

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

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| FRATERNAL ORDER OF POLICE LODGE 1, | : | |
| | : | |
| Charging Party, | : | |
| | : | ULP No. 22-01-1294 |
| v. | : | |
| | : | PROBABLE CAUSE DETERMINATION |
| CITY OF WILMINGTON, DELAWARE, | : | AND ORDER OF DEFERRAL |
| | : | |
| Respondent. | : | |

APPEARANCES

Jeffrey M. Weiner, Esq., for Charging Party, FOP Lodge 1
Lauren E.M. Russell, Esq., Young Conaway Stargatt & Taylor, LLP, for City of Wilmington

BACKGROUND

The City of Wilmington (“City”) is a public employer within the meaning of §1602(13)¹ of the Police Officers’ and Firefighters’ Employment Relations Act, 19 Del. C. Chapter 16 (“POFERA”).

The Fraternal Order of Police Lodge 1 (“FOP Lodge 1”) is an employee organization and an exclusive bargaining representative, within the meaning of 19 Del. C. §§1602 (7) and (8). FOP Lodge 1 represents the bargaining unit of sworn City of Wilmington Police Officers in the ranks of Patrol Officer through Lieutenant (“rank and file unit”). It also represents a bargaining unit of senior Wilmington Police Officers holding the ranks of Captain and Inspector (“Captains and Inspectors unit”).

¹ Effective September 10, 2021, the Police Officers’ and Firefighters’ Employment Relations Act was amended. As part of that modification, all of the definitions contained in §1602 were renumbered.

The City and FOP Lodge 1 are parties to two collective bargaining agreements. The rank and file unit and the City were parties to a collective bargaining agreement with a term of July 1, 2020 through June 30, 2021, and at the time this Charge was filed had negotiated and agreed upon a tentative successor Agreement with the term of July 1, 2021 through June 30, 2024. The current collective bargaining agreement for the Captains and Inspectors unit has a term of July 1, 2020 through July 1, 2023.

On January 11, 2022, FOP Lodge 1 filed an unfair labor practice charge with the Public Employment Relations Board (PERB) alleging conduct by the City in violation of 19 Del. C. §1607 (a)(3) and/or (a)(5), which state:

- (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
 - (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.

FOP Lodge 1 alleges the City violated these provisions by unilaterally implementing mandatory COVID-19 testing and/or by requiring WPD officers to use their earned leave in order to be paid for time they are unable or ineligible to work due to a positive COVID-19 test result and/or as a result of quarantine or isolation requirements.

On January 21, 2022, the City filed its Answer to the Charge, denying the conclusions and assertions made by the FOP that it had violated the POFERA. Included with its Answer was New Matter in which the City asserts 1) it had no duty to bargain implementation of COVID-19 Workplace Guidance which was consistent with state and federal public health guidance and which was necessary to limit the spread of the virus and to maintain a safe and healthy workplace; 2) that the FOP failed to request to bargain the Workplace Guidance and therefore waived its right to do

so; 3) that the Charge that the City unilaterally required Police Officers to use sick leave to cover COVID-19 related absences is untimely, as this requirement has been in place since July 1, 2021, more than 180 days prior to the filing of this Charge; 4) binding interest arbitration is inapplicable to this case as it is only available under the POFERA for unsuccessful negotiations for collective bargaining agreements; and 5) because the FOP has raised an identical issue in a class action grievance which is being processed through the parties' negotiated grievance procedure, this charge should be deferred pending completion of the grievance and arbitration procedure.

FOP Lodge 1 filed its response to the City's New Matter on January 27, 2022,² in which it denied the legal positions set forth therein and asserts it is without knowledge of certain factual allegations concerning the City's discontinuation of the Emergency Paid Sick Leave bank for COVID-19 related absences effective July 1, 2021. The FOP admits that it filed a class action grievance admitting to the implementation of the COVID-19 Workplace Guidance for Employees and that the grievance process is on-going and has not been completed. The FOP asserts that the grievance and the unfair labor practice charge should "proceed simultaneously."

This probable cause determination is based upon a review of the pleadings submitted in this matter.

DISCUSSION

Regulation 5.6 of the Rules of the Public Employment Relations Board requires:

- (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

² The FOP moved to amend its Answer to the City's New Matter to clarify that the City had not implemented the mandatory testing requirements for its firefighters and that the City was engaged in negotiations with the exclusive bargaining representative of its firefighters concerning this issue. The City did not object to the amendment of the FOP's Answer to New Matter. The complete pleadings, as amended, have been reviewed and considered in reaching this decision.

request that the Board review the Executive Director's decision in accord with 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 has, or 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 determining whether probable cause exists to support an unfair labor practice 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. *Flowers v. DART/DTC*, ULP 04-10-453, V PERB 3179, 3182 (DE.PERB, 2004).

In order to find there was a violation of the POFERA as alleged, it is necessary to establish both that there was a change in the status quo relating to mandatory weekly COVID-19 testing and the required use of earned leave and that these matters are mandatory subjects of bargaining. Failure to establish either element will result in dismissal of the Charge. *Brandywine Affiliate, NCCEA/DSEA/NEA v. Brandywine School District*, ULP 85-06-005, I PERB 131, 143 (1986). To establish there has been a change in the status quo, it must first be determined there has been a material change in the negotiated terms and conditions of employment of bargaining unit employees.

It is undisputed that the FOP submitted a class action grievance pursuant to the parties' negotiated Agreement, "... objecting to the implementation of the Policy." The parties agree that grievance process is on-going and not yet complete.³

This Board has held that where resolution of an alleged statutory violation directly relates to a contractual issue which is subject to resolution through the parties' negotiated grievance and

³ City New Matter ¶¶44-45; FOP Response to New Matter ¶¶44-45.

arbitration procedure, PERB may invoke a discretionary, limited deferral policy:

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.

Fraternal Order of Police 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 1 v. City of Wilmington*, ULP 10-11-773, VII PERB 4935 (2011). The question of whether PERB should withhold its processes arises only when a charge presents a set of facts which not only allege statutory violations but also allege a breach of the collective bargaining agreement which is subject to resolution through the grievance procedure.

The collective bargaining agreements between these parties include negotiated grievance procedures that culminates in the submission of unresolved issues to final and binding arbitration before an impartial arbitrator. The purpose of the POFERA to support and promote collective bargaining is not furthered by allowing parties to sidestep the grievance procedure by casting a dispute in statutory terms. Because there is a pending grievance which is actively being processed, staying the further processing of this Charge and deferring resolution of the underlying issue of whether there was a change to the terms and conditions of employment of bargaining unit employees gives full force and effect to the parties' agreement.

PERB's deferral policy is not unconditional. Consequently, should this agency be advised that the substance of the underlying grievance is not being resolved in accordance with the parties' negotiated grievance procedures, the deferral order will be rescinded and a hearing will be convened forthwith to consider the merits of the Charge.

Deferral of a charge to processing through the negotiated grievance and arbitration process does not constitute a final resolution of the pending unfair labor practice charge nor deprive PERB of jurisdiction or responsibility to resolve the charge. Where deferral is ordered, the PERB retains

jurisdiction over the unfair labor practice charge for the express purpose of reconsidering the matter upon application of either party for any of the following reasons:

- 1) the arbitration award failed to resolve the statutory claim;
- 2) the arbitration has resulted in an award which is repugnant to the applicable statute;
- 3) the arbitral process has been unfair; and/or
- 4) the dispute is not being resolved by arbitration with reasonable promptness.

The processing of this Charge is stayed pending the exhaustion of the parties' grievance and arbitration procedure.

DETERMINATION

Considered in a light most favorable to the FOP, the pleadings are sufficient to establish that the City may have violated 19 Del. C. §1607 (a)(3) and/or (a)(5) as alleged. Because the resolution of the allegations of this Charge requires a determination that there has been a change in the application of the parties' collective bargaining agreements, the Charge is deferred to the negotiated grievance and arbitration procedure.

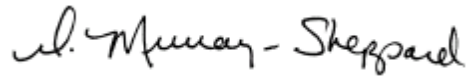
Without prejudice to either party and without deciding the merits of the controversy or whether the Charge was timely filed as it relates to the use of paid leave for COVID-19 related absences, PERB retains jurisdiction over the Charge for the limited purpose of entertaining a timely and appropriate motion for further consideration that:

- 1) the arbitration award failed to resolve the statutory claim;
- 2) the arbitration resulted in an award which is repugnant to the applicable statute;
- 3) the arbitral process has been unfair; and/or
- 4) the dispute is not being resolved by arbitration with reasonable promptness.

The parties are directed to notify the Public Employment Relations Board within sixty (60)

days from the date of this decision as to the status of the underlying grievance.

DATE: February 18, 2022



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