

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

| | | |
|--|---|---------------------------------------|
| DELAWARE TRANSIT CORPORATION, |) | |
| |) | PERB REVIEW OF THE |
| Appellant, |) | EXECUTIVE DIRECTOR'S |
| |) | DECISION |
| v. |) | <hr style="width:20%; margin:auto;"/> |
| |) | |
| AMALGAMATED TRANSIT UNION, LOCAL 842, |) | ULP No. 13-03-889 |
| |) | |
| Appellee. |) | |

Appearances

Aaron Shapiro, OMB/HRM/ SLREP, for the Delaware Transit Corp.

Lauren M. Hoye, Esq., Willig Williams & Davidson, for ATU Local 842

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. The Delaware Transit Corporation (“DTC”) is an agency of the State.

The Amalgamated Transit Union (“ATU”) is an employee representative within the meaning of 19 Del.C. §1302(i). By and through its affiliated Local 842, the ATU is the exclusive bargaining representative of two bargaining units of DTC paratransit, fixed route, operating and maintenance employees, within the meaning of 19 Del.C. §1302(j).

DTC and the ATU have a long collective bargaining relationship and were parties to two collective bargaining agreements (each of which had an expiration date of August 31, 2010) which remained in effect during the period in which the parties were engaged

in negotiations and impasse resolution proceedings for successor agreements. During the period of time relevant to the processing of this unfair labor practice charge, the parties were engaged in binding interest arbitration proceedings.¹

On March 11, 2013, the ATU filed an unfair labor practice charge with Delaware Public Employment Relations Board (“PERB”) alleging DTC had violated 19 Del.C. §1307(a)(1) and (a)(5).² DTC filed its Answer and New Matter on March 27, 2013, denying the material allegations in the Charge. After a period of mutually agreed abeyance, the ATU filed its Response to New Matter. The pleadings were completed on August 27, 2013.

A probable cause determination was issued on June 30, 2014 and a hearing was held on August 21, 2014, after which the parties submitted written argument. The decision of the Executive Director was issued on March 8, 2016, in which she found DTC violated its statutory duty to bargain in good faith by failing to maintain the status quo of a mandatory subject of bargaining, i.e., discipline. By unilaterally implementing changes to the disciplinary schedule for use of electronic devices while operating DTC equipment, DTC was found to have violated 19 Del.C. §1307(a)(1) and (a)(5).

The Executive Director ordered DTC to cease and desist from engaging in conduct in violation of its statutory duties. It was directed to administer all discipline for infractions occurring after January 25, 2013 in accordance with the discipline set forth in Directive #099.01, to make all adversely affected employees whole, to post notices of

¹ The interest arbitrator’s award had been issued prior to the filing of this unfair labor practice charge.

² §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 by this chapter.
- (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate bargaining unit, except with respect to a discretionary subject.

determination in the workplace and to advise PERB within sixty days of all steps taken in compliance with the Order.

On March 11, 2016, DTC requested review of the Executive Director's decision by the full Public Employment Relations Board. The Board accepted written argument from the parties concerning both DTC's motion to stay enforcement of the Executive Director's order and on the merits of the request for review. By letter dated March 29, 2016, DTC's motion was denied because the request did not meet the enumerated standards for issuance of a stay and specifically because the Appellant did not establish there would be irreparable harm if a stay was not issued.

A copy of the complete record in this matter, including the written arguments of the parties on appeal, was provided to each member of the Public Employment Relations Board. A public hearing was convened on April 20, 2016, at which time the full Board met in public session to hear and consider this request for review. The parties were provided the opportunity to present oral argument and the decision reached herein is based upon consideration of the record and the arguments presented to the Board.

DISCUSSION

The Board's scope of review is limited to the record created by the parties and consideration of whether the Executive Director's decision is arbitrary, capricious, contrary to law, or unsupported by the record. After consideration of the record and the arguments of the parties on appeal, the Board must vote to affirm, overturn, or remand the decision to the Executive Director for further action.

This case concerns a public employer's right, if any, to unilaterally implement a substantive change to a mandatory subject of bargaining when negotiations with the

union concerning that issue do not result in agreement. Neither party has the right to unilaterally modify terms and conditions of employment, absent either negotiated agreement, the express waiver of the right to negotiate by the opposing party, or extreme circumstances (e.g., an emergency) necessitating change to the mandatory subject of bargaining. None of those conditions are present in this case.

Contrary to DTC's assertions, the Executive Director's decision does not change or modify the long-standing and consistently applied duty to negotiate in good faith concerning mandatory subjects of bargaining. Rather, it addresses what actions may (or may not) be taken should those negotiations be unsuccessful. The PERA is structured to provide a period of stability and labor peace between negotiations. In furtherance of that goal, it requires that negotiated collective bargaining agreements have a term of not less than two years, unless otherwise agreed to by the parties. This period of stability occurs during the term of a collective bargaining agreement. Neither party may unilaterally implement a change in a mandatory subject of bargaining during this period.

In this case, DTC desired to change the disciplinary procedures for violations of its "Cell Phone Usage" policy. It notified employees of the change to Policy #099, after which the ATU filed this unfair labor practice charge. The Charge was held in abeyance while the parties attempted to resolve the dispute over changes to the policy. Unfortunately, those discussions did not result in agreement over revisions to the disciplinary schedule. Thereafter, DTC chose to implement a change to the Cell Phone Usage policy, including changes to the disciplinary schedule. The Board notes the changes it ultimately implemented on July 31, 2013 (retroactive to June 1, 2013) were not identical to the proposals DTC had on the table at the time that the parties abandoned their discussions.

DTC seeks to persuade this Board that the Executive Director erred in finding that the ATU President's assertion that the parties were at impasse was not dispositive. Again, there is no legal precedent in the thirty-two year history of this Board wherein it has found that any party has a right to unilaterally implement changes to a mandatory subject of bargaining without negotiating that change to agreement with the other party (unless the other party has either waived its right to negotiate or there is an emergency which necessitates such change).

The Board notes that DTC did not argue below that the provisions of the Delaware Transit Authority Act ("DTAA"), 2 Del.C. Chapter 13, removed discipline from the mandatory scope of collective bargaining under the PERA.³ DTC concedes "working conditions" as defined and applied under the PERA have historically and legally included discipline. It also concedes that 2 Del.C. §1307(b)(1)⁴ grants to DTC the authority to collectively bargain with its organized employees relative to "...wages, salaries, hours, working conditions, health benefits, pensions and retirement allowances." The Board notes the similarity of DTC's obligation (as subsidiary of the Delaware Transit Authority) to collectively bargain subjects which are substantially similar to the scope of bargaining under the PERA, specifically as it relates to "working conditions".

DTC also argues that 2 Del.C. §1309(a)(2)⁵ grants to it a unilateral right to

³ This argument was also not raised as a jurisdictional defense to the charge.

⁴ "All subsidiaries operating any public transportation facility or specialized transportation facility shall have authority to bargain collectively with labor organizations representing employees and may enter into agreements with such organizations relative to wages, salaries, hours, working conditions, health benefits, pensions and retirement allowances of such employees."

⁵ 1309 Powers.

⁵ (continued)

The Authority shall have all of the powers necessary or convenient to carry out and effectuate

determine discipline without requiring negotiation. In response, the ATU notes that the DTAA explicitly and specifically limits the scope of negotiations in §1325, which states:

§ 1325 Employees of the Delaware Transit Corporation and subsidiaries.

... Such employees shall be considered state employees for the purposes of participating in the group medical insurance, workers' compensation and deferred compensation plans available to state employees. Participation in, and the terms of, medical insurance, workers' compensation and deferred compensation programs available through the State shall not be a subject of collective bargaining.

It is noted that the exemption does not include discipline or other working conditions.

Section 1325 of the DTAA also explicitly exempts DTC employees from protections of the State merit system. It does not, however, remove DTC from the jurisdiction of this Board to regulate collective bargaining between public employers and their employees in the State of Delaware nor was it modified to specifically exempt DTC from the PERA.

Consequently, the Board finds no support for DTC's argument that discipline is removed from the mandatory scope of bargaining by the DTAA.

Finally, while it is unfortunate that the Executive Director's decision was delayed in this matter, it was DTC which made the decision to unilaterally implement the changes to a mandatory subject of bargaining. It bears the responsibility for that decision, which was made in the absence of legal support therefore.

the purposes and provisions of this chapter, to be exercised through the written approval of the Secretary, including, but without limiting the generality of the foregoing, the power to:

... (2) Prescribe rules, regulations and policies in connection with the performance of its functions and duties, and to provide penalties for the violation of such rules and regulations and to provide for the enforcement of state law in or on any transportation facility owned or operated by the Authority or a subsidiary...

DECISION

After reviewing the record, hearing and considering the arguments of the parties, the Board unanimously affirms the decision of the Executive Director finding that in the absence of a negotiated agreement with ATU Local 842 concerning discipline, DTC acted in derogation of its statutory duty to bargain in good faith and 19 Del.C. §1307(a)(1) and (a)(5) by unilaterally implementing changes to the disciplinary schedule under its Cell Phone Usage policy (Policy # 099) in February, 2013 and in July, 2013.

Wherefore, DTC is directed to comply with the order as set forth in the March 8, 2016, decision of the Executive Director.

IT IS SO ORDERED.



Elizabeth D. Maron, Chairperson



R. Robert Currie, Jr., Member



Kathi A. Karsnitz, Member

DATE: May 4, 2016