

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE,)
COUNTY AND MUNICIPAL EMPLOYEES,)
COUNCIL 81, LOCAL S 879, 1036 and 1443,)
Charging Parties,)
) ULP 98-04-230
AND)
)
STATE OF DELAWARE, DEPARTMENT OF)
TRANSPORTATION,)
Respondent,)

Decision on Preliminary Issue of Timeliness

The American Federation of State, County and Municipal Employees, Locals 879, 1036 and 1433, (hereinafter "Charging Parties" or "AFSCME") are employee organizations within the meaning of 19 Del.C. §1302(h) and the exclusive bargaining representative of certain State employees of the Department of Transportation including, but not limited to, Equipment Operators within the meaning of 19 Del.C. §1302(i). The State of Delaware, Department of Transportation, (hereinafter "State" or "Respondent"), is a public employer within the meaning of 19 Del.C. §1302(n).

On April 23, 1998, Charging Parties filed the above-captioned unfair labor practice charge alleging conduct by the Respondent in violation of the Public Employment Relations Act, 19 Del.C. Ch. 13 (hereinafter "Act"), specifically §1307(a)(1), (a)(2),(a)(3) and (a)(6). [1]

Respondent's Answer, filed on May 4, 1998, denies the substantive allegations set forth in the Complaint and, as New Matter, contends the Complaint should be dismissed because it was not filed within the 180 day filing period required by PERB Rule 5.2(a). In its Response filed with the PERB on May 11, 1998, Charging Parties deny the Petition is untimely.

On May 20, 1998, the Executive Director issued a finding of probable cause to believe that an unfair labor practice may have occurred. The Executive Director also determined that a resolution of the timeliness issue was best addressed within the context of a factual record to be developed at an evidentiary hearing.

Contending that the timeliness issue should be resolved prior to proceeding to a hearing on the merits, the Respondent filed a Petition on May 27, 1998, to have the Executive Director's reviewed by the Public Employment Relations Board. The parties subsequently agreed to have the timeliness issue considered prior to an evidentiary hearing and based upon the allegations set forth in the pleadings. Written argument was submitted by the State on June 25, 1998, and by AFSCME on July 6, 1998. The following opinion and decision result from the record thus compiled.

[1] **§1307. Unfair Labor Practices - Enumerated**

(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.
- (3) Encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.
- (6) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its authority to regulate the conduct of collective bargaining under this chapter.

BACKGROUND

Insofar as the limited issue of timeliness, the complaint alleges the following:

6. The Department of Transportation issued a drug testing policy on December 2, 1994, without input from the Union where in the policy included "disciplinary action" (a mandatory subject of bargaining) for positive drug and/or alcohol test results.

7. The Union filed an unfair labor practice (ULP) claim against the Department of Transportation January 23, 1995, for failing to negotiate the policy.

8. The Executive Director of the Public Employment Relations Board (PERB) issued a ruling July 7, 1995 and was subsequently upheld by the Public Employment Relations Board, in that discipline was a mandatory subject of bargaining and that the Department was in violation of 1307(a)(5), as alleged.

9. The parties, after this final ruling of the PERB negotiated a "Memorandum of Agreement" with a "Tentative Agreement" dated January 24, 1996, and an effective date of July 1, 1996. Subsequently, a new "DelDot Workplace Drug and Alcohol Testing Program" was adopted and issued to all employees.

10. The testing procedure in the new policy requires DOT to use an outside medical contractor to provide all testing services, including the random scheduling of all employees covered by the collective bargaining agreement (Locals 837, 879, 1036 and 1443).

11. The medical contractor is to notify a selected member of management (contact person) of all employees whose random number is selected for random

12. Those employees notified that they have been selected for random testing are to report directly to the medical contractor and submit to a urinalysis. In cases of post-accident and reasonable suspicion, employees who are believed to be impaired will not be allowed to drive a vehicle to the specimen collection site, DOT shall arrange transportation.

13. After the issuance of the new policy those employees randomly selected reported directly to the contractor selection site. In no case was a supervisor escorting an employee/employees to the collection site, with the exception of post-accidents, reasonable suspicion or those employees the contractor retested for possible urinalysis tampering.

14. In the fall of October, 1997, and after the death of the department's selected contact person, Phil Fennimore, manpower development officer, the district engineers of all three counties ordered the supervisors (Local 837)

to escort employees of locals 879,1036, and 1443 to the collection site which is in direct violation of the negotiated "Memorandum of Agreement" testing procedures.

15. The alleged violations were brought to the attention of Secretary Anne P. Canby and Director of Highway Operations, Mr. John Gilbert by letter dated October 23, 1997.

16. The Secretary, Anne P. Canby, responded by letter dated October 30, 1997, and declared the department's intention to follow the provision of the agreement. The Secretary further encouraged the topic to be added to the agenda for discussion at the labor management committee (LMC) meetings held between the parties

17. At the labor management committee meeting (LMC) held February 9, 1998, the Department through its representative stated they were having trouble with a number of employees tampering with their urinalysis samples. The Department could however only name two employees who were retested due to possible urinalysis tampering.

19. The Department through its representative was to look into the situation and respond back to the Union.

20. During the week of April 6th and April 13th, 1998, the Department of Transportation again ordered employees rounded-up and driven to the medical contractor collection site for urinalysis testing, again in violation of the memorandum of agreement. The Department not only violated the testing procedures but went so far as to select employees that were not randomly selected by the medical contractor for testing.

21. On April 16, 1998, employees were rounded up and driven to the medical contractor collection site for urinalysis testing to the surprise of the collection site personnel as those employees were not on the list for random selection which was in direct violation of the Federal registry Mandatory Guidelines for Federal workplace Drug Testing Programs and the 1996 memorandum of agreement between the parties.

The DelDot Drug and Alcohol Testing Program provides, in relevant part:

III. SPECIFIC PROVISIONS

DelDot is dedicated to assuring fair and equitable application of this policy. All supervisors and managers are required to use and apply this policy in an unbiased and impartial manner. Each supervisor of affected employees will attend mandatory training regarding alcohol and drug testing, reasonable suspicion determinations, and all related courses as determined by DelDot. Any supervisor or manager who disregards the requirements of this policy, or who is found to deliberately misuse the policy in regard to subordinates, shall be subject

to disciplinary action, up to and including dismissal.

VII. TESTING PROCEDURES

DelDot will use outside medical contractors to perform all testing services, including the random scheduling of employee testing. The "pool" used for random testing shall consist of all employees Statewide covered by this policy who are also covered by the collective bargaining agreement between the State and the Union (Locals 879, 1306 and 1443).

The medical contractor will notify the contact person within DelDot of those selected for random testing. Selected employees shall report directly to the medical contractor.

POSITIONS OF THE PARTIES

STATE: The State argues the initial incident allegedly involving the selection and transportation of employees to be randomly tested necessarily occurred prior to the Union's letter of complaint dated October 23, 1997, to the Department Secretary and Director of Highway Operations. Since the unfair labor practice charge was not filed until April 23, 1998, it exceeds the filing period of 180 days as set forth in PERB Rule 5.2(a), and should be dismissed.

With regard to the specific conduct, the State argues:

(1) The letter of October 23, 1997, unequivocally establishes that Charging Parties had actual knowledge of the incident occurring in October 23, 1997; therefore, the time limit for the filing of the unfair labor practice charge contesting the method of selecting employees commenced at the time of the initial incident.

Should it be determined that additional incidents involving the selection of employees to be randomly tested occurred in April, 1998, the facts do not support the presence of a continuing violation upon which the Union can rely to resurrect the charge.

2) Because the Complaint does not allege that a second incident involving management's escorting employees for urinalysis testing occurred after October 23, 1997, that portion of the charge is based solely upon the incident occurring prior to October 23, 1997, which is clearly outside the 180 day filing period.

AFSCME: AFSCME argues that, pursuant to the Secretary's suggestion in her response to AFSCME's letter of October 23, 1997, the Union's concerns were raised at the February, 1998, LMC meeting. Despite management's commitment to request clarification from the State's negotiator of the drug and alcohol testing policy and report back to the Union, the Department again selected and transported employees to the contractor's site for testing, during the weeks of April 6th and 13th, 1998. On at least one occasion, employees were selected whose names were not on the list of employees to be tested. The Union contends these April incidents constitute the basis for the filing of the instant charge.

ISSUE

Was the unfair labor practice charge filed with the PERB by AFSCME on April 23, 1998, timely filed pursuant rule 5.2(a), of the PERB rules and regulations?

DISCUSSION

The Complaint cites incidents occurring in October, 1997, and April, 1998, allegedly involving what the Union perceives as the improper method of selecting and transporting employees to be randomly tested. The pleadings contain no reference to an intervening incident involving either management's selecting or escorting employees for random testing. In the absence of a continuing course of conduct there can be no continuing violation. Considering the intervening period of six months, the incidents occurring in October, 1997, and April, 1998, are sufficiently removed in time as to constitute separate and distinct occurrences.

The Union's decision to pursue its concern over the initial incident in October, 1997, internally, as the Secretary suggested, rather than to file an unfair labor practice charge does not preclude it from filing a charge following the subsequent incidents of April 1998. To conclude otherwise, could discourage parties from

engaging in meaningful efforts to resolve disputes internally and informally rather than instituting timely and costly unfair labor practice litigation. To accept the State's position would also enable a party to engage in prohibited conduct, initiate a lengthy internal review and then resume the prohibited conduct after the passage of 180 days leaving the other party with no cause of action and without redress under the Act.

DECISION

The unfair labor practice charge filed with the PERB by AFSCME on April 23, 1998, was timely filed pursuant to rule 5.2(a), of the PERB rules and regulations.

Pursuant to the Probable Cause Determination issued on May 20, 1998, a hearing will be convened as soon as possible to receive evidence on the underlying substantive issue.

August 14, 1998

(Date)

/s/Charles D. Long, Jr.

Charles D. Long, Jr.
Executive Director