

**STATE OF DELAWARE**  
**PUBLIC EMPLOYMENT RELATIONS BOARD**

<b>FRATERNAL ORDER OF POLICE LODGE 1,</b>	:	
	:	
Charging Party,	:	
	:	<b>ULP No. 18-04-1143</b>
v.	:	
	:	<b>PROBABLE CAUSE DETERMINATION</b>
<b>CITY OF WILMINGTON, DELAWARE,</b>	:	<b>AND ORDER OF DEFERRAL</b>
	:	
Respondent.	:	

**APPEARANCES**

*Jeffrey M. Weiner, Esq., for Charging Party, FOP Lodge 1*  
*Tara M. DiRocco Gryan, Asst. Solicitor, for Respondent, City of Wilmington*

**BACKGROUND**

The City of Wilmington (“City”) 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 Fraternal Order of Police, Lodge 1 (“FOP Lodge 1”), is an employee organization and an exclusive bargaining representative, within the meaning of 19 Del.C. §§1602(g) and (h). FOP Lodge 1 represents the bargaining unit of sworn City of Wilmington Police Officers in the ranks of Patrol Officer through Lieutenant.

The City and FOP Lodge 1 are parties to a collective bargaining agreement for this bargaining unit, which has a term of July 1, 2016 through June 30, 2020.<sup>1</sup>

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<sup>1</sup> The City alleges in its Answer that the term of the current collective bargaining agreement expires on June 30, 2020, rather than 2019, as stated in the Charge. Exhibit B to the City’s Answer is a copy of an arbitration request to which the grievance filed on January 16, 2017 (based on the pleadings this should be dated 2018) is appended. In that grievance, the FOP states the current collective bargaining agreement remains in full force and effect through June 30, 2020.

On April 20 2018, FOP Lodge 1 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)(3) and/or (a)(5), which state:

- (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.

FOP Lodge 1 alleges the City violated these provisions by implementing material changes to the terms and conditions of the residency requirement for bargaining unit employees based upon changes to the definition of residency. It asserts this change concerns a mandatory subject of bargaining and was made unilaterally, without negotiating, mediating, and, if necessary, resolving by binding interest arbitration, in violation of the City's good faith obligations under the POFERA. FOP Lodge 1 requests PERB find the City has violated the statute as alleged, require the City to cease and desist from modifying Residency unless and until it has negotiated and reached agreement, and to grant all reasonable remedies to make the FOP and its members whole, including attorney's fees.

On June 6, 2018, 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 1) the FOP has failed to exhaust its administrative remedies because it submitted a grievance alleging a violation of §5.1 of the parties negotiated Agreement, Maintenance of Standards, to arbitration pursuant to the parties negotiated grievance and arbitration procedures; consequently, this charge is not ripe for determination by PERB; 2) the FOP failed to object to the 2018 Declaration of Residency when it had the opportunity to do so as early as October, 2017; 3) the definition of residency is not a mandatory subject of bargaining; and

4) the residency requirement is reserved to the City's exclusive prerogative and therefore constitutes an illegal subject of bargaining. The City requests the Charge be dismissed with fees and costs assessed against the Charging Party.

FOP Lodge 1 filed its response to the City's New Matter on June 14, 2018, in which it denied the legal positions set forth therein, except that the FOP admits it did submit a grievance to arbitration in which it asserts the City has violated the Maintenance of Standards provision of the negotiated collective bargaining agreement and that the City has not contested the appropriateness of that request for arbitration.

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).

In order to find there was a violation of the POFERA as alleged, it is necessary to establish both that there was a change in the status quo relating to the residency definition and that the definition of residency is a mandatory subject of bargaining. Failure to establish either element will result in dismissal of the Charge. *Brandywine Affiliate, NCCEA/DSEA/NEA v. Brandywine School District*, ULP 85-06-005, I PERB 131, 143 (1986). To establish there has been a change in the status quo it must be determined there has been a material change in the residency requirement as it applies to bargaining unit employees.

It is undisputed that on or about January 16, 2018, the FOP submitted a grievance directly to the Wilmington Police Department's Chief of Police, pursuant to Article 4 of the parties negotiated Agreement. Where the alleged grievance, "... involves a matter of general application impacting on a significantly large number of employees", it is submitted directly to the Chief, per §4.13.

The grievance, which alleged a violation of Article 5, Maintenance of Standards, Section 5.1, stated:

On January 13, 2018 a memorandum was distributed to Wilmington Police Department Personnel directing that all employees complete the *Annual Residency and Outside Employment Declaration (Declaration)* and submit same by January 20, 2018. Notably, there were material changes to the terms and conditions of the residency requirement based upon changes in the definition of residence. The new definition seeks to impose restrictions upon employees that did not previously exist and materially changed the standard to which employees would be held. *Exhibit B to the City Answer*.

The FOP specifically laid out its complaint in the grievance letter:

- (1) The members of Fraternal Order of Police Lodge #1 have been aggrieved regarding **Section 5.1** of the Contract. The Maintenance of Standards clause provides that all "terms and conditions of employment shall be maintained at not less than the highest standards in effect at the time of the signing of this Agreement." When this Agreement was ratified the officers and members of Lodge #1 were being held to a residency standard that had been in place for some time. Members bound by the conditions of the City's definition of residency had a clear understanding of the terms they were required to meet and agreed to same upon commencement of their employment. The City made unilateral changes to the definition of the

requirement and did fail to negotiate this material change to the terms and conditions of employment.

- (2) The members of Fraternal Order of Police Lodge #1 have been aggrieved by having more restrictive, non-codified standards imposed upon them, through the issuance of a mandatory form, which are in conflict with the general orders by which they are governed. The **Code of Ordinances of the City of Wilmington Section 3-304** offers no definition for “residence”. Rather the standards and definitions applied to the rule are only set forth on the *Declaration* and in the *Directive*, and the definitions differ between these two documents. As the actual definition of residence is not codified, employees adhere to the conditions which are set forth in the policies of their department.
- (3) The members of Fraternal Order of Police Lodge #1 have been aggrieved through the distribution of the memorandum and form (Declaration) requiring that they take the action binding themselves to a new standard which materially changes the terms of their employment without notice and without the opportunity to properly address the City’s unilateral changes. *Exhibit B to the City Answer.*

Whether the City has committed the unfair labor practice as alleged is dependent on a preliminary determination that there was a change in the status quo of the residency requirement. There is unity in this issue with the issue grieved by the FOP on January 16, 2018.

This Board has held that where resolution of an alleged statutory violation directly relates 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 2016 - 2020 collective bargaining agreement between these parties includes a

negotiated grievance procedure that culminates in the submission of unresolved issues to final and binding arbitration before an impartial arbitrator. Application and/or interpretation of §5.1 falls within the express scope of resolution of this grievance procedure.

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. 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 grievance, staying the further processing of this Charge and deferring resolution of the underlying issue of whether there was a change, gives full force and effect to the parties' agreement.

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) the arbitration award failed to resolve the statutory claim;
- 2) the arbitration has resulted in an award which is repugnant to the applicable statute;
- 3) the arbitral process has been unfair; and/or
- 4) the dispute is not being resolved by arbitration with reasonable promptness.

The processing of this Charge is stayed pending the exhaustion of the parties' grievance

and arbitration procedure.

**DETERMINATION**

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)(3) and/or (a)(5), as alleged.

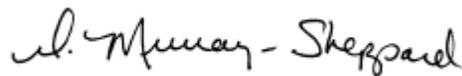
Because the resolution of the allegations of this Charge turns on application of the parties' collective bargaining agreement, the Charge is deferred to the negotiated grievance and arbitration procedure.

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 has 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: August 21, 2018



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