

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

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| LT. JAMES AZATO, | : | |
| | : | PERB Review of the Executive |
| Appellant, | : | Director's Dismissal of Petition to |
| and | : | <u>Modify Existing Bargaining Unit</u> |
| | : | |
| CITY OF LEWES AND INTERNATIONAL | : | REP. PET. NO. 18-09-1161 |
| BROTHERHOOD OF TEAMSTERS, LOCAL 326, | : | |
| AFL-CIO, | : | |
| | : | |
| Appellees. | : | |

APPEARANCES

Michele Allen, Esq., Allen & Associates, *for Appellant*

William W. Bowser, Esq., Young Conaway Stargatt & Taylor, *for City of Lewes*

The Appellant, Lt. James Azato (Lt. Azato), is employed by the City of Lewes Police Department as the second-in-command to the Chief of Police. The City of Lewes is a public employer within the meaning of §1602(l)¹ of the Police Officers and Firefighters Employment Relations Act (POFERA, 19 Del.C. Chapter 16). Lt. Azato is a public employee within the meaning of 19 Del.C. §1602(k).²

All Police Officers employed by the City of Lewes, excluding the Chief of Police and the

¹ "Public employer" or "employer" means the State or political subdivisions of the State or any agency thereof, any county, or any agency thereof, or any municipal corporation or municipality, city or town located within the State or any agency thereof, which:

... (3) Employs 25 or more full-time employees. For the purposes of this paragraph, "employees" shall include each and every person employed by the public employer except:

a. Any person elected by popular vote; and

b. Any person appointed to serve on a board or commission. 19 Del.C. §1602(l)

² "Public employee" or "employee" means any police officer or firefighter employed by a public employer except those determined by the Board to be inappropriate for inclusion in the bargaining unit; provided, however, that for the purposes of this chapter, this term shall not include any state employee covered under the State Merit System. 19 Del.C. §1602(k)

highest ranking officer who holds the position immediately subordinate to the Chief on a regular basis and who is above the rank of Sergeant, are included in a bargaining unit currently represented by the International Brotherhood of Teamsters, Local 326, AFL-CIO (Teamsters Local 326).³ Teamsters Local 326 is an employee organization within the meaning of 19 Del.C. §1602(g)⁴ and is an exclusive bargaining representative of the bargaining unit of Lewes Police Officers as defined above, within the meaning of 19 Del.C. §1602(h).⁵

On or about September 17, 2018, Lt. Azato filed a petition with the Public Employment Relations Board (PERB) for modification of certification of the bargaining unit of Lewes Police Officers represented by Teamsters Local 326. Specifically, the petition sought to include the Lieutenant's position held by Lt. Azato in the bargaining unit. The petition alleged "Assignments and responsibilities have been added and the terms and conditions of employment have changed since the official removal of the Lieutenant's position." The petition was not signed by either the City of Lewes or Teamsters Local 326, and there was no other indication that either of these organizations supported Lt. Azato's petition.

By letter dated September 18, 2018, the PERB Executive Director dismissed the petition without prejudice for lack of standing. The letter stated:

Section 1610(e) of the Police Officers and Firefighters Employment Relations Act, states: "Procedures for redefining or modifying a unit shall be set forth in the rules and procedures established by the Board." Pursuant to this statutory mandate, PERB has adopted Regulation 3.4, which states, in relevant part:

- (8) Modification of a Bargaining Unit: In the event that there is a substantial modification in the nature of the duties and working conditions of a position within the bargaining unit, or a new position is created which is not covered by the existing bargaining

³ DOL Case 250(b); PERB Representation Petition No. 16-10-1082.

⁴ "Employee organization" means any organization which admits to membership police officers or firefighters employed by a public employer and which has as a purpose the representation of such employees in collective bargaining, and includes any person acting as an officer, representative or agent of said organization. 19 Del.C. §1602(g)

⁵ "Exclusive bargaining representative" or "exclusive representative" means the employee organization which as a result of certification by the Board has the right and responsibility to be the collective bargaining agent of all employees in that bargaining unit. 19 Del.C. §1602(h)

unit definition, or there is some other compelling reason for the Board to consider modifying the designated bargaining unit, the public employer and/or the exclusive bargaining representative may file a petition with the Board ...

A modification petition can only be filed by the public employer and/or the exclusive bargaining representative and must allege there is a compelling reason for the Board to consider modifying the bargaining unit. As you are neither the public employer (the City of Lewes) nor the exclusive representative (Teamsters Local 326), you lack standing to file this petition; consequently, it must be dismissed.

A copy of the letter of dismissal was simultaneously provided to both the City of Lewes and Teamsters Local 326.

Thereafter, Lt. Azato filed a request for review by the full Public Employment Relations Board, which was received on September 21, 2018. A copy of the request for review was provided to the City and Teamsters Local 326, which were provided the opportunity for each to file a written response. The City of Lewes, through its counsel, filed a response which PERB received on October 9, 2018.

A copy of the record in this matter was provided to each member of the Public Employment Relations Board for review prior to the hearing. A hearing was convened on November 14, 2018,⁶ at which time the full Board met in public session to hear and consider this request for review. Both Lt. Azato and the City of Lewes were provided the opportunity to present oral argument.⁷ The decision reached herein is based upon consideration of the record and the arguments presented to the Board.

DISCUSSION

The Board's scope of review is limited to the record created by the parties and consideration of whether the decision is arbitrary, capricious, contrary to law, or unsupported by

⁶ The appeal hearing was originally scheduled for October 17, 2018, but was postponed and rescheduled at the Appellant's request.

⁷ Representatives of Teamsters Local 326 attended the public hearing but did not take a position with respect to the appeal.

the record. After consideration of the record and the arguments of the parties on appeal, the Board must vote to either affirm, overturn, or remand the decision to the Executive Director for further action.

The Delaware PERB has broadly construed representation of public employees for purposes of collective bargaining as a foundational right under the three statutes it administers. In this case, the Board's function and responsibilities are set forth in the Police Officers and Firefighters Employment Relations Act, as are the rights of police and firefighters, public employers, and bargaining representatives. Section 1603 states:

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 choosing.
- (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.

Contrary to the Appellant's assertions during the hearing, there is no "absolute right to representation" under the statute. The clear statutory language establishes an employee's right is to be represented by an exclusive representative, if any, without discrimination. An employee organization which admits police officers employed by a public employer and which has as a purpose the representation of those police officers in collective bargaining, can become an exclusive representative only "... as a result of certification" by PERB. 19 Del.C. §1602(g) and (h).⁸

⁸ 19 Del.C. §1602

(g) "Employee organization" means any organization which admits to membership police officers or firefighters employed by a public employer and which has as a purpose the representation of such employees in

Only an employee organization can file a petition to be certified as an exclusive bargaining representative. That petition must be accompanied by a showing of support from at least 30% of the employees that organization seeks to represent. 19 Del.C. §1610(a). This Board is exclusively charged with determining whether a petition is properly filed and supported, and if so, then engages in the process to define an appropriate bargaining unit and ultimately to conduct the election that may lead to certification of an exclusive bargaining representative.

The purpose of a bargaining unit modification petition is to change the composition of a defined bargaining unit for which an exclusive representative has been certified. PERB Rule 3.4(8) establishes there are limited circumstances under which a modification petition can be filed.⁹ It states a modification petition may be filed by either the exclusive representative of the existing bargaining unit or the public employer when "...there is a substantial modification in the nature of the duties and working conditions of a position within the bargaining unit, or a new position is created which is not covered by the existing bargaining unit definition, or there is some other compelling reason for the Board to consider modifying the designated bargaining unit..."

When a petition to modify a bargaining unit is filed, there is an existing collective bargaining relationship between the exclusive representative and the public employer. Substantial modifications in the duties and/or working conditions of bargaining unit positions, and/or the

collective bargaining, and includes any person acting as an officer, representative or agent of said organization.

- (h) "Exclusive bargaining representative" or "exclusive representative" means the employee organization which as a result of certification by the Board has the right and responsibility to be the collective bargaining agent of all employees in that bargaining unit.

⁹ PERB Rule 3.4 (8) Modification of a Bargaining Unit: In the event that there is a substantial modification in the nature of the duties and working conditions of a position within the bargaining unit, or a new position is created which is not covered by the existing bargaining unit definition, or there is some other compelling reason for the Board to consider modifying the designated bargaining unit, the public employer and/or the exclusive bargaining representative may file a petition with the Board which shall include the following:

- (a) The name of the employer;
- (b) The name of the exclusive representative;
- (c) A description of the bargaining unit;
- (d) A brief statement explaining the reasons for a modification of the bargaining unit.

creation of new positions are known to and of mutual interest to both the employer and the union representing the bargaining unit.

This Board has held that a petition by an exclusive representative to include an unrepresented group of positions in an existing bargaining unit through bargaining unit modification meets the 3rd condition of PERB Rule 3.4(8). It constitutes “some other compelling reason for PERB to consider modifying the certified bargaining unit.” Permitting only the employer and/or the exclusive representative to file a modification petition “... is consistent with the transfer of rights which occurs once employees have chosen to be represented.” *In RE: Battalion Chiefs of Wilmington Fire Dept.*¹⁰ The petition must be accompanied by a verifiable showing of support of at least thirty percent (30%) of the affected employees. The PERB Executive Director is charged with reviewing the petition for purposes of determining whether it satisfies the requirements of PERB Rule 3.

This holding has been invoked in a number of modification petitions, and in each case, PERB has required the petition to be supported by the existing representative of the bargaining unit. The Appellant’s reliance on the decision in *Battalion Chiefs of the WFD* is misplaced. The decision states PERB has entertained modification petitions, where unrepresented employees seek to be represented through inclusion within an existing bargaining unit were a showing of interest by at least 30% of the unrepresented employees “... and an indication by the exclusive representative of the bargaining unit that it is willing to represent the employees/positions in question.”¹¹ The decision also makes it clear that the exclusive representative, Local 1590, International Association of Firefighters, supported the petition and that its President “testified in support of the Battalion Chiefs’ position during the hearing.”¹² More importantly, each

¹⁰ REP 95-16-142, III PERB 1253, 1258 (PERB, 1995)

¹¹ *Supra.* at p. 1257.

¹² *Supra.* at p. 1263.

modification petition filed since the Wilmington Fire Department case in 1995 was filed directly by the exclusive representation of the bargaining unit of which modification was sought or by the public employer.¹³

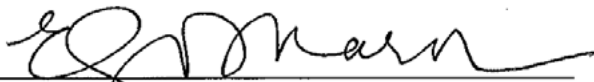
The Appellant filed the instant modification petition on his own behalf. The Executive Director, consistent with Board precedent and the statutory purposes, correctly determined he did not have standing to file the petition and appropriately dismissed the petition, without prejudice.

DECISION


After reviewing the record, hearing and considering the arguments of the parties, the Board unanimously affirms the decision of the Executive Director dismissing the modification petition because the petitioner is neither a public employer nor the exclusive representative of the bargaining unit of which modification is sought, as required by PERB Rule 3.4(8).

Wherefore, the appeal of the dismissal is denied.

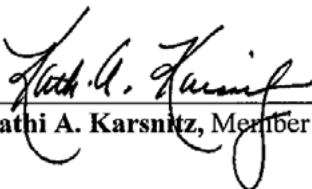
IT IS SO ORDERED.



Elizabeth D. Maron, Chairperson



R. Robert Currie, Jr., Member



Kathi A. Karsnitz, Member

DATED: December 19, 2018

¹³ See *In Re: Dover Police Dept. Lieutenants and FOP Lodge 15*, REP 98-08-242, III PERB 1831, 1832 (1999).
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