

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

FRATERNAL ORDER OF POLICE, LODGE NO. 5,	:	
	:	
Charging Party,	:	
	:	
v.	:	<u>ULP No. 17-07-1109</u>
	:	
NEW CASTLE COUNTY, DELAWARE,	:	Decision on the Pleadings
	:	
Respondent.	:	

Appearances

Ronald Stoner, Esq., for FOP Lodge No. 5

Laura T. Hay, Esq., Assistant County Attorney, for New Castle County

BACKGROUND

New Castle County, Delaware (“County”) is a public employer within the meaning of §1602(l) of the Police Officers and Firefighters Employment Relations Act, 19 Del.C. Chapter 16 (“POFERA”).

Fraternal Order of Police, Lodge No. 5 (“FOP”) is an employee organization within the meaning of §1602(g) of the POFERA and is the exclusive representative of a bargaining unit of County employees (within the meaning of §1602(h)), which includes, all County Police Officers holding the ranks of Police Officer, Corporal, Sergeant, and Lieutenant.

The County and FOP Lodge 5 are parties to a current collective bargaining agreement which has a term of April 1, 2015 through March 31, 2019.

On or about July 11, 2017, the FOP filed an Unfair Labor Practice Charge with the Public Employment Relations Board (“PERB”) alleging that the County has refused to bargain collectively in good faith and interfered with the rights of bargaining unit employees, in violation of 19 Del.C. §1607(a)(1) and (a)(5), which state:

§1607. Unfair Labor Practices – Enumerated

(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.

Specifically, the FOP alleges the County refused to schedule a step II grievance hearing, thereby unilaterally modifying the terms of the negotiated grievance procedure.

On July 28, 2017, the County filed its Answer to the Charge in which it admitted material facts and denied the legal conclusions asserted in the Charge. The Answer includes Affirmative Defenses in which the County asserts the Charge fails to state a claim for which relief can be granted and that it is not ripe for resolution by PERB because the FOP has also filed an action in Superior Court seeking a declaration concerning the scope of its Chief Human Resources Officer’s authority in police disciplinary matters. The County also asserts under New Matter that the Charge is subject to dismissal or stay because of the pendency of the FOP’s declaratory judgment action in Superior Court.

On August 4, 2017, the FOP filed its Response to the New Matter raised in the County’s Answer. The FOP denies the affirmative defenses and new matter set forth

therein.

This determination results from a review of the pleadings submitted by the parties, pursuant to PERB Rule 5.6(b).

DISCUSSION

Rule 5.6 of the Rules and Regulations of the Delaware Public Employment Relations Board provides:

- (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 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 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.

The Delaware PERB is responsible for administering and applying three public sector collective bargaining statutes, including the POFERA, which states:

§ 1608 Unfair labor practices — Disposition of complaints.

- (a) The Public Employment Relations Board is empowered and directed to prevent any unfair labor practice described in §1607(a) and (b) of this title and to issue appropriate remedial orders. Whenever it is charged that anyone has engaged or is engaging in any unfair practice described in §1607(a) and (b) of this title, the Board or any designated

agent thereof shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice charge and including a notice of hearing containing the date and place of hearing before the Board or any designated agent thereof. Evidence shall be taken and filed with the Board; provided, that no complaint shall issue based on any unfair labor practice occurring more than 180 days prior to the filing of the charge with the Board.

- (b)(1) If, upon all the evidence taken, the Board shall determine that any party charged has engaged or is engaging in any such unfair practice, the Board shall state its findings of fact and conclusions of law and issue and cause to be served on such party an order requiring such party to cease and desist from such unfair practice, and to take such reasonable affirmative action as will effectuate the policies of this chapter, such as payment of damages and/or the reinstatement of employee...

The Charge alleges the County has failed or refused to schedule a step II grievance hearing and that this failure constitutes both a unilateral change in a mandatory subject of bargaining and also an interference with employee rights guaranteed by the POFERA. The merits of the grievance are not before PERB nor is the question concerning the scope of the CHRO's authority to impose discipline involving police officers. For these reasons, the County's assertions that the Charge fails to state a claim for which relief can be granted, that the Charge is not ripe for resolution by PERB, and that a decision on the issue presented should be stayed pending the Court's disposition of the FOP's Declaratory Judgement action are without merit and are, therefore, denied.

It is well established in Delaware case law the "grievance procedure is a mandatory subject of bargaining and may not be unilaterally changed by either party, either overtly or by inaction." *Donahue v. City of Wilmington*, ULP 08-11-637, VI PERB 4123, 4128 (2008). The grievance procedure lies at the heart of the continuous collective bargaining process and is the vehicle through which the negotiated collective bargaining agreement is

defined and refined during the life of the agreement. *Cape Henlopen Education Assn. v. CHSD*, ULP 01-05-319, III PERB 2239, 2245 (2001).

For the collective bargaining process to have meaning, the parties have a statutory good faith obligation to follow the negotiated grievance procedure consistently and strictly in accordance with the contractual terms. *Indian River EA v. Bd. of Education*, ULP 99-09-053, I PERB 667, 674 (1991). The negotiated grievance procedure may not be modified or ignored unless the parties have mutually agreed to do so. *Caesar Rodney Education Assn. v. Bd. of Education*, ULP 02-06-360, IV PERB 2729, 2733 (PERB Decision on Review, 2002); affirmed C.A. No. 1549-K, IV PERB 2933 (Chan. Ct., 2003).

The burden to process grievances in accordance with the negotiated procedures falls upon both parties in scheduling and participating in the hearings. The employer's representative can certainly argue that a grievance is procedurally deficient and/or that it does not meet the negotiated definition of a grievance during the processing of a grievance. What this Board has repeatedly held is that a party may not fail or refuse to schedule or participate in the negotiated grievance process based on its objection to either the procedural or substantive grievability of the matter.

There are no material issues of facts relevant to consideration of the issue presented in this Charge in the pleadings. The County admits that on June 27, 2017, the FOP filed a timely grievance on behalf of Officer Doe¹, "... alleging contract violations of Section 19 based on the Chief Human Resources Officer lacking authority to dismiss without a recommendation to dismiss by the Chief of Police and for failure to meet the just cause

¹ Because the underlying grievance concerns the termination of a police officer, the parties agreed to simply refer to the Grievant as "Officer Doe" for purposes of this proceeding.

standard of Police Directive 26, Appendix A.” *Charge and Answer* ¶8. The County further admits that by email dated June 27, 2017, the FOP was notified that the grievance was docketed and “... has been placed on the step II grievance docket for scheduling.”² *Charge Exhibit D*.

By email dated June 30, 2017, the County advised the FOP:

...[P]lease be advised that it is the County’s position that as a probationary employee [Officer Doe] is not entitled to a step II grievance hearing or any hearing associated with his dismissal. Pursuant to Section 23(b) of the collective bargaining agreement between New Castle County and FOP Lodge 5 it states, “***During the probationary period defined above, an employee may be disciplined or dismissed from service without a breach of this Agreement or constituting a grievance.***” As such, the County does not recognize the grievance (FOP/17-05) filed on behalf of [Officer Doe] and is not scheduling a step II grievance hearing or any other hearing associated with [Officer Doe’s] dismissal. *Charge Exhibit E*, emphasis in the original.

The County further admits that its position did not change as a result of continuing email correspondence concerning the scheduling of the step II grievance hearing. *Answer* ¶11.

Section (15) of the 2015-2019 collective bargaining agreement, Step Two: Chief Administrative Officer, states:

- (a) Within thirty (30) working days of the receipt of any appeal from a Step One grievance decision, the Chief Administrative Officer **shall** hold a Step Two hearing. The Chief Administrative Officer **shall** conduct investigations, appoint advisory committees, require the attendance of members of the department as witnesses and require the production or examination of records, books, papers and other documents relating to the matter as they deem necessary. The FOP Grievance Committee, through the Chief Human Resources Officer, **shall** have the authority to require the attendance of members of the department as witnesses and require the production or examination of records, books, papers and other

² The pleadings establish that the parties agreed to skip Step I of the grievance procedure. The FOP stated in ¶9 of its Charge that it has, “... consistently skipped Step I in dismissal cases under the belief that the Chief of Police cannot provide relief from a decision of the CHRO.”

documents relating to the matter.

- (b) The employee, grievance representative, and/or members of the grievance committee and/or counsel shall present the grievance at the Step Two hearing.
- (c) The Chief Administrative Officer **shall** submit his or her decision in writing, on the grievance within ten (10) working days and shall affix his or her signature thereto. *Charge Exhibit A*, emphasis added.

In *AFSCME Local 3109 v. New Castle County*, (ULP 11-07-819, VII PERB 5141, 5146 (2011)), the Hearing Officer, considering a similar set of circumstances, held:

Absent agreement to the contrary, the parties are bound by the clear and unambiguous terms of their negotiated agreement which dictates the manner and schedule for processing grievances at Step III. When the County chooses to unilaterally ignore its obligation to process grievances through the negotiated procedure, it violates its duties and obligations under the PERA.

Based on the uncontested facts as admitted by the County and the precedent of this Board, it is determined that the County has unilaterally modified the terms and conditions of employment and a mandatory subject of bargaining by failing and refusing to process the grievance at issue in this Charge through the contractual procedure set forth in Section 15 of the current collective bargaining agreement. For these reasons, the County is found to have violated 19 Del.C. §1607(a)(1) and (a)(5), as alleged.

CONCLUSIONS OF LAW

1. New Castle County, Delaware is a public employer within the meaning of §1602(l) of the Police Officers and Firefighters Employment Relations Act, 19 Del.C. Chapter 16.
2. Fraternal Order of Police, Lodge No. 5 is an employee organization within the meaning of 19 Del.C. §1602(g) and is the exclusive representative of a bargaining unit

of New Castle County employees (within the meaning of §1602(h)), which includes, all County Police Officers holding the ranks of Police Officer, Corporal, Sergeant, and Lieutenant.

3. The County and FOP Lodge 5 are parties to a current collective bargaining agreement which has a term of April 1, 2015 through March 31, 2019.

4. The grievance procedure is a mandatory subject of bargaining. Unilateral changes to the status quo of a mandatory subject of bargaining constitutes a per se violation of the POFERA.

5. New Castle County unilaterally modified the negotiated terms of the grievance procedure by failing or refusing to schedule and conduct a Step II grievance hearing, in violation of its duty to bargain in good faith and 19 Del.C. §1607 (a)(5).

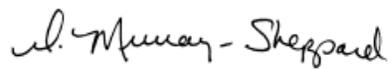
6. By this action, the County has interfered with the rights guaranteed to employees by the Police Officers and Firefighters Employment Relations Act, in violation of 19 Del.C. §1607(a)(1).

WHEREFORE, New Castle County is hereby directed to cease and desist from failing or refusing to abide by the terms of the negotiated grievance procedure and to immediately schedule the Step II hearing on Officer Doe's grievance.

FURTHER, New Castle County is directed to advise the Public Employment Relations Board within thirty (30) days of the date of this decision of its compliance with this Order.

IT IS SO ORDERED.

DATE: December 4, 2017



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