

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

GEORGETOWN POLICE DEPARTMENT FRATERNAL	:	
ORDER OF POLICE,	:	
	:	
Charging Party,	:	
	:	<u>ULP No. 20-05-1231</u>
v.	:	
	:	
TOWN OF GEORGETOWN, DELAWARE,	:	PROBABLE CAUSE DETERMINATION
	:	
Respondent.	:	

The Town of Georgetown, Delaware (“Town”) is a public employer within the meaning of 19 Del. C. §1602(l) of the Police Officers and Firefighters Employment Relations Act, 19 Del. C. Chapter 16 (POFERA).

The Georgetown Police Department Fraternal Order of Police (“FOP”) is an employee organization within the meaning of 19 Del. C. §1602(g). It is the exclusive bargaining representative of a bargaining unit of Georgetown Police Officers at and below the rank of Captain, as defined in DOL Case 240.

On May 26, 2020, the FOP filed an unfair labor practice charge with the Delaware Public Employment Relations Board (“PERB”) alleging conduct by the Town in violation of its obligations under the POFERA. The Charge was amended on June 17, 2020, to properly allege violations of 19 Del. C. §1607(a)(1), (2), (3), (4) and (6), which state:

(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.

- (2) Dominate, interfere with or assist in the formation, existence or administration of any labor organization.
- (3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.
- (4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition or complaint, or has given information or testimony under this chapter.
- (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.

The FOP specifically alleges the Town violated the POFERA by terminating the employment of the FOP President without just cause; interfering with the officer's rights under the Delaware Law Enforcement Officers Bill of Rights ("LEOBOR", 11 Del. C. Chapter 92); and interfering with the officer's and the FOP's rights to bring a grievance under the negotiated grievance procedure. The FOP requests PERB find the Town violated the statute as alleged and to cease and desist from further violations; that PERB require the Town to reinstate the FOP President to his prior employment and make him whole; and that PERB specifically find the Town violated the statute by refusing to process the grievance.

On June 10, 2020, the Town filed its Answer to the Charge in which it admitted some facts, denied or qualified other asserted facts, and raised new matter in its defense. The Town asserts the Charge should be dismissed because PERB does not have jurisdiction to adjudicate either alleged violations of LEOBOR and/or alleged violations of the Town's Code or administrative policies.¹ It asserts the Charge fails to allege facts which could reasonably be construed to violate the POFERA and that the FOP lacks standing to bring

¹ The FOP denies it raised any claim under the Town's Code or administrative policies. *FOP Response to New Matter* ¶19.

a grievance on behalf of a discharged police officer because he is no longer an employee or member of the bargaining unit. Because the collective bargaining agreement is “entirely inapplicable”, the Town asserts the complained of actions are outside of PERB’s jurisdiction.

The FOP filed its Response to the Town’s New Matter on June 17, 2020. It denied the Town’s legal conclusions and asserted the faces presented in the new matter establishes the *prima facie* basis for the Charge. It asserts the Town has repudiated the parties’ collective bargaining agreement, a matter which falls within the prohibitions of the POFERA.

This probable cause determination is based on review of the pleadings submitted by the parties.

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.

- (b) If the Executive Director determines that an unfair labor practice 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 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*, ULP 04-10-453, V PERB 3179, 3182 (Probable Cause Determination, 2004).

The limited purpose of a probable cause determination is to establish that the facts alleged by the Charging Party are sufficient to establish cause to believe that the alleged violations of the statute may have occurred. *Eastburn v. JP Court*, ULP 09-05-673, VI PERB 4349, 4352 (Probable Cause Determination, 2009). The FOP alleges the Town has violated the POFERA by terminating the employment of the FOP President without just cause; interfering with the officer's rights under the LEOBOR; and interfering with the officer's and the FOP's rights to bring a grievance under the negotiated grievance procedure.

The allegations in the charge are insufficient to establish that the Town may have discharged or discriminated against any employee because he signed or filed an affidavit, petition or complaint. Neither is there an allegation that the employee gave information or testimony under the POFERA. Consequently, the charge that the Town violated 19 Del. C. §1607(a)(4) is dismissed.

Whether or not the Town violated the provisions of the parties' collective bargaining agreement is not subject to primary review by the PERB.² The Board's purpose

² PERB has a long-standing and well defined discretionary deferral policy "where the alleged statutory violation is directly related to resolution of a contractual issue." *FOP Lodge No. 1 v. City of Wilmington*, ULP 10-11-773, VII PERB 4935, 4939 (PCD & Order of Deferral, 2011).

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, 192 NLRB 837 (1971).

is to promote harmonious and cooperative relationships between public employers and the police they employ through granting employees the right to organize, requiring the employer collectively bargain with certified representatives, and providing effective resolution of disputes which arise under the POFERA. 19 Del. C. §1601.

The POFERA does not establish a just cause requirement for discipline or discharge of police officers and firefighters covered by the Act. Where the just cause protection exists, it is customarily negotiated into the parties' collective bargaining agreement, for which the negotiated grievance procedure is the method to contest whether that standard was met.³ In this case, whether the Officer was terminated for just cause is not a matter for initial resolution under the POFERA. Similarly, enforcement responsibility for LEOBOR protections is not vested in the PERB.⁴

The Charge alleges the Town violated the negotiated grievance procedure in two ways: first, by failing to recognize the right of the FOP to bring a grievance on behalf of a terminated bargaining unit employee; and secondly, by failing or refusing to process the grievance through the negotiated Step 3 hearing process. The grievance procedure is a mandatory subject of bargaining. 19 Del. C. §1602(e), (n). Consequently, if the Town's actions are proven to effect a unilateral change in the negotiated grievance procedure, an unfair labor practice may be found to have occurred. *General Teamsters Local 326 v. City of Rehoboth Beach, Delaware*, ULP 09-07-691, VI PERB 4343, 4345 (Probable Cause Determination, 2009).⁵

³ Alternatively, the requirement that discipline only be imposed for just cause can also be established in the employer's policies, merit protections, and/or by a legislative act.

⁴ *FOP Lodge 5 v. New Castle County*, ULP 17-08-1115, IX PERB 6991, 6995 (2018).

⁵ See *LiUNA Local 1029 v. DSCYF*, ULP No. 20-04-1227, IX PERB 8267 (Decision on the Pleadings; 2020); *affirmed by the full Board on review*, 9/18/20.

The Charge also alleges the Town violated the rights of the FOP President by terminating him, asserting the termination was based on union animus. In *Wilmington Firefighters Association Local 1590 v. City of Wilmington*, ULP 93-06-085, II PERB 937 (1994), PERB adopted the NLRB's *Wright Line* analysis for evaluating allegations of whether an (a)(1) and/or (a)(3) violation may have occurred. That analysis involves a shifting burden of proof:

The burden to proof is initially on the Charging Party to establish what equates to a *prima facie* case of unlawful employer motivation. The essential elements which must be proven include: (a) that the affected employee engaged in activity protected by the statute; (b) the employer had knowledge of the employee's involvement in the protected activity; and (c) the employee's protected conduct was a substantial or motivating factor in the employer initiating the adverse action. If the charging party succeeds in establishing a *prima facie* case of union animus, the burden shifts to the employer to prove that the same action would have occurred despite the employee's involvement in the protected activity...⁶

Having found the pleadings sufficient to establish that an unfair labor practice may have occurred, the Town's assertion that the charge should be dismissed for failure to state a claim under the POFERA is denied.

DETERMINATION

Considered in a light most favorable to the Charging Party, the pleadings are sufficient to establish that the Town may have violated 19 Del. C. §1607 (a)(1), (2), (3), and/or (a)(6), as alleged. The pleadings raise both questions of fact and law which can only be resolved following the creation of a complete evidentiary record and the consideration of argument.

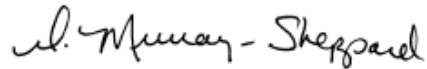
WHEREFORE, a hearing will be promptly scheduled for the purpose of developing

⁶ *Sussex County Vo-Tech Teachers Assn. v. Sussex County Vocational Technical School District*, ULP 96-07-183. III PERB 1629, 1635 (1997).

a full and complete factual record upon which as decision can be rendered concerning:

DID THE TOWN OF GEORGETOWN VIOLATE SECTIONS 1607 (A)(1), (2), (3), AND/OR (6) WHEN IT TERMINATED THE PRESIDENT OF THE GEORGETOWN POLICE DEPARTMENT FRATERNAL ORDER OF POLICE, AND/OR INTERFERE WITH RIGHTS GUARANTEED UNDER THE POLICE OFFICERS AND FIREFIGHTERS EMPLOYMENT RELATIONS ACT BY FAILING OR REFUSING TO PROPERLY PROCESS A GRIEVANCE UNDER THE TERMS OF THE NEGOTIATED COLLECTIVE BARGAINING AGREEMENT?

DATE: October 19, 2020



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