STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

COMMUNICATION WORKERS OF AMERICA Local 13101,	:	
Charging Party,	:	
v.	:	**ULP No. 12-05-864**
STATE OF DELAWARE, DEPARTMENT OF SAFETY AND HOMELAND SECURITY, DIVISION OF STATE POLICE,	:	**Probable Cause Determination Order of Dismissal**
Respondent.	:	

APPEARANCES

James Hummell, Executive, President, CWA Local 13101
Thomas J. Smith, SLREP, OMB, for DSHS/DSP

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 the Division of State Police (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 employed by the Division of State Police. [1]

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

[1] It is unclear from the pleadings to which of these units the position involved in this matter belongs.

agency of the State in which the Division of State Police ("DSP") is organizationally located.

CWA and DSHS/DSP are and were parties to collective bargaining agreements at all times relevant to this Charge.

On May 11, 2012, the CWA filed an unfair labor practice charge with the Delaware Public Employment Relations Board ("PERB") alleging conduct by the State in violation of §1307(a)(1), of the PERA, which provides:

> (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 because of the exercise of any right guaranteed under this chapter.

The Charge alleges that on February 27, 2012, a Deputy Attorney General ("DAG") was present and asked questions of a bargaining unit employee during a pre-termination hearing. The CWA contends that the presence of the DAG at the pre-termination hearing violated a prior settlement agreement by the parties not to have counsel present at such hearings. By doing so, the State violated §1307(a)(1), of the PERA.

On May 23, 2012, the State filed its Answer to the Charge denying the allegations set forth in the Charge. In New Matter, the State contends that the settlement agreement cited by the CWA applies to meetings held in connection with the negotiated grievance procedure which is set forth in Section 4 of the collective bargaining agreement. Pre-termination meetings, however, are provided for in Section 16 of the collective bargaining agreement and are entirely separate from the grievance procedure.

The State maintains that the DAG was present at the pre-termination hearing

because the employee involved was also facing criminal charges stemming from the same conduct resulting in his termination. DSHS included its DAG in the meeting to advise the employee of his rights concerning self-incrimination and the implications involved with his discussing the underlying conduct. The State also alleges the CWA has not identified any specific questions and/or comments by the DAG which could reasonably be construed as so "disruptive, coercing or intimidating". It concludes the Charge should be dismissed because it fails to assert any facts that may constitute a violation of Section 1307(a)(1) of the PERA.

On June 1, 2012, Charging Party filed its Response to New Matter in which it maintains that even if one accepts the State's contention that the agreement not to have counsel present at grievance meetings and hearings applies exclusively to grievance-related matters, it was the action of the State to have counsel present which created the restraint and coercion of employees which is prohibited by the PERA.

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).

PERB Rule 5.2 (c)(3) requires a Charging Party to include specific information in its Charge to allow a preliminary assessment of the procedural and substantive viability of that charge. PERB has previously held:

> The Charging Party must allege facts in the complaint with sufficient specificity so as to, first, allow the Respondent to provide an appropriate answer, and second, to provide facts on which the PERB can conclude there is a sufficient basis for the charge. The Charge must also explicitly link the factual allegations to the "specific provisions of the statute alleged to have been violated." PERB Rule 5.2. The initial burden rests on the Charging Party to allege facts that support the charge that §1307 of the PERA has been violated. *Sonja Taylor-Bray v. AFSCME Local 2004*, ULP 10-07-727, VII PERB 4633, 4636 (2010); *Flowers v. Amalgamated Transit Union, Local 84*, ULP 10-07-752, VII PERB 4749, 4754 (2010); *Jamell Harkins v. State of Delaware, Delaware Transit Corporation*, ULP No. 11-12-842, VII PERB 5393, 5396 (2012).

The pleadings in this case are not sufficient to support a finding of probable cause to believe that an unfair labor practice, as alleged, has occurred. CWA relies upon a settlement agreement it entered into with the State wherein the parties agreed that absent compelling circumstance, neither party will "…have legal counsel attend Step 1, 2, or 3

grievance meetings as provided for under the terms of the Agreement for purposes of providing legal representation." *Stipulated Settlement Agreement for ULP 08-09-631, Exhibit 1 to Charge, ¶6.* The grievance procedure is set forth in Article 4 of the parties' collective bargaining agreement.

The underlying issue in this Charge involves the presence of a Deputy Attorney General at a pre-termination meeting. The Charge fails to provide the necessary nexus between the presence of a DAG at the opening of a pre-termination meeting and an interference with the employee's rights under the PERA. It is undisputed that the pre-termination meeting was conducted in exercise of the employee's contractual right set forth in Article 16 of the negotiated agreement.

Further, the assertion that the DAG "first advised the Union Representative that he would not participate in the proceeding and then began to ask questions and speak during the meeting" does not provide sufficient specificity to support the alleged interference with employee rights. The March 6, 2012 termination notice states:

> At the start of the meeting, the Division's legal counsel advised you that you had a Fifth Amendment Right not to say anything in the pre-termination meeting which might incriminate you in the prosecution of pending criminal charges against you (attempted theft and filing a false instrument). After consulting with Mr. Hummell[2], you invoked your Fifth Amendment right. *Attachment 2 to State's Answer.*

The presence and participation of the DAG at the pre-termination hearing does not constitute a *per se* violation of §1307(a)(1), of the PERA. Charging Party has not alleged any specific conduct by the DAG during the hearing that could reasonably be construed as having violated the PERA.

[2] CWA Local 13101 President James Hummell attended the February 27, 2012 pre-termination hearing as the employee's union representative.

DECISION

The Charge fails to establish probable cause to believe that an unfair labor practice, as alleged, may have occurred.

WHEREFORE, the Charge is hereby dismissed, with prejudice.

Dated: August 28, 2012

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