2017 WL 2721820 (Del.Ch.) (Trial Order)
Chancery Court of Delaware.

State of Delaware, Delaware Transit Corporation, Appellant,
v.
AMALGAMATED TRANSIT UNION LOCAL 842, Appellees.

No. 12360-VCS.
June 23, 2017.

Affirmed

Joseph R. Slights III, Vice Chancellor.

***1** Date Submitted: March 23, 2017

Date Decided: June 23, 2017

Upon Consideration of an Appeal from the Public Employee Relations Board.

ORDER

This 23rd day of June, 2017, upon consideration of the appeal of the Delaware Transit Corporation ("DTC") from a determination of the Public Employee Relations Board (the "PERB") that DTC violated the Public Employment Relations Act (the "PERA") when it implemented changes to its cell phone usage and corresponding discipline policy for DTC drivers, it appears to the Court that:

1. The Amalgamated Transit Union Local 842 ("ATU") is the exclusive bargaining representative for two bargaining units that include DTC drivers and maintenance employees.[1] The relationship between DTC and ATU is governed by two collective bargaining agreements that were applicable during the relevant time period.[2]

2. On January 25, 2013, DTC issued revisions to its cell phone usage and discipline policy ("Directive 99.02") for its drivers and other employees, the prior version of which had existed since 2009.[3] Even though the parties had just finished engaging in interest arbitration proceedings regarding their collective bargaining agreements, DTC did not present changes to the cell phone policy during those proceedings.[4] Nor did DTC engage in any other kind of bargaining with ATU over its revisions to the cell phone policy.[5]

3. On February 20, 2013, ATU notified DTC management that it would like to discuss its concerns with Directive 99.02.[6] ATU then filed an unfair labor practice charge on March 11, 2013, alleging that DTC had violated the PERA in its unilateral adoption of Directive 99.02.[7]

4. ATU's unfair labor practice charge was held in abeyance while the parties attempted to resolve their differences regarding Directive 99.02.[8] DTC and ATU met approximately five times in April and May 2013 to attempt to negotiate a cell phone usage policy that would be acceptable to both sides.[9] The final meeting between the parties occurred on May 29.[10] At the May 29 meeting, the ATU representative, Roland Longacre, advised DTC that he could not agree at that time to the latest DTC proposal, Directive 99.03, even though it appears the proposal reflected the product of the parties' most recent negotiations.[11] With the hope that the parties would be able to resolve the dispute, Mr. Longacre advised DTC that he needed to return to ATU in order to devise a counteroffer.[12]

5. In a letter to Mr. Longacre dated May 30, 2013, DTC's Chief Operating Officer, Richard Paprcka, advised ATU that the May 29 meeting was the "last" bargaining meeting, and that DTC planned to enforce Directive 99.02 in the form it was issued on January 25, 2013.[13] In response, Mr. Longacre sent Mr. Paprcka a letter dated June 12, 2013, in which he stated that the parties had reached an impasse.[14] Thereafter, DTC decided that it would implement Directive 99.03 -- the product of its unfinished negotiations with ATU -- on July 31, 2013.[15] There were no formal discussions between ATU and DTC between May 30 and July 31, 2013.[16]

***2** 6. The parties engaged in a hearing of ATU's unfair labor practice charge, under 19 *Del. C.* §§ 1307(a)(1) and (a)(5),[17] before the Executive Director of the PERB on August 21, 2014.[18] Following the hearing and post-hearing briefing, on March 8, 2016, the Executive Director issued a final decision in which she determined that DTC had breached its bargaining obligations under Sections 1307(a)(1) and (a)(5) of the PERA by unilaterally changing the cell phone usage and disciplinary policy, which were mandatory subjects of collective bargaining.[19] DTC appealed the Executive Director's decision to the full PERB, which affirmed the Executive Director in a decision issued on May 4, 2016.[20]

7. DTC filed its Verified Notice of Appeal from the PERB decision in this Court on May 19, 2016.[21]

8. When reviewing the decision of an administrative agency, the court must determine whether the decision is "supported by substantial evidence and is free from legal error."[22] An agency's conclusions of law will be reviewed de novo.[23] When the issue of law is a question of statutory interpretation,

Delaware courts do not accord agency interpretations of the statutes which they administer so-called *Chevron* deference, as do federal courts in reviewing administrative decisions under the federal Administrative Procedures Act. In interpreting a statute, Delaware courts must ascertain and give effect to the intent of the legislature. If the statute is found to be clear and unambiguous, then the plain meaning of the statutory language controls.[24]

9. On appeal to this Court, DTC contends that the PERB committed legal error in its finding that DTC violated Sections 1307(a)(1) and (a)(5) of the PERA when it implemented Directive 99.03.[25] DTC argues that the PERB decision is incorrect as a matter of law because DTC has unilateral authority to implement disciplinary policy changes pursuant to Section 1309(2) of the Delaware Transportation Authority Act (the "DTAA").[26] According to DTC, this power overrides any obligations that may be imposed by the PERA.

***3** 10. "When the Court acts in its appellate capacity on an appeal from an administrative agency, it is limited to the record and will not consider issues not raised before the agency."[27] "This waiver rule 'furthers the goal of permitting agencies to apply their specialized expertise, correct their own errors, and discourage litigants from reserving issues for appeal.' "[28] As the PERB noted, "DTC did not argue below that the provisions of the Delaware Transit Authority Act ('DTAA'), 2 *Del. C.* Chapter 13, removed discipline from the mandatory scope of collective bargaining under the PERA."[29] Accordingly, the PERB concluded that the statutory arguments were waived.[30]

11. DTC now asserts that it has "consistently argued that the cell phone policy was issued as 'a core component of DTC's inherent managerial authority and prerogative,"[31] which flows from the DTAA. While DTC may have argued to the Executive Director that it maintained this "inherent managerial authority and prerogative," it did not cite to 2 *Del. C.* Chapter 13 (or to the DTAA at all for that matter) in the hearing before the Executive Director. Therefore, DTC has waived its argument that the DTAA permitted DTC unilaterally to implement Directive 99.03.[32]

12. Even if DTC's argument that the DTAA permitted it unilaterally to implement Directive 99.03 is not deemed waived, the argument fails on the merits in any event. DTC points out that the DTAA gives DTC the right to "prescribe rules, regulations and policies in connection with the performance of its functions and duties and to provide penalties for the violation of such rules and regulations,"[33] and at Section 1325 of the DTAA, states that DTC employees "shall not be considered state employees for purposes of wages, salaries, fringe benefits or for purposes of any other benefits which may accrue to state employees."[34] According to DTC, this statutory scheme gives DTC unbridled rule- and policy-making authority with respect to all matters, including the cell phone usage policy and corresponding disciplinary measures for violating that policy.

13. On the other hand, the PERA provides that public employees shall have the right to engage in collective bargaining over mandatory subjects of bargaining.[35] Collective bargaining is defined as "the performance of the mutual obligation of a public

employer through its designated representatives and the exclusive bargaining representative to confer and negotiate in good faith with respect to terms and conditions of employment ...."[36] The PERA goes on to define "terms and conditions of employment" to include "matters concerning or related to wages, salaries, hours, grievance procedures and working conditions; provided however, that such terms shall not include those matters determined by this chapter or any other law of the State to be within the *exclusive prerogative* of the public employer."[37] DTC argues that since the DTAA puts policy- and rule-making within DTC's "exclusive prerogative," such acts are excepted from the PERA by that statute's own terms.

***4** 14. DTC has accurately quoted the provisions of the DTAA upon which it relies. Its argument misses the mark, however, because it invokes provisions that do not apply here (Section 1325) and it ignores other statutory provisions that are actually relevant to DTC employee bargaining rights. As previously discussed, Section 1325 of the DTAA does carve out DTC employees from the PERA in certain circumstances involving wages and benefits. It also provides that DTC employees "shall be considered state employees for the purposes of participating in the group medical insurance, workers' compensation and deferred compensation plans available to state employees. Participation in, and the terms of, medical insurance, workers' compensation and deferred compensation programs available through the State shall not be a subject of collective bargaining."[38] Thus, the full text of Section 1325 of the DTAA reveals that the circumstance at issue here--the promulgation of work place policies and discipline--is neither included in nor excepted from this provision. Work place policies are not "wages, salaries [or] fringe benefits" (areas in which DTC employees are not deemed to be State employees under the DTAA), nor are they "group medical insurance, workers' compensation, [or] deferred compensation programs" (areas in which DTC employees are deemed to be State employees under the DTAA). The bottom line is that Section 1325 of the DTAA is not instructive either way in that it neither reinforces nor contradicts the provision of the PERA relied upon by the PERB.

15. Other provisions of the DTAA are actually relevant to the analysis. Specifically, at Section 1307(b)(1), the DTAA provides that DTC "shall have the authority to bargain collectively" and "enter into agreements with [labor] organizations relative to wages, salaries, hours, working conditions, health benefits, pensions and retirement allowances of such employees."[39] The PERA, at Sections 1307(a)(1) and (a)(5), requires public employers to engage in good faith collective bargaining for mandatory bargaining subjects.[40] "In Delaware, these mandatory bargaining subjects include all 'terms and conditions of employment' or those 'matters concerning or related to wages, salaries, hours, grievance procedures, and working conditions.' "[41] The PERB has interpreted matters concerning discipline to be a subject of mandatory bargaining under the PERA as "term[s] and condition[s] of employment."[42]

16. When engaging in statutory construction, all statutes must be read *in pari materia* to ascertain the intent of our General Assembly.[43] It is also well-settled that specific provisions will govern over general provisions.[44] In this respect, DTC is correct that the DTAA, when compared to the PERA, is the more specific statute with regard to DTC employees since it applies specifically to DTC employees while the PERA applies generally to all public employees.[45] But that does not end the analysis.

17. When read *in pari materia* with the PERA, the DTAA, at Section 1309, gives DTC the power to prescribe rules and policies. It does not, however, cast this authority as absolute or unchecked, *i.e.*, as its "exclusive prerogative." Indeed, the DTAA, at Section 1307, provides that DTC may engage in collective bargaining, including with regards to working conditions. Section 1325 of the DTAA then lists the ways in which DTC employees will or will not be treated like other state employees, as well as the subjects upon which DTC explicitly is not obligated to engage in collective bargaining. There is no express conflict between any of these provisions in the DTAA and the obligation under the PERA to engage in good faith collective bargaining over terms and conditions of employment, including discipline.[46] Therefore, I find that the decision of the PERB that DTC violated Sections 1307(a)(1) and (a)(5) of the PERA when it unilaterally implemented the disciplinary policy in Directive 99.03 must be affirmed because the DTAA does not override the PERA such that DTC may determine unilaterally to implement changes to its disciplinary policies.

***5** 18. Based on the foregoing, the Court is satisfied that the PERB applied the correct legal standards and that its decision is supported by substantial evidence. Accordingly, the decision of the PERB that DTC violated Sections 1307(a)(1) and (a)(5) of the PERA when it unilaterally adopted Directive 99.03 must be AFFIRMED.

IT IS SO ORDERED.

s/ Joseph R. Slights III

Vice Chancellor

Footnotes

1 Record ("R.") 250, 345.

2 R. 251.

3 R. 69, 76-78.

4 R. 251,272.

5 R. 122, 254.

6 R. 80, 82-83, 122, 255-58.

7 R. 1-13, 124, 251, 346.

8 R. 167,251.

9 R. 125,258

10 R. 137, 258.

11 R. 137, 258.

12 R. 137, 153.

13 R. 96, 138, 259.

14 R. 66--67, 154, 259--60.

15 R. 98--104.

16 R. 140.

17 These provisions of the PERA state: "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; (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." 19 *Del. C.* §§ 1307(a)(1) and (a)(5).

18 R. 105--207.

19 R. 250--75.

20 R. 303--51.

21 R. 352--54.

22 *Angstadt v. Red Clay Consol. Sch. Distr.*, 4 A.3d 382, 387 (Del. 2010).

23 *Fraternal Order of Police Lodge No. 15 v. City of Dover*, 1999 WL 1204840, at * 2 (Del. Ch. Dec. 10, 1999), *aff'd*, 755 A.2d 388

(Del. 2000).

24 *Am. Fed'n of State, Cty. & Mun. Empls. v. State, Dep't of Health & Social Servs.,* 61 A.3d 620, 627 (Del. Ch. 2012) (internal quotation marks and citations omitted).

25 In its briefs, DTC also argued that the PERB's finding that DTC and ATU were not at an impasse at the time DTC implemented Directive 99.03 was not supported by substantial evidence. At oral argument on March 23, 2017, however, both sides agreed that the factual finding that the parties were not at an impasse was not consequential to the appeal and has no bearing on the ultimate outcome regardless of which statutory construction prevails. DTC has also challenged the Executive Director's failure to issue a timely decision pursuant to PERB Rule 7.2, alleging that this caused harm to the parties. *See* Opening Br. of Appellant, State of Del. Transit Corp. ("Opening Br.") 20-21. PERB Rule 7.2 provides that: "Within thirty (30) days after the close of the record, the Executive Director shall issue a decision. The decision shall be in writing and contain a statement of the case, findings of fact, conclusions of law, and the appropriate remedy. A copy of the decision will be served upon each of the parties." While there may have been a violation of PERB Rule 7.2, DTC has not articulated any colorable arguments as to why this should affect the underlying merits of the unfair labor practice charge, the PERB's ruling, or the standard of review that the Court should apply here. DTC also disputes the Executive Director's statement in her decision that "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." R. 272. Since the parties here did engage in bargaining, however, this comment is mere dicta, which neither the Executive Director nor the PERB relied upon in their findings that DTC violated the PERA. "[P]erhaps the *most* well-settled proposition of common law is that dictum does not constitute binding precedent." *Nelson v. Frank E. Best Inc.,* 768 A.2d 473, 478 (Del. Ch. 2000). Therefore, I decline to reach this issue in my review of the PERB decision.

26 This provision of the DTAA states that: "The Authority shall have all of the powers necessary or convenient to carry out and effectuate the purposes and provisions of this chapter ... including, but without limiting the generality of the foregoing, the power to: (2) Prescribe rules, regulations and policies in connection with the performance of its functions and duties, and to provide penalties for the violation of such rules and regulations and to provide for the enforcement of state law in or on any transportation facility owned or operated by the Authority or a subsidiary." 2 *Del. C.* § 1309(2).

27 *Pub. Water Supply Co. v. DiPasquale,* 735 A.2d 378, 381 (Del. 1999).

28 *Am. Fed'n of State, Cty. & Mun. Empls., Council 81 v. State,* 2013 WL 4077871, at *5 (Del. Ch. July 31, 2013) (quoting *Pub. Water Supply,* 735 A.2d at 381). *See also id.* at *6-7 (applying the waiver rule to an issue that the party had raised before the PERB but had not raised before the arbitrator presiding over binding interest arbitration between the parties).

29 R. 349. *See* R. 208-23 (DTC's post-hearing opening brief before the Executive Director).

30 R. 349.

31 Opening Br. 9 n.2 (citing R. 209).

32 *Am. Fed'n of State, Cty. &Mun. Empls., Council 81,* 2013 WL 4077871, at *6-7.

33 2 *Del. C.* § 1309(2).

34 2 *Del. C.* § 1325.

35 19 *Del. C. §* 1303. *See also City of Wilm. v. Wilm. FOP Lodge #1,* 2004 WL 1488682, at *3 (Del. Ch. June 22, 2004) ("The general rule is that certain provisions of a collective bargaining agreement known as 'mandatory bargaining subjects' may not be unilaterally changed upon the expiration of the collective bargaining agreement. In Delaware, these mandatory bargaining subjects include all 'terms and conditions of employment' or those 'matters concerning or related to wages, salaries, hours, grievance procedures, and working conditions.' ") (internal citations omitted).

36 19 *Del. C.* § 1302(e).

37 19 *Del. C.* § 1302(t) (emphasis added).

38 2 *Del. C.* § 1325.

39 2 *Del. C.* § 1307(b)(1).

40 19 *Del. C.* §§ 1307(a)(1) and (a)(5).

41 *Wilm. FOP Lodge #1*, 2004 WL 1488682, at *3. The PERA defines "terms and conditions of employment" as "matters concerning or related to wages, salaries, hours, grievance procedures and working conditions, provided however, that such term shall not include those matters determined by this chapter or any other law of the State to be within the exclusive prerogative of the public employer." 19 *Del. C.* § 1302(5).

42 *AFSCME v. Del. Dept. of Transp.*, ULP No. 951-01-111A, II PERB 1270, 1290, *aff'd*, II PERB 1201 (1995).

43 *Crosby v. State*, 824 A.2d 894, 897 (Del. 2003).

44 *A. W. Fin. Servs., S.A. v. Empire Res., Inc.*, 981 A.2d 1114, 1131 (Del. 2009).

45 Opening Br. 12-13.

46 19 *Del. C.* §§ 1307(a)(1)and (a)(5).

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