

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

COMMUNICATION WORKERS OF AMERICA,)	
LOCAL 13101,)	
)	
Charging Party,)	
)	<u>ULP No. 12-01-848</u>
v)	
)	
STATE OF DELAWARE, DEPARTMENT OF)	
SAFETY AND HOMELAND SECURITY,)	
DIVISION OF STATE POLICE,)	
)	
Respondent.)	

BACKGROUND

The State of Delaware (“State”) is a public employer within the meaning of 19 Del. C. Section 1302(p) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (“PERA” or “Act”). The Department of Safety and Homeland Security (“DSHS”) is an agency of the State in which the Division of State Police (“DSP”) is organizationally located.

The Communication Workers of America (“CWA”) is an employee organization within the meaning of 19 Del.C. §1302(i) of the PERA. Local 13101 is the certified representative of a unit of Non-Uniformed Support Staff employed by DSHS/DSP (excluding supervisory and confidential employees) within the meaning of §1302(j) of

the Act. PERB Cert. 05-04-475. It also represents a bargaining unit of telecommunication employees.¹

On January 25, 2012, CWA filed an unfair labor practice charge (“Charge”) with the Public Employment Relations Board (“PERB”) alleging conduct by the State in violation of 19 Del.C. §1307(a)(1) and a)(5), 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:
 - (1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.
 - (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.

CWA alleges that on or about January 13, 2012, the Director of Human Resources for DSP “interfered with restrained or coerced” two (2) non-uniformed employees of DSP by denying them union representation they requested during an interview which reasonably could have been expected to result in discipline and by discriminating against such individuals with respect to their employment status.

On or about February 10, 2012, the State filed its Answer denying the Charge asserting that the interviews in question were conducted by a State Police Sergeant as part of an ongoing criminal investigation. Both employees were advised of this fact and read their Miranda Rights. One employee agreed to proceed and did not request Union representation.

¹ It is unclear from the pleadings to which of these two units the employees involved in this matter belong.

After being informed that the interview was part of an ongoing criminal investigation, the State asserts the other employee declined to proceed. Only after being suspended with pay and benefits did she request Union representation. At that point, the investigating officer informed the employee of her right to Union representation during any disciplinary proceeding and also explained her right to counsel. The State maintains that because no discipline resulted and no questions were asked of this employee, no violation of her right to Union representation occurred.

The State alleges that no discipline resulted to either employee because the suspensions were without the loss of either pay and benefits. For this reasons, the State maintains there was no violation of the employees right to Union representation.

DISCUSSION

Rule 5.6 of the Rules and Regulations of the Delaware Public Employment Relations Board provides:

- (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 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*, ULP 04-10-453, V PERB 3179, 3182 (Probable Cause Determination, 2004).

Whether discipline occurred is not dispositive of this matter. The Weingarten rule establishes that where an employee reasonably believes that discipline may result from an investigatory interview he/she has a right to Union representation during the interview, upon request. Once the two (2) employees involved here were informed that the interviews in question were part of an ongoing criminal investigation their concern about possible discipline was justified.

The critical consideration therefore, is whether the employees made a timely request for Union representation. According to the State, in one instance, there was an interview followed by a suspension. Whether the employee participating in the interview requested Union representation, if at all, prior to the interview is unclear. The CWA alleges that he requested Union representation but does not identify when the alleged request occurred. The State, on the other hand, denies that a request for Union representation was made, at any time.

Concerning the other employee, the Charge alleges that she requested representation but again does not identify when the alleged request occurred. The State further maintains that when this employee was informed that the interview was part of the ongoing criminal investigation, she declined to proceed and no interview occurred.

According to the State, her request for Union representation was made only after she was suspended.

In both instances, whether a request for Union representation was made and/or when the request was made is a critical factual issue which must be resolved before any decision can be rendered on the Charge.

DETERMINATION

Considered in a light most favorable to Charging Party, the pleadings support a determination that there is probable cause to believe that an unfair labor practice, as alleged, may have occurred.

The pleadings raise questions of fact which can only be resolved following a hearing convened for the purpose of creating an evidentiary record upon which a decision can be rendered.

A hearing will be scheduled in order to receive evidence concerning whether the State violated 19 Del.C. §1307(a)(1) and/or (a)(5), as alleged.

Date: March 7, 2012



CHARLES D. LONG, JR.
Hearing Officer
Del. Public Employment Relations Board