STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

FRATERNAL ORDER OF POLICE, LODGE NO. 1,	:	
Complainant,	:	
	:	
v.	:	U.L.P. No. 89-08-040
	:	
CITY OF WILMINGTON,	:	
Respondent.	:	

Decision on Respondent's Motion to Dismiss or Stay

The City of Wilmington (hereinafter "City") is a municipal corporation of the State of Delaware and a public employer within the meaning of 19 Del.C. section 1602 (1). Fraternal Order of Police Lodge No. 1 (hereinafter "FOP") is the exclusive bargaining representative of the employees of the City of Wilmington's police department in the ranks of patrol person, sargeant, lieutenant, and matrons, within the meaning of 19 Del.C. section 1602 (g). At all times relevant to this matter the City and the FOP were parties to a collective bargaining agreement which is effective for the period of July 1, 1987 through June 30, 1990.

On August 21, 1989, the FOP filed the above referenced unfair labor practice charge with the Public Employment Relations Board. The City's Answer to the charge was filed on September 19, 1989 and the FOP's response to new matter raised in the Answer was filed on

September 25, 1989. On October 20, 1989, the City filed an Amended Answer which contained a motion to dismiss or stay the proceedings in this case, pending exhaustion of the contractual grievance procedure. At the October 24 informal conference, the FOP objected to the City's Amended Answer, asserting the City had waived its right to raise the additional affirmative defense.

It is the FOP's objection and/or the City's Motion which are the limited subject of this decision.

ISSUE 1: Did the City waive its right to amend its Answer by failing to raise the affirmative defense of deferral to arbitration in its initial Answer?

The FOP asserts that the City should be prohibited from amending its Answer to include deferral as an affirmative defense on the basis that the City waived its right to do so by knowingly electing not to include the defense in its original Answer of September 19. Because the City had raised the same defense on August 30 in a separate matter before the PERB (thereby evidencing the City's knowledge of deferral as a defense), the FOP contends that the City is guilty of undue delay and/or dilatory motive in asserting the deferral defense. The FOP argues that the time lapse between August 30 and October 20 clearly evidences dilatory motive.

Rule 5.1 of the Rules and Regulations of the Delaware Public Employment Relations Board states that the purpose of pleadings in an unfair labor practice proceeding is the formation of issues and the Board will liberally construe its rules toward effectuating that

policy. Rule 5.8 (c) further provides:

> Subject to the approval of the Board, an answer may be amended, in a timely manner, upon motion of the party filing it. Such motion shall be in writing, unless made at the hearing and before the commencement of the testimony. In the event the Complaint [sic] is prejudiced by the amendment, a motion for continuance will be granted.

It is clear from a literal reading of Regulation 5.8(c) that, where the Complainant is prejudiced by an Amended Answer, the PERB will grant a motion for continuance. A party is prejudiced only where the filing of an amendment adversely affects that party's ability to present a claim or defense based on the merits of the case. In this matter, there has been neither a hearing nor a stipulation of facts submitted by the parties. The purpose of the October 24 informal conference was to discuss not only the factual disputes contained in the pleadings but also the process by which they would be resolved. There is no evidence on the recored to establish the FOP has been prejudiced by the City's filing of the Amended Answer.

Further, it is not sufficient for a party to merely allege undue delay and/or dilatory motive absent supporting evidence. The raising of the deferral defense by the City in a separate action does not, alone, constitute sufficient evidence of either undue delay or improper motive.

For the reasons set forth above, the PERB accepts the City's Amended Answer as timely filed.

ISSUE 2: Can the Public Employment Relations Board stay an

unfair labor practice proceeding by deferring the issue to the parties' negotiated contractual grievance procedure?

It is undisputed that, by memorandum dated August 11, 1989, the City of Wilmington upgraded the salaries of twenty-four (24) grade #1 probationary patrol officers and twenty-four (24) grade #1 patrol officers from $18,570 to $21,570 and from $21,669 to $22,900, respectively.

Article XVI, Classification and Salaries, section 1 (c), of the parties' current collective bargaining agreement provides, in part:

> Effective July 1, 1989, the following salary rates will be in effect in the Police Department:
>
> Patrol Officer
>
> | | |
> |---|---|
> | Probation | $18,570 |
> | 1 | $21,669 .... |

Article XVIII, Ordinances and Statutes, further provides:

> In the event any ordinances or statutes relating to the members of the Police Department provide or set forth benefits or terms in excess of or more advantageous than the benefits or terms of this Agreement, the provisions of such ordinances or statutes shall prevail...

The FOP alleges that the City has unilaterally altered a mandatory subject of bargaining during the term of a current collective bargaining agreement and by its actions violated its obligation to bargain in good faith and to refrain from interfering with, restraining

or coercing employees in the exercise of rights guaranteed under the Act, in violation of 19 Del.C. section 1607(a)(5) and (a)(1). The City asserts that its actions were permitted as a matter of contractual right under Article XVIII because the salary increases for the above noted positions were provided for in Substitute No. 1 for City Ordinance 89-035, as passed by the City Council.

The question of whether the PERB should stay an unfair labor practice proceeding arises only when the issue also involves an alleged breach of the parties' collective bargaining agreement. The Public Employment Relations Board has held [1] that it is not controlling in an unfair labor practice proceeding that the disputed action may or does, in fact, constitute a violation of an existing collective bargaining agreement. Seaford Education Assn. v. Board of Education, Del.PERB, ULP No. 87-10-018 (2/2/88). Although the Board has exercised its jurisdiction where the issue raised by the unfair labor practice involved the interpretation of specific contractual provisions (see Brandywine Affliate v. Brandywine School District, Del.PERB, ULP No. 86-06-005 (2/5/86); Seaford, Supra.), these cases differ in one significant respect from the present dispute. The City of Wilmington and FOP Lodge No. 1 have negotiated a grievance procedure which culminates in the submission of outstanding disputes to final and binding arbitration by an impartial arbitrator. The Supreme Court of Delaware, ruling on the jurisdiction of the Court of Chancery under the

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1 Although these prior decisions involve local school districts and their certificated professional employees, relevant provisions of the Public School Employment Relations Act (14 Del.C. Chapter 40) upon which they were decided and comparable provisions of The Police Officers and Firefighters Employment Relations Act (19 Del.C. Chapter 16) which controls the current matter are identical. Local 1590 v. City of Wilmington, Del.PERB, ULP No. 89-05-037 (June 26, 1989).

labor statute [2] covering public employees not within the jurisdiction of the PERB, concluded that "deferral to arbitration is a sound and sensible policy for Delaware to follow". City of Wilmington v. Local 1590, IAFF, Del.Supr., 385 A.2d 720 (1986). The Court stated that pre-arbitral deferral will "require the parties... to honor their contractual obligation rather than, by casting their dispute in statutory terms, to ignore their agreed upon procedures". Wilmington v. Local 1590, (Supra. at p. 724), citing Collyer Insulated Wire, NLRB, 192 NLRB 837 (1971).

This is a case of first impression for the Public Employement Relations Board. There are numerous factors which support the PERB's adoption of a limited deferral policy in this case. The City of Wilmington and FOP Lodge No. 1 have a long standing and well established collective bargaining relationship. The City has clearly indicated its willingness to submit this issue to arbitration in accord with the provisions of the collective bargaining agreement. It is clear that a decision in this matter, regardless of its source, must turn on an interpretation of Article XVIII of the labor agreement. In contrast, a potential statutory violation arises only if it is determined that the agreement did not authorize the City's action. When the parties have contractually committed themselves to mutually agreeable procedures for resolving contractual disputes, it is prudent and reasonable for this Board to afford those procedures the full opportunity to function. Collyer (Supra.).

Accordingly this unfair labor practice is stayed pending the

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2 The Right of Public Employees to Organize, 19 Del.C. Chapter 13.

exhaustion of the parties' contractually agreed upon grievance/arbitration procedure. The PERB retains jurisdiction in this matter for the express purpose of reconsidering the matter, on application of either party, for any of the following reasons: 1) that the award failed to resolve the statutory claim; 2) that arbitration has resulted in an award which is repugnant to the Police Officers and Firefighters Employment Relations Act; 3) that the arbitral process has been unfair; and/or 4) that the dispute is not being resolved by arbitration with reasonable promptness.

WHEREFORE, the City's Motion to Stay is hereby granted, in accord with the provisions set forth above. The parties are ordered to notify the Public Employment Relations Board of their compliance with this order.

IT IS SO ORDERED.

Charles D. Long, Jr.
CHARLES D. LONG, JR.
Executive Director
Delaware PERB

D. Murray-Sheppard
DEBORAH L. MURRAY-SHEPPARD
Principal Assistant
Delaware PERB

DATED: December 18, 1989