

**PUBLIC EMPLOYMENT RELATIONS BOARD
FOR THE STATE OF DELAWARE**

FRATERNAL ORDER OF POLICE, PROBATION AND PAROLE LODGE 10,	:	
	:	
Charging Party,	:	<u>ULP No. 09-08-698</u>
	:	
v.	:	PROBABLE CAUSE DETERMINATION
	:	
STATE OF DELAWARE DEPARTMENT OF CORRECTION,	:	
	:	
Respondents.	:	

BACKGROUND

The State of Delaware (“State”) is a public employer within the meaning of §1302(p) of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13 (1995). The Department of Correction (“DOC”) is an agency of the State of Delaware.

Fraternal Order of Police, Lodge 10, (“FOP”) is an employee organization which admits public employees to membership and has as a purpose the representation of those employees in collective bargaining pursuant to 19 Del.C. §1302(i). The FOP is a certified exclusive bargaining representative of State employees who work in the Department of Correction, Bureau of Community Correction, within the meaning of 19 Del.C. 1302(j).

The FOP and DOC are parties to a collective bargaining agreement which has a term of January 1, 2007, through December 31, 2009.

The State denies (in its Answer to the Charge) the FOP is either part of a compensation bargaining coalition under 19 Del.C. §1311A, as PERB has no determination or certified a bargaining coalition of Merit Employee Bargaining Unit 3, as required by §1311(b)..

On or about August 4, 2009, the FOP filed an unfair labor practice charge alleging the State had violated 19 Del.C. §1307(a) (5) and (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.

The Charge alleges on or about July 1, 2009, “DOC unilaterally announced and implemented a new method of calculating overtime, whereby employees would only receive overtime paid at time and one-half their regular hourly rate after working 40 hours in a week, and hours worked would only include hours actually worked, and not vacation time, sick time, holiday time, or other benefit time.” *Charge ¶6*. The FOP alleges that by failing or refusing to bargain over these changes in a mandatory subject of bargaining, it has committed an unfair labor practice in violation of 19 Del.C. §1307(a)(5) and (a)(6).

On or about August 11, 2009, the State filed its Answer to the Unfair Labor Practice Charge, denying all material allegations contained therein. The Answer also included New Matter in which the State alleges the Charge should be dismissed because:

- PERB does not have jurisdiction over the alleged unfair labor practice charge because the acts complained of in the Charge are within the exclusive authority of the Executive and Legislative Branches of government under constitutional, common and case law, as well as otherwise.
- The Charge fails to state a claim for which relief can be granted because improper unilateral changes must affected mandatorily negotiable subjects of bargaining under the PERA. “Pay for Overtime Service” is excluded from the scope of mandatory bargaining by Section 18 of the Fiscal Year 2010 Appropriate Act.
- The Charge fails to state a claim for which relief can be granted under §1307(a)(5) because the FOP does not allege any conduct which would

support the conclusion that the State failed or refused to bargain collectively in good faith with the exclusive representative of represented employees because the FOP is not party to a compensation agreement under 19 Del.C. §1311A. The FOP represents a bargaining unit of merit employees for whom payment for overtime is not within the scope of bargaining.

- The Charge fails to state a claim for which relief can be granted under §1307(a)(6) because the FOP does not allege any conduct which would support the allegation that the State failed or refused to comply with any provision of the PERA or with PERB rules.

On or about August 26, 2009, the FOP filed its Response to New Matter denying all material allegations contained therein. The FOP also alleged in its Response that 29 Del.C. §5914 explicitly sets forth the manner in which the State Merit Rules are to be changed:

The Director shall prepare and submit to the Board proposed rules governing the classified service. The rules shall be reviewed by the Board at a public hearing held following the public notice. The rules, as proposed by the Director, shall become final upon completion of the public hearing, unless rejected by a majority of members appointed to the Board.

This Probable Cause Determination is based upon a review of the pleadings.

DISCUSSION

The Rules and Regulations of the Delaware PERB require that upon completion of the pleadings in an unfair labor practice proceeding, a determination shall be issued as to whether those pleadings establish probable cause to believe the conduct or incidents alleged could have violated the Public Employment Relations Act, 19 Del.C. Chapter 13. DE PERB Rule 5.6. For the purpose of this review, factual disputes established by the pleadings are considered in a light most favorable to the Charging Party in order to avoid dismissing what may prove to be a valid charge without the benefit of receiving evidence concerning that factual dispute. *Richard Flowers v. State of Delaware, Department of Transportation, Delaware Transit Corporation*, Probable Cause Determination, ULP No. 04-10-453,V PERB 3179 (2004).

The State makes an initial assertion in its New Matter that PERB lacks jurisdiction to consider the Charge because, “the acts complained by the Charging Parties in their Charge are within the exclusive authority of the Executive and Legislative Branches of government under the constitutional law, common law, case law and otherwise.” *State’s New Matter I ¶9*. The assertion does not cite any supporting constitutional, statutory or case law to support this legal conclusion.

The Public Employment Relations Board was created by an act of the General Assembly and signed into law by the Governor in 1982. PERB is, by statute, a neutral, independent agency which is not subject to the control or supervision of any cabinet agency or officer thereof. 14 Del.C. 4006. The Board is expressly charged with administering the PERA. 19 Del.C. §1301(3). Its powers and responsibilities with respect to the administration of the unfair labor practice provisions of the statute are set forth in §1308, Disposition of Complaints:

(a) The Board is empowered and directed to prevent any unfair labor practice described in § 1307 (a) and (b) of this title and to issue appropriate remedial orders. Whenever it is charged that anyone has engaged or is engaging in any unfair practice as described in § 1307(a) and (b) of this title, the Board or any designated agent thereof shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice charge and including a notice of hearing containing the date and place of hearing before the Board or any designated agent thereof. Evidence shall be taken and filed with the Board; provided, that no complaint shall issue based on any unfair labor practice occurring more than 180 days prior to the filing of the charge with the Board.

(b)(1) If, upon all the evidence taken, the Board shall determine that any party charged has engaged or is engaging in any such unfair practice, the Board shall state its findings of fact and conclusions of law and issue and cause to be served on such party an order requiring such party to cease and desist from such unfair practice, and to take such reasonable affirmative action as will effectuate the policies of this chapter, such as payment of damages and/or the reinstatement of an employee; provided however, that the Board shall not issue:

a. Any order providing for binding interest arbitration on any or all issues arising in collective bargaining between the parties involved; or

b. Any order, the effect of which is to compel concessions on any items arising in collective bargaining between the parties involved.

(2) If, upon the evidence taken, the Board shall determine that any party charged has not engaged or is not engaging in any such unfair practice, the Board shall state, in writing, its findings of fact and conclusions of law and issues and dismiss the complaint.

(c) In addition to the powers granted by this section, the Board shall have the power, at any time during proceedings authorized by this section, to issue orders providing such temporary or preliminary relief as the Board deems just and proper subject to the limitations of subsection (b) of this section.

The PERA explicitly defines the State to be a public employer to which the Act applies:

“Public employer” or “employer” means the State, any county of the State or any agency thereof, and/or any municipal corporation, municipality, city or town located within the State or any agency thereof, which upon the affirmative legislative act of its common council or other governing body has elected to come within this chapter, or which employs 100 or more full-time employees. 19 Del.C. 1302(p)

Accordingly, the State’s assertion that PERB is without jurisdiction to consider this unfair labor practice charge is without basis, and is therefore dismissed.

The Charge alleges the DOC violated the PERA by unilaterally modifying the method for calculating overtime payments without negotiating such changes with the certified exclusive bargaining representative of the Probation & Parole Officers. In order to prevail on the allegation that the State instituted a unilateral change in violation of the duty to bargain in good faith, it must first be determined whether the method of payment for overtime constitutes a “term and condition of employment” within the meaning of §1302(t) of the PERA, on which there is a mandatory obligation on the State and the exclusive representatives to negotiate. 19 Del.C. §1301(2); 1302(e); §1304(a). A unilateral change in a mandatory subject of bargaining constitutes a *per se* violation of the duty to bargain in good faith. *AFSCME Local 2004 v. State of Delaware/DSCYF & PERB, CA 14869, (VC Jacobs, 1996), II PERB 1425, 1432.*

There is no question that matters covered by the Merit Rules pursuant to 29 Del.C. §5938(c)¹ are “discretionary” and therefore excluded from the mandatory scope of bargaining for State Merit employees. *Supra*, p. 1433. Whether overtime provisions, while unquestionably a matter relating to wages, are outside of the scope of bargaining for State Merit employees has not been previously addressed by PERB. Additionally, the State has asserted that Section 18 of the 2010 State Appropriations Act² further limits the scope of bargaining. Resolution of these issues requires an established factual record and argument by the parties.

Section 1313(a) of the PERA provides that “no collective bargaining agreement shall be valid or enforceable if its implementation would be inconsistent with any statutory limitation on the public employer’s funds, spending or budget, or would otherwise be contrary to law.” If, as the unions assert, the existing collective bargaining agreements contain provisions which address the eligibility and method of computing overtime, those provisions may be invalid or unenforceable if they are inconsistent or contrary to law. The Charge and Answer raises a legal question concerning the applicability of §1313(a) to the facts of this case.

¹ 29 Del.C. §5938, Collective Bargaining: (c) The rules adopted or amended by the Board under the following sections shall apply to any employee in the classified service represented by an exclusive bargaining representative or covered by a collective bargaining agreement under Chapter 13 of Title 19, except in the case of collective bargaining agreements reached pursuant to § 1311A of Title 19: §§ 5915 through 5921, 5933, 5935 and 5937 of this title.

² Section 18: Notwithstanding Merit Rules 4.4.2 and 4.4.3, an agency that requests approval of a starting rate higher than 85 percent of midpoint, or that requests that incumbents be leveled up to a newly-hired employee, shall provide documentation showing that sufficient funds exist within the agency’s base budget to fund such actions. An agency that requests approval of a starting pay rate higher than 85 percent of midpoint shall also indicate if approval of such starting rate will result in a request to level up the salary of the existing employees, and shall indicate if sufficient funds exist within the agency’s base budget to fund such a leveling up action. Notwithstanding any provision of this Act or the Delaware Code to the contrary, no provision of Chapter 4.0 of the Merit Rules shall be considered compensation for the purpose of collective bargaining and leveling up can only occur with the concurrence of the Director of the Office of Management and Budget and the Controller General. The Director of the Office of Management and Budget and Controller General, with concurrence of the co-chairs of the Joint Finance Committee shall promulgate policies and procedures to implement this section. *{Emphasis added to reflect the portion of Section 18 cited in ¶28 of the State’s New Matter.}*

DETERMINATION

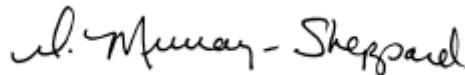
Consistent with the foregoing discussion, PERB has exclusive authority under 19 Del.C. §1301 to administer the unfair labor practice provisions of the PERA, consistent with the statutory mandates of §1308 of the Act.

The pleadings do, however, provide a sufficient basis for finding probable cause to believe that an unfair labor practice in violations of 19 Del.C. §1307(a)(5) and/or (a)(6) may have occurred.

WHEREFORE, a hearing shall be scheduled forthwith to establish a record on which a determination can be made as to whether either the State and/or the Department of Correction failed to bargain good faith in violation of 19 Del.C. §1307(a)(5) and/or refused or failed to comply with any provision of the statute or with rules and regulations established by the PERB in violation of 19 Del.C. §1307(a)(2)(6).

IT IS SO ORDERED.

DATE: December 15, 2009



DEBORAH L. MURRAY-SHEPPARD
Executive Director
Del. Public Employment Relations Bd.