

bargaining representative” of the bargaining unit of certain employees of the Department of Correction at all times relevant to this dispute. 19 Del.C. §1302(j).³

At all times relevant to this matter the State and AFSCME were parties to a collective bargaining agreement for the term of April 1, 1993 to March 31, 1996. The Agreement has been extended year-to-year since 1996 by agreement of the parties.

On May 20, 2004, Charging Party filed an unfair labor practice complaint against the Respondent alleging that the State’s method of posting vacancies within the Food Service and Maintenance sections of the Bureau of Administration of the Department of Correction violates Articles 7, 10, 28 and 29 of the collective bargaining agreement and in so doing the State has unilaterally altered a mandatory term and condition of employment in violation of 19 Del.C. §1307(a)(5), which provides:

- (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
 - (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate bargaining unit, except with respect to a discretionary subject.

AFSCME relies primarily on the following contract language to establish the status quo which it maintains requires the posting of vacancies on an institution by institution basis rather than by county or region as is the State’s practice:

² 19 Del.C. §1302(i): “Employee organization” means any organization which admits to membership employees of a public employer and which has as a purpose the representation of such employees in collective bargaining, and includes any person acting as an officer, representative or agent of said organization.

³ 19 Del.C. §1302(j): “Exclusive bargaining representative” or “exclusive representative” means the employee organization which as a result of certification by the Board has the right and responsibility to be the collective bargaining agent for all employees in that bargaining unit.

Article 7

SPECIAL RIGHTS OF THE PARTIES

7.3 As used in this section, the term institution shall include the following: SCI, MCI, PTA, DCC, WCI, MPCJF Transportation Unit, Community Correction, STA and Maintenance Section.

Article 28

TRANSFERS WITHIN INSTITUTIONS

28.1 Vacancies at each institution shall be posted by shifts and days off. Applicants for transfer to such posted shift and days off shall be selected in order of seniority of those employees eligible to bid. To be eligible, an employee must have an overall satisfactory rating on the most current performance appraisal, and must not within the last year have an AWOL in which the employee did not call in.

28.2 Only when transfer applications processed in accordance with 28.1 have been exhausted, vacancies may be filled in accordance with Article 29.

Article 29

TRANSFERS BETWEEN INSTITUTIONS AND
FILLING VACANCIES

29.1 Employees who wish to be considered for voluntary transfer to another institution shall submit a written request to the Department Personnel Section, with the desired institution(s) specified for placement on a voluntary transfer list. Transfer requests may only be submitted when that classification is opened by the Personnel Office.

The unfair labor practice charge requests the Public Employment Relations Board to: 1) issue a cease and desist order; 2) restore the status quo; and 3) provide such other relief as the Board deems proper and fitting.

The State filed its Answer on June 21, 2004, denying the allegation and setting forth the following New Matter: I. The Charge should be dismissed as the Charging Party

has failed to file a Complaint within 180 days of the alleged violation; II. The unfair labor practice charge should be deferred to arbitration.

The Union filed its Response to New Matter on July 21, 2004. The parties subsequently requested that the matter be held in abeyance pending settlement discussions. When these discussions were unsuccessful the Charge was reactivated and a hearing was held on April 5, 2005, for the limited purpose of determining whether the Charge was timely filed. The following decision results from the record created by the parties.

DISCUSSION

No probable cause determination has been issued in this matter to date. To establish a violation of §1307(a)(5) of the Act the subject matter must involve a mandatory subject of bargaining. The posting of vacancies and the procedure for filling those vacancies have been determined by the PERB to be mandatory subjects of bargaining. Appoquinimink Ed. Ass'n. v. Bd. of Ed., Del. PERB, ULP No. 1-3-84-3-2A, I PERB 35, 57 (1984). The PERB has also held that a unilateral change in a mandatory subject of bargaining constitutes a per se violation of the duty to bargain in good faith. Brandywine Ed. Ass'n. v. Bd. of Ed., Del. PERB, ULP No. 85-06-005, I PERB 131, 143 (1985).

Under the heading of New Matter I, the State raises the issue of timeliness. With regard, thereto, this matter does not involve a single one-time incident. Rather, a series of incidents occurred in which numerous individual vacancies were posted over a number of years. I find that each individual posting constituted an independent act sufficient to

trigger the 180 day statutory filing period. After having reviewed the pleadings I conclude that, when viewed in a light most favorable to Charging Party, probable cause exists to believe that an unfair labor practice may have occurred.

Although the date of the posting resulting in this unfair labor practice charge is not evident from the hearing record, considering the time limits set forth in Article 6, Grievance and Arbitration Procedure, of the collective bargaining agreement for the filing of a grievance and the absence of any protest by the State that the grievance was untimely, I deduce that the incident which triggered this unfair labor practice charge occurred within the 180 day period required by Section 1308(a) of the PERA and PERB Rule 5, Unfair Labor Practice Proceedings, Section 5.2, Filing of Charges, paragraph 5.2(a)

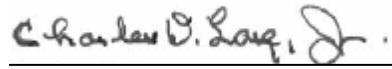
Timeliness under the statute, however, is different from the issue of waiver. It is undisputed that the method of posting vacancies currently utilized by the State has been the practice for at least the past ten (10) years and that numerous Union officials, including the President, Treasurer and Southern, Central, and Northern Regional Representatives have been regular recipients of copies of the various postings.

Much of the testimony and documentary evidence placed on the record at the hearing concerned whether the Union waived its right to protest the posting procedure because the Union was on notice of the longstanding practice. The parties each presented oral argument at the close of the hearing.

If the parties are satisfied that their closing arguments adequately present their respective position on the issue of waiver, I will proceed to address that issue. If not, the parties may supplement their closing argument by written simultaneous submissions. The

parties are to advise me of their desire not later than Monday, June 13, 2005. Otherwise, I will rely on the record as it now stands to resolve the issue of whether the Union waived its right to protest the current method of posting vacancies.

DATE: June 2, 2005

Handwritten signature of Charles D. Long, Jr. in cursive script, written over a horizontal line.

Charles D. Long, Jr.,
Executive Director,
Delaware PERB