

PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF DELAWARE

FRATERNAL ORDER OF POLICE,	:	
LODGE #1,	:	
Charging Party,	:	
	:	<u>ULP No. 09-07-690</u>
v.	:	Probable Cause Determination
	:	
CITY OF WILMINGTON, DELAWARE,	:	
Respondent	:	

BACKGROUND

The City of Wilmington (“City”) is a public employer within the meaning of §1602(l) of the Police Officers’ and Firefighters’ Employment Relations Act (“Act”), 19 Del.C. Chapter 16, (1989).

The Fraternal Order of Police, Lodge No. 1 (“FOP”) is an employee organization within the meaning of §1602(g) of the Act and the exclusive bargaining representative within the meaning of §1602(h) of the Act of all sworn members of the Wilmington Police Department except for the Chief.

The City and the FOP are parties to two (2) collective bargaining agreements for the period July 1, 2007 through June 30, 2010. One of the Agreement’s applies to rank and file police officers while the other applies to the ranks of Captain and Major.

On or about July 10, 2009, the FOP filed an unfair labor practice charge alleging that the City violated 19 Del.C. §1607(a)(1), (5) and/or (6), which provide:

§1607(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 FOP alleges that both of the current collective bargaining agreements contain provisions involving Working Conditions, Hours of Work and Outside Employment. Prior to June 17, 2009, the above-referenced contractual provisions incorporated into Directive 6.51 governing the period November 22, 1993 through June 17, 2009.

On June 17, 2009, the Chief of Police issued an Informational Bulletin promulgating a new Directive 6.51 entitled, "Overtime, Compensatory Time and Payroll." Citing section D of the revised Directive (entitled "Overtime/Comp. Time") as an example, the FOP maintains that revised Directive 6.51, "contains new and/or substantive modifications of existing practices, including without limitation the following: elimination of the ability to elect comp time" for Court appearances; Civic Association Meetings and Arrest/Report Writing. The FOP maintains that it was not provided with prior notice requesting to negotiate changes in "Working Conditions, Outside Employment and/or Hours of Work." *Charge ¶8.*

On or about August 3, 2009, the City filed its Answer referring PERB to the specific documents cited by the FOP. The City admits "the new Directive 6.51 modifies the former version" including limitations on the ability for officers to elect compensatory time in lieu of cash for certain operational assignments. *Answer ¶8.* The City maintains

that not every aspect of working conditions, outside employment and hours of work are mandatory subjects of bargaining.

Under “New Matter,” the City contends that section D of revised Directive 6.51 is a verbatim quotation taken from prior Directives 6.54(A)(12) and 6.54(a)(13) and were included in section 6.51 D for housekeeping purposes only. Therefore, any protest as to the application of this language is untimely.

The City further maintains that: 1) the decision to pay officers in the form of cash instead of allowing them to select compensatory time off is a matter of inherent managerial policy rather than a mandatory subject of bargaining; and 2), the payment of “cash overtime” rather than allowing officers to elect cash or compensatory time off has an effect on the City’s budget as well as its staffing levels and is not, therefore, a mandatory subject of bargaining.

On August 11, 2009, the FOP filed its Response To New Matter denying the City’s position as set forth therein.

DISCUSSION

Regulation 5.6 of the Rules of the Delaware Public Employment Relations Board requires:

- (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 submission of briefs.

- (b) If the Executive Director determines that an unfair labor practice 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.

For purposes of reviewing the pleadings to determine whether probable cause exists to support the charge, factual disputes revealed by the pleadings are considered in a light most favorable to the Charging Party in order to avoid dismissing a valid charge without the benefit of receiving evidence in order to resolve factual differences. *Flowers v. DART/DTC*, Del. PERB Probable Cause Determination, ULP 04-10-453, v. PERB 3179, 3182 (2004).

The specific provisions of the revised Directive 6.51 to which the FOP maintains the duty to bargain attaches are not specifically identified in the Charge. The specific provisions addressed under general subject matter headings may include subject matter other than mandatory subjects of bargaining. Thus each such provision must be considered individually rather than focusing upon the general heading under which they are included.

In order to resolve the issue(s) presented in the Charge, it is necessary to first resolve the threshold issue of determining the bargaining status of the specific subject matter for which the FOP seeks an order to bargain. *Appoquinimink Ed. Assn. v. Board of Education*, ULP 1-3-84-3-2A, I PERB 35, 39 (1984).

In order to move this Charge forward, the FOP must first clearly identify the specific provisions of the revised Directive 6.51 which are the basis for the Charge.

The second step is to determine the bargaining status of each issue in dispute. This determination normally results from a consideration of the evidentiary record (developed either through hearing or stipulated to by the parties) and the argument

presented by the parties.¹

The City is correct in its assertion that the portion of 6.51 D quoted in the Charge is a lifted, *verbatim*, from Directive 6.54 sections A 12 and 13. The FOP is entitled, however, to present its reason(s) for citing this provision in the revised Directive 6.51 as a “new and substantive” modification.

DETERMINATION

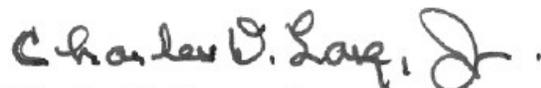
Considered in a light most favorable to the Charging Party, the pleadings are sufficient to establish probable cause to believe that a violation of 19 Del.C. §1607 (a)(1), (a)(5) and/or (a)(6) may have occurred.

Consistent with the foregoing discussion, the FOP is hereby directed to submit the specific provisions of revised Directive 6.51 which are the basis for this Charge. This list is to be submitted to PERB on or before close of business on Friday, January 8, 2010.

Following receipt of this information, a prehearing conference will be convened in order to schedule and delimit the scope of the record required to address this Charge.

It is so ordered.

Date: December 14, 2009



Charles D. Long, Jr.,
Hearing Officer
Del. Public Employment Relations Board

¹ *AFSCME Council 81, Locals 879,1036 &1443 v. State DOT*, ULP 98-04-230, III PERB 1743, 1744 (1998)