

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

FRATERNAL ORDER OF POLICE, LODGE NO. 7,	:	
	:	
Charging Party,	:	
	:	<u>ULP No. 17-08-1117</u>
v.	:	
	:	Probable Cause Determination
UNIVERSITY OF DELAWARE,	:	
	:	
Respondent.	:	

BACKGROUND

The University of Delaware (“University”) 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”). The University of Delaware Police Department is an agency of the University.

Fraternal Order of Police Lodge No. 7 (“FOP”) is an employee organization within the meaning of §1602(f) of the POFERA and is the exclusive bargaining representative of the unit of sworn University police officers holding the ranks of Police Officer through Sergeant, within the meaning of 19 Del.C. §1602(g).

The FOP and the University are parties to a current collective bargaining agreement which has a term of July 1, 2016 through June 30, 2019.

On August 29, 2017, the FOP filed an unfair labor practice charge (“Charge”) alleging conduct by the University in violation of 19 Del.C. §1607(a)(3) and/or (a)(5), which state:

§1607 (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:

- (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, except with respect to a discretionary subject.

Specifically, FOP alleges the University violated the statute and its good-faith obligations by implementing a unilateral change without negotiation in the Call-In, On-Call/Standby, which the FOP asserts is a mandatory subject of bargaining.

On September 8, 2017, the University filed its Answer denying that it engaged in conduct in violation of §1607(a)(3) and/or (a)(5). Included in its Answer was New Matter, in which the University asserts the Charge fails to state a claim for which relief can be granted under the POFERA; that the FOP has failed to exhaust its administrative remedies; and that the Charge should be deferred to arbitration because it concerns a violation of the collective bargaining agreement.

On September 18, 2017, the FOP filed its Answer to Respondent's New Matter admitting to some facts, but denying the defenses and new matter set forth by the University.

DISCUSSION

Rule 5.6 of the Rules and Regulations of the Delaware Public Employment Relations Board ("PERB") 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.

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 those differences. *Flowers v. DART/DTC*, ULP 04-10-453, V PERB 3179, 3182 (Probable Cause Determination, 2004).

The POFERA defines collective bargaining as:

... [T]he mutual obligation of a public employer through its designated representatives and the exclusive bargaining representative to confer and negotiate in good faith with respect to terms and conditions of employment, and to execute a written contract incorporating any agreements reached." 19 Del.C. §1602(e).

It further defines the scope of mandatory subjects of bargaining to include:

...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. 19 Del.C. §1602(n).

The University admits that prior to July, 2017, extra duty assignments were staffed either by volunteers or by patrol officers who were on shift. It also admits that, "an officer assigned to work patrol could use his/her accumulated compensatory or vacation time for

the patrol shift hours, in whole or in part, and then volunteer to work the extra-duty assignment based upon overtime rates.” It is undisputed that there has been a decline in the number of officers who voluntarily signed up for and worked extra duty assignments.

The University also advised Police Sergeants (who are bargaining unit members) during a Sergeants’ Retreat on July 25, 2017 of its desire to modify the practice for staffing extra duty assignments. It also admits that at least one Lieutenant discussed changing the procedure with bargaining unit officers before August 2, 2017, the date on which it asserts the University discussed the change with the Officers and Directors of FOP Lodge 7.

The University denies it “stated that patrol officers would be prohibited from applying accumulated compensatory or vacation time to their patrol shift hours in order to work extra duty assignments.”

The University asserts it was not and is not obligated to bargain with the FOP concerning the practice of assigning staff to extra-duty assignments because it is a matter of inherent managerial policy under 19 Del.C. §1605, which states:

A public employer is not required to engage in collective bargaining on matters of inherent managerial policy which include, but are not limited to, such areas of discretion or policy as the functions and programs of the public employer, its standards of services, overall budget, utilization of technology, the organizational structure and the staffing levels, selection and direction of personnel.

The University also argues it does not have a duty to bargain with the FOP because the FOP waived its right to negotiate changes to “policies, rules, regulations, and practices necessary to carry out ... managerial and administrative prerogatives,” in Article III, Management Rights, of the parties’ collective bargaining agreement.

On their face, the pleadings raise legal issues including whether the process by which bargaining unit employees are assigned and required to work extra duty assignments

is a mandatory subject of bargaining, and, if so, whether the University unilaterally implemented a change without adequate notice to the FOP and without providing the opportunity to bargain; whether the FOP waived any right to negotiate such changes; and/or whether the essential elements of this Charge are covered by the negotiated collective bargaining agreement and should therefore be deferred to resolution through the grievance and arbitration process.

The pleadings also identify issues of fact including whether the University mandated that all officers be placed on standby, whether it expanded the definition of “operational necessity” to include all extra duty assignments, whether officers were notified they “would be prohibited from applying accumulated compensatory or vacation time to their patrol shift hours in order to work extra duty assignments”, whether there is a pending grievance which would resolve the issue underlying this Charge, and/or whether the FOP failed to request negotiations after it was effectively placed on notice as to the University’s desire to modify the practice by which extra duty assignments were made.

For these reasons, the pleadings are sufficient, when considered in a light most favorable to the Charging Party, to establish that an unfair labor practice may have occurred.

A hearing will be promptly scheduled for the purpose of establishing a factual record on which argument can be considered in order to render a determination on this Charge.

DETERMINATION

Considered in a light most favorable to the Charging Party, the pleadings are sufficient to establish that the University may have violated 19 Del.C. §1607 (a)(3) and/or

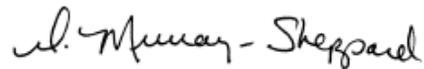
(a)(5), as alleged. The pleadings raise both questions of fact and law which can only be resolved following the creation of a complete evidentiary record and the consideration of argument.

WHEREFORE, a hearing will be promptly scheduled for the purpose of developing a full and complete factual record upon which a decision can be rendered concerning:

WHETHER THE UNIVERSITY OF DELAWARE INTERFERED WITH THE PROTECTED RIGHTS OF BARGAINING UNIT EMPLOYEES AND/OR VIOLATED ITS DUTY TO BARGAIN IN GOOD FAITH BY IMPLEMENTING A UNILATERAL CHANGE IN A MANDATORY SUBJECT OF BARGAINING CONCERNING THE STAFFING OF EXTRA DUTY ASSIGNMENTS IN VIOLATION OF 19 DEL.C. §1607 (A)(3) AND/OR (A)(5).

Having found probable cause based on the pleadings, the University's assertion that the charge fails to state a claim upon which relief can be granted is denied.

DATE: December 27, 2017



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