

PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF DELAWARE

IUE-CWA, AFL-CIO,)	
LOCAL 88315,)	
)	
Charging Party,)	
)	
v.)	<u>ULP No. 07-08-583</u>
)	Probable Cause Determination
CITY OF DOVER,)	
Respondent.)	

BACKGROUND

The City of Dover (“City”) is a public employer within the meaning of §1302(p) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994) (“PERA”).

The International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers - Communication Workers of America, AFL-CIO, Local 88315 (“Union”) is an employee organization which admits to membership public employees and which has as a purpose the representation of such employees in collective bargaining pursuant to 19 Del.C. §1302(i). The Union represents certain employees of the City as defined in DOL Case 194 for the purpose of collective bargaining and is certified as the exclusive representative of that Unit. 19 Del.C. §1302(j).

The City and the Union were parties to a collective bargaining agreement for the term July 1, 2003, through June 30, 2007. Article 41 of that Agreement provides: “If negotiations are not concluded as of June 30, 2007, the provisions of this agreement shall remain in full force and effect until negotiations are completed and shall automatically be

extended until such time as a new or modified agreement is approved by both parties, effective date of termination notwithstanding.” The parties are currently in negotiations over a successor agreement.

Article 6 of the Agreement provides, in relevant part: “The City will maintain a bi-weekly pay period with Friday as payday. If payday falls on a holiday, payday will be on Thursday. The City plans to implement this change in the fall of 2004, if all bargaining units agree.” At all times relevant to this Charge, the City has issued pay checks to bargaining unit employees on Wednesday.

It is undisputed that the regular payday was not moved from Wednesday to Friday during the initial term of the Agreement because not all of the bargaining units agreed. During the current negotiations, the Union proposed to delete the above quoted contractual provision from Article 6.

On or about July 18, 2007, the City included in bargaining unit employees’ pay envelopes a memorandum stating:

The Payroll Office will be implementing the Friday pay day change on August 31, 2007. **The Wednesday, August 29, 2007 paycheck will be dated Friday, August 31, 2007. Please make sure you have made the necessary changes with your bank if you have any electronic banking transactions.**¹ (*emphasis in original*)

On August 2, 2007, the Union filed an unfair labor practice charge alleging that by its action the City violated §1307 of the PERA, Unfair labor practices, subsection (a)(5), which provide:

- (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

¹ The announced change was subsequently delayed until the pay of September 28, 2007

representative of employees in an appropriate unit, except with respect to a discretionary subject.

The Union requests that the PERB: 1) find that the City violated the statute; 2) issue a cease and desist order; and 3) provide other appropriate and reasonable relief.

On August 15, 2007, the City filed its Answer denying all material allegations of the Charge.

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 will review 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 has, or 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 benefit of receiving evidence in order to resolve factual differences. *Flowers v. DART/DTC*, Del.PERB, ULP No. 04-10-453 Probable Cause Determination, V PERB 3179, 3182 (2004).

Questions of contract interpretation are, for the most part, within the exclusive jurisdiction of an arbitrator when arbitration is provided for in the parties' collective bargaining agreement. Although Articles 6 and 41 of their collective bargaining agreement are cited by the parties in the pleadings, there is no allegation that a contractual violation has occurred nor is there evidence that a grievance was filed or is pending. In this case, the Union only alleges a statutory violation.. *Seaford Ed. Assn. v. Bd. of Ed.*, Del. PERB, ULP No. 87-10-018, I PERB 233, 236 (1988).

As a defense to an unfair labor practice charge, a Respondent may present evidence that it acted pursuant to a specific contract provision. The PERB has determined that interpreting contract language may be periodically required in order for PERB to resolve an unfair labor practice properly before it. *Christina Ed. Assn. v. Bd. of Ed.*, Del. PERB, ULP No. 88-09-026, I PERB 359, 366 (1988).

It is well established under Delaware case law that a unilateral change in a mandatory subject of bargaining constitutes a violation of the duty to bargain in good faith and of 19 Del.C. §1307(a)(5). Consequently, the preliminary legal issue raised by this Charge is whether the day of the week on which pay checks are issued is a mandatory subject of bargaining. This determination must be made before reaching the issue of whether the City unilaterally initiated an impermissible change in the status quo of a mandatory subject of bargaining.

The Delaware PERB has established case law defining and describing three classes of bargaining subjects. The first, "terms and conditions of employment" are mandatory subjects of bargaining and are defined to mean:

... matters concerning or related to wages, salaries, hours, grievance procedures and working conditions; provided however,

that such term shall not include those matters determined by this chapter or any other law of the state to be within the exclusive prerogative of the public employer. 19 Del.C. §1302(t).

Unilateral change in the status quo of a mandatory subject of bargaining is not permitted.

Changes must either be negotiated or imposed through binding interest arbitration.

Permissive subjects of bargaining are neither required nor prohibited from negotiation and may be bargained by agreement of the parties. Permissive subjects of bargaining are defined at §1305:

A public employer is not required to engage in collective bargaining on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion or policy as the functions and programs of the public employer, its standards of service, overall budget, utilization of technology, the organizational structure and staffing levels and the selection and direction of personnel.

The third class of subjects are reserved to the “exclusive prerogative” of the public employer. Bargaining over this class of subjects is prohibited and, therefore, illegal. 19 Del.C. §1302(t). Appoquinimink Ed. Assn. DSEA/NEA v. Bd. of Ed., Del PERB, ULP No. 1-3-84-3-2A, I PERB 35 (1984).

Determining which class of bargaining subjects is involved in a particular dispute is controlled by applying the test set forth in Woodbridge Ed. Assn. v. Bd. of Ed., Del PERB, ULP No. 90-02-048, I PERB 537, 545 (1990).

The Union requests that the City be ordered to cease and desist from implementing the change in the day paychecks are issued. To preliminarily enjoin the City from changing the pay day constitutes extraordinary equitable relief. It is established Delaware law that, to be successful, a request for preliminary injunctive relief must satisfy two requirements. First, the charging party must establish that there is a

reasonable probability that it will ultimately prevail on the merits of the dispute; and secondly, that it will suffer irreparable injury if its request for injunctive relief is denied. *Gimbel v. Signal Companies*, Del. Ch., 316 A.2d 599 (1974). Failure to establish either element precludes the granting of the requested relief. *New Castle Vo-Tech Ed. Assn v. Bd. of Ed.*, Del PERB, ULP No. 85-05-025, 1 PERB 257, 260 (1988).

A preliminary injunction is not supported by the pleadings in this case. First, until it is determined that day on which paychecks are issued is a mandatory subject of bargaining, there is no basis upon which to conclude that there is a likelihood that the Union will prevail on the merits. Second, while the change may well constitute an inconvenience on the affected employees, there is no evidence or allegation that irreparable harm will result if preliminary relief is not granted.

DETERMINATION

Considered in a light most favorable to the Charging Party, the pleadings constitute probable cause to believe that an unfair labor practice may have occurred. The preliminary issue is whether the pay period or day on which pay checks are issued is a mandatory subject of bargaining. If the answer is in the affirmative the City may not unilaterally alter the status quo of such subjects. If the answer is in the negative the City is not bound to continue the current practice. *Appoquinimink Ed. Assn, DSEA/NEA v. Appoquinimink Bd. of Ed.*, Del PERB, ULP 98-09-243, III PERB 1785, 1807 (1998).

Before determining whether there are factual questions in issue, it is first necessary to establish whether the pay period and/or the frequency and/or day for issuing pay checks are terms and conditions of employment and, therefore, mandatory subjects of

bargaining. Presented with this purely legal preliminary question, the parties are directed to file simultaneous written argument in support on the preliminary issue, to be received not later than Monday, October 29, 2007.

IT IS SO ORDERED

Date: September 27, 2007



Charles D. Long, Jr., Executive Director
DE Public Employment Relations Board