STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF DELAWARE, DEPARTMENT OF SAFETY AND HOMELAND SECURITY, DIVISION OF STATE POLICE, Appellant/ Cross-Appellee,	:	**PERB Review of the Executive Director's Decision**
v.	:	
DELAWARE STATE TROOPERS ASSOCIATION, Appellee/ Cross-Appellant.	:	**ULP No. 08-05-624**

Appearances

Thomas J. Smith, Office of State Labor Relations and Employment Practices, for the State
Jeffrey M. Weiner, Esq., for Delaware State Troopers Association

BACKGROUND

The State of Delaware ("State") is a public employer within the meaning of 19 Del.C. §1602(l) of the Police Officers' and Firefighters' Employment Relations Act ("POFERA"), 19 Del.C. Chapter 16 (1986). The Department of Safety and Homeland Security, Division of State Police ("DSHS/DSP") is an agency of the State.

The Delaware State Troopers Association ("DSTA") is an employee organization within the meaning of 19 Del.C. §1602(g), and is the certified exclusive bargaining representative of the unit of uniformed, sworn Delaware State Police officers from the Ranks of Trooper through Major, as defined in DOL Case 75.

The State and DSTA have a long standing collective bargaining relationship, and were parties to an agreement with the term of July 1, 2005 through June 30, 2007. These parties have been engaged in negotiations for a successor agreement since May, 2007, and have exhausted

PERB sponsored efforts to mediate the impasse in these negotiations. Binding interest arbitration was initiated and public hearings were held on June 4, July 14 and July 15, 2008. The decision in that case is currently pending.

On May 22, 2008, the State filed an unfair labor practice charge alleging that DSTA violated 19 Del.C. §1607(b)(2) and (b)(3)[1] by bargaining to impasse on a non-mandatory subject of bargaining, specifically the creation of the new professional rank of First Sergeant. On May 30, 2008, DSTA filed its Answer to the Charge denying all material allegations, and asserting under New Matter that the State's Charge was time barred. The State responded by denying DSTA's New Matter.

DSTA also filed a Counter-Charge on May 30, 2008, alleging the State violated 19 Del.C. §1607(a)(5) and (a)(6)[2], asserting that the State had mischaracterized DSTA's First Sergeant Career Development proposal and had refused to negotiate with respect to a mandatory subject of bargaining. The State filed its Answer to the Counter-Charge denying all material allegations, and asserting under New Matter that DSTA's Counter-Charge was time barred. DSTA responded by denying the State's New Matter.

On July 7, 2008, the Executive Director issued a Probable Cause Determination and Order of Dismissal in which she found "neither the State's Charge nor DSTA's Counter-Charge

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[1] It is an unfair labor practice for a public employee or for an employee organization to any of the following:

(2) Refuse to bargain collectively in good faith with the public employer or its designated representative if the employee organization is an exclusive representative.

(3) Refuse or fail to comply with any provision of this chapter or with rules or regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

[2] 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.

(6) Refuse or fail to comply with any provision of this chapter or with rules or regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

were filed within the 180-days required for timely filing of an unfair labor practice charge." *State of Delaware, DSHS, Div. of State Police v. Del. State Troopers Association,* ULP 08-05-524, VI PERB 4003, 4008 (2008).

On or about July 11, 2008, the State requested review of the Executive Director's Decision and DSTA filed a cross-request for review. The parties were permitted the opportunity to file written argument which was received by the Public Employment Relations Board ("Board") from both the State and DSTA on August 6, 2008.

A copy of the complete record in this matter was provided to each member of the Board. The full Board convened in public session on August 19, 2008 to consider the State's and DSTA's requests for review.

DISCUSSION

Upon consideration of the record and arguments presented on appeal, the Board finds the Executive Director did not abuse her discretion, commit an error of law, or err in her application of the Police Officers and Firefighters Employment Relations Act, when she found that neither the State's Charge nor DSTA's Counter-Charge was timely filed as required by 19 Del.C. §1608(a).

19 Del.C. §1602 sets forth relevant definitions which serve as a basis for this decision:

> (i) "Impasse" means the failure of a public employer and the exclusive bargaining representative to reach agreement in the course of collective bargaining.
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> (j) "Mediation" means an effort by an impartial third party confidentially to assist in reconciling an impasse between the public employer and the exclusive bargaining representative regarding terms and conditions of employment.
>
> (e)"Collective bargaining" means the performance of the mutual obligation of a public employer through its designated representatives and the

> exclusive bargaining representative to confer and negotiate in good faith with respect to terms and conditions of employment, and to execute a written contract incorporating any agreements reached. However, this obligation does not compel either party to agree to a proposal or require the making of a concession.

The State argues the 180 day statute of limitations did not begin to run until there is a final action resulting in an adverse action or until some final action is taken which is not subject to change. It asserts that this cannot occur in the collective bargaining process until the parties are required to submit their "last, best, final offers" just before hearing in the binding interest arbitration process.

Adoption of this standard, while it may be applicable in other types of unfair labor practice proceedings, would thwart the purpose of the statute and obstruct the collective bargaining process. When there is a genuine dispute as to whether a proposal is or is not a mandatory subject of bargaining, as long as the parties stay in their respective corners without seeking resolution of the issue, the bargaining process cannot effectively move forward. The policy favoring negotiation of the terms and conditions of employment is undermined unless there is resolution of this question early in the process. The parties could not conduct meaningful negotiations while this issue remained unresolved as it would permit one or both parties to hide behind a position as to its negotiability.

Further,19 Del.C. §1615 (g) clearly states that the parties are always free, and encouraged, to resolve their impasse voluntarily: "[i]f at any point in the impasse proceedings invoked under this chapter, the parties are able to conclude their labor dispute with a voluntarily reached agreement, the Board shall be so notified, and all impasse resolution proceedings shall be forthwith terminated." Parties may always change their positions to reach an agreement at any point in the process. There is no point at which a final position is taken "which is not subject to change." For example, in this case, either party could advise PERB that it accepts the other

party's offer, even though the BIA hearing has been concluded, argument made, and the record is before the arbitrator for decision. Should that occur, by statute, the impasse resolution process is terminated.

To adopt the State's argument would unduly delay the mutual resolution of disputes and would also lead to undue delay, confusion and disruption of the binding interest arbitration process. The statute is also clear on this point.

> (a) Within 7 working days of receipt of a petition or recommendation to initiate binding interest arbitration, the Board shall make a determination, with or without a formal hearing, as to whether a good faith effort has been made by both parties to resolve their labor dispute through negotiations and mediation and as to whether the initiation of binding interest arbitration would be appropriate and in the public interest, except that any discretionary subject shall not be subject to binding interest arbitration. *19 Del.C. §1615.*

The statute provides that the binding interest arbitration process cannot move forward unless the parties have engaged in a good faith effort to resolve their labor dispute. The State's Charge was filed well after the January 17, 2008 request for binding interest arbitration; at the latest, its assertion of bad faith in negotiations should have been made in response to DSTA's binding interest arbitration request.

The statute of limitations began to run for both parties in this case at the same time. On October 3, 2007, the State responded to DSTA's request for mediation, by stating:

> …[DSTA] stated at the conclusion of the last bargaining session, September 5, 2007, that there was no need to schedule an additional negotiation sessions as neither party appeared willing to modify its proposals that had been rejected by the other party. The State agreed that there would be little purpose served by scheduling another session if the Union continued to demand that the State agree to specific Union proposals on non-mandatory subjects of bargaining.

The Board agrees that at that point, the 180-day statute of limitations began to run for the filing of an unfair labor practice charge concerning the negotiability of the proposal in question.

Finally, the dismissal of this Charge and Counter-Charge does not leave the parties without recourse. The dispute is included in the arguments made before the Executive Director in the pending binding interest arbitration proceeding. Both parties have been afforded the opportunity to argue their positions on negotiability in that forum. The Executive Director's decision in that matter is subject to review by this Board, and then by the Court of Chancery, on appeal by either party. 19 Del.C. §1609.

DECISION

For the reasons set forth above, following review of the complete record in this case, the Public Employment Relations Board unanimously affirms the decision of the Executive Director finding that both the State's Charge and DSTA's Counter-Charge were not filed within the 180-days required for timely filing of an unfair labor practice charge under 19 Del.C. §1608(a).

IT IS SO ORDERED.

Elizabeth D. Maron, Esq., Chairperson

R. Robert Currie, Jr., Member

Kathi A. Karsnitz, Esq., Member

DATE: September 4, 2008