

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

<b>CORRECTIONAL OFFICERS ASSOCIATION OF DELAWARE,</b>	:	
	:	
	:	
Charging Party,	:	
	:	
v.	:	<b><u>ULP No. 15-02-988</u></b>
	:	<b>Probable Cause Determination</b>
	:	
<b>STATE OF DELAWARE, DEPARTMENT OF CORRECTION,</b>	:	
	:	
	:	
Respondent.	:	

APPEARANCES

*Lance Geren, Esq., Freedman & Lorry, P.C., for COAD*  
*Aaron M. Shapiro, SLREP/HRM/OMB, for the State*

**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 19 Del.C. §1302(i). It is the exclusive bargaining representative of the unit of uniformed rank and file Correctional Officers, within the meaning of §1302 (j). DOL Case 1. COAD represents bargaining unit employees at various DOC facilities, including Baylor Women’s Correctional Institution, Court and Transportation, Employee

Development Center, Howard R. Young Correctional Institution, James T. Vaughn Correctional Center, Morris Community Corrections Center/Central Violation of Probation, New Castle County Community Corrections, Sussex Community Corrections Center/Sussex Violation of Probation/Sussex Work Release Unit, and Sussex Correction Institution.

COAD and the State are parties to a collective bargaining agreement effective July 1, 2014, through June 30, 2015. They have also completed negotiations for a successor agreement to be effective July 1, 2015 through June 30, 2018.

On February 12, 2015, COAD filed an unfair labor practice charge with the Public Employment Relations Board (“PERB”) alleging conduct by DOC in violation of Sections 1307(a)(5) and (a)(6) of the PERA, 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, the Charge alleges that in February, 2015, DOC announced at various locations and facilities that it would begin implementing a time and attendance program, which it referred to as “eStar”. COAD asserts it believes that one component of the eStar program will be to require employees to administer their time and attendance well before the start of their shift, and that this time will not be compensated. It asserts the Union was provided neither notice nor the opportunity to bargain over this change, which it argues constitutes a midterm unilateral change to a mandatory subject of bargaining, in violation of DOC’s statutory obligations.

On May 8, 2015, DOC filed its Answer to the Charge. DOC maintains that bargaining unit employees have been required to arrive at work on time and have their arrival recorded. It

denies announcing the implementation of a time and attendance program or the implementation of any changes to attendance requirements. DOC further denies that it has modified or proposed any change to a mandatory subject of bargaining (term and condition of employment), or that eStar is inconsistent with Section 21.11 of the collective bargaining agreement. It asserts it has not refused to bargain over a modification to a mandatory subject of bargaining.

Also included in DOC's Answer was New Matter. It asserts the Charge fails to state a claim for which relief may be granted because COAD has not identified "any authority, precedent, practice or bargaining history to demonstrate that payroll and leave management data integration are within the scope of mandatory bargaining". DOC also asserts the Charge is premature because "there has been no actual or contemplated mid-term change to the parties collective bargaining agreement", and "COAD representatives have been invited to be part of the planning process at each DOC facility."

On May 19, 2015, Charging Party filed its Response to New Matter. In denying all the material allegations contained therein, COAD alleges that although eStar has not yet been fully implemented, upon information and belief, DOC has executed a contract with the vendor, has begun the installation of equipment and communicated to the affected employees that the program will be fully operational by October, 2015.

COAD further maintains that eStar includes a time keeping system which is a mandatory subject of bargaining as it has a direct impact on hours of work, hours for which employees are compensated, and possible disciplinary implications. Insofar as the Union's involvement, COAD asserts it was invited to participate only after the implementation of the eStar system had commenced and after the filing of this unfair labor practice charge. The Union asserts it was confronted with a *fait accompli*, with no meaningful opportunity to negotiate.

This probable cause determination is based upon a review of the pleadings submitted in

this matter.

### **DISCUSSION**

Regulation 5.6 of the Rules of the Public Employment Relations Board requires:

- (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 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 has, or 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 determining whether probable cause exists to support an unfair labor practice 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. *Flowers v. DART/DTC*, ULP 04-10-453, V PERB 3179, 3182 (DE. PERB, 2004).

Whether time and attendance requirements constitute mandatory subjects of bargaining under the PERA is a legal question. If it is determined that the duty to bargain attaches, a factual determination must be made as to whether DOC instituted a unilateral change and/or otherwise violated its collective bargaining obligations under the PERA.

### **DETERMINATION**

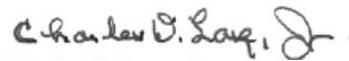
For the reasons set forth above, the pleadings are sufficient to support the further processing of this charge and raise both factual and legal questions concerning the alleged modification and

implementation of eStar and revisions to time and attendance policies.

Having determined the pleadings provide probable cause, DOC's assertion that the pleadings fail to state a claim for which relief can be granted is dismissed.

A hearing will be promptly scheduled for the purpose of establishing a factual record upon which argument can be made and a decision rendered. The issue to be addressed is whether DOC violated 19 Del.C. §1307 (a)(5) and (a)(6) by unilaterally implementing a new time and attendance program and/or by creating a new policy inconsistent with the terms of the parties' collective bargaining agreement.

Date: June 10, 2015



Charles D. Long,  
Hearing Officer,  
Public Employment Relations Board