STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

CORRECTIONAL OFFICERS ASSOCIATION OF DELAWARE,	:	
Charging Party,	:	**ULP No. 12-08-871**
v.	:	
	:	**Probable Cause Determination**
STATE OF DELAWARE, DEPARTMENT 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 the unit of uniformed rank and file Correctional Officers within the meaning of 19 Del.C. §1302(j). Included in this bargaining unit are Correctional Officers ("CO") in the DOC Facilities Management Division who hold positions classified as CO/Physical Plant Maintenance Trades Mechanics I, II and III.

COAD and the State are parties to a current collective bargaining agreement which has a term of July 1, 2012 through June 30, 2014.

On August 3, 2012, Charging Party filed an unfair labor practice charge ("Charge") alleging conduct by DOC in violation of 19 Del.C. §1307(a)(5) and/or (a)(6), which state:

> §1307 (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.

Specifically, COAD alleges that CO/Physical Plant Maintenance Trades Mechanics I, II and III are regularly scheduled for stand-by duty. On or about May 2, 2012, DOC issued a memorandum to all Superintendents, Foreman and Mechanics within the Facilities Maintenance Department, which stated in relevant part:

> Since 2007, mechanics have been permitted to claim mileage reimbursement or use a state vehicle for transportation between work and home while on stand-by duty. Unfortunately, this practice is in violation of state policy and/or state code. Therefore, effective July 1, 2012 employees will no longer be reimbursed for mileage between work and home and will no longer be provided with a take home state vehicle while on stand-by duty.
>
> Mechanics will continue to receive stand-by pay (MERIT Rule 4.17) and call back pay (MERIT Rule 4.16). *Charge Exhibit A; Answer Exhibit 5.*

The Charge alleges on or about July 1, 2012, DOC unilaterally discontinued its policy and practice of reimbursing employees for mileage to and from work and permitting the affected employees to take a State vehicle home while assigned to stand-by duty. COAD charges that by unilaterally discontinuing this practice and creating a

new policy, DOC has unlawfully failed or refused to bargain concerning a mandatory subject of bargaining in violation of 19 Del.C. §1307(a)(5) and/or (a)(6).

On August 15, 2012, the State filed its Answer denying that it engaged in conduct in violation of §1307(a)(5) and/or (a)(6). The State does not deny the factual allegations set forth in the Charge but maintains the decision to discontinue the mileage allowance and the availability of take home vehicles to DOC employees during their assignment to stand-by duty was required in order to comply with State law and an Office of Management and Budget ("OMB") revised policy. It argues that the practice at issue was not bargained for by the parties and is not included in the collective bargaining agreement. The State asserts COAD has failed to identify any right to bargain for the use of a State-owned vehicle and/or a mileage allowance. The State further maintains that it has no duty to bargain over its obligation to comply with existing law.

Included in its Answer was New Matter, in which the State asserts COAD has failed to state a claim for relief under 19 Del.C. §1307(a)(5) and/or (a)(6) or any standard under the statute or PERB's rules.

On August 20, 2012, COAD filed its Response to New Matter contending that the allegations constitute legal conclusions to which no response is required; otherwise, COAD denied all of the assertions contained in the State's new matter.

DISCUSSION

Rule 5.6 of the Rules and Regulations of the Delaware Public Employment Relations Board ("PERB") 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

> (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).

It is undisputed that DOC Capitol Program Administrator Eric B. Smeltzer issued a memorandum on May 25, 2012, to DOC Superintendents, Foremen and Mechanics concerning "Stand-by; State Vehicle Use/Mileage Reimbursement." The State admits that effective July 1, 2012, mechanics were "no longer reimbursed for mileage between work and home" and were "no longer provided with a take home state vehicle" while on stand-by duty as they had been prior to July 1, 2012.

The duty to negotiate agreements establishing terms and conditions of employment is the fundamental premise of the PERA. 19 Del.C. §1301. The good-faith obligation is reiterated in the statutory definition of "collective bargaining":

> "Collective bargaining" means the performance of the mutual

> obligation of a public employer through its designated representatives and the exclusive bargaining representative to confer and negotiate in good faith with respect to terms and conditions of employment and to execute a written contract incorporating any agreements reached…" 19 Del.C. 1302(e).

The PERA defines "terms and conditions of employment to mean "…matters concerning or related to wages, salaries, hours, grievance procedures and working conditions; provided however, that such term shall not include those matters determined by this chapter or any other law of the State to be within the exclusive prerogative of the public employer." 19 Del.C. §1302(t). Public employers are not required to engage in collective bargaining on matters of inherent managerial policy, which includes but is not limited to "such areas of discretion or policy as the functions and the programs of the public employer, its standards of services, overall budget, utilization of technology, the organizational structure and staffing levels, and the selection and direction of personnel." 19 Del.C. §1305. This reservation on the obligation to bargain does not, however, prohibit an employer from choosing to negotiate concerning permissive subjects of bargaining.

The scope of mandatory collective bargaining does not and cannot include those matters determined by the PERA or any other law of the State to be within the exclusive prerogative of the public employer. *Superior Court of the State of Delaware v. UFCW Local 27,* Rep. Pet. 08-10-634, VI PERB 4211, 4214 (Bd. decision on review, 2009). These matters are illegal subjects of bargaining. Section 1313(e) specifically states that any provision of a collectively bargained agreement which is determined to be contrary to law shall be void and unenforceable.

PERB established the test for defining the scope of negotiations and determining

whether an issue is either a mandatory, permissive or illegal subject of bargaining:

> The application of the balancing test … was addressed in Woodbridge Ed. Assn. v. Bd. of Ed., Del. PERB, ULP No. 90-02-048, I PERB 537, 546 (1990).[1] There, the PERB concluded that where a subject does not fall within a specific statutory exception thereby removing it from the duty to bargain, it must be determined whether the subject falls within the statutory definition of terms and conditions of employment under 19 Del.C.§1302(q) and/or involves a matter of inherent managerial policy as defined under Employer rights at 19 Del.C. §1305.
>
> If the answer to either question is yes, the subject is mandatory or permissive respectively. If both questions are answered affirmatively, the balancing test adopted by PERB in Appoquinimink must be applied so that the critical question becomes "does the impact of the matter on the employer's operation as a whole clearly outweigh the direct impact on the individual employees?"

The State relies upon OMB Operating Policy VO-19 (entitled, "Acceptable Vehicle Use Policy and Exemptions) to support its position that the use of state vehicles and/or mileage reimbursement for employees who are called back to work while on stand-by status is not a mandatory subject of bargaining. The OMB policy raises a number of issues which are unrelated to the statutory issue raised by the instant Charge. A departmental policy cannot be relied upon to establish the negotiability of a specific issue over which bargaining has been requested. The determination of negotiability is exclusively a function of interpretation and application of the statute. Consequently, the policy promulgated by OMB is irrelevant and does not impact the ultimate determination of whether there is a duty to bargain concerning mileage reimbursement or use of a state

[1] To the extent that applicable provisions of the Public Employment Relations Act, (19 Del.C. Chapter 13), the Police Officers and Firefighters Employment Relations Act, (19 Del.C. Chapter 16 and the Public School Employment Relations Act, 14 Del.C. Chapter 40 are identical, decisions issued under one statute serve as precedent for similar issues arising under the other statutes.

vehicle while on stand-by duty.

The State also relies upon 29 Del.C. §5117(a), and §7106 (a) and (b) to support its conclusion that the discontinued practice violated State law and was, therefore illegal.

> 5117(a) It is the intent of this section to clearly establish that state employees are liable for the full cost of commuting to and from work, including the cost of parking, and that the State will not participate in the payment of any of that commuting cost, including parking cost. . . .
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> 7106(a) No motor vehicle owned by any state agency/school district . . . . shall be driven by any employee before or after the prescribed working hours of that employee.
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> 7106(b) When not on official State business, every motor vehicle owned by any agency/school district . . . . shall be parked at the agency or motor pool location to which the vehicle is assigned.

The Charge raises a question of first impression concerning the scope of bargaining. The resolution of the current dispute requires a determination as to whether mileage reimbursement to DOC employees who are required to commute while on stand-by assignment and/or use State vehicles to commute while on stand-by status are negotiable under the PERA.

DETERMINATION

Considered in a light most favorable to the Charging Party, the pleadings support a determination that there is probable cause to believe a violation of 19 Del.C. §1307(a)(5) and/or (a)(6) may have occurred. The pleadings raise questions of fact which can only be resolved following submission of a complete evidentiary record upon which the legal issues may be considered and a decision may be rendered.

Wherefore, a hearing will be promptly scheduled for the purpose of establishing a factual record upon which a decision can be rendered concerning:

> Whether DOC violated its duty to bargain in good faith and 19 Del.C. §1307(a)(5) and/or (a)(6) by unilaterally discontinuing the reimbursement of bargaining unit employees for mileage and/or the use of State vehicles while on assigned stand-by duty, as alleged?

Having found probable cause based on the pleadings, the State's assertion that the charge fails to state a claim upon which relief can be granted is denied.

Dated: October 31, 2012

Charles D. Long, Jr.

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