

PUBLIC EMPLOYMENT RELATIONS BOARD
STATE OF DELAWARE

FRATERNAL ORDER OF POLICE, LODGE 1,)	
)	
Charging Party,)	<u>ULP No. 10-11-773</u>
)	
v.)	PROBABLE CAUSE
)	DETERMINATION
CITY OF WILMINGTON, DELAWARE,)	& DEFERRAL ORDER
)	
Respondent.)	

APPEARANCES

Jeffrey M. Weiner, Esq., for FOP Lodge 1
Michael P. Stafford, Esq., Young, Conaway, Stargatt & Taylor, for City of Wilmington

BACKGROUND

The City of Wilmington, Delaware (“City”) is a public employer within the meaning of 19 Del.C. §1602(l) of the Police Officers and Firefighters’ Employment Relations Act, 19 Del.C. Chapter 16 (“POFERA”)

The Fraternal Order of Police, Lodge No. 1 (“FOP”) is an employee organization within the meaning of 19 Del.C. §1602(g) and the exclusive bargaining representative of police officers employed by the Wilmington Police Department.

FOP Lodge 1 and the City are parties to a collective bargaining agreement which has a term of July 1, 2007 through June 30, 2010, which was in effect at all times relevant to this Charge.

On or about November 17, 2010, the FOP filed an unfair labor practice Charge alleging the City violated 19 Del.C. §1607(a)(1), (a)(5) and (a)(6), which provide:

§1607 (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 in or 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.
- (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 FOP alleges the City violated Article 15.1¹ of the parties' collective bargaining agreement when it sent Notices of Lay-off to two (2) Senior Lieutenants, two (2) Master Sergeants, one (1) Sergeant and one (1) Master Corporal. It asserts that by these actions, the City has implemented a unilateral change in Article 15.1 without negotiating first with the FOP, in violation of the POFERA.

On or about December 2, 2010, the City filed its Answer to the Charge in which it denied that any Senior Lieutenant, Master Sergeant, Sergeant or Master Corporal received a "Notice of Layoff". The letters sent to these officers advise them that "as a result of necessary expenditure reductions, your position ... is being eliminated in Fiscal Year 2011 effective January 3, 2011." The City asserts because the officers who received the letters have "bumping" rights (should they choose to exercise them), the six employees who will actually be laid off will be the six employees with the least seniority

¹ **Section 15.1** Layoffs, when necessary, shall begin with those employees having the least seniority in the Department. This seniority shall be based on the employee's date of appointment as a Patrol Officer. No new appointments shall be made until all laid-off Patrol Officers who wish to return have been recalled. Employees who have been laid off shall have recall rights in the inverse order of layoff according to seniority.

based on their date of appointment as a Patrol Officer.

The City's Answer also included New Matter, in which the City asserted: 1) the organizational structure and staffing levels of the Police Department are matters of inherent managerial policy which the City may unilaterally alter under the POFERA; 2) PERB should defer consideration of this Charge to the contractual grievance procedure under its discretionary deferral policy; 3) the City did not commit an unfair labor practice because it complied with Section 15.1 of the agreement in that none of the named officers suffered a severance, break, or suspension of employment; and 4) the City's actions are protected by contractual privilege.

The FOP filed its Answer to New Matter on or about December 8, 2010, in which it responded to each of the City's assertions and argued they should either be dismissed or decided in favor of the FOP.

This determination is based upon a review of the pleadings.

DISCUSSION

Regulation 5.6 of the Rules of the Delaware 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 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. *Flowers v. DART/DTC*, Del.PERB, Probable Cause Determination, ULP 04-10-453, V PERB 3179, 3182 (2004).

The FOP alleges the City has unilaterally altered the terms of Section 15.1 of the negotiated agreement, in violation of the POFERA. It does not argue that the City cannot alter staffing levels; rather it argues that the manner in which the six identified officers were notified of the lay-off violated the collective bargaining agreement.

On its face, the Charge fails to allege any facts which would establish that the City has refused or failed to comply with a provision of the POFERA or with PERB rules and regulations. Consequently, the Charge that the City has violated 19 Del.C. §1607(a)(6) is dismissed.

The PERB has held since its earliest decisions that a unilateral change to a mandatory subject of bargaining constitutes a *per se* violation of a party's duty to bargain in good faith. In the 1984 *Appoquinimink* scope decision, PERB found that procedural matters relating to a reduction in force were mandatory subjects of bargaining, *Appoquinimink Education Association v. Board of Education of Appoquinimink School District*, ULP No. 1-3-84-3-2A, I PERB 35, 57 - 58 (PERB, 1984). Background for this determination was provided in the decision:

...Generally, where the subject matter of a given proposal relates to the substance or criteria for the ultimate decision, it tends toward

permissive, as infringing upon the decision-making authority of the employer. Where the subject matter of a proposal relates primarily to matters of procedure or communication, it tends toward being mandatory.

Section 15.1 does not limit the City's authority to determine police staffing levels, but prescribes the process for reduction in force after the employer has determined that it will reduce staffing and also establishes the order for recalling employees. In order to determine whether the City instituted a unilateral change in this mandatory subject of bargaining, it must be determined whether the *status quo* was modified. It is undisputed that Article 15.1 establishes the *status quo* in this case.

Where the resolution of an alleged statutory violation is directly related to the resolution of a contractual issue, the PERB has adopted a discretionary and limited deferral policy on the premise that:

When parties have contractually committed themselves to agreeable procedures for resolving contractual disputes, it is prudent and reasonable for this Board to afford those procedures the full opportunity to function. *Fraternal Order of Police Lodge No. 1 v. City of Wilmington*, ULP 89-08-040, I PERB 449 (PERB, 1989), citing *Collyer Insulated Wire*, NLRB, 129 NLRB 837 (1971).

FOP Lodge 1 and the City of Wilmington have negotiated a grievance procedure which culminates in the submission of unresolved issues to final and binding arbitration before an impartial arbitrator. The City explicitly states in the New Matter in its Answer that it is willing to resolve this issue through the contractual grievance procedure. *City's Answer*, ¶14.

The Board's deferral policy is not unconditional and does not constitute a final resolution of the pending unfair labor practice charge. Where deferral is ordered, the PERB retains jurisdiction over the unfair labor practice charge for the express purpose of

reconsidering the matter upon application of either party for any of the following reasons:

- 1) that the arbitration award failed to resolve the statutory claim;
- 2) that the arbitration has resulted in an award which is repugnant to the applicable statute;
- 3) that the arbitral process has been unfair; and/or
- 4) that the dispute is not being resolved by arbitration with reasonable promptness.

Because a determination of whether the City violated its obligations under the POFERA turns upon application of Section 15.1 of the collective bargaining agreement, this matter is deferred to resolution through the grievance and arbitration procedure. Further processing of the Charge is therefore stayed pending the exhaustion of the contractual procedure.

DECISION

Considered in a light most favorable the FOP, the pleadings fail to establish probable cause to believe that a violation of 19 Del.C. §1607(a)(6) has occurred; consequently that charge is dismissed.

Because the resolution of this Charge turns on application of Article 15.1 of the parties' collective bargaining agreement, the Charge is deferred to the negotiated grievance and arbitration procedure.

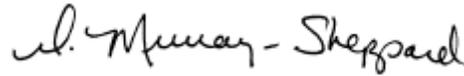
PERB retains jurisdiction over the Charge that the City has acted in violation of 19 Del.C. §1607(a)(1) and/or (a)(5) for the express purpose of reconsidering the matter, on application of either party, for any of the following reasons:

- 1) that the arbitration award failed to resolve the statutory claim;
- 2) that the arbitration has resulted in an award which is repugnant to the applicable statute;

- 3) that the arbitral process has been unfair; and/or
- 4) that the dispute is not being resolved by arbitration with reasonable promptness.

The parties are directed to notify the Public Employment Relations Board within sixty (60) days from the date of this decision as to the status of the grievance.

DATE: March 18, 2011



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