STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

CORRECTIONAL OFFICERS ASSOCIATION OF DELAWARE,	:	
Charging Party,	:	
v.	:	**ULP No. 16-06-1071**
STATE OF DELAWARE, DEPARTMENT OF CORRECTION,	:	**Probable Cause Determination and Order of Dismissal**
Respondents.	:	

APPEARANCES

Lance Geren, Esq., Freeman and Lorry, for COAD
Aaron Shapiro, Office of State Labor Relations & Employment Practices, for DOC

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 a bargaining unit of DOC uniformed employees (as defined in DOL Case 1) within the meaning of §1302(j) of the Act.

DOC and COAD are parties to a current collective bargaining agreement which has a term of July 1, 2015 through June 30, 2018.

COAD alleges that by unilaterally changing its policy with respect to the lunch bags, and by creating a new policy, DOC has refused to bargain collectively in good faith

with the Union over a mandatory subject of bargaining. It further alleged that by continuing to apply the terms of the new policy, DOC has engaged in a continuing violation of 19 Del.C. §1307(a)(5) and (a)(6). COAD requests DOC be directed to refrain from continuing to implement the alleged unilateral change, to make any bargaining unit employees whole who have been adversely impacted by the new policy (including reimbursement for any costs of newly purchased lunch bags) and, upon request, to bargain with the union over any changes to the policy.

On July 13, 2016, the State filed its Answer to the Charge, in which it admits DOC Policy 8.32A was modified effective June 6, 2016, to change the permissible size of clear plastic bags employees could use to bring items into the facility. It also admits it did not negotiate this change with COAD. The State specifically denies the size of the bags constitutes a mandatory subject of bargaining and further denies that DOC had an obligation to negotiate concerning the contents of DOC Policy 8.32A. It concludes the Charge fails to state a claim for which relief can be granted and requests the charge be dismissed in its entirety.

This probable cause determination is based on review of the pleadings submitted by the parties.

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).

It is undisputed that the three page DOC Policy 8.32 A, *Institutional Permitted and Prohibited Items*, effective September 22, 2010[1], was replaced effective June 6, 2016, by a policy of the same name and number.[2] The 2010 policy stated, in relevant part:

J. The following items are permitted for individuals <u>not</u> participating in Visiting Room activities:
… 7. A single clear bag, not to exceed 10" x 10.5" x 6" dimensions

The June 6, 2016 revised DOC Policy states, in relevant part:

C. Allowable Items for Employees, Contractual Staff and Volunteers

1. All staff shall be mindful of the property brought into the facility during performance of their duties. Staff shall limit items to only those required during their scheduled shift(s) for the specific day(s). If available, personal items, absent those designated in section VI.B. Prohibited Items, sections 1 and 2, may be stored in the designated employee locker within the designated staff locker room for use as needed or for safe keeping during completion of the duty day. Note that employee lockers are subject to search at any time. Permissible items include:

[1] Answer, Exhibit 1.

[2] Charge, Exhibit A.

a. One clear bag, no larger than 12 inches x 8 inches x 9 inches, for the purpose of carrying those items required for duty.

COAD contends this change in the policy violates the DOC's good faith obligation to negotiate under the PERA. Specifically, COAD asserts:

> Since in or around 2010, bargaining unit employees have been permitted to utilize lunch bags that are clear and have the dimensions of 6 inches by 12 inches by 16 inches. Correction officers are required to carry all of their personal belongings in this clear bag for safety and security reasons.
>
> On or about May 25, 2016, DOC unilaterally modified Policy 8.32A, to go into effect on June 6, 2016, and reduced the permissible size of the lunch bag to 12 inches by 8 inches by 9 inches.
>
> The Union was not afforded the opportunity to bargain over the changes to the permissible size of the lunch bags. [3]

The State denies the predecessor policy permitted employees to bring a single clear plastic bag into the facilities which were 6 inches by 12 inches by 16 inches. It notes that the predecessor policy permitted bags "… not to exceed 10" by 10.5" by 6" in size".[4] The State asserts in its Answer:

> COAD has incorrectly identified the historically permissible size of approved clear plastic bags, and has failed to acknowledge that the permissible size of the bags has been *increased*, not reduced… [A]t best, the change in the permissible size of the plastic bags is *de minimus*, and an increase in the size of the approved bags (864 cubic inches to 630 cubic inches) is a benefit to bargaining unit members, not a detriment. [5]

PERB Rule 5.2 (c)(3) requires a charging party to include specific information in its Charge which allows a preliminary assessment of the procedural and substantive viability of that charge. The burden is on the charging party to provide facts in the complaint with sufficient specificity so as to provide a basis on which it may be concluded

[3] Charge ¶¶ 7 – 9.

[4] DOC Policy 8.32A, Section VI.J.7

[5] Answer, ¶11.

that there is a sufficient basis for the charge.[6]

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 set forth 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).

The dimensions of a bag which a correctional officer may bring into a facility is not a matter concerning or related to wages, salaries, hours, or the grievance procedure. In order to find that it is a mandatory subject of bargaining, the size of the bag must be found to be a matter concerning or related to working conditions. The Delaware PERB has held that a "working condition":

> . . . relates generally to the job itself, i.e., to circumstances involving the performance of the responsibilities for which one is compensated or the opportunity to and qualifications necessary to perform work required of those employees who are members of the certified bargaining unit. [7]

[6] *Sonja Taylor-Bray v. AFSCME Local 2004*, ULP 10-07-727, VII PERB 4633, 4636 (2010); *Flowers v. Amalgamated Transit Union, Local 842*, ULP 10-07-752, VII PERB 4749, 4754 (2010); *Jamell Harkins v. State of Delaware, Delaware Transit Corporation*, ULP No. 11-12-842, VII PERB 5393, 5396 (2012)

[7] *Smyrna Educators Assn. v. Bd. of Education*, D.S. 89-10-046, I PERB 475, 487 (1990)).

PERB has defined a "de facto" working condition to be one which an employee can avoid only by quitting his or her job. [8]

In this case, COAD has failed to establish a basis on which it might be reasonably concluded that the change in the size of the bag in which employees are permitted to bring an enumerated limited number of personal items into a correctional facility for their use during their duty period is a "matter concerning or related to wages, salaries, hours, grievance procedures and working conditions." Having found the pleadings fail to establish a reasonable basis on which it might be concluded that the dimensions of the clear plastic bag constitute a mandatory subject of bargaining, there is no probable cause to believe that an unfair labor practice has occurred,

DECISION

For the reasons set forth above, the Charge fails to establish a sufficient factual and legal basis on which it might be concluded that there is probable cause to believe that an unfair labor practice may have occurred.

WHEREFORE, the Charge is hereby dismissed, without prejudice.

DATE: December 28, 2016

D. Murray-Sheppard

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

[8] *Smyrna Educators' Assn., v. Bd. of Education,* ADS 89-10-046, I PERB 521, 525 (1990); AAUP, DSU Chapter v. DSU, ULP 97-12-224, IV PERB 2693, 2702 (2002).