STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

AMALGAMATED TRANSIT UNION, LOCAL 842,	)	
	)	
Charging Party,	)	
	)	
v.	)	**ULP No. 12-04-863**
	)	
STATE OF DELAWARE, DEPARTMENT OF TRANSPORTATION, DELAWARE TRANSIT CORPORATION,	)	**Decision on the Pleadings**
	)	
	)	
Respondent.	)	

APPEARANCES

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

Thomas J. Smith, SLREP/OMB, for DTC

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, 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 alleges that DTC has 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 ATU maintains DTC has failed and refused to pay the grievant a safety bonus and an attendance incentive to which he is entitled under Sections 11.7 and 38.3[3] of the

[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 and the Delaware Supreme Court.

[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 yearend 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:

collective bargaining agreement. By so doing, the ATU asserts DTC has violated its duties and obligations under the PERA.

On April 19, 2012, DTC filed its Answer to the Charge in which it denies engaging in conduct which violated the provisions of the PERA, as alleged. It argues neither the performance incentive nor the safety bonus qualifies as a "benefit" as that term is normally understood. It asserts the ATU and DTC attach fundamentally differing interpretations to the term "benefits" as used in the arbitration award and that this dispute concerning interpretation and application of a negotiated term are properly resolved in arbitration and are not actionable as an unfair labor practice.

Included within its Answer, DTC asserts three issues of new matter: 1) the Charge should be deferred for resolution to the negotiated grievance procedure; 2) PERB should adopt and apply a post-arbitral deferral policy for resolution of this matter; and 3) PERB lacks statutory authority to compel DTC to make a concession concerning an issue arising in collective bargaining with the ATU, as circumscribed by 19 Del.C. §1308(b)(1)(b).[4]

On April 27, 2012, the ATU filed its Response to New Matter in which it denies

---

> 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.

[4] (b)(1) If, upon all the evidence taken, the Board shall determine that any party charged has engaged or is engaging in any such unfair practice, the Board shall state its findings of fact and conclusions of law and issue and cause to be served on such party an order requiring such party to cease and desist from such unfair practice, and to take such reasonable affirmative action as will effectuate the policies of this chapter, such as payment of damages and/or the reinstatement of an employee; provided however, that the Board shall not issue:…

> b. Any order, the effect of which is to compel concessions on any items arising in collective bargaining between the parties involved.

the new matter set forth in DTC's Answer.

DISCUSSION

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

> (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 presented to support the claim that DTC's alleged failure or refusal to fully implement the grievance arbitrator's binding award may have violated 19 Del.C. §1307(a)(2) and/or (a)(6) as alleged. Wherefore, these portions of the Charge are

dismissed.

The facts underlying the grievance and the arbitrator's award are undisputed. A grievance was filed contesting the September 18, 2008 discharge of Paratransit Operator Harry Bruckner (Grievant). The grievance was heard by the arbitrator on November 9, 2009, who issued his decision on January 5, 2010. The arbitrator sustained the grievance and directed that the grievant be reinstated, stating:

> The grievance is sustained. The Corporation did not have just cause to terminate that grievant. It is ordered that the grievant be reinstated to his former position with back pay less any earnings he received while separated by the Corporation. The grievant shall also be credited with all benefits including seniority that may have been lost as a result of the termination. Finally, when the grievant is reinstated he will be placed on the disciplinary step that he was on prior to his termination. *Union Exhibit #1, Charge.*

The parties' negotiated grievance procedure (a mandatory subject of bargaining under the PERA) culminates in final and binding arbitration. The grievance at issue in this charge was processed through the negotiated procedure and the mutually selected arbitrator rendered his decision and award. There is no dispute DTC fully exercised its right to challenge that award through the Delaware courts. The arbitrator's award was upheld by both the Court of Chancery and the Delaware Supreme Court.

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 the termination." *(emphasis added*) An attendance incentive and a safety bonus are economic benefits that the Grievant may have been eligible to receive had he not been terminated without just cause.

DTC argues that because the Grievant had experienced both attendance and safety-related problems in prior years, it is unlikely that he would have qualified for

either benefit if he had, in fact, worked during the period he was unable to work because of his discharge. The attendance incentive and safety bonus are benefits the Grievant may have lost as a result of the termination, and therefore clearly fall within the scope of the arbitrator's award.

DTC also argues this Board lacks statutory authority to compel the employer to make a "concession concerning an issue arising in collective bargaining". It is firstly noted that this issue did not arise within the context of collective bargaining, but rather concerns the employer's good faith duty to adhere to terms of the negotiated agreement. Requiring parties to abide by their mutual agreement to resolve contractual disputes through final and binding arbitration neither grants a benefit to nor requires a concession by either party. The decision in this case is limited to the facts presented and is issued to preserve and protect the procedure by which these parties have agreed to resolve questions concerning interpretation and application of their collective bargaining agreement.

Further, the resolution of this charge does not require the interpretation of a contractual provision. Consequently, DTC's request for deferral is misplaced. The issue here involves the enforcement of an arbitration decision in which the directed remedy is clear and unambiguous on its face. Therefore, the dispute is subject to resolution based upon the pleadings, as required by 19 Del.C. §1308(b).

For these reasons, DTC's affirmative defenses are denied. The record is sufficient to support a finding that DTC has violated 19 Del.C.§1307(a)(1), (a)(3) and (a)(5), as alleged.

CONCLUSIONS OF LAW

1. The State of Delaware is a public employer within the meaning of 19 Del.C.

§1302(p). The Delaware Transit Corporation ("DTC") is an agency of the State of Delaware.

2. 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" of DTC, within the meaning of §1302(j), of the Act.

3. The pleadings are 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).

4. There is insufficient evidence on the record to support the claim that DTC may have violated 19 Del.C. §1307(a)(2) and/or (a)(6), as alleged. Those charges are therefore dismissed.

WHEREFORE, DTC IS HEREBY ORDERED TO TAKE THE FOLLOWING AFFIRMATIVE STEPS:

A) Cease and desist immediately from violating §1307 (a)(1), (a)(3) and (a)(5) of the Public Employment Relations Act;

B) Within twenty (20) days of the date of this decision, award the Grievant the attendance incentive and safety bonus as directed by the arbitration award.

C) Immediately post the Notice of Determination in all areas where notices affecting employees in the bargaining unit represented by ATU Local 842 are normally posted and in the agency's administrative offices. These Notices

must remain posted for at least thirty (30) days in order to provide notice to all affected employees of the decision in this matter.

D) Notify the Public Employment Relations Board in writing within thirty (30) calendar days of the date of this decision of all steps taken to comply with this Order.

Dated: May 3, 2013

Charles D. Long, Jr.

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