the PERA. First, they allege that DOT disregarded Mr. O'Neal and AFSCME Local 837's *Weingarten* rights in the manner in which an investigatory interview was conducted on August 17, 2022, in violation of 19 *Del. C.* §1307(a)(1) and (a)(3). Secondly, they assert that by failing or refusing to provide requested information the employer relied upon to determine disciplinary suspension issued to Mr. O'Neal, DOT violated 19 *Del. C.* §1307(a)(5) and (a)(8). The charges will be addressed sequentially.

Weingarten Rights

In 1975, the United States Supreme Court issued its decision in *NLRB v. J. Weingarten, Inc.,*[34] in which it determined that, under the National Labor Relations Act, an employee has the right to have a union representative join him during an investigatory interview when the employee reasonably believes that the investigation may result in discipline. The Court found that the employer's refusal to provide the requested

[33] *AFSCME Local 3615 v. City of New Castle*, ULP 18-11-1168. IX PERB 8707, 8722 (2023). "Questions concerning application and/or interpretation of the negotiated agreement are subject to resolution by and through the negotiated grievance procedure."

[34] *NLRB v. J. Weingarten, Inc.,* 420 US 251, 260 (1975).

representation during an investigatory interview interfered with the individual employee's Section 7 rights under the NLRA, which state in relevant part:

> Employees shall have a right to self-organization, to form, join or assist a labor organization, to bargain collectively through representatives of their choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection.[35]

The Delaware PERA similarly grants public employees the right to engage in concerted activities for purposes of collective bargaining and for mutual aid and protection, among other rights which include the right to organize and to negotiate and grieve through representatives of their choosing.[36]

In finding the National Labor Relations Board's holding should have been sustained because it was a "permissible construction of 'concerted activities … for mutual aid or protection by the agency charged by Congress to enforce the NLRA", the Supreme Court opined:

> The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of §7 that 'employees shall have the right… to engage in … concerted activities for the purpose of … mutual aid and protection.' *Mobil Oil Corp. v. NLRB*, 482 F.2d 842, 847 (CA7 1973). This is true even though the employee alone may have an immediate stake in the outcome; he seeks 'aid or protection' against a perceived threat to his employment security. The union representative whose participation he seeks is, however, safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing discipline unjustly. The representative's presence is an assurance to other employees in the bargaining unit that they, too, can obtain his aid and protection if called upon to attend a like interview. Concerted activity for mutual aid or protection is therefore as present here …
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> . . .
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> The [NLRB]'s construction also gives recognition to the right when it

[35] 29 U.S.C. §157.

[36] 19 Del. C.§1303.

> is most useful to both the employee and the employer.[37] A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. [38]

There is no question that the meeting between HR Manager Daniels and Mr. O'Neal on August 17, 2022 was for the purpose of investigating a complaint that he had made discriminatory and/or inflammatory comments in the workplace. Mr. O'Neal understood the purpose of the meeting. Ms. Daniels stated in the scheduling email that both Mr. O'Neal and his union representative should attend the meeting.[39] Mr. O'Neal directly requested Shop Steward Ramirez join him for the meeting a short time before it was

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[37] Quoting *Independent Lock Co.,* 30 Lab. Arb. 744, 746 (1958):

> [Participation by the union representative] might reasonably be designed to clarify the issues at the first stage of the existence of a question, to bring out the facts and the policies concerned at this state, to give assistance to employees who may lack the ability to express themselves in their cases, and who, when their livelihoods are at stake, might in fact need the more experienced kind of counsel which their union steward might represent. The foreman, himself, may benefit from the presence of the steward by seeing the issue, the problem, the implications of the facts, and the collective bargaining clause in question more clearly. Indeed, good faith discussion at this level may solve many problems, and prevent needless hard feelings from arising … [It] can be advantageous to both parties if they both act in good faith and seek to discuss the question at this stage with as much intelligence as they are capable of bringing to bear upon the problem.

The Court also quoted from *Caterpillar Tractor Co.,* 44 Lab. Arb. 647, 651 (1965):

> The procedure … contemplates that the steward will exercise his responsibility and authority to discourage grievances where the action on the part of management appears to be justified. Similarly there exists the responsibility upon management to withhold disciplinary action, or other decisions affecting the employees, where it can be demonstrated at the outset that such action is unwarranted. <u>The presence of the union steward is regarded as a factor conducive to the avoidance of formal grievances through the medium of discussion and persuasion conducted at the threshold of an impending grievance</u>. It is entirely logical that the steward will employ his office in appropriate cases so as to limit formal grievances to those which involve differences of substantial merit. Whether this objective is accomplished will depend on the good faith of the parties, and whether they are amenable to reason and persuasion. *Emphasis added.*

[38] *Weingarten*, p. 263-264.

[39] Charging Parties Exhibit G.

scheduled to begin.[40]

It is an employee's individual right to seek the assistance of his union representative if called into an interview where he reasonably believes the interview may put his job security or working conditions in jeopardy. It is the employee's right to seek mutual aid and protection by being accompanied by a union representative, rather than being required to rely on individual self-protection.[41] The right of the Union to be present and to participate in the investigatory hearing derives from the employee's request for representation. There is no evidence of record to support the allegation that DOT interference with AFSCME Local 837's organizational rights or discriminated in any way so as to encourage or discourage membership in the union in violation of 19 *Del. C.* §1307(a)(3).

The Supreme Court also, however, placed its imprimatur on the NLRB's guidance to employers during investigatory interviews. [42] The employer, the Board noted, has no duty to bargain with any union representative who may be permitted to attend an investigatory interview noting:

> … We are not giving the Union any particular rights with respect to predisciplinary discussions which it otherwise was unable to secure during collective bargaining negotiations.[43]

The union was also cautioned that its right to participate in the investigatory interview could not interfere with the employer's exercise of its legitimate prerogative to carry on its investigation:

> The employer may, if it wishes, advise the employee that it will not

[40] TR at p. 154-155.

[41] *Weingarten*, p. 262.

[42] Supra., at p. 259-260.

[43] Citing *Mobile Oil,* p. 1052.

> proceed with the interview unless the employee is willing to enter the interview accompanied by his representative.
>
> The employee may then refrain from participating in the interview, thereby protecting his right to representation, but at the same time relinquishing any benefit which might have been derived from the interview. The employer would then be free to act on the basis of information obtained from other sources.[44]

The Delaware PERB explicitly adopted *Weingarten* principles in *CWA Local 13101 v. Delaware Dept. of Safety and Homeland Security, Division of State Police.*[45] That decision identified a public employee's statutory right to union representation, upon request, during an investigatory interview. It also provided explicit guidance to public employers:

> Once an employee makes a valid request for union representation, the employer is permitted one of three options under *Weingarten*: (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview at all. "Under no circumstances may the employer continue the interview without granting the employee union representation, *unless* the employee voluntarily agrees to remain unrepresented *after* having been presented by the employer with the choices mentioned in option (3) above or if the employee is otherwise aware of those choices."[46]

The question of whether Mr. O'Neal's rights were violated during the interview requires a factual determination. Mr. Ramirez testified that Ms. Daniels stated at the beginning of the meeting that his purpose was merely to serve as an observer and not to provide guidance to Mr. O'Neal. Mr. Ramirez also testified that Ms. Daniels' demeanor was threatening. Mr. O'Neal recalled that Ms. Daniels prohibited Mr. Ramirez from audio taping the meeting and notified him that, as an observer, he was not permitted to interrupt

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[44] Supra., at p. 1052.

[45] ULP 12-01-848, VIII PERB 5847 (2013).

[46] *CWA Local 13101 v. DSTA,* Supra., at p. 5856, citing *United States Postal Service*, 13-CA-16195-P, 241 NLRB 18 (NLRB, 1979).

the interview.[47] Ms. Daniel's notes from the August 17 interview appear to have been provided to Vice President Chadick by email on September 26, 2022.[48] She does not reference Mr. Ramirez at all, except to record that he was present. While all three individuals testified at the hearing, their testimony was inconsistent and contradictory.

If the type of confrontation which the Charging Parties allege occurred between Mr. Ramirez and Ms. Daniels, it is surprising that Ms. Daniels did not mention it in her notes. Nor did Mr. Chadick raise any concerns about the interview until the October 26, 2022 pre-decision hearing. It is the Charging Parties' obligation to provide sufficient credible evidence to support its charge. The three individuals who were present at the August 17, 2022 investigatory interview provided testimony and statements which differed substantially both in content and tenor.

It is not necessary, however, to reach a determination as to what actually occurred in the August 17 investigatory interview because after the Union expressed its concerns about the sufficiency of the investigatory interview, the DOT Director of Human Resources offered to conduct a new investigatory interview to alleviate AFSCME's concerns. It is not reasonable to conclude this was an admission of wrongdoing. As explained in the DOT Director of Human Resources email response to the AFSCME Council 81 Staff Representative on November 2:

> … DelDOT is mindful of the perceived representation issues raised by the Union on October 25, 2022 and for that reason we are reinterviewing Mr. O'Neal with his Union representative present. Mr. O'Neal's previous statement will not be held against him. If Mr. O'Neal chooses not to participate in the reinterview process, as is his right to do so, we

[47] Charging Parties Exhibits O and P. I note that these "notes" appear to have been prepared well after the interview and provided to Mr. Chadick, at his request, on October 12, 2022.

[48] State Exhibit 1.

will have to decide on the issue without his participation…[49]

DOT offered to reinterview Mr. O'Neal, with a new investigator who had not been involved in either the incident or the prior interview, with his Union representative present and advised Mr. O'Neal, through his Union, that if he declined the second interview opportunity, DOT would proceed with its decision making as if he had never been interviewed. This explanation of Mr. O'Neal's options is consistent with *Weingarten* protections and the direction offered by this Board in the 2013 decision in *CWA Local 13101 v. DSTA*.

The December 8, 2022 suspension letter does not reference comments made by Mr. O'Neal during the August 17, 2022 interview. It does, however, rely on admissions made by Mr. O'Neal himself during the October 26 pre-decision hearing.[50]

Whether DOT had just cause to discipline Mr. O'Neal with a one-day suspension for the incident which occurred on August 3, 2022 must be determined through the negotiated grievance procedure. The record, however, is insufficient to conclude that Mr. O'Neal was denied *Weingarten* protections to which he was entitled. He was provided the opportunity to be reinterviewed with his representative in order to eliminate the Union's procedural concerns, but Mr. O'Neal declined to be reinterviewed.

Duty to Provide Information

It is well established through Delaware PERB caselaw that the duty to bargain in good faith under the Public Employment Relations Act obligates a public employer to provide information to an exclusive bargaining representative which is necessary and

[49] Exhibit 5, State Answer to the Charge.

[50] Charging Parties Exhibit E, p. 044-045.

relevant to the performance of its representational duties.[51]

A union's assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested.[52] The scope of the duty to supply information under 19 *Del. C.* §1307(a)(5) turns upon the facts and circumstances of each case.

In this case, the Union cited to Section 17.7 of the parties' collective bargaining agreement when it made its first request for information. That section of the parties' agreement states, "If disciplinary action is taken, the Union shall, upon request, be provided a copy of all documents, or relevant portions thereof, used as a basis for the disciplinary action." The recommendation for a one-day suspension was made on September 12, 2022, but no discipline was taken until December 8, 2022, following the pre-decision meeting and issuance of the suspension by a DOT Hearing Officer. It is not clear from the record created by the parties that it is the practice of these parties to exchange information prior to the actual issuance of discipline.

Section 17.8 of the collective bargaining agreement explains the purpose of the pre-decision meeting."

> 17.8 Pre-decision hearings shall be informal meetings to provide employees with an opportunity to respond to a proposed dismissal, suspension or disciplinary demotion, and to offer any reasons why such

[51] *AAUP v. DSU,* ULP 95-10-159, III PERB 2177 (Del. PERB, 2001); *Delaware Correctional Officers Association v. Delaware Dept. of Correction*, ULP 00-07-286, III PERB 2209, 2214 (2001); *AFSCME Locals 1007, 1267 & 2888 v. DSU,* ULP 10-04-739, VII PERB 4693, 4705 (2010); *AFSCME Locals 320 & 1102 v. City of Wilmington*, ULP 10-08-761, VII PERB 4757, 4760 (Probable Cause Determination, 2010); *Amalgamated Transit Union, Local 842 v. State of Delaware, Delaware Transit Corp.*, ULP 12-02-850, VIII PERB 5493 (Probable Cause Determination, 2012). The obligation has also been recognized by the Court of Chancery and the Delaware Supreme Court. *Bd. of Education of Colonial School District v. Colonial Education Assn., DSEA/NEA,* CA 14383, II PERB 1343 (Del. Chan., 1996), *affirmed Colonial EA v. Bd. of Education*, Case 129, 1996, III PERB 1519 (Del. Supr., 1996).

[52] *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 302 (1979).

action may not be justified or would be too severe a penalty.[53]

It is not the first step of a grievance process; rather, it provides the employee with the opportunity to provide his side of the story and to offer reasons as to why the proposed suspension is unjustified or too severe.

The back and forth email exchanges between AFSCME then Vice President Chadick and President Kwasnieski with Ms. Daniels and Ms. Smith-George between September 26 and October 5, 2022 do not provide a factual basis on which to conclude that there was a violation of either 19 *Del. C.* §1307(a)(5) and/or (a)(8). On its face, the information request was for "… copies of discipline issued to other employees for similar situations used to determine Mr. O'Neal's proposed discipline" *(emphasis added).* DOT reasonably construed this request to be for discipline issued in similar situations, i.e., to supervisors who have publicly made "unprofessional and divisive" remarks which violate the State's Standard of Conduct Policy and Procedure and DOT's Code of Conduct.[54] DOT further believed AFSCME was requesting copies of all discipline "used to determine Mr. O'Neal's proposed discipline" as this is literally what was requested.

In President Kwasnieski's email of October 5, 2022, he accurately summarizes DOT's basis for the recommended discipline,

> … the decision to apply discipline of a one-day suspension to Mr. O'Neal, was based off of the evidence discovered in your investigation and statements made, not any previous disciplinary action for similar offense. We are not arguing about the offense, it is pretty clear what transpired. We are however, mindful of the Department's commitment to be consistent in its discipline. We cannot properly represent our member if the decision was based off of previous cases that were of similar content, and we do not have that information to review. That

[53] Charging Parties Exhibit A, p. 017.

[54] Charging Parties Exhibit C, p. 039.

information would be relevant to the case and necessary for us to have.[55]

In her email response on October 6, Ms. Daniels confirms, "… I will not forward any discipline records of other employees. I have provided the union with all pertinent or relevant portions thereof [*sic*] information used as the basis for my recommended discipline…"[56]

While the email communication could have been clearer (on both sides),[57] Ms. Daniels confirmed that she did not consider any discipline issued to any other employee in reaching her recommendation that Mr. O'Neal be suspended for one day. Similarly, when the discipline was actually issued on December 8, 2022 (following the pre-decision meeting), there is no indication that discipline of other employees was considered in reaching the decision.[58] It is clear that at least Vice President Chadick believed that the suspension issued to Mr. O'Neal was inconsistent with discipline issued to other bargaining unit employees. The record, however, is insufficient to establish that DOT failed or refused to provide information responsive to the specific information request.

It is a violation of §1307(a)(8) for a public employer to "refuse to disclose any public record as defined by Chapter 100 of Title 29." A public record is defined at 29 *Del. C.* §10002(o) to mean,

…[I]nformation of any kind, owned, made, used, retained, received,

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[55] Charging Parties Exhibit H, p. 054-055.

[56] Charging Parties Exhibit H, p. 054.

[57] Ms. Daniels testified, "I believe that I remained very consistent in my emails by stating that I provided you [*the Union*] all the information that I needed in terms of deciding the level of disciplinary actions. So there were no comparators." *TR. @ p. 238-239.* Apparently, Vice President Chadick did not find her responses to be as clear as she intended.

[58] Should the State claim at arbitration that its decision to suspend Mr. O'Neal was based upon its consideration of discipline issued to other DOT employees, AFSCME will have the opportunity to challenge that assertion based on the documentary record created by the many emails sent and received concerning providing information. Any claim to that effect could have a detrimental effect on the working relationship between DOT and AFSCME Local 837.

> composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of physical form or characteristic by which such information is stored, recorded or reproduced. For purposes of this chapter, the following records shall not be deemed public:
>
> (1) Any personnel, medical or pupil file, the disclosure of which would constitute an invasion of personal privacy, under this legislation or under any State or federal law as it relates to personal privacy… 29 *Del. C.* §10002(o).

PERB has held that records which fall within the "personnel" exception are not public documents under 29 *Del. C.* §10002(o)(1). The obligation, if any, of the employer to disclose such documents arises under the terms of the collective bargaining agreement and, therefore, raise a contractual issue unrelated to the alleged violation of 19 *Del. C.* §1307(a)(8).[59]

Finally, it is concerning that the parties have not yet processed this grievance through their agreed upon procedure for resolving issues arising under their collective bargaining agreement. The parties stated during the hearing that the grievance was being held in abeyance for well over a year while this charge was being pursued.[60] The PERA mandates that parties negotiate written grievance procedures through which contractual disputes can be resolved promptly.[61] While these parties have agreed that the negotiated time limits may be extended by their mutual agreement, one is left to wonder whether most of the issues raised in this charge might have been addressed more directly through the timely processing of the grievance.

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[59] *Scott v. DOT, DTC*, ULP 05-02-467, V PERB 3271, 3276 (2005).

[60] TR at p. 84.

[61] 19 *Del. C.* §1313(c).

DECISION

Based on the record, review and consideration of the arguments and case law presented by the parties, and application of the PERA, the Charging Parties have not established that the Department of Transportation engaged in conduct in violation of 19 *Del. C.* §1307(a)(1), (a)(3), (a)(5) and/or (a)(8) as alleged. The evidence is insufficient to establish that DOT:

- Interfered with, restrained, or coerced Mr. O'Neal in or because of the exercise of his right to engage in protected, concerted activity by having his Shop Steward accompany him to an investigatory interview which he believed might result in disciplinary action, in violation of 19 *Del. C.* §1307(a)(1);

- Encouraged or discouraged membership in AFSCME Local 837 by discrimination in regard to hiring, tenure or other terms and conditions of employment, in violation of 19 *Del. C.* §1307(a)(3);

- Violated its good faith obligations under the Public Employment Relations Act by failing or refusing to provide the Union with information which it requested in order to perform its representational duties, in violation of 19 *Del. C.* §1307(a)(5); and

- Failed or refused to provide public records to the Charging Parties in violation of 19 *Del. C.* §1307(a)(8).

WHEREFORE, the Charge is dismissed.

IT IS SO ORDERED.

DATE: September 17, 2024

D. Murray-Sheppard

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