

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMALGAMATED TRANSIT UNION, LOCAL 842,	:	
	:	
Charging Party,	:	
	:	
v.	:	ULP No. 13-03-889
	:	
STATE OF DELAWARE, DELAWARE TRANSIT	:	PROBABLE CAUSE DETERMINATION
CORPORATION,	:	
Respondent.	:	

BACKGROUND

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 a bargaining 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 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 March 11, 2013, the ATU filed an unfair labor practice charge alleging conduct by DTC in violation of 19 Del.C. Section 1307(a)(1) and (a)(5) of the PERA.¹ Specifically, the Charge alleges that on or about January 25, 2013, the Chief Executive Officer of DTC issued a revision to the Division Directive concerning cell phone usage (“Revised Directive”). The document summarizes the revised policy focuses as follows:

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 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. . . . Discipline shall also be applied in accordance with this directive for electronic device related violations in garages, shops and maintenance facilities.² *Charge Exhibit 1.*

The Revised Directive was distributed to all bargaining unit employees on February 20, 2013, with an effective date of March 1, 2013.

ATU Local 842 asserts the Revised Directive mandates the following changes to the existing policy: 1) increases the frequency and severity of the disciplinary progression (Charge ¶5; 2) authorizes the use of global positioning signal (GPS) receivers (Charge ¶ 6; 3) authorizes

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.

² Unlike the prior policy, the revised policy contains a discipline schedule authorizing a two (2) week suspension for a first offense and discharge for a second offense of a specific infraction.

the use of hands-free or blue-tooth devices while driving non-revenue vehicles (Charge ¶7); 4) prohibits the use of electronic devices in all maintenance areas except break rooms and offices (Charge ¶8); and 5) discriminates against bargaining unit employees (Charge ¶9).

The Charge asserts the President and Business Agent of ATU Local 842 sent an e-mail to Charging Party's Chief Executive Officer, the Acting Chief Operations Officer and the DOT Labor Relations Officer on or about February 20, 2013, requesting to meet to discuss the Revised Directive prior to its implementation. The e-mail included a list of the Union's concerns. The ATU asserts it received no response from DTC prior to the filing of the instant Charge.

On March 27, 2013, DTC filed its Answer to the Charge, in which it acknowledged implementing changes to the cell phone policy but denied that the revisions violated any provisions of the PERA, as alleged. DTC included new matter with its answer, asserting: 1) the Charge fails to allege facts which, even if true, would constitute a violation of 19 Del.C. § 1307(a)(1) and (5); and/or 2) the Charge fails to identify any mandatory subjects of bargaining about which collective bargaining is required.

Extensions were granted to the ATU for filing its response to DTC's new matter (without objection from DTC). By email dated May 7, 2013, the ATU notified PERB:

The Union is requesting another extension in giving its response to the state's answer in this ULP.

We appear to be close to settling this ULP but due to scheduling conflicts we have been unable to meet to finalize our work. Our current extension runs out today. We are asking to extend this until May 31, 2013.

The extension was granted.

On or about May 30, 2013, the ATU filed its Response to the new matter included in the State's Answer, denying the allegations and assertions contained therein.

The further processing of the Charge was held in abeyance while the parties engaged in efforts to resolve the underlying dispute.

On or about August 16, 2013, DTC filed a motion to amend its Answer to the Charge. DTC reaffirmed its position that the Revised Directive does not concern or relate to a mandatory subject of bargaining and asserted it is required both by law and public policy to provide for the safety of the employees and the public. It also asserts the parties met on four occasions during which agreements were reached concerning GPS, cell phone and radio usage as well as modifications to the discipline mandated in the Revised Directive. DTC averred that at the start of the fifth and final meeting, the Union President (without explanation) informed DTC's representatives that the ATU Executive Board had rejected the tentative agreements which the parties had reached in the prior meetings.

DTC alleges in its Amended Answer that ATU Local 842 violated its obligations under the PERA when it refused to participate in further discussions and offered no path forward for resolution of the dispute. DTC further stated in its Amended Answer that it intended to implement the Revised Directive and to include the changes to which the ATU had agreed. It requests the Charge be dismissed because it was mooted by the union's failure and/or refusal to negotiate and its unilateral rejection of the good faith agreements reached by the parties in their efforts to resolve the dispute.

On August 27, 2013, the ATU filed its Response to DTC's Amended Answer. The ATU specifically denied that agreements were reached and asserts DTC unfairly and improperly implemented the Revised Directive on July 31, 2013, retroactive to June 1, 2013.

DISCUSSION

Regulation 5.6 of the Rules of the Public Employment Relations Board requires:

- (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 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 has, or 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 determining 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. *Flowers v. DART/DTC*, Del.PERB, Probable Cause Determination, ULP 04-10-453, V PERB 3179, 3182 (2004).

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 which was distributed in February and in the policy that was implemented on July 31, 2013.

Whether other provisions of DTC's cell phone policy are mandatorily negotiable raises a question of first impression under the PERA. The case law is clear, however, that there is a continuing statutory obligation to negotiate changes to mandatory subjects of bargaining.

Viewed in a light most favorable to the charging party, the pleadings are sufficient to support the conclusion that an unfair labor practice may have occurred in violation of 19 Del.C. §1307(a)(1) and/or (a)(5), because both the distributed and the implemented Revised Directive

³ *AFSCME Council 81 v. Delaware Dept. of Transportation*, ULP 95-01-111, 11 PERB 1279, 1290 (1995); affirmed by full PERB, II PERB 1201 (1995).

included substantive changes to the discipline that could be imposed on bargaining unit employees under the policy.

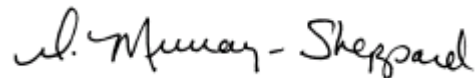
DTC has raised a legitimate defense (if proven) that it met its statutory obligations, if any, by meeting with the ATU and revising the policy prior to implementation to include the changes to which the parties had mutually agreed.

DETERMINATION

For the reasons set forth above, the pleadings are sufficient to support the further processing of this charge and raise both factual and legal questions concerning the modification and implementation of the Revised Directive concerning DTC's Cell Phone Usage Policy.

A prehearing conference will be scheduled forthwith to determine whether a hearing is required to establish a factual record on which argument can be made and determination reached.

Dated: June 30, 2014



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