

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

FRATERNAL ORDER OF POLICE, LODGE 11,	:	
	:	
Charging Party,	:	
	:	<u>ULP No. 22-06-1303</u>
v.	:	
	:	
STATE OF DELAWARE, DEPARTMENT OF	:	PROBABLE CAUSE DETERMINATION
SAFETY AND HOMELAND SECURITY, DIVISION	:	AND ORDER OF DISMISSAL
OF CAPITOL POLICE,	:	
	:	
Respondent.	:	

Appearances

Sr. Cpl. Robert Johnson, President, for Fraternal Order of Police, Lodge 11
Thomas J. Smith, State Labor Relations & Employment Practices, for DSHS/DSP

BACKGROUND

The State of Delaware (“State”) is a public employer within the meaning of 19 Del. C. §1602 (13) of the Police Officers’ and Firefighters’ Employment Relations Act, 19 Del. C. Chapter 16 (“POFERA”). The Department of Safety and Homeland Security (“DSHS”) is an agency of the State, of which Delaware Capitol Police is a division.

Fraternal Order of Police Lodge 11 (“FOP Lodge 11”) is an employee organization within the meaning of 19 Del. C. §1602 (7). It is the exclusive representative of the bargaining unit of all Capitol Police Officers in the ranks of Capitol Police Officer (Patrolman), Captain, and Sergeant, within the meaning of 19 Del. C. §1602 (8). DOL Case 153.

FOP Lodge 11 and the State are parties to a collective bargaining agreement which

has a term of July 1, 1995 through June 30, 1997.¹ By its terms, this collective bargaining agreement “automatically renewed from year to year thereafter ...”

On June 7, 2022, FOP Lodge 11 filed an unfair labor practice charge with the Delaware Public Employment Relations Board (“PERB”) alleging conduct by the State in violation of 19 Del. C. §1607 (a)(5),² which states:

- (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
 - (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 11 charges the State violated its duty to bargain in good faith when the Secretary of the Department of Homeland Security suspended the process to fill promotional vacancies in the ranks of Major, Lieutenant, and Sergeant in February 2022. That process was later terminated, and a new promotional process implemented in May, 2022, following adoption and implementation of a revised promotion policy and standard operating procedures. FOP Lodge 11 seeks to have the new promotional process suspended and requests the process which began in January 2022 be reimplemented.

On June 16, 2022, the State filed its Answer to the Charge admitting that the Chief of Police and the DSHS Secretary terminated the DHR screening process and initiated a new procedure for filling promotional vacancies in May, 2022. The State denied all

¹ Attachment 1 to the State’s Answer and New Matter.

² FOP Lodge 11 also enumerated multiple Merit Rules which it asserts were violated, including Merit Rule 2.1, 6.5, 7.1, 7.4, 7.6, 7.6.2, 8.1, 8.2, 8.2.1, 10.4, 14.1, and 16.2. Exclusive jurisdiction for alleged violations of the State Merit Rules rests with the Merit Employee Relations Board, not this agency. 29 Del. C. §5943 states, in relevant part:

- (a) The exclusive remedy available to a classified employee for the redress of an alleged wrong, arising under a misapplication of any provision of this chapter, the merit rules or the Secretary’s regulations adopted thereunder, is to file a grievance in accordance with the procedure stated in the merit rules. Standing of a classified employee to maintain a grievance shall be limited to an alleged wrong that affects his or her status in his or her present position.

conclusions that DSHS has violated the POFERA as alleged.

The State included in its Answer affirmative defenses in response to the Charge. It asserted the Charge fails to allege facts sufficient to establish that DSHS/Capitol Police may have violated 19 Del. C. §1607 (a)(5).

FOP Lodge 11 filed its Response to the State's New Matter on June 28, 2022, in which it denied the affirmative defense set forth therein. FOP Lodge 11 requested an Injunction and Temporary Order for Preliminary Relief by halting the promotional process until its Charge was resolved. It also requested an expedited hearing of the charge.

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

FACTS

The following uncontested facts are derived from the pleadings³:

On or about January 22, 2022, the Chief of Capitol Police requested the Department of Human Resources ("DHR") to post, accept applications, and screen candidates for a Major position. On or about January 24, 2022, the incumbent Major sent an email which included "... the tentative timeline for the promotional process for the Major, Lieutenant, and Sergeant positions." These hiring processes were initiated pursuant to Capitol Police Directive 34 (effective 5/26/21) and Standard Operating Procedure D-23 (effective 12/20/21).

³ Included in the Charge was a section entitled "Timeline of Events" which set forth the factual allegations of FOP Lodge 11. The Charge also included 41 pages of documents to support its factual allegations. The State, in responding, chose not to respond to anything beyond the first three numbered paragraphs of the Charge. PERB Rule 5.3 requires that an Answer to a Charge must be specific as to each allegation of the Charge, and further states, in relevant part, "A party who fails to ... specifically deny allegations in the complaint shall be deemed to have admitted the averments in the complaint that are not denied." The documents provided support the factual assertions made in the FOP Lodge 11 Timeline and are included in this decision as unrefuted.

Initial interviews for the Major position were conducted on February 15, 2022. Following those interviews, four (4) applicants⁴ were identified as finalists and scheduled for interviews with the Chief of Police to be conducted on February 21, 2022.

By email dated February 17, 2022, DHR advised applicants that the promotional process for Capitol Police Major, Lieutenant, and Sergeant positions was postponed until further notice by the Secretary of the Department of Safety and Homeland Security.

On or about April 4, 2022, the DSHS Chief of Administration forwarded to the FOP Lodge 11 President revisions to the Capitol Police Promotional Process. The email stated:

Once you have had an opportunity to review this process, please let me know if you have any questions. After your approval, we will distribute it to the candidates. Then we can get the process moving again.

Thereafter, the DSHS Chief of Administration engaged in at least one phone call and responsive emails with the FOP Lodge 11 President concerning the union's questions and concerns.

On or about May 27, 2022, the Chief of Police emailed to all Capitol Police Officers copies of updated promotional directives.

On or about May 31, 2022, applicants for the Major, Lieutenant and Sergeant positions were notified by email that the positions would not be filled at that time "due to an administrative decision" and that the positions would be reposted. They were encouraged to watch for the new posting on the DHR Jobs website.

DISCUSSION

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

⁴ Of the four finalists, two (2) were bargaining unit members represented by FOP Lodge 11 and two were not.

- (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).

FOP Lodge 11 argues that “once DSHS entered into talks with FOP 11 concerning the promotional process by requesting changes in the middle of the process, then failed to respond to questions about the process and new promotional policy, they violated 19 Del. C. 1607(a)(5).”⁵

The Charging Party has the burden to support an allegation of bad faith bargaining. *Appoquinimink Education Assn. v Bd. of Education*, ULP 1-2-84A, I PERB 23, 26 (PERB, 1984), adopting *NLRB v. Katz*, U.S., 369 US 736 (1962). An alleged unilateral change does not violate the employer's obligations under the POFERA unless it involves a mandatory subject of bargaining, which are statutorily defined to be “... matters concerning

⁵ FOP Lodge 11 Response to New Matter, ¶5.

or related to wages, salaries, hours, grievance procedures and working conditions...”.

The POFERA reserves certain rights to the public employer’s inherent managerial policy. While the employer may choose to negotiate concerning these permissive subjects of bargaining, it is not required to bargain concerning, “... such areas of discretion or policy as the functions and programs of the public employer, its standards of service, overall budget, utilization of technology, the organizational structure and the staffing levels, selection and direction of personnel.”⁶

Terms and conditions of employment as defined in §1602 (15) (i.e., mandatory subjects of bargaining) are explicitly limited to exclude matters of inherent managerial policy reserved to the employer’s discretion by §1605⁷ as well as matters determined by other laws of the State to be within the employer’s exclusive prerogative.

FOP Lodge 11 alleges the State violated its good faith obligations to bargain by suspending and later terminating the hiring processes for Capitol Police positions which was initiated in January, 2022. The terminated processes were then replaced with a new policy and procedure and the positions were to be reposted and conducted under the new process. FOP Lodge 11 asserts that the new process causes harm to the two members of the bargaining unit who had been determined eligible to proceed to second interviews with the Chief of Police for the Major position under the previous process.

There is no precedent in Delaware case law for concluding that processes related to promotions are mandatory subjects of bargaining.⁸ When and whether an employer

⁶ 19 Del. C. §1605, Employer rights.

⁷ 19 Del. C. §1602 (15) “Terms and conditions of employment” ... shall not include those matters determined by this chapter or any other law of the State to be within the exclusive prerogative of the public employer.

⁸ *Delaware State Troopers Association v. Dept. of Safety and Homeland Security, Division of State Police*, ULP 20-09-1248, IX PERB 8321 (PERB, 2021).

decides to fill a promotional vacancy falls squarely within inherent managerial policy of staffing levels and selection of personnel.⁹

It is well established in Delaware PERB case law that the unfair labor practice forum is not a substitute for the grievance procedure.¹⁰ To the extent that parties may choose to negotiate concerning promotional processes, any agreements reached would be subject to enforcement through their negotiated grievance procedure. In fact, these parties agreed in Article IV, Management Rights, of their negotiated collective bargaining agreement that:

Except where modified by the specific terms of this Agreement, the management of the Department and its employees, including but not limited to the right to... promote ... employees..., are the exclusive prerogatives of the Employer.¹¹

There are no other provisions in the collective bargaining agreement which specifically mention or address “promotion”.

For the reasons set forth above, this unfair labor practice charge is dismissed because it fails to set forth a claim which is subject to resolution under the Police Officers’ and Firefighters’ Employment Relations Act. There is, therefore, no reason to consider either FOP Lodge 11’s request for a preliminary injunction halting the promotional process or for scheduling an expedited hearing in this matter. Both requests are denied.

DETERMINATION

Considered in a light most favorable to the Charging Party, the pleadings are not sufficient to establish that the State unilaterally modified a mandatory subject of bargaining

⁹ *DSTA v. DSHS, DSP*, ULP 20-09-1248, IX PERB 8321 (Probable Cause Determination and Order of Dismissal, 2021; affirmed by the full PERB, IX PERB 8351 (PERB, 2021).

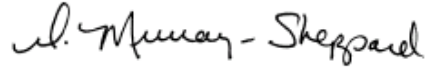
¹⁰ *Brandywine Affiliate, NCCEA/DSEA/NEA v. Brandywine Board of Education*, ULP 85-06-005, I PERB 131, 142-143 (PERB, 1986).

¹¹ Attachment 1 to the Answer to the Charge, at p. 2.

or violated 19 Del. C. §1607 (a)(5), as alleged.

Having found no probable cause exists to find that an unfair labor practice may have been committed, the Charge is dismissed.

DATE: August 24, 2022



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