STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

CORRECTIONAL OFFICERS ASSOCIATION OF DELAWARE,	:	
Charging Party,	:	**ULP No. 12-08-871**
v.	:	**Decision on the Merits**
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 in the DOC Facilities Management Division who hold positions classified as CO/Physical Plant Maintenance Trades Mechanics I, II and III (Mechanics).

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.

The Charge alleges on or about July 1, 2012, DOC unilaterally discontinued its policy and practice of allowing employees to either claim reimbursement for mileage to and from work or to use a State vehicle to commute when responding to an emergency call back while assigned to stand-by duty.

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). 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 in which it denied all of the assertions contained in the State's new matter.

A Probable Cause Determination was issued on October 31, 2012, which found probable cause to believe a violation of 19 Del.C. §1307(a)(5) and/or (a)(6), as alleged, may have occurred. A public hearing was convened on January 8, 2013 for the purpose of receiving evidence. During the hearing the parties entered testimony and documentary evidence into the record. The record closed following receipt of written argument.

FACTS

The following facts are derived from the testimony and documentary evidence

contained in the record created by the parties.

DOC Physical Plant Maintenance Trades Mechanics I, II, and III (Mechanics) are responsible for all general maintenance at correctional facilities statewide. They are merit, career ladder positions, with advancement through the career ladder based on education, training and experience.

DOC facilities are divided into four regions, which include specific institutions: Northern Division (Howard R. Young Correctional Institution, Webb Community Correction Center, Plummer Community Center); Northern Satellite (Baylor Women's Correctional Institution); Central (James T. Vaughn Correctional Center, Central Violation of Parole Center, Morris Community Correction Center); and Southern (Sussex Correctional Institute. Sussex Violation of Probation Center). The correctional institutions are in continuous operation 24 hours each day, every day of the year. Mechanics are assigned to fixed shifts, working five consecutive days with two consecutive days off. The primary institutions (Howard R. Young, Baylor, James T. Vaughn, and Sussex) are staffed with two shifts each weekday for 7:00 a.m. – 3:00 p.m., and 3:00 p.m. – 11:00 p.m. Additionally, reduced crews are assigned to work 7:00 a.m. – 3:00 p.m. on Saturday and Sunday. Only Howard R. Young has a second weekend shift assigned to work 3:00 p.m. – 11:00 p.m.

Prior to the summer of 2007, DOC called Mechanics from a voluntary overtime list to respond to emergencies which occurred in facilities during non-shift hours. However, DOC experienced difficulties in securing coverage for emergency situations (particularly during the summer) using the voluntary overtime list, which caused problems in the correctional facilities. COAD Shop Steward Gordon Fletcher testified then Capital Programs Administrator Jerry Platt discussed the problem with COAD's

Secretary, Mike Lenigan, at that time. While COAD favored creating a third shift to address the coverage issue, it ultimately acceded to the rotating stand-by assignment procedure proposed by DOC. There was agreement that Mechanics would be compensated for additional trips (above and beyond normal commutes for their regular shifts) by providing either a state vehicle or mileage reimbursement. *TR p. 16.* Current Programs Administrator Eric Smeltzer corroborated Fletcher's recollection with his testimony that he understood at the time that the mileage reimbursement/use of state vehicle option was included to make implementation of the stand-by assignments "more palatable to the Union." *TR p. 29.*

A rotational stand-by assignment for Mechanics was implemented on a facility-by facility basis in 2007. As an example, it was implemented at the South Region (where Smeltzer was the Facilities Superintendent at that time) on or about July 24, 2007, when Capital Programs Administrator Platt issued an email memorandum to Smeltzer, which stated:

> Due to recent events where no Mechanic has responded to emergency calls from the institutions, including the events of July 22, 2007[1], I have decided to place the South Region Mechanics on Stand-By. Please work with Sheri to develop a Stand-By Schedule that is coordinated with payroll period. The next payroll period starts on 8/5/07. That is when Stand-By should start. Due to this long delay, I suggest that you do not mention this until early next week. Otherwise, I think you may have problems getting any response this weekend.
>
> As a result of this, we will be ordering a cell phone for stand-by use. When it arrives please see that it is activated and properly set up for voice mail. Even if the phone has not arrived by 8/5/07, please start the Stand-By. They will have to work around this inconvenience. But it should be here by then.
>
> You can give the Mechanics the option of taking home a state

[1] Testimony established the July 22, 2007 incident referenced in this email involved a problem with the HVAC system at the Sussex VOP that Facility Superintendent Smeltzer had to respond to because he was unable to get either a mechanic or a foreman to respond from the voluntary overtime list. *TR p. 28.*

> vehicle or getting reimbursed for mileage for call-backs. However, I do not want any tools in the state vehicle, if they choose that option. Also, you should remind everyone of their responsibilities while driving state vehicles. Please have everyone submit the mileage from their home to the institution. That is what will be used for reimbursement purposes; we will not be paying mileage based on where they are when they receive the call.
>
> Also, remind everyone of the opportunities to accumulate comp time in limited amounts.
>
> Let everyone know that I am open to allowing Mechanics to "work deals" with each other in order to cover their stand-by duties, but we will not be making payroll adjustments for these deals. Also, the duty is ultimately the responsibility of the Mechanic on the schedule, and that is who will be disciplined if anything goes wrong.
>
> When you have your schedule worked out, please communicate this with Sheri. Also, get with each Warden to let them know the schedule and the procedure to call the Mechanics. Specifically, the home number should be called first, and then the cell phone number should be called. Let me know if I have forgotten anything. *State Exhibit 3*.

This practice was ultimately applied to all regions, but was not reduced to writing as a formal DOC Policy until February 16, 2010, when DOC Policy 6.2, Stand-by, was issued:

> I. Authority: 29 Del.C. 89 8903 (4)(5)(7)
>
> II. Purpose: To establish stand-by policy for uniformed Facility Maintenance employees.
>
> III. Applicability: All uniformed Facility Maintenance employees.
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> IV. Policy: To maintain fair and consistent practices for stand-by duty statewide.
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> V. Procedures: Each region will develop a schedule for employees to provide after-hours emergency maintenance coverage for all facilities within the region. All full-time Maintenance Mechanic I – III employees will be included in any such schedule. The length of each stand-by assignment shall be established by the Regional Superintendent, and shall coincide with pay periods. The length of each turn on the stand-by

list shall be the same for every employee within a region. Stand-by schedules shall be prepared for six month periods. Tentative schedules for longer periods may be prepared, but are subject to modification.

The schedule will be developed beginning with the employee having the most seniority within the Department and proceeding through the list to the employee with the least seniority. Each employee will select his/her slot in the rotation. If an employee refuses to select a slot in the rotation, a slot will be assigned by the Regional Superintendent. This rotation will be repeated continuously for the duration of the schedule.

New employees may be placed in the rotation schedule, but may not assume stand-by duties until they have worked in the region for six full months. In the event that a Maintenance Mechanic transfers from one region to another, they may be placed into the rotation, but must work in their new region for two full months prior to assuming stand-by duty. Upon inclusion of new or transferring employees into a stand-by list, previously approved vacation requests must be honored when inserting these employees into the stand-by list.

An employee is permitted to arrange for another employee to provide stand-by coverage for a 24-hour period if the assigned employee is unable to work during their turn in the rotation. Written notice of this arrangement (signed by both employees) must be received by the Regional Superintendent at least 24 hours in advance of the change, and the Regional Superintendent must notify all facilities impacted. Also, the covering employee agrees that he/she will not receive stand-by compensation for this change, but will be compensated for any overtime duties that may be performed.

Employees are permitted to trade slots in the rotation or find a replacement employee for their turn in the rotation. Written notice of this arrangement (signed by both employees) must be received by the Regional Superintendent at least two weeks in advance of the change, and the Regional Superintendent must notify all facilities impacted. In this case, stand-by compensation

will be received by the employee covering the time period.

Employees on stand-by may be provided with a department-issued cell phone, as funding permits. In the event of an emergency, the Shift Commander will attempt to make contact with the assigned employee in this order:

1. Employee's Home Phone
2. Department-issued Cell Phone
3. Employee's Foreman or Regional Superintendent

If an employee is unable to utilize or access the department-issued cell phone, they are responsible for providing the Shift Commander and Superintendent with an alternative phone number at which they can be reached. Lack of access to a department-issued cell phone is not a justification for failure to respond.

At no time shall the employee take longer than 90 minutes to arrive at the facility after being contacted by the Shift Commander. If the Shift Commander feels that a situation requires attention sooner than the stand-by employee can provide, he has the option to call the Foreman or Regional Superintendent to get a quicker response. In the event that a Foreman or Regional Superintendent must be called, the Foreman or Regional Superintendent has the option of calling any employee or contractor to handle the situation, or handling the situation himself. Prior to handling the situation himself, the Foreman or Regional Superintendents shall make a reasonable attempt to contact other eligible employees to fulfill the required needs, if the situation permits the time necessary to make any such arrangements.

In the event that an employee on stand-by cannot be contacted by the Shift Commander or fails to respond, the stand-by pay for that day(s) will be docked. There will be no exceptions. The employee may also receive disciplinary action for this incident at the Regional Superintendent's discretion.

In all cases, the stand-by employee shall report to the facility. Upon arrival at and departure from a

> facility, the employee must contact the shift commander and/or Primary Control. Upon his/her arrival at the facility and assessment of the situation, if additional assistance is required, the stand-by employee shall contact the Foreman or Regional Superintendent for prior approval. Additionally, if a contractor is required, the stand-by employee must first contact the Foreman or Regional Superintendent for approval. *Union Exhibit 1*.

Current Capital Administrator Smeltzer testified that at some point prior to May, 2012, a question was raised during a "town hall meeting" at Howard R. Young as to whether Mechanics would have the option to use a state vehicle while on assigned stand-by duty. Before this meeting, Mechanics working at Howard R. Young did not have this option because there were no state vehicles available for use at that facility; consequently, all Mechanics at Howard R. Young were reimbursed for travel when called back during stand-by. Smeltzer testified the question prompted him to review the Delaware Code, after which he concluded, "We were probably violating the law." *TR p. 33.*

Thereafter, Capital Administrator Smeltzer issued the following memorandum on May 25, 2012:

> To: Superintendents, Foremen and Mechanics
> From: Eric Smeltzer
> Subject: Stand-by; State Vehicle Use/Mileage Reimbursement
>
> 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)[2]

[2] Merit Rule 4.17, Stand-by Pay, states in relevant part:

> FLSA-covered employees assigned to critical public service approved by the Director, and authorized by agencies to be on-call regularly for emergency services for an average of 64 off-duty hours or more per week, shall receive stand-by pay equal to 5% of their paygrade

and call back pay (MERIT Rule 4.16).[3]

The following code and policy references provide the basis for this change:

Del Code Title 29 Chapter 52:

§5117. *Employees neither supplied with, nor reimbursed for, parking expenses associated with commutation to work; exceptions.*

(a) No state agency may rent parking spaces for employees' or state officials' private vehicles. 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 commuting costs, including parking costs.
(b) This section does not alter the existing policy of reimbursing employees for expenses incurred while travelling on state business.
(c) Subsection (a) of this section shall not apply to the use of rented parking spaces, as part of an approved employee recognition program established pursuant to §5950 of this title.
(d) Subsection (a) of this section shall not apply to any commuter benefit approved by the Department of Transportation pursuant to 30 Del.C. Chapter 20, subchapter V.

C. Defining Critical Need and Cost Justification of Commuting

Agencies will be required to provide evidence that the assignment of a vehicle to drive to and from their duty station meets or exceeds the standards of situations as follows:

1. The employee is on paid stand-by on-call status and is expected to personally respond to emergencies of situations. Evidence must be provided that the employee is called out on a regular basis (more than once per month) and is not part of a rotational call back situation. The requesting agency will provide the area, zone or county to which the employees are to respond and provide evidence of that need. Whenever there are assigned multiple vehicles and

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midpoint while so assigned. Such increased pay shall continue during absences only for paid holidays or sick leave of five successive work days or less occurring during the period of assignment. Any call-back work required during on-call periods shall also be compensated in accordance with 4.16.

[3] Merit Rule 4.16, Call-Back Pay, states, in relevant part:
4.16.1 FLSA-covered employees who have left the work site at the end of their scheduled shift and are called back for overtime service shall be paid for such service in accordance with the provisions for overtime pay, provided that minimum total payment is equivalent to four times their regular straight time hourly rate. Employees shall be paid according to this call-back provision or the overtime provision, whichever is greater, not both.

employees in an area zone or county, it must be demonstrated these apparent redundant assignments are mission critical. It should be also demonstrated that the state owned vehicle is critical for the response.

2. *A limited approval can be granted for situations where the employee is in a rotational stand-by on-call status, the vehicle is equipped with tools or equipment necessary to meet the emergency situations and a rapid response is required where it can be demonstrated a slow response would negatively impact the public, involve a life threatening situation or result in a significant loss of property.*

3. *A public policy or task force recommendation dictates that to enhance response to a potential crisis a specific and limited number of critical staff members are granted authorization to commute in a state vehicle. It must be demonstrated that a response could be significantly delayed by not having an assigned vehicle which would negatively impact the public, involve a life threatening situation or result in a significant loss of property. Each responder's role must demonstrate they are a first on scene emergency responder and not a supporting team member who could first obtain a vehicle from the employee's duty station prior to responding to the scene of an event.*

Note: Fleet Services operating policies and procedures can be found at the following link:
http://gss.omb.delaware.gov/fleet/documents/policies/ policy 022212.pdf

If there are any questions please do not hesitate to call. *Union Exhibit 2.*

It is undisputed the memorandum was not provided to COAD prior to its issuance to individual Mechanics on May 25, 2012. Shop Steward Fletcher testified he called Capital Administrator Smeltzer after receiving the memorandum. Smeltzer confirmed the two spoke by telephone and that he responded to Fletcher's request not to change the policy by stating, "I didn't have the ability or flexibility to be able to negotiate anything, and I had to put an end to the practice." *TR p. 37.*

The memorandum was implemented on July 1, 2012.

PRINCIPAL POSITIONS OF THE PARTIES

Correctional Officers Association of Delaware:

COAD charges that by unilaterally discontinuing the option to use a State vehicle or to be reimbursed for additional commuting costs, DOC has unlawfully failed or refused to bargain concerning a mandatory subject of bargaining. When C/O Mechanics are required to respond to emergency calls during off-duty hours while assigned to stand-by duty, they incur additional commuting expenses, above and beyond those incurred for reporting for their regular shifts. The option of using a State vehicle or reimbursement for mileage was negotiated as a means of limiting the economic harm suffered by employees who were required to incur these additional costs.

COAD asserts the use of state vehicles and mileage reimbursements are not illegal subjects of bargaining. There has never been an administrative or judicial ruling prohibiting bargaining concerning the reimbursement of costs incurred by an employee performing emergency services based on 29 Del.C. § 5117(a), §7103(b) and/or §7106 (a) and (b). The State's argument is based on the conclusions of Capital Administrator Smeltzer who testified he has no legal training and did not seek a qualified legal opinion before changing the policy. COAD asserts Smeltzer also admitted he did not engage in negotiations over the changes and did not inform COAD directly.

When Mechanics respond to a call while assigned to stand-by, they are not performing their normal duties, but are under the State's direction and are travelling on State business when mandated to report on an emergency basis. This type of travel is covered by 29 Del.C. §5117(b)[4] and was not cited by the State.

State of Delaware:

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 state

[4] 29 Del.C.§5117(b): This section does not alter the existing policy of reimbursing employees for expenses incurred while travelling on state business.

owned 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 maintains that it has no duty to bargain over its obligation to comply with existing law.

The State argues that providing mileage reimbursement or take-home vehicles while on stand-by duty (although it has been done in the past) violates State law, namely 29 Del.C. §5117(a), §7103(b) and §7106(a) and (b). The law requires state employees to be "liable for the full cost of commuting to and from work… the State will not participate in payment of any of that commuting cost…" The policy change was based on a "reasonable and good faith interpretation and application of the law". It asserts COAD is attempting to create exceptions and allowances that do not exist within the text of the cited statutory provisions.

Alternatively, the State asserts that if mileage reimbursement and the use of state vehicles are not found to be illegal subjects of bargaining, they are clearly not mandatorily negotiable under the PERA. It argues the direct or indirect reimbursement of commuting costs does not constitute a "working condition" because it has no impact on the employment status of mechanics or the manner in which they perform their duties. It argues the mechanics are required to make the same commute from their residence to the workplace when they are called back on stand-by as they make to report for work for their regular shifts.

The State concludes the policy is a matter of inherent managerial policy and

discretion, and therefore, a permissive subject of bargaining about which the employer cannot be compelled to bargain. It argues the core issue is DOC's implementation of a stand-by rotation program to insure that maintenance needs are met at all times of day, every day. It asserts "the manner in which mechanics report to the facilities is a matter of carrying out a Department function", the use of take-home vehicles involves Department property, and mileage reimbursement involves the use of Department funds. Even if a balancing test is applied, the State argues the impact on the Department's operations as a whole outweighs the impact, if any, on individual employees:

> "The practice of reimbursing for mileage or allowing the use of take-home vehicles while on stand-by duty forces the Department to put more miles on Department-owned vehicles than otherwise would be, and to spend more money on mileage reimbursement than would otherwise be spent. Additionally, a decision confirming the right to mileage reimbursement or to use take-home vehicles could have an adverse impact on the State's overall budget, as it would undoubtedly be cited as precedent by employees and Unions in the future."

DISCUSSION

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 established by 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 issue raised by this charge is not whether the change in the policy violated the parties' collective bargaining agreement, but whether it constituted a unilateral change in the status quo of a mandatory subject of bargaining, sufficient to constitute a violation of

the PERA. It is a well-established tenet of labor law that terms and conditions of employment may be established by practice, whether or not they are specifically included in the collective bargaining agreement. *Brandywine Affiliate, NCCEA/DSEA/NEA v. Brandywine Board of Education*, Del. PERB, ULP No. 85-06-005, I PERB 131, 142 (1986). In order to sustain its charge, COAD must establish not only that a unilateral change occurred, but also that the change involved a mandatory subject of bargaining.

The National Labor Relations Board addressed the standards for evaluating whether an employer's practice is sufficient to constitute a term and condition of employment in *Sunoco, Inc. (R&M)*, 249 NLRB 240, 244 (2007):

> An employer's practices, even if not required by a collective-bargaining agreement, which are regular and long-standing, rather than random or intermittent, become terms and conditions of unit employees' employment, which cannot be altered without offering their collective-bargaining representative notice and an opportunity to bargain over the proposed change. *Granite City Steel Co.*,167 NLRB 310, 315 (1967); *Queen Mary Restaurants Corp. v. NLRB*, 560 NLRB 403, 408 (9th Cir. 1977); *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988); *B & D Plastics*, 302 NLRB 245 fn. 2 (1991); *DMI Distribution of Delaware*, 334 NLRB 409, 411 (2001). A practice need not be universal to constitute a term or condition of employment, as long as it is regular and longstanding. *Locomotive Fireman & Enginemen*, 168 NLRB 677, 679–680 (1967).
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> A past practice must occur with such regularity and frequency that employees could reasonably expect the "practice" to continue or reoccur on a regular and consistent basis. *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353–354 (2003); *Eugene Iovine, Inc.*, 328 NLRB 294, 297 (1999).

A practice is most often held to exist where the parties are in substantial agreement as to the existence of the alleged course of conduct. *Brandywine (Supra @ 144).* In this case, there is no dispute that prior to July 1, 2012, DOC either reimbursed

Mechanics for mileage or provided a state vehicle to be used for travel to respond to emergency calls when the employees were on stand-by duty.

The issue presented is whether this practice constituted a term and condition of employment and is, therefore, a mandatory subject of bargaining. It is clear that a policy change which deprives employees of reimbursement for travel expenses incurred in the normal course of their job duties or revocation of the option to use an employer-owned vehicle to perform those duties has a direct and negative economic impact on the affected employees. Prior to the July 1, 2012 implementation of the new policy, Mechanics who were called back for purposes of responding to emergency maintenance calls while on assigned stand-by duty did so without incurring travel costs.[5]

Reporting when directed while on stand-by duty is clearly distinguishable from the obligation to report to work for a regular, scheduled shift. Employees can coordinate carpools, join a van pool, catch a bus, or be dropped off and picked up when they are reporting to work on a regular established schedule with a defined start and end time, e.g., a regularly scheduled shift. Options are much more limited when an employee is on stand-by and may be called to report at irregular, unscheduled and unanticipated times outside of a regularly scheduled shift. Testimony established that call-backs typically occur between 3:00 p.m. and 7:00 a.m. and vary widely in frequency and duration of required response.

The change in policy changes the conditions of employment for Mechanics. Besides the economic impact, PPTMT's were required as of July 1, 2012, to secure personal transportation to respond to emergency calls while assigned to stand-by duty. The policy change requires Mechanics (who may previously have used a State vehicle) to

[5] This charge concerns only these emergency call-back situations and not the normal daily commute of Mechanics. Commuting costs for regular shifts during a two-week stand-by assignment are and remain the responsibility of the employees.

secure an alternative transportation method to be available at unpredictable times for indeterminate periods of time.

The State's assertion that both mileage reimbursement and use of a state vehicle to respond to emergency call-backs are illegal subjects of bargaining is not dispositive of the question of the employer's good faith obligation to bargain under the PERA. Initially, I take administrative notice of the fact that the portions of Title 29 which are relied upon were the law prior to DOC's 2007 implementation of the stand-by rotation process for mechanics. There is no evidence in the record before me that anything changed between 2007 and 2012, except that Capital Programs Administrator Smeltzer was asked a question about making a previously unavailable vehicle available to mechanics for purposes of responding to emergency maintenance calls at Howard R. Young, which prompted him to independently "do some research". On cross examination, he admitted that he is not legally trained and that he did not seek counsel with anyone who was, prior to reaching his decision to unilaterally change the policy.

If DOC believed that an existing practice which concerned employee working conditions was "inconsistent with any statutory limitation … or otherwise contrary to law" it had an affirmative duty to advise COAD and to place the union (as the exclusive bargaining representative of the affected employees) on notice of any proposed change in the practice. The record is devoid of any communication from DOC to COAD. Direct communication with individual bargaining unit members does not constitute notice to the exclusive bargaining representative, a basic requirement of the good faith obligation to bargain.

There is a long-standing principle of labor law that the duty to bargain in good faith continues beyond the period of actual negotiations which was articulated by the U.S.

Supreme Court:

> Collective bargaining is a continuous process. Among other things, it involves day to day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. Conley v. Gibson, 355 U.S. 41, 46; 41 LRRM 2089, 2091 (1957); NLRB v. Acme Industrial Co., 385 U.S. 432, 64 LRRM 2069 (1967).

Employers and unions regularly enter into discussions concerning terms and conditions of employment which result in agreements to resolve issues that arise between collective bargaining negotiations. Doing so is necessary for a healthy labor-management relationship. Contractually, parties customarily reserves the right not to enter into negotiations during the term of a contract, but the reality is that these types of discussions and resolutions are often to the mutual benefit of both parties and the operational effectiveness of the workplace.

The facts in this case reveal that a situation existed in 2007 in which DOC was having difficulty finding enough mechanics to voluntarily respond to emergency calls and the voluntary overtime list was not meeting operational needs. Although other options were discussed, ultimately the employer exercised its option to establish a rotating stand-by assignment procedure, consistent with its discretion to direct the workforce. The employer, in consultation with the union, considered the impact of that decision on the individual employees and agreed to cover the additional commuting costs employees incurred when they were required to respond to emergency calls during off-duty hours. Employees assigned to stand-by duty are compensated at 5% above their normal wage rate for their assigned two week period and are guaranteed a minimum of four hours of compensation when required to report, consistent with Merit Rules 4.16 and 4.17. The stand-by premium compensates employees for the disruptions they experience

in their personal lives while assigned to stand-by, e.g., they must remain within 90 minutes of their work facilities at all times during what would normally be "off-duty" hours; they must have plans in place to be able to immediately respond should they be called back; they must remain fit for duty at all times during the two-week assignment (perhaps limiting their social and personal habits). A stand-by assignment is very different from a voluntary overtime situation where an employee has a choice as to whether to accept a call to return to work. Mechanics who fail to report to a call back while on assigned stand-by duty are subject to discipline and loss of stand-by pay. *DOC Policy 6.2, Union Exhibit 2.*

As a result, a binding practice was created which was accepted by both parties and which was consistently implemented over a period of approximately five years. Once established and accepted, neither party was free under the PERA to unilaterally modify that practice to the extent that it is a mandatory subject of bargaining without providing notice and the opportunity to bargain to the other party.

Finally, the State's argument that "a decision confirming the right to mileage reimbursement or to use take-home vehicles could have an adverse impact on the State's overall budget, as it would undoubtedly be cited as precedent by employees and Unions in the future" is irrelevant. Collective bargaining, by its nature and intent, incurs costs for the parties. A decision by this agency which requires the employer to comply with its statutory responsibilities and obligates it to negotiate in good faith concerning the terms and conditions under which its employees work does not adversely affect the State's overall budget; it requires the State, as an employer, to comply with the law. In one of the earliest decisions issued by this agency, an employer's argument that it was required to make a unilateral change in order to protect its position in future bargaining was

rejected. *Brandywine Affiliate, NCCEA/DSEA/NEA v. Brandywine Board of Education*, ULP 1-9-84-6B (1984). That principle has not changed in the thirty year history of the PERB or the evolution of labor law in this country over the last eight decades.

CONCLUSIONS OF LAW

1. The State of Delaware is a public employer within the meaning of 19 Del.C. §1302(p). The Department of Correction ("DOC") is an agency of the State of Delaware.

2. The Correctional Officers Association of Delaware ("COAD") is the exclusive bargaining representative of DOC employees, including Correctional Officer Physical Plant Maintenance Trade Mechanics I, II and III, within the meaning of 19 Del.C. §1302(j).

3. By unilaterally implementing changes to the Stand-by policy which unilaterally shifted additional costs to Physical Plant Maintenance Trade Mechanics who worked stand-by duty and modified their terms and conditions of employment, DOC violated its duty to bargain in good faith and 19 Del.C. §1307(a)(5) and (a)(6).

WHEREFORE, THE STATE OF DELAWARE, DEPARTMENT OF CORRECTION, IS HEREBY ORDERED TO TAKE THE FOLLOWING AFFIRMATIVE STEPS:

A) Cease and desist from engaging in conduct in dereliction of the duty to collectively bargain in good faith with the exclusive bargaining representative of its employees. The changes unilaterally implemented effective July 1, 2012 in violation of 19 Del.C. §1307(a)(5) and (a)(6) are to be immediately rescinded and returned to the status quo as it existed immediately prior to the unilateral change.

B) Make all affected employees whole for actual losses suffered since July 1, 2012 as a result of the unlawful implementation of a unilateral change in terms and

conditions of employment.

C) Immediately post the Notice of Determination in all areas where notices affecting employees in the bargaining unit represented by COAD are normally posted throughout the Department and in its administrative offices. These Notices must remain posted for at least 30 days in order to provide notice to all affected employees of the decision in this matter.

D) Notify the Public Employment Relations Board in writing within sixty (60) calendar days of the steps taken to comply with this Order.

IT IS SO ORDERED.

DATE: August 8, 2012

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