

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

FRATERNAL ORDER OF POLICE,)	
LODGE NO. 1,)	
)	
Charging Party,)	
)	<u>ULP No. 12-12-881</u>
v.)	
)	Probable Cause Determination
CITY OF WILMINGTON,)	
)	
Respondent.)	

BACKGROUND

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

The Fraternal Order of Police, Lodge No. 1, (“FOP”) is an employee organization and the exclusive bargaining representative, within the meaning of 19 Del.C. §§1602(g) and 1602(h), respectively, of all police officers employed by the City excluding the rank of Chief.

On December 7, 2012, the FOP 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)(1), (5) and (6).¹ Specifically, the Charge alleges that, “on or about Monday,

¹ 19 Del.C. §1607. Unfair labor practices – Enumerated.

- (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
 - (1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this Chapter; ...
 - (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit;

November 5, 2012, the City announced a one-time payment to City employees in lieu of their not having received cost of living adjustments (“COLAs”) in FY 2010, 2011, 2012, 2013.” As a condition of the one-time payment to the City’s unionized employees, union leadership had to advise the City that it did not object to the payment. The Charge further alleges members of the FOP bargaining unit who retired during FY 2010, 2011, 2012 or 2013 did not receive the one-time payment; they also did not receive the COLA benefit during their employment in those fiscal years. The City also did not make the one-time payment to those bargaining unit members who were on terminal leave (i.e., paid leave time prior to retirement) as of November 8, 2012, even though these individuals were considered employees by the City and were receiving pay checks (not pension checks) from the City.

The FOP alleges the City did not request to open the parties’ collective bargaining agreement for the purpose of entering into negotiations concerning the one-time payment to the FOP membership at any time prior to November 5, 2012.

On December 28, 2012, the City filed its Answer and Countercharge denying the FOP’s allegations that it violated the statute. The City maintains that officers on terminal leave and retirees did not receive the one-time payment because neither group qualifies as a “current” employee.

The City asserts under New Matter included in its Answer that the one-time payment was negotiated. It argues the City offered the FOP a one-time payment for current employees and that the FOP accepted that offer and notified the City by email dated November 6, 2012 from the FOP President to the Mayor’s Chief of Staff.

(6) Refuse or fail to comply with any provision of this Chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

The City countercharged the one-time payment was “based upon budgetary considerations and the number of ‘current employees’ of the FOP that were going to receive such payment.” It avers that should PERB find the City did not negotiate in good faith or that the FOP mistakenly accepted the terms of the one-time payment, then the one-time payment agreement should be deemed null and void, the parties should be returned to their original positions and the payment should be returned to the City.

On February 8, 2013, the FOP filed its Answer to the City’s Countercharge acknowledging the FOP’s receipt of the Mayor’s e-mail dated November 5, 2012, and the e-mail from the Mayor’s Chief of Staff dated November 6, 2012. The FOP also acknowledges the FOP President replied to the City by e-mail dated November 6, 2012.

The FOP included in its Answer to the Countercharge New Matter in which it asserts neither the November 1 nor the November 5 communications referenced “current employees”. Neither communication included a copy of Substitute No. 1 to Ordinance No. 12-066.

On March 5, 2013, the City filed its Response to the FOP’s New Matter, in which it admits the Ordinance was not conveyed to the FOP by the Mayor’s Office. The Ordinance was and is, however, a public document and was signed into law on November 2, 2012. The City asserts Section 4 of the Ordinance clearly states that payments will be made to all *current* employees. The City also asserts “no bargaining representative of the FOP objected to the Ordinance and on November 6, 2012, with implied knowledge of a public law, the FOP Executive Board sent a written acceptance of the one-time payment for Rank and File and Captains and Inspectors.”

DISCUSSION

Regulation 5.6 of the Rules of the Delaware 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 the provisions set forth in Regulation 7.4. The Board will decide such appeals following a review of the record, and, if the Board deems necessary, a hearing and/or submission of briefs.
- (b) If the Executive Director determines that an unfair labor practice may have occurred, he shall where possible, issue a decision based upon the pleadings; otherwise, he shall issue a probable cause determination setting forth the specific unfair labor practice which may have occurred.

For purposes of reviewing the pleadings to determine whether probable cause exists to support the Charge, factual disputes revealed by the pleadings are considered in a light most favorable to the Charging Party in order to avoid dismissing a valid charge without the benefit of receiving evidence in order to resolve factual differences. Flowers v. DART/DTC, PERB Probable Cause Determination, ULP 04-10-453, V PERB 3179, 3182 (2004).

The documents included with the pleadings are uncontested and establish the following chronology of events:

On or about November 1, 2012, the Mayor's Chief of Staff, John Rago, sent the following memorandum from the Mayor (by email) to "Presidents of the City Union Locals", concerning "One-Time Payment to Employees in Lieu of COLA":

I am writing to ask for your support for a one-time payment for City employees. The reality of the current fiscal climate is very clear. We must and should do something beyond just telling our employees we cannot provide them with a cost-of-living increase, which is the unfortunate position we have found ourselves in for four years.

The one-time payment issue is not connected in any way to labor negotiations, the arrival of the incoming administration, or projected

deficits. It has everything to do instead with fairness for our employees. Also, it's the right thing to do.

These funds will be taken from the unassigned fund balance and will not affect the City's permanent reserve fund. We have been responsible in every way over many years by adhering to sound fiscal principles in order to keep the City's finances as strong as possible. We have maintained our City's stable fiscal position in spite of a bad economy and ever-increasing costs. This one-time payment will not affect our current fiscal position.

Our bond rating remains solid. While other cities have experienced massive layoffs and major cuts in services, we have not. Our Department Directors, our employees and City Council have worked very hard over several budget cycles to lower our expenses by more than \$15 million to help us weather this economic storm.

This one-time payment takes into account not only our current fiscal position, but today's economic realities that affect all of us. I ask you to support this one-time payment proposal. While it does not affect the City's bottom line or our deficit projections, it will go a long way to assist City employees who have played an important role in helping us to manage our finances and plan our City's future.

Should Council approve this one-time payment plan at tonight's council meeting, each union has until the close of business (5 p.m.) on Thursday, November 8 to voice any objection to the one-time payment plan.

Thank you for your consideration of this important matter for City employees. *City Exhibit 1.*

The FOP admits this email was received by its President.

During its regular meeting on November 1, 2012, the City Council approved Substitute No. 1 to Ordinance No. 12-066, which states, in relevant part:

AN ORDINANCE CONSTITUTING AMENDMENT NO. 2 TO ORDINANCE NO. 12-019, THE ANNUAL OPERATING BUDGET FOR THE FISCAL YEAR BEGINNING ON JULY 1, 2012 AND ENDING ON JUNE 30, 2013

WHEREAS, in view of the fact that City employees who are not members of a collective bargaining unit (non-union employees) and City employees who are members of collective bargaining units – AFSCME Locals 1102, 1102B, 320 and FOP Lodge #1 (Captains and Inspectors) – have not received cost-of-living (“COLA”) increases for any of the four

(4) fiscal years of 2010, 2011, 2012, and 2013; and

WHEREAS, the police and fire unions – FOP Lodge #1 (Rank and File) and IAFF Local 1590 respectively – have not received COLA increases for any of the three (3) fiscal years of 2011, 2012 and 2013; and

WHEREAS, the Administration has recommended and the Wilmington City Council concurs that current employees who worked any part of a fiscal year enumerated above and did not receive a COLA increase shall receive a one-time payment to compensate for lack of increase in wages; and

WHEREAS, the Administration has recommend and the Council concurs that a one-time payment in lieu of receiving a COLA increase is a fair and appropriate measure; and

WHEREAS, the Administration has recommended and the Council concurs that compensation shall be paid to current employees as set forth in Section 4 of this ordinance, which generally authorized payments of between \$175 to \$500 to each employee for each fiscal year the employee did not receive a COLA increase, up to a maximum of \$2,000; and

WHEREAS, the City Council enacted Substitute No. 2 to Ordinance No. 12-019, an operating budget for fiscal year 2013, and the Council deems it necessary to enact amendment No. 2 to said operating budget for fiscal year 2013 to appropriate the funding to allow compensation to be paid to current employees as set forth in Section 4 of this ordinance.

THE COUNCIL OF THE CITY OF WILMINGTON HEREBY ORDAINS:

SECTION 1: That all City of Wilmington (“the City”) employees who are not members of a collective bargaining agreement (“non-union employees”) and are employed by the City on the date of adoption of this ordinance shall receive a one-time payment, as described in Section 4, if such employee worked any part of the four (4) fiscal years of 2010, 2011, 2012, or 2013 as an employee of the City and did not receive a cost-of-living (“COLA”) increase.

SECTION 2. That all employees of the City who are members of the collective bargaining units (“union employees”) – AFSCME Locals 1102, 1102B, 320 and FOP Lodge #1 (Captains and Inspectors) – and are employed by the City on the date of adoption of this ordinance shall receive a one-time payment, as described in Section 4, if such employee worked any part of the four (4) fiscal years of 2010, 2011, 2012, or 2013 as an employee of the City and did not receive a cost-of-living (“COLA”)

increase.

SECTION 3. That all union employees of the City who are members of the police and fire unions – FOP Lodge #1 (Rank and File) and IAFF Local 1590 – and are employed by the City on the date of adoption of this ordinance shall receive a one-time payment, as described in Section 4, if such employee worked any part of the three (3) fiscal years of 2011, 2012, or 2013 as an employee of the City and did not receive a cost-of-living (“COLA”) increase.

SECTION 4. All current employees of the City who meet the qualification requirements of Sections 1, 2 or 3 above shall receive a one-time payment in an amount determined by the following payment schedule: (1) all non-union employees and union employees of AFSCME Locals 1102, 320 and FOP Lodge #1 (Captains and Inspectors) shall receive \$500 for each fiscal year of 2010, 2011, 2012, or 2013 that such employee worked any part of for a maximum payment of \$2000, (2) all union employees of FOP Lodge #1 (Rank and File) and IAFF Local 1590 shall receive \$500 for each fiscal year of 2011, 2012, or 2013 that such employee worked any part of for a maximum payment of \$1,500, and (3) all employees of AFSCME Local 1102B shall receive \$175 for each fiscal year of 2010, 2011, 2012, or 2013 that such employee worked any part of for maximum payment of \$700.

SECTION 5. Said payments to the said non-union employees of the City shall be payable as of November 9, 2012. Said payments to the said union employees of the City shall be payable as of November 16, 2012 unless an objection to such payment is made by a collective bargaining representative on or before November 8, 2012....

The Mayor signed the Budget Amendment Ordinance the following day, November 2, 2012.

City Exhibit 3.

On November 5, 2012, the City issued a press release relating to the one-time payment to employees which stated:

ONE-TIME PAYMENT TO EMPLOYEES IN LIEU OF NOT
RECEIVING COLA IN FY 2010, 2011, 2012, 2013

Monday, November 5, 2012

- The budget amendment will provide a one-time payment of between \$175 and \$500 to all City employees – some of whom have gone without a cost-of-living increase for four years.

- The highest payment that an employee could receive is \$2,000 based on a formula for an employee receiving between \$175 and \$500 for each of the last four fiscal years (FY 10, 11, 12 and 13) that the employee did not receive a cost-of-living increase.
- The cost of the payment plan is \$2 million. The money would be taken from the City's unassigned fund balance.
- The one-time payment plan will have **NO** effect whatsoever on the City's current budget, nor will it have any effect on **any** City budget in **any** future year because the one-time payment will not be *[sic]* added to an employees' base salary – it is simply a one-time payment only, or a “one and done” payment.
- Because of the economic downturn in recent years, the Baker Administration chose to avoid substantial lay-offs of City employees. That left the Administration in a position of not being able to offer cost-of-living increases to most employees.
- Mayor Baker has concluded that the next Administration will face similar budget constraints in the foreseeable future which may hamper its ability to offer employees a cost-of-living increase.
- Mayor Baker says now is the logical time to give employees a one-time payment to help them support their families and pay their bills.
- Non-Union employees, members of Local 1102 and Local 320, and the WPD Captains and Inspectors will receive a \$2,000 payment for not having a COLA in FY 2010, 2011, 2012, and 2013.
- Members of FOP Lodge #1 (rank and file police officers) and members of IAFF Local 1590 (firefighters) will receive a payment of \$1,500 for not having received a COLA in FY 2011, 2012 and 2013.
- School crossing guards, who are members of Local 1102B, work a part-time day and a part-time year, so they will receive a total of \$700 or \$175 per year for not having received a COLA in FY 2010, 2011, 2012, and 2013.
- Now that the budget amendment was approved at the November 1 Council Meeting, non-union City employees will receive their one-time payment on Friday, November 9.
- Employees affiliated with a union would receive their one-time payment on Friday, November 16 provided that their respective union

leaders do not object to the one-time payment by 5 p.m. on Thursday, November 8. *FOP Exhibit A.*

This document was provided to FOP Lodge #1's President by the Mayor's Chief of staff, via email, on November 5, 2012. The email stated, "As you requested Mike, I have attached a bullet point summary of the one-time payment issue. Please let me know if you need more info. Thanks, John".

In an email dated Tuesday, November 6, 2012, FOP Lodge #1 President, Michael Lawson advised the Mayor's Chief of Staff, "The FOP Executive Board voted to accept the one time payment for the Rank and File and the Captains and Inspectors. If you have any questions, please call me at [number provided]. Thanks ... Mike." *City Exhibit 2.*

The City made a one-time payment to members of FOP bargaining units on November 16, 2012.

The documents appended to the pleadings speak for themselves. I note that neither the Mayor's initial e-mail to the FOP (November 1, 2012) nor the November 5, 2012 e-mail forwarding the bulleted summary of the one-time payment plan to the FOP includes the term "current employees". Each document refers simply to "employees". It is further noted that only the Ordinance refers to "current employees" and states those who "are employed by the City on the date of the adoption of this ordinance shall receive a one-time payment".

FOP Lodge #1 (in its Charge) and the City (in its Countercharge) each allege there has been a failure or refusal to bargain in good faith concerning the one-time payment. As both parties have asserted an allegation of bad faith, the pleadings are sufficient to place this matter in issue and to proceed to hearing.

The question of whether the one-time payment was bargained for or unilaterally implemented can be addressed at hearing and subsequent argument. Additionally, evidence and

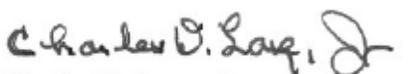
argument will be accepted concerning the omission of a reference to “current employees” in the communications to the FOP from the City on November 1 and November 5, 2012, as well as for whether the exclusion of retirees and/or officers on terminal leave constituted a per se violation of the City’s statutory obligations under the POFERA.

DETERMINATION

Consistent with the foregoing discussion, the pleadings are sufficient to support a finding of probable cause to believe that an unfair labor practice, as alleged, may have occurred. The burden falls on the party making the allegation of bad faith to present facts and argument which support the allegation.

A prehearing conference will be scheduled to determine whether either party wishes to place additional evidence on the record and to determine the manner by which argument will be received. Upon completion of the record and receipt of argument, a decision will be rendered concerning whether either the City of Wilmington and/or FOP Lodge #1 violated the Police Officers’ and Firefighters’ Employment Relations Act, as alleged.

Dated: April 4, 2013



CHARLES D. LONG, JR.
Hearing Officer
Del. Public Employment Relations Board