

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

FRATERNAL ORDER OF POLICE,)	
LODGE 4,)	Decision on Motion to
)	Quash or Limit Subpoena
v.)	Duces Tecum
)	
CITY OF NEWARK, DELAWARE.)	<u>ULP 01-06-321</u>

Background

At the request of the Fraternal Order of Police, Lodge 4 (“FOP”) the Executive Director issued a subpoena duces tecum on January 10, 2002, to Charles M. Zusag, Assistant City Manager, for the hearing in the above-captioned matter scheduled for January 17, 2002. The Assistant City Manager was compelled to produce:

All records, notes, memoranda, and copies of all written offers made to FOP Lodge 4 in connection with the negotiations between FOP Lodge 4 and the City of Newark, that are the subject of the underlying Unfair Labor Practice No. 01-06-321.

The City of Newark (“City”) filed a Motion to Quash or Limit the Subpoena Duces Tecum on January 15, 2002, for the following reasons:

- The subpoena is overly broad and burdensome.
- The subpoena requests information protected by attorney-client privilege.
- The Board’s remand of this charge for hearing was limited to “the factual circumstances” surrounding the issuance of the letter to bargaining unit members which is at issue in the case; therefore, subjective perceptions as captured in notes and memoranda are not relevant.
- Mandating production of the documents requested would have a deleterious effect on future negotiations, as the City’s Chief Negotiator has a reasonable expectation that his internal communication while working in that capacity

will remain confidential.

- The FOP has already received all relevant documents, which were provided to them during the course of the negotiations.

The FOP filed its response to the City's Motion on January 16, 2002. The FOP argues:

- PERB should adhere to the requirements of Superior Court Rule 45, Subpoena, (B)(3)(a), wherein a subpoena may be quashed upon a showing that it "(ii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or (iii) subjects a person to undue burden." Any claim of privilege or other protection must be made "expressly and shall be supported by a description of the nature of the documents, communications or things not produced that is sufficient to enable the demanding party to contest the claim." The City's general objections do not meet this standard.
- The requested information relates directly to the negotiations which are the subject of the unfair labor practice charge, which occurred over 5 negotiation and 3 mediation sessions. There has been no showing by the City of undue burden.
- The City cites no authority for special protection of negotiation notes.
- Motivation is the essence of the unfair labor practice charge; therefore evidence relating to why the letter was sent and the timing of the letter are relevant.

DECISION

The purpose in issuing a subpoena duces tecum is to ensure that documentary evidence essential to a party's case is brought before the Hearing Officer. The purpose of a hearing under the Police Officers' and Firefighters' Employment Relations Act is set forth in PERB Regulation 7.1:

The purpose of a hearing under Regulation 7 is to develop a full and factual record upon which the Executive Director may make a decision. The party filing a complaint shall have the burden of proving the allegation of the complaint by a preponderance of the

evidence. The principles of relevancy and materiality are paramount. The technical rules of evidence do not apply.

Regulation 7.7 further provides:

The Board shall, where it deems necessary, subpoena witnesses and issue subpoenas requiring the production and examination of books, papers, or other documents it deems relevant to the issue before it. . . . The Board may decline to honor such request for a subpoena if the Board determines that the evidence sought does not relate to the matter to be heard, that such subpoena request does not describe with sufficient particularity the evidence whose production is requested, or that the subpoena seeks to compel the appearance of witnesses who would offer testimony that would merely be repetitive of other witnesses who will be produced.

PERB's rules clearly set forth that the technical rules of evidence do not apply and the standards by which a subpoena may be declined or quashed. As the full Board has expressly delegated its authority ¹ to conduct hearings to the Executive Director and his office, these rules apply equally to matters before him or a Hearing Officer.

In this case, the full Board found “probable cause to believe that the City violated its duty to bargain in good faith or dominated, interfered with, or assisted in the existence or administration of the FOP in violation of 19 Del.C. §1607 (a)(2) and (a)(5) when the City’s letter was delivered directly to bargaining unit employees.” The Board remanded this matter for hearing to the Executive Director, finding “the factual circumstances surrounding the communication, timing of the letter, and the history of the parties’ relationship and prior communications need to be examined.” FOP 4 v. City of Newark, Decision of the PERB on the Hearing Officer’s Decision, ULP 01-06-321, IV PERB Binder 2395 (2001).

¹ The Board’s authority to conduct hearings, subpoena witnesses and documents, and to delegate this power is found at 14 Del.C. §4006 (f) and (h), as incorporated by reference into the POFERA at 19 Del.C. §1606.

Considering the scope of the Board's remand, the subpoena duces tecum is enforced, but limited as follows:

Mr. Zusag is hereby compelled to bring with him to the hearing records and notes relating to the collective bargaining sessions involving the City and the FOP, as well as any memoranda exchanged by these parties. He should also produce copies of all written offers made to FOP Lodge 4 in connection with these negotiations and all written communication relating to the letter which is the subject of this unfair labor practice charge.

This order excludes any and all internal memoranda concerning the substance of the negotiations drafted by Mr. Zusag and/or the City's counsel.

IT IS SO ORDERED.

DATE: 16 January 2002

/s/Charles D. Long, Jr.
CHARLES D. LONG, JR.
Executive Director
Del. Public Employment Relations Bd.