

PUBLIC EMPLOYMENT RELATIONS BOARD
FOR THE STATE OF DELAWARE

WILMINGTON FIREFIGHTERS ASSOCIATION,	:	
LOCAL 1590,	:	
	:	
Charging Party and Respondent ,	:	<u>ULP No. 09-06-686</u>
	:	
v.	:	Executive Director’s Decision
	:	on Local 1590’s Charge
CITY OF WILMINGTON, DELAWARE,	:	and City’s Counter Charge
	:	
Respondent and Charging Party.	:	

Appearances

Ronald Stoner, Esq., for Wilmington Firefighters Assn. Local 1590
Martin C. Meltzer, Esq., Assistant City Solicitor for City of Wilmington, DE

BACKGROUND

The City of Wilmington, Delaware (“City”) is a public employer within the meaning of §1602(l) of the Police Officers and Firefighters Employment Relations Act (“POFERA”), 19 Del.C. Chapter 16 (1986).

The Wilmington Firefighters Association, Local 1590 (“WFFA”) is an employee organization which admits public employees to membership and has as a purpose the representation of those employees in collective bargaining pursuant to 19 Del.C. §1602(g). WFFA is the exclusive bargaining representative of the City’s uniformed Fire Department employees in the ranks of Firefighter through Battalion Chief, as certified in DOL Case 23.

On or about June 15, 2009, Local 1590 filed an unfair labor practice charge alleging

the City had violated 19 Del.C. §1607(a)(5).¹ Specifically, the Charge alleged:

During a critical time in contract negotiations, the City proposed and negotiated a percentage salary increase for Fiscal Year 2010, at the same time as it was intending to require Local 1590 to give back the very same negotiated percentage salary increase in exchange for no layoffs of Local 1590 members. The City knew by withholding that information, the membership of Local 1590 would be ratifying an agreement with a FY 2010 percentage increase that the City intended not to actually give them. The City's actions in concealing a material fact, that they proposed and intended to agree to the FY 2010 percentage salary increase but then demand that it be eliminated in return for no layoffs, prevented Local 1590 from properly representing its members during the negotiations and subsequent ratification. The City's actions constitute a failure to bargain in good faith and an unfair labor practice in violation of 19 Del.C. 1607(a)(5). *Charge, ¶14.*

On July 2, 2009, the City filed its Answer to the Charge² denying all material allegations. The Answer also included New Matter and a Counter Charge in which the City alleged the Local 1590 had violated 19 Del.C. §1607(b)(2).³ The City's Counter Charge alleges Local 1590 ratified the collective bargaining agreement with the knowledge that full implementation would result in layoff of its members and did so in bad faith and in violation of its statutory obligations "with the intent to compel the City by any means, including litigation, to provide more than what they bargained for."

On or about July 15, 2009, the Local 1590 filed its Response to New Matter and

¹ 19 Del.C. §1607, Unfair labor practices

(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 bargaining unit.

² The City amended its Answer and New Matter on July 13, 2009. Local 1590 was provided additional time to respond to the New Matter (as amended) and the Counter Charge.

³ 19 Del.C. §1607, Unfair labor practices

(b) It is an unfair labor practice for a public employee or for an employee organization or its designated representative to do any of the following:

(2) Refuse to bargain collectively in good faith with the public employer or its designated representative if the employee organization is an exclusive representative.

Answer to the Counter Charge.

A Probable Cause Determination was issued on August 27, 2009, wherein the Executive Director found the pleadings established a sufficient basis for finding probable cause to believe that an unfair labor practice(s) may have occurred.

A hearing was conducted before the Executive Director on September 30, 2009, during which documentary evidence and testimony were received into the record on both WFFA's Charge and the City's Counter Charge. The parties presented oral argument at the conclusion of the hearing.

This decision results from the record thus created by the parties.

FACTS

The facts as recited herein are based upon the testimonial and documentary evidence of record.

Negotiations for a successor to the parties 2001 – 2007 collective bargaining agreement were initiated in October, 2007. Negotiations continued through August, 2008, at which point the parties focused their efforts on revisions to the Salary Matrix. *Union Exhibit 1*. It is undisputed that during the period of negotiations, significant compromises were made by both parties, particularly with respect to the wage and salary matrix proposals.

At the beginning of the February 9, 2009 negotiation session, the City's Human Resource Director received a phone call from the City's Budget Director alerting her to a projected \$9 million deficit in Fiscal Year 2009 (July 1, 2008 – June 30, 2009). Through its Chief Negotiator, the City passed this information on to the WFFA bargaining team. That negotiation session continued during which the parties discussed WFFA proposals.

Although this was the last formal session attended by full negotiating teams, the parties continued to exchange proposals and negotiate through primary representatives of both parties.

On February 19, 2009 the Mayor announced in a Press Release “a series of cost-saving measures effective March 1 to counter a projected budget deficit in Fiscal Year 2009 which ends on June 30, 2009” and projected that deficit would be more than \$9 million. The Mayor directed his Chief of Staff to institute measures on March 1, 2009, which included:

- * Imposing a hiring freeze, keeping all non-essential vacancies unfilled.
- * Imposing a freeze on all non-essential overtime
- * Imposing a freeze on all non-essential travel
- * Suspending the 94th Wilmington Police Academy scheduled to convene in June.
- * Announcing a voluntary furlough program for employees giving them the option of taking one or more days off without pay , but allowing City departments to continue their normal delivery of services.

The press release also stated “if the City’s fiscal condition worsens, the Mayor said that he wants to make clear to everyone that all options are on the table including, but not limited to, suspension of cost-of-living pay adjustments and employee step increases, layoffs, mandatory furloughs, unpaid holidays and a rolling by-pass of equipment within public safety to reduce overtime costs,” noting that some of these options would require union negotiations. The release concluded “the financial outlook for the next fiscal year looks substantially worse than the current fiscal year” and promised the Mayor would present a combination of cost-cutting and revenue enhancements in his FY2010 Budget Address on March 26, 2010. *City Exhibit 5.*

On or about February 25, 2009, the City’s Chief Negotiator sent to the WFFA’s Chief Negotiator an e-mail entitled “City of Wilmington and 1590 – City’s Final Offer”.

Attached to this e-mail was nine page proposal which included Salary Matrix adjustments and proposed wage increases of 2.0% in FY 2008, 2.25% in FY 2009, and 2.25% in FY 2010. The cover e-mail also indicated “all tentative agreements reached to date would, of course, be included in the successor agreement.” *City Exhibit 6.*

On or about March 12, 2009, a tentative agreement was reached between the WFFA and the City negotiating teams. WFFA President Turner signed the tentative agreement on March 20, 2009. *Union Exhibit 3.*

On or about March 18, 2009, the Mayor issued a second Press Release, this one announcing the implementation of the Voluntary Furlough Program to help meet the FY 2009 deficit. This release stated the City’s financial outlook for FY 2010 looked “much bleaker” than the FY 2009 deficit. If the condition worsened, the Mayor stated “all cost-saving options are on the table including, but not limited to, suspension of FY 2010 wage increases, suspension of employee step increases, layoffs, mandatory furloughs, unpaid holidays and a rolling by-pass of equipment within public safety to reduce overtime costs,” again noting that some of these options would require union negotiations. *City Exhibit 10.*

On or about March 20, 2009, the Mayor met with the Union leadership representing all of the City’s unionized employees, at his request. WFFA President Turner attended this meeting as did the City’s Director of Human Resources. During this meeting, the Mayor advised the Union leaders that there was a large deficit for the remainder of FY 2009 and that there would also be a large deficit in FY 2010. The Mayor requested the Unions’ assistance in meeting the economic crisis, stating he did not favor lay-offs and that all cost-cutting options would be considered. He specifically asked the unions to forego all FY 2010 salary increases to help meet the deficit, in lieu of lay-offs.

On or about March 23 and March 24, the WFFA conducted informational meetings for its membership to explain the terms of the tentative agreement as required by the WFFA By-laws. WFFA President Turner testified the possibility of lay-offs was not raised during these meetings.

On or about March 25, 2009, the Mayor sent a letter to all City of Wilmington employees who were not represented by the unions⁴ in which he stated reserves would be needed to close the FY 2009 budget deficit and stated that the City's financial troubles were very serious. He requested that in order to reduce the FY 2010 salary line by \$2.5 million, he was requesting all City employees (union, non-union, administrators, and elected officials) to forego any salary or step increases in FY 2010. The press release noted the Mayor had met with Union leaders and proposed to them the foregoing of salary increases. He stated he "felt it was fairer to ask all employees to forego salary and step increases than to balance the budget through layoffs or through a mandatory furlough program." *City Exhibit 11*.

The Mayor made his annual Budget Address for FY 2010 before City Council on March 26, 2009 in which he again asked that FY 2010 salary increases be deferred, estimating this would save the City \$2.5 million. He stated that he did not want to balance the budget through lay-offs because lay-offs unnecessarily disrupt levels of service, are costly, time consuming and seldom achieve their intended purpose. He also stated he would only use the City's cash reserves if it was absolutely necessary and would avoid using the City's Rainy Day Fund to balance the FY 2010 budget. During this address, the Mayor requested all employees forego FY 2010 salary increases:

⁴ A copy of this letter was provided to each of the four Union Presidents, including President Turner, by the City's Director of Personnel.

I am asking all City employees, elected officials, union and non-union and administrators to forego any salary or step increases in FY 2010. This will save \$2.5 million. I have communicated why we need to do this to the leadership of the City's unions. I have also sent information to all City employees who are not represented by a union. We need everyone's cooperation and understanding and I am hoping we will receive it. *City Exhibit 12.*

The WFFA conducted a ratification vote on the terms of the tentative agreement on April 1, at which time the membership accepted the terms of the 2007-2010 collective bargaining agreement as set forth in the March 12, 2009 tentative agreement. Those terms included a 2.0% general salary increase for FY 2008, a 2.25% general salary increase for FY 2009, 2.25% general salary increase for FY 2010 and significant modifications to the salary matrix. Retroactivity applied to "all salaried items including, but not limited to, overtime, shift differential, out of call pay, etc." *City Exhibit 30, Article 16.2*

By letter dated April 17, 2009, the four Presidents of the Unions representing City employees (AFSCME LU #320, AFSCME LU #1102, FOP Lodge #1 and IAFF Local 1590) responded to the Mayor concerning his proposed wage freeze for FY 2010.

... We appreciate you meeting with the union leaders, but, due to the city's spending pattern, we decline to participate in pay freezes, step freezes, furlough days, or any other kind of "pay loss". We believe that the city employees, who have been here for many years, need to be taken care of first. These employees are the backbone of this city and are the ones who have made Wilmington "a place to be somebody." Please accept this letter as our answer to the March 20th meeting, and we do not require a follow-up meeting.

WFFA President Turner was a signatory to this letter.

The Mayor responded to the four Union Presidents by letter dated April 21, 2009, which stated, in relevant part:

I am in receipt of your letter of April 17, 2009, rejecting my plan to maintain your members' current salaries in order to avoid layoffs in Fiscal Year 2010. It was my hope that this strategy of shared sacrifice would minimize disruption to City services and prevent the loss of jobs

among your members. At a time when the State and County governments are substantially reducing the salaries and benefits of their employees, my plan simply asked that you maintain your current salaries for another year. I am also disappointed that you have not suggested any other plans that might reduce your members' pay or benefits in any way so that layoffs can be avoided.

The City is facing the most troubling financial crisis in decades. As you know, our major revenue sources are down sharply, including real estate tax, transfer tax, franchise fees, permits, investment earnings, and new State revenues. Preliminary third quarter figures show further revenue erosion. Since the beginning of the budget process in January, the departments have cut \$15 million from their budgets in an attempt to balance the FY'10 operating budget. Furthermore, I am seeking City Council's approval of \$7.2 million in new taxes, fees, and other revenues. It is unfortunate that you have elected not to work with me to both balance the City's budget and preserve the jobs of your members.

In spite of these cuts and proposed revenue increases described above, we still need to avoid any impact of salary increases in Fiscal Year 2010.

As a result, the budget pending before City Council contains absolutely no funding for salary increases for any City employee, union or non-union. Because you have elected not to participate, I have directed the Chief of Staff to immediately develop a layoff plan for Fiscal Year 2010 that will affect all unions. He will be working with the appropriate department heads to compile a list of all union positions targeted for layoffs. These reductions will occur in the operating departments (Police, Fire, Public Works, etc.) that utilize union labor and will correspond, proportionally, to the impact of each union's Fiscal Year 2010 salary and step increases. *City Exhibit 13.*

In a press release on April 23, the Mayor announced he had "regrettably been forced to plan for layoffs" because the Union Presidents had rejected his request that their members forego salary and step increases in FY 2010 in order to maintain their jobs, salaries and benefits. While the plans were being made for layoffs, the Mayor stated he remained "ready and willing to further discuss with union leaders the consequences of their decision." *City Exhibit 14.*

The Mayor again reached out to the Union Presidents by letter dated April 30, reminding them that his offer to exchange FY 2010 wage increases for layoffs was still

viable but that agreement would have to be reached quickly because of the pending resolution of the FY 2010 budget by City Council. He requested the Unions respond by May 5, 2009. *City Exhibit 15.*

WFFA President Turner responded to the Mayor in an undated letter (which was marked received by City Personnel on May 5):

I am in receipt of your letter dated April 30, 2009. As you know, the proposed contract between the Wilmington Firefighter's Association and the City has not been approved as yet by the City Finance Committee and the City Council. We expect that will be resolved on May 7th.

Anticipating that the contract will be approved and in order to give your request immediate consideration, I have scheduled this issue to be discussion at Union Meetings scheduled for May 11th and May 13th. That should allow all shifts for the Fire Department to attend one of the meetings.

At the conclusion of the May 13th meeting, I will notify your office in writing of the Union's decision on the wage freeze. *City Exhibit 17.*

The Mayor responded to President Turner's letter on or about May 7, 2009, stating:

Thank you for responding to my last request for your union to consider the plan I proposed on March 20, 2009. I fully understand your union's unique position since your collective bargaining agreement is pending before City Council this evening. I am encouraged that you have scheduled union meetings immediately following this Council session to discuss my plan.

The plan requires your members to forego Steps and Salary increases for Fiscal Year 2010 in exchange for the City's agreement not to execute our managerial right to lay off your union members. I believe these layoffs would not be in the best interest of the City of IAFF members. However, please understand that we will need to promptly issue a layoff list if your members reject this plan.

We must hear from you on May 13th, as soon as the voting is tallied, as your members' decision will have considerable effect on the Fiscal Year 2010 Operating Budget. In addition, if your membership agrees to my plan, please make arrangements with the Personnel Director, Monica Gonzalez-Gillespie, to sign the Memorandum of Agreement by the end of

the business day on May 14, 2009.

I appreciate your members' willingness to consider the plan to maintain their FY'09 salary and benefits into Fiscal Year 2010 in exchange for the preservation of their jobs. *City Exhibit 18.*

On the evening of May 7, 2009, City Council approved the tentative agreement between the City and WFFA, as ratified by the WFFA members on April 1, 2009. Following the approval of Council, WFFA President Turner sent an e-mail later that evening to the City's Personnel Director, requesting additional information:

As you are aware the firefighters' contract was approved by the City Council earlier this evening, this approval will allow my membership to discuss and vote upon the City Administration's proposed concessions. In making this very important decision I need to provide my membership with as much information as possible. A number of questions have arisen and I hope that you can provide me with this very important information.

- 1) If the concessions are rejected and layoffs take place, will these layoffs be done per the city code using city seniority, whereby demotions will take place and employees will be bumped down through the ranks?
- 2) If layoffs occur how will employees' pensions be affected?
- 3) If an employee chooses to retire during FY 2010 would they be eligible to receive those proposed salary and step increases included in their last year's retirement salary?
- 4) If an employee is laid off, when do their medical benefits expire?

Please forward a copy of the Memorandum of Agreement that is part of your concession package so that it may be reviewed prior to Monday's meeting. I would request a written reply by Monday Afternoon so that I can provide this information to my membership during the 1st of two scheduled meetings. *City Exhibit 19*

The Personnel Director responded the next morning (Friday, May 8) and suggested they discuss the WFFA's questions on Monday morning, when the parties had a previously scheduled meeting. The parties met as planned and the WFFA's questions were responded to by the City and discussed by the parties.

On May 8, the City forwarded to the WFFA President a draft Memorandum of

Agreement which included:

1. This Agreement is an amendment to the collective bargaining agreement of July 1, 2007 to June 30, 2010, between the City and the Union.
2. In consideration that the City will not exercise its managerial right to lay-off employees, IAFF Local 1590 agrees that movement through the all [*sic*] steps and associated increases will not occur for IAFF Local 1590 during Fiscal Year 2010, and that the IAFF Salary Rates (“Salary Rates”) for Fiscal Year 2010 shall be zero (0%) percent increase of the schedule negotiated for Fiscal Year 2009.
3. The City agrees that for the consideration offered by the Union in Term 2 of this Agreement, that there will be no layoffs of any employee represented by IAFF Local 1590 during Fiscal Year 2010 ending on June 30, 2010.
4. Any dispute regarding the interpretation or application of this Agreement shall be handled pursuant to the grievance procedures set forth in the CBA.
5. The parties acknowledge that all parties have fulfilled their obligations to engage in collective bargaining over the subjects contained in this Agreement.
6. To the extent that this Agreement conflicts with any provision of the CBA, City procedures, practices or guidelines, this Agreement shall control.
7. It is the understanding by all parties to this Memorandum of Agreement between the City and the Union that all terms herein are dependent on City Council passing Mayor Baker’s City of Wilmington Fiscal Year 2010 Operating Budget Ordinance including the proposed tax and revenue enhancement package or an amended budget that provides an equivalent combination of revenues and expenditures. If the Fiscal Year 2010 Budget including the proposed tax and revenue enhancement package or an amended budget that provides an equivalent combination of revenues and expenditures, is not passed by the City Council this agreement is null and void.
8. The agreements set out in Terms 2 and 3 will be included in the successor agreement. *Union Exhibit 5.*

WFFA President Turner testified he did not contribute to the language or content of this

initial draft of the Memorandum of Agreement.

The successor 2007 – 2010 collective bargaining agreement between the City and WFFA was signed by the parties on Tuesday, May 12, 2009. *City Exhibit 30*. Immediately following execution of the successor agreement, the WFFA scheduled mandatory membership meetings to discuss the City's proposal to forego the negotiated FY 2010 salary increase in lieu of lay-offs.

On May 14, 2009, the Mayor released another press release, this time announcing the layoff of 17 police officers and 8 firefighters in order to close the FY 2010 budget deficit. The Mayor's Chief of Staff announced that the Mayor's recommended budget was being redrafted to include the reduction in public safety staff because they had "refused to accept the Mayor's offer to preserve the jobs of all police officers and firefighters in exchange for receiving no salary increases for one year." The Mayor stated he would keep the door open for the police and fire unions to change their position and help to avoid the layoffs. *City Exhibit 23*.

WFFA officials continued to discuss and exchange proposals with City officials to hammer out details of a Memorandum of Understanding. In a May 28 letter to the City's Personnel Director, WFFA's Counsel stated:

My client has reviewed the final draft of the Memorandum of Agreement 05/28/09 and it has been approved by the Executive Board for signature by the President, Kevin Turner. The Agreement will be presented to the membership for ratification, consistent with the Union's By-Laws.

Please note that my client's Executive Board has approved this Agreement with the express understanding that no firefighter employed by the City of Wilmington will be subject to layoff from the signed date of this Agreement through June 30, 2010. If your understanding differs from ours, please notify me immediately. *City Exhibit 24*

The Memorandum of Agreement was signed by the WFFA President and City

Personnel Director Gonzalez-Gillespie on May 28. This version of the MOA contained a number of significant modifications from the initial draft presented by the City on May 8. WFFA President Turner testified the changes resulted from demands made by the WFFA after learning that similar modifications had been offered to FOP Lodge 1. Specifically, those changes included:

2. In consideration that the City will not exercise its managerial right to lay-off employees, the Union agrees that the salary increases for the third year of the CBA, in Classification and Salaries, Section 16.2, will be deferred from the effective date of July 1, 2009 through midnight on June 30, 2010. Employees shall remain eligible for Step and Time in Rank increases as provided currently in the CBA, the City Code and City procedures, practices and guidelines.
6. It is the intent of this Agreement to facilitate a wage deferral for Fiscal Year 2010 in return for an agreement of no employee layoffs. Any conflicts with the CBA, City procedures, policies or practices will be evaluated in such a manner as to preserve this wage deferral and not defeat its intended purpose.
7. It is the understanding by all parties to this Memorandum of Agreement between the City and the Union that all terms herein are dependent on City Council passing Mayor Baker's City of Wilmington Fiscal Year 2010 Operating Budget Ordinance with an amendment to fund Step and Time in Rank increases for Fiscal Year 2010 and to revised [sic] the authorized strength of the Fire Department to 173 positions. This budget must also include the proposed tax and revenue enhancement package or an amended budget that provides an equivalent combination of revenues and expenditures. If the Fiscal Year 2010 Budget including the proposed tax and revenue enhancement package or an amended budget that provides an equivalent combination of revenues and expenditures, is not passed by the City Council this agreement is null and void.
8. ¶8 of the May 8, 2009 draft was dropped in its entirety. City Exhibit 24.

The signed MOA continued to be the subject of discussion between the City and the WFFA, and the final version (dated June 9, 2009) contained the following additional modifications:

2. In consideration that the City will not exercise its managerial right to lay-off employees, the Union agrees that the salary increases for the third year of the CBA, in Classification and Salaries, Section 16.2, will be deferred from the effective date of July 1, 2009 through midnight on June 30, 2010. This deferral shall not prohibit or otherwise impede IAFF Local 1590 from negotiating salaries effective July 1, 2010 above and beyond the 2.25% deferred from July 1, 2009 to July 1, 2010. Employees shall remain eligible for Step and Time in Rank increases as provided currently in the CBA, the City Code and City procedures, practices and guidelines.

4. Any dispute regarding the interpretation or application of this Agreement shall be handled pursuant to the grievance procedures set forth in the CBA. The City agrees that such procedures will survive upon the expiration of the CBA to resolve any dispute regarding the interpretation of [sic] application of the mutual agreements in Term 2 of this Agreement. *Union Exhibit 6.*

In response to the Hearing Officer's question, WFFA's Counsel made an un rebutted affirmation that these final changes were made at his request to clear up language concerns the WFFA had with the May 28 draft.

The WFFA conducted two informational meetings of its general membership on June 4 and June 9 to explain the MOA to its members.

On June 12, the WFFA filed this unfair labor practice Charge asserting the City had violated its duty to bargain in good faith by withholding information from the WFFA membership who ratified an agreement that included FY 2010 salary increases the City did not intend to fund.

On June 15, 2009, the MOA was rejected by a vote of the general membership of WFFA Local 1590.

On June 16, 2009, the WFFA advised the City that its membership had rejected the MOA. *City Exhibit 28.*

The FY 2010 budget was passed by City Council on June 18, 2009.

On July 1, 2009, all firefighters in the bargaining unit represented by WFFA Local 1590 received FY 2010 step and general salary increases as provided for in Article 16 of the 2007 – 2010 collective bargaining agreement.

President Turner testified that seventeen (17) Firefighters received lay-off notices, but only eight (8) were ultimately laid off. As of the September 30, 2009 date of the hearing on this matter, five (5) Firefighters had been recalled from lay-off due to subsequent retirements and promotions.

ISSUE

WHETHER THE CITY FAILED TO BARGAIN IN GOOD FAITH IN VIOLATION OF 19 DEL.C. §1607(A)(5) AND/OR WHETHER WFFA LOCAL 1590 FAILED TO BARGAIN IN GOOD FAITH IN VIOLATION OF 19 DEL.C. §1607(B)(2) DURING THE COURSE OF THEIR NEGOTIATIONS.

PRINCIPAL POSITIONS OF THE PARTIES

WFFA Local 1690:

Local 1590 asserts the City failed to bargain in good faith and violated the POFERA when it decided not to seek to reopen the parties' tentative agreement at the time that it became aware that the Mayor would not recommend funding the 2.25% general salary increase the parties had agreed to for Fiscal Year 2010.⁵ The City chose to allow the tentative agreement to go to Union ratification, approval by the City Council and execution by signature of the parties when it absolutely knew that the Mayor would not recommend funding of the negotiated salary increase. By so doing, the City violated its duty to bargain in good faith.

⁵ Fiscal Year 2010 runs from July 1, 2009 through June 30, 2010.

The evidence proves that the City offered a salary increase for FY 2010 that it knew it could not pay and did not anticipate having to pay. The City made the wrong choice in not seeking to reopen the negotiations based on exigent economic circumstances. It is well-established NLRB precedent that employers can take extraordinary action in response to exigent economic circumstances, whether those circumstances occur during the course of negotiations or during the term of a collective bargaining agreement. The City has not proven such circumstances existed or that it so advised the Union and offered to negotiate concerning the impact of those circumstances.

The Union argues the City laid out an ultimatum – either give back the FY 2010 increases or firefighters would be laid off. At the time that ultimatum was communicated (first by the Mayor to all the City Unions on March 20, 2009, and then publicly on March 26, 2009), Local 1590 did not have a FY 2010 salary increase to give back. The new agreement did not come into effect until after it was ratified by the Union membership on April 1, 2009, passed by City Council on May 7, 2009, and finally executed by signature on May 12, 2009.

The record reveals that prior to making its last offer, the City was aware that there was a looming deficit projected for FY 2010. Local 1590 argues it did not fail to negotiate, rather the Mayor failed to honor the collective bargaining agreement when he issued the ultimatum to either relinquish the FY 2010 salary increase or suffer lay-offs. The lay-off threat came after the tentative agreement had been reached and the Union had relied on the promised wage increase to settle other issues during the course of the negotiations.

The Union asserts the City's actions sowed distrust and eroded the relationship between these parties. The Mayor's public accusations that it was the Union that chose to

have its members laid-off further deteriorated the relationship. The evidence reveals that it was, in fact, the City that chose to lay-off firefighters, rather than bargain in good faith with Local 1590 to identify alternative options to address the impact of the projected deficit on this bargaining unit.

Whether a party or parties have met their duty to bargain in good faith must be determined based upon consideration of all of the surrounding circumstances. *FOP Lodge 4 v City of Newark*, ULP 93-10-092, II PERB 995, 1001 (1994). Good faith also requires that the claims made by either party be honest claims, *NLRB v. Truitt Manufacturing Company*, 351 US 149 (1956). At the time these parties entered into the tentative agreement, the Mayor knew he would not recommend funding support for the negotiated wage increase for FY 2010. Based on these facts and circumstances, it is clear that the City did not and could not meet its good faith obligations imposed by the statute.

The City had an obligation to reopen negotiations and to present the dire economic projections for FY 2010 to the Local 1590 across the bargaining table. When the City chose not to do so, it violated the letter and intent of the law, specifically 19 Del.C. §1607(a)(5).

The Union specifically and uncategorically denies it violated its duty to bargain in good faith and asserts that the City's Counter Charge is wholly without merit. It asserts there is not a single piece of evidence which supports the City's allegation that the Union somehow violated its duty to bargain in good faith by ratifying the negotiated tentative agreement. The City's Counter Charge should be summarily dismissed.

Local 1590 reserved argument on a prospective remedy until the preliminary issue of whether an unfair labor practice has been committed as alleged in the Charge and/or Counter Charge. It requested PERB hold the record open in the event that further

evidence is necessary to fashion a fair and equitable remedy.

City of Wilmington:

The City asserts that resolution of Local 1590's charge is simple and straightforward: the City did not violate its duty to bargain in good faith because it met its obligation to fund the negotiated FY2010 general wage increase. In fact, all bargaining unit firefighters received the 2.25% wage increase for FY2010 which was included in the successor agreement.

The City exercised its managerial prerogative to lay-off eight firefighters in order to fund the wage increase for the remainder of the bargaining unit. There is no provision in the collective bargaining agreement which prohibits lay-offs nor was there an agreement between the parties not to lay-off firefighters in FY 2010. The issue of lay-offs was never raised or discussed during the course of the negotiations which resulted in the tentative agreement.

The City was open and honest with the WFFA and revealed the pending FY 2009 deficit of \$9M in February, 2009, before the parties entered into the tentative agreement. The City also disclosed to the leadership of all of the City Unions (including Local 1590) on March 20, 2009 that there was a large projected deficit in FY 2010 which would require the cooperation of all City employees in order to avoid lay-offs. The City asserts that everyone in Wilmington, including City employees, knew there was a looming deficit that would affect wages in FY 2010.

The City also argues when it entered into the tentative agreement with Local 1590, that constituted a binding and enforceable agreement which Local 1590 could enforce through an unfair labor practice charge before PERB. That tentative agreement

included a general salary increase of 2.25% for firefighters in FY 2010. It is ridiculous for Local 1590 to argue it did not have an FY 2010 wage increase to “give back” or negotiate over in order to avoid lay-offs until the tentative agreement was executed on May 12, 2009.

The City asserts the evidence is clear that these parties continued to engage in good faith bargaining (albeit at times contentious) for more than eighteen months. Those negotiations successfully culminated in the resolution of all disputed terms and a tentative agreement that was ratified by the Union membership on April 1 and approved by City Council on May 7, 2009.

In fact, negotiations continued even after resolution of the 2007-2010 collective bargaining agreement. Those negotiations resulted in the Memorandum of Agreement that was signed by the Union President and City Human Resources Director on May 28, 2009. The Memorandum of Agreement was approved by the Union’s Executive Board, but was later narrowly rejected by the Union membership in a ratification vote on June 15, 2009.

The City charges Local 1590 violated its duty to bargain in good faith when it filed its unfair labor practice charge asserting that the City is responsible for the lay-offs. It asserts the Union was fully aware of the City’s FY 2010 deficit, yet the Union chose to reject a reasonable compromise proposal. In filing an unfair labor practice charge, the Union seeks to gain through these proceedings more than what it bargained for in the 2007-2010 collective bargaining agreement, i.e., to continue to receive the negotiated 2010 wage increase and to effectuate a no lay-off clause which was neither discussed nor agreed to.

DISCUSSION

WFFA's Charge

The evidence clearly establishes and the WFFA does not dispute that the City met its obligation to advance bargaining unit firefighters in both step and general salary increases for FY 2010 on July 1, 2009, as required by the negotiated salary matrix found in Article 16.2 of the 2007-2010 collective bargaining agreement. Consequently, this Charge does not allege that the City instituted a unilateral change in a mandatory subject of bargaining, which is a *per se* violation of the duty to bargain in good faith.

The WFFA's Charge asserts that the City violated its duty by its conduct during the period of time immediately precedent to the reaching of a tentative agreement through the ratification process. Specifically, the WFFA alleges that the City made a final offer to the union which included a general salary increase of 2.25% for FY 2010, for which the City knew or should have known the Mayor would not recommend funding. By this strategic decision, the union asserts it was misled and that its members voted to ratify a tentative agreement which included a hollow promise of an FY 2010 wage increase.

The course of conduct during negotiations and the surrounding circumstances in which the negotiations occurred must be examined in order to determine whether the City engaged in a course of conduct which violated its duty to bargain in good faith.

The evidence in this case supports the conclusion that the WFFA negotiating team (as well as bargaining unit members) was well aware of the City's deteriorating fiscal situation before, during and after its ratification of the 2007-2010 collective bargaining agreement. WFFA President Turner testified the WFFA negotiating team was first made aware of the FY 2009 budget deficit during the February 9, 2009 negotiating session. The Mayor released a press release on February 19, stating the financial outlook for FY

2010 looked substantially worse than FY 2009 and laid out several options for controlling compensation costs, noting some would require negotiations with the unions.

When the City made its “final offer” on February 25, 2009 (an offer that was subsequently modified and then accepted by the WFFA on March 12), there is no evidence of record to support the WFFA’s assertion that it did not intend to fund the matrix adjustments and general salary increases included therein. In fact, the City did fund those increases and bargaining unit firefighters were the only City employees who received step, time in rank and general salary increases on July 1, 2009.

The WFFA also charges it was the City’s obligation to seek to reopen the negotiations after March 20, when it became clear that the City could not afford to fund the FY 2010 salary increases. WFFA President Turner testified the City took no steps to communicate with the WFFA concerning modifying the tentative agreement.

This argument misses the point. The Mayor made it very clear through a series of meetings, speeches and press releases that in order to fund the negotiated salary increases, a reduction in force would be required as a last resort to control compensation costs. He made it clear that he understood that any alternative to lay-offs would have to be negotiated with the unions in order to meet the City’s need to recoup \$2.5 million in FY 2010 compensation costs. The Mayor repeatedly made it clear that “all options are on the table” and requested the unions to meet with him to discuss alternatives to lay-offs.

The WFFA also made it clear to the Mayor on or about May 5 that the union would not consider any modifications to the terms of the 2007-2010 agreement until it was approved by the City Council. *City Exhibit 17*. Whether the WFFA chose to discuss the impact of the undisputed fiscal crisis with the City before or after the successor agreement was approved by City Council was a strategic or tactical decision which is not

material to resolution of this Charge.

In fact, the WFFA did negotiate concerning the terms of a Memorandum of Agreement which would have avoided lay-offs. An agreement was reached to defer the 2.25% general salary increase for FY 2010 through June 30, 2010. *Union Exhibit 6*. That Agreement was approved by WFFA's Executive Board and signed by the Union President. The evolution of the MOA evidences movement by both sides.⁶ The City moved from its request to forego both step and general increases in FY 2010, to an agreement simply to "defer" the 2.25% general salary increase. The WFFA agreed to defer the general salary increase in order to maintain all bargaining unit jobs. On its face, the MOA evidences that the both parties engaged in a collective effort to avoid lay-offs.

The fact that the Memorandum of Agreement was defeated by the Union membership in a ratification vote neither proves nor disproves the allegation that one or both parties failed to bargain in good faith. There is no allegation here that the Union leadership failed or refused to support the Memorandum of Agreement before its membership. In fact, the terms of the Memorandum of Agreement specifically states at ¶5 "The parties acknowledge that all parties have fulfilled their obligation to bargain over the subjects contained in this Agreement."

The Police Officers and Firefighters Employment Relations Act establishes that public employers are not required to negotiate with respect to "matters of inherent managerial policy", which include staffing levels. 19 Del.C. §1605.⁷ This Board has a long line of cases in which "matters of managerial policy" have been held to be

⁶ See Facts, p 10 -13, and Union Exhibits 5 & 6 and City Exhibit 24.

⁷ 19 Del.C. §1605, Employer Rights: A public employer is not required to engage in collective bargaining on matters of inherent managerial policy which include, but are not limited to, such areas of discretion or policy as the functions and programs of the public employer, its standards of services, overall budget, utilization of technology, the organizational structure and the staffing levels, selection and direction of personnel.

permissive subjects of bargaining. Employers are not required under the law to negotiate with respect to staffing levels, although an employer may choose to do so.

In this case, the 2007-2010 collective bargaining agreement does not address staffing levels, include a lay-off procedure, or a “no lay-off” guarantee. In contrast, the negotiated MOA specifically states, in relevant part, at ¶7, “It is the understanding by all parties to this Memorandum of Agreement between the City and the Union that all terms are dependent on City Council passing Mayor Baker’s City of Wilmington Fiscal Year 2010 Operating Budget Ordinance with an amendment to fund Step and Time in Rank increases in Fiscal Year 2010 and to revise the authorized strength number of the Fire Department to 173 positions.” *Union Exhibit 6*. When the MOA was negotiated, the WFFA clearly understood that the terms of that agreement would maintain a defined staffing level and insured that the number was included in the agreement.

Based upon the evidence presented and consideration of all of the arguments made by the parties, I find that the City did not violate its duty to bargain in good during the course of the negotiations for the 2007-2010 collective bargaining agreement between these parties nor in the subsequent events which resulted in the ultimate lay-off of eight City firefighters in FY 2010.

City’s Counter Charge

The evidence and argument presented by the City in support of its charge that the WFFA failed to meet its obligation to bargain in good faith fall short of the providing substantial proof that any violation occurred. The crux of the City’s Counter Charge appears to be that by filing its Charge, the WFFA committed an act of bad faith in an effort to retaliate against the City for the layoff of firefighters.

Simply stated there is no evidence of abuse of process by the WFFA in exercising its statutory right to file an unfair labor practice charge. The City has argued if it had sought to reopen the negotiations to address the FY 2010 deficit after the tentative agreement was signed, the WFFA would have filed an unfair labor practice charge then. That may well be true, but when the Charge was filed is irrelevant, as the WFFA has a right to file a Charge whenever it deems appropriate.

The filing of a Charge raises a statutory question and places the burden on the Charging Party to prove its Charge. Not all charges filed before PERB are found to be statutory violations.

In this case, the City has failed to support its allegation that by and through its actions the WFFA violated its duty to bargain in good faith and 19 Del.C. §1607(b)(3).

It became clear during the processing of this Charge and Counter Charge that the relationship between the City and the WFFA was negatively affected as a result of the events described herein. It is also evident that the war of words over whether the City or the WFFA is responsible for the lay-offs of the eight Firefighters has not helped the situation. Accusations that the WFFA failed to share in the sacrifice of other City employees only served to further “fan the flames”. The Fire Department and members of the WFFA certainly experienced a sacrifice when the ranks of firefighters were reduced, as did those firefighters who lost their employment as result of the lay-offs.

There is no doubt that the deteriorating economic climate in the City, State and country and rapidly declining revenue base caused the problem which resulted in the City’s need to balance a deficit budget for FY 2010. The City’s only unilateral option under the POFERRA (in this case) to control compensation costs for unionized

employees was to reduce the work force. The WFFA and the City engaged in a good faith effort to negotiate a resolution which would have avoided lay-offs, i.e., the MOA. Under the WFFA's by-laws that agreement required ratification by the membership, which it did not receive.

Following the failure of the ratification process, the City met its obligation by adhering to the requirements of the collective bargaining agreement. All bargaining unit firefighters received the negotiated salary and other compensation increases negotiated for FY 2010. The City also met its obligation to adhere to the Budget by reducing the ranks by eight employees. As evidenced by the filing of this Charge and Counter Charge, difficult situations often lead to unhappy results.

CONCLUSIONS OF LAW

1. The City of Wilmington ("City") is a public employer within the meaning of §1602(1) of the Police Officers' and Firefighters' Employment Relations Act, 19 Del.C. Chapter 16 (1989).

2. The Wilmington Firefighters Association, Local 1590, is an employee organization which admits to membership firefighters and has as a purpose the representation of those firefighters in collective bargaining pursuant to 19 Del.C. §1602(g).

3. The City and the WFFA were parties to a collective bargaining agreement which was effective July 1, 2001 through June 30, 2007. The parties initiated negotiations for a successor agreement in 2007.

4. The parties reached a tentative agreement for a successor agreement with a term of July 1, 2007 through June 30, 2010 on or about March 12, 2009, and signed on

March 20, 2009. The tentative agreement was subsequently ratified by the WFFA membership on April 1, 2009, approved by City Council on May 7, 2009, and signed by the parties May 12, 2009.

5. Among other negotiated provisions, the 2007 – 2010 collective bargaining agreement included a 2.25% general salary increase for all bargaining unit employees to be effective July 1, 2009.

6. On or about May 28, 2009, the City's Personnel Director and the WFFA President signed a Memorandum of Agreement which amended the 2007-2010 collective bargaining agreement wherein the WFFA agreed that "In consideration that the City will not exercise its managerial right to lay-off employees, the Union agrees that the salary increases for the third year of the CBA... will be deferred from the effective date of July 1, 2009 through midnight on June 30, 2010."

7. The Memorandum of Agreement was not approved by ratification of the WFFA general membership.

8. On July 1, 2009, all members of the bargaining unit represented by the WFFA received the negotiated FY 2010 step and general salary increases as set forth in the 2007-2010 collective bargaining agreement.

9. On or about July 1, 2009, the City reduced the staff complement of Fire Department by eight firefighters.

10. The evidence presented is insufficient to support the Charge that the City violated its duty to bargain in good faith and 19 Del.C. §1607(a)(5) during the course of the negotiations for the 2007-2010 collective bargaining agreement or in the subsequent events which resulted in the lay-off of eight City firefighters in FY 2010.

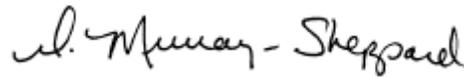
11. There is insufficient evidence to support the Counter Charge that by and

through its actions the WFFA violated its duty to bargain in good faith and 19 Del.C.
§1607(b)(3).

WHEREFORE, both the Charge and the Counter Charge are hereby dismissed in
their entirety.

IT IS SO ORDERED.

DATE: February 8, 2010



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