

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

<b>FRATERNAL ORDER OF POLICE,</b>	)	
<b>PROBATION/PAROLE, LODGE 10,</b>	)	
	)	
<b>Charging Party,</b>	)	
	)	<b>Unfair Labor Practice</b>
<b>v.</b>	)	<b><u>03-04-387</u></b>
	)	
<b>STATE OF DELAWARE, DEPARTMENT</b>	)	
<b>OF CORRECTION, BUREAU OF</b>	)	
<b>COMMUNITY CORRECTIONS,</b>	)	
	)	
<b>Respondent.</b>	)	

**BACKGROUND**

Fraternal Order of Police, Probation/Parole, Lodge 10, (“Lodge 10”) is an employee organization within the meaning §1302(i) of the Public Employment Relations Act (“PERA” or “Act”) and the exclusive representative of Probation/Parole Officers and Senior Probation/Parole Officers within the meaning of §1302(j). 19 Del. Ch. 13 (1994)

The State of Delaware, Department of Correction, Bureau of Community Corrections (“DOC”) is a public employer within the meaning of Section 1302(p) of the Act.

The unfair labor practice charge filed on April 22, 2003, alleges, inter alia: 1) that Procedure 6.2, Supervision Standards, unilaterally promulgated by the DOC on January 29, 2003, eliminates the contractual distinction between Level II and Level III position classes as provided for in Article 9.2, of the collective bargaining agreement; 2) the subject matter of Procedure 6.2 constitutes a mandatory subject of bargaining; 3) by failing to negotiate with

Lodge 10 prior to implementation of Procedure 6.2, DOC has committed a violation of 19 Del.C. Section 1307(a)(1) and/or (a)(5).<sup>1</sup>

DOC filed its Answer on May 1, 2003, contending: 1) Procedure 6.2 is not a mandatory subject of bargaining; 2) Procedure 6.2 does not eliminate the contractual distinction between Level II and Level III position classes; 3) DOC has the right under Article 18, Management Right, of the collective bargaining agreement to implement Procedure 6.2 after posting the Procedure where such notices are normally posted and sending a copy of the Procedure to the Lodge 10 President.

Under a Section entitled New Matter, DOC asserts that Lodge 10 filed two grievances alleging the adoption of Procedure 6.2 violates the collective bargaining agreement. DOC contends that because the essence of this dispute involves the interpretation and application of several contractual provisions, it is properly a subject to be resolved pursuant to the parties' negotiated grievance and arbitration procedure, and requests this Charge be deferred.

In the Response to New Matter filed on May 8, 2003, Lodge 10 requests that DOC's request to defer the Charge be denied.

### **APPLICABLE STATUTORY PROVISIONS**

19 Del.C. Section 1307, Unfair Labor Practices, provides in relevant part:

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

---

<sup>1</sup> The Charge erroneously cited §1607 (a)(1) and (a)(5) of the Police Officers and Firefighters Employment Relations Act, 19 Del.C. Chapter 16. This error was subsequently corrected by FOP Lodge 10 through amendment to correctly identify the identical provisions of the Public Employment Relations Act, i.e., 19 Del.C. §1307(a)(1) and (a)(5)

- (1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this Chapter.
- (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.

### DISCUSSION

In Fraternal Order of Police, Lodge No. 1 v. City of Wilmington, Del. PERB, ULP No. 98-02-226, III PERB 1695, 1696 (1998), the PERB observed, in relevant part:

The Board has, however, adopted a limited deferral policy providing for the suspending [of] the processing of an unfair labor practice charge pending exhaustion of the parties' negotiated grievance and arbitration procedures. The deferral policy is grounded in the Board's belief that when parties have mutually committed themselves to mutually agreeable procedures for resolving contractual disputes, it is prudent and reasonable for PERB to afford those procedures the full opportunity to function. FOP #1 v. City of Wilmington, Del PERB, ULP 89-08-040, I PERB 449 (1989).

The policy requires that the following conditions must be met before a charge is considered for deferral:

- 1) A decision on the unfair labor practice charge turns on the interpretation of a provision of the parties' collective bargaining agreement;
- 2) The parties have a long standing and well established collective bargaining relationship; and
- 3) The employer has clearly indicated its willingness to submit the contractual issue to arbitration.

Whenever an unfair labor practice charge is deferred, the PERB retains jurisdiction to reconsider the charge for any of the following reasons, upon the application of either party:

- 1) The arbitration award which was rendered failed to resolve the statutory claim;
- 2) Either party refused to abide by the arbitrator's decision;
- 3) The arbitral process was unfair;

- 4) The dispute was not being resolved by arbitration with reasonable promptness; and/or
- 5) The issue was satisfactorily resolved by the parties through collective [bargaining]. *FOP I v. City of Wilmington, (Supra.) @ 1697.*

The preference for arbitration over the unfair labor practice forum where issues involve the interpretation and/or application of the parties' collective bargaining agreement was addressed in Delaware State University v. Delaware State University Chapter of the American Association of University Professor, Del.Chan., CA 1389-K, III PERB 1971 (2000). Vice Chancellor Strine observed:

. . . the Delaware Supreme Court has provided guidance as to when the PERB should defer to collective bargaining agreement provisions that establish grievance and arbitration procedures, even when such provisions address statutorily protected rights. In City of Wilmington v. Wilmington Firefighters Local 1590, our Supreme Court adopted the federal "pre-arbitral deferral policy" under which the National Labor Relations Board ("NLRB") "refrain[s] from exercising jurisdiction in respect of disputed conduct arguably both an unfair labor practice and a contract violation when . . . the parties have voluntarily established by contract a binding settlement procedure." The reason for deferring "to the contractually agreed-upon arbitration procedures when the issue is a refusal-to-bargain" is to require parties "to honor their contractual obligations rather than, by casting [a] dispute in statutory terms, to ignore their agreed-upon procedures."

This approach is therefore premised on a recognition that collective bargaining agreements often define statutorily protected rights more specifically and that particular actions may breach both the contract and the relevant statute. *DSU v. AAUP, (Supra) @ 2000 (footnotes omitted).*

The National Labor Relations Board specifically adopted a pre-arbitral deferral standard for alleged violations of §8 (a)(3) and (a)(5) of the LMRA <sup>2</sup> where the "dispute is principally between the contracting parties – the employer and the union – [and] the principle

---

<sup>2</sup> These sections correspond to 19 Del.C. §1302(a)(3) and (5).

issue is whether the complained of conduct is permitted by the parties' contract." General American Transportation Corp., NLRB, 228 NLRB 808, 810; 94 LRRM 1483 (1977).

I specifically note that this dispute is between two parties which have a collective bargaining relationship which dates back to the creation of the bargaining unit in 1985.<sup>3</sup> The parties' contractual grievance arbitration process clearly encompasses the dispute at issue<sup>4</sup>; DOC has indicated its willingness to utilize arbitration to resolve this dispute,<sup>5</sup> and the question of whether the adoption of modifications to Procedure 6.2 eliminates the contractual distinction between Level II and Level III supervision of offenders is well-suited for resolution in arbitration.

In light of this agency's mission to encourage parties to resolve disputes through their negotiated mechanisms, it is a prudent exercise of discretion to defer this matter to the parties' contractual grievance arbitration procedure.

### **DECISION**

For the reasons set forth above, this charge is deferred to the parties' arbitration procedure for resolution. In accordance with PERB's established deferral policy, PERB retains jurisdiction to reconsider the charge for any of the following reasons, upon the application of either party:

- 1) The arbitration award which was rendered failed to resolve the statutory claim;
- 2) Either party refused to abide by the arbitrator's decision;
- 3) The arbitral process was unfair;

---

<sup>3</sup> DOL Case No. 165

<sup>4</sup> Article 6.1 of the 2002-2005 Collective Bargaining Agreement.

<sup>5</sup> State's Answer to Charge, ¶26.

- 4) The dispute was not being resolved by arbitration with reasonable promptness;  
and/or
- 5) The issue was satisfactorily resolved by the parties through collective bargaining.

**WHEREFORE**, the parties are hereby ordered to take all steps necessary to process this issue to arbitration with all deliberate speed and to advise PERB of the outcome of the arbitration process within seven (7) days of receipt of a decision therein.

**IT IS SO ORDERED.**

/s/CHARLES D. LONG, JR.

CHARLES D. LONG, JR., ESQ.

EXECUTIVE DIRECTOR

DEL. PUBLIC EMPLOYMENT RELATIONS BD.

DATE: June 30, 2003