STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

AMALGAMATED TRANSIT UNION LOCAL 842,	)	
	)	
Charging Party,	)	
	)	**ULP No. 13-03-889**
v.	)	**Decision on the Merits**
	)	
STATE OF DELAWARE, DELAWARE TRANSIT CORPORATION,	)	
	)	
	)	
Respondent.	)	

APPEARANCES

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

Rebecca N. Miller, SLREP, for the Delaware Transit Corp.

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

The Amalgamated Transit Union (“ATU”) is an employee organization within the meaning of §1302(i) of the PERA. By and through its affiliated Local 842, the ATU is the exclusive bargaining representative of a unit of “all full-time and part-time [DTC] paratransit employees statewide and all full-time and part-time employees providing fixed route transit service in the Greater Dover Area,” and a second bargaining unit of “all hourly-rated operating and maintenance employees” in New Castle County, within the meaning of §1302(j) of the

PERA.

The ATU and DTC were parties to a collective bargaining agreement with a term of July 1, 2008 through August 31, 2010. At all times relevant to this Charge, the parties were engaged in a binding interest arbitration proceeding for the purpose of establishing the terms of a successor agreement. During this period, the terms of the 2008-2010 agreement remained in effect.

On March 11, 2013, the ATU filed an unfair labor practice charge alleging DTC had engaged in conduct in violation of 19 Del.C. §1307(a)(1) and (a)(5)[1] of the PERA, by unilaterally implementing changes to the Cell Phone Policy which affected mandatory subjects of bargaining, without negotiating those proposed changes with the ATU.

On March 27, 2013, DTC filed its Answer to the Charge including New Matter, in which it acknowledged implementing changes to the cell phone policy but denied that the revisions violated any provisions of the PERA, as alleged.

Thereafter, the further processing of the Charge was held in abeyance at the ATU's request while the parties engaged in an effort to resolve the underlying issues. When those efforts did not result in resolution, the ATU filed its Response to New Matter on May 30, 2013.

On August 16, 2013, DTC filed an Amended Answer to the Charge, asserting the Charge was now moot because DTC had met with the ATU President over the course of five meetings in April through May, 2013, for the purpose of discussing the ATU's concerns with changes to the

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[1] §1307. Unfair labor practices.

(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 unit, except with respect to a discretionary subject.

cell phone policy. It asserted the parties reached an agreement which the ATU President rejected at the last meeting on May 29, 2013, with no explanation nor did he propose a path forward for further negotiations. The DTC asserts "as a measure of good faith and desire to achieve the important goals established by the policy, DTC implemented the exact policy agreed to by the ATU President because there was no other meaningful path or process forward in the wake of ATU's bad faith actions."

On April 27, 2013, the ATU filed its Response to DTC's Amended Answer, specifically denying that agreements were reached.

A Probable Cause Determination was issued on June 30, 2014, finding the pleadings were sufficient to support the further processing of the charge. Thereafter, a prehearing conference was convened to identify factual and legal issues. A hearing on the merits was conducted on August 21, 2014, during which the parties were afforded the opportunity to call and cross-examine witnesses and to submit documentary evidence. The record closed following receipt of written argument submitted by the parties.

This decision is based upon review of the record created by the parties and consideration of their arguments as well as related case law.

FACTS

The facts included herein are derived from the documentary and testimonial evidence presented by the parties.

Since approximately 2009 DTC has regulated the use of cell phones and other electronic devices by employees of DTC while on duty, through Directive #099.01 ("Directive #099.01") which stated:

Division Directive: Cell Phone Usage **REF: 099.01**

Issued by: Stephen B. Kingsberry Issued: 11-09-09
Executive Director

PURPOSE:

Delaware Transit Corporation (DTC) recognizes its responsibility to our employees, customers, and the general public to provide the safest possible environment by acting responsibly, avoiding hazardous situations and recognizing and eliminating unsafe practices. The use of a cellular telephone, cellular telephone accessories, and/or electronic entertainment devices can provide major distractions while operating a revenue or non-revenue vehicle resulting in potential safety hazards.

POLICY:

The Delaware Transit Corporation mandates every effort be expended to provide quality transit services in a safe manner. Recognizing unnecessary distractions can cause undue risks to employees, customers and the general public, DTC prohibits the use of all cellular telephones, cellular telephone accessories and/or electronic entertainment devices, including but not limited to, cellular phones, blackberries, blue-tooth devices, hands-free devices, cellular phone earpieces, cellular phone headsets, portable DVD players, and/or other entertainment devices while operating a DTC revenue or non-revenue vehicle.

POLICY IMPLEMENTED:

The use of any cellular telephone, related accessory, and/or electronic entertainment device is prohibited when operating a DTC revenue or non-revenue vehicle.

An employee operating a revenue or non-revenue vehicle may use a cellular phone in an emergency situation after the vehicle has been stopped in a safe location. An emergency is defined as an unforeseeable combination of circumstances that call for immediate action and/or need for assistance.

Employees may have a personal cellular phone in their possession as long as it is turned off during operation of a revenue or non-revenue vehicle.

Failure to comply with this directive may result in disciplinary action up to and including termination of employment. *Union Exhibit 1*

According to the testimony of the witnesses, Directive #099.01 had been enforced using the standard progressive discipline process used for other discipline administered to bargaining unit employees by DTC. As reflected in disciplinary letters issued to bargaining unit employees in 2012, a letter of warning was issued for a first violation of Directive #099.01. Thereafter, a

second incident within a twelve month period resulted in a one (1) day suspension without pay; a third incident in a twelve month period resulted in a two (2) day suspension without pay; a fourth incident in a twelve month period resulted in a three (3) day suspension; and a fifth incident within a twelve month period resulted in termination of DTC employment. *Union Exhibit 2.*

On January 25, 2013, DTC unilaterally issued a revised cell phone policy. ("Directive #099.02"). There was no documentation or testimony in the record to establish that the revised policy was either provided to the ATU or otherwise announced to employees and the revisions were not discussed nor negotiated with the ATU on or before January 25, 2013. Directive #099.02 stated:

> Division Directive: Cell Phone Usage **REF: 099.02**
> Issued by: Lauren L. Skiver Issued: 11-09-09
> Executive Director Revised: 1-25-13
>
> **PURPOSE:**
> Delaware Transit Corporation (DTC) recognizes its responsibility to our employees, customers, and the general public to provide the safest possible environment by acting responsibly, avoiding hazardous situations and recognizing and eliminating unsafe practices. The use of a cellular telephone, cellular telephone accessories, and/or electronic entertainment devices can provide major distractions while operating a revenue or non-revenue vehicle resulting in potential safety hazards. This directive defines when, how and if electronic devices may be used.
>
> **DIRECTIVE:**
> The Delaware Transit Corporation mandates every effort be expended to provide quality transit services in a safe manner. Recognizing unnecessary distractions can cause undue risks to employees, customers and the general public, DTC <u>prohibits</u> the use of all cellular telephones, cellular telephone accessories and/or electronic entertainment devices, including but not limited to, cellular phones, Smartphones, blue-tooth devices, hands-free devices, cellular phone earpieces, cellular phone headsets, portable DVD players, e-readers and/or other entertainment devices while operating a DTC revenue vehicle.
> DTC's directive regarding the unauthorized use of electronic devices applies while operating revenue vehicles.
> In addition, this directive regarding the unauthorized use of electronic devices applies while operating non-revenue vehicles unless a

hands-free device is in use.

Discipline shall also be applied in accordance with this directive for electronic device related violations in garages, shops and maintenance facilities.

DEFINITIONS:

Electronic Device – Any personal device that makes or receives calls, leaves messages, sends or receives text messages, accesses the internet, receives or sends a global positioning system (GPS) signal, allows for uploads or downloads of data, text or images, or requires any user action to operate. These include but are not limited to cell phones, personal digital assistants (PDA), GPS, games, iPods, iPads, portable computers, MP3 players, televisions, portable radios, video players, as well as any similar or future devices known by different names, whether or not the device is company issued.

Hands-free Device – An attachment, add-on, built-in feature or addition to a mobile telephone or other Electronic Device that, when used, allows for the free use of hands for other actions. This includes a Hands-Free Device that requires the use of hands to initiate or terminate a telephone call or to turn the device on or off. Examples include, but are not limited to, Bluetooth devices, headsets (wired or wireless), and speakerphones.

Operating – Operating a revenue or non-revenue vehicle includes driving or being in control of a revenue or non-revenue vehicle that is moving or capable of being moved unless the revenue or non-revenue vehicle is parked in a safe location off the active roadway with the backup brake engaged as applicable.

Using an Electronic Device means one of the following:

- Operating one or more of the device's functions, such as, but not limited to, viewing the device, using it to check the time, or to check to see if any messages have been received;
- Using the device to communicate orally or through text with another person or another device, such as, but not limited to, placing or answering calls, and sending, reading or replying to text messages or emails; or
- Wearing or using a Hands-Free Device whether or not turned on.

Use of Electronic Devices – Operating Vehicles

Revenue Vehicles:

- Employees operating revenue vehicles are prohibited from using hands-free and Electronic Devices. Employees operating revenue vehicles are also prohibited form wearing Electronic Devices on their person.
- Operators may monitor on board two-way radios while

operating a revenue vehicle.

- In case of an emergency, where on-board equipment is inoperable, an operator may use an Electronic Device after the vehicle has been properly stopped and secured.

Non-Revenue Vehicles:

- Using an Electronic Device while operating non-revenue vehicles is prohibited unless a Hands-Free device is used. Use of a Hands-Free Device should, however, be limited to company business when a vehicle is not equipped with a two way communication system.
- In the event a Hands-Free Device is unavailable, the operator must stop and secure the vehicle prior to using an electronic device.

Garages, Ships, and Maintenance Facilities

- Using an Electronic Device is prohibited in garages, shops, and maintenance facilities, except in designated areas, i.e., break rooms and offices.
- Using an Electronic Device is prohibited while performing safety sensitive duties, i.e., operating a fork truck, etc.

ACCOUNTABLITY: These are the Progressive discipline procedures that will be followed within a 3-year period from the first offense:

Revenue Vehicles:

- Using an Electronic Device while Operating a Revenue Vehicle
  - First Offense: 2 weeks suspension
  - Second Offense: Discharge

Non-Revenue Vehicles:

- Using an Electronic Device while Operating a Non-Revenue Vehicle without a Hands-Free Device
  - First Offense: 2 weeks suspension
  - Second Offense: Discharge

Garages, Shops, and Maintenance Facilities:

- Using an Electronic Device in garages, and maintenance facilities, except in designated areas, i.e., break rooms and offices.
- Using an Electronic Device while performing safety sensitive duties, i.e., operating a fork truck.
  - First Offense: 2 weeks suspension
  - Second Offense: Discharge *Union Exhibit 3*

On February 20, 2013, Directive #099.02 was distributed to all ATU bargaining unit employees, who were placed on notice that the policy would go into effect nine days later, on March 1, 2013.

That same day, ATU President, Roland Longacre (ATU President), sent an email to DTC Chief Executive Officer, Lauren Skiver expressing the union's concerns and requesting to discuss concerns and questions it had. Appended to that email was a document entitled, "Union's Cell Phone Policy Issues," which stated:

> 1. Punitive progression on discipline. This policy takes us from a 5 step process in a rolling calendar year that has been used in the past not only for this but for a vast majority of our progressive discipline to a much more punitive standard of a 2 step in a rolling 3 year period. Are we looking for terminations or to correct behavior?
> 2. Why was there a change from the previous policy to this one which now allows the use of hands free ear pieces in non-revenue vehicles while the vehicle is in motion? Has it gotten safer to use these devices in Non-Revenue Vehicles since the last policy was issued?
> 3. Many operators use GPS devices to assist in the performance of their jobs. Maps are both getting harder to find as less of them are being published and are not up to date. Delaware is still a place where new building is going on creating new roads. This will force operators to rely on dispatchers more putting a much larger work load on the dispatchers. Operators will be calling in more frequently for locations of drop offs and pickups and directions. It is not known when upgrades to the current communication system will be in place that will provide an on board GPS that drivers can access.
> 4. In the Maintenance Department why would a supervisor be able to use a cell phone in an office when a land line is readily available for company business? Obviously we do not want employees on the phone when they are supposed to be working why would a Union employee not be able to use their phone in an emergency in the lined areas in the shop away from the various work stations or next to their tool box?
> 5. On page 2 where it talks about Use of Electronic Devices – Operating Vehicles: the first bullet point what is the definition of "Wearing Electronic Devices on their Person".
> 6. Will there be issues when an employee gets an emergency call from home in dispatch? Dispatchers already face a heavy workload with normal operations. This policy will increase their burden with the

increase in calls for directions.

7. This policy appears to be directed solely at the members of Local 842 and is *[sic]* such discriminatory toward the members of this bargaining unit. The change from zero tolerance in the use of hands free devices in the previous policy to the use of hands free devices being allowed in non-revenue is a prime example of this. Another is the addition of the prohibition of use in the maintenance facilities with the exception of the foreman's office. How is the company going to enforce this policy with the supervisors as far as abuse from extended personal calls during work hours when using hands free devices in non-revenue vehicles, or the foreman's office? There are no cameras or other surveillance devices on most non-revenue vehicles. There is no surveillance equipment directed towards the foreman's office in the shop. The Foreman's Office does have a land line phone in the office.
8. What is to be done with existing letters and discipline that are in employee's files with regards to the new progression? Will these be removed and employees be allowed to start fresh with a clean record?
9. When is the official date that this policy takes effect? *Exhibit 5 to the Unfair Labor Practice Charge.*

The parties agreed to discuss the revisions to Directive 099.01. Discussions occurred on five (5) separate occasions: April 2, April 9, April 17, April 29 and May 29, 2013. The parties agreed to hold the pending unfair labor practice charge in abeyance while they attempted to resolve their differences. They also agreed that no discipline would occur during the period of the discussions. During these discussions, the ATU's concerns regarding use of GPS systems in paratransit and maintenance vehicles and the use of portable radios in the maintenance shop areas were resolved. No final agreement was reached, however, on the disciplinary progressions.

At the final meeting on May 29, 2013, DTC presented the ATU with a comprehensive document for signature. The ATU President verbally rejected the proposed agreement specifically taking issue with the disciplinary progression and the manner in which cell phone incidents which led to accidents would be addressed.

The following day, May 30, 2013, Richard Paprcka, DTC's Chief Operating Officer

(DTC Chief Operating Officer) sent a letter to the ATU President, which stated:

> On May 29, 2013, we held the last of a series of meetings to finalize the cell phone policy which is the subject of U.L.P. No. 13-03-889, in an attempt to reach a mutually agreeable policy for all DTC employees. As Local 842 President, you were representing your members in this and the previous meetings that got the policy to a point where it was ready for mutual agreement. At the start of the meeting, you advised Mr. Seibel and I that your position had changed and you now had no interest in agreeing to any settlement regardless of the terms since your Executive Board would not support it.
>
> With that in mind, DTC has no other alternative then to enforce the DTC Cell phone policy #99.02 as issued January 25, 2013, including the discipline schedule for violations of it. As you know, these disciplinary proceedings were postponed by mutual consent of both DTC and ATU Local 842 pending the outcome of the discussions to revise this policy.
>
> Although discussions between us over the previous weeks were productive and it appeared that a revised cell policy was within reach, we are very disappointed in this outcome. We encourage you to revisit this issue with your Executive Board as we remain committed to resolving our differences with regard to this policy.
>
> Should you have any questions, I can be reached at [*phone number provided*]. *Union Exhibit 8.*

By letter dated June 12, 2013, the ATU President responded to DTC's Chief Operating Officer:

> I received your letter dated May 31, 2013 [*sic*] concerning our talks about the cell phone policy and while most of your letter is accurate a few statement [*sic*] we feel is was [*sic*] not accurate as it describes the Union's position. At our last meeting I did state that the Union Executive Board was not in agreement with the latest offer from DTC. You also stated that DTC could not move any further then [*sic*] their present proposal. It was then that I indicated that we would wait for the PERB to make their determination.
>
> As you are aware I submitted the Union's response to the State's answer to ULP 13-03-889. I also received by email revised dates for discipline under the disputed policy. I would have hoped that this could have waited until PERB made their determination on the ULP charge. It is our position that this is a subject of collective bargaining and DTC should [2] be able to unilaterally force this on the ATU members just because we

[2] When questioned directly at the hearing, the ATU President testified there was a typographic error and that the sentence should read, "…DTC should <u>not</u> be able to unilaterally force this on ATU members…"

> came to an impasse. We should have to wait until PERB has made their determination on the charge.
>
> With that being said I am requesting that the discipline in this matter be postponed until PERB has reached its decision. Also regardless of what policy we would be working under the Union would be grieving several of these due to the fact that the letters are incomplete. Many are missing who is alleged to have observed the violation, and where the alleged violation is supposed to have happened.
>
> It is our hope that you will consider this request. *Employer Exhibit 1*.

There were no further meetings held between the parties, and the record does not clearly establish whether Directive #099.02 was, in fact, implemented and whether any bargaining unit employees were disciplined thereunder. On July 31, 2013, DTC's Chief Operating Officer again sent a letter to the ATU Local 842 President, which stated:

> As you know, we recently discussed changes to the DTC Cell Phone Policy. Despite our best efforts, we were unable to reach agreement. While we were disappointed in this outcome, we did appreciate the opportunity to exchange [*sic*] in a constructive conversation with you about this important subject. With that being said, we are prepared to introduce the new DTC Cell phone policy to you.
>
> The new DTC Cell Phone Policy #099.03 replaces the old DTC Cell Phone Policy #099.02, and will be issued on July 31, 2013. It will be retroactive back to June 1, 2013. As you know, we suspended all disciplinary action with regard to #099.02 after the Union filed U.L.P. No. 13-03-889. As a result, no one was penalized under #099.02. This was a concession made by DTC that allowed the parties to discuss the cell phone policy freely without any scheduled disciplinary distraction. DTC adopted many of the changes that the Union suggested was needed to address operator and maintenance concerns in the development of #099.03.
>
> Cell-phone violations issued prior to June 1, 2013 will be subject to progressive discipline as outlined in the former five (5) step disciplinary schedule. Violations occurring on or after June 1, 2013 will be subject to the disciplinary schedule described in Policy #099.03 (attached); disciplinary accrual also begins with the first violation during this same time period. You will note that this excludes all violations involving the use of a dedicated GPS, a change that was requested by the Union from #099.02.
>
> Notice of implementation will be posted in each work location. Copies of the DTC Cell phone policy #099.03 will be distributed to all work areas and will be available for employees to review upon request. Should

you have any questions, I can be reached at [*phone number provided*]. *Union Exhibit 9.*

Appended to this letter was a copy of Directive #099.03, Division Directive: Cell Phone Usage, which stated:

Division Directive: Cell Phone Usage	**REF: 099.03**
Issued by: Richard Paprcka, COO	Effective Date: 6-01-13
Approved by: Lauren L. Skiver, CEO	Revised: 6-01-13

PURPOSE:

Delaware Transit Corporation (DTC) recognizes its responsibility to our employees, customers, and the general public to provide the safest possible environment by acting responsibly, avoiding hazardous situations and recognizing and eliminating unsafe practices. The use of a cellular telephone, cellular telephone accessories, and/or electronic entertainment devices can provide major distractions while operating a revenue or non-revenue vehicle resulting in potential safety hazards. This directive defines when, how and if electronic devices may be used.

DIRECTIVE:

The Delaware Transit Corporation mandates every effort be expended to provide quality transit services in a safe manner. Recognizing unnecessary distractions can cause undue risks to employees, customers and the general public, DTC prohibits the use of all cellular telephones, cellular telephone accessories and/or electronic entertainment devices, including but not limited to, cellular phones, Smartphones, blue-tooth devices, hands-free devices, cellular phone earpieces, cellular phone headsets, portable DVD players, e-readers and/or other entertainment devices while operating a DTC revenue vehicle.

DTC's directive regarding the unauthorized use of electronic devices applies while operating revenue vehicles.

In addition, this directive regarding the unauthorized use of electronic devices applies while operating non-revenue vehicles unless a hands-free device is in use.

Discipline shall also be applied in accordance with this directive for electronic device related violations in garages, shops and maintenance facilities.

DEFINITIONS:

Electronic Device – Any personal device that makes or receives calls, leaves messages, sends or receives text messages, accesses the internet, allows for uploads or downloads of data, text or images. These include but are not limited to cell phones, personal digital assistants

(PDA), games, iPods, iPads, portable computers, MP3 players, televisions, portable radios, video players, as well as any similar or future devices known by different names, whether or not the device is company issued. A specific exception to these prohibited electronic devices is a "hands-free GPS only device" which shall be operated in a hands-free manner. This exclusion applies to Paratransit Operators and Vehicle Maintenance employees and is an interim measure pending the full implementation and operation of the new AMDT Units. This exception recognizes the benefits of these hands-free GPS units to the DTC Paratransit service and the Vehicle Maintenance Department.

Hands-free Device – An attachment, add-on, built-in feature or addition to a mobile telephone or other Electronic Device that, when used, allows for the free use of hands for other actions. This includes a Hands-Free Device that requires the use of hands to initiate or terminate a telephone call or to turn the device on or off. Examples include, but are not limited to, Bluetooth devices, headsets (wired or wireless), and speakerphones. As noted earlier, a hands-free GPS only device is permitted for Paratransit Operators and Vehicle Maintenance Department employees.

Operating – Operating a revenue or non-revenue vehicle includes driving or being in control of a revenue or non-revenue vehicle that is moving or capable of being moved unless the revenue or non-revenue vehicle is parked in a safe location off the active roadway with the backup brake engaged as applicable.

Using an Electronic Device means one of the following:

- Operating one or more of the device's functions, such as, but not limited to, viewing the device, using it to check the time, or to check to see if any messages have been received;
- Using the device to communicate orally or through text with another person or another device, such as, but not limited to, placing or answering calls, and sending, reading or replying to text messages or emails; or
- Wearing or using a Hands-Free Device whether or not turned on.

Use of Electronic Devices – Operating Vehicles

Revenue Vehicles:

- Employees operating revenue vehicles are prohibited from using hands-free and Electronic Devices with the specific exception of a hands-free GPS unit. Employees operating revenue vehicles are also prohibited form wearing Electronic Devices on their person.
- Operators may monitor on board two-way radios while operating a revenue vehicle.
- In case of an emergency, where on-board equipment is

inoperable, an operator may use an Electronic Device after the vehicle has been properly stopped and secured.

- All employees may utilize a cell phone when the employees are on a layover, not subject to being on duty, or on meal break and/or bathroom breaks. A cell phone may be used at a transit hub or layover point, only when the vehicle has been turned off and properly secured, provided that it does not create an unsafe condition or contribute to or cause any disruption or delay in service or any inconvenience to customers. The Operator should exit the driver's seat and the vehicle (weather permitting) in these incidents to avoid confusion upon observation.
- Maintenance employees who are servicing a vehicle on a road call may utilize a cell phone from the vehicle to make a work related call regarding the condition of the vehicle but only after the vehicle has been turned off and properly secured. The employee should exit the driver's seat and the vehicle (weather permitting) in these instances to avoid confusion upon observation.

Non-Revenue Vehicles:

- Using an Electronic Device while operating non-revenue vehicles is prohibited unless a Hands-Free device is used. Using a Hands-Free Device should, however, be limited to company business when a vehicle is not equipped with a two way communications system.
- In the event a Hands-Free Device is unavailable, the operator must stop and secure the vehicle prior to using an electronic device.

Garages, Shops, and Maintenance Facilities

- Using an Electronic Device is prohibited in garages, shops, and maintenance facilities, except in designated areas, i.e., break rooms and offices. This is not meant to prohibit a portable radio being used from a maintenance employee's work bench. However, a portable radio being carried on their person and/or used in conjunction with ear buds is specifically prohibited while on duty.
- Using an Electronic Device is prohibited while performing safety sensitive duties, i.e., operating a fork truck, etc.

ACCOUNTABLITY: These are the Progressive discipline procedures that will be followed within a 2-year period from the first offense:

NOTE: Discipline for accidents that involved the use of a prohibited electronic device will be administered in accordance with the DTC Accident Review Committee Directive.

Revenue Vehicles:

- Using an Electronic Device while Operating a Revenue Vehicle
  - First Offense: 10 work day suspension
  - Second Offense: 20 work day suspension
  - Third Offense: Discharge

Non-Revenue Vehicles:

- Using an Electronic Device while Operating a Non-Revenue Vehicle without a Hands-Free Device
  - First Offense: 10 work day suspension
  - Second Offense: 20 work day suspension
  - Third Offense: Discharge

Garages, Shops, and Maintenance Facilities:

- Using an Electronic Device in garages, and maintenance facilities, except in designated areas, i.e., break rooms and offices.
- Using an Electronic Device while performing safety sensitive duties, i.e., operating a fork truck.
  - First Offense: 10 work day suspension
  - Second Offense: 20 work day suspension
  - Third Offense: Discharge *Union Exhibit 10*

ISSUE

WHETHER DTC VIOLATED §1307 (A)(1) AND/OR (A)(5) OF THE PUBLIC EMPLOYMENT RELATIONS ACT, AS ALLEGED, BY UNILATERALLY IMPLEMENTING REVISED DIRECTIVE #099.02 AND/OR #099.03 (CELL PHONE USAGE), AS ALLEGED.

DISCUSSION

It is well established in Delaware case law developed under the application of the three public sector collective bargaining statutes 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.[3] It is undisputed that, insofar as it applies to bargaining unit employees, the administration of discipline for violating the cell phone policy was modified both in the Revised Directive #099.02 which was distributed in February, 2013 and in Directive #099.03 which was implemented on July 31, 2013.

The PERB has held that a unilateral change in the status quo of a mandatory subject of bargaining constitutes a *per se* violation of the duty-to-bargain. The parties acknowledge that, but for the continuing dispute over the subject of discipline resulting from violating the cell phone policy, all other issues were resolved during their discussions. There is no dispute in this case that "discipline" qualifies as a term and condition of employment and is a mandatory subject of bargaining. Consequently, while DTC may have been discussing other concerns the union had with Directive #099.02 as it was issued in February, 2013, it had a statutory duty to bargain concerning the undisputed unilateral changes to the discipline included in that policy and in any subsequent revisions.

Two witnesses testified in the hearing: Roland A. Longacre, immediate past President of ATU Local 842 and Richard Paprcka, DTC's Chief Operating Officer. Both men testified to the best of their recollections concerning the meetings which were held between April 2 and May 29, 2013. Some of the testimony, however, was inconsistent with the documents which were created contemporaneously with the meetings and introduced into evidence at the hearing.

The DTC Chief Operating Officer testified he was hired into his position in early 2013 and had been in the position for approximately a month when he was scheduled to conduct three disciplinary hearings involving ATU bargaining unit employees on April 2, 2013. Prior to

[3] *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).

convening the scheduled hearings, he requested to meet with the ATU President to discuss three pending unfair labor practice charges (which he characterized as relating to DTC's return to work, tampering with safety and surveillance equipment, and cell phone usage policies). He testified he expressed to the ATU President that he preferred to try to work things out with the union rather than litigate problems and asked if the ATU was willing to meet to try to resolve the issues underlying the ATU's pending unfair labor practice charges. The ATU President agreed to meet with DTC's Chief Operating Officer to discuss the union's concerns. Following this exchange, the parties agreed to cancel the disciplinary hearings scheduled to be heard that day.

DTC's Chief Operating Officer testified a second meeting was held on April 7 or 9, 2013, in the conference room at DTC's Beech Street office in Wilmington, which he and his Labor Relations Manager and the ATU President and Vice President attended. During that meeting, he testified the parties resolved the return to duty policy issue by agreeing to provide eight hours of back pay to affected bargaining unit employees. The parties then signed off on a "ulp settlement", to resolve that unfair labor practice charge.

The parties also discussed the tampering policy issue and reached a verbal agreement which would resolve the second pending unfair labor practice charge. It was agreed the verbal agreement would be reduced to writing by DTC and reviewed with the union at the next meeting.

According to DTC's Chief Operating Officer, the discussion then turned to the cell phone usage policy at issue in this charge. The ATU President clearly and unequivocally expressed the union's concern that moving from a five step to a two step disciplinary progression (as included in Directive #099.02) was unwarranted, unfair, and unnecessary to accomplish the goal of preventing bargaining unit employees from using cell phones and other electronic devices while they were performing DTC work. He expressed concern about the prohibition on the use of GPS devices for paratransit operators and questioned the prohibition on having music played through

radios in the maintenance shop. He also expressed the ATU's belief that Directive #099.02 unfairly targeted bargaining unit employees because the prohibition on the use of hands-free devices was lifted for non-revenue vehicles.

DTC's Chief Operating Officer testified that during the course of the four meetings convened in April, 2013, the parties were able to fairly easily resolve the concerns relating to GPS usage in paratransit and maintenance vehicles and to allow for radios to continue to be played in the maintenance shops. He also testified they spent a good deal of time discussing and resolving how and when bargaining unit employees might be permitted to use or check their electronic devices when they were on breaks or layovers between runs. He testified the parties used the policy adopted by the New Jersey Transit Authority (his previous employer) as a starting point and then "word smithed" changes to create language which was suitable for DTC operations and acceptable to the ATU.

Both the DTC Chief Operating Officer and the ATU President testified they did not spend much time during these meetings discussing the union's fairness concern that the more restrictive portions of the policy applying only to bargaining unit employees. It is undisputed that Directive #099.03, which DTC adopted on July 31, 2013 (retroactive to June 1, 2013) does not make any changes to this aspect of Directive #099.02 which was distributed in February, 2013.

It is unclear when the working draft of the cell phone usage policy the parties were discussing (denoted as "REF: #009.XX")[4] was created or provided to the ATU. DTC's Chief Operating Officer testified this document was created by DTC and included the agreements which had been reached up to the point of its creation. DTC did not provide any documentation which shed light on which it created this specific document or whether there were other drafts

[4] *Union Exhibit 6.*

that were generated over the course of the four meetings. It was undisputed that the ATU did not either generate drafts or provide written proposals during the course of these discussions.

The ATU President testified he was not provided with a copy of this document until the April 29 meeting and that he continued to express his concerns about the severity of the discipline, with the union proposing a five and ten day suspension (rather than ten and twenty days). He testified there was on-going discussion about how violations of the policy which resulted in a preventable accident would be treated, and that language in this document reflects the union's proposal to skip the first step of discipline and progress to the second step in the event of an accident. He also testified this document reflects that the parties did agree to increase the "look-back" period from one (as it had been applied under #099.01) to two years, which reduced it from the three year look-back period in Directive #099.02 that DTC published in February.

A comparison of *Union Exhibit 6* (which I conclude reflects the evolution of the policy through the April 29, 2013 meeting)[5] and *Union Exhibit 7* (the document provided to the ATU at the May 29 meeting) reveals there were substantive changes made to the disciplinary schedule, specifically related to an accident involving a cell phone usage violation. These documents support the testimony of the ATU President that there was, in fact, no agreement reached by these parties prior to or at the May 29 meeting. It does not support DTC's Chief Operating Officer's testimony that the parties had agreed in earlier meetings to not address the issue of a related accident within the cell phone usage policy.

[5] This document (*Union Exhibit 6*) has a revision date of May 1, 2013, which the DTC Chief Operating Officer testified was the effective date it placed on all drafts DTC prepared during the course of the April meetings because the parties had agreed to suspend all disciplinary proceedings concerning alleged violations of this policy until May 1. I find this suspect in that the "final" policy which DTC provided to the ATU at the final meeting on May 29, 2013, has a revision date of May 10, 2013 *(Union Exhibit 7*). There is no explanation or evidence of any agreement between the parties to change this revision date, if as DTC's Chief Operating Officer testified, the May 1 date was reached by agreement of the parties in early April.

DTC's Chief Operating Officer testified that at the conclusion of the April 29 meeting he did not believe there were any remaining unresolved issues concerning acceptable revisions to the Cell Phone Usage policy. Knowing that he would be out of the office for the following two weeks, the DTC Chief Operating Officer directed his Labor Relations Manager to make the changes which were agreed upon in the April 29 meeting and to provide them to the union as soon as possible so that any differences could be identified before a final meeting. He testified he was disappointed when he returned to the office and learned the draft had not yet been provided to the union. He further testified that DTC then scheduled the May 29 meeting but did not provide a copy of the document to the union prior to that meeting.

When the DTC Chief Operating Officer, the DTC Labor Relations Manager and the ATU President met in DTC's Dover offices on May 29, 2013, the document identified as Directive #099.02, revised 5-10-13 (*Union Exhibit 7*) was provided to the ATU President for the first time, ostensibly to sign as the final agreement of the parties. The DTC Chief Operating Officer testified the ATU President responded there was no way he could sign the document because his Executive Board did not support it.

The ATU President had a very different recollection of the May 29 meeting. He does not recall that the union had at any time agreed to a three step disciplinary progression constituted of a ten day suspension, a twenty day suspension and then termination. He recalled the union had moved from its initial proposal to a progression of a five day suspension, a ten day suspension, and then termination. He testified the question of the interaction between the cell phone usage policy and a preventable accident policy came into DTC's consideration after a serious accident involving a paratransit bus in Sussex County and was not a part of the April - May 2013 discussion between the parties. The DTC Chief Operating Officer also referenced this accident as influencing DTC's consideration of the cell phone usage policy but was unable to establish

either when this incident occurred or when it was discussed (if at all) in these meetings.

The Chief Operating Officer's statement in his May 30, 2013 letter to the union indicates a fundamental misunderstanding about the nature of the duty to bargain concerning a mandatory subject of bargaining under the PERA. He stated, "DTC has no other alternative then to enforce the DTC Cell phone policy #099.02 as issued January 25, 2013[6], including the discipline schedule for violations of it." In fact, DTC had a statutory duty to bargain with ATU Local 842 concerning the disciplinary schedule and had no authority to implement changes thereto without bargaining, at least to the point of impasse, with the union.

The fact that DTC did not implement the policy on May 30, 2013, to which it asserts DTC had reached agreement with the union is telling. In fact, it did not issue or implement Directive #099.03 until July 1, and then advised the union it would be implemented retroactively to June 1, 2013. There is no evidence that any agreement was ever reached between these parties as to the manner of implementation of the discipline schedule set forth in the July 31, 2013 letter, which states,

> "Cell-phone violations issued prior to June 1, 2013 will be subject to progressive discipline as outlined in the former five (5) step disciplinary schedule. Violations occurring on or after June 1, 2013 will be subject to the disciplinary schedule described in Policy #099.03 (attached); disciplinary accrual also begins with the first violation during this same time period… *Union Exhibit 9*

DTC's argument that it "was entitled to implement Directive #099.03 after ATU refused to participate in further discussions and declared impasse" is misplaced. DTC argues it had a right under the law to implement the policy after impasse was reached, relying upon the U.S.

[6] Directive #099.02 as it was issued on January 25, 2013, included two disciplinary steps (1st offense: 2 week suspension; 2nd offense: discharge; and contained no language concerning accidents which involved cell phone usage violations).

Supreme Court's decision in *NLRB v. Katz.*[7] The Delaware PERB adopted the *Katz* rule in one of its earliest cases, *Appoquinimink Ed. Assn. v. Bd. of Education*.[8] In a later decision in *New Castle County Vo-Tech Education Association v. New Castle County Vo-Tech School District*,[9] this agency found the employer's reliance on a purported impasse to support imposition of its last offer was misplaced, finding,

> The District's reliance on *Katz* to support such a right is misplaced. 14 Del.C. Section 4016, Strikes Prohibited, sub-section (a) provides that "No public school employee shall strike while in the performance of his or her official duties." The integrity of the collective bargaining process is of crucial importance and, if it is to be maintained, the statutory prohibition on self-help must necessarily impose upon the employer a correlative duty to refrain from altering terms and conditions of employment during the course of negotiations. This duty is greater in the public sector than in the private sector where employees have a means to balance the relative bargaining positions of the parties by exercising their right to strike, a right expressly precluded by the Delaware statute.

In *Appoquinimink Education Association v. Appoquinimink School District,*[10] it was found significant that the Delaware's public sector collective bargaining law is silent concerning when, if at all, and under what circumstances, if any, the duty to bargain in good faith ends thereby permitting unilateral changes to the status quo of mandatory subjects of bargaining.

In a prior unfair labor practice decision involving ATU Local 842 and DTC[11], this agency applied a standard for evaluating whether the employer had met its statutory good faith obligations to negotiate prior to implementing a unilateral change to a mandatory subject of bargaining:

> [A]s a general rule, when, as here, parties are engaged in collective negotiations for a collective bargaining agreement, an employer's obligation to refrain from unilateral changes extends beyond the duty to

[7] 369 U.S. 736, 742 (1962).
[8] ULP No. 1-2-84A, I PERB 23 (1984).
[9] ULP No. 88-05-025, I PERB 309, 312 (1988).
[10] ULP No. 98-09-243, III PERB 1785, 1801 (1998).
[11]

> provide a union with notice and an opportunity to bargain about a particular subject matter before implementing such changes. Rather, an employer's obligation under such circumstances encompasses a duty to refrain from implementing such changes at all, absent overall impasse on bargaining for the agreement as a whole.
>
> There are two limited exceptions to that general rule:
>
> 1) when a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining, or
>
> 2) when economic exigencies or business emergencies compel prompt action. *Visiting Nurses Services of Western Mass. v. NLRB*, 177 F. 3d 52, 57 (1st Cir. 1999), citing *Visiting Nurse Services*, 1998 WL 414982 at *9.

The record supports a finding that the parties met and discussed changes to Directive #099.02 prior to DTC's unilateral implementation of Directive #099.03. It does not, however, establish that impasse existed, nor does it provide a foundation for finding there was a legally sustainable basis for implementing a unilateral change.

While a unilateral change in a mandatory subject of bargaining is prohibited without agreement by the parties, there is no obligation on either party to agree to bargain during the term of an existing collective bargaining agreement absent a provision in that agreement requiring mid-term bargaining. Either party may request to open negotiations and either party may decline to participate with impunity. In this case, the parties had been involved in extended negotiations for a successor to their 2008-2010 collective bargaining agreement, and were involved in a very contentious binding interest arbitration proceeding. There is no evidence in this record that this issue was ever presented as part of those negotiations.

It was a violation of the duty to bargain concerning discipline when DTC issued Directive #099.02 on February 20, 2013 which included broad substantive changes to the disciplinary progression for violations of the policy. It was a second violation of the duty to bargain when DTC issued Directive #099.03, again modifying the disciplinary procedures both for cell phone

usage and for accidents involving cell phone usage. The fact that the parties met in an unsuccessful effort to resolve an unfair labor practice charge does not obviate the statutory duty to bargain concerning a mandatory subject of bargaining.

Finally, there has been no clear and unmistakable waiver by the ATU of its statutory right to negotiate with respect to discipline in this case. An effective waiver under the PERA must be evidenced by, "… an express contractual provision, the parties' negotiating history, or a combination of the two." *AFSCME Council 81 v. DelDOT*, ULP 95-01-111, II PERB 1279, 1291 (1995). The record establishes these parties engaged in discussions concerning the substance of the Cell Phone Usage Directive i21n April and May, 2013. While it is clear that a meeting of the minds occurred on many of the ATU's concerns and that those resolutions were included in the final Directive #099.03, it is also clear that the parties did not resolve the one area on which there was an absolute duty to bargain, e.g. discipline under the policy.

CONCLUSIONS OF LAW

1. 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.

2. The Amalgamated Transit Union, Local 842 is an employee organization within the meaning of 19 Del.C. Section 1302(i) of the PERA.

3. By and through its affiliated Local 842, the ATU is the exclusive bargaining representative of a unit of "all full-time and part-time [DTC] paratransit employees statewide and all full-time and part-time employees providing fixed route transit service in the Greater Dover Area," and a second bargaining unit of "all hourly-rated operating and maintenance employees" in New Castle County, within the meaning of §1302(j) of the PERA.

4. The ATU and DTC were parties to a collective bargaining agreement with a term of July 1, 2008 through August 31, 2010. At all times relevant to this Charge, the parties were engaged in a binding interest arbitration proceeding for the purpose of establishing the terms of a successor agreement. During this period, the terms of the 2008-2010 agreement remained in effect.

5. In the absence of an agreement between the parties, by unilaterally implementing Directive #099.02 on February 20, 2013, and Directive #099.03 on July 31, 2013, retroactive to June 1, 2013, DTC acted in derogation of its statutory duty to bargain and violated 19 Del.C. Section 1307 (a)(1) and (a)(5).

WHEREFORE, THE DELAWARE TRANSIT CORPORATION IS HEREBY ORDERED TO TAKE THE FOLLOWING AFFIRMATIVE STEPS:

A) Cease and Desist from engaging in conduct which violates the employer's obligation to negotiate in good faith with respect to a mandatory subject of bargaining, i.e., discipline. The changes in the disciplinary progression for violating the cell phone usage policy are to be immediately rescinded and returned to the status quo as it existed under Directive #099.01 prior to the unilateral changes.

B) Administer all discipline occurring after January 25, 2013, according to the discipline schedule as it existed prior to that date under Directive #099.01.

C) Make whole any employee who suffered adverse consequences as a result of discipline assessed during the foregoing period other than that proscribed in Directive #099.01.

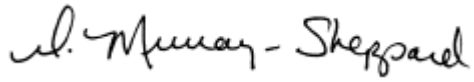
D) Immediately post the Notice of Determination in all areas where notices affecting employees in the bargaining unit represented by ATU are normally posted throughout the Department and in its administrative offices. These Notices must remain posted for at least 30

days in order to provide notice to all affected employees of the decision in this matter.

E) Notify the Public Employment relations Board in writing within sixty (60) calendar days of the steps taken to comply with this Order.

IT IS SO ORDERED.

Dated: March 8, 2016



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