

PUBLIC EMPLOYMENT RELATIONS BOARD
STATE OF DELAWARE

CORRECTIONAL OFFICERS ASSOCIATION)	
OF DELAWARE,)	
)	
Charging Party,)	
)	
v.)	<u>ULP No. 10-11-775</u>
)	
STATE OF DELAWARE DEPARTMENT)	Probable Cause Determination
OF CORRECTION,)	
)	
Respondent.)	

BACKGROUND

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

The Correctional Officers Association of Delaware (“COAD”) is an employee organization within the meaning of §1302(i) of the PERA and is the exclusive bargaining representative of a bargaining unit of DOC uniformed employees (as defined in DOL Case 1) within the meaning of §1302(j) of the Act.

On or about November 23, 2010, COAD filed the instant unfair labor practice charge alleging that DOC violated §1307(a)(5) and (a)(6) of the Act, which provide:

§1307. Unfair Labor Practices

- (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 his chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

COAD and DOC have been parties to an interim collective bargaining agreement since October, 2002, and are currently negotiating the terms of a successor agreement, including compensation.

COAD alleges that prior to July 1, 2010, bargaining unit employees performed security functions in connection with the provision of medical services to inmates at Howard R. Young Correctional Institute (“HRYCI”), including performing security duties for the medical unit on overtime assignments.

The union charges DOC, on or about July 1, 2010, subcontracted health care services at HRYCI without affording COAD the opportunity to bargain. By so doing, COAD alleges DOC deprived bargaining unit employees of security-related work they normally performed on both a straight time and overtime basis. COAD maintains the unilateral change affected a mandatory subject of bargaining. The Charge also alleges that DOC has continued to apply the terms of the unilaterally altered practice and has thereby engaged in a continuing and repeated violation of 19 Del.C. §1307(a)(5) and/or (a)(6).

On December 26, 2010, the State filed its Answer in which it maintains there is or was no general or standing duty assignment for correctional officers to provide security related to medical services and operations at HRYCI. The State further maintains that, “all authority to designate the availability of any overtime is specifically and exclusively

reserved to the State under Article 19.1 of the CBA, the Public Employment Relations Act and other law.”

Under New Matter, the State alleges COAD was on notice that DOC intended to subcontract out medical services in November, 2009 when a request for proposals was publicly issued and in May, 2010, when the selected medical services vendor was publicly announced. For these reasons, the State asserts the Charge should be dismissed as untimely. The State also asserts COAD has failed to state a claim for which relief can be granted under the PERA because the Charge fails to demonstrate the work in question has ever constituted a designated duty assignment for correctional officer or that it has ever been the subject of collective bargaining. The State asserts COAD has failed to establish that the work in question is a mandatory subject of bargaining “by contract, practice, policy, history or law.”

On December 20, 2010, Charging Party filed its Response to New Matter denying the New Matter alleged in the State’s Answer to the Charge.

This probable cause determination results from a review of the pleadings.

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 shall decide 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 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 the benefit of receiving evidence in order to resolve factual differences. *Flowers v. DART/DTC*, PERB Probable Cause Determination, ULP 04-10-453, V PERB 3179, 3182 (2004).

While the pleadings focus on the overtime nature of a portion of the HRYCI security work in question, the Charge raises an issue as to whether the work contracted out constitutes bargaining unit work, qualifies as a mandatory subject of bargaining, and, if so, whether DOC has a right under the PERA and/or existing contractual commitments with the COAD to subcontract bargaining unit work without first engaging in collective bargaining.

DETERMINATION

Consistent with the foregoing discussion, the pleadings constitute reasonable cause to believe that an unfair labor practice may have occurred, when considered in a light most favorable to the Charging Party.

The pleadings raise multiple factual issues which can only be resolved following development of a complete evidentiary record and receipt of argument based thereon. Therefore, a hearing will be convened forthwith for the purpose of addressing whether

the work contracted out constitutes bargaining unit work, qualifies as a mandatory subject of bargaining, and, if so, the right of management under the Act and/or existing contractual commitments with the Union to subcontract bargaining unit work without first engaging in collective bargaining with the Union. Evidence and argument concerning the timeliness of the Charge will also be received at hearing. Timeliness will be considered as a preliminary issue in the decision rendered following development of the full record.

IT IS SO ORDERED

DATE: May 31, 2011



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