

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

WILMINGTON FIREFIGHTERS ASSOCIATION,)	
LOCAL 1590,)	
)	
Appellant,)	PERB Review of the
)	Executive Director's
v.)	Decision
)	<u>ULP 09-06-686</u>
CITY OF WILMINGTON, DELAWARE,)	
)	
Appellee.)	

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

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

A Probable Cause Determination was issued on August 27, 2009 finding, based on a review of the pleadings, that probable cause existed to believe that an unfair labor practice(s) may have occurred. The Executive Director conducted a hearing on September 30, 2009, and issued her decision on February 8, 2010, in which she held:

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 faith [*sic*] during the course of negotiations for the 2007-2010 collective bargaining agreement between these parties nor in the subsequent events which resulted in the ultimate lay-offs of eight City firefighters in FY 2010.

...[T]he 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(a)(2) [*sic*]. *WFFA Local 1590 v. City of Wilmington*, ULP 09-06-686, VII PERB 4495, 4517, 4518 (2010).

¹ (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:

(5) Refuse or fail to bargain 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 (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.

On or about February 17, 2010, WFFA requested review of the Hearing Officer's decision, asserting the Hearing Officer's Decision to dismiss its Charge against the City was not supported by substantial evidence. Specifically, the WFFA asserts in its request for review:

The Union takes exception with the Executive Director's decision in that the focus of the ruling seems to be that the evidence is insufficient to show that an unfair labor practice took place because: (1) The Union was *aware* during the negotiations that the City was facing a budget shortfall; and (2) The parties did conduct negotiations on a wage concession/no layoff provision *after* the CBA⁴ was approved by Wilmington City Council.

... [T]he Union reiterates its position that the unfair labor practice occurred during the negotiations in February and March 2009, when the City offered and then allowed the Union to accept an FY 2010 salary increase without any mention from the City's bargaining team that the City would be unable to fund the increase or that the salary increase would be funded through layoffs to the Union members. That is the simple undisputed truth. The bargaining that took place on the promised FY 2010 salary increase was apparently no bargaining at all.

The party that places a proposal on the table should not do so if they can't deliver what they have offered. The City's proposal had strings attached that should have been presented at the table. The evidence shows that the City could not deliver what they offered, a FY 2010 salary increase with no strings attached. Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims.

...Statements made by the Mayor *outside* of the bargaining table are not part of the negotiations. Political figures often promote and publicize ideas, plans and possibilities to gauge the public's reaction, as well as in an attempt to influence the actions of other levels of government, elected officials, unions, private employers or employees. To suggest that the Union should have relied on the Mayor's statements made outside of negotiations rather than the contract proposals presented to by the City's bargaining team, undermines the whole bargaining process.

⁴ "CBA" = collective bargaining agreement.

... The Union maintains that the Executive Director's focus on bargaining of the Memorandum of Understanding ("MOU") after the collective bargaining agreement was approved is incorrect if the bargaining was necessitated by the unfair labor practice. In this case, the City's actions placed the Union's bargaining team in the unenviable position of presenting the Union with a tentative agreement containing an FY 2010 salary increase, having the Union ratify the agreement, watch the City present the agreement for approval by Wilmington City Council and then have to ask the Union membership to give back the very same salary increase or face layoffs.

The Union bargaining team had a responsibility to its members to meet with the City regarding the MOU. The Union bargaining team had a responsibility to its members to present a tentative agreement on the MOU to the Union membership. However, to suggest that this is evidence of good faith bargaining is off target. The testimony of the City Personnel Director made clear that the City had the choice of asking the Union to void the Tentative Agreement with the FY 2010 salary increase and renegotiate the salary issue or allow the Tentative Agreement to become the new collective bargaining agreement and make the Union accept the MOU or suffer lay-offs. The City Personnel Director testified that the City considered that the Union might file an unfair labor practice petition if the City asked the Union to void the Tentative Agreement, so the Mayor's Chief of Staff decided that the City would not try to bargain a new collective bargaining agreement. This decision by the City led directly to the MOU and ultimately to the layoffs. This decision prevented the parties from conducting negotiations that may have produced an agreement that could have satisfied both parties. This decision was adverse to the bargaining process and highly detrimental to the relationship between the parties and should have been considered as evidence of bad faith on the part of the City. *WFFA Request for Review of Decision*, February 17, 2010, p. 3-5.

WFFA requests the Board enter an Order finding the City violated its duty to bargain in good faith and 19 Del.C. §1607(a)(5) and provide a mechanism for remedy.

A copy of the complete record in this matter was provided to each member of the Public Employment Relations Board. A public hearing was held on March 17, 2010, at which time the full PERB met in public session to consider the requests for review. The

parties were afforded the opportunity to present oral argument and the decision reached herein is based upon consideration of the record and arguments presented to this Board.

DISCUSSION

The Public Employment Relations Act requires public employers and certified exclusive bargaining representatives of their employees to enter into collective bargaining negotiations with the willingness to resolve disputes relating to terms and conditions of employment and to reduce any agreements reached through such negotiations to writing. 19 Del.C. §1301(2). Collective bargaining is defined as the performance of the 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. 19 Del.C. §1302 (e). The statute also provides that the refusal to bargain collectively in good faith with the other party is an unfair labor practice. 19 Del.C. §1307 (a)(5); (b)(2).

The WFFA recognizes in its argument that exigent economic circumstances can trigger a change in the bargaining process. It argues, however, that because the City did not seek to reopen negotiations on the Tentative Agreement, it did not meet its good faith obligation. The genesis of the WFFA's Charge appears to be that the information concerning the impact of the financial deficit was not conveyed directly to the Union across the bargaining table, specifically within the context of negotiations for the 2007-2009 collective bargaining agreement. It asserts the City had a good faith obligation to

“come back to the table and at least give the Union an opportunity to bargain an alternative.”

This Board concluded in one of its first decisions in 1984 that alleged violations of the duty to bargain in good faith are best resolved based upon an examination of the totality of the conduct of the parties. Seaford Education Association v. Bd. of Education, Del.PERB, ULP 9310-092 (1984). There is no question that this duty to bargain in good faith creates a continuing obligation.

The totality of circumstances standard for examining the good faith duty to bargain must include the consideration of all of the surrounding circumstances. The record establishes that even before the Tentative Agreement between these parties was finalized, the WFFA was made aware of the pending fiscal crisis in the last negotiation session between these parties on February 9, 2009. The Mayor met with Union leaders, including the WFFA President, on March 20, 2009 (prior to the general membership meetings of the WFFA to review the terms of the Tentative Agreement). At that meeting, the Mayor specifically asked the unions to forego all FY 2010 salary increases in order to avoid layoffs in FY 2010. The WFFA was clearly placed on notice that the City was seeking economic concessions for FY 2010.

The deteriorating economic climate and rapidly declining revenue base required the City to balance a deficit budget for FY 2010. The record supports the conclusion that information concerning the scope and impact of that deficit was fluid over the period of time in question. The 2007-2009 Agreement included a restructuring of the salary matrix, retroactive salary increases for FY 2008 and FY 2009, and the FY 2010 salary increase in issue. To argue there was bad faith because the FY 2010 salary increase could not be met

is belied by the facts in this case. The City did honor its commitment to FY 2010 salary increases for this bargaining unit, albeit by decreasing expenses through the layoff of eight firefighters.

The City also sought to negotiate the terms of a Memorandum of Agreement (“MOA”) with the WFFA prior to the execution of the Tentative Agreement, with the understanding that the MOA would effectively modify the 2007-2009 collective bargaining agreement. The WFFA declined to meet and discuss the MOA until after the Tentative Agreement was executed. The MOA which was ultimately tentatively agreed upon (although later rejected in a ratification vote by the membership) evidences substantial and significant changes which resulted from effective bargaining.

During the period of time in issue, both the City and the WFFA made a number of strategic decisions in their respective approaches to the negotiations, vis-à-vis the impact of the FY 2010 deficit. Upon examining and considering the totality of the circumstances surrounding the negotiations, the Executive Director found no bad faith on either side.

The Board concludes the Executive Director’s decision was supported by substantial evidence and was not contrary to law.

The rhetoric during this difficult period for both the City and the WFFA was often heated and not conducive to improving the labor-management relationship. As these parties re-enter into bargaining for a successor to the 2007-2009 Agreement this spring, there is a continuing need to approach negotiations with honest and open bilateral communication and a good faith commitment, as difficult economic times continue.

DECISION

After reviewing the record and hearing and considering the arguments of the parties, the Board unanimously affirms the decision of the Executive Director dismissing WFFA's Charge that the City failed or refused to bargain in good faith in violation of 19 Del.C. §1607(a)(5).

Wherefore, the appeal is denied.

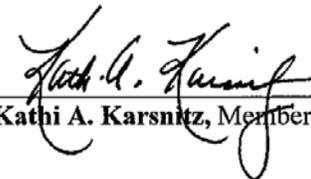
IT IS SO ORDERED.



Elizabeth D. Maron, Chairperson



R. Robert Currie, Jr., Member



Kathi A. Karsnitz, Member

DATED: APRIL 23, 2010