

**STATE OF DELAWARE  
PUBLIC EMPLOYMENT RELATIONS BOARD**

<b>FRATERNAL ORDER OF POLICE, LODGE 1,</b>	:	
	:	
Charging Party,	:	
	:	<b>ULP No. 16-12-1090</b>
v.	:	
	:	<b>PROBABLE CAUSE DETERMINATION</b>
<b>CITY OF WILMINGTON, DELAWARE,</b>	:	<b>&amp; ORDER OF DEFERRAL</b>
	:	
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, 2011 through June 30, 2016.

On December 20, 2016, 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)(2), (a)(5) and/or (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;
  - (2) Dominate, interfere with or assist in the formation, existence or administration of any labor organization;
  - (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 violated these provisions when it denied paid parental leave benefits to bargaining unit members. The FOP asserts its membership is entitled to these benefits (which were created by City Ordinance 40-341) by operation of §20.1 of the parties' collective bargaining agreement, which states (in relevant part):

In the event any ordinances or statutes relating to members of the Police Department provide or set forth benefits or terms in excess of or more advantageous than the benefits or terms of the Agreement, the provisions of such ordinances or statutes shall prevail...

On January 6, 2017, 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 collective bargaining agreement was expired at the time the bargaining unit member requested paid parental leave on August 19, 2016, and, further, that Ordinance 40-341 did not come into effect until July 1, 2016 (the day after the collective bargaining agreement expired). It also asserts bargaining unit employees are expressly excluded from application of the paid parental leave benefit ordinance and that the FOP did not, at any time during the pendency of the Ordinance or negotiations of the collective bargaining agreement, attempt to negotiate concerning paid parental leave benefits. Finally, the City asserts a grievance is currently pending

arbitration which mirrors this Charge. It contends the Charge should either be dismissed or deferred pending a determination on the merits in arbitration.

The FOP filed its response to the City's New Matter on January 13, 2017, in which it denied the legal positions set forth therein. The FOP argued the City's assertion that the FOP has failed to exhaust its contractual remedies because the disputes are contractual in nature and have not yet been processed through grievance arbitration, is without basis in law. It asserts its Charge is based on application of 19 Del.C. §1607, while the grievance is premised only on an alleged contractual violation. The FOP contends it should be entitled to proceed simultaneously on both grounds.

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 alleges the City deprived bargaining unit members of paid parental leave benefits which were created by Ordinance 40-341 and made applicable to Wilmington Police by application of §20.1 of the parties' negotiated agreement. *Charge ¶10*. The underlying basis of this Charge is the meaning and application of a negotiated provision of the collective bargaining agreement.

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 question of whether PERB should withhold its processes arises only when a charge presents a set of facts which not only allege statutory violations but also allege a breach of the collective bargaining agreement which is subject to resolution through the grievance procedure.

The 2011-2016 collective bargaining agreement between these parties includes a negotiated grievance procedure that culminates in the submission of unresolved issues concerning "disputes or misunderstandings which may arise between the parties concerning the application or interpretation of the Agreement" to final and binding arbitration before an impartial arbitrator.<sup>1</sup> Application and/or interpretation of §20.1 falls within the express scope of resolution of this grievance procedure. Because the FOP has submitted this grievance for resolution to final and binding arbitration and the City does not contest the appropriateness of the arbitration of the

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<sup>1</sup> §4.1 of the 2011-2016 collective bargaining agreement. *Charge Exhibit B*.

grievance, staying the further processing of this Charge gives full force and effect to the parties' agreement as to how issues arising under their agreement should be resolved. The purpose of the POFERA to support and promote collective bargaining is not furthered by allowing parties to sidestep the grievance procedure by casting a dispute in statutory terms.

PERB's deferral policy is not unconditional. PERB will not 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 grievance is 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 of a charge to processing through the negotiated grievance and arbitration process 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 parties' grievance and arbitration procedure.

## DECISION

Considered in a light most favorable to the FOP, the pleadings are sufficient to establish that the City may have violated 19 Del.C. §1607 (a)(1), (a)(2) (a)(5), and/or (a)(6), as alleged.

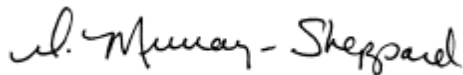
Because the resolution of the allegations of this Charge turns on application of the parties' collective bargaining agreement, the Charge is deferred to the negotiated grievance and arbitration procedure.

Without prejudice to either party and without deciding the merits of the controversy, PERB retains jurisdiction over the Charge for the limited purpose of entertaining a timely and appropriate motion for further consideration that:

- 1) the arbitration award failed to resolve the statutory claim;
- 2) the arbitration resulted in an award which is repugnant to the applicable statute;
- 3) the arbitral process was been unfair; and/or
- 4) 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 grievance.

DATE: February 27, 2017



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