

**STATE OF DELAWARE**  
**PUBLIC EMPLOYMENT RELATIONS BOARD**

<b>FRATERNAL ORDER OF POLICE LODGE NO. 1,</b>	:	
	:	
Charging Party,	:	
	:	<b><u>ULP No. 23-12-1389</u></b>
v.	:	
	:	<b>PROBABLE CAUSE DETERMINATION</b>
<b>CITY OF WILMINGTON, DELAWARE,</b>	:	
	:	
Respondent.	:	

**BACKGROUND**

The City of Wilmington (“City”) is a public employer within the meaning of §1602(13)<sup>1</sup> 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 Major (“Captains and Majors unit”).

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, 2021 through June 30, 2024. The current collective bargaining agreement for the Captains and Majors unit has a term of July 1, 2023 through July 1, 2026.

On December 1, 2023, FOP Lodge 1 filed an unfair labor practice charge with the Public

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.

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 failing to respond to the FOP's request to re-open negotiations, mediating, and, if necessary, resolving contract terms related to Employee Residency Requirements, through binding interest arbitration.

On December 19, 2023, the City filed its Answer to the Charge, denying the conclusions and assertions made by the FOP that it had violated the POFERA.

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 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. DOT/DTC*, ULP 04-10-453, V PERB 3179, 3182 (DE. PERB, 2004).

The underlying facts in this case are not in dispute. They include the following:

On July 27, 2022, the Governor signed into law HB 422 of the 151<sup>st</sup> General Assembly, entitled, “An Act to Amend the Charter of the City of Wilmington Relating to Residency”, which stated:

Section 1. Amend Section 3-304 of the Charter of the City of Wilmington by making deletions as shown by strike through and insertions as shown by underline as follows:

Sec. 3-304. - Citizenship and residence.

(a) Citizenship—All officers and employees of the city shall be citizens of the United States when the duties of the position require direct participation in the formulation, operation, or review of broad public policy or require the exercises of important discretionary governmental powers over citizens. Positions subject to such requirement shall be designated by ordinance of City Council.

(b) Residence—~~Except as otherwise required by this Charter, the city may, by ordinance, determine whether, and to what extent, employees~~ All officers, regular employees, and probationary employees of the city shall be residents of the city at the time of their election, appointment, or ~~employment~~ hire and remain residents ~~such~~ during their tenure. ~~tenure, except as provided herein. It shall not be necessary for any non elected officer, regular employee, probationary employee, or limited service employees to be a resident of the city at the time of appointment or employment, but such residence in the city must be required within six (6) months thereafter. Employees who are subject to the requirements of Title 22 of the Delaware Code, Section 841, regarding duration of employment, shall not be subject to the residency requirement after first meeting the requirements of that section. Appointed members of boards and commissions, shall be residents of the city, but this requirement~~ Any such residency requirement shall not apply to the additional advisory boards appointed by the mayor pursuant to the provisions of section 3- 100(g) of this Charter.

By letter dated October 23, 2023,<sup>2</sup> addressed to the City’s Director of Human Resources, the President of FOP Lodge No. 1 requested to initiate a reopener of the 2021 – 2024 rank and file

<sup>2</sup> Exhibit A to the Charge.

collective bargaining agreement, stating:

... The issue we seek to address in this reopener pertains to conditions of residency for sworn members of the Fraternal Order of Police Lodge #1, in light of developments in Delaware law that directly impact the mandatory subject of bargaining concerning employee residency.

In particular, we would like to draw your attention to the Delaware Court of Chancery's decision in January 2021, as cited in Case Number 2019-0506-KSJM, which affirmed that residency is a mandatory subject of collective bargaining under Delaware law. On July 27, 2022, the Governor signed legislation that amended Section 3-304 of the City of Wilmington's Charter. This amendment empowers the City of Wilmington to determine whether, and to what extent, its employees are required to be City residents. As a result, the City is granted the authority to negotiate residency requirements with unionized employees, such as our members, as a term and condition of employment.

In light of these legal developments and the clear affirmation of the mandatory bargaining status of employee residency, we believe it is necessary to reopen our existing collective bargaining agreement to address this issue. We would like to initiate discussions and negotiations to establish clear and mutually agreeable terms and conditions regarding residency requirements, if any, for our members.

We kindly request your prompt attention to this matter and your agreement to commence the reopener process as soon as practicable. We look forward to engaging in productive discussions with your team to find a resolution that aligns with the evolving legal framework and the best interests of our members and the City of Wilmington.

Please let us know your availability for scheduling meeting or negotiations, and any further steps required to facilitate this reopener process.

Thank you for your cooperation, and we remain committed to maintaining a constructive and collaborative relationship.

The FOP Lodge #1 President sent a second letter on November 17, 2023, reiterating the FOP's request, stating:

... To date we have not received a response to our initial request, and we understand the demands on your time. However, the matter at hand is of significant importance, and we seek your cooperation in addressing the issues we presented in our earlier communication.<sup>3</sup>

The City admits that it has not responded to the FOP's request to re-open negotiations on

<sup>3</sup> Exhibit B to the Charge.

the residency issue.<sup>4</sup> It asserts the City and the FOP are scheduled to initiate negotiations for a successor agreement for the rank and file bargaining unit on Friday, January 12, 2024.

The City also asserts that the Wilmington City Council amended Chapter 40, Section 40-3 and 40-4 of the City Code.<sup>5</sup> With the passage of this ordinance, the City asserts its residency requirement is now an illegal subject of bargaining under the POFERA.

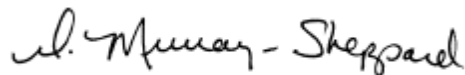
With all inferences drawn in the favor of the Charging Party, the pleading are sufficient to support the possibility that an unfair labor practice may have occurred. It will be the FOP's burden to establish that the City had a good faith obligation to enter into mid-term negotiations concerning the residency requirements, at the FOP's request, and that the City violated §1607(a)(3) and/or (a)(5), as alleged.

#### **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 there are very limited factual differences and the Charge primarily involves legal issues, a prehearing conference will be convened to discuss the further processing of this Charge, including establishing a schedule for providing argument.

DATE: January 22, 2024



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

<sup>4</sup> City Answer ¶ 10.

<sup>5</sup> *Ibid.* A copy of the modified ordinance cited by the City in its Answer was not provided in the pleadings.