

**STATE OF DELAWARE**

**PUBLIC EMPLOYMENT RELATIONS BOARD**

<b>FRATERNAL ORDER OF POLICE, LODGE NO. 5,</b>	:	
	:	<b>PERB Review of Executive</b>
Appellant,	:	
	:	<b>Director's Decision</b>
<b>v.</b>	:	<hr/>
	:	
<b>NEW CASTLE COUNTY, DELAWARE,</b>	:	<b>ULP No. 19-12-1216</b>
	:	
Appellee.	:	

*Appearances*

*Anthony Delcollo, Esq., Offit Kurman, for FOP Lodge No. 5*

*Margaret M. DiBianca, Esq. and Kevin Levine, Esq., Clark Hill PLC,  
for New Castle County*

**BACKGROUND**

Fraternal Order of Police, Lodge No. 5 (“FOP”) is an employee organization within the meaning of §1602(g) of the Police Officers and Firefighters Employment Relations Act (“POFERA”) 19 Del. C. Chapter 16. FOP Lodge 5 is the exclusive representative of a bargaining unit of County employees which includes all County Police Officers holding the ranks of Police Officer, Corporal, Sergeant, and Lieutenant.

New Castle County, Delaware (“County”) is a public employer within the meaning of 19 Del. C. §1602(l).

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).

On January 8, 2020, the County filed its Answer to the Charge which included Affirmative Defenses and New Matter. On January 16, 2020, the FOP filed its Response denying the affirmative defenses and new matter set forth in the County’s Answer.

On June 30, 2020, the Executive Director issued a decision on the pleadings,<sup>1</sup> consistent with PERB Rule 5.6(a), in which she found the Charge failed to establish a sufficient factual or legal basis supporting the conclusion that there was probable cause to believe the alleged unfair labor practices may have occurred. The Charge was therefore dismissed.

On July 6, 2020, the FOP requested review of the Executive Director’s decision by the full Public Employment Relations Board. In response to the FOP’s request, the parties were provided the opportunity to submit limited argument concerning the merits of the FOP’s request for review. Written submissions were received from both parties, culminating on August 12, 2020.

A copy of the complete record in this matter was provided to each member of the Public Employment Relations Board. A public hearing<sup>2</sup> was convened on August 19, 2020, at which time the full Board met in public session to hear and consider the FOP’s request for review. The parties were provided the opportunity to present oral argument and to answer questions from the Board. The decision reached herein is based upon

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<sup>1</sup> *FOP Lodge No. 5 v. New Castle County*, ULP 19-12-1216. IX PERB 8253 (6/30/20).

<sup>2</sup> In accordance with Governor Carney’s March 13, 2020 Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat, the hearing was conducted by video conference, using the Zoom platform. Log-in instructions were provided to the parties and members of the public prior to the hearing.

consideration of the record and the arguments presented by the parties.

## **DISCUSSION**

The Board's scope of review is limited to the record created by the parties and consideration of whether the Executive Director's decision is arbitrary, capricious, contrary to law, or unsupported by the record. After consideration of the record and the arguments of the parties on appeal, the Board must vote to affirm, overturn, or remand the decision to the Executive Director for further action.

The Executive Director found, based on the facts as presented in the pleadings, that the FOP did not have standing to bring the instant unfair labor practice charge because the timely allegations made do not involve any bargaining unit employees for which the FOP has representational responsibilities. The FOP asserts in its request for review that one of the individuals involved in the June 7, 2019 meeting<sup>3</sup> was an NCC Police Corporal who was a bargaining unit employee. The charge does not identify the individuals who attended the June 7, 2019 meeting nor who attempted to lodge complaints. The identified Corporal is mentioned only once in the charge and is identified only as one of the individuals who gave a statement during the investigation of the original complaint made on August 18, 2018. *Charge ¶11*. There is no dispute that this statement was made outside of the 180-day statute of limitations. 19 Del. C. §1608. The Board concurs that the charge fails to establish that the alleged failure of the County to process employee complaints involves either a bargaining unit employee or the FOP in its representative capacity.

The FOP argues strenuously on appeal that the County failed to abide by the

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<sup>3</sup> Paragraph 17 of the Unfair Labor Practice Complaint alleges a meeting held on June 7, 2019 during which a variety of complaints alleging misconduct were presented to the employer. The refusal to process these complaints provides a predicate for the Unfair Labor Practice charge.

provisions of §20(c)<sup>4</sup> of the parties' collective bargaining agreement. It attempts to bootstrap an alleged violation of this contractual provision into an unfair labor practice charge. The FOP argues the Professional Standards Board ("PSU") was contractually created to maintain "accountability and compliance with the law beyond the contract." It asserts that by not processing an alleged complaint which should have been considered by the PSU, the County has eviscerated the purpose for the PSU and has essentially eliminated police accountability. It further argues that because the PSU can investigate any complaint against a police officer and can determine the appropriate disciplinary charges and penalties, the PSU is necessarily a term and condition of employment, over which the parties are required to negotiate.

Whether the creation and functioning of the PSU is a mandatory subject of bargaining is elemental to this Board's jurisdiction in this matter. In its charge, the FOP alleged the employer's refusal "to process complaints regarding conduct that facilitated and supported an environment that violated multiple sections of the CBA, thus eliminating those protections" unilaterally changed "conditions of employment that are required to be the subjects of collective bargaining."<sup>5</sup> "Terms and conditions of employment" are mandatory subjects of bargaining and are defined to include, "... matters concerning or related to wages, salaries, hours, grievance procedures and working conditions..." The FOP cites to the definition of a working condition found in *FOP Lodge 7 v. University of Delaware*.<sup>6</sup>

The Public Employment Relations Board has held "working

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<sup>4</sup> §20(c) Professional Standards Unit.

The department shall establish a unit, to be known as the Professional Standards Unit, which shall be responsible for handling all internal investigations.

<sup>5</sup> Charge, ¶23(d).

<sup>6</sup> ULP 17-08-1117 PERB 7072 (2017).

conditions” are broader than physical working conditions, and is a condition which “... relates generally to the job itself; i.e., to circumstances involving the performance of responsibilities for which one is compensated or the opportunity and qualifications necessary to perform work required of those employees who are members of the certified bargaining unit.” *[citation omitted]*

There is nothing on the face of this charge that reasonably constitutes a unilateral change in working conditions for bargaining unit employees as defined above.

The FOP conflates a complaint of misconduct by a high ranking County Police Officer (brought forth by subordinate officers and civilian employees) with a “PSU complaint.” The purpose of the PSU is explicitly to establish “the internal investigation procedures to be followed when a police officer is questioned in connection with an investigation of his/her conduct.”<sup>7</sup> The collective bargaining agreement establishes procedures by which an internal investigation is to be conducted by the PSU, including explicit limitations on questioning and other protections for officers who are being investigated by the PSU. It does not address how or by whom the determination is made to refer a complaint to the PSU for investigation.

If a bargaining unit employee or the FOP believes that the negotiated procedures of the PSU have been misapplied or violated, their recourse for enforcement of §20 is to file a grievance. A matter constituting a grievance does not rise to the level of an unfair labor practice charge unless it involves a unilateral change in a mandatory subject of bargaining. The FOP’s allegation that the complainants in this matter were unable to successfully file a complaint using the PSU against a ranking officer does not constitute a violation of the employee’s rights or the County’s obligations under the POFERA.

Finally, the FOP asserts the Executive Director erred in finding the failure or refusal

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<sup>7</sup> §20 of the collective bargaining agreement.

of the County to provide a copy of the WPD investigative report did not violate the POFERA. Whether or not the WPD investigative report was a record the employer was obligated to produce under Section 12(c) of the parties' collective bargaining agreement<sup>8</sup> is an issue of contract interpretation which should be addressed through the negotiated grievance procedure. Accordingly, the FOP's assertion that the failure to provide the requested information should be adjudicated before the PERB as an unfair labor practice is without basis in fact or law.

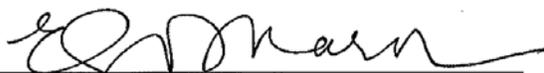
**DECISION**

After reviewing the record, hearing and considering the arguments of the parties, the Board unanimously affirms the decision of the Executive Director that 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 the alleged unfair labor practices may have occurred.

Wherefore, the FOP's appeal is denied.

**IT IS SO ORDERED.**

DATE: October 12, 2020

  
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Elizabeth D. Maron, Chairperson

  
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Kathi Karsnitz, Member

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<sup>8</sup> Section 12(c) states: "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." This provision arguably conflicts with 11 *Del. C.* §9200(d) which protects investigatory reports such as the one here in issue from mandatory disclosure.

*Gregory T. Chambers*

**Gregory T. Chambers, Member**