

STATE OF DELAWARE  
PUBLIC EMPLOYMENT RELATIONS BOARD

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| DELAWARE CORRECTIONAL OFFICERS ASSOCIATION, | : |                             |
|   | : |                             |
| Petitioner,                                 | : |                             |
|   | : |                             |
| v.  | : | <u>U.L.P. No. 95-03-123</u> |
|   | : |                             |
| STATE OF DELAWARE,                          | : |                             |
| DEPARTMENT OF CORRECTION,                   | : |                             |
|   | : |                             |
| Respondent.                                 | : |                             |

PROBABLE CAUSE DETERMINATION

The Delaware Correctional Officers Association ("DCOA" or "Union") is an employee organization within the meaning of Section 1302(h) of the Public Employment Relations Act ("PERA" or "Act"), 19 Del.C. Chapter 13 (1994). DCOA is the exclusive bargaining representative of employees in the State's Adult Correctional Institutions within the meaning of Section 1302(i). The State of Delaware, Department of Correction ("Employer") is a public employer within the meaning of Section 1302(m), of the PERA.

DCOA filed the above-captioned unfair labor practice charges with the Public Employment Relations Board ("PERB") on March 23, 1995. The charge alleges violation of Article 1307, Unfair Labor Practices, (a)(1), (2), (5) and (6), of Public Employment Relations Act, 19 Del.C. 13 (1984), which provide:

(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.

(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.

(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 unit this Chapter.

#### BACKGROUND

The parties are currently engaged in negotiations for the purpose of entering into a collective bargaining agreement and have been so engaged since April, 1994. On or about September 15, 1994, the parties entered into an Interim Agreement which contains the following overtime provisions:

##### Article 15/Overtime

1. The parties agree to implement Sections 2 and 3 of this Article after a transition period of up to sixty (60) calendar days which shall be used to work out the implementation of these provisions. A committee consisting of two members from the State and the Association at each institution shall meet for this purpose. The State and the Association may have one additional representative above the local level who may also attend an institutional meeting. During this transitional period the parties agree to a moratorium on grievances pertaining to overtime.

2. The State shall determine overtime availability. Once the decision to utilize overtime is made, the Association shall determine the manner of distribution of such overtime, subject only to any limitations the State places on overtime eligibility.

3. The State shall reserve the right to distribute overtime, including but not limited to freezing employees, any time that the overtime distribution made by the Association fails to meet the operational or security needs.

The Petitioner alleges that on January 6, 7, and 8, 1995, the negotiated procedures for assigning overtime was not utilized by the Respondent in that the Association's overtime distribution list was not followed pursuant to Section 2 of the negotiated procedure.

The Respondent denies the charge claiming that the Association's overtime list was not followed for security reasons which is a contingency provided for in Section 3 of the overtime procedure.

The Respondent further argues that the Interim Agreement contains a mutually agreed upon procedure for resolving disputes concerning contract interpretation and application. The PERB has no authority to insert itself as an additional step in the contractual grievance procedure and is, therefore, without jurisdiction in this matter.

The Petitioner denies that an emergency existed maintaining that adequate time was available to make the telephone calls necessary to distribute the overtime according to the list.

Regardless of the contractual grievance procedure, the Petitioner maintains that whether the Respondent's conduct constitutes a violation of the Act, as alleged, is a question properly before the Board for resolution.

#### OPINION

The authority to dismiss an unfair labor practice charge for lack of probable cause to believe that an unfair labor practice has occurred is found in Article 5.6 of the Board's Rules and Regulations which provides:

##### 5.6 Decision or Probable Cause Determination

(a) Upon review of the Complaint, Answer and 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 shall decide such appeals following a review of the record, and, if the Board deems necessary, a hearing and/or the submission of briefs.

The issue raised by Charge 123 concerns the interpretation and application of the contractual overtime provisions agreed to by the parties in September, 1994.

The PERB has consistently applied its policy concerning issues requiring contract interpretation as first set forth in Brandywine Affiliate NCCEA/DSEA/NEA v. Brandywine School District Board of Education (Del. PERB, U.L.P. No. 85-06-005 (1985)).

The unfair labor practice forum is not a substitute for the grievance procedure and the Public Employment Relations Board has not jurisdiction to resolve grievances through the interpretation of contract language. It may, however, be necessary for the Board to periodically determine the status of specific contractual provisions in order to resolve unfair labor practice issues properly before it.

In the case of Indian River Ed. Assn. v. Bd. of Ed. Indian River School District (Del. PERB, U.L.P. No. 88-11-027 (1988)), the PERB dismissed the charge for lack of probable cause to believe that a violation had occurred, concluding:

The determination of whether the District's action in this matter was proper necessarily requires the interpretation of Article XVII, Section D. This determination is, by statute, the function of the negotiated grievance procedure. In exercising its authority the Board cannot, as it is requested to do here, serve as an alternative to the grievance procedure. Lastly, the complaint contains no allegation, nor does the record establish, that the [school] Board's refusal to honor the appeal to Level III was for any reason other than its good-faith perception of its rights under the relevant contract language.<sup>1</sup>

Analysis of contractual language by the PERB has been limited to matters requiring the determination of the status quo. Christine Education

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<sup>1</sup> See also Lake Forest Ed. Assn. v. Lake Forrest Bd. of Ed., Del. PERB, U.L.P. No. 92-07-076 (1992); L.A.F.E., Local 1590 v. City of Wilmington, Del. PERB, U.L.P. No. 91-10-093 (1992).

Assn. v. Bd. of Ed., Christina School District, Del. PERB, U.L.P. No. 88-09-026  
(1986).<sup>2</sup>

The Complaint does not allege that a grievance was filed or that the State has refused to process a grievance through the grievance procedure. The fact that the grievance procedure does not contain a provision requiring review by a neutral third party is of no consequence. The procedure for resolving disputes involving the interpretation and/or application of the collective bargaining agreement was not unilaterally imposed upon the Association by the State. To the contrary, the contractual grievance procedure was mutually agreed to during the give and take of the collective bargaining process, the result of which is that the Petitioner is bound by the procedure for which it bargained and to which it agreed.

#### DECISION

Based upon the foregoing, it is determined that pursuant to Rule 5.6, Decision or Probable Cause Determination, of the Rules and Regulations of the Public Employment Relations Board, the pleadings fail to support a finding of probable cause to believe that a violation of 19 DeI.C. §1307, as alleged, has occurred.

Accordingly, the Charge is dismissed.

**IT IS SO ORDERED.**

DATED: August 31, 1995

/s/Charles D. Long, Jr.  
Executive Director

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<sup>2</sup> See also Indian River Ed. Assn. v. Bd. of Ed., Indian River School District, Del. PERB, U.L.P. No. 90-09-053 (1990); F.O.P. Lodge No. 1 v. City of Wilmington, Del. PERB, U.L.P. No. 93-08-088 (1993), I.A.F.F., Local 1590 v. City of Wilmington, Del. PERB, U.L.P. No. 93-06-085 (1993).

