STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 81, LOCAL 247, AFL-CIO,	:	
Charging Party,	:	**ULP No. 15-05-997**
v.	:	**Probable Cause Determination**
STATE OF DELAWARE, DEPARTMENT OF CORRECTION,	:	
Respondent.	:	

APPEARANCES

Lance Geren, Esq., Freedman & Lorry, P.C., for AFSCME
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 American Federation of State, County and Municipal Employees, Council 81, AFL-CIO, (AFSCME) is an employee organization within the meaning of 19 Del.C. §1302(i). By and through its affiliated Local 247, AFSCME is exclusive representative of a bargaining unit of certain DOC employees, within the meaning of §1302(j). DOL Case 123. PERB takes

administrative notice that the bargaining unit positions represented by AFSCME Local 247[1], as set forth in DOL Case 123, are not coextensive with the positions represented by AFSCME Local 247 as part of the Merit Unit 11[2] coalition. Some of the AFSCME 247 positions are also represented in Merit Unit 10[3], while other positions do not appear to be represented in any merit unit at this time.[4]

AFSCME Local 247 and the State are and have been parties to multiple collective bargaining agreements which cover AFSCME 247 represented DOC employees at adult correctional institutions. It is presumed that AFSCME Local 247 has filed this petition on behalf of all of the positions its represents, as certified in DOL Case 123, regardless of whether some of the positions are also included in merit units pursuant to 19 Del.C. §1311A.

On May 8, 2015, AFSCME 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 that it would begin implementing a time and attendance program, which it referred to as "eStar". AFSCME

[1] Includes only Department of Correction positions.

[2] Merit Unit 11 includes both Department of Correction and Department of Services for Children, Youth and their Families positions, which are defined as "correctional supervisors".

[3] Merit Unit 10 includes both Department of Correction and Department of Services for Children, Youth and their Families positions, which are defined as "correctional officers"

[4] For example, the recognition clause (Article 3) of the 1993 – 1996 agreement between DOC and AFSCME Local 247 includes positions such as "Senior Secretary", "Administrative Officer", "Administrative Assistant", etc., which do not appear as titles/classifications which are represented in either Merit Unit 10 or 11.

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 alleges 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 19, 2015, DOC filed its Answer to the Charge. DOC maintains that bargaining unit employees have been required to arrive at work on time and to 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 the terms of any collective bargaining agreement it is party to with AFSCME Local 247. It denies it has 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 AFSCME 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 "AFSCME and the State have agreed to meet and discuss eStar planning and implementation."

On May 27, 2015, AFSCME filed its Response to New Matter. In denying all the material allegations contained therein, AFSCME 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.

AFSCME asserts 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, AFSCME 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. It argues 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 26, 2015

Charles D. Long, Jr.

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