

**STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD**

FRATERNAL ORDER OF POLICE, LODGE 1,	:	
	:	
Charging Party,	:	
	:	ULP No. 14-07-963
v.	:	
	:	PROBABLE CAUSE DETERMINATION
CITY OF WILMINGTON, DELAWARE,	:	& ORDER OF DEFERRAL
	:	
Respondent.	:	

APPEARANCES

Jeffrey M. Weiner, Esq., for Charging Party, FOP Lodge 1
Tara M. DiRocco, Asst. Solicitor, for Respondent, City of Wilmington

BACKGROUND

The City of Wilmington (City) is a public employer within the meaning of §1602(p) of the Police Officers' and Firefighters' Employment Relations Act, 19 Del.C. Chapter 16, (POFERA).

The Fraternal Order of Police, Lodge 1 (FOP), is an employee organization and an exclusive bargaining representative, within the meaning of 19 Del.C. §§1602(g) and (h). The FOP represents the bargaining unit which includes all officers of the Wilmington Police Department below the rank of Captain.

The City and FOP Lodge 1 are parties to a collective bargaining agreement for this bargaining unit which has a term of July 1, 2007 through June 30, 2010. As of the date of this determination, a successor agreement has not been reached by these parties.

On July 23, 2014, the FOP filed an unfair labor practice charge with the Public

Employment Relations Board (PERB) alleging conduct by the City in violation of 19 Del.C. §1607(a)(1), (a)(5) and (a)(6), which state:

- (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;
 - (4) 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 the City violated these provisions on May 10, 2014, when it “unilaterally modified the Uniform Services Division shift from a 12-hour work day to an 11-hour work day for Uniform Services in violation of §19.1” of the negotiated agreement. It also alleges other modifications were made which similarly violated the parties’ collective bargaining agreement as a result of the reduction in the shift length of Uniform Services Division. It also asserts that at no time prior to May 10, 2014, did the City request the FOP open the collective bargaining agreement and negotiate with respect to the modification of mandatory subjects of bargaining.

On August 15, 2014, the City filed its Answer to the Charge, denying the conclusions and assertions made by the FOP that it had violated the POFERA. Included with its Answer was New Matter. The City asserts the FOP’s proposed alternative 11-hour shift was implemented (rather than the eleven hour shift configuration proposed by the Chief of Police) and that the FOP voted to waive the contractually required 75 day notice to implement the shift change. It also argues the FOP has failed to exhaust its contractual remedies by pursuing its pending grievances through arbitration; consequently the issue is not ripe for PERB determination. Finally, the City asserts it has not instituted a unilateral change in the status quo by implementing a new deployment plan and that it , in fact, complied with its contractual obligations before altering

shift times, based on Chief's determination that there is an operational need for the efficient utilization of manpower.

The FOP filed its response to the City's New Matter on August 22, 2014, in which it denied the factual and legal positions set forth therein. The FOP argued the City's assertion that the FOP has failed to exhaust its contractual remedies because the dispute are contractual in nature and have not yet been processed through grievance arbitration, is without basis in law. It asserts that although a Demand for Arbitration has been filed with the American Arbitration Association (AAA), the City has not waived the argument it advanced in *City of Wilmington v. FOP Lodge 1*¹ and has not agreed to participate in final and binding grievance arbitration.

This probable cause determination is based upon a review of the pleadings submitted in this matter.

DISCUSSION

Regulation 5.6 of the Rules of the 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 provisions set forth in Regulation 7.4. The Board will 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 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.

For purposes of determining whether probable cause exists to support an unfair labor practice charge, factual disputes revealed by the pleadings are considered in a light most

¹ C.A. 2024-NC V PERB 3077, 2004 WL 1488682, (Chan. Ct., 2004)

favorable to the Charging Party in order to avoid dismissing a valid charge without the benefit of receiving evidence. *Flowers v. DART/DTC*, ULP 04-10-453, V PERB 3179, 3182 (DE.PERB, 2004).

It is well established under Delaware PERB case law that it is a violation of the duty to bargain in good faith for a party to unilaterally implement a change in a mandatory subject of bargaining following expiration of the parties' collective bargaining agreement. *Appoquinimink Ed. Assn. v. Bd. of Education*, ULP 1-2-84A, I PERB 23 (DE.PERB, 1984); *Brandywine Affiliates, DSEA/NEA v. Brandywine School District*, ULP 1-9-84-6B, I PERB 83 (DE.PERB, 1984); *New Castle County Vo-Tech Education Assn. v. New Castle County Vo-Tech School District*, ULP 88-05-025, I PERB 309 (DE. PERB, 1988); *Smyrna Educators' Assn. v. Bd. of Education*, ULP 88-12-032, I PERB 403 (DE.PERB, 1989); *Indian River Education Assn. v. Bd. of Education*, ULP 90-09-053, I PERB 667 (DE.PERB, 1991); *FOP Lodge 1 v. Wilmington*, ULP 03-10-408, V PERB 3057, 3072 (DE.PERB, 2004). Hours are a term and condition of employment and a mandatory subject of bargaining. 19 Del.C. §1602(n).²

The question thus becomes what is the status quo which must be maintained following expiration of the collective bargaining agreement until new terms are established by a successor agreement. Where the predecessor agreement specifically addresses the term or condition of employment at issue, it may provide insight into the nature of the underlying relationship itself.³ The FOP specifically asserts the City violated the following provisions of the predecessor agreement: Article 5, Maintenance of Standards; Article 19, Work Schedule, Section 9.1, 19.1A; and Article 21, Alteration of Agreement, Section 21.1.

² §1602(n): "Terms and conditions of employment" means matters concerning or related to wages, salaries, hours, grievance procedures and working conditions; provided, however, that such term shall not include those matters determined by this chapter or any other law of the State to be within the exclusive prerogative of the public employer.

³ *New Castle County Vo-Tech Education Assn.*, (Supra, p. 320); *FOP Lodge 1*, (Supra., p. 3073).

The City does not contest that the shift times for uniformed services officers were changed from twelve to eleven hours on or about May 10, 2014. Considered in a light most favorable to the charging party, the pleadings are sufficient to establish the City may have violated 19 Del.C. §1607(a)(1), (a)(5) and (a)(6), as alleged.

This Board has held that where resolution of alleged statutory violations directly relate to a contractual issue which is subject to resolution through the parties' negotiated grievance and arbitration procedure, PERB may invoke a discretionary, limited deferral policy:

When parties have contractually committed themselves to agreeable procedures for resolving contractual disputes, it is prudent and reasonable for this Board to afford those procedures the full opportunity to function. *Fraternal Order of Police Lodge No. 1 v. City of Wilmington*, ULP 89-08-040, I PERB 449 (PERB, 1989), citing *Collyer Insulated Wire*, NLRB, 129 NLRB 837 (1971); *FOP Lodge 1 v. City of Wilmington*, ULP 10-11-773, VII PERB 4935 (2011).

The 2010-2013 collective bargaining agreement between these parties includes a negotiated grievance procedure that culminates in the submission of unresolved issues concerning the interpretation, application and/or operation of that agreement to final and binding arbitration before an impartial arbitrator. The FOP admits it has three pending grievances filed under Article 4 of the collective bargaining agreement for which it has filed a demand for arbitration with the AAA. *FOP Response to City's New Matter*, ¶23, 24.

PERB's deferral policy is not unconditional. The contractual issue considered by the arbitrator must be factually parallel to the unfair labor practice issue raised before the PERB and the arbitrator must be presented generally with the facts relevant to resolving the unfair labor practice charge. In order to defer to resolution through the arbitration procedure, the contractual issue which underlies the unfair labor practice charge must be submitted for determination.

In this case, the FOP asserts its charge cannot be deferred to arbitration because the City has not agreed to participate in final and binding arbitration, and in fact, has successfully argued

in the past that it is not required to do so after the expiration of a collective bargaining agreement.⁴

PERB cannot defer resolution of a legitimate unfair labor practice claim unless the matter will be placed before the arbitrator for resolution. Consequently, should this agency be advised that the substance of the underlying grievances are not being resolved at arbitration, the deferral order will be rescinded and a hearing will be convened forthwith to consider the merits of the charge.

Deferral to arbitration does not constitute a final resolution of the pending unfair labor practice charge nor deprive PERB of jurisdiction or responsibility to resolve the charge. Where deferral is ordered, the PERB retains jurisdiction over the unfair labor practice charge for the express purpose of reconsidering the matter upon application of either party for any of the following reasons:

- 1) that the arbitration award failed to resolve the statutory claim;
- 2) that the arbitration has resulted in an award which is repugnant to the applicable statute;
- 3) that the arbitral process has been unfair; and/or
- 4) that the dispute is not being resolved by arbitration with reasonable promptness.

Because a determination of whether the City violated its obligations under the POFERA turns upon application of the collective bargaining agreement, this matter is deferred to the parties' negotiated grievance and arbitration procedure.

Further processing of this Charge is stayed pending the exhaustion of the contractual procedure.

DECISION

Considered in a light most favorable the FOP, the pleadings are sufficient, however, to

⁴ City of Wilmington v. FOP Lodge 1, Supra.

establish that the City may have violated 19 Del.C. §1607 (a)(1), (a)(5), and/or (a)(6), as alleged.

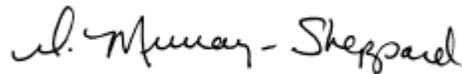
Because the resolution of the allegations of this Charge turns on application of the parties' collective bargaining agreement, the Charge is deferred to the negotiated grievance and arbitration procedure.

PERB retains jurisdiction over the Charge that the City has violated its duty to bargaining in good faith by unilaterally implementing a change to a mandatory subject of bargaining for the express purpose of reconsidering the matter, on application by either party, for any of the following reasons:

- 1) that the arbitration award failed to resolve the statutory claim;
- 2) that the arbitration has resulted in an award which is repugnant to the applicable statute;
- 3) that the arbitral process has been unfair; and/or
- 4) that the dispute is not being resolved by arbitration with reasonable promptness.

The parties are directed to notify the Public Employment Relations Board within sixty (60) days from the date of this decision as to the status of the arbitration of the underlying grievances.

DATE: January 16, 2015



DEBORAH L. MURRAY-SHEPPARD
Executive Director
Del. Public Employment Relations Bd.