STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF DELAWARE, DEPARTMENT OF TRANSPORTATION, DELAWARE TRANSIT CORPORATION,	)	
Appellant,	)	**PERB Review of Hearing Officer's Decision on the Pleadings**
v.	)	
	)	**ULP No. 12-04-863**
AMALGAMATED TRANSIT UNION, LOCAL 842,	)	
Appellee.	)	

APPEARANCES

Thomas J. Smith, SLREP/OMB, for Appellant, DTC

Roland W. Longacre, President/Business Agent, for Appellee, ATU Local 842

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. That agreement includes a contractual grievance procedure that culminates in final and binding arbitration.

On April 9, 2012, the ATU filed an unfair labor practice charge alleging conduct by DTC in violation of §1307(a)(1), (2), (3), (5) and (6), of the Act.[1] Specifically, the ATU alleged that DTC failed to comply with a binding grievance arbitration decision. The arbitration sustained the grievance filed by the Union protesting the discharge of a bargaining unit employee and directed DTC to reinstate the employee with back pay and "all benefits including seniority that may have been lost as a result of the termination."[2] The Charge asserted DTC failed and refused to pay the grievant a safety bonus and an

[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.

[2] The arbitrator's award was upheld on appeal by both the Delaware Court of Chancery (C.A. No. 5345 VCL (Feb. 4, 2011, Laster, V.C.)) and the Delaware Supreme Court (*Delaware Transit Corporation v. Amalgamated Transit Union Local 842*, 342A.3d 1064 (De. 2011)).

attendance incentive to which he is entitled under Sections 11.7 and 38.3[3] of the collective bargaining agreement. By so doing, the ATU asserted DTC violated its duties and obligations under the PERA.

On April 19, 2012, DTC filed its Answer to the Charge in which it denied engaging in conduct which violated the provisions of the PERA, as alleged. It argued neither the performance incentive nor the safety bonus qualified as a "benefit" as that term is normally understood. It asserted the ATU and DTC attach fundamentally differing interpretations to the term "benefits" and that this dispute concerned interpretation and application of a negotiated term which is properly resolved through the contractual grievance and arbitration process, not in the unfair labor practice forum.

On April 27, 2012, the ATU filed its Response to New Matter in which it denied the new matter set forth in DTC's Answer.

Upon review of the pleadings, the Hearing Officer concluded in his decision on the pleadings dated May 3, 2013, that the pleadings were sufficient to support a finding that DTC unilaterally modified the negotiated grievance procedure by failing or refusing to implement the binding arbitration award rendered thereunder, in violation of 19 Del.C. §1307(a)(1), (a)(3), and (a)(5).

---

[3] Section 11.7 states:

> Safety Incentive – Each Operator that is not charged with a preventable accident during any year of this contract will receive a $250 year end bonus. The year will be calculated from May 1st to April 30th of each year with payment of the bonus being made in June.

Section 38.3 states:

> Attendance Incentive – Any operator who has perfect attendance for a year during the term of this contract will receive a 1% lump sum bonus. The year will be measured from May 1st to April 30th of each year and the bonus will be paid in June. To be eligible for this bonus, operators must not have any unscheduled absences. Unscheduled absences are defined as miss outs, sick call outs, workers compensation, disability, job abandonment, or any other absence that was not specifically approved by the administration. Union officials on Union business are considered on an approved absence.

On or about May 8, 2013, the Appellant, DTC requested the full Public Employment Relations Board review the Hearing Officer's decision, asserting the decision was "arbitrary, capricious, unsupported by the record and contrary to law." DTC requested the PERB "reverse the Hearing Officer's decision that DTC violated §§1307(a)(1), (a)(3) and (5) of the Act, based on erroneous legal conclusions and lack of evidence establishing that DTC refused to comply with a mutually negotiated provision of the parties' collective bargaining agreement."

The Appellee responded on May 20, 2013, requesting the Board reject the Appellant's request for review and affirm the Hearing Officer's decision.

A copy of the complete record in this matter was provided to each member of the Public Employment Relations Board. A public hearing was convened on July 17, 2013, at which time a quorum of the 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 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 either affirm, overturn, or remand the decision to the Executive Director for further action.

PERB Rule 5.6 requires the designated Hearing Officer to review the pleadings to determine whether they are sufficient to establish probable cause to believe that an unfair labor practice may have occurred. The Rule also requires that when the pleadings reveal that

an unfair labor practice has occurred, a decision on the pleadings shall be issued, where possible. A decision on the pleadings is subject to the same review by the full Public Employment Relations Board as any other final decision rendered by the Executive Director or her designee.

It is well-established in Delaware PERB case precedent that a unilateral change in the status quo of mandatory subjects of bargaining constitutes a *per se* violation of a party's duty to bargain in good faith and 19 Del.C. §1307(a)(5). *ILA Local 1694-1 v. Diamond State Port Corporation,* ULP 11-02-787, VII PERB 4977, 4983 (2011); *affirmed* VII PERB 5069 (6/21/11). PERB has held that the "grievance procedure is a mandatory subject of bargaining and may not be unilaterally changed by either party, either overtly or by inaction." *Donahue v. City of Wilmington,* ULP 08-11-637, VI PERB 4123, 4128 (2008). Once agreed upon, the negotiated grievance procedure may not be modified or ignored unless the parties have mutually agreed to do so. *Caesar Rodney Education Assn. v. Bd. of Education,* ULP 02-06-360, IV PERB 2729, 2733 (PERB Decision on Review, 2002); affirmed C.A. No. 1549-K, IV PERB 2933 (Chan.Ct., 2003).

The instant unfair labor practice charge alleged the State had failed or refused to fully implement a final and binding arbitration award. The Hearing Officer found, based on the pleadings, "the award is clear on its face, requiring the Grievant 'be credited with all benefits, including seniority that may have been lost as a result of termination.'" Contrary to the State's position, he did not interpret or apply any provisions of the collective bargaining agreement, other than the grievance procedure. The decision requires the employer to abide by its good faith commitment to resolve disputes by ultimately submitting them to arbitration and being bound by the final and binding decision of the arbitrator.

The State argues that a subsequent arbitration decision (issued nine months after the filing of this unfair labor practice charge) is dispositive of the alleged statutory violation and

that PERB's Hearing Officer should have deferred to that arbitration award ("Simpkins Award").[4] Putting aside the fact that the *Simpkins Award* was not provided to the Hearing Officer for his consideration at any point after its issuance until the State filed its request for review of the Decision on the Pleadings on May 8, 2013, that arbitration decision is clearly not on point with the issue raised in the instant unfair labor practice charge. The terminated Grievant in the unfair labor practice charge was not a party to the grievance in the *Simpkins Award* grievance. Further, the *Simpkins Award* addressed the question of whether disciplinary suspensions or other circumstances when an employee fails to complete a regularly scheduled shift can be counted against a perfect attendance award when the incident or discipline is not logged as an "occurrence" under the No-Fault Attendance policy. The arbitrator concluded:

> Suspension plainly falls within the policy statement that '[a]ll absences regardless of reason (except for non-chargeable occurrences [specifically delineated] are chargeable for purposes of absence accountability." Thus the manner of treatment of disciplinary suspension or other forms of scheduled work absences was clear then and accepted as an integral part of the relationship. If the way of applying the no-fault attendance program was ambiguous before the 2007 Agreement, the challenge should have been made by giving notice that the long-standing practice would no longer be recognized. This was not done and the practice has become part and parcel of the negotiated 2007 Agreement. Incorporating a past practice into a collective bargaining agreement incorporates the manner of its previous applications and the Perfect Attendance Awards as well. Changes to the underlying understanding of the parties as to how the No-Fault Attendance and Perfect Attendance Recognition Policies are to be applied now requires negotiation. It cannot be accomplished by arbitration in the absence of an agreement of the parties … *Simpkins award, p. 11.*

The *Simpkins Award* is limited to disciplinary suspensions and does not, in any manner, address a termination which is found by an arbitrator not to be based on just

[4] *In the Matter of DTC and ATU Local 842*, AAA 14 390 00403 12 RVB, heard September 20, 2012, decided January 11, 2013 (Arbitrator John Paul Simpkins, Esq.)

cause, wherein the arbitrator directs the Employer to return the Grievant to work with back pay and to credit him "…with all benefits, including seniority, that may have been lost as a result of the termination." *(emphasis added).* The *Simpkins Award* does not address a Safety Bonus in any way.

There is a fundamental difference between the impact of a disciplinary suspension on the ability of an employee to earn a Perfect Attendance Award and an employee who is prevented from earning the award because he is precluded from working because the employer has terminated him without just cause (in violation of the collective bargaining agreement). In the case of a disciplinary suspension, the employee is absent from work and unable to perform his or her duties as a result of a work rule violation; consequently, the employee is ineligible for an attendance award because of his or her actions.

In the case of an employee who is improperly prohibited from working because he or she was terminated without just cause, that employee has no opportunity to meet the standards of perfect attendance or exemplary safety. But for the improper termination, the employee would have had the opportunity to meet the standards for both awards. The Hearing Officer was correct in applying the clear and unambiguous language of the arbitration award as these bonuses were monetary benefits that "may have been lost as a result of the termination."

The Board finds the Hearing Officer properly applied its ruling in *International Longshoreman's Association Local 1694-1 v. Diamond State Port Corporation*, ULP 11-02-787, VII PERB 5069 (6/21/11), affirming the decision of the Hearing Officer below (VII PERB 4977 (4/13/11)). As in the *ILA* case, the State argues that there was a legitimate question as to what the arbitrator's award meant (in this case, what "all benefits which may have been lost" means). And as in the *ILA* case, the State did not

seek clarification as to the award's meaning, despite its request to the Courts to overturn the award on other grounds. DTC does not have the unilateral right to decide what the award means. The negotiated grievance procedure binds the parties to the final award of an arbitrator. In this case, the arbitrator's award was clear on its face; the employer was bound to implement that award.

DECISION

After reviewing the record, and considering the arguments of the parties, the Board unanimously affirms the decision of the Hearing Officer finding DTC violated 19 Del.C. §1307(a)(1), (a)(3) and (a)(5) in unilaterally modifying the parties' negotiated grievance procedure by failing or refusing to fully implement a binding arbitration award rendered thereunder. DTC is ordered to immediately notify the office of the Executive Director in writing of all steps taken to comply with the Hearing Officer's order.

IT IS SO ORDERED.

KATHI A. KARSNITZ, Acting Chairperson

R. Robert Currie, Jr., Member

DATE: July 23, 2013