

**STATE OF DELAWARE**  
**PUBLIC EMPLOYMENT RELATIONS BOARD**

FRATERNAL ORDER OF POLICE, LODGE NO. 15,	:	
	:	
Charging Party,	:	
	:	
v.	:	<u>U.L.P. No. 98-08-241</u>
	:	
CITY OF DOVER, DELAWARE,	:	
	:	
Respondent.	:	

Appearances

*Perry F. Goldlust, Esq. Heiman, Aber, Goldlust & Baker., for FOP Lodge 15*  
*William W. Pepper, Sr., Esq., Schmittinger & Rodriguez, P.A., for Dover*

**Background**

Fraternal Order of Police Lodge No. 15 (“FOP Lodge 15”) is an employee organization within the meaning of §1602(f) of the Police Officers’ and Firefighters’ Employment Relations Act, 19 Del.C. Chapter 16 (“POFERA” or “Act”). FOP Lodge 15 is the exclusive bargaining representative, within the meaning of 19 Del.C. §1602(g), of all sworn police officers employed by the Dover Police Department in the ranks of Patrolman, Patrolman First Class, Corporal and Sergeant. <sup>1</sup>

The City of Dover, Delaware, (“City”) is a public employer within the meaning of 19 Del.C. §1602(l).

On August 18, 1998, FOP Lodge 15 filed an unfair labor practice charge alleging the City violated 19 Del.C. §1607(a)(5) by instituting a requirement that all police officers wear protective vests, without first negotiating with the union. Relevant portions of §1607 state:

- (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:

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<sup>1</sup> This bargaining unit was modified on May 3, 1999, to also include Lieutenants.

- 5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit.

A hearing was held on November 5, 1998, during which both parties were afforded full opportunity to present testimonial and documentary evidence. The record closed with the completion of responsive briefing on February 16, 1999. This decision is based upon the record thus created by the parties.

### FACTS

The City of Dover and FOP Lodge 15 have a long standing collective bargaining relationship. They were parties to a collective bargaining agreement for the term of July 1, 1994, through June 30, 1997. Article 3.15 of that agreement, Benefits in Effect, provided, in relevant part:

Standards in effect as of the time of negotiations concerning the below listed benefits shall become part of this Agreement:

19. Vests

These parties entered into negotiations for a successor agreement in or about April, 1997. FOP Lodge 15 proposed in its initial written submission to the City to modify Article 3.15, subsection 19, to clarify that the City would supply officers with protective vests and replace those vests according to the manufacturer's suggested schedule.

The City responded to the FOP's proposal at a negotiation session on April 24, 1997. The City's written counterproposal states, "The City is in Agreement with the requested wording changes at: ... Section 3.15, 19. Vests..." (City Exhibit A). The notes taken at this meeting by the City's note-taker, however, relating to Section 3.15, subsection 19, provide:

**19. Vest**  
**CITY AGREES WITH LANGUAGE, but needs to change it to say wearing should be mandatory.** (emphasis in original document) FOP Exhibit 1.

Representatives of the City, including the City's Personnel Director and Chief of Police, and representatives of FOP Lodge 15 subsequently discussed whether vest usage should be

mandatory. At some point, then Chief of Police Richard Smith told FOP representatives he would not mandate that protective vests be worn. City Personnel Director Bruce Andrews also told FOP representatives the City was withdrawing its proposal to mandate officers wear protective vests.

The parties entered into an agreement for the term July 1, 1997 through June 30, 2000.

Relevant portions of Article 3.15 of that agreement provide:

3.15 Benefits in Effect

Standards in effect as of the time of negotiations concerning the below listed benefits shall become part of this Agreement:

19. Vests – The City shall issue and replace bullet proof vests to members. The replacement of such vests shall be at the suggested manufacturer time.

There is no evidence of record which indicates there were any written rules, regulations, directives or procedural notices in effect at the time this collective bargaining agreement went into effect which mandated officers wear protective vests at any specific time or during specific activities. A custom and practice among officers was to wear vests during firearms training, when executing search warrant, and during stake-outs and SORT (Special Operations Response Team) related activities. The record establishes that while the majority of officers regularly wore protective vests, this was a voluntary choice which was not universal among all officers. The City was aware of this custom and practice within the police department.

On or about July 28, 1998, Deputy Chief of Police, Major Robert C. Hirt, issued Procedural Notice 41, which purpose was "... to establish standards for the administration and operation of the Patrol Unit, and it's [*sic*] interaction with other units within the department." Section XI, Equipment, of PN 41 provides:

Officers will be issued uniforms, body armor, and assorted equipment. These items will remain the property of the City of Dover and will be cared for as mandated in Chapter 26.

The use of soft body armor has proven to provide effective protection from handgun assaults and at reducing serious injuries in vehicle accidents. All members of the department are encouraged to wear soft body armor while on duty. Any

member of the Department having been issued soft body armor shall be required to wear it while assigned in high risk duty assignments. High risk assignments shall include but are not limited to the following:

- 1) Any uniform patrol duty including Special Enforcement Units, fatal accident investigation teams, and officers working special duty jobs. (extra duty)
- 2) Stake-outs.
- 3) Execution of search and arrest warrants.
- 4) Any assignment deemed to be of a high risk nature by a supervisor or commanding officer.
- 5) Firearms training.
- 6) S.O.R.T. operations.

The wearing of Departmental issued soft body armor optional [*sic*] when:

- 1) Officers are performing administrative duties and are substantially removed from contact with the public.
- 2) At the discretion of the Chief of Police.

The parties do not dispute the mandate in PN 41 extends beyond the custom and practice which existed prior to July 28, 1998, and that officers are subject to discipline for failure to comply with this notice.

### **ISSUE**

- I. Are terms and restrictions concerning the wearing of soft body armor (protective vests) by police officers mandatory subjects of bargaining?
- II. If so, did the City of Dover violate its duty to bargain in good faith when it promulgated PN 41 without negotiation with FOP Lodge 15?

### **POSITIONS OF THE PARTIES**

#### **Fraternal Order of Police:**

FOP Lodge 15 argues safety rules, including the replacement of protective vests and requirements as to when they must be worn, are mandatory subjects of bargaining which the City of Dover is obligated

to bargain under the POFERA. It asserts the City acknowledged this fact when it negotiated on these subjects during the course of the collective bargaining negotiations for the current agreement.

When the City unilaterally implemented Procedural Notice 41, it substantially altered the long standing and agreed upon practice concerning the use of protective vests by police officers. As a result of PN 41, officers are subject to discipline for not wearing a protective vest, unit commanders no longer have authority to grant exceptions to the mandated wearing of vests, and PN 41 mandates nearly constant wearing of vests without regard for extenuating circumstances such as excessive heat and other conditions, many of which are encountered on bike and traffic patrols.

The FOP argues the City attempted to negotiate mandating vest usage during the most recent collective bargaining negotiations, but failed in this effort and then withdrew its proposal. The City cannot now, under the POFERA, unilaterally impose that mandate without negotiation.

City:

The City argues it did not commit an unfair labor practice in promulgating PN 41 because it has the inherent right and responsibility to make working conditions for its police officers as safe as is reasonably possible. The collective bargaining agreement does not prohibit the City from promulgating a policy on the mandatory usage of protective vests. To the contrary, this right is guaranteed by the management rights clause of the parties' collective bargaining agreement.

The promulgation of PN 41 falls within the Chief's authority, pursuant to Article 1.5 of the collective bargaining agreement, to "... determine the manner of operation..." of the Department because this Notice governs patrol procedures. The City argues this unfair labor practice charge was filed by the FOP in an effort to erode the management rights of the Chief.

Although the FOP argues the parties agreed not to alter the practice concerning the wearing of vests, the City argues the collective bargaining agreement is silent on this point. Therefore, the City asserts, this issue must fall within the management authority of the Chief.

The City also argues PN 41 does not violate former Chief Smith's statement that the City would not require all police officers to wear protective vests. There are a number of officers who are not required to wear vests under the implemented policy.

### **OPINION**

A public employer violates 1607(a)(5) of the Police Officers and Firefighters Employment Relations Act when it unilaterally alters a term or condition of employment or implements a new condition of employment without first negotiating with the exclusive bargaining representative of the affected employees. This obligation to bargain before making changes extends to working conditions regardless of whether they exist through custom and practice or are expressly and specifically set forth in a collective bargaining agreement.

The parties do not dispute that prior to July 28, 1998, there was no written policy or directive requiring officers of the Dover Police Department to wear protective body armor. The City did, however, provide officers with protective vests which most officers wore at their discretion. The Firearms Training Officer required that all officers on the firearms range wear protective vests. Officers involved in SORT training and operations routinely wore protective vests. Officers executing search warrants involving criminal suspects customarily wore the vests for their own protection. Officers on traffic and bike patrols wore protective vests at their discretion.

It is not disputed that the issuance of PN 41 constituted a written directive identifying when officers are required to wear protective vests and that the scope of the directive is broader than the preceding practice of the Dover Police Department. There is no question that PN 41 was unilaterally implemented by the City. This change, however, only constitutes a violation of the employer's duty to bargain in good faith if the use of protective vests is a mandatory subject of bargaining.

The Delaware Public Employment Relations Board clearly set forth its four part test for determining whether an issue constitutes a mandatory subject of bargaining in Woodbridge Education

Assn. v. Bd. of Education (Del.PERB, ULP 90-02-048 (I PERB Binder 537, 1990)), which must be applied in order to resolve in this matter:

- 1) Are rules for the usage of protective vests expressly reserved to the exclusive prerogative of the public school employer by the POFERA or any other law?

The record contains no assertion that any Delaware law requires a police officers to wear protective vests under specific conditions. The City has relied upon no law which specifically reserves to the municipality the right to determine how protective vests will be deployed by local police departments. Consequently, this issue is not statutorily reserved to the exclusive prerogative of the City and does not constitute an illegal subject of bargaining.

- 2) Do rules for usage of protective vests fall within the statutory definition of “terms and conditions of employment”?

“Terms and conditions of employment” means matters concerning or related to wages, salaries, hours, grievance procedures and working conditions. 19 Del.C. §1602(n). By defining terms and conditions of employment to encompass all matters “concerning or related to” the enumerated areas, the Delaware General Assembly intentionally created a broad and encompassing scope of negotiability and mandated that labor and management negotiate to mutually define those terms and conditions of employment. Smyrna Educators Assn. v. Board of Education, Del.PERB, ULP 87-08-015 (I PERB Binder 207 (1987)).<sup>2</sup> This duty to bargain terms and conditions of employment unquestionably extends beyond the period of contract negotiations and applies during the term of a collective bargaining agreement. Smyrna (Supra.)

Prior PERB decisions hold that a “working condition” is broader than a “physical working condition” and is a condition which:

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<sup>2</sup> Prior PERB rulings rendered under either the Public School Employment Relations Act (14 Del.C. Chapter 40 (1982)) and/or the Public Employment Relations Act (19 Del.C. Chapter 13 (1994)) are controlling to the extent that the relevant provisions of those statutes are identical to those of the Police Officers’ and Firefighters’ Employment Relations Act (19 Del.C. Chapter 16 (1986)).

... relates generally to the job itself, i.e., to circumstances involving the performance of the responsibilities for which one is compensated or the opportunity to and qualifications necessary to perform work required of those employees who are members of the certified bargaining unit. Smyrna Educators Assn. v. Bd. of Education, Del.PERB, D.S. 89-10-046 (I PERB Binder 475 (1990)).

The full PERB held “a *de facto* working condition is one which an employee can avoid only by quitting his or her job.” Smyrna Educators’ Assn. v. Bd. Of Education Del.PERB, ADS 89-10-246 (I PERB Binder 521 (1990)). Applying this definition, PERB found drug testing to be a “condition of employment” because employees could avoid the mandate for annual testing only by resigning their employment.

In this case, officers may be disciplined for failure to wear the protective vests under the conditions mandated by Section XI of PN 41. Officers cannot avoid this mandate while serving on the Dover Police Department. Protective vest usage, therefore, constitutes a working condition and is a mandatory subject of bargaining.

- 3) Do rules on using protective vests constitute a matter of “inherent managerial policy as defined in the Employer Rights section of the POFERA (§1605)?

The statute provides a public employer:

... is not required to engage in collective bargaining on matters of inherent managerial policy, which include but are not limited to such areas of discretion or policy as the functions and programs of the public employer, its standards of service, overall budget, utilization of technology, the organizational structure and the staffing levels, selection and direction of personnel. 19 Del.C. §1605.

The Public Employment Relations Board has interpreted this statutory provision to create a “permissive” category of bargaining subjects, i.e., those which employers may chose to negotiate but cannot be compelled to negotiate. When officers are required to wear protective vests is not an issue which involves the functions or programs of the Dover Police Department, its overall budget, its organizational structure, its staffing levels, and or the selection and direction of its officers as those terms are generally understood. The policy concerns underlying Article XI of PN 41 do, however, involve the Department’s standards of service and the use of technology.

An employer may undertake good faith negotiations with respect to a permissive subject of bargaining without forfeiting its right to abandon those negotiations or to withdraw the subject from entirely from negotiations at some later time. Capital Educators Assn. v. Bd. Of Education, Del.PERB, DS 1-11-84-3CAP (I PERB Binder 105 (1984)). The fact that the City discussed the issue of mandatory vest usage with the FOP during their most recent negotiations does not compel a finding that this matter also constitutes a mandatory subject of bargaining. That determination must be based on the specific facts of this case.

For these reasons, this matter falls within the “inherent managerial policy” as defined in the Employer Rights section of the Police Officers’ and Firefighters’ Employment Relations Act.

- 4) Does the impact of the issue on the operation of the municipality as a whole clearly outweigh the direct impact of this issue on individual officers?

If an issue falls within the definitions of both mandatory and permissive subjects of bargaining, this balancing test is applied in order to determine whether the matter more directly impacts upon the operations of the municipality as a whole, and is therefore permissive; or whether it more directly impacts upon the individual employees in the performance of their responsibilities. Woodbridge (Supra.).

In this case, the record is void of any evidence concerning the impact of mandated vest usage on the operation of the City of Dover or its police department. There is no evidence of an increasing incidence of violent crime in the City or that the City is experiencing increasing rates of injury to officers which could have been reduced by requiring that vests be worn. The City established that PN 41, which includes the vest provision, was issued as part of the City’s efforts to seek accreditation for its police department. While one of the criteria for accreditation was that all policies be written, no evidence was offered that requiring officers to wear protective vests was a condition for accreditation.

On the other hand, the FOP provided testimonial evidence on the impact of mandatory vest usage under the conditions established by PN 41 on individual officers. Vests can be both hot and cumbersome for officers, especially those assigned to bicycle patrols and those working extra duty traffic assignments

during summer races at Dover Downs speedway. Testimony also established that vests often don't fit well under uniforms which were tailored to fit the officers' bodies without the vests. The FOP asserted, without contradiction by the City, that officers would be required to replace uniforms which did not fit, because of the vests, at their own expense. Although these concerns were raised with the City during the negotiating process, PN 41 is silent on both points.

Considering the evidence presented, this policy clearly impacts the individual officers to a greater extent than it does the operations of the municipality as a whole. For these reasons, it is determined it is a mandatory subject of bargaining which the City was obligated to negotiate with the FOP.

This holding is consistent with the holdings of the Massachusetts Labor Relations Commission (Town of Shrewsbury v. Local 426, International Brotherhood of Police Officers, MUP-6426 (1987); affirmed; - mandated seat belt usage is mandatory subject of bargaining because it is an issue of employee safety); the Iowa PERB (Iowa City v. Iowa City Police Patrolmen's Association, 5 NPER 16-13089 (1982) – bulletproof vests are mandatory subjects of bargaining); the New Jersey PERC (Township of South Brunswick v. PBA Local 166, 8 NPER NJ-17138 (1986) – safety items, including armored vests, are mandatory subjects of bargaining); and the New York PERB (City of Albany v. Albany Police Officers Union Local 2841, AFSCME, AFL-CIO, 7 NYPER 3078 (1974) – issues consequential to the safety of police officers, including equipment issues, are mandatory subjects of bargaining).

All of these state decisions are consistent with the rulings of the National Labor Relations Board which has consistently held safety rules and practices constitute conditions of employment. Electri-Flex Company, 230 NLRB 713 (1978); J.P. Stevens & Co., 239 NLRB 738 (1978). In Gulf Power (5<sup>th</sup> Cir, 384 F.2d 822 (1967), the Court of Appeals upheld the NLRB's decision which specifically and unequivocally rejected the employer's argument that matters pertaining to safety are within the exclusive prerogative of management. All of these holdings are based on the U.S. Supreme Court's decision in Fibreboard Paper Co. (379 US 203 (1964)), which found that

“... what safety practices are observed...” are conditions of employment and therefore are mandatorily negotiable.

The City argued it retains exclusive authority to mandate police officers wear vests because 1) the collective bargaining agreement is silent on this point, and 2) this issue falls within the parameters of the management rights clause contained in the collective bargaining agreement. The issue before the Public Employment Relations Board is not whether the complained of conduct violates the parties’ collective bargaining agreement. The parties have agreed upon a procedure by which grievances concerning the scope and applicability of the collective bargaining agreement are to be resolved. The unfair labor practice forum is not a substitute for the contractual grievance procedure. Brandywine Affiliate, DSEA/NEA, v. Board of Education, Del.PERB, ULP 85-06-005 (I PERB Binder 131, 1986). Unfair labor practice charges raise an issue of statutory interpretation.

Furthermore, it is well established that a contractual management rights clause does not waive the statutory duty to bargain unless such waiver is specific, clear and unequivocal. Article 1.5, Management, states;

- 5) The Management of the City of Dover Police Department and the direction of all Department personnel, including; the right to hire; assign; suspend; transfer; promote; discharge or discipline for violation of the Rules and Regulations of the Department, duly promulgated, providing, for such discipline and to maintain the discipline and efficiency of its members; the right to relieve members from assignments for legitimate reasons; the right to determine the manner of operation and to change the methods or processes, or to use new equipment; the right to establish schedules; to introduce new and improved methods of operation; and to extend, limit, or curtail its operations, is vested exclusively in the Police Chief. The above statement of management functions shall be deemed to exclude other functions not listed herein. In no case shall the exercise of the above prerogative of management be in derogation of the terms and conditions of this Agreement or of State law.

Generally written provisions cannot constitute waivers of the right to bargain absent further evidence of intent. In this case, the FOP made it very clear to the City of Dover it opposed the City’s proposal to mandate officers wear vests. There is no evidence of record that the FOP intended to waive its right to negotiate on this matter or engaged in any conduct from which such an intent could be reasonably inferred. Witnesses for the City testified they knew the FOP opposed the mandate that

officers wear vests. It is disingenuous at best to now argue that the FOP forfeited its right to negotiate concerning this subject because it signed a collective bargaining agreement which includes a generally worded management rights clause.

For all of the reasons discussed herein, it is determined that when and where police officers are required to wear protective vests is a mandatory subject of bargaining which the City is required to negotiate with the FOP. By implementing the provision of PN 41 which mandates the conditions under which officers are required to wear protective vests without providing notice and the opportunity to bargain to FOP Lodge 15, the City of Dover violated its duty to bargain in good faith and 19 Del.C. §1607(a)(5).

#### **CONCLUSIONS OF LAW**

1. The City of Dover, Delaware, is a public employer within the meaning of 19 Del.C. §1602(l).
2. FOP Lodge 15 is an employee organization within the meaning of 19 Del.C. §1602(f), and is the exclusive bargaining representative of all sworn Dover Police Department officers in the ranks of Patrolman through Sergeant.
3. Rules concerning when police officers are required to wear protective vests constitute a mandatory subject of bargaining within the meaning of 19 Del.C. §1602(n).
4. By unilaterally implementing Article XI of Procedural Notice 41, without providing the FOP notice and the opportunity to bargain, the City of Dover violated its duty to bargain in good faith and 19 Del.C. §1607(a)(5).

WHEREFORE, the City of Dover is hereby ordered to:

- A. Cease and desist from failing to bargain in good faith with FOP Lodge 15 over the mandatory wearing of protective vests by police officers;
- B. Take the following affirmative actions which will effectuate the policies of the Police Officers and Firefighters Employment Relations Act:

- a) Rescind the provisions of Procedural Notice 41 which mandate the conditions under which Dover police officers are required to wear protective vests.
- b) Post the attached Notices of Decision in all places where notices affecting police officers represented by FOP Lodge 15 are normally posted for a period of thirty (30) days.
- c) Provide FOP Lodge 15 with notice and the opportunity to collectively bargain any changes to the custom and practice which existed prior to the implementation of Article XI of PN 41 concerning the use of protective vests by Dover police officers.

**IT IS SO ORDERED.**

*/s/ Deborah L. Murray-Sheppard*  
**DEBORAH L. MURRAY-SHEPPARD**  
Principal Assistant/ Hearing Officer  
Del. Public Employment Relations Bd.

Issued: 26 May 1999