

**STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD**

FRATERNAL ORDER OF POLICE, LODGE 1,	:	
	:	
Charging Party,	:	
	:	ULP No. 15-12-1019
v.	:	
	:	PROBABLE CAUSE DETERMINATION
CITY OF WILMINGTON, DELAWARE,	:	and ORDER OF DISMISSAL
	:	
Respondent.	:	

APPEARANCES

Jeffrey M. Weiner, Esq., for Charging Party, FOP Lodge 1
David H. Williams, Esq., Morris James LLP 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 were parties to a collective bargaining agreement for this bargaining unit which has a term of July 1, 2010 through June 30, 2011. The parties engaged in an unsuccessful effort to negotiate the terms of a successor agreement; ultimately, the impasse was submitted to binding interest arbitration pursuant to 19 Del.C. §1615. The interest arbitrator

issued his award on October 13, 2015, adopting FOP Lodge 1's last, best, final offer, in its entirety.

Thereafter, the City appealed the interest arbitrator's decision to the full Public Employment Relations Board. In its request for review, the City requested the Board stay implementation of the award until the request for review was heard and decided. The full PERB heard the City's appeal on November 18, 2015, and issued its award affirming the interest arbitrator's decision and award on December 21, 2015, thereby making a stay of the award unnecessary.

On December 14, 2015, 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), (2), (3), (5), and (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.
 - (2) Dominate, interfere with or assist in the formation, existence or administration of any labor organization.
 - (3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.
 - (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 the City acted maliciously with intent to deprive the members of the Wilmington Police rank and file bargaining unit of retroactive benefits and salary increases awarded by the Interest Arbitrator, in the absence of a stay.

On December 29, 2015, the City filed its Answer to the Charge, denying the assertions made by the FOP that it had violated the POFERA. The City denies the legal conclusion reached by the FOP and asserts the union is attempting to use this Charge as a vehicle to enforcement of the interest arbitration award prior to the exhaustion of the statutory appeal process.

The City's Answer did not include new matter or affirmative defenses. 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 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).

The FOP asserts the City violated its statutory duties by failing to implement the interest arbitrator's decision and award in a timely manner. The FOP argues that in the absence of a stay,

the City was obligated to promptly pay to bargaining unit employees the moneys the City had offered under its last, best, final offer, which, if the City was successful on appeal, would be the amount the City owed to those employees.¹ The FOP concluded:

[The City's] actions were malicious, intending to deprive the members of Respondent [*sic*] FOP Lodge #1 of their retroactive benefits and increased salary based upon their having challenged Respondent Wilmington in binding interest arbitration and prevailed and, thereby, despite the absence of any stay, depriving the members of Fraternal Order of Police Lodge #1 receiving these benefits, like all other City employees, except for Firefighters, in time for the Holiday Season. *Charge ¶22.*

The City responded that the City is provided with a fifteen day period in which to appeal a decision of the full PERB on review of an interest arbitrator's decision. Until the Board issued its decision on December 21, 2015, the City could not exercise its right to appeal or to seek a stay from the Court of Chancery. Were the City to implement its last, best, final offer (rather than the FOP's which the arbitrator chose), it argued it would have commit an unfair labor practice. Further, the City argues that if it had paid its proposed wage increase and the Court of Chancery subsequently reversed or remanded the arbitrator's decision, restoring the *status quo* would incur an enormous administrative expense (and might, in fact, be impossible). Finally, the City asserts the FOP is attempting to enforce the binding interest arbitration award through this unfair labor practice proceeding and to effectively deny the City the appeal rights guaranteed to it by 19 Del.C. §1609.

PERB takes administrative notice of the fact that the City did, in fact, exercise its right to file a timely appeal to the Court of Chancery, pursuant to its §1609 statutory right, in which it moved to stay implementing the interest arbitrator's order. By so doing, this Charge becomes moot, as PERB is now without jurisdiction to resolve this matter. Exclusive control of the award now rests with the Court of Chancery.

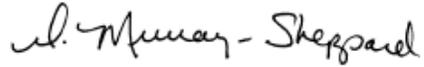
¹ The money offered by the City in its last, best, final offer was less than the money awarded by the interest arbitrator when he chose the FOP's last, best, final offer.

DECISION

For the reasons set forth above, the allegations of this Charge are moot as the underlying binding interest arbitration award is on appeal to Chancery Court, where there is also a pending motion to stay implementation of the award.

Wherefore, this Charge is dismissed.

DATE: May 2, 2016



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