PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF DELAWARE

CORRECTIONAL OFFICERS ASSOCIATION OF DELAWARE,	)	
Charging Party,	)	
v.	)	**ULP No. 15-10-1013**
STATE OF DELAWARE, DEPARTMENT OF CORRECTION,	)	**Probable Cause Determination**
Respondent.	)	

BACKGROUND

The State of Delaware ("State") is a public employer within the meaning of §1302(p) of the Public Employment Relations Act, 19 Del.C. Chapter 13 ("PERA"). The Department of Correction ("DOC") is an agency of the State.

The Correctional Officers Association of Delaware ("COAD") is an employee organization within the meaning of §1302(i) of the PERA and is the exclusive bargaining representative of a bargaining unit of DOC uniformed employees (as defined in DOL Case 1) within the meaning of §1302(j) of the Act.

DOC and COAD are parties to a current collective bargaining agreement which has a term of July 1, 2015 through June 30, 2018.

On or about October 20, 2015, COAD filed the instant unfair labor practice charge alleging that DOC violated §1307(a)(1), specifically referencing 19 Del.C. §1303(a), which state:

> §1307. Unfair Labor Practices
>
> (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.
>
> §1303. Public employee rights.
>
> Public employees shall have the right to:
>
> (3) Engage in other protected activities for the purpose of collective bargaining or other mutual aid or protection insofar as any such activity is not prohibited by this chapter or any other law of the State.

COAD alleges that two bargaining unit employees were involved with an incident with a supervisor at the Baylor Women's Correctional Institute ("BWCI") on or about July 31, 2015. The Charge alleges the supervisor addressed one of the employees "in an unprofessional and abusive manner using profanity and threats". Both bargaining unit employees filed written incident reports, "complaining" about the supervisor's behavior, which COAD asserts is protected concerted activity within the meaning of 19 Del.C. §1303. Thereafter, in August, DOC "initiated an internal affairs investigation" against the two bargaining unit employees. COAD asserts this constitutes interference with, restraint and coercion of the employees because they engaged in protected concerted activity.

On October 30, 2015, the State filed its Answer. While admitting that each of the bargaining unit employees filed an incident report concerning the July 31, 2015 incident with the supervisor, the State denies this constitutes protected concerted activity under the PERA. It further denies that the internal affairs investigation involving the two bargaining unit employees is in any manner related to the July 31, 2015 incident or the reports the employees filed concerning that incident. The State's Answer did not contain any new matter.

This probable cause determination results from a review of the pleadings.

DISCUSSION

Regulation 5.6 of the Rules of the Delaware Public Employment Relations Board requires:

> (a) Upon review of the Complaint, the Answer and the 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 submission of briefs.
>
> (b) If the Executive Director determines that an unfair labor practice may have occurred, he shall where possible, issue a decision based upon the pleadings; otherwise, he shall issue a probable cause determination setting forth the specific unfair labor practice which may have occurred.

For purposes of reviewing the pleadings to determine whether probable cause exists to support the Charge, factual disputes revealed by the pleadings are considered in a light most favorable to the Charging Party in order to avoid dismissing a valid charge without the benefit of receiving evidence in order to resolve factual differences. *Flowers v. DART/DTC*, PERB Probable Cause Determination, ULP 04-10-453, V PERB 3179, 3182 (2004).

On their face, the pleadings provide a sufficient basis to conclude there is a probability that an unfair labor practice may have occurred. Although there do not appear to be material factual disputes, the charge raises a legal issue under the PERA as to whether the employees' conduct was concerted and therefore, afforded protection. It also raises a legal question as to whether DOC has engaged in conduct which interferes with, restrains or coerces employees in the exercise of their statutory rights to engage in concerted activities for their mutual aid or protection.

The burden is on the Charging Party to factually support its allegations. In determining whether the initiation of an investigation constitutes a violation of §1307(a)(1) as alleged, the test is not whether the employees were actually interfered with, restrained or coerced, but whether the conduct reasonably tended to interfere with the free exercise of the employee rights. The standard for evaluating such reasonable tendency is an objective one. *AFSCME Local 2305 v. DHSS, DPC*, Del. PERB, ULP 08-04-619, VI PERB 4133, 4143 (2009).

DETERMINATION

Consistent with the foregoing discussion, the pleadings constitute reasonable cause to believe that an unfair labor practice may have occurred, when considered in a light most favorable to the Charging Party.

An informal conference will be scheduled for the purpose of identifying any factual disputes and defining the manner in which the argument will be received in order that a record may be created on which a determination can be made.

IT IS SO ORDERED.

DATE: December 10, 2015

D. Murray-Sheppard

DEBORAH L. MURRAY-SHEPPARD
Executive Director
Del. Public Employment Relations Bd.