

**STATE OF DEAWARE**  
**PUBLIC EMPLOYMENT RELATIONS BOARD**

<p><b>AMALGAMATED TRANSIT UNION, LOCAL 842,</b></p> <p style="text-align: center;"><b>Charging Party,</b></p> <p style="text-align: center;">v.</p> <p><b>STATE OF DELAWARE, DEPARTMENT OF TRANSPORTATION, DELAWARE TRANSIT CORPORATION,</b></p> <p style="text-align: center;"><b>Respondent.</b></p>	<p>)</p>	<p><b><u>ULP No. 15-10-1011</u></b></p> <p><b>Probable Cause Determination</b></p>
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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”). The Delaware Transit Corporation (“DTC”) is an agency of the State.

The Amalgamated Transit Union (“ATU”) is an employee representative within the meaning of §1302(i) of the PERA. By and through its affiliated Local 842, the ATU is the exclusive bargaining representative of certain hourly operators and maintenance employees of the Delaware Transit Corporation. 19 Del.C. §1302(j).

The ATU and DTC are parties to a collective bargaining agreement with a term of September 1, 2013 through August 31, 2016.

On October 13, 2015, ATU filed an unfair labor practice charge with the Public Employment Relations Board (“PERB”) alleging conduct by DTC in violation of 19

Del.C. §1307(a)(1) and/or (a)(5).<sup>1</sup> Specifically, the ATU alleges DTC has failed or refused to negotiate concerning a change to the long-standing progressive discipline schedule for preventable accidents, which the ATU asserts is a mandatory subject of bargaining.

On October 23, 2015, DTC filed its Answer to the Charge denying it had formally, officially or intentionally altered the disciplinary schedule for preventable accidents. It further denies the receipt of any demand from the ATU to negotiate, as asserted in ¶9 of the Charge.

DTC included New Matter in its Answer, alleging the Charge asserts no facts which, even if proven, would violate any of the cited provisions of 19 Del.C. §1307(a); therefore, the Charge should be dismissed for failure to state a claim. DTC asserts the Charge is subject to deferral to resolution under the negotiated grievance and arbitration proceedings included in Section 8 of the collective bargaining agreement. It also asserts the Charge is untimely because there have been two similar incidents involving discipline in excess of the preventable accident standards prior to the incident on which the Charge is based.

On October 30, 2015, ATU Local 842 filed a Response to New Matter denying the New Matter contained in DTC's Answer.

On or about October 30, 2015, the ATU amended its Charge to include allegations that DTC had also failed or refused to negotiate concerning discipline for

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<sup>1</sup> §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.
- (5) Refuse to bargain collectively in good faith with an employer representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.

unsecured wheelchair flips during paratransit service. DTC responded to the Amended Charge by filing its Answer, New Matter and Counterclaim on November 9, 2015. ATU Local 842 responded by filing its Response to New Matter and Answer to the Counter Charge on November 23, 2015.

Thereafter, on November 24, 2015, ATU Local 842 advised PERB that the parties had reached a partial resolution of the Charge, providing a copy of a document executed by both the ATU President and a representative of the State Labor Relations and Employment Practices office, which states, in relevant part,:

The parties to the above-referenced case have reached a partial resolution of the instant dispute. In particular, ATU Local 842 has agreed to withdraw those portions of its Amended Unfair Labor Practice Charge pertaining to wheelchair flips (paragraphs 11 through 16, the third sentence of paragraph 17 of the Amended Charge, and the portion of the request for relief that pertains to wheelchair flips at clause 3). DTC has agreed to withdraw its Counterclaim against ATU Local 842. The remaining portions of ATU Local 842's Amended Charge remain pending with the Board...

This probable cause determination is based upon a review of the pleadings concerning the remaining issues submitted in this matter.

### **DISCUSSION**

Rule 5.6 of the Rules and Regulations of the Delaware Public Employment Relations Board provides:

- (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 the 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 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).

It is well established under PERA case law that matters concerning or related to discipline are a condition of employment and may not be unilaterally altered by either party without negotiation at least to the point of impasse. *AFSCME Council 81 v. Delaware Dept. of Transportation*, ULP 95-01-111, II PERB 1279, 1290 (1995); affirmed by full PERB, II PERB 1201 (1995); *CWA Local 13101 v. Kent County Levy Court*, ULP 14-08-971, VIII PERB 6321, 6326 (2014).

The issue raised by this Charge is not whether an individual Operator was disciplined with or without just cause (a matter which is subject to resolution exclusively through the negotiated grievance and arbitration process), but whether the employer instituted a unilateral change to a mandatory subject of bargaining without providing notice and the opportunity to negotiate over such change to the union.

The full Board has held on review:

...[W]hether there has been a violation of the statutory duty to

bargain cannot be decided by the grievance and arbitration procedure. Simply stated, the grievance procedure addresses questions of contractual interpretation. *AFSCME Council 81 v. DOT*, ULP 95-01-111A, II PERB 1201, 1206 (1995, PERB Decision on Review).

The Charge alleges DTC has failed or refused to negotiate with the ATU concerning changes to the disciplinary schedule for preventable accidents. Resolution of the individual grievance filed on behalf of the individual Fixed Route Operator will not and cannot be dispositive of the question of whether DTC has a duty to negotiate concerning this alleged change. The duty to bargain is exclusively statutory in origin. For this reason, DTC's request for deferral is denied, as there is no unity of issue.

The pleadings raise both factual and legal issues. To prevail in this matter, ATU Local 842 must establish by a preponderance of the evidence that DTC has implemented a unilateral change in a mandatory subject of bargaining, without notice and the opportunity to negotiate, in violation of its statutory duties. A hearing will be promptly scheduled for the purpose of establishing a factual record on which argument can be considered in order to render a determination on this Charge.

### **DETERMINATION**

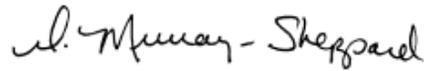
Considered in a light most favorable to the Charging Party, the pleadings support a determination that there is probable cause to believe a violation of 19 Del.C. §1307(a)(1) and/or (a)(5) may have occurred. The pleadings raise questions of fact which can only be resolved following submission of a complete evidentiary record and argument.

**WHEREFORE**, a hearing will be promptly scheduled for the purpose of establishing a factual record upon which a decision can be rendered concerning:

WHETHER DTC VIOLATED ITS DUTY TO BARGAIN IN GOOD FAITH AND 19  
DEL.C. §1307 (A)(1) AND/OR (A)(5) BY FAILING OR REFUSING TO  
NEGOTIATE A UNILATERAL CHANGE IN THE DISCIPLINARY PROCESS FOR  
PREVENTABLE ACCIDENTS, AS ALLEGED?

Having found probable cause based on the pleadings, DTC's assertion that the charge fails to state a claim upon which relief can be granted is denied. For the reasons set forth above, DTC's request for deferral is denied.

Dated: January 4, 2016



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