

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

<b>UNITED FOOD AND COMMERCIAL WORKERS</b>	:	
<b>UNION, LOCAL 27,</b>	:	
	:	
Charging Party,	:	
	:	<b>ULP 12-09-876</b>
<b>v.</b>	:	
	:	<b>Probable Cause Determination</b>
<b>STATE OF DELAWARE, THE FAMILY COURT</b>	:	
<b>OF THE STATE OF DELAWARE,</b>	:	
	:	
Respondent.	:	

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 Family Court of the State of Delaware (“Family Court”) is an agency of the State.

The United Food and Commercial Workers Union, Local 27 (“UFCW”) is an employee organization within the meaning of §1302(i) of the PERA and is the exclusive bargaining representative of certain employees of the Family Court within the meaning of 19 Del.C. §1302(j).

UFCW and Family Court are parties to a collective bargaining agreement which had a term of June 5, 2007 through June 4, 2010. The parties do not dispute that this agreement remains in effect and that it covers terms and condition of employment for bargaining unit members, including hours of work and overtime.

On September 19, 2012, the UFCW filed an unfair labor practice charge (“Charge”) alleging conduct by Family Court in violation of 19 Del.C. §1307(a)(5) and (a)(6), 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.

The Charge also alleges a general violation of 19 Del.C. §1311A, Collective bargaining in the state service.

Specifically the Charge alleges on or about June 6, 2012, the Chief Judge of Family Court issued an internal policy memorandum (“IPM 12-002”) entitled “Attendance Policy Revised.” IPM 12-002 unilaterally defined terms and conditions of employment without prior notice to or negotiation with the UFCW, including work start and end times for bargaining unit employees, meal and other breaks, floating holidays, tardiness and absences, and the imposition of discipline (including reduction in pay) for infractions. The UFCW alleges the policy also authorizes the Court to use electronic card reader reports and other surveillance methods to monitor bargaining unit employees. The UFCW notified the Court by correspondence dated June 7, 2012 that it objected to IPM 12-002 to the extent it adopted any new or amended terms that confer less advantageous benefits or working conditions on any matter covered by the policy. The Charge avers that the Court neither acknowledged nor answered the union’s bargaining demand, nor did it withdraw the policy pending negotiations, or alter or abandon its use of surveillance of bargaining unit employees.

The UFCW charges the Court violated 19 Del.C. §1307(a)(5), (a)(6) and/or §1311A by its unilateral publication of IPM 12-002, use of electronic card readers and other surveillance methods to monitor bargaining unit employees, and its subsequent failure or refusal to negotiate

concerning terms and conditions of employment after the union made a timely demand for bargaining on June 7, 2012, following its receipt of IPM 12-002 on June 6, 2012.

On September 28, 2012, the State filed an Answer to the Charge on behalf of the Court in which it denied the allegations of the Charge. The State denies IPM 12-002 in any way creates or modifies any attendance or leave standards applicable to Court employees. All of the terms and standards in IPM 12-002 existed in substantially identical form in the preceding policy, IPM 11-006, which was adopted on October 3, 2011. The only substantive change was the addition of the following language:

Section B: Work Hours, Breaks and Meal Breaks

2. Tardiness: ... In order to enforce this policy, management may utilize personal observation, card access reader reports, and any other method deemed appropriate by management to determine employee tardiness.

The State maintains this sentence simply memorializes "... methods long used to monitor employee attendance under the auspices of IPM 11-006", which (like IPM 12-002) is a statewide policy that applies to all Family Court employees, locations and facilities.

The State further denies the union has any right or authority under the PERA to bargain for any of the terms identified in the Charge. It argues, "the authority to ensure that employees report to work as and when required is a managerial prerogative, exclusively reserved to the State's inherent authority and discretion as a public employer under the Act, the Merit System, the Merit Rules and the Management Rights clause of the parties CBA".<sup>1</sup> It also denies that the exercise of its prerogative and responsibility constitutes surveillance or that the methods used to monitor employee attendance require negotiation and mutual agreement.

Under New Matter included with its Answer, the State alleges that the Charge fails to

---

<sup>1</sup> 19 Del.C. §1302(t) and §1305; 29 Del.C. §5938(c), Merit Rule 15.2, Attendance, and Article 1 of the parties CBA.

state a claim for relief under 19 Del.C. §1307(a) as alleged and is untimely.

On or about October 9, 2012, the UFCW filed its Response to New Matter contending that the allegations constitute legal conclusions to which no response is required and otherwise, denying all of the assertions contained in the new matter.

### **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 United Food and Commercial Workers Union, Local 27 was certified as the exclusive bargaining representative of the bargaining unit of Family Court employees on or

about September 13, 2006. At no time after enactment of the modifications to the PERA which include §1311A (on or about August 2, 2007), was this bargaining unit or any portion thereof certified as a “compensation” unit nor was the UFCW determined to be part of a union coalition under §1311A of the PERA. Consequently, that provision of the statute is inapplicable to this bargaining unit and the UFCW’s charge that the State has violated 19 Del.C. §1311A is dismissed.

The pleadings in this matter raise numerous factual and legal issues concerning the adoption and implementation of IPM 12-002. The Charge raises a question of first impression concerning the scope of bargaining. The resolution of the current dispute requires a determination as to whether the policy in IPM 12-002 is negotiable under the PERA, and if so, did the unilateral adoption of IPM 12-002 violate Section 1307(a)(5), (a)(6) and/or Section 1311A, of the PERA.

### **DETERMINATION**

The pleadings do not support a finding that there is probable cause to believe that the State violated 19 Del.C. §1311A. Consequently, that portion of the Charge is dismissed.

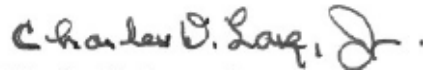
Considered in a light most favorable to the UFCW, the pleadings support a determination that there is probable cause to believe a violation of 19 Del.C. §1307(a)(5) and/or (a)(6) may have occurred. The pleadings raise questions of fact which can only be resolved following submission of a complete evidentiary 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 argument can be made and decision rendered concerning:

WHETHER FAMILY COURT VIOLATED 19 DEL.C. §1307(A)(5) AND/OR (A)(6) AS ALLEGED, BY FAILING OR REFUSING TO NEGOTIATE WITH THE UFCW CONCERNING THE ATTENDANCE POLICY (IPM 12-002) PRIOR TO IMPLEMENTATION AND APPLICATION TO BARGAINING UNIT EMPLOYEES.

Having found probable cause based upon the pleadings, the State's claim that the Charge fails to state a claim upon which relief can be granted is denied. The issue of timeliness of the Charge will be considered preliminarily following completion of the evidentiary record and receipt of argument from the parties.

DATE: December 5, 2012



---

Charles D. Long, Jr.,  
Del. Public Employment Relations Bd.