STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

CORRECTIONAL OFFICERS ASSOCIATION OF DELAWARE,	)	
Charging Party	)	ULP No. 04-09-449
	)	ULP No. 04-09-450
v.	)	(consolidated)
STATE OF DELAWARE, DEPARTMENT OF CORRECTION,	)	
Respondent	)	

PROBABLE CAUSE DETERMINATION

The State of Delaware, Department of Correction, is a public employer within the meaning of 19 Del.C. Section 1302(p) of the Public Employment Relations Act ("PERA" or "Act").

The Correctional Officers Association of Delaware ("COAD") is an employee organization within the meaning of 19 Del.C. Section 1302(i), of the PERA and the exclusive bargaining representative of certain designated employees of the State, namely Correctional Officers, within the meaning of 19 Del.C. Section 1302(j) of the PERA.

COAD filed the above-captioned unfair labor practice charges with the Public Employment Relations Board ("PERB" or "Board") on September 17, 2004. Each Charge alleges violations of Article 1307, Unfair Labor Practices, (a) (1), (2) and (3), of the Act, 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.

(3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.[1]

The Complaint in ULP No. 04-09-449 alleges:

> Corrections wardens are requiring supervisors to freeze COAD member officers over for additional mandatory overtime without following the procedures in the interim agreement and by refusing to allow frozen personnel the opportunity to swap the freeze with personnel who wish to voluntarily work the shift.
>
> (a) Wardens are directing supervisors to make the calls and determine who is frozen themselves, against the clear language of the interim agreement, and [by] refusing to allow frozen personnel the opportunity to swap the freeze with personnel who wish to voluntarily work the shift. The result of this new procedure is causing COAD members who have small children or elderly relatives not to be able to care for them, subjecting them to criminal charges for endangering the welfare of a child or elder abuse. Several COAD member officers have declined overtime and found someone else to work the overtime only to be told that

[1] On September 23, 2004, without objection by COAD, the State's Motion to Consolidate the Charges was granted.

> that is no longer permitted and they will be suspended or fired if they leave to take care of their children.

The complaint further alleges that: " . . . the intent of freezing is to cover staffing levels during emergency shortages – and not to supplement the department's short falls in manning the facilities." (ULP, ¶3(c)).

The State's Answer filed on September 22, 2004, denies the allegations and further states:

> . . . that it has followed all procedures in the interim collective bargaining agreement relating to the freezing of employees to work overtime. In addition, there are no provisions in the interim agreement which restrict the ability of Wardens to have supervisors 'call and determine who is frozen' or require Wardens to 'allow frozen personnel the opportunity to swap the freeze with personnel who wish to voluntarily work the shift." (Answer, ¶(3)).

Under New Matter the State alleges that COAD has failed to allege any facts which, if true, would constitute a violation of either 19 Del.C. Section 1307 (a)(1), (2) or (3). As to 19 Del.C. Section 1307(a)(1), the State alleges:

> 4. Nothing in the Charging Party's allegation even remotely suggests, or could reasonably be construed or inferred to suggest, that the State interfered with, restrained or coerced employees in or because of their rights under the PERA.
>
> 5. Thus, as to 19 DelC. § 1307(a)(1), because the Charging Party has failed to allege any facts that would, if proven, show that the State interfered with, restrained or coerced any employee in or because of the exercise of any right guaranteed under this chapter, this part of the Charge must be dismissed.

As to 19 Del.C. Section 1307(a)(2):

9. Nothing in Charging Party's allegation even remotely suggests, or could reasonably be construed or inferred to suggest, the State dominated, interfered with or assist in the formation, existence or administration of any labor organization.

10. Thus, as to 19 Del.C. § 1307(a)(2), because the Charging Party has failed to allege any facts that would, if proven, show that the State dominated, interfered with or assist in the formation, existence or administration of any labor organization, this portion of the Charge must be dismissed.

As to 19 Del.C. 1307(a)(3)[2]:

14. Nothing in Charging Party's allegation even remotely suggests, or could reasonably be construed or inferred to suggest, that the State encouraged or discouraged membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.

15. Thus, as to 19 Del.C. § 1307(a)(3), because Charging Party has failed to allege any facts that would, if proven, show that the State discouraged membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment, this part of the Charge must be dismissed.

[2] By letter to the parties dated November 19, 2004, PERB acknowledged that paragraphs 14, 15, 38 and 39 of Respondent's Answer and New Matter to ULP Nos. 04-09-449 and 04-09-450, contained inadvertent references to the language cited in 19 Del. C. §1307 (a)(1) instead of 19 Del. C.§1307(a)(3). By that same letter PERB informed the parties that it would treat the substance of Respondent's New Matter III as relating in whole to Section 1307 (a)(3), as indicated herein.

On October 6, 2004, COAD filed its Response to New Matter denying each of the material allegations set forth, therein.

As to ULP No. 04-09-450, COAD alleges:

> . . . wardens are requiring supervisors to get additional medical information from COAD members that violates the Federal HIPPA regulations as follows: (a) Wardens are refusing signed doctors' excuse from work documents and are requesting detailed notes from medical practitioners with specific patient medical conditions and information from COAD members. This additional information is not required under the interim contract and violates patient privacy under HIPPA, the Federal Health Information Privacy Act that became effective April 2003." (ULP, ¶ 3(a)).

The State's Answer filed on September 22, 2004, denies the allegations and under New Matter alleges that COAD has failed to allege any facts which, if true, would constitute a violation of either 19 Del.C. Section 1307 (a)(1), (2) or (3). The State's position is identical to that taken in ULP No. 04-09-449 regarding the three (3) alleged statutory violations.

The State also alleges under the heading of New Matter the following:

> 1. Nowhere in the Public Employment Relations Act, Title 19, Chapter 13, does 19, Chapter 13, does the PERB have subject matter jurisdiction over allegations that the provisions of HIPPA have been violated. Without subject matter jurisdiction over HIPPA, the PERB is not empowered to issue a decision as to whether employee rights have been violated under that Act. (Answer, New Matter IV, ¶¶ 42, 43).

> 2. Even if PERB has subject matter jurisdiction over claims for relief under HIPPA, Charging Party's (sic) has failed to allege sufficient facts that, even if true, would constitute a violation of the HIPPA statute or regulations. (Answer, New Matter V, ¶ 44).

The State, under New Matter, further contends that the PERB should dismiss COAD's charge because the interim collective bargaining agreement [in effect between the parties] expressly permits the State to request [additional] "medical information from employees that reasonably explains why [an affected employee] was unable to perform [his/her] duties on the day(s) in question." (Answer, New Matter VI, Caption, ¶49).

On October 6, 2004, COAD filed its Response to New Matter denying each of the material allegations set forth, therein.

DISCUSSION

The authority to issue either a decision or a finding of probable cause to believe that an unfair labor practice may have occurred based upon the pleadings is found in Article 5.6 of the Rules and Regulations of the Public Employment Relations Board, 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 provisions set forth in Regulation 7.4.

> The Board will decide such appeals following a review of the record, and, if the Board deems necessary, a hearing and/or the submission of briefs.

PERB Rule 5.2, Filing of Charges, provides, in relevant part:

> (c) The charge shall include the following information:
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> (3) A clear and detailed statement of the facts constituting the alleged unfair labor practice, including the names of the individuals involved in the alleged unfair labor practice, the time, place of occurrence and nature of each particular act alleged, and reference to the specific provisions of the statute alleged to have been violated. Each fact shall be alleged in a separate paragraph with supporting documentation where applicable.

At times, management decisions are considered objectionable by the employees they affect. Not every management action, however, constitutes an unfair labor practice within the jurisdiction of the PERB. PERB Rule 5.2 assures not only that the Respondent has sufficient information enabling the preparation of an informed answer but also enables the PERB to fulfill the requirements of Rule 5.1, insofar as issuing either a decision or a probable cause determination.

In order to qualify as a potential unfair labor practice subject to PERB intervention, the conduct in question must allegedly violate at least one of the specific unfair labor practices enumerated in Section 1307(a) or (b), of the Act. The Complaint in this matter alleges three (3) specific violations of the Public Employment Relations Act. As the Charging Party, the burden rests with the Association to support the alleged violations of Sections 1307(a)(1), (a)(2) and (a)(3).

Section 1307(a)(1) requires the interference, restraint or coercion of an employee by an employer because the employee(s) exercises a right guaranteed under 19 Del.C. Chapter 13. Included are two (2) distinct elements. One involves conduct by the employer and the other conduct by the affected employee(s). Each is necessary for the alleged violation to have occurred. The pleadings in this matter do not allege conduct by employees who are exercising a right guaranteed by the Act.

A violation of 19 Del.C. §1307(a)(2) requires conduct by the employer intended to dominate, interfere with or assist in the formation, existence or administration of a labor organization. No such conduct is alleged.

> The test previously established by the PERB for Section 1307(a)(1) and (a)(2) cases is whether the conduct reasonably tended to interfere with either the free exercise of employee rights or administration of the labor organization. Sussex Co. Vo-Tech Teachers' Assn. v. Bd. of Education, Del. PERB, ULP 88-01-021, I PERB 287, 297 (July 13, 1988). In order for the disputed actions to rise to the level of an unfair labor practice, it must, either on its face or within the context of the surrounding circumstances, reasonably tend to interfere with employees' rights or to exercise undue influence and/or coercion of employees or the Association. Smyrna Educators Assn. v. Smyrna School District, Del. PERB, ULP 91-03-061, I PERB 645 (May 16, 1991).

A violation of 19 Del.C. §1307(a)(3) requires conduct by the employer intended to encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment. No reasonable reading of the complaint provides a basis for concluding that the conduct attributed to the

employer was intended to encourage or discourage membership in an employee organization.

With regard to ULP No. 04-09-450, the Complaint alleges violations of the Federal Health Information Privacy Protection Act ("HIPPA"). The Public Employment Relations Board, established by §4006 of Title 14, and incorporated by §1306 of Title 19, empowers the PERB to administer this chapter. [3] This statutory provision sets forth the extent of the PERB's jurisdiction and authority which is limited to administering the Act. The PERB has no jurisdiction to resolve the alleged violations of HIPPA.

Concerning the alleged violations of the interim collective bargaining agreement in effect between the parties, these are matters to be properly resolved through the negotiated grievance and arbitration procedure. Smyrna Educators Association (supra.).

DECISION

Consistent with the foregoing discussion, the pleadings in ULP 04-09-449 and ULP No. 04-09-450 fail to establish probable cause to believe that an unfair labor practice may have occurred.

Each Complaint is, therefore, dismissed without prejudice.

IT IS SO ORDERED

Dated: December 9, 2004

/s/Charles D. Long, Jr.
Charles D. Long, Jr.
Executive Director
Del. Public Employment Relations Board

[3] 19 Del.C. §1306, The Public Employment Relations Act, which controls the resolution of this matter provides, "The Board established by § 4006 of Title 14, known as The Public Employment Relations Board, shall be empowered to administer this chapter under the rules and regulations which it shall adopt and publish.