

**STATE OF DELAWARE**

**PUBLIC EMPLOYMENT RELATIONS BOARD**

**CORRECTIONAL OFFICERS ASSOCIATION OF DELAWARE,**  
Charging Party,  
v.  
**STATE OF DELAWARE, DEPARTMENT OF CORRECTION,**  
Respondent.

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**ULP No. 13-04-897**  
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**Probable Cause Determination**  
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**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).

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 April 5, 2013, COAD filed an unfair labor practice charge with the Delaware Public Employment Relations Board (“PERB”) alleging conduct by the State in violation of Sections

1307(a)(5) and (6) of the PERA.<sup>1</sup>

Specifically, the Charge alleges that on or about January 3, 2013, “after a series of meetings between the State and the Union, the State implemented Policy No. 8.27, a dress code applicable to all bargaining unit members. (“Policy 8.27”). The State subsequently unilaterally implemented additional policies through its various correctional facilities related to uniforms without first bargaining with COAD over the changes to the existing policies or the effects of the changes on the bargaining unit employees.”

On May 15, 2013, the State filed its Answer to the Charge in which it denied DOC had violated any portion of the PERA as alleged. It included in its Answer New Matter asserting the Charge fails to allege facts sufficient to state a claim for relief under 19 Del.C. §1307(a); COAD has failed to set forth any specific standard or practice concerning implementation of Policy 8.27 which concerns a mandatory subject of bargaining for which there is an obligation to bargain; and argues the Charge should be deferred for resolution to the parties’ negotiated grievance procedure.

On May 23, 2013, COAD filed its Response to New Matter contending that the allegations contained therein constitute legal conclusions to which no response is required; otherwise, COAD denied all of the assertions contained in the State’s new matter.

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<sup>1</sup> §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.

## 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).

The duty to bargain concerning 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). 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 Charge raises a legal issue concerning the scope of bargaining under the PERA. The resolution of this dispute requires a determination as to whether Uniform/Dress Code policies constitute mandatory subjects of bargaining under the PERA. When viewed in a light most favorable to the charging party, the pleadings are sufficient to support a determination that an unfair labor practice may have occurred.

Having found probable cause, the State’s defense that the pleadings fail to state a claim on which relief may be granted is denied. To prevail in this matter, COAD must establish by a preponderance of the evidence that DOC has implemented a unilateral change in a mandatory subject of bargaining, without negotiation with COAD, in violation of its statutory duties. The pleadings raise both factual and legal questions, which require creation of an evidentiary record and the receipt of argument to resolve.

The State has also argued the charge should be deferred to the parties’ contractual grievance procedure for resolution. PERB has an extensive body of case law establishing its policy of discretionary pre-arbitral deferral. Although there is a grievance pending in this matter, it raises a contractual issue concerning application of Article 19.2 of the collective bargaining agreement. Article 19.2 requires “work rules, policies, orders and directives shall be interpreted and applied fairly to all employees”. Application of this contractual provision requiring “fairness” would not resolve the statutory issue concerning the negotiability of uniforms and its

impact, if any, on the duty to bargain. For this reason deferral to arbitration is not warranted here.

**DETERMINATION**

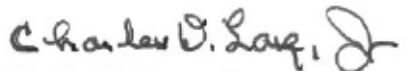
Considered in a light most favorable to the Charging Party, the pleadings support a determination that there is probable cause to believe a violation of 19 Del.C. §1307(a)(5) and/or (a)(6) may have occurred. The pleadings raise questions of fact which can only be resolved following submission of a complete 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 IMPLEMENTING POLICIES  
CONCERNING UNIFORMS AND THE DRESS CODE FOR BARGAINING UNIT  
EMPLOYEES IN ITS CORRECTIONAL FACILITIES WITHOUT FIRST BARGAINING  
OVER THE CHANGES TO THE EXISTING POLICIES OR THE EFFECTS OF THE  
CHANGES ON THE BARGAINING UNIT EMPLOYEES.

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. Because the pending grievance does not address the statutory issues raised by the Charge, the request for deferral of the dispute to resolution through the grievance procedure is also denied.

Dated: June 28, 2013



CHARLES D. LONG, JR.

Hearing Officer

Del. Public Employment Relations Board