

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

WILMINGTON FIREFIGHTERS ASSOCIATION,
LOCAL 1590,

Charging Party,

v.

CITY OF WILMINGTON,

Respondent.

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U.L.P. No. 93-10-093

The Wilmington Firefighters Association, IAFF, (hereinafter "WFFA" or "Charging Party") is an employee organization within the meaning of §1602(f) of the Police Officers' and Firefighters Employment Relations Act, 19 Del.C. Chapter 16 (hereinafter "Act").

The City of Wilmington (hereinafter "City" or "Respondent") is a public employer within the meaning of §1602(l) of the Act.

On October 15, 1993, Charging Party filed an unfair labor practice complaint with the Public Employment Relations Board (hereinafter "Board"). The charge alleges conduct in violation of §§1607 (a)(1), (a)(3), (a)(4), (a)(5) and (a)(8) of the Act, which provide:

(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.

(3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.

(4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition or complaint, or has given information or testimony under this chapter.

(5) Refuse to bargain collectively in good faith with an

employee representative which is the exclusive representative of employees in a appropriate unit.
(8) Refuse to disclose any public record as defined in Chapter 100 of Title 29.

The WFFA amended its charge on October 29, 1993, requesting that the PERB convene an emergency hearing and grant appropriate preliminary relief from the City's alleged unfair practices.

On October 26, 1993, the Respondent filed its Answer denying the charge and asserting a counter claim against the WFFA. The City alleged that the WFFA had exhibited a practice of filing frivolous claims against the City, that the appropriate forum for the resolution of the union's concerns was the grievance procedure, which the WFFA had attempted to circumvent and refused to cooperate with the City, and that the WFFA has refused to deal in good faith with the City by refusing to resolve outstanding issues between the parties through the agreed upon grievance procedure. Its Answer to the Amended Charge was filed on November 8, 1993.

An informal conference was convened by the PERB on November 3, 1993. At the close of the conference, the WFFA submitted a memorandum in support of its request for injunctive relief. On November 5, 1993, the City responded to the WFFA's submission. On November 23, 1993, PERB Executive Director Charles Long declined to grant the preliminary relief sought by the WFFA, finding that the record established no reasonable basis for concluding that it would be impossible or not feasible to restore the status quo with a final order in this matter.

Pursuant to a request by PERB officials during the November 3 informal conference, the WFFA filed a chronology detailing the processing of its most recent grievances, including the June 20 grievance alleging the City failed to provide adequate training for Senior Firefighters. The WFFA filed an addendum to this chronology on November 10, 1993. The City responded to the WFFA's submission on November 16, 1993.

The WFFA filed its Response to New Matter on November 16, 1993.

The hearing in this matter was conducted on December 13, 1993. The parties filed responsive briefs with the final brief being received from the WFFA on May 20, 1994.

BACKGROUND

The WFFA and the City of Wilmington were parties to a collective bargaining agreement for the term of July 1, 1990 through June 30, 1993. The parties have been engaged in negotiations for a successor agreement during the processing of this charge, reaching agreement on its terms approximately six weeks prior to the issuance of this decision.

The Wilmington Firefighters Association, Local 1590, IAFF, is the exclusive bargaining representative of the firefighters in the ranks of Firefighter, Lieutenant and Captain (except for the Chief's Aide, regardless of his/her rank) employed by the Fire Department of the City of Wilmington. Wayne R. Warrington is the President and Vincent Carroccia serves as the Secretary-Treasurer of the WFFA.

On January 8, 1993, James T. Wilmore was sworn in as Chief of the Wilmington Fire Department, having been appointed by the newly elected mayor of the City. In this position, Chief Wilmore serves as President of the Board of Trustees of the Firefighters Pension Board.

Article XXVI of the collective bargaining agreement created Senior Firefighter status. It provides:

SECTION 1: Firefighters with eight (8) or more years of service as of the effective date of the Agreement will receive an increase in their base salary of \$1,000 effective July 1, 1991, provided they have satisfied and maintain the following "Senior Firefighter" criteria by June 30, 1993:

- (1) Currently listed as qualified to "Act-out-of-Rank" by department.
- (2) Qualified as a Fire Apparatus Driver/Operator in accordance with NFPA 1002 excluding Section 3-4 (Hydraulic Calculations). No written test will be required.
- (3) Qualified by State as Basic Emergency Medical Technician.

During April, May and early June of 1992, the twelve hour Ambulance Attendant recertification course was offered to each platoon in two six hour classes on Saturdays. The E-mail sent by Battalion Chief Wright, dated April 8, 1992, states that this refresher course would enable firefighters to challenge the Ambulance Attendant test to recertify at the conclusion of the class. The memo further states this refresher course would not be offered again; consequently, "... in the future all members will have to take the complete sixty (60) hour program to certify". City Exhibit 4.

In January 1993, Chief Wilmore attended his first Labor Management Meeting with the WFFA. During the meeting, WFFA Secretary-Treasurer Carroccia raised the issue of the prior administration's failure to provide the required EMT training.

The issue of EMT training was again raised by the WFFA at the March 10, 1993 Labor Management Meeting. The minutes of that meeting, as prepared by Chief Wilmore's Executive Secretary, provide:

Training

Battalion Chief Wright is handling the issue of the EMT courses. As far as the make-up classes for the 2 day training, we will probably have to call someone in.

The April 1, 1993, Labor Management Meeting minutes indicate that EMT Training was again discussed. The minutes state:

EMT Training

Training will be made available for participants who don't get the 3 day training. It will be provided on duty collectively.

If the EMT card has expired, a refresher course is required to become recertified. There is a sixty day grace period for expired cards.

The EMT training course will be offered to the recruits. We may be able to work around schedules.

The CPR training will be done by Jim Zent.

There is money in the account for courses.

On April 21, 1993, Battalion Chief Wright issued a memo to Chief Wilmore identifying by name Senior Firefighters who required EMT-Ambulance Attendant

and/or Firefighter II certification. The list included the names of eighteen (18) firefighters who needed only EMT certification, seven (7) firefighters who needed only Firefighter II certification, eight (8) firefighters who needed both EMT and Firefighter II, and three (3) firefighters who needed Firefighter II certification but did not have the requisite eight (8) years of seniority to qualify for Senior Firefighter status.

On June 4, 1993, the WFFA filed an unfair labor practice charge against the City with the Public Employment Relations Board (ULP No. 93-06-085, hereinafter "WFFA Charge 085"). That Charge was amended on August 4, 1993. The hearing was conducted by the PERB on September 15, September 16, October 4 and October 8, 1993.

On June 8, 1993, EMT Training was again discussed in a Labor Management meeting. The minutes state:

- EMT Classes - The names of persons who do not have EMT training will be sent to Payroll. The course will be available during the rookie class. Firefighters need to make themselves available to attend those classes. Suggestion was made to allow instructors within the Department to administer the test. Try to get a variance from the State Fire School.
- Firefighter 2 - Individuals who failed in the past must make provisions to take this on their own.

Following this meeting, Chief Wilmore provided Firefighter Carroccia with a copy of Battalion Chief Wright's April 21, 1993 list of firefighters requiring EMT and/or Firefighter II certification.

On June 9, 1993, Secretary-Treasurer Carroccia wrote to Chief Wilmore requesting an extension on the June 30 deadline for requalifying for Senior Firefighter status. His letter reads:

This is to follow up on our conversation at the labor management committee meeting on June 8, 1993 concerning the 25 individuals who currently need EMT certification to continue in Senior Firefighter status. The administration has failed to meet its obligation to provide on-the-job training as required by Article XXVI, Section 1, (3) of the contract. Numerous attempts were made by Local 1590 with the prior administration to have on-the-job EMT training made available to members who needed it, but these efforts

were unsuccessful. While we recognize that this situation was not the result of your administration, an extension of the deadline is the only equitable solution in light of the administration's failure to provide adequate opportunities for on-the-job EMT training.

You mentioned at the labor management committee meeting that you would consider extending the June 30 deadline and scheduling additional EMT on-the-job training. On behalf of Local 1590 and the affected members, we hereby request that you agree to extend the June 30, 1993 deadline and that adequate EMT training opportunities be provided on the job as required by the contract.

With regard to our conversation concerning the 18 members who need Firefighter II training, you indicated that these members have had up to three opportunities to take the test. You indicated that any additional attempts to receive the certification would be at the members' own expense and responsibility. This is agreeable to the union.

Please let me know the administration's position on extending the June 30, 1993 deadline for EMT certification as soon as possible since the deadline is fast approaching. Thank you.

Chief Wilmore responded to the WFFA's request, denying the extension, by letter dated June 14, 1993, which provides:

I am in receipt of your letter dated June 9, 1993 regarding on-the-job EMT training. As I stated in the meeting, I am amenable to having those firefighters affected by the contract deadline take the training required along with the recruit class.

At this point, we are not in a position to extend the deadline past June 30, 1993, due to contract stipulations. You will need to contact Battalion Chief Jack Wright to ascertain the necessary requirements for each individual. It will be incumbent upon those individuals to avail themselves to the classes when they are held.

As we stated, the training is mutually beneficial to the Fire Department, as well as to the firefighter, in that the citizens of Wilmington benefit from the expertise, and the firefighter qualifies for \$1,000 as a senior firefighter.

On June 20, 1993, WFFA President Warrington filed a grievance with the Deputy Chief of Operations, Clifton Armstead. The grievance alleges that the City failed to provide training as set forth in Article XXVI of the collective bargaining agreement, Senior Firefighter:

The Administration has failed to meet its obligation to provide on the job training for the EMT and NFPA Firefighter III training as required by Article XXVI, Section 1, (3) and (4) of the Union contract.

There are presently 25 members needing EMT training and 18 members needing Firefighter III practical training to meet the criteria for Senior Firefighter.

On behalf of Local 1590 I.A.F.F. and the affected members, we request that you agree to extend the June 30th, 1993 deadline and that adequate EMT and Firefighter III training opportunities be provided on the job as required by the contract.

By memorandum dated June 28 to Chief Wilmore (on which the Director of Personnel was copied), President Warrington advised the City that the Union was requesting that the grievance be heard at Step 2 because the Deputy Chief had failed to hear it at Step 1, as provided by the contract.

When the grievance was not heard at Step 2, the WFFA appealed it to arbitration in accord with the contractual grievance procedure by a letter to Chief Wilmore dated July 10, 1993. Copies of the appeal letter were sent to both Personnel Director Wayne Crosse and WFFA Attorney Barry Willoughby.

On July 1, 1993, Battalion Chief Wright sent a memo to Chief Wilmore, identifying Senior Firefighters who had failed to satisfy the contractual criteria for maintaining Senior Firefighter status. This list named the same 33 individuals identified in Battalion Chief Wright's April 21 memo. The memo indicates a copy was also sent to Lisa Hemphill of the Payroll Department and Wayne Crosse, Director of Personnel for the City.

On October 4, 1993, Chief Wilmore issued a memo to Lisa Hemphill of the Payroll Department advising her that 33 firefighters had failed to maintain their Senior Firefighter pay status and alerting her that "... their pay should be adjusted effective July 1, 1993". Again, the individuals included on the list were identical to those named in Battalion Chief Wright's April 21 and July 1 memoranda. Three of the named firefighters, however, included on the list had retired since July 1, 1993, including WFFA President Warrington who retired on July 16, 1993. The retirees were indicated on the Chief's October 4 memo by an asterisk, with the notation, "Retired members whose pension should be adjusted".

As a result of Chief Wilmore's October 4 memo to Payroll, Personnel Director Wayne Crosse sent a letter dated October 20, to each affected firefighter, advising him or her that the base pay had been reduced effective July 1, 1993 by the \$1,000 Senior Firefighter stipend. The letters further stated that the City would recoup in four installments the overages paid since July 1 from the firefighter's wages. At the time these letters were sent, the reduction in pay and the first recoupment installment had already been deducted on October 15, 1993.

By letter dated November 2, 1993, Personnel Director Crosse advised the three retired firefighters that because they had failed to meet the criteria for Senior Firefighter prior to June 30, 1993, their rank for the purpose of computing their pension should have been that of Firefighter 4, rather than Senior Firefighter. The letter advised the retirees that consequently they had been overpaid during the period between July 1 and the date of their retirement, and that the overage must be repaid to the City on or before December 3, 1993.

On October 9, President Warrington went to Station 1 to place documents into the City's interdepartmental mail. While at the station, he went into Lt. Laws' office where the clipboard and binders containing the Department's Standard Operating Procedures ("SOP's") and General Orders of the Chief ("GO's") are posted. While he was reading through these documents, Battalion Chief Patrick, who was stationed at Station 1 on that date, returned to the station and noticed Mr. Warrington in the Lieutenant's office, reviewing departmental documents. Battalion Chief Patrick told Mr. Warrington he had a problem with him being in the fire station in the officer's quarters reviewing the documents. Mr. Warrington responded by citing his contractual right as a union officer to inspect the worksite. Battalion Chief Patrick then went to his own office and telephoned Chief Wilmore to seek advice on how to handle the situation. In response to the call, Chief Wilmore came to the station where he advised President Warrington that he would be permitted to review the material

but only after making a written request to do so through the Chief's office.

On October 18, representatives of the WFFA and the City met to discuss approximately eleven outstanding "old" grievances. Among those attending this meeting were WFFA President Warrington, WFFA Attorney Willoughby, WFD Chief Wilmore and Deputy Personnel Director Yanonis. Included among the grievances discussed was the grievance filed on June 20 regarding the City's alleged failure to provide adequate on-the-job training under Article XXVI of the collective bargaining agreement.

A second grievance meeting was held on November 19, 1993. The purpose of this meeting was for the City to respond to the "old" grievances discussed on October 18. Early in this meeting, Deputy Personnel Director Yanonis stated that the City's intention was to grant the training grievance and reinstate Senior Firefighters status to the effected employees. Following a caucus, Mr. Yanonis indicated that the City's position was subject to change. He requested an extension of time to further investigate the grievance, which the WFFA declined to grant. The training grievance was denied at Step 2 on December 9, 1993.

Early in Chief Wilmore's tenure he identified the need to hire a class of firefighter recruits. By letter dated January 27, 1993, Chief Wilmore advised the Director of the Delaware State Fire School that the Wilmington Fire Department was anticipating hiring a class of recruits in April or May of 1993. The Chief inquired whether the Fire School facilities would be available during these months for training of the recruits. He further stated, "Also there are 27 firefighters who need to be recertified as emergency medical technicians. Please inform me of any other information you may need." WFFA Ex. 14.

On March 4, 1993, the Assistant Director of the Fire School advised Chief Wilmore that the Fire School would not be available for training WFD recruits until the weeks of July 12 through the end of August 1993. The Fire School requested to

meet with the City to discuss details of the recruit training. In order to determine when and how EMT recertification training would be conducted, the Fire School requested additional information regarding the status of each individual requiring recertification. WFFA Ex. 15.

On March 29, 1993, Battalion Chief Wright received a proposed training schedule for the recruit class from the Fire School. WFFA Ex. 16. This memo includes two sets of dates. The first is typewritten and then crossed out with a second handwritten set of dates beside it. The original typewritten dates begin the week of June 7 and end the week of July 26, 1993. The Ambulance Attendant/ EMT training was to be offered on Wednesday, Thursday and Friday of each of the first three weeks of the training, with the examination scheduled for Wednesday, June 30. According to the handwritten dates, the training was to be conducted from July 5, through August 27, 1993, with the Ambulance Attendant testing scheduled for Wednesday, July 18, 1993.

The schedule for hiring the new recruits was sent to Chief Wilmore from City Personnel Supervisor McClure on April 16, 1993. The schedule established the following time frames:

- April 1 - April 12: Initial screening of applicants by City Personnel
- April 13 - May 5: Criminal, motor vehicle and employment
background checks to be conducted
- April 13 - May 5: Physical agility test
- May 10 - May 14: Written examination
- May 24 - June 7: Panel Interviews/ Oral exams
- June 10 - June 14: Interviews conducted by Chief Wilmore
- June 28: Appointment of the new recruit class with training to
begin at the Fire School after June 28 but before July 12.

WFFA Ex. 17.

The recruit process soon fell behind this schedule. The written exams were given on May 17 (approximately one week behind the City's scheduled date of May 10) and the panel interviews were not conducted until June 28 through July 9. Applicants were notified of their panel interview appointments by letters dated June 24. WFFA Exhibits 19 and 20. Correspondence between the City Solicitor and the

Office of the State Attorney General on July 2, 1993, confirms that the criminal background checks were not conducted until after the panel interviews. WFFA Ex. 21.

Chief Wilmore conducted interviews from July 12 through July 14. By letter dated July 19, Chief Wilmore recommended to the City's Public Safety Director twenty-five (25) recruits. Results of the physical examinations were posted July 27 and 28. Letters were sent to the successful applicants confirming their appointment as Probationary Firefighters on July 30, 1993. The recruit class was hired on August 2, 1993.

The recruit training included the 60 hour basic Ambulance Attendant certification course. The final examination was given to the recruits sometime during the middle of September, 1993. At that time Firefighter Carroccia and Firefighter Lopez were permitted to take the test without having attended the full sixty hour course in order to be recertified as Senior Firefighters.

The new firefighters took the oath of office and were assigned to Engine Companies on September 29.

ISSUE

1. Did the City interfere with, restrain or coerce firefighters and/or interfere with the existence or administration of the Wilmington Firefighters Association, Local 1590 or otherwise discourage membership in this labor organization through its course of conduct regarding the Senior Firefighters, in violation of 19 DeL.C. §1607 (a)(1), (a)(3) or (a)(4)?

2. Did the City violate its duty to bargain in good faith and/or to disclose public records, or otherwise interfere with, restrain or coerce the WFFA or its president in refusing to allow the union president free access to the Departments Standard Operating Procedures and General Orders in the Fire Stations?

POSITIONS OF THE PARTIES

WFFA:

The WFFA asserts that the City reduced in rank and pay the Senior Firefighters who still required Ambulance Attendant and/or Firefighter II certification on June 30, 1993, in an effort to retaliate against the WFFA and to intimidate its members because of the malice the WFD Administration held towards the union. The union points out that the issue of the City's need to provide training had been repeatedly brought to the Administration's attention since the first Labor Management meeting between the WFFA and Chief Wilmore's administration in January of 1993.

The WFFA asserts that the City's actions are a continuation of the campaign of harassment and intimidation of the WFFA, its officers and members alleged and proven in WFFA Charge 085. It argues the timing of the City's actions in this case clearly establishes its illegal motive. The WFFA argues that the City changed its position on making the requisite training available to Senior Firefighters as a result of the parties' deteriorating relationship. It notes that prior to June 8 (4 days after the WFFA filed its first unfair labor practice charge against the City), the City's position was that training would be provided to allow Senior Firefighters to maintain their status. In responding to Firefighters' Carroccia June 9 request to extend the deadline, Chief Wilmore responded on June 14 that no extension would be granted. The WFFA disputes the credibility of Chief Wilmore's testimony that he still believed on June 14 that the basic EMT course would be offered to an as yet unappointed recruit class, thereby offering Senior Firefighters the opportunity to recertify as Ambulance Attendants before June 30, 1993.

Further the WFFA notes that the directive to the City's Payroll Department to reduce the wages of Senior Firefighters was issued by Chief Wilmore on October 4, 1993, the third day of hearing on the WFFA Charge 085. The union asserts the Chief initiated the reduction on that day to retaliate against the union for exposing both

the Chief and the Deputy Chief to embarrassment by compelling their testimony during the hearing on WFFA Charge 085. ⁶ The WFFA further asserts that the Chief's effort to reduce the pension benefits of the three recently retired Senior Firefighters was illegal and violated his fiduciary duty as a trustee of the Firefighters Pension Board

The WFFA argues the City was the first to breach the Article XXVI, Senior Firefighters, by failing to provide the requisite training. The Ambulance Attendant refresher course was offered only once during the life of the contract, and no provision was made for firefighters who did not pass the examination at that time or who were unable for some reason to take the class when it was offered. It notes that the WFFA's June 20 training grievance was ignored until October 18. It argues the City's bad faith and retaliatory motives are further evidenced by its conduct in denying these grievances at the November 19 meeting. It characterizes the City's excuse for changing its position during the grievance meeting, namely that the grievance involved significantly more employees than the City had thought, as "patent nonsense".

Finally, the WFFA asserts that the City's attempt to restrict the Union President's access to the Department's Standard Operating Procedures and General Orders was based on union animus, was an unlawful attempt to retaliate against the President for filing unfair labor practice charges, and violated both the City's duty to bargain in good faith and to provide access to public records under the statute. The WFFA argues that the timing of the incident on the morning following the close of the PERB hearing on the WFFA's first charge makes the City's motive "stunningly obvious". It asserts that the City failed to articulate any credible or legitimate reason for its action. It argues that the Chief's demand that the Union president request

⁶ Chief Wilmore testified on September 16 and Deputy Chief Armstead testified on October 4.

access to the Department's SOP's and GO's in writing violates its duty to bargain in good faith as the contract guarantees Union officials access to the work site.

City:

The City argues there is no credible evidence of record that its actions were motivated by an union animus or that the actions complained of were undertaken to retaliate against the WFFA, its officers or members. Rather, the City argues that the reduction in the pay of Senior Firefighters who failed to meet the qualifying criteria was based on a legitimate business interest, namely, compliance with the contractual terms agreed to by the parties.

The City argues that it met its obligation to provide Ambulance Attendant training to Senior Firefighters. Because all of these firefighters had previously been certified, the City was under no obligation to provide the full 60 hour basic course. Therefore, by providing the 12 hour refresher course and the opportunity to be recertified by challenging the exam, the City asserts it met its contractual obligation.

The City argues that the Chief's willingness to allow Senior Firefighters who required the Ambulance Attendant's certification to take the class with the recruits evidences his good faith. It asserts that the Chief was not attempting to mislead the union in stating on June 14 that, although he could not extend the deadline, he would allow Senior Firefighters to take the basic Ambulance Attendant certification training with the recruits if it was offered prior to June 30, 1993. It asserts that the Chief had no authority to extend the contractual deadline for satisfying the Senior Firefighters criteria.

The City argues that Battalion Chief Wright's July 1 memorandum to Chief Wilmore constituted a directive to the Payroll Department to reduce the pay of Senior Firefighters who had failed to meet the training requirements to maintain that status. It argues that it was only in a later conversation with Personnel Director

Crosse that the Chief learned the salaries of the affected Senior Firefighters had not been reduced. The City argues that the Fire Chief had no control over the recoupment process nor did he take any action against the affected retirees. The City asserts that the WFFA has produced no evidence of union animus by either Personnel Director Crosse or Battalion Chief Wright, who authored the original memo.

The City denies that it failed to process the training grievances, as alleged. It asserts that it first became aware of the grievances at the October 18 meeting between the parties to discuss the outstanding grievances. The City argues the grievance was denied because the City received new information that the twelve (12) hour Ambulance Attendant Refresher had been offered to the firefighters in the Spring of 1992.

Finally, the City disputes the WFFA's contention that union access to the work site or to public records was denied when the Chief restrained the union president from free access to the officers' quarters in the Fire Station. The City points out that on October 9, 1993, WFFA President Warrington was no longer an employee of the WFD and his access to the work site and departmental information was therefore subject to limitation. The City argues that the employees' right to representation by the union must be balanced against the employer's right to control its property. It asserts that the imposition of a written request to view departmental policies, procedures and order, from the union president who had retired from the department, did not result in undue hardship for the union. The City does not dispute that the Standard Operating Procedures and General Orders are public record, but rather asserts that the union was never denied access to them.

OPINION

The WFFA charges that the City of Wilmington violated the rights of firefighters by engaging in conduct which violates their right to engage in

protected activity without discrimination, to be represented by their exclusive representative without interference and to exercise their rights under the Police Officers and Firefighters Employment Relations Act without interference, restraint or coercion. As set forth in the decision in WFFA, Local 1590 v. City of Wilmington (Del.PERB, ULP No. 93-06-085 (1994)), the right of employees to engaged in protected activity must be balanced against the right of the employer to manage the public enterprise. The issue in a union animus case is "whether the employee's conditions of employment were adversely affected because the employer was motivated to retaliate because of the employee's protected activity or for legitimate business reasons". WFFA v. City (Supra., at p. 18)

The PERB adopted the NLRB's Wright Line (251 NLRB 1083, 105 LRRM 1169 (1980)) analysis for establishing causality in union animus cases. A "pretextual" case involves a situation where there is no legitimate business justification for the action taken by the employer against an employee who has engaged in protected activity, and the reason proffered clearly either did not exist or was not relied upon. On the other hand, where a "dual motive" is alleged, the burden is on the charging party to prove that the employee's protected conduct was a substantial or motivating factor in the employer's adverse conduct. WFFA I (at p. 20). The standard for evaluating causation in a dual motive case is:

The burden of proof is initially upon the charging party to establish that th employee's conduct was protected by the Act and that this conduct was a substantial or motivating factor in the employer's adverse actions. The charging party is not required to prove that the employer's action rests solely upon discriminatory purposes. in order to establish what equates to a *prima facie* case of unlawful employer motivation, the employee must establish that the employee engaged in protected activity, that the employer had knowledge of the employee's protected activities, and that the employee's activity was a substantial or motivating factor for the employer's actions. Proof of these elements warrants an inference that the employee;s protected conduct was a motivating factor in the adverse personnel action and that a violation of the Act occurred.

Once the charging party establishes its *prima facie* case, the burden shifts to the employer to prove that the same action would have taken place even in the absence of the employee's protected

activity. WFFA I, (at page 21)

The WFFA alleges that the conduct complained of in this charge is a continuation of the City's pattern of harassment and intimidation, in retaliation for protected activity, which was found to violate the Act in WFFA I. There are, however, several material differences between the two charges. The conduct complained of in the first charge specifically targeted individual firefighters. More importantly, these firefighters were primarily union officers. The City's actions had negative consequences specifically for those individuals. In finding that the WFFA had established its prima facie case the PERB held:

[R]elevant evidence exists to support the inference that an anti-union motive existed sufficient to support the WFFA's prima facie case. The facts establish that 1) the employer knew who the union officers were, 2) knew these union officers engaged in protected activities, and 3) the new administration harbored a basic and unsupported distrust of the union and believed that normal union functions constituted a threat to the operational efficiency of the department.

The actions complained of in the present matter affect a group of approximately thirty senior members of the Wilmington Fire Department. Except for WFFA President Wayne Warrington and Secretary Treasurer Vince Carroccia there is no evidence of record to establish that any of the other affected employees had engaged in activity protected by the Act.

The WFFA alleges Chief Wilmore's union animus is evidenced by the incredibility of his testimony concerning his June 14 letter. The Chief testified that when he denied the WFFA's request to extend the Senior Firefighter qualification deadline, he believed that it was still possible for the affected employees to be recertified by taking the Ambulance Attendant course with the recruits prior to June 30. The evidence, however, indicates that as early as March 4, the Chief had been advised by the State Fire School that it could not provide training for the recruits before July. Even by the recruit training schedule established by the City Personnel

Office, the Ambulance Attendant test would not be offered until July 18. Further, by June 14, the City had fallen behind its own hiring schedule and had not yet initiated the panel interviews scheduled for May 24 through June 7. Considering the circumstances, if the Chief did not know that the training would not be offered before the June 30 deadline, he reasonably should have known. However, without other evidence of an illegal motive, this fact alone is not sufficient to find the City violated the statute.

The WFFA further argues that the Chief's October 4 order to reduce the pay of Senior Firefighters resulted directly from the embarrassment suffered by Department officials while testifying in PERB hearings on WFFA Charge 085. It argues that the Chief's testimony that he did not know the salaries of the affected employees had not been reduced effective July 1 until about October 4 is pretextual and wholly without merit.

Chief Wilmore had clearly advised the WFFA during the June 8 Labor Management meeting that the list of Senior Firefighters who did not qualify to maintain that status would be sent to Payroll. At that time, the Chief also provided Secretary-Treasurer Carroccia with Battalion Chief Wright's April 21 listing the affected employees. Chief Wilmore's June 14 letter clearly states ~~the Chief~~ the June 30 contractual deadline would not be extended..

On July 1, 1993, Battalion Chief Wright sent a memorandum to Chief Wilmore which identifies thirty three (33) Senior Firefighters and states:

In accordance with the contract, the following members have not completed their requirements for Senior Firefighter as of June 30, 1993, and therefore should be reverted back to their original base salary.

The memo indicates copies were sent to Personnel Director Crosse and Lisa Hemphill of the Payroll Department. Ms. Hemphill did not testify. Nor were procedures described concerning how Payroll receives and/or processes notices of change to employees' rates of pay. In the absence of this information, Battalion Chief Wright's

memo may or may not constitute an appropriate directive to the Payroll Department. Further where there is no other evidence of protected activity or the employer's retaliatory motive, union animus be considered the underlying motivation for Chief Wilmore's October 4 directive .

There is no compelling evidence to suggest that the City's actions concerning Senior Firefighters were motivated wholly or in part by an anti-union motive. The Union's argument that because the City violated the Act with the conduct detailed in WFFA Charge 085 and because the WFFA does not accept the City's rationale for its actions here, is not compelling. While the PERB may draw reasonable inferences from both direct and circumstantial evidence, it may not accumulate these inference in order to reach a conclusion which constitutes only educated conjecture. WFFA (Supra.)

Having concluded that the WFFA has not produced compelling evidence sufficient to prove that the City acted upon illegal motives does not, however, resolve this charge. A thorough review of the record establishes continuing problems in the relationship between these parties and that actions have occurred which do violate the statute.

The first issue concerns whether the City met its obligation to provide "on-duty" training under Article XXVI of the collective bargaining agreement, necessary for the Senior Firefighters to fulfill the requirements for maintaining that status after June 30, 1993. The record establishes that two courses were offered in the April to June, 1992 time frame. The first was the Patient Assessment course which firefighters with current Ambulance Attendant certification are required to take annually, along with CPR training, in order to retain their certification. This class was detailed in Battalion Chief Wright's March 16, 1992 memorandum which establishes a schedule of 3 days of 3 hour classes for each platoon. WFFA Exhibit 11. It is in this memo that Battalion Chief Wright states, "Should members not be

available to make these dates when the class is offered to their platoon, a make-up class will be scheduled at a later date". This class would not have applied to the individuals named in the April 21 Senior Firefighter memo because the named Senior Firefighters did not have existing "EMT" or Ambulance Attendant certification.

Second, an Ambulance Attendant Refresher course was also offered to each platoon for all firefighters who needed to renew their expired certification. Battalion Chief Wright testified that the twelve-hour refresher was a special arrangement with the Fire School to allow Wilmington Firefighters with expired certifications to "challenge" the certification test. Firefighter Carrocia corroborated B/C Wright's testimony with his understanding that the Spring 1992 refresher course was a "special offer". Battalion Chief Wright detailed the scheduling of this 12 hour training to be conducted over two days in his April 8, 1993, E-mail memo to all members of the WFD. The April 8 memo specifically states that the purpose of the training is to allow members to challenge the Ambulance Attendant test, that the certification is required to qualify as a Senior Firefighter, and that "... This is the last time this opportunity to challenge the test will be offered. In the future all members will have to complete the 60 hour program to certify". The memo contained a training schedule for each platoon. Battalion Chief Wright testified that the training was conducted on Saturdays in order to accomodate the State Fire School, whose weekday schedule was full. Contrary to the WFFA's assertion, there is no mixed message in this memo about whether the refresher course will be offered again. It was clear that the only alternative to taking the twelve hour refresher was for senior firefighters to invest sixty hours in retaking the basic Ambulance Attendant course and examination.

It is undisputed the WFFA repeatedly raised the issue of EMT training in Labor Management meetings in January, March, April and June of 1993. A careful review of the record also makes clear that on different occasions, the training referred in

the minutes was sometimes the 2 day, 12 hour Ambulance Attendant recertification course and sometimes the 3 day, '9 hour Patient Assessment course necessary to retain existing Ambulance Attendant certification. As discussed above, these courses were required by two separate and distinct populations of firefighters. Consequently, the training referred to in the first sentence, under Training, of the April 1 minutes, i.e., the "3 day training", is the Patient Assessment course, while the "2 day training" referred to in the March minutes would have been the refresher course. The April minutes promised to make the Patient Assessment course available "on duty collectively." This is logical as all firefighters with existing Ambulance Attendant certifications were required to take this course annually. The two day refresher or recertification course, on the other hand, is referred to in the March Labor Management meeting minutes, where it states that,

Battalion Chief Wright is handling the issue of the EMT courses. As far as the 2 day training, we will probably have to call someone in.

Although the testimony received during the hearing obscured this distinction, it is evident from these documents that both Patient Assessment and the refresher or recertification course were discussed during the course of Labor Management meetings.

While the March 1993 Labor Management meeting minutes clearly note that Battalion Chief Wright was "handling" EMT training and specific reference was made to contacting someone outside of the WFD to obtain the two day refresher training, there is no evidence that the City's representatives ever followed up on these discussions. Battalion Chief Wright testified that he did not attend Labor Management meetings and was never advised that the WFFA had requested further recertification opportunities. There can be no question but that Chief Wilmore, at least, was repeatedly made aware of the the WFFA's concerns regarding opportunities for Senior Firefighters to receive the necessary training to maintain that status. Despite repeated documented assurances that training was being "handled", that money was

available for training, that schedules could be worked around, that test administrators might be available within the WFD, and that variances from the State Fire School could be pursued, there is no evidence on the record that the City ever undertook a good faith effort to do any of these things. Failure by the Administration to follow up on the discussions internally, and specifically with Battalion Chief Wright, violates the City's obligation to deal in good faith with the exclusive bargaining representative of its employees. ⁷

The WFFA argues that when the City first breached its obligation to provide training under Article XXVI, it relinquished its right to enforce the terms of that same contractual provision against the Senior Firefighters. The question of whether or not the City provided adequate training under the contract is a matter of contractual interpretation to be resolved through the parties contractual grievance procedure, particularly where the process culminates in binding arbitration by a neutral third party. It is the role of the PERB to assess the alleged unfair conduct against the statutory standard and not to unnecessarily interject itself into the parties' contractual relationship.

The core of these parties problem centers on their failure to effectively utilize the contractual grievance procedure. The record in this case is replete with flagrant disregard for the process and the parties' obligations thereunder. The June 20, 1993 grievance filed by the WFFA, protesting the City's alleged failure to provide adequate training to Senior Firefighters is a perfect example. In its October 29, 1993 Answer to the Charge and its November 8, 1993 Answer to the Amended Charge, the City acknowledges it received this grievance. Each of these pleadings were filed after the October 18 grievance meeting at which this matter was admittedly discussed.

⁷ The obligation to deal in good faith with WFFA representatives is not limited to negotiations centered on reaching successor agreements.

However, during testimony, in its response to the WFFA's chronology of grievances, and in its post-hearing brief, the City attempts to argue that it never received these grievances. The City is bound by its admissions, but more important to this matter is the inherent contradiction within its various submissions.

The training grievance was dated June 20, 1993⁸ and sent to Deputy Chief Armstead. When no hearing was scheduled or held under Step I of the parties' grievance procedure, President Warrington advised Chief Wilmore by letter dated June 28, 1993, that the WFFA wished to proceed to a Step 2 hearing. Having received no response from the City to this request, the WFFA notified Chief Wilmore by letter dated July 10, that the grievance would be processed to arbitration. The matter was first discussed over three (3) months later on October 18 at the collective grievance meeting.

The situation is further exacerbated by Personnel Director Crosse's testimony that at the time he wrote the October 20 letters to the Senior Firefighters, notifying them of their loss of status and pay and their reimbursement obligation to the City, he had no knowledge that an issue existed as to whether adequate training had been provided under the contract. His testimony is reinforced by his subsequent actions. Upon learning of the training issue, Mr. Crosse immediately rescinded his recoupment directive to Payroll.⁹ The October 18 grievance meeting was attended by Mr. Crosse's Deputy Director, with whom he admittedly frequently discussed labor matters. It is difficult to accept that the City's top Personnel officials had no communication concerning this issue prior to the training dispute first coming to

⁸ Two grievances were actually filed on June 20, 1993. One concerned the obligation of Senior Firefighters to pass a physical exam under Article XXVI and alleges that the City never developed such a test. The second grievance is the one here considered and concerns the City's alleged failure to provide adequate "EMT" and Firefighter II certification opportunities.

⁹ The PERB notes, however, that there is nothing in the record to suggest that the affected Senior Firefighters were so notified.

Mr. Crosse's attention after his letters of October 20 were sent.

The parties next met on November 19 for the City to respond to the grievances discussed on October 18. ¹⁰ Whether the City met its training obligation under Article XXVI continued to be an issue, however, in consideration of the WFFA's grievance involving the reduction in pay and status of active Senior Firefighters. At the November 19 meeting, the City initially indicated it would grant the WFFA's grievance and would reinstate the affected Senior Firefighters' pay and status. After some discussion, the City retreated from this position. Both Mr. Yanonis and Mr. Crosse testified the reason for the change in its position occurred because the WFFA considered the grievance to involve more individuals than did the City.

While the WFFA expressed exasperation and lack of understanding with the City's changed position, the record demonstrates the City's justification is not without a foundation. City witnesses testified they believed the reinstatement to involve approximately 13 to 16 employees. The WFFA stated that the list of Senior Firefighters who had failed to qualify to maintain their status as of July 1, 1993 was generated by the City and contained the names of the same thirty three (33) individuals named in Battalion Chief Wright's list of April 21, 1993. The April 21 list included eighteen (18) Senior Firefighters who needed only Ambulance Attendant certification, seven (7) who needed only Firefighter II certification, and eight (8) who needed both the Ambulance Attendant and Firefighter II certifications. ¹¹ Three of the individuals who required only Ambulance Attendant certification had retired from the WFD

¹⁰ No Step 2 Answer to the June 20 training grievance was entered into the record. It appears that the City joined the training grievance with the WFFA's grievance of the October 15 reduction in pay and status of the active Senior Firefighters. That decision indicates it is a resolution the grievance involving "Alleged violation of Article XXVI, Section 1 Subsections 3, 4 and 5, Senior Firefighters, Docked Pay", thereby indicating it resolved both the training and pay reduction issues.

¹¹ The April 21, 1993 memo also included three (3) firefighters who needed Firefighter II certification but were not eligible for Senior Firefighter status because they did not have eight (8) years of service with the WFD.

prior to the November hearing, leaving fifteen (15) active firefighters who required only Ambulance Attendant certification to maintain their Senior Firefighter status.

The minutes of the June 8 Labor Management meeting specifically state:

Firefighter 2 - Individuals who failed in the past must make provisions to take this on their own.

By letter dated June 9, 1993, WFFA Secretary-Treasurer Carroccia confirmed the Union's understanding on this point:

With regard to our conversation concerning the 18 members who need Firefighter II training, you indicated that these members have had up to three opportunities to take the test. You indicated that any additional attempts to receive the certification would be at the members' own expense and responsibility. This is agreeable to the union. [emphasis added.]

Both Secretary-Treasurer Carroccia and President Warrington testified they had discussed the June 9 letter and had mutually decided to have Mr. Carroccia write it. Despite the clear understanding and acceptance by the WFFA that adequate opportunities had been provided for Senior Firefighters to get Firefighter II certification on duty, however, the June 20 grievance filed by President Warrington alleges that the City failed to provide adequate Firefighter II training under the terms of the agreement.

The impact of the WFFA's retreat from its clear acceptance of the adequacy of the Firefighter II training and the City's failure to process the June 20 training grievance was that the parties were operating on different premises. Based on its understanding that the WFFA had waived its right to protest the adequacy of the Firefighter II training, the City could justifiably believe that only the fifteen (15) active firefighters who needed only Ambulance Attendant certification were the subject of the grievance. When the City requested additional time to investigate the grievance at the November 19 hearing, the WFFA denied the request believing that the City was stalling because the list of affected Senior Firefighters had not changed since its initial issuance on April 21, 1993.

The City issued its Step 2 grievance answer on December 9, 1993, holding:

Decision: It is the City's position training was provided, consistent with Article XXVI of the contract. This grievance is denied. [WFFA Ex. 5]

Personnel Director Crosse testified that in addition to the dispute concerning the number of employees affected by the grievance, at some point after November 19, "new information" became available from Battalion Chief Wright that training had been provided. The grievance was denied on that basis.

While the issue of the number of Senior Firefighters covered by the grievance had some validity, the City's position of not knowing what training it had offered is unacceptable. The training issue was repeatedly raised by the Union and discussed with responsible WFD representatives since January. Yet, as of November, the City did not know whether the training had been offered and/or whether it had satisfied its obligation under Article XXVI.

On the other hand, the WFFA must assume some responsibility for the problem. It also had access to the information regarding the Ambulance Attendant refresher or recertification course contained in Battalion Chief Wright's April 8, 1992 memo, in which he clearly stated that that course would be offered only once. Although the WFFA had a right to rely upon the information provided by the Chief in the Labor/Management meeting, no evidence was produced that the WFFA contacted Battalion Chief Wright directly with its concerns, even in response to the Chief's direct suggestion in his June 14, 1993 letter.

These circumstances confirm the importance of the grievance procedure as a vehicle for communication and evolution of the parties' on-going relationship. The complete failure of the grievance procedure and the communication process, for whatever reason (whether it be lack of commitment, the change in administration, or the refusal to communicate directly), is largely responsible for the deterioration in the working relationship between these parties. There are no clean hands in

assessing responsibility for the failure. The informal conference convened by the PERB in this charge included a lengthy analysis of how problems with the grievance procedure could be corrected. The parties agreed to devise a standard grievance form, to develop a numbering system and work out details for the "service" of documents, including to whom documents would be delivered, how receipt would be acknowledged and how grievance meetings would be scheduled.

Neither party can be excused for the failure of the grievance procedure to effectively address legitimate concerns. The parties are under a continuing obligation to act in good faith under the statute. The City's apparent lack of coordination and communication between its officials and departments in administering the contract and the grievance procedure is unjustifiable. As a result, the information given to the WFFA was contradictory, misleading and violated the City's good faith obligation. Similarly, the WFFA's contradictory positions concerning the acceptability of the City's performance under the contract also violates its duty to bargain in good faith.

What is particularly striking in reviewing the evidence concerning the reduction in status and pay of the Senior Firefighters, is the absence of any evidence establishing the individual firefighters were notified of their contractual responsibilities or the impending consequences. While the lists of affected employees were exchanged by City and WFFA officials, training was frequently discussed and the Union placed on notice in June that a list of unqualified Senior Firefighters would be sent to Payroll on July 1, there was neither testimony nor documentation that the individuals who stood to actually lose money and status were notified by either the City or the WFFA.

Based upon circumstances underlying the reduction of Senior Firefighters, the apparent confusion and lack of communication also impacted the pension benefits of the recently retired Senior Firefighters. While Personnel Director

Crosse's letter to the affected retirees of November 2, 1993, indicates that their pensions were based on erroneous calculations, there is no evidence on the record that the retiree's benefits were ever altered or that recoupment money was ever tendered to the City as requested.

The remaining issue concerns the October 9, 1993 incident at Station 1 involving WFFA President Warrington, Battalion Chief Patrick, Chief Wilmore and the department's Standard Operating Procedures and General Orders. It is undisputed that President Warrington was in Station 1, in Lieutenant Laws' office reviewing the SOP's and General Orders when Battalion Chief Patrick returned to the station. Battalion Chief Patrick testified he was not normally stationed at Station 1. Because the Union president was no longer an active WFD employee, Battalion Chief Patrick was troubled by Mr. Warrington being in the officer's quarters. President Warrington asserted his contractual right to inspect the work site, which he argued included the right to review departmental documents. Battalion Chief Patrick admitted the situation was new to him and he telephoned Chief Wilmore for guidance. After speaking with the Chief, Patrick advised Warrington that while he had the right to inspect the work site, he would have to make a written request to review the documents. While the two were discussing the issue in the Battalion Chief's office, Chief Wilmore called on the telephone. When Battalion Chief Patrick told the Chief that he was discussing the issue with President Warrington, the Chief responded that he would come to the station. Upon his arrival, the Chief advised President Warrington that he did not have unlimited access to the officer's quarters to review the SOP's and General Orders and would have to submit a written request to the Chief in order to review these documents in the future.

The WFFA argues that the Chief's directive that President Warrington submit a prior written request to review the SOP's and General Orders impinges upon and interferes with the WFFA's ability to police compliance with the collective

bargaining agreement. Article II, Section 4 of the contract provides:

The City further agrees to recognize any authorized Union official and to permit the said officials to visit the work sites of the Fire Department, to investigate working conditions, adjust grievances or disputes, conduct normal Union business or to implement any other matters relating to the terms and condition of this contract, but this activity shall be conducted so that it does not impair the operations or manpower availability of the Department.

The Union argues that by violating this contractual provision the City has made a unilateral change in a mandatory subject of bargaining in violation of §1607(a)(5). Whether access to the Standard Operating Procedures and General Orders constitutes inspection of the work site is proper subject matter for the grievance procedure. Under these circumstances, it does not constitute a question of statutory interpretation for the PERB.

Insofar as the pending unfair labor practice charge, it is undisputed that the exclusive bargaining representative must be afforded reasonable access to the information necessary to carry out its representative functions. The employer, on the other hand, has the right to control its property and operations. The collective bargaining agreement provides that any work rule or regulation which violates the collective bargaining agreement is subject to the grievance procedure. Consequently, the interests of the Union must be reasonably balanced against the interests of the employer. Until October 9, President Warrington's access to the Fire Stations to review the SOP's and General Orders had not been questioned. However, it cannot be denied that his status within the Department was changed by the fact that he was now a retiree. While as an individual he did not pose a security risk in the minds of other departmental employees, limiting access to the officers' quarters does constitute a legitimate business concern of the Fire Department..

In balancing these interests, the directive that access to departmental documents, admittedly of interest to the Union in enforcing the collective bargaining agreement, must be requested in writing is not reasonable. The time

delay in making the request and receiving a response could conceivably unduly interfere with the Union's right and obligation to represent the bargaining unit members in a timely and efficient manner, in violation of §1607(a)(1).

CONCLUSIONS OF LAW

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

2. The Wilmington Firefighters Association, Local 1590, IAFF, is an employee organization within the meaning of §1602(f) of the Act.

3. The Wilmington Firefighters Association, Local 1590, IAFF, is an exclusive bargaining representative within the meaning of §1602(g) of the Act.

4. The evidence presented was insufficient to support a finding that the City was motivated in whole or in part by union animus in its reduction in rank and pay of Senior Firefighters who failed to meet the contractual criteria to maintain their status by June 30, 1993. By its actions, the City did not interfere with, restrain in or coerce any employee in violation of 1607(a)(1), nor did it encourage or discourage membership in the WFFA by discrimination in violation of §1607(a)(3), nor otherwise discriminate against an employee because that employee had exercised his or her rights to be involved in PERB proceedings under §1607(a)(4).

5. The evidence presented did not establish that the pensions of retired firefighters whose pension calculations were erroneously based upon the premise that those employees had qualified under the contractual provisions to maintain Senior Firefighter status were ever adjusted. Nor is there evidence that any of these employees ever made recoupment payments. The same circumstances which underlie the finding that the City did not violate §§1607(a)(1), (a)(3), and (a)(4) in reducing the pay and rank of active Senior Firefighters warrant the same result in

considering retired Senior Firefighters.

6. By failing to process grievances through the grievance procedure and otherwise acting in derogation of its good faith obligation under the statute, the City has violated §1607(a)(5).

7. By failing to pursue a good faith resolution of outstanding issues, the WFFA has violated §1607(a)(5).

8. By limiting the Union President's access to review the Standard Operating Procedures and General Orders of the Fire Department by requiring him to make a written request to the Fire Chief, the City has interfered with the rights guaranteed under this chapter, in violation of §1607(a)(1). ¹²

9. The City did not refuse to disclose any public record as that term is defined in Chapter 100 of Title 29.

WHEREFORE, the City is hereby order to take the following affirmative actions:

I. Cease and desist from:

a. Engaging in conduct which tends to interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under 19 Del.C. Chapter 16.

b. Refusing to bargain collectively in good faith with the WFFA.

II. Within ten (10) days from the receipt of the Notice of Determination from the Public Employment Relations Board, post the Notices in all areas where notices affecting employees are normally posted, including but not limited to each fire station and the Public Safety Building.

¹² During the informal conference this issue was discussed and the City agreed that President Warrington could have access to these documents in the Chief's office at the Public Safety Building. Based upon this agreement, there exists no need for remedial action.

The WFFA is hereby ordered to cease and desist from all actions in derogation of its duty to bargain in good faith with the City of Wilmington.

IT IS SO ORDERED.

/s/ Deborah L. Murray-Sheppard
DEBORAH L. MURRAY-SHEPAPRD
Principal Assistant
Del. Public Employment Relations Bd.

/s/ Charles D. Long, Jr.
CHARLES D. LONG, JR.
Executive Director
Del. Public Employment Relations Bd.

DATED: August 2, 1994