

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF THE UNIT
CLARIFICATION PETITION OF FRATERNAL
ORDER OF POLICE LODGE NO. 5

Fraternal Order of Police Lodge No. 5,

Petitioner,

AND

New Castle County,

Employer,

American Federation of State,
County and Municipal Employees,
Council 81, AFL-CIO,

Intervenor.

REPRESENTATION PETITION

No. 86-12-008

BACKGROUND

New Castle County ("County") and AFSCME, Council 81, Local 3109 ("Local 3109") were parties to a collective bargaining agreement covering the period June 26, 1984 through June 30, 1986. On June 5, 1986, the parties signed a Memorandum of Agreement which set forth the terms of a contract for the period July 1, 1986 through June 30, 1987. During November or December of 1986, the parties agreed to the terms of a new contract for the period July 1, 1987 through June 30, 1989.

On June 27, 1986, the legislature passed the Police Officers and Firefighters Employment Relations Act (19 Del.C. Chapter 16 (Supp. 1986) ("Act"). The legislation was signed by the Governor and by its terms, became effective sixty (60) days thereafter on September 8, 1987.

Thereafter, on December 10, 1986, the New Castle County Fraternal Order of Police, Lodge No. 5 ("Lodge No. 5") petitioned the Public Employment Relations Board ("PERB" or "Board") to redefine or modify the current Lodge No. 5 bargaining unit, consisting of patrol officers, corporals, sergeants and lieutenants, by adding to it the positions of colonel, major and captain. Alternatively, the petitioner seeks to have these positions placed into any bargaining unit which the Board determines to be appropriate. The three positions involved are currently part of a bargaining unit for which AFSCME, Council 81, Local 3109 is the exclusive bargaining representative. As originally certified by the Department of Labor under the provisions of 19 Del.C. Chapter 13, Right of Public Employees to Organize, Local 3109 also includes non-police managers and administrators.

On December 12, copies of the petition were mailed to New Castle County, the Delaware Department of Labor, and Local 3109. On December 23, the County filed its response, raising substantive issues which are not material to the issues being decided herein.

On January 5, 1987, Local 3109 filed a motion to intervene. This motion, which effectively includes a motion to dismiss, raises the following issues: (1) the jurisdiction of the PERB to process and rule on the petition based on a lack of jurisdiction over the

subject matter; and (2) that the collective bargaining agreement currently in effect between the County and Local 3109 serves as a contract bar to any election involving the eight (8) police officers in the named classifications for at least three years. Neither the County nor Lodge No. 5 objected to the intervention of Local 3109 and its motion was subsequently granted. The PERB stayed the processing of the substantive issues raised by the County pending a resolution of the jurisdiction and contract bar questions.

On January 9, 1987, an informal conference was held at which time the parties agreed to brief their respective positions regarding the jurisdiction and contract bar issues. Briefs were subsequently filed by Lodge No. 5, and Local 3109. New Castle County took no position on these two issues and therefore did not file briefs. Lodge No. 5 resubmitted its petition with its opening brief which was received on January 30, 1987. The final brief was filed on February 9, 1987.

ISSUES

The issues are determined to be:

1. Does the PERB have jurisdiction to process the representation petition filed by Lodge No. 5 on behalf of the New Castle County police officers currently included in the managers and administrators bargaining unit, which is currently represented by Local 3109, and previously certified by the Department of Labor?
2. Is there a contract currently in effect between New Castle County and Council 81, Local 3109, which bars the petition filed

by Lodge No. 5?

POSITIONS OF THE PARTIES

I. JURISDICTION

Local 3109 argues that section 1610(f) of the Police Officers and Firefighters Employment Relations Act expresses a legislative intent not to interfere with or disturb previously certified bargaining units; therefore, the status of Local 3109 as exclusive bargaining representative should remain unchanged until such time as there is either a successful decertification election or the unit is appropriately modified by the Department of Labor in accord with the provisions of 19 Del.C. Chapter 13, Right of Public Employees to Organize.

Lodge No. 5 contends that section 1601(2)(d) of the Act expressly transfers jurisdiction over police officers and firefighters from Title 19, Chapter 13 and the Department of Labor to Title 19, Chapter 16 and the Public Employment Relations Board. This fact, it argues, not only renders the current Local 3109 bargaining unit inappropriate, as a matter of law, but also precludes the officers involved from petitioning for relief under Chapter 13, since they no longer have any rights thereunder. Lodge No. 5 also maintains that the facts do not involve a question of decertification since, even if its petition is granted, Local 3109 would continue as the certified representative for the remaining non-police members of the bargaining unit.

II. Contract Bar

Local 3109 contends that, aside from the question of jurisdiction, there is currently a valid collective bargaining agreement in effect between itself and New Castle County which does not expire until June 30, 1989; therefore, the petition filed on December 10, 1986 is untimely under section 1610(f) of the Act, which limits the filing period to not more than 180 days nor less than 120 days prior to the expiration of an existing collective bargaining agreement. Alternatively, Local 3109 also argues that if the Board should determine the document expiring June 30, 1987 to be the controlling agreement, the applicable filing period would then be January 2 to March 2, 1987 and the filing of the petition would still be outside of the permissible period and therefore untimely.

Lodge No. 5 disputes the existence of a contract bar based on the principle of "premature extension" which provides that where a collective bargaining agreement is "prematurely extended" by the parties through the negotiation of an amendment or a new contract which contains a later termination than that of the original agreement, the successor agreement does not abolish the statutory window period attaching to the current agreement.

Lodge No. 5 maintains that the controlling contract between the County and Local 3109 is the agreement which expires on June 30, 1987; therefore, according to 19 Del.C. section 1610(f), the statutory filing period extends from January 2, 1987 through March 3, 1987. By refiling its petition on January 30, 1987, Lodge No. 5 contends that the petition is now timely.

OPINION

A review of the relevant provisions of the Police Officers and Firefighters Employment Relations Act (19 Del.C. Chapter 16) resolves the question of the PERB's jurisdiction. Section 1601, Statement of Policy, establishes the class of employees to whom the Act applies:

It is the declared policy of the State and 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.

19 Del.C. section 1601.

Section 1602(c) defines the term "public employee" or "employee" to mean:

...any police officer or firefighter employed by a public employer except those determined by the Board to be inappropriate for inclusion in the bargaining unit; provided, however, that for the purpose of this chapter, this term shall not include any state employee covered under the State Merit system". 19 Del.C. section 1602(1).

The police officers involved here have not been previously determined by the PERB to be inappropriate for inclusion in a bargaining unit, nor are they covered under the state merit system; therefore they are within that class of employees to whom the Act applies.

Further, section 1601 expressly provides for the administration

of the Act by:

...empowering the Public Employment Relations Board to assist in resolving disputes between police officers and firefighters and their public employers and to administer this Chapter. 19 Del.C. section 1601(3).

Finally, Section 1618(2) resolves any questions concerning the possible existence of dual jurisdiction. It reads:

Amend section 1301(2), Chapter 13, Title 19, Delaware Code by adding a new Subsection 2(d) which shall read as follows:

"(2)(d) All police officers and firefighters employed by the State or political subdivisions of the State or any agency thereof, any county or any agency thereof, or any municipal corporation, municipality, city or town located within the State or any agency thereof, which upon the affirmative action of its common council or other governing body, has elected to come within Title 19, Delaware Code, Chapter 13, or which hereafter elects to come within Chapter 16 of this Title. All police officers and firefighters included in this subsection shall be subject to the provisions of Chapter 16, Title 19." 19 Del.C. section 1618(2)

This section accomplishes two things: (1) it brings police officers and firefighters within the jurisdiction of Chapter 16 and the PERB; and (2) by amending section 1301(2), the exceptions clause of Chapter 13, it expressly removes police and firefighters from the coverage of 19 Del.C. Chapter 13 and the Department of Labor. Consequently, there is no dual jurisdiction.

The positions of Local 3109 must yield to the express and unambiguous provisions of the statute. Prior certifications under Title 19, Chapter 13 are controlling only until properly contested under the provisions of Section 1610(f). Secondly, Chapter 13 remedies are no longer available to police officers and firefighters since they are expressly excluded from Chapter 13 coverage. Finally, since there is no effort here to strip Local 3109 of its representative status we are not presented with a question of decertification. Even if the petition is ultimately granted, Local 3109 would continue as the exclusive bargaining representative for all of the remaining bargaining unit members. 1

If the entire membership of Local 3109 had been included within the coverage of Chapter 16, or if the unit consisted solely of police officers and/or firefighters, the question of jurisdiction would be moot. The concerns expressed by Local 3109 arise solely because of the mixed nature of the Local 3109 membership, the majority of whom are non-police employees and undisputedly outside the jurisdiction of Chapter 16 and the PERB. This fact cannot, however, negate the scope of Chapter 16 which, as written, applies directly to individual police officers and firefighters and not to bargaining units as a whole.

1 See also Commonwealth of Pennsylvania v. Pennsylvania Labor Relations Board, et al., 441 A.2d 470 (1982). Pennsylvania Commonwealth Court upheld a decision of the Pennsylvania Labor Relations Board where, under similar circumstances, it interpreted similar statutory language as conferring jurisdiction.

II. Contract Bar

Although the legislature expressed a desire that this Act not interfere with or disturb existing bargaining units, section 1610(f) contains provisions for the proper raising of questions concerning the appropriateness of a bargaining unit:

Any bargaining unit designated as appropriate prior to the effective date of this Chapter, for which an exclusive representative has been certified, shall so continue without the requirement of a review and possible redesignation until such time as a question concerning appropriateness is properly raised under the Chapter. The appropriateness of a unit may be challenged by the public employer, 30 percent of the members of the unit, an employee organization, or the Board not more than 180 days nor less than 120 days prior to the expiration of any collective bargaining agreement in effect on the date of passage of this Chapter.

The Rules and Regulations of the Public Employment Relations Board, at Regulation 3.1, also provide for a similar window period prior to the expiration of all collective bargaining agreements:

3.1 A petition for exclusive recognition shall be barred if:

(b) There is an existing labor-management agreement of three (3) years or less covering the employees in the proposed unit, Provided That a petition may be filed during the period between the 180th day and the 120th day before the expiration of the existing Agreement.

(c) For contracts with a fixed term longer than three (3) years, the existing contract shall act as a bar only for the first three (3) years and a petition may be filed during the period between the 180th day and 120th day before the expiration of the third year of the Agreement.

It is undisputed that a valid labor agreement existed between the County and Local 3109 for the period of June 26, 1984 through June 30, 1986. During the term of this Agreement, a document entitled "Memorandum of Agreement" was executed by the parties setting forth the provisions of a successor agreement. This Memorandum provides, in relevant part:

The parties have agreed that the existing contract which by its terms would expire on June 30, 1986, will continue in full force and effect through June 30, 1987, except as modified below:

1. The term of the contract shall be July 1, 1986 through June 30, 1987, and all relevant dates in the Collective Bargaining Agreement shall reflect the new term.

Whether this language is interpreted as extending the contract expiring on June 30, 1986, or as constituting a new agreement with its own term of July 1, 1986 to June 30, 1987, the inescapable conclusion is that the expiration date of the contract in force during all times relevant to this matter is June 30, 1987. The fact that during the term of the agreement expiring on June 30, 1987, the parties successfully concluded negotiations on a successor

agreement which would not become effective until July 1, 1987, cannot be used as a vehicle for destroying the statutory window period attaching to the prior agreement. The premature extension doctrine as established by the National Labor Relations Board in Deluxe Metal Furniture Company (112 NLRB 995 (1958)) provides that when a collective bargaining agreement to which a given window period attaches is prematurely extended by the execution of either an amendment or a new contract, such premature extension does not destroy the statutory window period of the original agreement. 1 This is a valid principle which is applicable to the situation at hand. To conclude otherwise would permit the parties to a collective bargaining agreement to negotiate away the statutorily guaranteed period during which employees may select or reject representatives of their own choosing. The application of this principle to the present facts neither diminishes the stability of the employer/employee relationship nor the security of the current collective bargaining agreement.

The remaining question therefore becomes whether or not the petition, as filed, is timely. Section 1610(f) of the Act and Regulation 3.1, require only that a petition questioning the appropriateness of a bargaining unit be filed not more than 180 days nor less than 120 days prior to the expiration date of an existing collective bargaining agreement. When originally filed on December 10, 1986, the petition was untimely because it was prior to the

1 State jurisdictions adopting this doctrine include New Jersey, California and Rhode Island.

opening of the statutory window period on January 2, 1987; however, when Lodge No. 5 resubmitted its petition on January 30, 1987, it effectively remedied the defect of untimely filing and the petition is therefore properly filed under the statute and the rules and regulations of the agency.

CONCLUSIONS OF LAW

1. New Castle County is a Public Employer within the meaning of 19 Del.C. section 1602(m).

2. Fraternal Order of Police Lodge No. 5 is an employee organization within the meaning of 19 Del.C. section 1602(g).

3. American Federation of State, County and Municipal Employees (AFSCME), Council 81, Lodge 3109, is an employee organization within the meaning of 19 Del.C. section 1602(g).

4. The employees in the classifications of Colonel, Major and Captain are public employees or employees within the meaning of 19 Del.C. section 1602(1).

5. The Public Employment Relations Board is the agency empowered to assist in resolving disputes between police officers and firefighters and their employers and to administer Chapter 16.

6. 19 Del.C. section 1618(2) expressly removes police officers and firefighters from the coverage of Title 19, Chapter 13.

7. The contract in force between New Castle County and AFSCME Local 3109 during all times material to the issues raised herein expires June 30, 1987.

8. The statutory window period for the filing of the petition

here in question is not more than 180 days nor less than 120 days prior to the expiration of the existing collective bargaining agreement, i.e., between January 2 and March 3, 1987.

9. The petition, as refiled on January 30, 1987, is properly filed.

10. The question of representation within the meaning of 19 Del.C. section 1610(f) is properly raised before the Public Employment Relations Board.

IT IS SO ORDERED.

Charles D. Long, Jr.

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ISSUED: March 4, 1987

