

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

FRATERNAL ORDER OF POLICE LODGE NO. 1,	:	
	:	
Charging Party,	:	
	:	<u>ULP No. 23-12-1389</u>
v.	:	
	:	DECISION ON THE MERITS
CITY OF WILMINGTON, DELAWARE,	:	
	:	
Respondent.	:	

Appearances

Jeffrey M. Weiner, Esq., for FOP Lodge No. 1

Michael P. Stafford, Esq., Young Conaway Stargatt & Taylor, for the City

BACKGROUND

The City of Wilmington, Delaware, (“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 No. 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

¹ Effective September 10, 2021, the Police Officers’ and Firefighters’ Employment Relations Act was amended. As part of that modification, the definitions contained in §1602 were renumbered. On January 31, 2024, FOP Lodge 1 amended its Charge to correct the statutory citations.

and file unit and the City were parties to a collective bargaining agreement with a term of July 1, 2021 through June 30, 2024, which was applicable at all times relevant to this Charge. The current collective bargaining agreement for the Captains and Majors unit has a term of July 1, 2023 through June 30, 2026.

On December 1, 2023, 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).² The Charge alleges the City violated the POFERA by unilaterally failing to respond to the FOP's request to re-open negotiations related to Employee Residency Requirements in order to resolve any necessary contractual changes, including through mediation and binding interest arbitration if mutual agreement could not be reached.

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.

A probable cause determination was issued on January 22, 2024, finding:

[T]he 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.³

A prehearing teleconference was convened on January 26, 2024. Following the prehearing conference, copies of the following documents were included in the record:

² (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.

³ *Fraternal Order of Police Lodge No. 1 v. City of Wilmington*, ULP 23-12-1389, Probable Cause Determination, IX PERB 8843, 8847 (1/22/24).

- Vice Chancellor McCormick’s January 22, 2020 decision in *City of Wilmington v. FOP #1*, C.A. No. 219-0506 KSJM;
- City Ordinance 40-3 and 40-4 (current and prior copies)
- Documents provided by FOP Lodge 1 which included:
 - City Code, Chapter 2, Article III, Division 18, The Citizen Complaint Review Board
 - Ordinance 23-031, Bereavement Leave
 - Section 1-4 Designation of Legal Holidays
 - Ordinance 16-004. Paid Parental Leave
 - Resolution 16-078, Amending the Agreement between the City and AFSCME Local 320
 - Resolution 16-079, Amending the Agreement between the City and AFSCME Local 1102.
 - Resolution 17-048, Amending the collective bargaining agreement between the City and FOP Lodge No. 1 (rank and file)
- City Ordinance 40-10. – Collective bargaining agreements.

The record closed upon receipt of Opening and Responsive argument by the parties. This decision is based upon review and consideration of the record created by the parties, their arguments and relevant case law.

FACTS

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 151st 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 of the city shall be residents of the city at the time of their election, appointment, or hire and remain residents during their tenure. 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.⁴

This amendment to the Charter empowered the City to determine whether, and to what extent, its employees can be required to be residents of the City.⁵

By letter dated October 23, 2023,⁶ 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 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.

⁴ Subsection (b) of Section 3-304 of the City Charter previously stated: 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 and remain such during their 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 shall not apply to the additional advisory boards appointed by the mayor pursuant to the provisions of section 3-100(g) of this Charter.

⁵ City Brief at p. 1.

⁶ Exhibit A to the Charge.

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.

On November 16, 2023, City Council passed an ordinance⁷ amending §40.3 and §40.4 of the City Code, which stated, in relevant part:

Sec. 40-3 – Residency requirement, annual declaration

- (a) All elected officers of the city shall be residents of the city for the term of their office and as otherwise required by law. Non-elected regular employees shall acquire residency in the city within one (1) year of employment⁸, and shall not be required to be residents of the city at the time of hiring. However, a preference for applicants or prospective employees who are bona fide city residents will be granted as specified in section 40-4 of this article.
- (b) In accordance with 22 Del. C. §841, all non-elected employees shall be required to reside within the geographical boundaries of the city for a period of five (5) years.⁹
- (c) All regular city employees shall file an annual declaration of residency, pursuant to city code chapter 2, section 2-151.

Sec. 40-4 – Preference for employment of residents.

⁷ Substitute No. 2 to Ordinance No. 23-040

⁸ Prior to this amendment, non-elected employees were required to become city residents within six months of being hired.

⁹ This language replaced the prior subsection (b) which stated: Notwithstanding the provisions of this section, and in accordance with 22 Del. C. §841, any non-elected employee who was employed as of January 28, 1998, who at that time had at least 12 years of service for the city, shall not be required to become or remain a resident of the city during his/her employment; no non-elected employee who is/was hired, rehired, or reinstated after January 28, 1998, who has an aggregate of 15 years of service for the city, shall be required to become or remain a resident of the city during his/her employment.

The department of human resources¹⁰ and each appointing authority in city government, including the mayor and department heads and the director of human resources, shall grant a preference for the employment in the appointed and classified services of applicants or prospective appointees who, at the time of their application, employment, or appointment to a position in city government, are bona fide residents of the city.¹¹ In cases where residents and nonresidents are equally qualified for particular vacant positions, the city resident will receive first consideration in filling such vacant position.

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.¹²

As of the date of the filing of the Answer to this Charge (December 19, 2023), the City had not responded to FOP Lodge 1's request, and the parties had not entered into negotiations concerning the residency requirement.

POSITIONS OF THE PARTIES

FOP Lodge 1:

FOP Lodge 1 asserts residency is a mandatory subject of bargaining on which the City is required to negotiate with the exclusive bargaining representative of its police. The revisions to the City Charter and amendment of City Ordinance 40-3 and 40-4 cannot supersede or negate the City's duty to bargain the residency requirement. City Ordinance 40-10, Collective bargaining agreements, has no impact on the disposition of this unfair labor practice charge.

FOP Lodge 1 argues that City Ordinance 40-3(b) is unenforceable against any police

¹⁰ This provision of the City Code previously referenced the "personnel department".

¹¹ The amendment deleted "... or have met the city's residency requirement pursuant to city charter section 3-304..."

¹² Exhibit B to the Charge.

officer hired before its passage by City Council on November 16, 2023. It also argues that City Ordinance 40-3(b) is also unenforceable against any officer hired after November 16, 2023 unless and until a residency requirement is determined by negotiation (including mediation and/or binding interest arbitration, if necessary).

City of Wilmington:

The City admits that it has not responded to the FOP's request to re-open negotiations on the residency issue.¹³ It asserted 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 asserted that the Wilmington City Council amended Chapter 40, Section 40-3 and 40-4 of the City Code.¹⁴ With the passage of this ordinance, the City asserts its residency requirement is now an illegal subject of bargaining under the POFERA.

ISSUES

- 1) DOES THE CITY HAVE A GOOD-FAITH OBLIGATION UNDER THE POLICE OFFICERS' AND FIREFIGHTERS' EMPLOYMENT RELATIONS ACT TO REOPEN THE 7/1/21 – 6/30/24 WILMINGTON POLICE DEPARTMENT COLLECTIVE BARGAINING AGREEMENT TO NEGOTIATE CONCERNING THE RESIDENCY REQUIREMENT IN RESPONSE TO CHANGES IN THE CITY'S CHARTER AND/OR ORDINANCES, AND/OR TO FOP LODGE #1'S 10/23/23 REQUEST TO REOPEN?
- 2) DOES THE REVISION OF CITY ORDINANCES 40-3 AND 40-4 SUPERSEDE OR NEGATE THE CITY'S DUTY TO BARGAIN (I.E., ARE CHANGES TO THE RESIDENCY REQUIREMENT A MANDATORY SUBJECT OF BARGAINING)?

¹³ City Answer ¶ 10.

¹⁴ *Ibid.* A copy of the modified ordinance cited by the City in its Answer was not provided in the pleadings.

3) WHAT IMPACT, IF ANY, DOES ORDINANCE 40-10, COLLECTIVE BARGAINING AGREEMENTS, HAVE ON THE DISPOSITION OF THIS CHARGE?

DISCUSSION

This Board has held, since its earliest decisions, that "... the duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor management relations during the term of the agreement."¹⁵ This Charge raises a new issue for consideration. FOP Lodge 1 asserts that the City violated its duty to bargain in good faith when it failed to respond to the union's request to negotiate what it asserts was a mandatory subject of bargaining. There is no allegation here that the City implemented a unilateral change in the existing terms and conditions of employment. This Charge is more in the nature of requesting this Board decide whether a residency requirement which affects the bargaining unit is a mandatory or illegal subject of bargaining. The City, in its submissions, agrees that the bargaining status of the residency requirement should be resolved through this process.

The analysis as to whether an issue is a mandatory or illegal subject of bargaining under the POFERA begins with the understanding that the fundamental purpose of the statute is to promote negotiations concerning a broad and encompassing scope of bargaining.¹⁶ There is a rebuttal presumption that issues should be negotiated. Issues should only be excluded from negotiations where it is clear the subject is either not a term and condition of employment, is an illegal subject of bargaining, or unequivocally falls with the definition of inherent managerial policies, as defined in §1605.

Section 1602 (5) defines collective bargaining¹⁷ to mean "... the performance of the

¹⁵ *Smyrna Educators Association v. Bd. of Education*, ULP 87-08-015, I PERB 207, 216 (1987), citing *NLRB v. Acme Industrial Co.*, 385 US 432 (1967).

¹⁶ 19 *Del. C.* §1601. Statement of Policy.

¹⁷ Public employers and public employee representatives certified to represent the employees of that employer are obligated to "... enter into collective bargaining negotiations with the willingness to resolve

mutual obligation of a public employer through its designated representatives and the exclusive bargaining representative to confer and negotiate in good faith with respect to terms and conditions of employment, and to execute a written contract incorporating any agreements reached”. Section 1602 (15) defines both mandatory and illegal subjects of bargaining.

“Terms and conditions of employment” means matters concerning or relating to wages, salaries, hours, grievance procedures and working conditions; provided, however, that such term 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.

Matters within the "exclusive prerogative" of the employer must be explicitly granted or mandated by State law, not simply by a general grant of authority.¹⁸ An employer’s exclusive prerogative constitutes subjects of bargaining on which the employer is expressly prohibited from bargaining. The 1984 *Appoquinimink* decision quoted the Pennsylvania Supreme Court:

If, however, the General Assembly mandates a particular responsibility to be discharged by the [employer] and the [employer] alone, then the matter is removed from bargaining ... even if it has a direct impact on “wages, hours, and other terms and conditions of employment”. The removal from collective bargaining results not because it necessarily falls within the purviews of §701¹⁹ but rather because to do otherwise would be in direct violation of a statutory mandate and thus excluded under §703²⁰... We therefore conclude that items bargainable under §701 are only excluded under §703 where other applicable statutory provisions explicitly and definitively prohibit the public employer from making an agreement as to that specific term or condition of employment.²¹

Further, negotiated contractual provisions which are found to be inconsistent or contrary to law

disputes relating to terms and conditions of employment and to reduce to writing any agreements reached through such negotiations. 19 *Del. C.* §1601(2).

¹⁸ *Appoquinimink Education Association v. Bd. of Education*, Del. PERB, ULP 1-3-84-3-2A, I PERB 35, 44 (1984)

¹⁹ §701 of Pennsylvania’s Act 195 parallels §1602(5) of the POFERA.

²⁰ §703 of Pennsylvania’s Act 195 parallels §1613(e) of the POFERA.

²¹ *Pennsylvania Labor Relations Bd. v. State College Area School District*, Pa. Supr., 337 A.2d 262, 269 (1975).

are invalid and unenforceable under §1613(e) of the POFERA.²²

It is beyond question that a requirement that an employee reside within a certain geographically defined area is a condition of employment. If the employee fails to meet the residency requirement, he, she, or they are no longer eligible to remain employed by the City. This decision is consistent with the holdings in many jurisdictions applying similar public sector collective bargaining laws.²³

Prior to the modification of the City's Charter by the State General Assembly, the Charter required all city employees "...shall be residents of the city at the time of their election, appointment, employment and remain such during their tenure..." except for the specific exceptions which followed.²⁴

When the City's Charter was modified in 2022, it provided the City discretion to adopt a residency requirement:

- (b) Except as otherwise required by the Charter, the city may, by ordinance, determine whether and to what extent employees of the city shall be residents of the city at the time of their election, appointment, or hire and remain residents during their tenure.

There is nothing in this amended language which either mandates that a residency requirement be adopted, or which constrains the City's exercise of its discretion such that it falls outside of the obligation to collectively bargain a condition of employment. There is no statutory prohibition, either under the POFERA or the Charter of the City of Wilmington, which prohibits collective bargaining related to a residency requirement.

²² *Woodbridge Education Assn. v. Bd. of Education*, Del. PERB, ULP 90-02-048, I PERB 537(1990); *AFSCME Council 81 v. DOT Division of Highways*, Del. PERB, ULP 95-01-111, II PERB 1279 (1995).

²³ Numerous cases were cited in the briefing provided by the parties from other jurisdictions, including Pennsylvania, New Jersey, Illinois, Ohio, New York, Massachusetts, Michigan, Connecticut and Florida.

²⁴ See FN 10.

The FOP asserts that the decision by then Vice Chancellor McCormick²⁵ upholding an arbitrator's decision finding the City's revisions to the definition of "residency" (on the declaration of residency form police officers are required to complete annually) violated the collective bargaining agreement, is dispositive of this unfair labor practice charge. The FOP relies specifically on FN 112 of that decision:

In briefing, the City stated that "[i]n the absence of the requirement in the City's Charter enacted by the General Assembly, the City has consistently agreed *arguendo* that a requirement that Covered Employees reside in the City would be an appropriate bargaining subject, *i.e.* a condition of employment under [the Act]." This decision holds that no requirement in the City Charter removes the issue of residency from the subject of bargaining. Hence, the City concedes that residency is an appropriate bargaining subject.²⁶

The Vice Chancellor's decision reaches the same conclusion but was not reached under application of the POFERA. The question raised by this charge specifically requests clarification as to whether the residency requirement is a prohibited subject of bargaining or a mandatory subject of bargaining.

For the reasons stated herein under the conditions of this charge, it is determined that the residency requirement is a condition of employment and is not an illegal subject of bargaining. Consequently, prior to initiating any change to the conditions of employment for the police officers, the City must notify FOP Lodge 1 and engage in negotiations, if requested.

Having found the residency requirement to be a condition of employment, and therefore a mandatory subject of bargaining under the POFERA, City Code Ordinances §40-3 and §40-4 cannot supersede the City's duty to bargain. To find otherwise would be to conclude that the City's changes to its own ordinances can preempt the collective bargaining rights granted by the

²⁵ *City of Wilmington v. Wilmington Fraternal Order of Police Lodge No. 1*, WL 11715655 (Del.Chan, Jan. 22, 2020).

²⁶ *Ibid* at p. 28.

Delaware General Assembly.²⁷

The parties agree that City Code Ordinance §40-10 has no bearing on the disposition of this Charge. The Ordinance provides that “the terms of the collective bargaining agreement shall govern” unless the agreement “is silent in regard to matters addressed in the [Personnel Code]” in which case the terms therein would govern. There is no conflict presented between the Personnel Code and the collective bargaining agreements. Further, this Ordinance can also not be invoked to negate the City’s mandatory duty to bargain residency, as a condition of employment, under the POFERA.

CONCLUSIONS OF LAW

1. The City of Wilmington, Delaware is a public employer within the meaning of §1602(13) of the Police Officers’ and Firefighters’ Employment Relations Act, 19 Del. C. Chapter 16.
2. The Fraternal Order of Police Lodge No. 1 is an employee organization within the meaning of 19 Del. C. §1602(7). It is also the exclusive bargaining representative of two bargaining units of Wilmington Police Officers within the meaning of 19 Del. C. §1602(8).
3. A residency requirement is a condition of employment and/or continued employment. It constitutes a term and condition of employment and is a mandatory subject of bargaining under the POFERA.
4. The residency requirement in the City Charter is not determined by the POFERA or any other law of the State to be within the exclusive prerogative of the public employer. 19 Del. C. §1302(15).
5. The adoption and/or amendment of City Code Ordinances §40-3 and §40-4 cannot

²⁷ Adopting the rationale of *City of Pittsburgh v. Fraternal Order of Police, Fort Pitt Lodge No. 1*, 161 A.3d 160 (Pa. 2017).

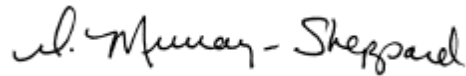
supersede the City's duty to bargain.

6. City Code Ordinance §40-10 can also not be invoked to negate the City's mandatory duty to bargain residency, as a condition of employment, under the POFERA.

WHEREFORE, the City of Wilmington is directed to engage in negotiations with FOP Lodge No. 1 concerning a requirement that police officers be or remain residents of the City as a condition of employment, as required by the Police Officers' and Firefighters' Employment Relations Act.

IT IS SO ORDERED.

DATE: April 11, 2024



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