

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

<b>FRATERNAL ORDER OF POLICE, LODGE NO. 5,</b>	:	
	:	
Charging Party,	:	
	:	
v.	:	<b><u>ULP No. 19-12-1216</u></b>
	:	
<b>NEW CASTLE COUNTY, DELAWARE,</b>	:	<b>Decision on the Pleadings</b>
	:	
Respondent.	:	

Appearances

*Anthony Delcollo, Esq., Offit Kurman, for FOP Lodge No. 5*  
*Margaret M. DiBianca, Esq., Clark Hill PLC, 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 were at all times relevant to the processing of this unfair labor practice charge, parties to a collective bargaining agreement which had a term of April 1, 2015 through March 31, 2019.

On or about December 5, 2019, the FOP filed an Unfair Labor Practice Charge with

the Public Employment Relations Board (“PERB”) alleging that the County engaged in conduct in violation of 19 Del. C. §1607 (a)(1), (a)(3), (a)(5) and (a)(6), which state:

§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.
  - (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.
  - (6) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

Specifically, the FOP alleges the County violated these sections of the POFERA by:

- (a) Unilaterally changing and/or disregarding negotiated protections and duties of the collective bargaining agreement;
- (b) Failing to correctly process the good faith complaints of FOP members related to the violation of multiple County directives, potential administrative violations, and possible illegal behavior;
- (c) Discouraging the reporting of a complaint, discouraging the exercise of bargained for protections in the collective bargaining agreement relating to working conditions as defined in the statute, and otherwise interfering with the exercise of rights guaranteed by the statute or working conditions bargained for;
- (d) Eliminating protections and unilaterally changing, in bad faith, conditions of employment that are required to be the subject of collective bargaining.

- (e) Refusing to investigate and take action on a complaint and thus disregarding and in effect unilaterally modifying the multiple working conditions bargained for in the collective bargaining agreement.
- (f) Failing to follow directives and rules related to sexual harassment and conduct unbecoming towards county employees as well as other bargained for working conditions;
- (g) Failing to comport with the negotiated for requirement in the collective bargaining agreement that the County maintain the highest standards that were in effect at the time this agreement was signed; and/or
- (h) Refusing a request to produce a disciplinary investigation report consistent with established and agreed upon grievance process/procedures thereby unilaterally modifying a mandatory term of collective bargaining – the grievance process/procedure - and failing to bargain in good faith. *Charge ¶23.*

On January 8, 2020, the County filed its Answer to the Charge in which it admitted some facts, while contesting others, and denied the legal conclusions asserted in the Charge. The Answer included Affirmative Defenses in which the County asserts the Charge fails to state a claim for which relief can be granted; that it is not ripe for resolution by PERB because the FOP has also filed an action in Superior Court seeking a declaration concerning the scope of its Chief Human Resources Officer's authority in police disciplinary matters; and that portions of the Charge are barred by the statute of limitations. The County also asserts under New Matter that the Charge is subject to dismissal or stay because of the pendency of the FOP's declaratory judgment action in Superior Court.

On January 16, 2020, the FOP filed its Response to the New Matter raised in the County's Answer. The FOP denies the affirmative defenses and new matter set forth therein.

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

## DISCUSSION

Rule 5.6 of the Rules and Regulations of the Delaware Public Employment Relations Board 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.

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 factual differences. *Flowers v. DART/DTC*, PERB Probable Cause Determination, ULP 04-10-453, V PERB 3179, 3182 (2004). In this case, the material underlying facts are documented and/or uncontested.

Prior to a consideration of the merits of the Charge, it is necessary to make a preliminary determination as to whether the Charge is timely. The POFERA states, "... 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. §1608(a)*. PERB Rule 5.2 states (in relevant part):

- (a) A public employer, labor organization, and/or one or more employees may file a complaint alleging a violation of ... *19 Del. C. §1307*. Such complaints must be filed within one

hundred and eighty (180) days of the alleged violation. This limitation shall not be construed to prohibit introduction of evidence of conduct or activity occurring outside the statutory period, provided the Board or its agents finds it relevant to the question of commission of an unfair labor practice within the limitations period.

The authority of PERB to adopt a rule requiring the prompt filing of unfair labor practice charges is well established. *FOP Lodge 15 v. City of Dover* (ULP 98-02-225, III PERB 1709, 1714, 1718 (PERB, 1998); *AFSCME Local 3911 v. New Castle County*, ULP 09-07-695, VII PERB 4401, 4405 (PERB, 2009); *ATU Local 842 v. State of Delaware, DTC*, ULP 12-02-850, VIII PERB 5493, 5497 (2012).

The Charge was filed on December 5, 2019; the preceding 180-day period would have commenced on June 7, 2019.<sup>1</sup> Consequently, the Charge, as it relates to any potential violation of the statute which occurred prior to June 7, 2019, is untimely. Specifically, anything related to complaints by the FOP or its members concerning conduct or processes which occurred before June 7, 2019 are statutorily time barred.

The only timely actions which the FOP alleges as the basis for the Charge is a June 7, 2019 meeting between the Acting Director of Public Safety, “five of the six complainants” and the union presidents of FOP Lodge 5 and AFSCME Local 3109<sup>2</sup>, and a series of emails and events which occurred thereafter.

The FOP describes the June 7, 2019 meeting in ¶17 of the Charge:

On June 7<sup>th</sup>, 2019 a meeting was held, wherein ... complaints were presented to the [*then Acting Public Safety*] Director. During that meeting, which was attended by the Director, FOP president Yard, five of the six complainants, and a representative from AFSCME

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<sup>1</sup> PERB Regulation 1.1(a) states, in relevant part: “In computing any period of time prescribed by or allowed by the Act, these Regulations or an Order of the Board, the day of the act or event after which the designated period of time begins to run shall be included.”

<sup>2</sup> Charge Paragraph 17.

Local 3109, it was made abundantly clear that the employees/FOP members in attendance were providing additional formal complaints that contained new material related to alleged misconduct carried out by [*senior NCCPD officers*] and others, beyond the apparent scope of the WPD investigation...

At some point either during or following the meeting, the manila envelope containing the complaints was sealed and then delivered to the County's Attorney.

By letter dated June 18, 2019, County Attorney Davis Wilson returned the unopened envelope to the FOP's counsel. The letter stated:

... I have enclosed an envelope that Fraternal Order of Police Lodge #5 President Jonathan Yard and other FOP members, provided to Acting Director of Public Safety Michael Hojnicky at a meeting without the presence of counsel on June 7, 2019. Acting Director Hojnicky and President Yard joint sealed this envelope, and it remains unopened.

It is my understanding that the materials in the envelope relate to a system-wide grievance that the FOP filed on May 3, 2019, and later withdrew on May 6, 2019. I am returning the envelope to you because former County Attorney Carol Dulin previously communicated with you about this matter in your capacity as FOP's legal counsel.

Substantively, the County's position remains unchanged from what Ms. Dulin conveyed to you – that is, the County desires to adhere to the formal processes set forth in the collective bargaining agreement. My reiteration of the County's position should not be understood to mean that the County is willing to waive or toll any timeframes under the CBA.<sup>3</sup>

In correspondence dated June 25, 2019 the FOP responded:

... [T]he meeting itself and the complaints issued by the NCC employee complainants are not FOP matters. The meeting and the contents of the envelope constitute separate complaints that were lodged by each individual NCC employee in attendance at the June 7 meeting. The attendance of President Yard, as was explained at the meeting, was merely for the purpose of offering support for the concerns of FOP members that, dependent upon actions taken by the County, could engender a matter or matters of FOP concern in

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<sup>3</sup> Exhibit A to the FOP's Unfair Labor Practice Charge.

the future.<sup>4</sup>

There is nothing on the face of the Charge which supports a determination that the June 7, 2019 meeting violated any provisions of the POFERA or that it is subject to challenge by the FOP as the exclusive representative of the certified bargaining unit of New Castle County Police officers.

The rights of police officers and firefighters under the POFERA are all related to collective bargaining and are defined in 19 Del. C. §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 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 such activity is not prohibited by this chapter or any other law of the state.
- (4) Be represented by their exclusive bargaining representative, if any, without discrimination.

The statute also establishes the rights and obligations of the employee organization which has been certified as the exclusive bargaining representative of an appropriate bargaining unit at §1604:

- (a) The employee organization designated or selected for purposes of collective bargaining by the majority of employees in an appropriate collective bargaining unit shall be the exclusive representative of all employees in the unit for such purposes and shall have the duty to represent all unit employees without discrimination. Where an exclusive representative has been certified, a public employer shall not bargain in regard to matters covered by this chapter with any employee, group of

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<sup>4</sup> Exhibit B to the Unfair Labor Practice Charge.

employees or other employee organization...

Paragraph 1 of the Charge identifies FOP Lodge 5 as the exclusive representative of New Castle County Police Officers at and below the rank of Senior Lieutenant. This is confirmed by the Section 3(b) of the 2015 – 2019 collective bargaining agreement.<sup>5</sup> FOP Lodge 5, as the certified exclusive bargaining representative of this bargaining unit, has the right and obligation to negotiate on behalf of the County Police Officers in the bargaining unit. Section 1601 (2) specifically obligates, “[P]ublic employers and organizations of police officers and firefighters which have been certified as representing their employees to enter into collective bargaining negotiations with the willingness to resolve disputes relating to terms and conditions of employment and to reduce to writing any agreements reached through such negotiations.”

The rank of Captain is not included in the bargaining unit represented by FOP Lodge 5. While Captains may be admitted to membership by the fraternal organization, Captains are not bargaining unit members. Consequently, FOP Lodge 5 does not have standing to negotiate with the County on behalf of Captains or any other rank of County Police Officer above Senior Lieutenant. Further, the negotiated collective bargaining agreement between the County and FOP Lodge 5 does not apply to Captains and a grievance cannot be filed on behalf of a Captain under the collective bargaining agreement.

The pleadings establish a formal complaint was filed by a female NCC Police Captain with the Chief of Police on or about August 20, 2018, alleging she had suffered discrimination in her employment through a sexually hostile work environment, sexual discrimination, and sexual abuse by a senior officer. The unfair labor practice Charge

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<sup>5</sup> The Recognition Clause is consistent with the bargaining unit certification maintained by the Public Employment Relations Board as DOL Case 53.

alleges that after her complaint was filed, additional members of the FOP, and other County employees also came forward to report similar behavior. *Charge, ¶10.*

It is undisputed that the County initiated an investigation of the Captain's complaint and requested the Internal Affairs Division of the Wilmington Police Department ("WPD-IA") conduct the investigation. During the course of its investigation, the WPD-IA received statements from two NCCPD Captains, a Master Corporal, a Corporal, a retired NCCPD Lieutenant and two civilian employees. The County asserts in its Answer that of these individuals, only the Corporal is represented in the bargaining unit. The assertion is determined to be factual based upon the admitted facts and the bargaining unit history.

The terms of the collective bargaining agreement establish terms and conditions of employment only for bargaining unit employees. In the circumstances presented in this Charge, FOP Lodge 5 lacks standing to file an unfair labor practice charge under the POFERA on behalf of anyone who is not in the bargaining unit and it has neither named nor established that this charge is filed on behalf of a bargaining unit member. The Charge does not assert facts sufficient to establish probable cause to believe that the County engaged in conduct which interfered with, restrained, or coerced any employee because she exercised a right under the POFERA; that it encouraged or discouraged membership in the FOP by discriminating in regard to hiring, tenure or other terms and conditions of employment; that it refused to bargain in good faith with the FOP concerning bargaining unit employees; or that it refused or failed to comply with the statute or PERB rules and regulations concerning the conduct of collective bargaining. For these reasons, those claims are dismissed.

The Charge also alleges the County violated its good faith obligation to provide information, specifically to provide the FOP with a copy of the WPD-IA report made at

the conclusion of the investigation of the August 2018 complaints of sexual discrimination, harassment, assault, and abuse by a senior NCC Police Department officer.

The duty to bargain in good faith under the Public Employment Relations Act requires a public employer to provide information to an exclusive bargaining representative that is necessary and relevant to that organization in performing its representational duty on behalf of bargaining unit members. *AFSCME 320 & 1102 v. City of Wilmington*, ULP 10-08-761, VII PERB 4757, 4760 (Probable Cause Determination, 2010). This obligation has been recognized by this Board, the Court of Chancery and the Delaware Supreme Court. *Bd. of Education of Colonial School District v. Colonial Education Association, DSEA/NEA*, Del.Chan., CA 14383, II PERB 1343 (1996), *affirmed Colonial Education Assn. v. Bd. of Education*, Del.Supr., Case 129, 1996, 152 LRRM 2575, III PERB 1519 (1996), (citing *Brandywine Affiliate, NCCEA/DSEA/NEA, v. Brandywine School District*, Del. PERB, ULP 85-06-005, I PERB 131, 149 (1986)); *AAUP v. DSU*, Del. PERB., Decision on Remand, ULP 95-10-159, III PERB 2177 (2001); *Delaware Correctional Officers Association v. Delaware Department of Correction*, ULP No. 00-07-286, III PERB 2209, 2214 (2001), *AFSCME Locals 1007, 1267 and 2888 v. DSU*, Del. PERB, ULP 10-04-739, VII PERB 4693, 4705 (2010).

Information which is not otherwise privileged, including “relevant information necessary for the bargaining representative to intelligently determine facts, assess its position and decide what course of action, if any, to take” must be provided. *NCCEA/DSEA/NEA v. Brandywine School District* (Supra., p. 149); *UFCW Local 27 and Family Court of the State of Delaware*, ULP 12-09-875, VIII PERB 5609, 5613 (2012).

This duty to provide information relates directly to the collective bargaining relationship between the employer and the exclusive representative and to the exclusive

representative's obligation to represent bargaining unit members. In this case, by email dated July 15, 2019, the FOP requested a copy of the WPD-IA report citing its alleged right under the collective bargaining agreement:

Pursuant to Section 12(c), please be advised that I am issuing a request under the [*collective bargaining agreement*] between FOP Lodge No. 5 and New Castle County that a copy of the investigatory report prepared by the Wilmington Police Department regarding the allegations of misconduct ... be provided for review by myself and FOP grievance representatives. To be clear, we are requesting a copy of the report by WPD that was prepared in light of complaints and information provided by [2 *named Captains*] and others.

We are requesting a copy of same pursuant to the obligation of the FOP when reviewing "complaints, grievances, appeals, or problems encountered to make every reasonable effort to ascertain, document, and present the true facts relating to the situation in order to facilitate appropriate and timely resolution or action."... *Answer Exhibit 4*.

It is noted that in its June 25 correspondence, the FOP specifically stated, "... the complaints issued by the NCC employee complainants are not FOP matters," but were, instead, "... separate complaints that were lodged by each individual NCC employee in attendance at the June 7 meeting."

The County responded by email dated August 8, 2019,

... Pursuant to Section 12(c)<sup>6</sup>, the County deems the investigatory report inappropriate for disclosure given the LEOBOR's<sup>7</sup> prohibition on releasing such information. The Division of Police is permitted to release an investigatory report only in the limited circumstance set forth in 11 Del. C. §9200(d)<sup>8</sup> ...

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<sup>6</sup> Section 12(c) "The FOP is obligated, when reviewing or submitting complaints, grievances, appeals, or problems encountered, to make every reasonable effort to ascertain, document, and present the true facts relating to the situation in order to facilitate appropriate and timely resolution or action. The County agrees to make available to the FOP such records as the County and the FOP may deem appropriate." *Answer Exhibit 1, p. 7*.

<sup>7</sup> Law Enforcement Officers Bill of Rights, 11 Del. C. Chapter 92.

<sup>8</sup> 11 Del. C. §9200(d): Unless otherwise required by this chapter, no law-enforcement agency shall be required to disclose in any civil proceeding, other than those brought by a citizen against

In addressing a prior unfair labor practice complaint alleging a violation of the related Section 12(b)<sup>9</sup> of the collective bargaining agreement, PERB held:

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. *FOP 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 No. 1 v. City of Wilmington*, ULP 10-11-773, 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.<sup>10</sup>

Having found that the pleadings do not establish that the FOP has standing to advance complaints under the terms of the collective bargaining agreement on behalf of non-bargaining unit employees, it also does not have standing to allege a violation of the

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a law-enforcement officer alleging that the officer breached the officer's official duties and that such breach resulted in injury or other damage to the citizen, any:

- (1) Personnel file; or
- (2) Internal affairs investigatory file compiled in connection with a law-enforcement officer under investigation or subjected to questioning for any reason which could lead to disciplinary action, demotion, or dismissal.

<sup>9</sup> §12(b) immediately precedes §12(c) in the negotiated collective bargaining agreement, and are both found in the Article entitled, "Grievance Procedure".

- (b) This procedure is designed to provide a peaceful and informal method of settling all such grievances while maintaining the professional integrity of employees covered by this Agreement. The parties agree that proceedings under this paragraph be kept informal and confidential as may be appropriate.

<sup>10</sup> *FOP Lodge No. 5 v. New Castle County*, ULP 17-08-1115, Probable Cause Determination and Order of Dismissal, IX PERB 6991, 6995 (2018).

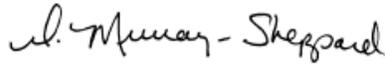
POFERA by the County which relates to an alleged failure to provide information related to those complaints. Wherefore, the charge that the County has violated its obligations under the POFERA to provide information is also dismissed as unsupported by the pleadings.

**DETERMINATION**

For the reasons set forth above, the Charge fails to establish a sufficient factual or legal basis on which it might be concluded that there is probable cause to believe that an unfair labor practice, as alleged, may have occurred.

**WHEREFORE**, the Charge is hereby dismissed.

DATE: June 30, 2020



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