STATE OF DELAWARE

DELAWARE PUBLIC EMPLOYMENT RELATIONS BOARD

CORRECTIONAL OFFICERS ASSOCIATION OF DELAWARE,	)	
Charging Party,	)	
v.	)	**ULP No. 09-01-660**
STATE OF DELAWARE, DEPARTMENT OF CORRECTIONS,	)	
Respondent.	)	

APPEARANCES

For the Association: *Lance Geren, Esquire*
Freedman & Lorry, P.C.

For the State: *Gerald Ross, SLREP*

BACKGROUND

The State of Delaware, Department of Corrections ("DOC") is a public employer within the meaning of §1302(p) of the Public Employment Relations Act ("PERA"), 19 Del.C. Chapter 13 (1994).

The Delaware Correctional Officers Association ("COAD") is an employee organization which admits to membership uniformed Correctional Officers employed by the Department of Corrections, as defined in DOL Case No. 1, and which has as a purpose the representation of such employees in collective bargaining pursuant to 19

Del.C. §1302 (h). COAD is the exclusive representative of those employees pursuant to 19 Del.C. §1302(j).

COAD and DOC are and at all times relevant to this matter have been parties to an interim collective bargaining agreement ("CBA") effective October 10, 2002. The interim agreement was negotiated by the parties upon COAD being certified as the exclusive bargaining representative for the uniformed correctional officers in 2002, following the decertification of the prior exclusive bargaining representative. It is unclear from the record in this case whether the parties have yet commenced bargaining over the terms of a successor agreement.

The interim CBA includes, *inter alia*, several provisions carried over from the prior collective bargaining agreement negotiated by the former exclusive bargaining representative. Article 19.1, of the prior Agreement, is one of the provisions carried over to the interim CBA, and provides:

> The State shall determine overtime availability. The Association shall determine the distribution of overtime including the generation and maintenance of the overtime lists, subject only to any reasonable documented limitations the State places on a specific employee's overtime eligibility. The State shall be responsible for designating the calling of overtime, provided, however, if C/O series employees are assigned to call scheduled overtime, those employees will be relieved of other responsibilities during calling time. For the purposes of this Article, unscheduled overtime will be defined as only that overtime authorized less than 4 hours prior to the start of such overtime.

COAD alleges that at the James T. Vaughan Correctional Center ("JVCC") the parties have had an established practice for scheduling overtime dating back to 2004 whereby, 1) COAD maintains an overtime eligibility list organized by seniority; 2) DOC

notifies COAD of the available overtime opportunities on a weekly basis; 3) two COAD shop stewards call employees from the overtime eligibility list during the 8:00 pm – 4:00 pm and 4:00 pm - 12.00 am shifts (one employee per shift); 4) every eligible employee is called even after the available overtime opportunities have been filled; 5) the two Correctional Officers who call the overtime list are themselves working overtime and have no responsibilities other than to call the overtime list.

In or around December, 2008, the Deputy Warden at JVCC determined that because of increased staffing and a resulting reduction in the need for overtime, it was unnecessary to have two people call the overtime list. The Deputy Warden issued a memo changing the procedure by permitting only one shop steward to call the eligible employees on the overtime list. COAD was not given prior notice of the change nor was it provided with an opportunity to bargain over the change.

On or about January 27, 2009, COAD filed an unfair labor practice charge alleging that by instituting a unilateral change in a mandatory subject of bargaining DOC violated 19 Del.C. §1307(a)(5) and/or (a)(6), 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 representative of employees in an appropriate unit, except with respect to a discretionary subject:
>
> (6) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

DOC filed its Answer to the Charge on February 4, 2009, in which it admits that a practice for scheduling overtime at JVCC exists but denies that the practice is that which Charging Party describes. DOC alleges that the weekly list it provides to COAD represents an estimate of available overtime rather than specific available overtime assignments. Unforeseen overtime needs routinely arise which are referred to the Primary Control Staff who contact the employees, not the COAD shop stewards.

By way of further answer DOC maintains that it has, at all times, followed the provisions of Article 19.1, of the collective bargaining agreement, which provide, in relevant part, "the State shall determine overtime availability and designate the calling of overtime."

DOC alleges that COAD has failed to allege any facts or circumstances which demonstrate that the State waived those contractual standards, that any practice supersedes the relevant provisions of Article 19.1 or that the State has otherwise violated the controlling language of the CBA.

DOC further alleges that, "COAD failed to provide any evidence to support its allegation of undue hardship or improper burdens on its members."

On March 2, 2009, a Probable Cause Determination was issued and a hearing was conducted by a PERB hearing officer on April 2, 2009. Post hearing briefs were filed by DOC and COAD on June 3, 2009 and June 5, 2009, respectively. The following discussion and decision result from the record thus compiled.

ISSUE

At the start of the hearing, without objection by either party, the hearing officer framed the issue as:

WHETHER THE STATE DEPARTMENT OF CORRECTIONS COMMITTED AN UNFAIR LABOR PRACTICE IN VIOLATION OF 19 DEL.C. 1307(A)(5) AND/OR (A)(6) BY UNILATERALLY INSTITUTING A CHANGE IN THE OVERTIME SCHEDULING PROCEDURE AT JAMES T. VAUGHN CORRECTIONAL CENTER?

PRINCIPAL POPSITIONS OF THE PARTIES

Association: The Association argues overtime scheduling is a mandatory subject of bargaining. Applying the balancing test adopted by the PERB in *Appoquinimink Ed. Assn. v. Bd. of Ed.*, Del. PERB, ULP No. 1-3-84-3-2A, I PERB 35 (1984), the impact of the overtime calling procedure on bargaining unit employees clearly outweighs any probable impact on the State, that being the cost of an additional eight (8) hours of premium pay per week.

The Association argues there is no evidence that the Association clearly and unmistakably waived its right to bargain over the overtime calling procedure.

The Association argues that to accept the State's position would render the other provisions of Article 19.1 void.

State: The State argues that it has fully complied with the applicable provisions of the parties' interim agreement, specifically Article 19.1 which authorizes the State to designate the calling of overtime.

The State contends that the Association was expressly placed on notice in 2004 the State would return to the previous overtime calling system when operating conditions at the JVCC improved.

The State agues that the Association has failed to establish by substantial evidence that an unfair labor practice was committed.

DISCUSSION

Much of the hearing record in this matter concerns the circumstances existing at the time the practice of utilizing two correctional officers to distribute the available overtime commenced in 2004 and the circumstances existing when management made the decision to utilize only one shop steward in December, 2008. It is undisputed that prior to 2004, management was responsible for distributing available overtime.

In *DCOA v. DOC*, Del. (PERB, ULP No. 95-03-124, II PERB 1151 (1995)), the PERB held:

> . . . incidental conduct may be so inherently destructive of the bargaining requirement as to constitute a *per se* violation of the duty to bargain in good faith. Examples of per se violations include the unilateral change in the status quo of a mandatory subject of bargaining . . .

Thus, in cases alleging a unilateral change in the status quo of a mandatory subject of bargaining, the circumstances resulting in and/or the motive for the alleged change are presumptively irrelevant. The critical requirement is that a change in the status quo of a mandatory subject of bargaining occurred.

The distinction between contractual grievances and unfair labor practices filed pursuant to statute was addressed by the PERB in *Brandywine Affiliate NCCEA/DSEA/ NEA v. Brandywine Bd. of Ed.* Del. PERB, ULP No. 85-06-005, I PERB 131 (1985), in which the Association's basic position was that the School District unilaterally altered the status quo of a mandatory subject of bargaining during the term of a collective bargaining agreement. To establish the status quo, the Association relied primarily upon a specific provision of the collective bargaining agreement.

In the Brandywine decision, the PERB observed:

> It is important here to understand that the issue here is not whether the disputed action taken by the District was in violation of the labor agreement. What is at issue is whether or not the District's action constituted a unilateral change of the status quo sufficient to violate Section 4007(a), of the Act, as alleged. In an unfair labor practice proceeding it is of no consequence that the disputed conduct may also constitute a violation of the collective bargaining agreement. While an unfair labor practice is statutory in origin and raises a question of statutory interpretation to be resolved by the Public Employment Relation Board, an alleged contract violation is proper subject matter only for the negotiated grievance procedure. The unfair labor practice forum is not a substitute for the grievance procedure and the Public Employment Relation Board has no jurisdiction to resolve grievances through the interpretation of contract language. It may, however, be necessary for the Board to periodically determine the status of specific contractual provisions in order to resolve unfair labor practice issues properly before it. [1] *Brandywine*, p. 142.

In considering a charge of a unilateral change in a mandatory subject of bargaining, PERB has limited its analysis of contract language to provisions which directly impact a determination of what constitutes the status quo. *Christina Ed. Assn. v. Bd. of Ed.*, Del. PERB, ULP No. 88-09-026, I PERB 358 (1986). See also *Indian River Ed. Assn. v. Bd. of Ed.*, Del. PERB, ULP No.90-09-053, I PERB 667 (1991); *FOP Lodge No. 1 v. City of Wilmington*, Del. PERB,ULP No. 93-08-088, II PERB 897 (1993).

In *Local 1590, IAFF, et. al. v. City of Wilmington*, Del. PERB, ULP No. 89-09-041, I PERB 457 (1990), the PERB reinforced its holding in *Christina Ed. Assn.* by declaring:

> The Board has consistently held that its jurisdiction encompasses interpretation of a collective bargaining

[1] Prior PERB rulings decided under the Public School Employment Relations Act, 14 Del.C. Chapter 40 (1982) and/or the Police Officers and Fire Fighters Employment Relations Act, 19 Del.C. Chapter 16 (1986) are controlling to the extent that the relevant provisions of those statutes are identical to those of the Public Employment Relations Act, 19 Del.C Chapter 13 (1994). *Council 81, AFSCME v. Del. DOT*, ULP 95-01-111, II PERB 1279, 1289 (1995).

> agreement where an unfair labor practice charge involves an allegation that requires a determination of whether one party has unilaterally altered the status quo as it relates to a mandatory subject of bargaining. In determining the status quo in cases where the parties are bound by a valid collective bargaining agreement, contractual language which is clear and unambiguous on its face effectively establishes the status quo.

I find that Article 19.1 of the interim agreement in effect between the parties is clear and unambiguous on it face in that it sets forth the responsibilities of both the State and COAD insofar as determining overtime availability, the basis for distributing the available scheduled overtime, and the designating of who calls the overtime list.[2]

The first sentence of Article 19.1 mandates that the State "shall" determine when scheduled overtime is required. The second sentence of Article 19.1 mandates that the Association "shall" determine the basis upon which the available overtime is to be distributed amongst the eligible employees and to develop and maintain the overtime lists. Both State and COAD witnesses testified that this step in the procedure resulted from historical inconsistencies in how employees were selected to work scheduled overtime, including allegations of favoritism by some shift supervisors.

Insofar as Article 19.1 involves the actual calling of employees to fill the scheduled overtime opportunities, the interim collective bargaining agreement provides:

> The State shall be responsible for designating the calling of overtime provided, however, if C/O series employees are assigned to call scheduled overtime, these employees will be relieved of other responsibilities during calling time.

[2] In the instant case, the parties' Interim Agreement defines a grievance in Article 19.1: "Any dispute which may arise between the parties about a disciplinary matter may be formalized by being reduced to writing." Neither party cited nor did review of the Interim Agreement reveal a negotiated procedure for the resolution of disputes concerning application or interpretation of other contractual provisions.

The operative words in the above-quoted language are “shall” and the phrase “if C/O series employees are assigned to call scheduled overtime”. The use of the word “shall” establishes the parties’ intent that the designation of who is to call the scheduled overtime using the list created by COAD is reserved to the State.

Inherent in the State’s right to designate the calling of overtime, is the right to determine the numbers and the types of employees assigned to accomplish this work. Otherwise, the right to designate the calling of overtime is meaningless.

By inserting the phrase, “if C/O series employees are designated to call scheduled overtime”, it is clear that correctional officers have no demand right to call the scheduled overtime. This language is consistent with and supportive of the State’s contractual right to designate the calling of overtime.

Merriam Webster’s Collegiate Dictionary, Eleventh Edition (2004) defines the term “status quo” as, “the existing state of affairs.” Consistent with the previously cited decisions of the PERB, the language of Article 19.1 establishes the existing state of affairs of the parties insofar as the availability, distribution and calling of scheduled overtime.

Consistent with the foregoing discussion, there has been no change in the status quo, as alleged by the Union.

I find no credible support for COAD’s argument that the decision reached herein removes its authority to determine the basis for the distribution of overtime or otherwise renders the balance of Article 19.1 void.

CONCLUSION

The evidence of record in this case is insufficient to establish that a unilateral change in the status quo, as alleged in the charge, has occurred; consequently, there has been no violation of 19 Del.C. Section 1307 (a)(5) and/or (a)(6), as alleged.

WHEREFORE, the Charge is dismissed.

IT IS SO ORDERED.

Date: 19 August 2009

Charles D. Long, Jr.,
Hearing Officer
Del. Public Employment Relations Bd.