

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

DOVER ORGANIZATION OF EMPLOYEES,	:	
	:	
Charging Party,	:	
	:	<u>ULP No. 19-02-1173</u>
v.	:	
	:	
CITY OF DOVER, DELAWARE,	:	PROBABLE CAUSE DETERMINATION
	:	
Respondent.	:	

The City of Dover, Delaware (“City”) is a public employer within the meaning of 19 Del.C. §1302(p) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (PERA).

The Dover Organization of Employees (“DOE”) is an employee organization within the meaning of 19 Del.C. §1302(i). It is the exclusive bargaining representative of a bargaining unit of full-time and part-time City of Dover employees as defined in DOL Case 194.

On February 6, 2019, DOE filed an unfair labor practice charge with the Delaware Public Employment Relations Board (“PERB”) alleging conduct by the City in violation of 19 Del.C. §1307(a)(1) and (a)(5), which provide:

- (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
 - (1) Interfere with, restrain or coerce any employee because of the exercise of any right guaranteed under this chapter...
 - (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.

DOE charges the City unilaterally instituted a change in the terms and conditions of employment of bargaining unit employees who are required to hold and maintain Commercial Drivers Licenses (CDL) as a condition of their continued employment. Specifically, it asserts the City issued a memorandum on January 28, 2019, by which it restricted the pool of medical examiners from whom it would accept physical examination certification required for CDL licensure. DOE asserts this is a change to the daily working conditions of bargaining unit employees that is not required by state or federal statute; that because compliance is mandatory, the City has effectuated an unavoidable imposition on working conditions; and that the limitation directly impacts the individual employee in the performance of their job function. DOE charges the City has failed to identify how limiting the network of available federally certified medical examiners advances their stated purpose of insuring "... employees are receiving quality care and are managing their health..." *Charge ¶9*. DOE alleges that an employee's failure to comply with the January 28, 2019 Memorandum may result in disciplinary action up to and including termination and that the City failed to negotiate this mandatory subject of bargaining during the most recent negotiations.

On March 13, 2019, the City filed its Answer to the Charge admitting it issued the January 28, 2019 Memorandum and also admitting this issue was not raised in the parties most recent negotiations. The City denies the Memorandum establishes a new policy or procedure for employees required to hold a CDL, asserting that employees required to maintain a CDL have been required to submit a medical certification since 2005. The City avers it has had a policy of directing employees to the Bayhealth Occupational Health Organization for their bi-annual examination, where the examination is provided at no

charge to the employee since 2005. The City asserts it expanded employee options in 2017 to allow for the examinations to be completed by the employee's primary care physician (PCP).

The City included, under New Matter, affirmative defenses in its Answer to the Charge. It argues the charge fails to state a claim for which relief can be granted under the PERA because CDL licensing requirements are established by federal and state statutes and are, therefore, illegal subjects of bargaining. It also argues the establishment of job classifications and duties are matters of inherent managerial authority pursuant to 19 Del.C. §1305, over which the City cannot be required to bargain. The City concludes the Charge fails to identify any action taken by the City which constitutes a unilateral change in a mandatory subject of bargaining in violation of its obligation to bargain in good faith.

The City also argues the Charge is untimely because the last change made to the policy at issue was in 2017, well prior to the 180 day statute of limitations found at 19 Del.C. §1308. The City also asserts DOE has waived its right to negotiate the City's "consistent policy and practice of directing employees to utilize Bayhealth to complete CDL medical examinations since at least 2005, and starting in 2017, has allowed employees to utilize their PCP." *Answer*, ¶38.

DOE filed its Response to the City's New Matter on March 22, 2019. It denies the Charge asserts any challenge to the CDL licensing requirements, clarifying its challenge is to the City's restriction of the pool of certified federal CDL medical examiners employees may use to satisfy the CDL requirements. It also denies there has been any challenge to the classification or job duties of bargaining unit employees required to hold CDL licenses. DOE specifically denies the legal assertions made by the City in its affirmative defenses.

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).

The Charge alleges the City engaged in conduct which interfered with, restrained or coerced bargaining unit employees who are required to hold a CDL license to continue their employment by “unilaterally impos[ing] new standards on represented employees that serve to restrict the pool of certified federal DOT CDL medical examiners that the employees may use to *satisfy* the statutory CDL requirements, thereby constituting a change in the term and condition of employment.” *Response to New Matter*, ¶28 (*emphasis*

in original).

The Charge raises two issues:

- 1) Whether limiting the list of federal certified medical examiners from whom the City will accept medical certification which is required to maintain a CDL license is a “term and condition of employment” as defined in 19 Del.C. §1302 (t)¹; and
- 2) If so, whether the City has failed or refused to meet its statutory duty to bargain in good faith and/or interfered with the rights of bargaining unit employees or DOE by making a unilateral change in the terms and conditions of employment of bargaining unit employees who are required to maintain a CDL as a condition of continued employment.

The first question is purely legal in nature and raises a question of first impression before PERB. The second issue requires the creation of a factual record upon which argument can be made in order to determine whether the City implemented a change in the working conditions for employees who are required to maintain a CDL. The second issue does not arise, however, unless the first issue is answered in the affirmative.

The pleadings in this matter are sufficient to establish probable cause to believe an unfair labor practice may have occurred. It will ultimately be DOE’s burden to establish by a preponderance of the evidence that the City violated the Public Employment Relations Act, as alleged.

DETERMINATION

Considered in a light most favorable to the Charging Party, the pleadings are sufficient to establish that the City may have violated 19 Del.C. §1307 (a)(1) and/or (a)(5), as alleged. The pleadings raise both questions of fact and law which can only be resolved following the creation of a complete evidentiary record and the consideration of argument.

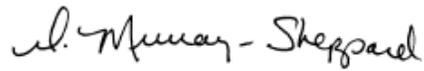
¹ "Terms and conditions of employment" means matters concerning or related to wages, salaries, hours, grievance procedures and working conditions; provided however, that such term shall not include those matters determined by this chapter or any other law of the State to be within the exclusive prerogative of the public employer.

WHEREFORE, a hearing will be promptly scheduled for the purpose of developing a full and complete factual record upon which a decision can be rendered concerning:

WHETHER THE CITY OF DOVER INTERFERED WITH THE PROTECTED RIGHTS OF EMPLOYEES AND/OR FAILED OR REFUSED TO BARGAIN IN GOOD FAITH BY UNILATERALLY LIMITING THE LIST OF FEDERAL CERTIFIED MEDICAL EXAMINERS FROM WHOM IT WILL ACCEPT MEDICAL CERTIFICATION WHICH IS REQUIRED TO MAINTAIN A CDL LICENSE IN VIOLATION OF 19 DEL.C. §1307 (A)(1) AND/OR (A)(5).

Having found probable cause based on the pleadings, the City's asserted defenses will be considered following creation of the factual record.

DATE: June 18, 2019



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