

STATE OF DEAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

<p>AMALGAMATED TRANSIT UNION,</p> <p>LOCAL NO. 842,</p> <p style="padding-left: 100px;">Charging Party,</p> <p style="text-align: center; padding-top: 20px;">v.</p> <p>STATE OF DELAWARE, DEPARTMENT</p> <p>OF TRANSPORTATION, DELAWARE</p> <p>TRANSIT CORPORATION,</p> <p style="padding-left: 100px;">Respondent.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p><u>ULP No. 12-04-862</u></p> <p>Probable Cause</p> <p>Determination</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 “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”, within the meaning of §1302(j), of the Act.

The ATU and DTC are 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 April 9, 2012, ATU filed an unfair labor practice charge with the Public Employment Relations Board (“PERB”) alleging conduct by Respondent in violation of Section 1307(a)(1), (a)(2), (a)(3), (a)(5), (a)(6) and/or (a)(7), of the Act.¹ Specifically, the ATU alleges DTC has failed or refused to negotiate concerning a return to work training requirement, which the ATU asserts is a mandatory subject of bargaining. ATU also asserts DTC has violated Section §11 of the parties’ collective bargaining agreement by enacting a return to work policy which it administers on an arbitrary “case-by-case” basis. By way of example, the Charge includes numerous examples of Kent County Paratransit Operators who were returned to work after periods of time ranging from six weeks to one year in 2011, on whom more limited recertification training requirements were imposed than those imposed on Kent County Paratransit Drivers Donna Whitaker and Harry Bruckner, who were each returned to work by a grievance arbitration award.

On April 19, 2012, the State filed its Answer to the Charge asserting it has a

¹ §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.
- (2) Dominate, interfere with or assist in the formation, existence or administration of any labor organization.
- (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 employer representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.
- (6) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.
- (7) Refuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting contract.

longstanding practice to require training for any employee returning to work after an absence of thirty (30) days or longer. DTC asserts the length and extent of the required training is determined on a case-by-case basis considering such factors as the duration of absence, length of service, work and safety history, changes to policies, procedures and/or equipment. Trainers provide this training on a rotational basis during the assigned trainer's shift. Whitaker was denied the opportunity to work extra duty hours on Saturday, December 10, 2011, because she had not yet completed the required training following her return to work.

At the time Ms. Whitaker returned to work, DTC did not have a written policy addressing return to work training. The State maintains that pursuant to Section 5² of the collective bargaining agreement, it retains the right to issue appropriate workplace policies. The subject of return to work training is not addressed in the collective bargaining agreement; consequently, the practice in place at that time did not conflict with any provision of the negotiated collective bargaining agreement.

The State admits it adopted Policy 0104.01 "Return to Work Training Requirement for Employees"³ on March 12, 2012 in response to the ATU's concerns, pursuant to its authority to issue appropriate policies for the management of its workforce as set forth in Section 8⁴ of the collective bargaining agreement.

The State included New Matter in its Answer, alleging the Charge asserts no facts

² Section 5: The management of the administration and the direction of the working forces, including the right to hire, promote or transfer . . . are recognized to be the Administration's, except that the exercise of such rights shall not be in violation of the terms and conditions of the Agreement.

³ Attachment 2 to the State's Answer.

⁴ Section 8 of the parties' collective bargaining agreement is entitled, "Disagreements, Disputes, Grievance Procedure and Arbitration".

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. The State also 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.

On April 27, 2012, Charging Party filed a Response to New Matter denying the New Matter contained in the State's Answer.

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).

Based on the pleadings, even when considered in a light most favorable to the ATU, there are no facts to support the claim that DTC's alleged failure or refusal to negotiate concerning return to work training requirements may have violated 19 Del.C. §1307(a)(2) and/or (a)(7) as alleged. Wherefore, these portions of the Charge are dismissed.

Whether return to work training requirements are a mandatory subject of bargaining about which the State is obligated to bargain with Charging Party raises a question of first impression before the PERB.

The Charge alleges DTC has failed or refused to negotiate with the ATU concerning condition of employment, i.e., the return to work training requirements. The Charge also asserts the ATU specifically requested to negotiate and that DTC refused this request. Resolution of the individual grievances filed on behalf of Ms. Whitaker and Mr. Bruckner will not and cannot be dispositive of the question of whether DTC has a duty to negotiate concerning return to work training requirements. 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. A hearing will be promptly scheduled for the purpose of creating a factual record upon which a decision can be rendered concerning DTC's obligation, if any, to bargain with ATU Local 842 over return to work training. It is the ATU's burden to establish that return to work training qualifies as a mandatory subject of bargaining.

DETERMINATION

The pleadings do not support a finding that there is probable cause to believe that the State violated 19 Del.C. §1307(a)(2) and (a)(7). Consequently, that portion of the Charge is dismissed.

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), (a)(3), (a)(5) and/or (a)(6) may have occurred. The pleadings raise questions of fact which can only be resolved following submission of a complete evidentiary record upon which the legal issues may be considered and a decision may be rendered.

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

WHETHER DOC VIOLATED ITS DUTY TO BARGAIN IN GOOD FAITH AND
19 DEL.C. §1307 A)(1), (A)(3), (A)(5) AND/OR (A)(6) BY FAILING OR
REFUSING TO NEGOTIATE CONCERNING RETURN TO WORK TRAINING
REQUIREMENTS, AS ALLEGED?

Having found probable cause based on the pleadings, the State'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: March 15, 2013



CHARLES D. LONG, JR.
Hearing Officer
Del. Public Employment Relations Board