

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF:

INTERNATIONAL BROTHERHOOD OF TEAMSTERS	:	Representation Petition
LOCAL 326,	:	<u>No. 17-12-1131 (CERT)</u>
	:	
PETITIONER,	:	
and	:	DECISION AND ORDER OF
	:	DISMISSAL
TOWN OF DELMAR POLICE DEPARTMENT,	:	
	:	
RESPONDENT.	:	

APPEARANCES

Jeffrey M. Weiner, Esq., for IBT Local 326
Aaron Shapiro, Connolly Gallagher, LLP, for the Town of Delmar

BACKGROUND

The International Brotherhood of Teamsters, Local 326, is an employee organization within the meaning of §1602(g)¹ of the Police Officers and Firefighters Employment Relations Act, 19 Del. C. Chapter 16.

The Town of Delmar, Delaware is a “body politic and a municipal corporation” in Sussex County, Delaware. The Charter for Delmar, Delaware defines the boundaries of the municipality² (which is wholly located within the State of Delaware) and the duties and powers of the

1 “Employee organization” means any organization which admits to membership police officers and 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.

2 According to its Fiscal Year 2018 budget, Delmar, Delaware had a population in 2010 of 1,597 residents and an area of .94 square miles. Employer Exhibit C.

municipality, under the laws and statutes of the State of Delaware. *Employer Exhibit E*. The powers conferred by its Charter are exercised by the Town Council, which consists of an elected Mayor and four elected Council members. *Delmar, Delaware Charter, Section 5*. Included in the enumerated powers is:

- (44) The Town may exercise any of its powers and perform any of its functions and may participate in the financing thereof, jointly or in cooperation, by contract or otherwise, with any one or more states, municipalities, counties, or civil divisions or agencies thereof or the United States or any agency thereof. The Council shall have the power to enter into any cooperative agreement with the Town of Delmar, Maryland, for the common good of the two towns. The Town Council may authorize the establishment of various commission, boards or agencies representing citizens of both towns, and having authority to carry out such duties as the Town Council may prescribe. The Town Council shall have the power to authorize such boards, into effect town ordinances, to grant or refuse permits, and to adopt such rules and regulations as may be required to carry out the agency's responsibilities, according to the standards and guidelines set forth by the Council. The Town Council may delegate to such boards, commissions or agencies any governmental powers to the full extent permitted by State and Federal law. *Delmar, Delaware Charter, Section 4*.

The Town of Delmar, Maryland is a Municipal Corporation under the laws of the State of Maryland in Wicomico County, Maryland. The Charter for Delmar, Maryland defines the boundaries of the municipality³ (which is wholly located within the State of Maryland) and the duties and powers of the municipality, under the laws and statutes of the State of Maryland. *Employer Exhibit D*. All legislative powers of Delmar, Maryland are vested in a Commission which consists of the Mayor and four Commissioners. *Delmar, Maryland Charter, Article IV*. Included in the enumerated powers of Delmar, Maryland is:

- (44) *Police Force*. To establish, operate and maintain a police force; to enter into an agreement with the Town of Delmar, Delaware, providing for the joint operation of one (1) police department to serve

³ According to its Fiscal Year 2018 budget, Delmar, Maryland had a population in 2010 of 3,003 residents and an area of 1.3 square miles. *Employer Exhibit C*.

the two (2) towns, said agreement to specifically provide that the two (2) towns shall be jointly liable for the costs and expenses thereof. All town policemen within the municipality shall have the powers and authority of constables in this state.

- (45) *Police Powers.* To prohibit, suppress and punish within the town all vice, gambling and games of chance; prostitution and solicitation therefor and the keeping of bawdy houses and houses of ill fame; all tramps and vagrants; all disorder, disturbances, annoyances, disorderly conduct, obscenity, public profanity and drunkenness.
Delmar, Maryland Charter, Article

On or about May 17, 1954, the Mayor and Council of Delmar, Delaware and the Commissioners of Delmar, Maryland, who were at that time “maintaining two (2) separate and distinct police departments,” entered into an agreement to “consolidate the said police departments so that the people of the Town of Delmar shall have better and more adequate police protection.” *Employer Exhibit F.* Each municipality agreed to pay to the other one-half of the value of all vehicles and police accessories, and that all vehicles would be titled in the name of the “Mayor and Council of Delmar, Delaware and the Commissioners of Delmar, Maryland, with Delaware registration.” The two towns agreed to pay one-half of the costs of operating the unified police department and that “all equipment, uniforms, and other accessories shall be owned jointly in equal shared by the two parties.” The Agreement created a Police Commission consisting of the Mayor of Delmar, Delaware and the President of the Commissioners of Delmar, Maryland which had authority to set the salaries of the police officers, to provide for a schedule of sick and vacation leave, to create tours of duty, assign the officers to shifts, to determine the prescribe of the officers, to have the power to discipline officers (including suspensions), to provide uniforms and equipment, to hear and determine public complaints about police conduct, to designate the Chief of Police, among other powers. The Agreement provided that revenue from fines and arrests which occurred in Delmar, Delaware would be paid to the Mayor and Council of Delmar, Delaware for its “sole and separate use”. Revenue from fines and arrests made in Delmar, Maryland would be

paid to the Commissioners of Delmar, Maryland, "... or whosoever may be entitled to the same under the General Laws of the State of Maryland." Article Five of the Agreement states:

It is hereby covenanted and agreed that the employing of any member of the police force shall be by the Mayor & Council of Delmar, Delaware, and the Commissioners of Delmar, Maryland, at a joint meeting at which a quorum of each Board must be present and voting; and it is further covenanted and agreed that the employing and discharging of all personnel under the jurisdiction of the Police Commission shall be subject to the approval at the joint meeting of the Mayor & Council of Delmar, Delaware, and the Commissioners of Delmar, Maryland, at which joint meeting a quorum of each Board must be present and voting.

The Agreement between the two municipalities was effective on June 1, 1954, and was signed by the Mayor of Delmar, Delaware and a Delmar, Maryland Commissioner.

Under this Agreement, the towns of Delmar, Delaware and Delmar, Maryland created a unified system for the delivery of municipal public safety services to the residents of the "Town of Delmar". The Town of Delmar also operates unified services for public works and other services to residents of the two municipalities. It maintains unified bank accounts into which funds from both Delmar, Delaware and Delmar, Maryland are transferred weekly. Funds are also received from federal and Delaware and Maryland state grants (specifically for the police department), as well as from the proceeds of the unified utility proceeds for water and wastewater services. *Employer Exhibits B and C*. The "Town of Delmar" ("Town") has for decades been "singular in the sense that it is an integrated government entity of both towns". *TR p. 91*.⁴

The operations of the unified Town are governed by the Joint Council, which is comprised of the elected Mayor and four Councilpersons of Delmar, Delaware and the elected Mayor and four Commissioners of Delmar, Maryland.⁵ The unified Town, through the Joint Council, hires

⁴ Citations to the hearing transcript are denoted as "TR" followed by a page number.

⁵ TR p. 97

the Town Manager and all department heads, including the Chief of Police. The department heads report directly to the Town Manager and ultimately to the Joint Council. The Joint Council annually approves a unified budget, which must be separately approved by the elected Delmar, Delaware Council and the elected Delmar, Maryland Commission. *Employer Exhibit B and C.*

By letter dated September 14, 1989 the Auditor of Accounts for the State of Delaware addressed the Delaware Police Pension Funding for Delmar Police:

Finding – The Town of Delmar maintains a municipal police force of six full-time police officers. The annual cost of operating this force is funded 50 percent from Maryland tax receipts and 50 percent from Delaware tax receipts. During Fiscal Year 1989 the Town received \$12,308.88 from the State of Delaware for pension funding for all six full-time police officers. However, based on the current method that the Town uses to pay for its police force cost, the claiming of six full-time officers on the Delaware “Registration for Police Pension Fund Benefits” appears to be inconsistent with the Town’s policy for dividing the costs between the two states. In addition it was noted that while Delmar has been claiming six full-time officers for revenue purposes in Delaware the Town only funded three officer pensions with such funds. This practice has resulted in an excess police pension fund balance for many years.

The Town paid \$3,020 to fund a defined benefit plan for six full-time police officers in Fiscal Year 1989, plus a \$175.00 actuary fee. Only one-half of the pension cost (\$1,510.00) and the \$175.00 actuary fee was paid from the Delaware Police Pension receipts. The remaining \$1,510.00 was paid from Maryland tax receipts. Theoretically, the State of Delaware fully funded the pension for six officers totaling \$12,308.88 while the Town disbursed only \$1,685.00 into the plan for three officers thus earning an excess balance of \$10,623.88 for Fiscal Year 1989. The \$10,623.88 in excess funds received by Delmar from the Delaware Police Pension funding program was then placed in the Mayor and Council Police Pension interest-bearing checking account. As of May 31, 1989, this account has grown to \$73,118.15. The Town is researching the possibilities of how these excess funds may be used.

IT IS RECOMMENDED THAT the Town of Delmar determine how long they have claimed/received funding for the entire police force in lieu of those officers paid from Delaware tax receipts and the total excess money received to date. Once the amount is determined, the Town should reimburse the State Treasurer for the excess funds, plus any accrued interest earned on these funds. IT IS FURTHER RECOMMENDED THAT in the future the Town of Delmar claim only those full-time police officers funded by Delaware Tax Receipts for State of Delaware pension

funding purposes. *IBT Exhibit 1, p. 3*

The Delmar Town Manager responded to the State of Delaware Auditor of Accounts on September 28, 1989 to clarify the police pension funds:

We respectfully request an extension of time for providing our response to the recommendations pertaining to Police Pension funds in order that the matter may be discussed with the full Mayor and Council at their October 2, 1989 meeting.

I would point out, however, that it is not entirely accurate to state that the Town funded the pensions for only 3 of our full time officers with Delaware Police Pension Funds. Delaware Police Pension funds were utilized for the Delmar, Delaware share or 50% of the pension cost for all 6 full time officers. All of Delmar's full time officers are fully certified in both Delaware and Maryland and all are paid from both Delaware and Maryland tax receipts. *IBT Exhibit 1, p. 5.*

The Town Manager wrote again to the Delaware Auditor of Accounts on November 13, 1989,

... As previously discussed with your office, we are investigating the possibility of enrolling our officers in the State pension plan and have reviewed this matter with Mr. Donald McArdle of the State Pension Office. He has advised that we have complied with the Delaware Code in reporting all full time policeman for funding through the Police Pension Fund Program.

On this basis of his advice, the Town plans no further action at this time. *IBT Exhibit 1, p. 8.*

By resolution of both the Mayor & Council of Delmar, Delaware and the Mayor and Commissioners of Delmar, Maryland on May 30, 2000, the Town of Delmar DE/MD elected to:

... participate in the *[Delaware]* County and Municipal Police Pension Plan retroactive to July 1, 1990, if approved by the Board of Pension Trustees of said Plan, then the election shall be effective retroactive to July 1, 1990 which said election shall cover all Town of Delmar Police Officers who were hired during and after retroactive to July 1, 1990. *Employer Exhibit G.*

At some point prior to June 2009, a referendum was conducted among the residents of Delmar, Maryland to authorize Delmar police officers "to organize a collective bargaining unit,

and, if need be, go to arbitration.”⁶

On June 8, 2009, the Mayor and Commissioners of Delmar, Maryland adopted Ordinance #709, a Police Department Labor Code. *IBT Exhibit 10*. The Ordinance was promulgated under the Constitution of the State of Maryland and the Charter of Town of Delmar, Maryland. The Ordinance applies only to sworn officers of the police department and provides processes for recognition of an employee organization as the exclusive bargaining representative; negotiations and impasse resolution; defines and provides a process for the resolution of unfair labor practice charges; prohibits strikes; provides alternatives for a negotiated grievance procedure; and establishes both employee and employer rights under the Ordinance.

There was no corollary ordinance passed by the Mayor and Council of Delmar, Delaware or by the Joint Council.

The Town of Delmar Employee Handbook⁷ states in Chapter 2, Employment, under Section D., General Hiring Policy:

The Municipal Relations Committee (MRC) will review the need, budget impact, and benefit to the Town of Delmar [*sic*] must approve all new positions.

The MRC is comprised of the Town Manager and the Mayors of Delmar, DE and Delmar, MD...*Employer Exhibit J, p. 11*.

The Personnel Handbook was separately adopted by the Mayor & Council of Delmar, Delaware and the Mayor and Commissioners of Delmar, Maryland on February 1, 2014.

Effective March 31, 2014, the Joint Council agreed “to recess the Police Commission meetings to allow the reorganization of the Police Chief command and reporting responsibilities.

⁶ TR p. 31

⁷ The Employee Handbook was created by a subcommittee appointment by the Joint Council which included the Mayors of the two municipalities and the Town Manager. The Handbook was reviewed by the Joint Council and then approved separately by the Delaware Council and the Maryland Commissioners. TR p. 93.

He will no longer report to the Police Commission but will report to and receive direction from the Town Manager.” *IBT Exhibit 5*.

Effective January 1, 2015, the Chief of Police issued Delmar Police Department Policy 1.2: Jurisdiction, Organization and Authority, which states in relevant part:

I. POLICY

The department is established by state and local law, and consists of a Chief of Police and other full-time and part-time officers and non-sworn employees, as determined by the Mayors and Joint Council. The chief executive of the police department is the Chief of Police, appointed by the Joint Council and subordinate to the Town Manager. The Chief, in turn, appoints police officers who are charged with enforcing the laws of the State of Maryland and Delaware and all local ordinances...

IV. ORGANIZATIONAL STRUCTURE

A. Organizational Structure

1. The Town of Delmar, Maryland’s Charter and the Town of Delmar, Delaware’s Charter authorizes the creation of a police department. The Chief of Police is responsible for the direction of all activities of the department. This direction is accomplished through written and oral orders as well as by personal leadership. Written orders take the form of general orders, standard operating procedures, and other directives as needed.
2. The department consists of a Police Chief, Command Staff, and as many police officers as the town’s joint council determines are required to protect and serve the community and otherwise support or carry out the department’s objectives...

V. AUTHORITY OF THE CHIEF OF POLICE

1. The Chief of Police is the Department Director and assumes responsibility for the overall management of the organization; authorizes the institution of programs which keep Delmar Police Department effective in responsiveness to a wide variety of community needs; and guides the department in progressive leadership and technology arenas. The Chief is responsible for keeping the Town Manager informed of Delmar Police Department activities and accomplishments.
2. The Chief of Police shall meet the minimum standards for initial employment as required by the Maryland Police and Correctional Training Commission and the Delaware Council on Police Training within 12 months of appointment... *Employer Exhibit L*.

On December 11, 2017, IBT Local 326 filed a Petition for Bargaining Unit Determination and Certification of Exclusive Bargaining Representative with the Delaware PERB. The Town opposed the petition.

A hearing was convened on April 27, 2018 at which time the parties were afforded the opportunity to present testimony and documents into the record. Thereafter, the parties were afforded the opportunity to submit written argument in support of their positions.

ISSUE

ARE POLICE OFFICERS EMPLOYED BY THE TOWN OF DELMAR “PUBLIC EMPLOYEES” AS THAT TERM IS DEFINED IN §1602 (K)⁸ OF THE POLICE OFFICERS AND FIREFIGHTERS EMPLOYMENT RELATIONS ACT?

Prior to hearing, the Executive Director set forth the following issues for purposes of eliciting evidence and argument necessary to resolve the issue above:

- What effect if any, does the dissolution of the Police Commission have, vis-à-vis the prior decisions?
- What, if any effect does funding source have on the computation of full time employees under the definition of a “public employer”?⁹

⁸ “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...
19 Del. C. §1602(k)

⁹ “Public employer” or “employer” means the State of Delaware or any agency thereof, any county , or agency thereof, any municipal corporation or municipality, city or town located within the State or any agency thereof, which:

- (1) Upon the affirmative legislative act of its common council or other governing body has elected to come within Chapter 13 of this title;
- (2) Hereafter elects to come within this chapter; or
- (3) Employs 25 or more full-time employees. For the purpose of this paragraph, “employees” shall include each and every person employed by the public employer except:
 - a. Any person elected by popular vote; and

- What effect, if any, does inclusion of the Delmar Police Officers in the Delaware County and Municipal Police/Firefighter Pension Plan for Police Officers have in determining whether Delmar is a public employer under the Police Officers and Firefighters Employment Relations Act?

PROCEDURAL HISTORY

In August, 1997, Fraternal Order of Police Lodge 9 petitioned the Public Employment Relations Board (“PERB”) to certify a bargaining unit of Town of Delmar Police officers. The Town opposed the petition asserting PERB lacked jurisdiction to process the petition because the Town was not a public employer within the meaning on 19 Del. C. §1602(l).

On February 13, 1998, the PERB Executive Director granted the Town’s Motion to Dismiss¹⁰ finding PERB does not possess jurisdiction under the POFERA to process the representation petition filed. The decision states:

...[T]he [Police] Commission does not qualify as public employer within the meaning of Section 1602(l) of the [Police Officers and Firefighters Employment Relations] Act. The Commission, created by the agreement of both municipalities and administered jointly by elected representatives of each, functions as an administrative agency. Funding for the Commission is provided equally by both municipalities. Police officers are subject to not only the policies and procedures promulgated by the Commission but also the personnel policies and procedures jointly promulgated by the two municipalities which apply to all employees serving both municipalities.

...Even if the [Police] Commission qualified as the employer of the police officers, it would not qualify as a public employer under Section 1602(l)...

... The record is replete with references to the “Town of Delmar”. Such references are misplaced. The record fails to establish the existence of a single independent and viable municipality of Delmar. Only for efficiency and convenience have the two municipalities agreed to jointly fund and oversee the administration of the public safety responsibilities provided by a single police department to the citizens of each.

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

¹⁰ *IN RE: FOP Lodge No. 9 and Town of Delmar*, REP 97-08-215, III PERB 2123 (PERB, 1998).

The decision held that Delmar, Delaware also did not qualify as a public employer under the POFERA because it did not meet the threshold of twenty-five full-time employees “over whom it has exclusive authority.” 19 Del. C. §1602(1)(3).

In September 2009, the Fraternal Order of Police filed a second petition seeking to certify a bargaining unit of Delmar police officers under the POFERA. Again the Town of Delmar, Delaware opposed the petition, asserting the Delaware PERB did not have jurisdiction to process the petition. The FOP responded that the petition was properly filed because Delmar, Maryland had modified its Charter, pursuant to a referendum of Delmar, Maryland residents, to allow police officers to collectively bargaining.

By letter dated October 19, 2010, the PERB Executive Director again dismissed the petition¹¹, finding:

... While the Ordinance¹² does establish a comprehensive process and procedure for collective bargaining which has been accepted by the Delmar, Maryland half of the municipal Commission, it does not recognize or provide for Delaware PERB jurisdiction over those processes.

Therefore, the petition is dismissed as the Delaware PERB does not have jurisdiction over the Delmar Police Commission. The Commission is an entity created by municipal corporations of the Mayor and Council of Delmar, Delaware and the Commissioners of Delmar, Maryland. While it may be “analogous to a bi-state agency”, the Commission is not, in fact, a bi-state agency. Delaware PERB lacks statutory jurisdiction because, “... the Commission is subject to the oversight of two municipalities, one of which is totally within and subject to the jurisdiction of the State of Maryland”. As such, it is not an agency within the State of Delaware, as required by Section 1602(1) of the [Delaware Police Officers and Firefighters Employment Relations Act].¹³

OPINION

¹¹ IBT Exhibit 3.

¹² Ordinance 709. IBT Exhibit 10.

¹³ Citing to *IN RE: FOP Lodge No. 9 and Town of Delmar, Supra.* @ p. 2128.

The fundamental issue in this case and in the two prior attempts by the sworn officers of the Delmar Police Department to organize is whether the Delaware Public Employment Relations Board has jurisdiction to process this petition and to conduct an election to certify an exclusive bargaining representative. The PERB's authority only extends to cases which are properly brought before it in compliance with the law.

The Police Officers and Firefighters Employment Relations Act grants police officers in the State of Delaware the right to organize and to be represented for purposes of collective bargaining. It obligates public employers and the organizations certified to represent police officers (in accordance with the provisions of the statute) to "enter into collective bargaining with the willingness to resolve disputes relating to terms and conditions of employment and to reduce to writing any agreements reached through such negotiations."¹⁴ It also empowers the PERB to administer the POFERA and to assist in resolving disputes between police officers and their public employers.

Public employers are defined in the statute to include "... any municipal corporation, or municipality, city or town located within the State or any agency thereof," which elects through the affirmative legislative act of its governing body to come under the POFERA or which employs twenty-five (25) or more full-time employees (excluding those who are either elected or appointed to serve on a board or commission).¹⁵

The State of Delaware does not have authority to create laws or to provide authority to its agencies which limit or circumscribe the authority of the State of Maryland, absent an instrument executed by the two states which creates such authority. Consequently, Delaware cannot create

¹⁴ 19 Del. C. §1601.

¹⁵ 19 Del. C. §1602(1).

an agency with powers and authorities the State itself does not have. The Delaware PERB has explicit jurisdiction over municipal corporations or municipalities located within Delaware. 19 Del. C. §1602(1).

In *Maxwell v. Vettters*¹⁶, the Delaware Supreme Court addressed the jurisdictional limits of a statutorily created Delaware agency, noting the agency is a “creature of statute”. It further noted that parties cannot confer jurisdiction on an agency outside of its statutory limitations.

It is widely recognized that parties to litigation may not confer subject matter jurisdiction upon a Court by agreement. 20 Am.Jur.2d, Courts, § 139 (1965). This is the law of our state. *Wife, A.M.M. v. Husband, J.L.W.*, Del.Ch., 285 A.2d 824 (1971); *Gahn v. Gahn*, Del.Super., 10 Terry 368, 116 A.2d 902 (1955). Likewise, parties may not confer subject matter jurisdiction on a quasi-judicial body by consent...

... The Legislature is deemed to have intended to enact a valid and constitutional statute, and the statute will be so construed whenever that construction is possible without doing violence to the legislative intent. *Screws v. United States*, 325 U.S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945); *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (1937); *Linder v. United States*, 268 U.S. 5, 45 S. Ct. 446, 69 L. Ed. 819 (1925); *Opinion of the Justices*, Del.Supr., 295 A.2d 718 (1972).

The Towns of Delmar, Delaware and Delmar, Maryland entered into a voluntary agreement in 1954 to consolidate their previously separate police departments into a single department which was to be jointly funded by both municipalities in order to provide better and more adequate police protection. That agreement provided for the funding of the unified police department and for oversight by a Police Commission which consisted of the Mayor of Delmar, Delaware and the President of the Commissioner of Delmar, Maryland.

Over time, the two municipalities determined and joined together to share other expenses and services. The “Town of Delmar” is a collaborative entity created by two municipalities which

¹⁶ 311 A.2d 864 (DE Supreme, 1973).

are separated by the political and geographical border between the states of Maryland and Delaware. The two municipalities entered into cost sharing agreements for services which are provided to the residents of both Delmar, Delaware and Delmar, Maryland, as reflected in the joint budget:

SHARED COST ALLOCATION:

Historically, all shared costs have been split evenly between Delmar, Maryland and Delmar, Delaware. In FY 06¹⁷ it was agreed by the Joint Council to allocate the cost share based upon the census population data which determined the split should be 60/40 in the Police, Executive and Finance Department's expenses. Also, it was agreed beginning FY 12 by the Joint Council to reallocate the cost share based upon actual road mileage between Delmar, Maryland and Delaware. Based upon the data received State Highway Administrations in FY 11 the split should be 73/27, therefore, where applicable the expenses within the Street and Highways Department allocated as determined. A written agreement was signed by the Joint Council, which stipulated that the cost allocation of all departments to be reviewed annually during budget preparations. *Employer Exhibit B, p. 10.*

Perhaps if the two municipalities had different names it would be easier to see the distinction. Delmar, Delaware and Delmar, Maryland are separately chartered and are political entities which exist under separate and distinct state governments. Both municipalities have authority under their separate charters to enter into joint ventures for the benefit of their citizens. The joint venture of the "Town of Delmar: The Little Town too Big for One State" is not the political equivalent of either Delmar, Delaware or Delmar, Maryland, but rather is a derivative of the agreement between the two chartered, municipal entities.

This decision is consistent with the dismissal of the two prior representation petitions filed in 1997 and 2009. The IBT asserted in its petition, however, there were factual and legal changes in the relationship of the Delmar Police Department which warranted reconsideration. Those

¹⁷ July 1, 2005 – June 30, 2006

changes do not, however, impact the jurisdiction of the Delaware Public Employment Relations Board.

The IBT asserted that when the Joint Council of Delmar, Delaware and Delmar, Maryland dissolved the Police Commission and reorganized the reporting structure such that the Chief of Police now reports to the Town Manager, it was a material change that affected the outcome of the two prior PERB decisions. The IBT is mistaken in this belief. The Town Manager is also an employee of the Joint Council which is comprised of the Mayor and Council of Delmar, Delaware and the Mayor and Commissioners of Delmar, Maryland. While the Chief of Police and the Police Department may no longer report directly to the two Mayors, they do still report to the Joint Council, which is comprised of the elected Mayors and Councilpersons and Commissioners of both municipalities. The Town Manager acts under the direction of both Delmar, Delaware and Delmar, Maryland.

The IBT also argued that when, by Joint Resolution of the two municipalities in May 2000, the Town of Delmar chose to participate in the County and Municipal Police Pension Plan for the State of Delaware to cover all Delmar Police Officers, the Town of Delmar, Delaware was estopped from asserting that it did not have a sufficient number of employees to qualify as a public employer under 19 Del. C. §1602(1). The IBT argues that because there was no issue of funding and/or constitutional conflict for purposes of the choosing the Delaware Police pension plan, Delmar, Delaware cannot assert it is not a municipality for purposes of the POFERA.

IBT Exhibit 1 reveals that in response to a concern raised by the Delaware Auditor of Accounts in September, 1989, the Town of Delmar contacted the Delaware State Pension Office to “investigate” the possibility of enrolling all Delmar police officers in the State of Delaware police pension fund. IBT Exhibit 1 includes multiple letters in February 1990 from the Pension Fund’s actuaries to the Delaware Pension Administrator which detail how much Delmar would be

required to contribute in order for Delmar police to participate in the County and Municipal Police Pension Plan. The only other document in this record which relates to this issue is the resolutions of Delmar, Delaware and Delmar, Maryland which states:

WHEREAS the General Assembly of the State of Delaware has passed legislation providing for a uniform police pension plan for counties and municipalities in the State of Delaware which legislation has been designated as Senate Bill 523 which is the addition of a new Chapter to the Delaware Code being designated Chapter 86 to Chapter 11; and

WHEREAS, it is provided in Section 8605 that any municipality may elect to participate in the plan retroactive to July 1, 1990 upon approval of a resolution adopted by the governing body of the municipality electing to participate in said Plan.

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE TOWN OF DELMAR, DE/MD, IN COUNCIL MET:

1. That the Council hereby elects to participate in the County and Municipal Police Pension Plan retroactive to July 1, 1990, if approved by the Board of Pension Trustees of said Plan, then the election shall be effective retroactive to July 1, 1990 which said election shall cover all Town of Delmar Police Officers who were hired during and after [sic] retroactive to July 1, 1990.
2. That the Town Clerk is hereby directed to forward this resolution to the Board of Pension Trustees and to do all other things necessary to implement said election.

This joint resolution makes it clear that the participation is contingent upon the Board of Pension Trustees' approval. There is nothing in this record to support the IBT's assertion that the approval was based on application of the definition of a municipal corporation as set forth in 22 Del. C. §801.¹⁸ As previously stated, parties cannot mutually confer authority on a state agency; consequently, it must be concluded that the Pension Trustees had authority under the enabling statute to grant approval for the Delmar Police to participate in the Plan.

¹⁸ 22 Del. C. §801(3): 'Municipal corporation' includes all cities, towns and villages created before or after December 28, 1961, under any general or special law of this State for general governmental purposes which possess legislative, administrative and police powers for the general exercise of municipal functions and which carry on such functions through a set of elected and other officials.

The Town of Delmar argued the petition should be dismissed based on the doctrines of *res judicata* and/or collateral estoppel. *Res judicata* does not apply in this case because the petitions were nominally filed by different parties (the Fraternal Order of Police and then IBT Local 326). All three petitions, however, seek to organize the Delmar Police Officers under the POFERA. As both issues are required for application of the doctrine, *res judicata* is not applicable in this case.

The IBT argues that it has asserted new facts which distinguish the present petition from the two prior petitions filed by the FOP. The participation of the Delmar Police Department in the Delaware County and Municipal Police Pension Plan occurred in 2000, prior to the filing of the second FOP petition in 2009. It was not, however, included in the record or argued in support of the petition.

The Joint Council agreed to recess the Police Commission meetings effective March 31, 2014 in order to allow for the reorganization of the responsibilities and reporting structure of the Police Chief.¹⁹ As a result of the reorganization, the Chief (like other department heads under the unified administration of the 1954 Agreement of Delmar, Delaware and Delmar, Maryland) reported directly to the Town Manager. The Town Manager, and ultimately the Police Chief as well, report to the Joint Council. There is no substantive change to the ultimate authority to create, operate and maintain the Delmar Police Department. It exists as a result of the mutual agreement of the two municipalities, of which one is wholly within the State of Maryland and not subject to the laws of Delaware. The funding of the unified Delmar Police Department by the towns of Delmar, Delaware (funding 40% of the costs) and Delmar, Maryland (funding 60% of the cost) has not changed.

Finally, this is the third time this same issue has been raised and decided. Unless and until

¹⁹ IBT Exhibit 5.

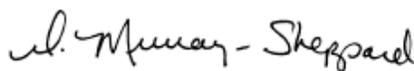
there is some change to the jurisdiction of the Public Employment Relations Board under the Police Officers and Firefighters Employment Relations Act, this issue is settled.

DECISION

For the reasons set forth herein, the Petition for Bargaining Unit Determination and Certification of Exclusive Bargaining Representative filed by the International Brotherhood of Teamsters Local 326, is dismissed. The Delaware Public Employment Relations Board does not have jurisdiction under the Police Officers and Firefighters Employment Relations Act to conduct certification proceedings for the “Town of Delmar” which is an agency formed by the mutual agreement of the Town of Delmar, Delaware and the Town of Delmar, Maryland in order to provide unified public safety services to the residents of both municipalities. The “Town of Delmar” is not a municipal corporation, or municipality, city or town located within the State of Delaware or an agency thereof.

IT IS SO ORDERED.

DATE: May 17, 2021



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