

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

DELAWARE STATE TROOPERS' ASSOCIATION, :
 Charging Party, :
 v. :
 :
DIVISION OF STATE POLICE, DEPARTMENT OF :
PUBLIC SAFETY, STATE OF DELAWARE, :
 Respondent. :

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PUBLIC SAFETY, STATE OF DELAWARE, :
 Charging Party, :
 v. :
 :
DELAWARE STATE TROOPERS' ASSOCIATION, :
 Respondent. :

This matter concerns the status of the Delaware State Troopers' Association (hereinafter "DSTA" or the "Union") as certified exclusive bargaining representative for a bargaining unit of state police officers. The DSTA is an "employee organization" within the meaning of 19 Del.C. section 1602(f). The Division of State Police, Department of Public Safety, State of Delaware (hereinafter "State") is a "public employer" within the meaning of 19 Del.C. section 1602(1). The charges allege violations of the Police Officers' and Firefighters' Employment Relations Act (hereinafter "the Act"). 19 Del.C. Chapter 16 (1986).

An unincorporated association of state police officers was first formed in 1969 under the name of Delaware Troopers' Lodge Fraternal Order of Police, Lodge No. 6. [1] On February 4, 1972, a an election was conducted in accord with the rules and regulations of the State Department of Labor resulting in the certification of the Delaware Troopers' Lodge Fraternal Order of Police Lodge No. 6 as the exclusive bargaining representative for the designated unit of state police officers.

Since 1972, numerous collective bargaining agreements have been consummated between the State of Delaware, Department of Public Safety, and Delaware Troopers' Lodge Fraternal Order of Police Lodge No. 6.

In 1978, the membership of Lodge No. 6 voted to also affiliate with the National Troopers' Coalition.

On or about June 30, 1989, the State of Delaware, Department of Public Safety, and Delaware Troopers' Lodge Fraternal Order of Police Lodge No. 6 entered into a collective bargaining agreement for the period July 1, 1989 through June 30, 1991.

In February, 1990, Delaware Troopers' Lodge Fraternal Order of Police, Lodge No. 6, Inc. (as incorporated in May, 1989) by a vote of its members (299-41) chose to discontinue its association with the National Fraternal Order of Police. As a result of this decision, the Delaware Troopers' Lodge Fraternal Order of Police, Lodge No. 6, Inc., on March 13, 1990, changed its name to the Delaware State Troopers' Association.

[1] According to the Petitioner, the Association was also known as the Delaware State Police F.O.P. Lodge No. 6.

On March 27, 1990, the State received a copy of a letter from the Delaware State Troopers' Association to the American Arbitration Association in reference to an arbitration which was pending between the parties. This letter represents the State's first knowledge that FOP Lodge #6 had changed its name. The State Personnel Office advised the American Arbitration Association that it was not currently a party to a collective bargaining agreement with the Delaware State Troopers' Association and, for this reason, would raise the issue of substantive arbitrability at the arbitration hearing scheduled for September 5, 1990.

On May 2, 1990, the State Deputy Director for Labor Relations advised the State Public Employment Relations Board that the State believed a threshold question concerning majority status existed between the FOP and the Delaware State Troopers' Association and of its intent to petition the PERB for a Declaratory Statement in accord with Section 6.1 of the Board's Rules and Regulations.

On May 22, 1990, the Delaware State Troopers' Association filed an unfair labor practice charge with the State Public Employment Relations Board alleging that by refusing to recognize the Association as the exclusive bargaining representative, the State had violated Sections 1607 (a)(2)(5) and (6) of the Police Officers' and Firefighters' Employment Relations Act, 19 Del. C. Section 1601-1618.
[U.L.P. No. 90-05-049]

On May 30, 1990, the State filed an unfair labor practice charge against the Delaware State Troopers' Association alleging that the Association: (1.) unilaterally asserted its claim as exclusive bargaining representative without benefit of the certification

procedures, in violation of Section 1607 (b)(3), of the Act; (2.) filed its unfair labor practice charge against the Employer in retaliation for the Employer's exercising its rights under the Act, in violation of Section 1607 (b)(6); and (3.) violated Section 1607 (b)(3) of the Act by failing to file its By-Laws with the PERB, as required by Section 10.7 (B), of the Board's Rules and Regulations.

[U.L.P. No. 90-05-050]

At an informal conference with the Executive Director of the State Public Employment Relations Board and Hearing Officer in this matter on June 26, 1990, the parties were advised that in accord with Regulation 5.6, Decision or Probable Cause Determination, paragraph (a), of the PERB's Rules and Regulations, the Hearing Officer was of the opinion that no probable cause existed to believe that unfair labor practices, as alleged, may have occurred and, for this reason, each of the charges would be dismissed. [2] The parties were granted the opportunity to present legal argument supporting their respective positions concerning the decision by the Executive Director to dismiss the State's charge that the Union's action constituted a change in the certified exclusive bargaining representative without the statutorily required certification procedures required by Section 4011, of the Act. At the request of the Union, it was agreed that a ruling on the remaining charges would be held in abeyance until such time as all

[2] Regulation 5.6 (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...

charges could be ruled upon simultaneously.

ISSUE

Whether, based on the pleadings and/or the supporting briefs, there is probable cause to believe that:

1. The action of the DSTA constitutes an attempt to unilaterally replace the Fraternal Order of Police as the certified exclusive bargaining representative for the unit of state police officers without submitting to the certification procedures provided for in Regulation 3 of the PERB Rules and Regulations, in violation of Section 1607(b)(3), of the Act, as alleged.

2. The members of the DSTA were denied fundamental due process in the severance of the relationship with the FOP, in violation of Section 1607(b)(3) of the Act, as alleged.

3. The DSTA filed an unfair labor practice charge in retaliation against the Employer for exercising its rights under the Act in violation of Section 1607(b)(7), as alleged.

4. The State, by raising a question of substantive arbitrability, has refused to recognize the Delaware State Troopers' Association in violation of Sections 1607(a)(2), (5) and (6) of the Act, as alleged.

PRIMARY POSITIONS OF THE PARTIES

UNION: The Respondent argues that the local Association, not the Fraternal Order of Police, was initially certified in 1972 as the exclusive bargaining representative for Delaware state police officers. The Union contends that as an unincorporated Association it functioned

as an independent body which lost neither its independent status nor its certification as the exclusive bargaining representative when it formed and subsequently merged into the incorporated entity of the Delaware Troopers' Lodge Fraternal Order of Police Lodge No. 6. The DSTA maintains that decision concerning its affiliation status constitutes an internal administrative matter within its exclusive prerogative which, along with its name change to the Delaware State Troopers' Association, resulted from a vote by the membership to discontinue affiliation with the Fraternal Order of Police and continue affiliation with the National Troopers' Coalition.

EMPLOYER: The Employer maintains that the Delaware State Troopers' Association and the Fraternal Order of Police are two competing labor organizations. To support its position the State points out that the majority of the Union's elected officers changed following the alleged disaffiliation and name change. (Employer's opening brief at page no. 3). The State also contends that the Delaware State Troopers' Association has no by-laws of its own but is operating under those of the FOP, the organization which the State argues is the true bargaining representative. The State maintains that the FOP constitution clearly establishes that the national organization has territorial jurisdiction over subordinate lodges; therefore, even assuming that a mere name change occurred, the DSTA remains subordinate to the FOP.

While the State does not question the right of the Association to gain autonomy, it protests the method. Substituting an irrelevant business incorporation for the statutorily required certification process, argues the State, creates the potential for disturbing the

labor relations stability which the State believes it has enjoyed.

Concerning the question of due process, the State disputes "that there is evidence that even rudimentary due process has been provided for in this case. This, standing alone, represents a most serious threat to the due process rights of our employees". (Employer's opening brief at page no. 10)

DECISION

— Both parties submitted supporting briefs in which are cited numerous decisions of the National Labor Relations Board. Although each case cited was considered, within its context, the PERB has previously determined that "while such decisions may provide some guidance, there are distinctions that exist between the public and private sectors. Experience gained in the private sector, while valuable, will not, however, necessarily provide an infallible basis for decisions in the public sector". Appoquinimink Ed. Assoc. v. Board of Ed. of Appoquinimink School District, Del. PERB, ULP No. 1-3-84-3-2A (1984).

Much attention was also given by each party to the process undertaken by the state police Association to incorporate, change its name and, ultimately, to allegedly disassociate itself from the FOP. The issue currently before the PERB concerns the determination of the certified exclusive bargaining representative. The legality of the incorporation procedures, disaffiliation and name change is not in issue; therefore, except as they may relate to the State's due process concerns, the specific procedures undertaken by the Union to accomplish its organizational objectives are considered irrelevant in deciding the representation issue.

Issue #1: The State properly argues that "the fundamental question to be answered is whether the facts demonstrate a name change, or a substantive departure from the entity certified by the Department of Labor". If the former, it is a matter of internal union business in which the State has no legitimate interest. If the latter, it can only be accomplished by a PERB sponsored election. On February 8, 1972, following a valid representation election pursuant to the authority vested in the Department of Labor, Division of Industrial Affairs under 19 Del.C. Chapter 13, the State Department of Labor determined that the "DELAWARE STATE POLICE-FOP LODGE #6 has received a majority of all votes cast by the public employees within the unit previously determined and is the exclusive bargaining representative within said unit."

The State argues that the certification extended to the Fraternal Order of Police, and not exclusively to the local organization of State Police, Lodge No. 6. The local organization of state police, on the other hand, argues that it alone has functioned as the exclusive bargaining representative and that its action represents only a name change consistent with an internal decision to terminate its affiliation with the Fraternal Order of Police.

It is undisputed that there is but a single certified representative for the bargaining unit of Delaware State Police. The question is whether that representative is the FOP or the local organization of state police. The title of the exclusive representative, as it appears on the 1972 notice of certification, DELAWARE STATE POLICE -FOP LODGE #6, , coupled with the composition of

the bargaining unit which includes only state police officers is, in my opinion, not inconsistent with an intent to certify the local organization as the exclusive representative. Nor is it totally inconsistent with the contrary interpretation urged by the State. Therefore, the original certification, on its face, is not sufficiently clear so as to be dispositive of the issue.

For this reason it is necessary to consider the bargaining relationship that has existed between the local organization of state police, the FOP and the State.

The PERB addressed the relationship of affiliation to certification in Kent Vocational Technical Education Assoc., Inc. v. Kent County Vocational School District, Rep. Pet. 85-02-002 (1985). In 1970, the Kent Vo-Tech School District initially recognized the Kent Teachers' Association as the exclusive bargaining representative for the Kent Center staff. The collective bargaining agreements negotiated between the parties recognized "the Association" as the exclusive bargaining representative. The term "Association" is defined in the Agreement as the Kent Vocational Technical Education Association. In 1980, the membership voted internally to affiliate with the Delaware Federation of Teachers, AFT/CIO. An election was also held in which the Kent Vocational Technical Education Association, Inc., Local #4108, DFT/ AFT, AFL/CIO received a majority of the votes cast and was certified as the exclusive bargaining representative.

The PERB recognized in Kent Vo-Tech. (Supra.) that the question of affiliation versus certification can, at times, be difficult to determine and often turns upon the circumstances present in each specific incident. In resolving this type of dispute, it is often

helpful to examine the historical relationship of the parties as it relates to the area of representation.

In this regard, the recognition clause contained in successive collective bargaining agreements between the state police officers and the State of Delaware recognizes the "Lodge" as the exclusive bargaining representative. Although not specifically defined, as was the case in Kent Vo-Tech (Supra.), reliance by the parties on the term "Lodge" in the recognition clause of the collective bargaining agreement supports a finding that the local unit is, in fact, the certified exclusive bargaining representative with which the State is obligated to bargain.

In Kent Vo-Tech (Supra.), Article II, Section b, of the Association's constitution expressly authorized the Association to affiliate with any state and/or national education associations provided the organization operated on a fiscal year commencing September first. Although no express authorization to affiliate was present in the constitution of the State Police, Lodge No. 6, neither was there an express limitation on its right to determine which, if any organization(s) it chose to associate. The Introduction to the constitution and by-laws governing Lodge No. 6 prior to its withdrawal from the FOP provided that "the Fraternal Order of Police -Delaware Troopers Lodge No. 6 is an organization for State Troopers, managed by State Troopers, actively engaged in police work, whose members agree to be bound and governed by the following By-Laws". This, in the absence of express language to the contrary, establishes an intent by the police to establish an autonomous and independent organization within the framework of the state and national FOP. The State Police,

expressly reserved unto themselves the authority to manage their own affairs while, while at the same time, voluntarily agreeing to be bound by a constitution and by-laws acceptable to the FOP. In so doing, they effectively retained the authority to withdraw from the FOP, at their discretion, absent a valid reason to the contrary. The Petitioner has presented no persuasive argument to the contrary.

Other undisputed factors also support a determination that the original certification extended exclusively to the local association of State Police. First, there is no denial from the Petitioner to the affirmations by the Respondent that never has a representative of the state or national FOP negotiated a labor agreement for the local unit, nor signed a contract nor been involved in the representation process in any other way. Secondly, there has been no change in the composition of the unit originally certified as appropriate. Nor has there been a resulting change in the continuity of representation. Although new officers were elected on February 20, 1990, the election represented the regularly scheduled biennial election separate from and unrelated to the organizational changes then taking place. Thirdly, in reviewing the Annual Employee Organizational Reports required to be filed annually with the PERB, at no time has any organization filed on behalf of the State Police other than the local organization. Since the inception of the Act in 1986, both the FOP and the National Troopers Coalition have been listed as affiliated organizations on the required forms filed by then Lodge No. 6.

The State has failed to raise any persuasive basis for concluding that the actions of the DSTA resulted in a "substantive departure from the entity certified by the Department of Labor". Based

on the pleadings and the supporting briefs, I can only conclude that the action of the local bargaining unit of Delaware state police officers represents a permissible internal reorganization and resulting name change.

The principles upon which this decision, as well as those of Kent Vo-Tech. (Supra.), is based may be relied upon in resolving related issues. The PERB, however, recognizes that disputes involving questions of representation need to be evaluated and resolved based on the individual circumstances present in each. For this reason, the State's concern that this decision sets dangerous precedent is not persuasive.

ISSUE #2: The State raises a concern that "its employees" were not afforded reasonable due process by Lodge No. 6 in its decision to disassociate itself from the FOP. The State alleges at paragraph 9. of its Complaint that, even assuming arguendo that a disaffiliation occurred, with respect to an election process there is no evidence that fundamental due process was provided to unit employees.

In its Answer, the DSTA simply denies the State's allegation and under the heading of New Matter alleges that in late 1989 and early 1990, the subject of whether to continue the dual association with the Fraternal Order of Police and the National Troopers Coalition was placed on the agenda and discussed at three meetings of Lodge No. 6 -- two regular meetings and one special meeting. This issue was then presented to the membership and voted upon by secret ballot simultaneously with the biennial election of officers.

In its Response, the State contends that the DSTA's pleading was

so vague in its reference to "In late 1989 and early 1990" and devoid of documentation, that the Petitioner was unable to respond.

It is a matter of record that documentation was received by the PERB on March 26, 1990 from the the authorized representative of the Delaware State Troopers' Association advising that "by secret ballot, an overwhelming supermajority (299 to 41) of the members of Lodge No. 6 indicated that they no longer desired to continue maintaining Lodge No. 6's affiliation with the National Fraternal Order of Police". In a letter from the same representative dated May, 30, 1990, of which the State received a copy, the PERB was again advised that "the majority of members of Lodge No. 6/Delaware Troopers overwhelmingly (88.2% of those casting ballots) voted to discontinue association with the State Lodge/National FOP".

Evidence of a procedure which includes the opportunity for open dialogue and a secret ballot election is sufficient to establish a presumption that reasonable due process requirements were satisfied. In this particular instance, the State offers no argument to rebut the DSTA's assertion or to affirmatively support its allegation concerning the lack of due process. The decision to sever its association with the FOP qualifies as internal Union business which resulted in no substantive change in either the identity of the certified exclusive bargaining representative, the composition of the appropriate bargaining unit, the continuity of representation or otherwise substantively impact the bargaining relationship or position of the parties. If, in fact, there is a concern about the lack of due process in the conduct of internal union business, a statutory forum is available by which bargaining unit members can seek redress, should

they so desire. Matters which pertain exclusively to the internal administration of a certified exclusive bargaining representative is of no concern to the employer. Consequently, the employer has no standing to file an action with the PERB questioning whether due process requirements were satisfied.

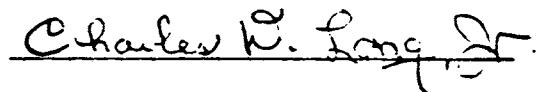
Issue #3: The State alleges that the DSTA violated section (b)(3) the Act by not filing a constitution and by-laws with the PERB subsequent to its alleged disaffiliation or, in the alternative, merely refiled the constitution and by-laws of the FOP after deleting the introductory Official Statement of the National FOP. The record establishes that an interim constitution and by-laws governing the DSTA were filed with the PERB on May 29, 1990. The adequacy of these documents or their form is not subject to question by an employer, absent a showing that they in some way cause prejudice or harm to its position in the bargaining relationship. No such allegation has been raised here.

Issue #4: The Association's charge that the State has violated Section 1607 (a) (2),(5), and (6) is also without merit. The only position taken by the State was to declare its intention to raise the issue of substantive arbitrability concerning the appropriateness of the exclusive representative at an arbitration hearing involving the parties. The defense of substantive arbitrability, raised in the context of the contractual recognition clause, necessarily requires the interpretation and application of a provision of the negotiated collective bargaining agreement. The State cannot be guilty of

committing an unfair labor practice on the basis of a position which it takes in an arbitration hearing concerning the meaning and/or impact of contractual language. There is no allegation that the State has otherwise improperly refused to recognize the DSTA and/or honor its obligations under the terms of the existing collective bargaining agreement.

WHEREFORE, Delaware State Troopers' Association v. State of Delaware, Unfair Labor Practice No. 90-05-049, and State of Delaware v. Delaware State Troopers' Association, Unfair Labor Practice No. 90-05-050, are each hereby dismissed for lack of probable cause to believe that such unfair labor practices may have occurred, in accordance with 19 Del.C. section 1608 and Regulation 5.6 of the Rules and Regulations of the Delaware Public Employment Relations Board.

IT IS SO ORDERED.



CHARLES D. LONG, JR.

Executive Director

Delaware Public Employment

Relations Board

DATED: October 1, 1990