

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

Wilmington Fraternal Order of Police,)	
Lodge No. 1,)	
)	
Petitioner)	
)	
v.)	
)	<u>ULP NO. 06-01-507</u>
City of Wilmington,)	Probable Cause Determination
)	
Respondent.)	

BACKGROUND

Wilmington Fraternal Order of Police, Lodge No.1 (“FOP Lodge No. 1”) is an employee organization under 19 Del.C. Section 1602(g), the Police Officers’ and Firefighters’ Employment Relations Act (“POFFERA”) and the exclusive bargaining representative within the meaning of 16 Del.C. Section 1602(h) of all sworn members of the Wilmington Police Department except for the Chief.

Respondent, City of Wilmington (“City” or “Wilmington”) is a public employer within the meaning of Section 1602(l) of the POFFERA.

The unfair labor practice charge filed on January 13, 2006, alleges the City engaged in conduct which violates 19 Del. C. Section 1607 (a)(1)(5) and/or (6) of the Act, which provide:

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

- (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.
- (6) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

The charge alleges, inter alia, that on November 28, 2005, without negotiating with FOP Lodge No.1, Wilmington Police Chief Michael J. Sczerba issued an Informational Bulletin promulgating new Directive 6.43, modifying the Comprehensive Substance Abuse Program contained and described in Article 26 of the Rank and File Bargaining Agreement (and impliedly the Captains & Inspectors Bargaining Agreement) in effect until June 30, 2007.

FOP Lodge No.1 further alleges that Public Employment Relations Boards and Courts “uniformly acknowledge that comprehensive substance abuse programs providing for random testing/screening for drugs are mandatory subjects of bargaining,” citing In the Matter of Newark, Respondent and FOP Lodge No. 12, 16 NJPER P 21186 (7/20/90)(Complaint, ¶ 7).

On or about January 26, 2006, the City filed its Answer and New Matter, denying material allegations of the Charge and rejecting FOP, Lodge No.1’s reliance on New Jersey precedent arguing the “present case is to be decided under Delaware law.” The City’s Answer raised New Matter asserting that “modification of the comprehensive substance abuse program is an employer’s right pursuant to 19 Del.C. Section 1605 and within the areas of discretion or policy.”

On or about February 6, 2006, FOP Lodge No. 1 filed its Answer denying the City of Wilmington's New Matter.

DETERMINATION

The Rules and Regulations of the Delaware Public Employment Relations Board (hereinafter "PERB") at Article V, Unfair Labor Practice Proceedings, Section 5.6, Decision or Probable Cause Determination, provide, in relevant part:

(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. If the Executive Director determines that there is no probable cause to believe that an unfair labor practice has occurred, the party filing the charge may request that the Board review the Executive Director's decision in accord with the provisions set forth in Regulation 7.4. The board shall decide such appeals following a review of the record, and, if the Board deems necessary, a hearing and/or the submission of briefs.

(b) If the Executive Director determines that an unfair labor practice has, or may have occurred, he shall, where possible, issue a decision based upon the pleadings; otherwise he shall issue a probable cause determination setting forth the specific unfair labor practice which may have occurred.

Considered in a light most favorable to the Charging Party, the pleadings constitute probable cause to believe that an unfair labor practice may have occurred. Specifically, the issue is whether the terms of an employer's substance abuse program constitutes a matter of inherent managerial policy within the discretion of the public employer, or whether the terms of such program constitute a mandatory subject of bargaining which cannot be altered by either party without prior negotiation.

Wherefore, in the absence of a stipulation, a hearing will be scheduled for the purpose of establishing a factual record upon which a decision can be rendered.

IT IS SO ORDERED.

DATE: March 17, 2006

/s/Charles D. Long, Jr.
Charles D. Long, Jr.
Executive Director