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Re: UP-23-10173, Martha's Vineyard Transit Authority

Dear Attorneys Bangs and Kelly:

On August 1, 2023, the Amalgamated Transit Union, Local 1548 (Union or ATU) filed a charge of prohibited practice (Charge) with the Department of Labor Relations (DLR), which it updated/corrected on August 10, 2023. The Charge alleges that the Martha's Vineyard Transit Authority (VTA), as a joint and/or single employer with Transit Connection, Inc. (TCI), engaged in prohibited practices within the meaning of Section 10(a)(5), and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law). Specifically, the Charge alleges that VTA refused to bargain on demand with ATU and engaged in bad faith and regressive bargaining.

On August 11, 2023, the DLR administratively closed the case and informed the parties that due to a question of jurisdiction, the DLR would take no furth action on the Charge unless the National Labor Relations Board (NLRB) declined jurisdiction. On December 14, 2023, the NLRB determined that the VTA is a political subdivision not subject to the NLRB's jurisdiction. On December 14, the DLR docketed the Charge. VTA filed a Motion for Summary Judgment and a Motion to Sever and Stay on February 10, 2024, which were received on February 12, 2024. On February 20, 2024, the Union filed a response to both motions. On February 21, 2024, I denied the Motion to Sever and Stay. I took the Motion for Summary Judgment under advisement. Pursuant to Section 11 of the Law and Section 15.05 of the DLR's Regulations, I conducted an investigation

on February 22, 2024.[1] Based on the evidence presented during the investigation, I have decided to dismiss the charge in its entirety for the reasons explained below.[2]

Background

Pursuant to M.G.L.c. 161B et. seq., VTA is a public authority providing public transit services to towns of Martha's Vineyard. VTA is empowered to enter into contracts including **"**an operating agreement with a private transportation company . . ." M.G.L.c. 161B §23. However, M.G.L.c. 161B §25 provides that "[n]othing in this chapter shall be deemed to authorize or permit any authority established by this chapter to directly operate any mass transportation service."

Angie Gompert (Gompert) has served as the VTA's Administrator since 1997. VTA has a small non-unionized staff of administrative personnel, maintenance staff, and seasonal employees. Since 2002, VTA has contracted with TCI, a private transportation contractor, to handle operations for VTA. TCI is headquartered in Florida. The President of TCI was Edward Pigman (Pigman) until his passing in late April 2023. His spouse, Mary Pigman, became President thereafter. The TCI President is not on the VTA board.

In March 2016, the NLRB certified ATU as the exclusive collective bargaining representative for Operators employed by TCI at its Edgartown, Massachusetts facility.

VTA's Contract with TCI

VTA's most recent contract with TCI was effective February 1, 2022 through January 31, 2023. The contract provides VTA with four additional one-year options to renew. In relevant part, the contract provides that TCI will furnish management services needed for the efficient operation of the public transportation service, including the supervision and dispatching of all transit services. TCI assumed full responsibility for daily operations of the VTA public transport system, but agreed to comply with all reasonable requests from the VTA to ensure that the transit system operates efficiently. TCI agreed to adopt VTA approved policies including sexual harassment policies, EEO policies, and

[1] I conducted the investigation via Webex video conferencing. During the investigative conference, I granted Union Counsel's Motion to Appear Pro Hac Vice. I held the record open until March 1, 2024 to allow the parties time to respond to certain documents introduced at the investigative conference.

[2] Because I have rendered a decision herein based upon my consideration of the entire investigatory record, I deny VTA's motion for summary judgment.

the VTA Vehicle Operator Handbook.[3] TCI is responsible for general administrative duties such as supplying human resource management and labor relations, payroll, recruitment, hiring, tracking performance measurements, termination, discipline, compensation, and other benefits. TCI supplies a full-time general manager (GM) to provide the day-to-day management of the transportation system. The GM directs and supervises employees, establishes training, safety programs, and personnel and labor relations services. VTA reserves the right to approve or reject any proposed candidate for the GM position. TCI is required to do a CORI check on all its staff. VTA reserves the right to adjust schedules as demands warrant. TCI agrees to require its drivers to keep the vehicles clean and conduct a pre-trip inspection of the vehicles. TCI agrees to provide certain specific training, including defensive driving, and disability awareness training. VTA can also request additional training. TCI is to furnish a list of all current employees to VTA twice a year with information necessary for VTA's insurance carrier to obtain operator safe driving records. VTA reserves the right to accept or reject any TCI employee based on his/her safe driving records. VTA provides uniforms and ID badges. TCI agrees to submit its personnel policies to VTA annually for review and approval. VTA reserves the right to be fully informed of TCI's operations and to make suggestions from time-to-time on changes in TCI's methods of operation. If certain safety standard violations are not adequately addressed by TCI, then TCI and VTA "shall discuss violations to fully identify their consequences." The contract further specifies what costs are paid directly by VTA, what costs are paid through operating funds, and what are reimbursable management expenses. TCI agrees to limit Operator overtime. VTA pays directly for advertising and recruiting costs for employees as well as uniforms and housing for drivers. The contract further provides that TCI is to obtain authorization from VTA for any purchase over $250.

The contract labeled TCI as an independent contractor. As such, TCI reserved the right to

> manage its business; to determine starting and ending times of employees, consistent with the VTA's scheduled hours of operation; to determine assignments of work and work tasks; to require reasonable overtime; to determine the qualifications and competency of employees; to require reasonable standards of performance; to direct the work force; to determine and re-determine job content; to make and enforce such reasonable rules and regulations, not in conflict with this Agreement, as it may from time to time deem best for the purpose of maintaining order, safety and/or effective operation of its business; to discipline, demote and discharge employees.

[3] During the investigation, VTA indicated that TCI actually drafted the vehicle operator handbook in current use. It covers topics such as wages, bonus program, disciplinary points for various infractions, and benefits. Many of the provisions of the guidebook which were drafted by TCI in or before 2016 are outdated and superseded by the terms of TCI's CBA with the Union. No one from TCI attended the investigation, and the Union did not dispute VTA's assertions in this regard.

Hiring and other working conditions

As noted in the contract with TCI, VTA pays for the recruitment of new Operators. Copies of job postings include the VTA logo. Job postings explain that TCI is the contracted operating company that hires, trains, and schedules all vehicle Operators, and dispatchers. Applications are to be emailed to humanresources@vineyardtransit.com or dropped at the operations office in Edgartown. Questions are referred to TCI HR at the same email address.[4] Only TCI has access to that email address. During the investigative conference, Gompert explained that neither she nor anyone at VTA played any role in selecting applicants for interview, interviewing any applicant, or hiring any applicant. The Union did not dispute this, admitting it was not sure of what took place regarding hiring behind the scenes. Gompert further explained that VTA has no role in any disciplinary matter or the firing of any TCI employee. The Union did not specifically dispute Gompert's assertions.

The Operators bid for routes. Once routes are assigned, there are no changes unless a road is closed due to an accident or something similar. TCI generally answers the phone to respond to inquiries, but if TCI does not answer the phone, Gompert or a VTA employee will. TCI handles dispatch duties unless it is short staffed, in which case Gompert or another VTA employee may fill in. If something goes wrong, such as a bus is unable to run for any reason, dispatch will let the Operator know that someone is coming to swap out the bus. During a snowstorm this winter, three buses became stuck. TCI did not answer the radio, so Gompert performed some dispatch duties.

As a result of the COVID-19 pandemic, TCI was unable to supply sufficient Operators to run the system. Gompert contacted Pigman about VTA's plans to hire Yankee Bus to cover the off-season.[5] In addition, at one unspecified point, Gompert approached Pigman to see if TCI was interested in additional funds for a wage scale adjustment in order to attract more drivers. The Union agreed to an increased wage scale.

Bargaining for a new CBA

In 2019, TCI hired Greg Dash (Dash) to be the lead negotiator prior to the previous CBA negotiations. VTA approved the expense for his hiring but played no role in his hiring. During the previous CBA negotiations, the TCI Operators went on strike when the parties were unable to reach agreement on a new CBA.

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[4] Gompert explained that VTA does not have a dedicated HR staff. The Union did not dispute this assertion.

[5] VTA stated that the Yankee Bus relationship ended in the Spring 2022. However, the Union submitted a contract dated December 1, 2022, between VTA and Yankee Bus, to supply additional drivers to operate public transit buses through December 31, 2022. The agreement contains a provision that it can be extended upon mutual agreement. VTA continued to send checks to Yankee Bus until mid-2023.

In anticipation for the negotiations for the next CBA, Gompert projected a financial plan and in December 2022, she communicated to Pigman what VTA's maximum reimbursement for wages would be for the term of the next CBA.

In December, Pigman spoke with a Union representative and indicated he wished the bargaining on the new CBA to be concluded quickly. The Union agreed. The parties did not sign any ground rules for negotiations. The Union submitted its proposal in December 2022. The first bargaining session took place on January 17, 2023. All bargaining sessions were conducted over Zoom. Dash served as TCI's chief negotiator. Neither Gompert nor any other VTA representative attended the bargaining sessions. At the end of each bargaining session TCI negotiators said that everything discussed still had to be approved, even when Pigman attended the session. Gompert denies that Pigman, Dash, or anyone from TCI reported to her what was taking place during the negotiations or that she or anyone from VTA had to approve TCI's negotiations.

On March 8, 2023, TCI submitted a set of proposals which incorporated some of the Union's December proposals.[6] In relevant part, TCI proposed modifications to Article 12 on Selection of Work in which TCI noted that seasonal Operators, who are not in the bargaining unit, are "hired to work during the peak season, which for purposes of this paragraph only, is defined as beginning on the last Friday in April and ending on the first Monday in October." The no strike provision did not reference sickouts. TCI adopted the Union's proposal on discipline that "[a]ny discipline imposed shall sunset after 24 months, for purposes of progressive discipline. It is understood that such progression is on a rolling 24-month period." The Union had proposed that the new wage rate was to commence effective January 1, 2023, but TCI proposed the wage rate would be effective March 1, 2023 and then on August 1 for the next two years. The Union had proposed that the term of the agreement run from January 1, 2023 through December 31, 2025. TCI proposed that the agreement would become effective at the start of the first pay period after ratification by the parties and expire December 31, 2025.

TCI submitted a new proposal on March 15, 2023. At the top of its proposal, TCI noted that the language highlighted in yellow "is thought to be acceptable to both parties, pending agreement on an entire CBA."[7] TCI highlighted the following:

-A provision prohibiting strikes that did not reference sickouts;
-The discipline article included the 24 month look back;

[6] The Union submitted copies of its December 2022 proposal and TCI's March 8, March 15, March 29, April 14, and April 20 proposals. The record is not clear whether the Union submitted any proposals after its initial proposal.

[7] The Union maintains that the parties tentatively reached some agreements, but because the negotiations were not in person, the parties did not initial any proposals.

- Article 12 covered "Selection of Work" without defining seasonal workers.[8]

Neither the provision that the new rate of pay would be effective on March 1, 2023, and then effective August 1 of the next two years or that the CBA would become effective "at the start of the first pay period after ratification by the parties and shall expired December 31, 2025" were highlighted.[9]

On March 29, TCI submitted another set of proposals. In this version, TCI changed the meaning of the yellow highlighted provisions. At the top of this version of the proposed CBA, TCI wrote "language NOT with the yellow highlight is thought to be acceptable to both parties, pending agreement on an entire CBA." The following were not highlighted:

- 24-month look back for discipline;
- No strike language without reference to sickouts;
- Defining seasonal operators as those working from the last Friday in April and ending on the first Monday in October;
- Although much of Article 19 is highlighted, so not agreed upon, part is not highlighted. In the unhighlighted provisions, the proposal provides that eligible employees who are covered by Medicare A and Medicare B, and who have also obtained an individual Medicare Supplement Insurance policy, may be eligible to receive a monthly payment from TCI to defray the cost of the Supplement Insurance. Eligible full-time employees would be reimbursed up to a maximum of $225 per month;
- The provisions about rates of pay was highlighted, so it was not deemed to be agreed upon although the Union maintains that the parties agreed that the wage rate increase would be effective on March 1, 2023.

There was no longer any agreement regarding the dates for the term of the agreement. Although the language remained the same as in the previous proposal, that the agreement would be effective at the start of the first pay period after ratification, the Union now wanted the new CBA to be effective on January 1, 2023, when the previous CBA expired.

This was the last meeting that Pigman attended. When the parties next met, Dash was joined by all new negotiators for TCI.

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[8] The Union indicates that this was in error and the parties had actually agreed to define seasonal Operators as those working from the last Friday in April to the first Monday in October.

[9] The Union asserts that these provisions were tentatively agreed upon so the Union could not explain why the dates for the wage increase and the dates for the term of the agreement were not highlighted.

TCI submitted a revised proposal on April 14, without any changes relevant to this Charge. TCI then presented another version on April 20, 2023. Although there is no notation on this version of what articles were thought to be acceptable to both parties, it included certain provisions that were thought to have been agreed to in the previous versions, specifically,

-the 24-month look back for discipline;

- the seasonal workers language;

-the health care reimbursement for the Medicare Supplement language;

-the no strike provision without reference to a sickout.

TCI stated it wanted to change the effective date of the wage rate increase to the date of the ratification of the agreement rather than March 1, 2023. The Union asked why they were making changes at this point and TCI responded that it had the right to make any changes before the parties reached final agreement on the whole CBA. The Union also recalls Dash saying that VTA would not pay retroactive pay.

Gompert's conversation with TCI negotiators

Pigman passed away at the end of April. During the course of the CBA negotiations, Gompert only had one discussion with anyone at TCI about the negotiations. She spoke with Dash and another TCI negotiator, Tara Dawson (Dawson). Gompert was unsure of the date of the conversation, believing that it was in mid-April, but also believing that it was after Pigman's death. Gompert recalls expressing that she did not understand why there was no agreement in place yet. She reiterated the total amount that VTA could afford for wages over the CBA term. She was not familiar with what the parties had been negotiating over and was never informed that there were any tentative agreements.

Without discussing specific proposals, Dash and Dawson mentioned some of the general topics being negotiated. Gompert expressed her view, on behalf of VTA, that it was "crazy" to be obligated to renegotiate a CBA in less than three-years. However, she said she did not direct the TCI negotiators as to the term of the CBA. When the Supplemental Medicare was mentioned, Gompert mentioned that VTA paid its employees 75% for Supplemental Medicare. She expressed her opinion that the same would be appropriate for TCI employees but she did not direct Dash and Dawson to make that proposal. Gompert also noted that VTA's insurance carrier for the auto policy had a three year look back. Therefore, she felt it was in VTAs best interest to have a 36 month look back with regard to discipline, but she did not direct TCI to negotiate only a 36 period look back. When they discussed seasonal employees, Gompert explained that she believed that the definition of a seasonal worker should be one who works for any 6 months rather than picking specific dates, but she did not direct TCI to follow her preference. During the investigation, Gompert stated that she did not recall any discussion about retroactive pay. She did recall discussing that she heard there was a possibility that the Operators would go on strike or a sickout. Gompert encouraged the negotiators to move along because the summer busy period was coming and if there was going to be a strike or other job action, VTA would need to prepare. Gompert did not direct TCI to make a best and final

offer, nor did she direct the contents of any such offer. She never saw any exchanged proposals including TCI's next offer.

TCI's May 1, 2023 Best and Final Offer

On May 1, 2023, TCI submitted what it termed its best and final offer. This set of proposals contained some changes from the earlier exchanges, including the following:

- adding a sick out to the no strike provision;
- changing the look back for discipline to 36 months;
- changing the definition of seasonal workers as "operators who are employed for - a maximum of six months in any calendar year;
- changing the language regarding Medical Supplement so that eligible full-time employees would be reimbursed for 75% of the cost of the Supplement, up to a maximum of $225 per month;
- changing the start date for the new wage rate to commence on the first pay period after signing. Thereafter the rates would increase at the start of the second and the third years;
- Changing the effective date of the agreement to the start of the first pay period after the parties have signed the agreement, and the expiration date to three years later.

The Union and TCI met on May 3 to discuss this proposal. The Union asked Dash why TCI was changing some of its proposals that had been tentatively agreed to, noting that it was regressive bargaining. The Union reports that Dash said that "the boss" told him to do it. When the Union noted that Pigman had died the previous week, Dash said that the boss was Gompert.[10]

The bargaining unit employees voted down the May 1 proposed CBA. On May 18, 2023, the Union submitted a new proposal, making some changes to the previous TCI proposal dated April 20, 2023. The Union sought to make changes to the articles pertaining to the recognition clause, the health insurance coverage, wages, and the expiration date of the CBA, seeking a three-year deal from the expiration of the previous agreement.

The Union attempts to bargain directly with VTA

Based on its belief that VTA was controlling some of the negotiations, on June 8, 2023, the Union sent a letter to Gompert and the members of the Advisory Board demanding that VTA immediately come to the table to bargain as a joint and/or single

[10] Dash did not attend the investigation. The Union asserted that he made this comment.

employer of the bargaining unit employees of TCI.[11] Gompert did not respond. She did not believe she could be involved in any negotiations involving the Union because of the language in M.G.L. 161B § 25.

On June 23, 2023, the Union followed up, demanding a response no later than July 7, 2023. VTA did not respond.

The Union and TCI reach agreement on a CBA

TCI and the Union continued negotiations. The Union maintains that Dash said he had to get approval from VTA. VTA denies that TCI sought its approval of the provisions in the CBA. On July 14, 2023, Mary Pigman, on behalf of TCI, signed a new CBA with the Union. In relevant part, the parties agreed to a 30 month look back for disciplinary actions. There was no reference to sickouts as part of the no strike provision. Seasonal workers were defined as those working from the last Friday in March to the first Monday in October. The provision about Medicare Supplement insurance covered 100% of the cost of the supplement for full time employees, up to a maximum of $225 dollars per month. The new wages were effective on July 1, 2023, and on August 1 thereafter. The parties added a year onto the terms of the agreement so it was now in effect from July 1, 2023 through June 30, 2026. The agreement was between the Union and TCI; VTA did not sign the agreement.

Party Arguments

The Union maintains that VTA is a single and/or joint employer of TCI's employees. The NLRB's test for single employer status looks at the interrelation of operations, common management, centralized control of labor relations and common ownership or financial control. The Union argues that the operations of VTA and TCI are interrelated. VTA posts and solicits job applications for TCI and receives those applications through VTA's human resources. VTA's administrator directs how TCI negotiates with the Union, and therefore VTA exercises centralized control over labor relations. There is common management because VTA's administrator sets policies and the terms of contract negotiations. Lastly, VTA has financial control over TCI due to the contract between VTA and TCI.

The Union also contends that the NLRB looks to see if the alleged joint employer shares or co-determines the employees' essential conditions of employment, established through showing that the entity exercises substantial, direct, and immediate control over wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction. The contract between VTA and TCI demonstrates that VTA retains the power to vet and approve policies, sets training, duties, fixes routes, can make reasonable requests, can

[11] The letter also noted that as a joint and/or single employer of the TCI employees, VTA needed to cease contracting with Yankee Bus as the Union had never consented to an outside contracting of bargaining unit work.

reject an Operator for cause, provides uniforms, pays for housing, accepts job applications, addresses inadequate disciplinary actions, pays TCI's bargaining costs, and has control over expenditures over $250.

The Union further asserts that VTA, as a single or joint employer, refused to bargain directly with the Union and engaged in bad faith and regressive bargaining by reneging on tentatively agreed upon proposals. Gompert admits to discussing a number of topics with Dash and Dawson. After that discussion, TCI submitted its "best and final offer" which made changes to proposals already tentatively agreed upon. Gompert admits to discussing every topic that was changed other than retroactive wage increases. Regardless of whether she directed TCI to adjust the CBA proposals, TCI did make changes to conform to VTA's preferences in its "best and final offer." The fact that ultimately TCI agreed to different proposals and did not get everything Gompert wanted does not demonstrate that VTA did not have control over TCI. It could be that VTA, after seeing the employees vote down the offer, changed its position. For these reasons, the Union believes that the DLR should issue a complaint.

Conversely, VTA believes that the Charge must be dismissed. VTA argues that as a matter of law, the DLR lacks primary jurisdiction to interpret MGL 161B § 25. Any decision would impact other transit authorities who are not a party to the case. Moreover, MGL 161B § 25 prohibits VTA from being a joint or single employer of the Operators. Any remedy ordering VTA to bargain would violate that provision.

On the facts, VTA argues it is neither a single nor joint employer of the TCI employees. VTA and TCI are separate entities. VTA is a governmental entity and TCI is a corporation headquartered in Florida. They do not have common management or common ownership. VTA provides a budget that TCI uses to pay the Operators, but VTA has no control over the day-to-day organization of TCI.

VTA did not agree to bargain with the Union, because it is not an employer and is not in a bargaining relationship with the Union. Additionally, VTA did not cause TCI to engage in bad faith bargaining. It played no role in the bargaining process. Gompert had one discussion with Dash and Dawson. She expressed her opinions but never directed TCI to negotiate in any particular manner. The best evidence that she did not direct TCI's negotiating efforts is that the final agreement does not conform with her preferred outcomes. For instance, the disciplinary look back was less than her desired 36 months and the agreement requires TCI to pay 100%, not 75% of the Medicare Supplement, up to a certain dollar figure. Regardless of what Dash may have said to the Union negotiators during negotiations, VTA did not direct the course of bargaining. Moreover, VTA also maintains that the Union did not provide any evidence that the parties had tentatively agreed to any specific proposal. Nothing was considered to be agreed upon until the whole contract was fully agreed upon. Lastly, VTA argues that the Charge is moot due to the Union and TCI's agreeing on a new CBA.

Analysis

Joint ER

The Union urges the DLR to look to NLRB law when deciding whether VTA is a single or joint employer of the TCI Operators. The Commonwealth Employment Relations Board (CERB)[12] may look to NLRB precedent for guidance, but NLRB precedent is not binding on the CERB. Alliance, AFSCME, SEIU and Luther E. Allen, Jr., 8 MLC 1518, SUPL-2024, 2025 (November 13, 1981). It is within the CERB's discretion to determine whether there is a need to look beyond Chapter 150E precedent for guidance, and whether such guidance is helpful or persuasive. See, e.g., Office and Professional Employees International Union, Local 6, AFL-CIO v. Commonwealth Employment Relations Board, 96 Mass. App. Ct. 764 (2019).

The CERB has not frequently considered the issue of whether a governmental entity is a joint employer, but it did consider whether the Department of Labor was a joint employer of ITT's Westover employees in ITT Job Training Services, Inc, CR-3663 (June 2, 1992). Similar to the NLRB's analysis, the CERB considered:

> the direct, day-to-day interactions between the public entity and the employees, analyzing which entity performs such functions as issuing paychecks, deducting and remitting employment taxes, routinely screening job applicants, enforcing work requirements, hiring, evaluating, disciplining, and discharging employees. See Hudson Bus Lines, 4 MLC 1630, 1635-36 (1977) (despite the Boston School Committee's substantial control over some areas of the bus company-contractor's operations, including the right to approve certain hiring decisions, the bus company … determined which drivers to assign to particular routes, issued the paychecks, and remitted all employment taxes was the actual employer of the bus drivers).

In that case, the CERB noted that the economic realities of supervising a contractor's performance required close scrutiny. Although DOL reserved substantial control over matters affecting the contractors' employees, the CERB determined that DOL was not a joint employer. DOL's contract with the independent contractor specified the parameters of employees' wages and benefits, the scope of the employees' work and job qualifications, the authority to fill senior staff, and defined the grievance procedures. But DOL did not routinely interview, evaluate, direct, supervise, discipline, or resolve grievances pertaining to these employees. The CERB concluded that although "DOL's supervisory controls are strict and comprehensive, they are exercised through ITT management, to assure compliance with DOL's contract, and do not involve a direct employment relationship with ITT's employees." Id. In making this determination, the CERB also considered the fact that DOL did not claim, or desire, an employer-employee relationship, finding "[a]n effort by a public entity to distance itself from a contractor's employees is influential in determining whether the public entity bears an employment relationship with those employees." Id.

Similarly, in Boston School Committee, 14 MLC 1181, 1195, SI-203 (September 2, 1987) (1987), aff'd sub nom. School Committee of Boston v. Labor Relations

[12] References to the CERB include its predecessor, the Labor Relations Commission.

Commission, 24 Mass. App. Ct. 721(1987), the CERB considered whether bus drivers, who were employed by private bus companies that had contracts with the school committee, were employed by a public employer and thus were public employees. The private bus companies supervised the daily work of the drivers, enforced work rules, hired, paid, disciplined, and fired drivers. The school committee set certain general requirements for drivers and reserved the right to reject drivers that it deemed unfit and to direct the bus companies to fire or discipline drivers. The school committee established certain rules that the bus company had to enforce and furnished guidelines for bargaining. The bus companies sought the school committee's approval for most of the proposals during contract negotiations between the bus companies and the union. The school committee approved the companies' expenses to ensure fiscal responsibility. The school committee necessarily needed to consider the financial expenditures and ensure the safety of the children riding the school buses. The Court of Appeals upheld the CERB's conclusion that the facts did not show such a pervasive control of the bus companies that school bus drivers were employed by the school committee, finding that "[c]areful oversight of the third parties is to be expected and, taken alone, not decisive. It would unreasonably limit the flexibility of governmental bodies to buy goods and services, particularly when the public need may be transient, if the employees of third-party vendors are automatically transmuted into public servants just because the government supervises the vendor closely." School Committee of Boston v. Labor Relations Commission, 24 Mass. App. Ct. 721 at 726-727.

In other cases, where the governmental entity retained more direct and comprehensive supervisory and fiscal links, the governmental entity was determined to be the employer. For example, in Worcester School Committee, 13 MLC 1471, MCR-3597 (February 17, 1987), the CERB determined that the school committee was the employer of Head Start employees because it exercised substantial control over Head Start employees, including resolving all grievances and approving all wages, benefits, hiring, firing, disciplinary actions, and personnel policies.

Here, there is no doubt that VTA's requirements in its contract with TCI gave VTA some control over matters affecting TCI's employees. VTA retained the right to require certain policies and training; approve or reject GM candidates; reject Operators due to safe driving ratings; set financial parameters; and approve other expenditures. However, TCI retained the day-to-day responsibilities for the operation and supplied human resource management. Although VTA sets an overall financial figure, it does not control the wages or benefits and does not issue the paychecks to the Operators. TCI, not VTA, directly supervises the employees. TCI determines work assignments and evaluates employees. TCI hires, disciplines, and discharge employees, although VTA reserved the right to require Operators to maintain safe driver records. The contract between VTA and TCI specifically documents that TCI is an independent contractor. VTA neither claims nor desires an employer-employee relationship with TCI's employees and when the contract ends, VTA will have no control over TCI. Applying the rationale applied in the above referenced CERB precedents, I find that the facts do not establish that VTA is a joint employer with TCI.

Single Employer

The CERB has found that separate public employers can constitute a single employer, for instance the CERB has found municipality and school committees are a single employing entity under Chapter 150E. See Town of Weymouth, 40 MLC 253, 255, MUP-10-6020 (March 10, 2014); Town of Saugus, 28 MLC 13, 17, MUP-2343, CAS-3388 (June 15, 2001). The CERB focuses on whether there is common control and ownership and whether the entities share management and labor relations policies. See Shore Collaborative and Massachusetts Federation of Teachers 7 MLC 1351, 1353, MCR-2894 (October 7, 1980) (finding that the member communities, through their school boards, have a single employer relationship with Collaborative employees because the Collaborative Board is composed entirely of school committee members who exercise complete control over the basic operation decisions and labor policy of the Collaborative).

Here, VTA is a governmental entity, created by statue, while TCI is a private company headquartered in Florida. There is no common ownership. Gompert is the administrator of VTA and Ed Pigman, and later his wife, served as President of TCI. VTA pays TCI as an independent contractor, with the contract running year to year with an option to cancel or renew the contract.

The Union argues that there is centralized control over labor relations because VTA directed the contract negotiations between TCI and the Union, however the Union failed to provide evidence to support that contention. VTA pays for TCI's lead negotiator but VTA did not attend negotiations. The Union negotiators assert that Dash told them during some negotiation sessions that he needed to obtain Gompert's approval, but the Union did not bring Dash to the investigation to provide specific information about any approval that he needed to obtain from VTA during the negotiation process.[13] The only first-hand information of VTA's alleged control over the negotiations presented during the investigation was Gompert's acknowledgment of one conversation with TCI negotiators about the CBA negotiations. The Union further argues that there is common management because the VTA set the policies and terms of contract negotiations. However, I find that the presented evidence, that VTA set some policies for TCI's employees such as sexual harassment and EEO policies, and had one discussion with TCI negotiators, is insufficient to demonstrate that there is common management. The Union also argues that there is an interrelation of operations because VTA posts job solicitations and receives the applications at VTA's human resources. VTA pays for job postings and applications go to an email address that references VTA, but the uncontroverted evidence demonstrates that VTA does not see the applications and does not direct the hiring decisions.

[13] Dash's comments that TCI needed to obtain VTA's approval and/or that VTA required TCI to make changes to proposals, standing alone, do not establish that VTA directed the contract negotiations. Dash could have had other reasons for making the comments, such as to delay negotiations or to place the "heat" on VTA rather than TCI regarding any proposals or positions that the Union might find objectionable.

Accordingly, I find that the evidence presented during the investigation fails to demonstrate that VTA and TCI are a single employer.

Failure to Bargain and Bad Faith Bargaining Allegation

Section 6 of the Law requires an employer and the exclusive representative of the employees to meet and negotiate in good faith with respect to wages, hours, standards of productivity and performance and any other terms and conditions of employment.

There is no dispute that VTA refused to bargain with the Union. There is a dispute whether VTA engaged in bad faith and regressive bargaining with the Union. However, because I have determined that VTA is not a single or joint employer, it does not have a bargaining relationship with the Union. Accordingly, I do not find probable cause to believe that VTA violated the Law by failing to bargain with the Union or by engaging in bad faith bargaining.[14] I therefore dismiss the charge in its entirety.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

Gail Sorokoff

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GAIL SOROKOFF, INVESTIGATOR

APPEAL RIGHTS

The charging party may, within ten (10) days of receipt of this order seek a review of the dismissal by filing a request with the Commonwealth Employment Relations Board pursuant to Department Rule 456 CMR 15.05(9). The request shall contain a complete statement setting forth the facts and reasons upon which such request is based. The charging party shall include a certificate of service indicating that it has served a copy of its request for review on the opposing party or its counsel. Within seven (7) days of receipt of the charging party's request for review, the respondent may file a response to the charging party's request.

[14] I make no determinations about whether TCI engaged in bad faith and/or regressive bargaining because the NLRB, not the DLR, has jurisdiction over alleged TCI unfair labor practices.