

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

DELAWARE CORRECTIONAL OFFICERS ASSOCIATION,	:	
	:	
Petitioner,	:	
	:	
v.	:	<u>U.L.P. No. 95-06-134</u>
	:	
STATE OF DELAWARE,	:	<u>U.L.P. No. 95-06-137</u>
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 13, 1995, and March 30, 1995, respectively. The charges allege violations of Section 1307, Unfair Labor Practices, (a)(1), (2), (5) and (6), of the Public Employment Relations Act, 19 DeL.C. 13 (1984), which provide¹:

- (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:

¹ Case No. 134 alleges violations of (a)(1), (2), (5) and (6). Case No. 137 alleges violations of (a)(1), (5) and (6).

- (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 under this Chapter.²

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 provision:

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) calendars 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 Interim Agreement also contains the following provision:

² Specifically, 1301, 1303, and 1304.

ARTICLE 34: TRANSFERS WITHIN AN INSTITUTION - ALL EMPLOYEES:

e. No employee will be involuntarily transferred from a shift or days off within an institution or to another shift or days off within an institution except under one or more of the following conditions:

1. The closing of an institution or part of an institution;
2. Relocation of a program;
3. By request of an employee;
4. By mutual consent of the parties;
5. When an employee is a member of a relief pool;
6. Or by arbitration decision.

The allegations in Charge 134 and 137 arise from a prisoner execution scheduled for March 17, 1995. Charge 134 alleges that the Employer's failure to assign overtime to cover the execution among the maintenance employees and correctional officers, corporals, sergeants, and K-nine officers according to the Association's distribution list, Article 15 of the Interim Agreement was violated thereby evidencing a failure by the State to meet its statutory duty to bargain in good faith.

Charge 137 alleges that the Respondent required the K-nine officers to report for the execution during scheduled time-off despite the fact that none of the prerequisite conditions was present in violation of Article 34, the transfer provision. The Petitioner claims that the Respondent's conduct in violation of the Interim Agreement evidences a breach of the duty to bargain in good faith.

The Respondent argues that the involuntary transfer provision is not applicable to the specific circumstances involved and the overtime provisions set forth in the Interim Agreement were followed in full. The Respondent further argues that because the Interim Agreement contains a

provision setting forth the parties' agreement to procedure which "shall" serve as the method for resolving disputes concerning contract interpretation and application to the PERB has no authority to insert itself as an alternate procedure and is, therefore, without jurisdiction in these matters.

The Petitioner acknowledges the presence of a contractual grievance procedure. It questions the objectivity of the procedure because the only appeals are to the Employer itself without resort to an impartial hearing.

OPINION

The authority to dismiss an unfair labor practice charge for no probable cause to believe that an unfair labor practice has occurred is set forth in Regulation V, of the Board's Rules and Regulations provides, 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 PERB has consistently applied its policy concerning charges requiring contractual interpretation as 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 no 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.¹

Analysis of contractual language by the PERB has been limited to matters requiring the determination of the status quo. Christina Education Assn. v. Bd. of Ed., Christina School District, Del. PERB, U.L.P. No. 88-09-026 (1986).²

Neither complaint alleges that a grievance was filed which the State refused to process through the negotiated 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

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

² See also Indian River Ed. Assn. v. Bd. of Ed., Indian River School District, Del. PERB, U.L.P. No. 90-09-053 (1990); FOP 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).

the State. To the contrary, the contractual grievance procedure was mutually agreed to by the parties during the give and take of the collective bargaining process, the result of which is that the DCOA 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 Del.C. Section 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