

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

FRATERNAL ORDER OF POLICE, LODGE NO. 5,	:	
	:	ULP No. 17-08-1115
Charging Party,	:	
	:	PROBABLE CAUSE DETERMINATION
v.	:	and ORDER OF DISMISSAL
	:	
NEW CASTLE COUNTY, DELAWARE,	:	
	:	
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 August 2, 2017, the FOP filed an Unfair Labor Practice Charge with the Public Employment Relations Board (“PERB”) alleging that the County interfered with the rights of bargaining unit employees, in violation of 19 Del.C. §1607(a)(1), which states:

§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.

Specifically, the FOP alleges the County included confidential documents relating to disciplinary grievance(s) in public filings in Superior Court and the PERB, thereby potentially subjecting those documents to public disclosure. The FOP argues the submission of confidential disciplinary documents violates provisions of the negotiated collective bargaining agreement and the Law Enforcement Officers' Bill of Rights (11 Del.C. §9200(12), "LEOBOR"). It also asserts the submission the documents into public records has a chilling effect on the potential filing of disciplinary grievances by other officers, in violation of the POFERA.

On August 14, 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 County asserts that the disputed records were sealed by the PERB (without objection by the County) on August 8, 2017. It also argues ¶ 12(b) of the negotiated agreement does not provide an absolute guarantee of confidentiality, but states the parties agree that grievance proceedings will "... be kept informal and confidential as may be appropriate". The County's Answer did not include any new matter.

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

DISCUSSION

Consistent with the statutory obligations set forth in 19 Del.C. §1608, Rule 5.6 of the Rules and Regulations of the Delaware Public Employment Relations Board states:

- (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 underlying facts in this case are not disputed. On or about June 15, 2017, FOP Lodge 5 filed a Declaratory Judgement Action in Superior Court. On July 27, 2015, the County filed a Motion to Dismiss that action. The County's Motion included as an appended exhibit the entirety of "... a Step II Grievance Decision involving discipline of a New Castle County Police Officer", from which the grievant's name was redacted.

On or about July 11, 2017, the FOP filed an unfair labor practice charge (ULP 17-07-1109) in which it alleged the County had refused to schedule a Step II hearing on a termination grievance for "Officer Doe"¹, in violation of 19 Del.C. §1607(a)(1) and/or (a)(5).² Thereafter, the County filed its Answer and New Matter in response to the Charge. In its Answer, the County included the Step II grievance decision it has submitted to the Court in its Motion to Dismiss the FOP's

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

² §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.

declaratory judgement action. It also included the Police Discipline Memorandum prepared and sent by the County Police Chief in order to establish that the Chief had recommended the termination of Officer Doe.

The instant unfair labor practice charge was filed in response to the County's submission of documents (which the FOP asserts are confidential) in both the Superior Court and PERB proceedings. The FOP argues the County submitted the disputed documents to PERB and Superior Court with the intention to embarrass the officers involved and potentially influence the decision maker by divulging the nature of the misconduct. The FOP requests the Step II grievance decision and the Chief's Discipline Memorandum be immediately stricken from the PERB's records and that the County be ordered to cease and desist from disclosing police disciplinary records.

By letter dated August 8, 2017, the two contested documents were sealed from public disclosure by the Executive Director (with the agreement of the parties) until resolution of the unfair labor practice charges. The parties were advised that the sealing of the exhibits would have no prejudicial effect on consideration of the merits of either charge.

On December 4, 2017, the Executive Director issued a decision on the pleadings in ULP 17-07-1109, finding the County violated its good faith obligations under the POFERA when it refused to schedule a Step II grievance hearing. *FOP Lodge 5 v. New Castle County*, ULP 17-07-1109, IX PERB 6967, 6970 (2017). The decision stated, "The merits of the grievance are not before PERB nor is the question concerning the Chief Human Resources Officer's authority to impose discipline involving police officers."³ Neither of the documents which are at issue in this proceeding were relevant or material to the resolution of the substantive issue raised in ULP 17-07-1109.

³ The scope of the Chief Human Resources Officer's authority was the subject of a Declaratory Judgement Action filed by FOP 5 in Superior Court on or about June 15, 2017. *Charge ¶4*.

It is well-established under the POFERA and related Delaware statutes concerning public sector collective bargaining in Delaware that issues which relate exclusively to an alleged violation of a collective bargaining agreement are subject to resolution through the parties' negotiated grievance procedure.

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*, ULP10-11-773, VII PERB 4935 (2011).

The scope of the confidentiality provision found in ¶ 12(b) of the current agreement between these parties should be resolved by the negotiated grievance process.

Delaware's Law Enforcement Officers Bill of Rights provides broad protections for "all records compiled as a result of any investigation subject to [LEOBOR] and/or a contractual grievance procedure" and requires that such records "... shall be and remain confidential and shall not be released to the public." 11 Del.C. §9200(c)(12). LEOBOR also provides that no law enforcement agency may be required to disclose "in any civil proceeding" either an officer's personnel file or an internal investigatory file compiled in connection with an investigation that could result in disciplinary action, demotion or dismissal. 11 Del.C. §9200(d).

The protection of investigatory records and records compiled during a contractual grievance procedure for Delaware law enforcement officers is set forth in LEOBOR. Enforcement responsibility of LEOBOR protections is not vested in the Public Employment Relations Board.

Similarly, the rules of practice of the Superior Court of Delaware provide parties with the means to restrict records from public disclosure on the basis of privilege or confidentiality. The Court, obviously, is responsible for enforcement of its rules of practice.

The action which was complained of, i.e., the filing of the confidential documents with the

potentiality that they could be publicly disclosed, was mitigated by the sealing of those documents from public disclosure on August 8, 2017. The disputed records were sealed in order to protect the due process rights of the grievant. The Executive Director takes administrative notice that there was no request to disclose the disputed records in the eleven day period between when the County filed its Answer and when the documents were sealed, nor at any time thereafter, up to and including the date of this decision.

The PERB is charged with promoting harmonious and cooperative relationships and assisting in resolving disputes between police officers and their employers. 19 Del.C. §1601. The statute grants the Board explicit authority to take "...such actions ... as may be necessary to discharge its powers and duties." 19 Del.C. §1605.⁴ Having determined that the disputed documents were neither material nor relevant to the resolution of ULP 17-07-1109, it is ordered that those documents now be permanently stricken from the records of Public Employment Relations Board

In this case, there is no factual basis on which to conclude that the County violated the POFERA by submitting the documents into the record, as there has been no disclosure and the records have now been stricken from the public record.

The FOP also alleged that by filing the disputed documents with its Answer to the Charge, the County violated the POFERA by "creat[ing] a chilling effect on officers filing grievances in disciplinary matters." The rights of police officers under the POFERA are set forth in §1603:

Employees shall have the right to:

- (1) Organize, form, join or assist any employee organization, provided that membership in, or an obligation to pay any dues, fees, assessments or other charges to, an employee organization shall not be required as a condition of employment.
- (2) Negotiate collectively or grieve through representatives of their own

⁴ 19 Del.C. §1605 incorporates by reference the duties, authorities, and responsibilities of the PERB set forth in 14 Del.C. §4005. Pursuant to subsection (f) of §4005, the Board has delegated its authority to the Executive Director.

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- (3) Engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection insofar as any such activity is not prohibited by this chapter or any other law of the State.
- (4) Be represented by their exclusive representative, if any, without discrimination.

In evaluating whether an employer has engaged in conduct which interferes with, restrains or coerces employees in the exercise of rights protected by the statute, the test is whether the action complained of reasonably tended to interfere with the employees' protected rights, employing an objective standard of reasonableness. *SCVT Teachers Association v. Board of Education*, ULP 88-01-021, I PERB 287, 297 (1988).

The County was ordered to meet its statutory obligation to abide by the negotiated grievance procedure and to immediately conduct the Step 2 grievance hearing. There is no factual basis on which to find there was a public disclosure of confidential disciplinary records which could reasonably have had a negative impact on the negotiated grievance procedure, generally, or which reasonably tended to interfere with, restrain or coerce County police officers in their access to the grievance procedure or any other right guaranteed by the POFERA. Consequently, this charge is dismissed.

ORDER

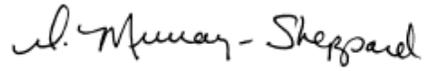
The Step II grievance answer and the Police Chief's Discipline Memorandum concerning Officer Doe which were included in the County's Answer to Charge #17-07-1109 as Exhibits A and C are hereby permanently stricken and removed from the records of the Public Employment Relations Board in unfair labor practice charges 17-07-1109 and 17-08-1115.

DECISION

Considered in a light most favorable to the Charging Party, the pleadings are not sufficient to establish that the County may have violated 19 Del.C. §1607 (a)(1), as alleged.

For this reason, the Charge is dismissed in its entirety, with prejudice.

DATE: March 9, 2018



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