**STATE OF DELAWARE**

**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| **FRATERNAL ORDER OF POLICE, LODGE NO. 15,** | ) | |
| **Charging Party** | ) | |
| | ) | **ULP No. 98-02-225** |
| **v.** | ) | |
| | ) | |
| **City OF DOVER,** | ) | |
| **Respondent** | ) | |

## BACKGROUND

The City of Dover (hereinafter "City") is a municipal corporation within the meaning of section 1602(l), the Police Officers' and Firefighters Employment Relations Act (hereinafter "Act"), 19 Del.C., Ch. 16. The Fraternal Order of Police, Lodge No. 15, (hereinafter "FOP") is the exclusive bargaining representative of the employees in the City's Police Department in the positions of Police Officer I, Police Officer II, Corporals and Sergeants (hereinafter ("Officers").

On February 19, 1998, the FOP filed the above-captioned unfair labor practice charge alleging that on July 10, 1997, during ongoing collective bargaining negotiations between the parties, the Chief of Police issued General Order 22-A which unilaterally imposed a residency requirement on the officers. On or about February 13, 1998, the City enforced the residency requirement for the first time against Patrolman Almeida pursuant to his oral agreement of February 20, 1996, prior to the commencement of his employment, and his subsequent written agreement of April 1, 1996, to comply with the residency requirement.

The FOP alleges that by failing to bargain over the residency requirement and requiring employees to sign a pre-employment agreement containing the residency requirement the City has engaged in conduct in violation of Section 1607 (a)(1), (3) and (5), of the Act.

On March 9, 1998, the City filed its Answer claiming that General Order 22-A was simply a recodification of the existing residency requirement initially codified on March 23, 1995. The City contends the residency requirement is not a mandatory subject of bargaining about which it is required to bargain and denies that Patrolman Almeida was the first Officer against whom the residency requirement was enforced.

Under the heading "New Matter", the City argues, *inter alia*, that since the Charge was not filed within 180 days of either the initial codification of the residency requirement on March 23, 1995 (at which time the FOP received a copy), or February 20, 1996, when Patrolman Almeida verbally acknowledged his obligation under the residency requirement, it is not timely filed as required by Rule 5.2. of the Rules and Regulations of the Public Employment Relations Board (hereinafter "PERB") and is, therefore, barred. Attached to the City's Answer is a written acknowledgment of the residency requirement signed by Officer Almeida on April 1, 1996.

In its Response To Matter filed on March 16, 1998, the FOP argues, *inter alia*, that the PERB lacks authority under the Act to create a statute of limitations. The FOP argues the appropriate statute of limitation is three (3) years under 10 Del.C. section 8106.

The parties submitted written argument in support of their respective positions concerning the issue of timeliness. The following discussion and decision results from the record thus compiled.

## ISSUE

Is the unfair labor practice charge filed by Charging Party in the above-captioned matter barred by PERB Rule 5.2?

## POSITIONS OF THE PARTIES

**FOP:** In support of its position, the FOP argues that 10 Del.C. section 8106 applies to all actions based upon statute which seek to recover either money or property. Butler v. Butler, Del.Super., 222 A.2d 269, 272 (1966). The FOP argues that public employees have a property right in their jobs and the benefits associated with their employment. Since the Act does not expressly provide a time within which an unfair labor practice charge can be brought, charges filed thereunder are subject to the three (3) year period set forth in 10 Del.C., section 8106.

Although the PERB has authority under 19 Del.C. section 1606 to adopt rules and regulations, as an administrative agency it cannot adopt a regulation that conflicts with a statute enacted by the legislature, Wilmington Country Club v. Delaware Liquor Commission, Del.Super., 91 A.2d 250, 254 (1952); M&M. Inc. v Wade, Del.Super., 297 A.2d 403 (1972); Simmons v. Del. State Hospital, Del.Super., 660 A.2d 384 (1995).

**City:** The City maintains State law does not prohibit the PERB from adopting a statute of limitations for unfair labor practice charges which, it argues, is not only consistent with, but also necessary, to accomplish the purpose of the Act. The City maintains the PERB's authority to establish a period within which a charge must be filed is further supported by Delaware case law. State ex. rel. Massey v. Terry, Del. Super., 148 A.2d 102 (1959) and is consistent with general labor law, specifically, the time period established by the National Labor Relations Act, 29 U.S.C. §160(b), and similar state statutes. Howard v. District of Columbia Public Employment Relations Board , D.C. App., 655 A.2d 320 (1995).

## DISCUSSION

. In support of its position the FOP cites the case of Wilmington Country Club v. Delaware Liquor Commission, (Del.Supr., A.2d 250, 254 (1952)), for the proposition that:

> a public administrative agency . . . may not adopt and promulgate rules and regulations which are inconsistent with the provisions of a statute. [1]

In the actual text of the decision, the word "statute" is followed by a comma rather than a period so that, within context, the language provides:

> . . . a public administrative agency . . . may not adopt and promulgate rules and regulations which are inconsistent with the provisions of a statute, particularly with a statute which it is administering or which created the agency. The authority conferred under this Section pertains to the adoption of rules and regulations found to be necessary in order to carry out the true legislative intent as indicated under the Act. Legislation, however, may not be enacted under the guise of its exercise by adopting a rule or regulation which is out of harmony with or alters, extends or limits the Act, or which is out of harmony with the clear legislative intent as therein expressed. [2]

The creation of a reasonable time period for the filing of an unfair labor practice charge is clearly in harmony with the expressed legislative intent as set forth in section 1601, Statement of Policy, which provides:

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[1] Despite "clubs" being included in the enabling legislation as one of the classes of establishments that could apply for and receive a license for the off-premises sales of alcoholic liquor, the Delaware Liquor Commission by rule deleted "clubs" from obtaining a license for the off-premises sales of alcoholic liquor, thereby, in effective, repealing a statutory right to which clubs are otherwise entitled.

[2] "Section" refers is 19 Del.C. Ch. 3, Delaware Alcoholic Beverage Control Commission, section 304, Duties and Powers; Appointment of Officers and Employees which authorizes the Commission to "Adopt and promulgate rules and regulations not inconsistent with this Title or any other law of the State, . . . ".

> It is the declared policy of the State and the purpose of this chapter to promote harmonious and cooperative relationships between public employers and their employees, employed as police officers and firefighters, and to protect the public by assuring the orderly and uninterrupted operations and functions of public safety services. These policies are best effected by:
>
> (1) Granting to police officers and firefighters the right of organization and representation;
>
> (2) Obligating public employers and organizations of police officers and firefighters which have been certified as representing their employees to enter into collective bargaining negotiations with the willingness to resolve disputes relating to terms and conditions of employment and to reduce to writing any agreements reached through such negotiations;
>
> (3) Empowering the Public Employment Relations Board to assist in resolving disputes between police officers or firefighters and their public employers and to administer this chapter.

Section 1606, Public Employment Relations Board. provides:

> The Board, established by §4006 of Title 14, known as the "Public Employment Relations Board," shall be empowered to administer this chapter under rules and regulations which it shall adopt and publish.

Pursuant to the statutory grant of rule-making authority, the PERB first adopted and published rules and regulations in 1984. In concert with the public policy and purpose of the Act, as set forth in section 1602(1), PERB Regulation 1, General Provisions, provides, in relevant part:

> 1.9 Construction of the Regulations
>
> These regulations set forth rules for the efficient operation of the board and the orderly administration of the Act. . .

1.10 Timeliness

Notwithstanding the provisions of Regulation 1.9, and so that the Act may be efficiently enforced and disputes thereunder swiftly resolved, the Board shall strictly construe all time limitations contained in the Act and in these Regulations.

Section 1607, of the Act, Unfair Labor Practices-Enumerated, sets forth specific types of prohibited conduct. Section 1608, Same-Disposition of Complaints, provides, in relevant part:

> (a) The Public Employment Relations Board is empowered and directed to prevent any unfair labor practice described section 1607 (a) and (b) of this title and to issue appropriate remedial orders.

Pursuant to the authority vested in the PERB by sections 1601(3), 1604 and 1608(a), Chapter 5 of the PERB's Rules and Regulations provides a procedure for the processing of unfair labor practice complaints. Rule 5, Unfair Labor Practice Proceedings, provides, in relevant part:

5.2 Filing of Charge

(a) A public employer, labor organization, and/or one or more employees may file a complaint alleging a violation of 14 Del.C. §1407, 19 Del.C. §1607, or 19 Del.C. §1307. Such complaint must be filed within one hundred and eighty (180) days of the alleged violation.

5.3 Answer to Charge

(a) The respondent shall have seven (7) days within which to file a written Answer.

5.4 Response to Answer

As to New Matter which is pleaded in the Answer in accord with Regulation 5.3(b) above, the Charging Party shall have five (5) days within which to file a written response.

In furtherance of the legislative intent, Rules 1.9, 1.10 and Rule 5 assure the timely and efficient processing of unfair labor practice charges alleging conduct in

violation of §1607. On the other hand, to permit such disputes to remain unresolved for up to three (3) years, as the F.O.P. urges, would be clearly inconsistent with the legislative intent. The time limits set forth in Regulation 5.2 are long-standing. They were included in the initial rules and regulations adopted by the PERB in 1984 governing 14 Del.C. Ch. 40, The Public School Employment Relations Act, and subsequently extended to the Police Officers' and Firefighters' Employment Relations Act in 1986 and to 19 Del.C. Ch. 13, The Public Employment Relations Act in 1996. [3]

The Board's authority to adopt a rule requiring the prompt filing of an unfair labor practice charge is supported by other Delaware authority. The Delaware Supreme Court held that the authority granted to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent or policy. Atlantis I Condominium Ass'n v. Bryson, Del. Supr., 403 A.2d 711 (1979). In Kreshtool v. Delmarva Power and Light Co., (Del. Supr., 310 A.2d 649 (1973)), the Delaware Supreme Court held that an expressed legislative grant of power or authority to an administrative agency includes the grant of power to do all that is necessary to execute that power or authority. In State ex rel. Massey v. Terry, (Del. Supr., 148 A.2d 102 (1959)), the Delaware Supreme Court upheld the right of the Board of Canvass to establish a deadline for the filing of a petition requesting a recount of votes. The Court observed that ". . . orderly and efficient procedures required the fixing of a deadline beyond which complaints . . . would not be received."

An Agency's exercise of its discretionary power is limited only in that it cannot act arbitrarily or capriciously. Spear v. Blackwell & Son, Inc., Del.Super., 221 A.2d 52 (1966); Gunnip v. Lautenklos, Del.Ch., 94 A.2d 712, (1953).

The PERB's adoption of a rule requiring the filing of an unfair labor practice charge within one-hundred eighty (180) days of the incident or conduct in question

[3] In 1996, the PERB formally adopted a one-hundred eighty (180) day filing period for 19 Del.C. Ch. 13 and, for consistency, amended the ninety (90) day filing period for 19 Del.C., Ch. 16 and 14 Del.C., Ch. 40 to one-hundred eighty (180) days.

is neither arbitrary nor capricious. The filing period set forth in Regulation 5.2 is the same as that contained in the National Labor Relations Act,. 29 U.S.C. §160(b), governing the filing of unfair labor practice complaints involving private sector employers, unions and employees with the National Labor Relations Board.

The three (3) Delaware public employment statutes are essentially identical and similar in content and organization to the National Labor Relations Act. In Cofrancesco v. City of Wilmington, (419 F. Supp.109 (1976)), the Delaware Supreme Court recognized that:

> Delaware law extends to state, county and municipal employees many of the same rights to organize and bargain collectively that the LMRA affords to employees in the private sector. 19 Del.C. §1301, et.seq. In cases where problems raised under Delaware's labor law are similar to those that arise under the LMRA, Delaware could be expected to consider and, in all likelihood, follow federal law **[4]**

Other state Public Employment Relations Boards have (under similar general grants of rulemaking authority) promulgated a statutory period within which a charge or claim must be filed. *See e.g.,* Washington, D.C, PERB Rule 520.4, 37 D.C. Ref. (1990)(unfair labor practice charges); New Jersey. N.J.A.C, 19:17-45 (agency fee assessment appeals) and N.J.A.C. 19:16-8.1 (interest arbitration appeals)

Perhaps the most persuasive authority is the analogous case of Kaprow v. Board of Education, (N.J. Supr., 622 A.2d 237 (N.J. 1993)). In Kaprow, the New Jersey Supreme Court upheld a ninety (90) day filing period promulgated by the New Jersey Board of Education for appealing an employee termination pursuant to a general

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**[4]** THE LMRA 29 U.S.C. §§141-97, amended the NLRA by providing additional facilities for the mediation of labor disputes affecting commerce, to equalize responsibilities of labor organizations and employers and for other purposes unrelated to this matter. Although all three statutes governing employee representation and collective bargaining in the public sector were enacted after the decision in Cofrancesco (Supra.), the statutes more closely mirror the relevant provisions of the LMRA than did the predecessor statute.

grant of authority set forth in the enabling legislation. In support of its decision, the Court observed:

Administrative agencies are given wide discretion to determine the proper means to accommodate the Legislature's goals. Cammarata v. Essex County Park Comm'n _, 26 N.J. 404, 411, 140 A.2d 397 (1958);

Administrative regulations are preemptively valid, and anyone challenging such a regulation bears the burden of establishing its invalidity. Medical Soc'y. v. New Jersey Department of Law and Pub. Safety, 575 A.2d 1348 (1990); Bergen Pines County Hosp. v. New Jersey Dep't. of Human Services, 476 A.2d 784 (1984);

A legislative grant of express power is always attended by such incidental authority reasonably necessary or appropriate to carry out the legislative mandate Mulligan v.. Wilson, 264 A.2d 745 (App. Div. 1970); See New Jersey Guild of Hearing Dispensers v. Long _, 384 A.2d 795 (1978); Cammarata _, (Supra.) 140 A.2d 397;

The Legislature's broad delegation of power to the Commissioner and the state Board ... encompasses the authority to establish a time limitation for the resolution of disputes under the school laws. The limitations period provides a measure of repose, an essential element in the proper and efficient administration of the school laws. ... Certainly, for the Commissioner to find that the efficient administration of a school system requires the stability offered by a ninety-day limitation period is reasonable;

A limitations period has two purposes. The first is to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims. Ochs v. Fed'l. Ins. Co., 90 N.J. 108 112, 447 A.2d 163 (1982). The second is purpose is "to penalize dilatoriness and serve as a measure of repose" by giving security and purpose to human affairs. Ibid.

Having established the adoption of a 180 day filing period for unfair labor practice charges is within the PERB's statutory grant of authority, its applicability to the current charge must be considered. The March 23, 1995, Memorandum from the Chief of Police to all officers establishing a residency requirement within ten (10) miles of the city limits, Officer Almeida's verbal and written commitment of February, 1996 and April 1, 1996, respectively, to abide by the residency requirement and the distribution of General Order 22-A on July 10, 1997, all exceed the 180 day filing period set forth in PERB rule 5.2.

Whether or not, as alleged by the FOP, the initial directive issued on March 23, 1995, expired at the end of twelve (12) months is irrelevant to the timeliness issue since General Order 22-A, issued on July 10, 1997, also predates the filing of the instant charge by more than 180 days.

Having failed to timely protest the validity of General Order 22-A for the reason that it was unilaterally implemented by the City or Officer Almeida's commitment to comply with the residency requirement, enforcement of the residency requirement against Officer Almeida cannot constitute a separate violation of the statute.

## DECISION

Consistent with the foregoing discussion, it is determined that:

1. Rule 5.2 of the Rules and Regulations of the Public Employment Relations Board which establishes a 180 day filing period for unfair labor practice charges filed pursuant to 19 Del.C. §1607, represents a valid exercise of the rulemaking authority conferred by § 1604 of the Act;

**2.** The filing of the unfair labor practice charge on February 19, 1998, exceeds the 180 day filing period as to both the directive issued on March 25, 1995, and General Order 22-A, issued ion July 10, 1997;

3. Having failed to timely protest the validity of General Order 22-A for the reason that it was unilaterally implemented by the City, enforcement of the residency requirement against Officer Almeida does not constitute a separate violation of the Act.

For the reasons set forth above, the Charge is untimely filed and, therefore, dismissed.

June 25, 1998
(Date)

Charles D. Long
Charles D. Long,
Executive Director