

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

FRATERNAL ORDER OF POLICE, LODGE 10,	:	
	:	
PETITIONER,	:	
	:	<u>DS 19-10-1207</u>
v.	:	
	:	
STATE OF DELAWARE, DEPARTMENT OF CORRECTION,	:	DETERMINATION AND ORDER
BUREAU OF COMMUNITY CORRECTIONS,	:	OF DISMISSAL
	:	
RESPONDENT.	:	

The State of Delaware (“State”) is a public employer within the meaning of 19 Del.C. §1302(p) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (“PERA”). The Department of Correction (“DOC”) is an executive branch agency of the State, and the Bureau of Community Corrections (“BCC”) is a division within the Department of Correction.

The Fraternal Order of Police (“FOP”) is an employee organization within the meaning of 19 Del.C. §1302(i). By and through its affiliated Lodge No. 10, the FOP is the exclusive representative of a bargaining unit of DOC/BCC employees holding the positions of Probation and Parole Officer I, Probation and Parole Officer II, and Senior Probation and Parole Officer, as defined in DOL Case 165. 19 Del.C. §1302(j).

FOP Lodge 10 and the State have a long history of collective bargaining. Their most recent agreement had a term of January 1, 2007 through December 31, 2009. The agreement included an evergreen clause in Article 22, which provides the agreement, “...

shall be automatically renewed from year to year thereafter, unless either party shall give the other party written notice of desire to terminate, modify or amend this Agreement 180 days prior to the expiration of this Agreement.”

The Probation and Parole Officers represented by FOP 10 are also included in a coalition of “law enforcement and investigative agents”, as set forth in 19 Del.C. §1311A(b)(9).¹ The coalition of employee organizations (“Unit 9 Coalition”) which represents State merit system employees in the compensation unit commonly referred to as “Unit 9” includes FOP Lodges 3, 10, and 11, General Teamsters Local 326, and AFSCME Council 81 with its affiliated Local 3384. The employees in Unit 9 are employed by numerous State agencies, including the departments of Safety and Homeland Security, Natural Resources and Environmental Control, Services for Children Youth and Their Families, Justice of the Peace Courts, and the Office of the State Fire Marshal, in addition to DOC.

The State and the Unit 9 Coalition were parties to a collective bargaining agreement which had a term of July 1, 2018 through June 30, 2019. In or around December, 2018, the State and the coalition entered into negotiations for a successor to the Unit 9 agreement. In or around late April 2019, the Unit 9 Coalition and the State entered into a Memorandum of Agreement which has a term of July 1, 2019 through June 30, 2023. Included in the Memorandum of Agreement are pay scales for DOC/BCC Probation and Parole Officers (collectively) represented by FOP Lodge 10.

¹ 19 Del.C. §1311A (b) For purposes of bargaining pursuant to this section, employees shall be classified in the following bargaining units, each of which shall independently bargain compensation:

- ... (9) Law-enforcement and investigative agents which is composed of agency police officers, natural resource and environmental control officers, parole and probation officers of the Department of Correction, alcoholic beverage control officers, deputy fire marshals I through V, investigators and similar occupations

There is no dispute that the terms of the Memorandum of Agreement were implemented, effective on July 7, 2019, the first day of the first pay cycle of Fiscal Year 2020.²

On or about October 10, 2019, FOP Lodge 10 filed a Petition for Declaratory Statement in which it asserts "... on or about July 7, 2019, the State unilaterally ceased paying hazardous duty pay to Probation and Parole Officers I, Probation and Parole Officers II, and Senior Probation and Parole Officers represented by the FOP." It asserts the failure to continue to provide hazardous duty pay to bargaining unit employees violates 29 Del.C. §5916(e)(1).³ The FOP asserts that because it did not agree to eliminate the statutory right to hazardous duty pay, the State committed an unfair labor practice and violated 19 Del.C. §1307(a)(1), (5) and (7)⁴ by instituting a unilateral change in the compensation of Probation and Parole Officers.

² In order for the MOA to have become effective on July 7, Section 8(a) of the Fiscal Year 2019 Budget Act (Senate Bill 235) required the Agreement be "finalized" by both parties prior to May 1, 2019.

³ 29 Del.C. §5916(e): No employee of any department or agency shall receive hazardous duty pay, except those specifically included in the following paragraphs:

- (1) Employees, otherwise qualified, who are employed by the Department of Correction (or its successor agency).

The FY 2020 Budget Act (Senate Bill 225, which was signed into law by the Governor on or about June 25, 2019) did not modify 29 Del.C. §5916(e)(1).

⁴ §1307 Unfair labor practices.

- (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, except with respect to a discretionary subject.
 - (7) Refuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting contract.

The State responded to the FOP's petition on November 4, 2019. It opposes the petition asserting that it is improper because 1) the FOP does not have standing to seek a declaratory statement concerning hazardous duty pay for probation and parole officers because it is matter which must be negotiated by the Unit 9 Coalition, pursuant to 19 Del.C. §1311A; 2) the petition does not meet the requirements for issuance of a declaratory statement under PERB Rule 6; 3) the requested Declaratory Statement pertains to an agreement between the State and the Unit 9 Coalition that hazardous duty pay is included in the negotiated wage rates for probation and parole officers; and 4) any claim that the State unilaterally changed compensation under the negotiated Memorandum of Agreement is subject to resolution under the parties' negotiated grievance procedure.

This decision results from review of the pleadings submitted by the parties.

DISCUSSION

PERB Rule 6, Petitions for Declaratory Statement,⁵ states that a petition may be filed where a controversy exists concerning (1) a potential unfair labor practice (2) whether a matter is within the scope of collective bargaining as defined by statute; or (3) the application of any statutory provision, regulation or order of the PERB. Rule 6.1(b). The Rule also states a "controversy" subject to resolution under the Declaratory Statement provision exists when:

⁵ PERB Rule 6 was adopted pursuant to §4006, Public Employment Relations Board, of the Public School Employment Relations Act, which is specifically incorporated by reference into the POFERA at §1606. 14 Del.C. §4006(h) states, in relevant part,

- (h) To accomplish the objectives and to carry out the duties prescribed in this chapter, the Board shall have the following powers:
 - (4) To provide by rule a procedure for the filing and prompt disposition of petitions for a declaratory statement as to the applicability of any provision of this chapter or any rule or order of the Board. Such procedures shall provide for, but not be limited to, an expeditious determination of questions relating to potential unfair labor practices and to questions relating to whether a matter in dispute is within the scope of collective bargaining.

- (1) The controversy involves the rights and/or statutory obligations of a party seeking a declaratory statement;
- (2) The party seeking the declaratory statement is asserting a statutory claim or right against a public employer, an exclusive representative, or a public employee who has an interest in contesting that claim or right;
- (3) The controversy is between parties whose interests are real and adverse; and,
- (4) The matter has matured and is in such a posture that the issuance of a declaratory statement by the Board will facilitate the resolution of the controversy. *Rule 6.1(c)*

The petition for declaratory statement filed by FOP Lodge 10 specifically alleges that by ceasing to pay bargaining unit employees hazardous duty pay effective July 7, 2019, the State made a unilateral change to a mandatory subject of bargaining (i.e., compensation). This action, the FOP asserts, violates the State's statutory obligations under the PERA to bargain in good faith, to reduce an agreement reached as result of collective bargaining to writing, and to refrain from interfering with, restraining or coercing bargaining unit employees in the exercise of their protected rights.

The FOP's petition states, "...[b]ecause the FOP did not agree to eliminate the statutory right of hazardous duty pay, the State violated 19 Del.C. §1307(a)(1), (5), and (7) by eliminating hazardous duty pay." *Petition ¶21*. The FOP also requests a remedy in its petition, namely that PERB, "... issue an order finding the State in violation of 19 Del.C. §1307(a)(1), (5), and (7) for unilaterally eliminating hazardous duty pay."

The preliminary inquiry as to whether a petition for declaratory statement is properly filed requires that the petition establish, on its face, that a controversy exists as defined by PERB Rule 6.1(b). This petition does not meet any of the three criteria, as it does not raise a question concerning either:

- (1) A potential unfair labor practice;
- (2) Whether a matter is within the scope of collective bargaining as defined by statute; or

(3) The application of any statutory provision or regulation or order of the Board.

“A petition for declaratory statement ... permits the expeditious processing of questions relating to a potential unfair labor practice...”⁶ “Unlike unfair labor practice charges which assert the statute has been violated and request remediation of the asserted wrongs, a declaratory statement addresses questions concerning applicability of statutory provisions and/or PERB rulings.”⁷

The instant petition asserts that the State committed an unfair labor practice by unilaterally ceasing to pay hazardous duty pay to bargaining unit employees and requests an order be issued finding a violation of specific unfair labor practice prohibitions found in §1307(a) of the PERA.

This is not a petition which seeks a determination which would pre-emptively provide guidance by which a potential unfair labor practice might be avoided. Consequently, it does not meet the criteria for consideration in this forum.

Because the petition does not involve a controversy which is subject to consideration by a declaratory statement, it is unnecessary to consider the merits of the affirmative defenses and new matter raised in the State’s response to the petition.

An objection to an alleged unilateral change in terms and conditions of employment is properly filed as an unfair labor practice charge. The FOP is reminded 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.”¹⁹ Del.C. §1308(a). Should the FOP choose

⁶ *Delaware Public Employees Council 81, AFSCME v. Appoquinimink School District*, DS 96-07-186, II PERB 1443, 1446 (1996).

⁷ *Bourdon v. Del. Office of State Personnel & DHSS*, DS 03-08-400, V PERB 3039, 3044 (2004).

to file an unfair labor practice charge, the State's defenses may be relevant and dispositive.

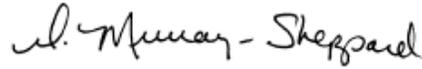
DETERMINATION

For the reasons set forth above, FOP Lodge 10's Petition for Declaratory Statement is denied as it fails to establish a controversy exists which is subject to resolution by a declaratory statement, under PERB Rule 6.1. This matter is not in a posture such that the requested declaratory statement will facilitate the resolution of a controversy between these parties.

Wherefore, this petition is dismissed.

IT IS SO ORDERED.

DATE: December 3, 2019



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