

STATE OF DELAWARE  
PUBLIC EMPLOYMENT RELATIONS BOARD

IN RE:       BATTALION CHIEFS OF THE CITY OF       :       Representation   Petition  
              WILMINGTON FIRE DEPARTMENT       :       \_\_\_\_\_No. 95-06-142\_\_\_\_\_

Appearances

*WFD Battalion Chief Allen Huelsenbeck, for Battalion Chiefs  
Teresa C. Fariss, Esq., Young, Conaway, Stargatt & Taylor, for Battalion Chiefs  
Lynn Seth, Esq., Assistant City Solicitor, for City of Wilmington*

**BACKGROUND**

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

Battalion Chiefs of the Wilmington Fire Department are public employees within the meaning of 19 Del.C. §1602(k).

Local 1590, International Association of Firefighters (hereinafter "Local 1590") is an employee organization within the meaning of 19 Del.C. §1602(f). The records of the Department of Labor, Governors Council on Labor Case #23 and #23(a) establish that Local 1590 was registered as the exclusive bargaining representative of "all positions in the Wilmington Fire Department" in 1966. In 1977, the City and Local 1590 agreed to exclude from the bargaining unit the positions of Fire Chief, Deputy Fire Chief, Internal Affairs Officer, and Chief's Aide. Following the passage of the POFERA in 1986, the City petitioned the Public Employment Relations Board (hereinafter "PERB") to "[r]emove the position of Battalion Chief from the

Bargaining Unit." Local 1590 did not oppose the proposed change and on August 1, 1988, an Order of Unit Modification was issued by the PERB.

At all times relevant to this matter, Local 1590 has and continues to be the exclusive bargaining representative, within the meaning of 19 Del.C. §1602(g), of the bargaining unit of Firefighters, Captains and Lieutenants. The City and Local 1590 are parties to a collective bargaining agreement with a term of July 1, 1993 through June 30, 1995. The recognition clause of this Agreement, Section 2.1, states:

The employer [City] recognizes the Union [Local 1590] as the exclusive bargaining agent for the employees certified by the Department of Labor and Industrial Relations [*sic*] for the purpose of this Agreement. The term "employees" and "firefighters" shall include the ranks of Firefighter, Lieutenant, and Captain in the Fire Department of the City of Wilmington, except that employee holding the confidential position of Chief's Aide shall be excluded from the bargaining unit regardless of the rank of the individual employee.

On or about June 19, 1995, Battalion Chief Allen Huelsenbeck filed a representation petition with the Public Employment Relations Board seeking representation for the unrepresented position of Battalion Chief of the Wilmington Fire Department within the bargaining unit currently represented by Local 1590. The petition was accompanied by authorization cards representing more than thirty percent (30%) of the Battalion Chiefs of the Fire Department.

By letter from Assistant City Solicitor, Lynn S. Seth, dated June 28, 1995, the City opposed "Battalion Chiefs becoming a part of Wilmington Firefighters Local 1590," stating that inclusion would cause "serious conflicts of interest for the Battalion Chiefs." The letter further stated the City's objection:

The position of Battalion Chief is a quasi-policy making position within the Fire Department. Battalion Chiefs are responsible for a variety of activities that impact on the daily work environment of the other members of the Department, including all members of Local 1590. They are required to administer the fire stations, oversee discipline, establish and update rules and regulations and prepare the operating budget for the Department.

Because these officers are responsible for the daily operation of the Department and are directly responsible for carrying out management's policies and directives, it would be inappropriate to have the individuals in the same bargaining unit as the employees they oversee.

Notices were posted advising all effected bargaining unit members and Battalion Chiefs that the petition had been filed. A copy of this Notice of Petition was forwarded to Michael McNulty, Local 1590 President. The accompanying letter from Deborah L. Murray-Sheppard, PERB Principal Assistant of June 29, 1995, stated:

This matter will proceed to hearing to receive testimony and evidence necessary to make a determination as to whether Battalion Chiefs are appropriate for inclusion within the bargaining unit of Firefighters.

A hearing was convened by the PERB on August 15, 1995. Following the hearing and its transcription, the parties filed simultaneous closing memoranda. <sup>1</sup>

#### ISSUES

1. Whether the representation petition filed on behalf of the Battalion Chiefs is, in fact, a petition to modify an existing bargaining unit and, therefore, subject to the requirements of Rule 3.4(8) of the PERB's Rules and Regulations?
2. If the petition is deemed proper, are Battalion Chiefs appropriate, within the meaning of 19 DeL.C. §1610(d), for inclusion in the bargaining unit currently represented by Local 1590?

#### OPINION

- I. *Whether the representation petition filed on behalf of the Battalion Chiefs is, in fact, a petition to modify an existing bargaining unit and, therefore, subject to the requirements of Rule 3.4(8) of the PERB's Rules and Regulations?*

The City argues that the petition filed by the Battalion Chiefs is a modification petition which fails to conform to the requirements of PERB Regulation 3.4(8) on two

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<sup>1</sup> Battalion Chief Huelsenbeck presented the Battalion Chiefs case during the August 15 hearing and at all time prior thereto. The closing memoranda was filed on behalf of the Battalion Chiefs by Teresa C. Fariss, Esq., of Young, Conaway, Stargatt and Taylor.

counts. First, the rule states that either a public employer or an exclusive bargaining representative must file a modification petition and the individual Battalion Chiefs filing this petition are neither. Secondly, a modification petition must be premised upon "... a substantial change in the duties and working conditions of a position within a bargaining unit... or there is some other compelling reason for the Board to consider modifying the designated bargaining unit." The City asserts that the Battalion Chiefs are performing the same duties and responsibilities as they did at the time of their exclusion from this bargaining unit in 1988 and that no other compelling reason has been offered to support this petition.

The Battalion Chiefs argue that the City waived its right to object to the sufficiency of the petition because it failed to raise the objection prior to the opening of the hearing. They argue that initially raising this issue at the hearing constituted unfair surprise, particularly in light of the fact that the Battalion Chiefs were not represented by counsel during or prior to the hearing.

The Battalion Chiefs further argue that they are seeking representation, as is their statutory right under 19 Del.C. §1603. It is inconsistent with these rights to maintain that these employees lack standing to file a petition simply because the ultimate outcome of the petition may be an amendment of the existing bargaining unit. Even if the petition is considered a modification petition within the meaning of PERB Rule 3.4(8), the Battalion Chiefs argue that the fact that they are unrepresented employees seeking representation constitutes a compelling reason to consider the petition.

The POFERA grants to police officers and firefighters the rights of organization and representation. 19 Del.C. §1603. The PERB has broadly construed employee representation as a fundamental right. Del. Public Employees Council 81,

AFSCME, AFL-CIO, Local 439 and University of Delaware, Del.PERB, Rep. Pet. 95-04-126  
(1995).<sup>2</sup>

In administering the provisions of the POFERA, the Public School Employment Relations Act and the Public Employment Relations Act, the PERB has established by practice and policy that the right to be represented for purposes of collective bargaining begins with and accrues to any group of statutorily eligible public employees seeking representation. Once a labor organization is certified through a secret ballot election as the exclusive bargaining representative of the designated bargaining unit, that organization has the right and obligation to represent that unit and the employer has the right and obligation to deal exclusively with that representative. Once part of a represented bargaining unit, however, the desires of any group of individual employees within that unit relative to representation matters are expressed solely through the decertification and certification procedures.

Consistent with this policy and practice, the PERB has entertained representation petitions filed by unrepresented employees seeking to be represented through inclusion within an existing bargaining unit. The PERB has required a showing of interest by at least thirty percent (30%) of the unrepresented employees and an indication by the exclusive representative of the bargaining unit that it is willing to represent the employees/positions in question. Notices of the petition are posted at the PERB's direction in the workplace to notify all effected employees of the proposed change to the unit. If it is determined that the position(s) in question are appropriate for inclusion in the existing unit, a secret ballot election is held among

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<sup>2</sup> Prior PERB rulings decided under the Public School Employment Relations Act, 14 Del.C. Chapter 40 (1982, 1989) and/or the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994), are controlling to the extent that the relevant portions of those statutes are identical to those of the Police Officers and Firefighters Employment Relations Act.

the unrepresented employees to determine whether a majority of these employees desires to be represented, consistent with their statutory right to choose their representative, if any. If the vote fails, the positions in question do not become part of the bargaining unit and the employees in those positions remain unrepresented consistent with the desires of the majority.

PERB Regulation 3.4(8) has been applied in circumstances where the employer and/or the exclusive representative of an existing bargaining unit seek to change the unit definition, through the addition or deletion of positions or general classifications of positions. A modification petition under Regulation 3.4(8) is precipitated by one of three circumstances; 1) there is a significant change in the duties and working conditions of "a position within the bargaining unit" (emphasis added), 2) a new position is created, or 3) there is some other compelling reason for the PERB to consider modifying the designated unit. Permitting only the employer and the exclusive representative to file modification petitions is consistent with the transfer of rights which occurs once employees have chosen to be represented. Regulation 3.4(8) does not apply, however, to a petition filed by unrepresented employees seeking representation, even where the employees desire to be represented within an existing unit. It is the right of unrepresented employees to choose their representative(s).

The fact that a group of unrepresented employees have filed a proper petition seeking representation, consistent with their statutory rights, is sufficient to cause the PERB to consider the appropriateness of their inclusion in the desired bargaining unit. Therefore, this representation petition is determined to be properly filed in accord with established PERB practice.

II. *Are Battalion Chiefs appropriate, within the meaning of 19 Del.C. §1610(d), for inclusion in the bargaining unit currently represented by Local 1590?*

In considering the appropriateness of the proposed bargaining unit, the PERB is charged with applying the factors set forth in §1610(d) of the POFERA. Bargaining unit determination must be premised on consistent reasoning and weighing of statutory factors resulting in a unit determination tailored to the unique facts and circumstances present in each individual representation matter. In RE: Kent County Vo-Tech Special Education Instructional Aides, Del.PERB, Rep. Pet. 91-06-065 (1992, p. 743).

The designated unit need not be the only appropriate bargaining unit. In RE: Caesar Rodney S.D. Instructional Aides, Del. PERB, Rep. Pet. 92-03-070 (1992, p. 829). The statute does not require that all employees in the bargaining unit perform identical functions, but rather that all bargaining unit employees share a community of interest premised upon the similarity of their duties, skills, and working conditions. C.R. Instructional Aides, (Supra., p. 831).

PERB Regulation 3.4(7), specifically incorporating the provisions of §1610 (d) of the statute, requires the PERB to consider the following factors in assessing the appropriateness of a petitioned bargaining unit:

- (a) Similarity of duties;
- (b) Skills and working conditions of the employees involved;
- (c) The history and extent of employee organization;
- (d) The recommendations of the parties involved;
- (e) The effect of overfragmentation of bargaining units on efficient administration; and
- (f) Other factors determined by the Executive Director to be relevant.

Similarities of Duties, Skills and Working Conditions:

The City maintains that by virtue of the Fire Department chain of command <sup>3</sup>, the responsibilities of Battalion Chiefs are not the same as those of Captains and other

<sup>3</sup> Wilmington Fire Department includes the following ranks in ascending order: Firefighters, Lieutenant, Captain, Battalion Chief, Deputy Chief, Chief of Fire.

Fire Department officers. It asserts that Battalion Chiefs are managerial employees, responsible for administering discipline, structuring overtime, enforcing directions and Standard Operating Procedures, and can be utilized in both the selection and recruitment processes for new firefighters.

The record establishes that the policies of the Wilmington Fire Department are established by an Administrative Board and set forth in the Rules and Regulations of the Department. The Chief of Fire adopts procedures, pursuant to the Rules and Regulations, which are commonly known within the Department as "SOP's" or Standard Operating Procedures. In developing these procedures, the Chief relies primarily upon his Deputy Chiefs, only involving the Battalion Chiefs. *Testimony of Chief Wilmore, Transcript p. 38.*

Chief of Fire James T. Wilmore testified that while the Deputy Chief has daily meetings with the Battalion Chiefs, he does not. Battalion Chiefs oversee the daily operation of their districts, but it is the Captains who are directly responsible for the operations of their companies and fire stations. Battalion Chiefs perform monthly facility inspections. Lieutenants, Captains and Battalion Chiefs can function as "Incident Commanders" at a fire scene and have authority to decrease assignments during a response and can place a situation "under control."

Testimony established that Battalion Chiefs do not have authority to assign overtime without notifying the Deputy Chief of Operations first. They do not have authority to change the scheduled rotation of details within a company without the Chief's express permission. They cannot issue written directives to their subordinates. They have no input into the budgetary process of the Department. Under the current administration and operation of the Department, Battalion Chiefs are not involved in either the hiring or promotional processes. They do not have

independent authority to terminate the employment of any subordinate. *Testimony of Deputy Chief Clifford Armstead, Transcript pp. 45 - 50.*

The primary area of concern raised during the processing of this petition relates to the respective responsibilities of Department officers <sup>4</sup> under the disciplinary procedures established by the Rules and Regulations. The roles of the officers differ depending upon whether an infraction is processed through the summary procedures or the full disciplinary procedure. In the case of "summary charges" <sup>5</sup>, the disciplinary procedure is initiated by the placing of a charge against a firefighter by a Lieutenant or Captain. The summary charge is sent to the appropriate Battalion Chief to be either validated or dismissed. <sup>6</sup> In validating a charge, the Battalion Chief is responsible for ensuring that the appropriate procedures have been complied with and that the charge is properly supported. If the charge is validated, it is returned to the originating officer, who assesses the appropriate penalty for the infraction. The Battalion Chief again has responsibility for reviewing the appropriateness of the assessed discipline.

Under full disciplinary procedures, officers of the Fire Department are selected to serve on three member Trial Board. Although the stated preference of the current administration is to appoint a Battalion Chief to head any given Trial Board, it is not mandated by the Department's Rules and Regulations. The other two members of the panel are Lieutenants and/or Captains. Testimony established that Lieutenants and Captains have served as Trial Board Presidents in the past.

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<sup>4</sup> "Officers" here refers to Lieutenants, Captains, and Battalion Chiefs.

<sup>5</sup> "Summary procedures" are followed in cases where 1) the offending action is not a dischargeable offense and 2) the charged employee admits to the offense.

<sup>6</sup> Deputy Chief Eoppolo is responsible for validating charges against any employee in the rank of Lieutenant or above.

Based upon the record established by the parties, it is determined that Battalion Chiefs share a significant similarity of duties, skills and working conditions with other officers of the Wilmington Fire Department currently included within the bargaining unit.

#### History and Extent of Organization

The City argues that the exclusion of Battalion Chiefs from the bargaining unit in 1988, by mutual agreement of the City and Local 1590, creates a "... presumption of inappropriateness that the Battalion Chiefs have failed to overcome by showing any change in circumstances that warrants the inclusion of Battalion Chiefs in the unit."

In modifying the bargaining unit consistent with the agreement of the parties, the PERB did not, either explicitly or implicitly, reach the issue of whether Battalion Chiefs were appropriate, consistent with the requirements of 19 Del.C. §1610(d), for inclusion in the unit at that time. Consequently, there exists no presumption at this time as to the appropriateness or inappropriateness of the Battalion Chiefs for inclusion in this unit.

The City further argues that the 1988 modification of the unit was based upon "dissatisfaction with the Battalion Chiefs being part of Local 1590." It asserts that there is no evidence to suggest that these same concerns do not still exist.

The City expressed its primary concern that inclusion of Battalion Chiefs in the unit would compromise the integrity of the Fire Department's disciplinary procedures. The Deputy Chief of Operations testified that prior to 1988, when Battalion Chiefs were in the unit, disciplinary procedures had not been a problem. The simple assertion by the City that this could be a problem now is not sufficient to overcome the many shared interests between the Battalion Chiefs and other bargaining unit members, especially where there is recent historical experience

with the proposed composite bargaining unit. Further, no evidence was offered that the existing inclusion of other officers in the unit constitutes or contributes to operational or disciplinary difficulties for the employer.

For these reasons, it is determined that the history and extent of organization supports the Battalion Chiefs' inclusion in the bargaining unit.

Recommendations of the Parties:

Clearly the City and the Battalion Chiefs differ in their recommendations regarding disposition of this petition. For this reason, the recommendations of the parties does not directly impact the determination of appropriateness in this matter.

Further, the City's argument that Local 1590 has not indicated its willingness to represent these employees is rejected. Notices were posted at PERB direction in the workplace advising all bargaining unit members and Battalion Chiefs of the content of the petition and its processing. Copies of all correspondence from the PERB to the parties were sent to the President of Local 1590. President McNulty testified in support of the Battalion Chiefs' position during the hearing. At no time during these proceedings, despite ample opportunities, did Local 1590 ever indicate its unwillingness or that of its membership to extend the scope of the bargaining unit to include Battalion Chiefs.

Overfragmentation:

The efficient administration of government requires designation of the fewest number of bargaining units as is consistent with the statutory rights of public employees to organize and choose a representative for meaningful and effective representation. Maintaining the fewest possible bargaining units enhances the efficient administration of a governmental organization by assuring that collective

bargaining results in some measure of uniformity in benefits and working conditions as well as preventing a patchwork pattern of representation which unduly complicates the process. In RE: Kent Co. Vo-Tech Special Education Instructional Aides, (Supra., at p. 746).

The City takes the position that placing Battalion Chiefs in a separate bargaining unit, similar to the bargaining structure within the Wilmington Police Department <sup>7</sup>, is the more reasonable accommodation to the Battalion Chiefs' desire for representation. It argues that the creation of a separate unit would not constitute overfragmentation. The City asserts that the Police Captains and Inspectors are in a separate bargaining unit because they are managerial employees with responsibilities similar to those of Fire Department Battalion Chiefs, namely the day to day management of the operations of their divisions.

The Battalion Chiefs argue that creating a bargaining unit of seven (7) employees would result in inefficient overfragmentation of units and would not adequately serve their interests, particularly in light of their community of interest with other Fire Department officers currently represented by Local 1590.

The PERB has held that it has an obligation to consider the appropriateness of the bargaining unit petitioned for by the employees seeking representation. In RE: Caesar Rodney Instructional Aides, (Supra., at p. 829). The alternative posed by the City of creating a second bargaining unit constituted exclusively of Battalion Chiefs was never properly placed before the Board for consideration and there is no evidence to suggest that it was raised with the Battalion Chiefs prior to submission of the City's closing argument. For this reason, overfragmentation is not dispositive in resolving the appropriateness issue.

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<sup>7</sup> Wilmington Police Department Captains and Inspectors are in a separate bargaining unit from rank and file police officers. Both units are represented, however, by Fraternal Order of Police Lodge No. 1.

Other Factors:

The City argues that the inclusion of Battalion Chiefs in the existing unit would cause a conflict for the Battalion Chiefs because they represent the interests of the City in the Department's disciplinary procedures. As previously stated, despite the City's repeated assertion that the disciplinary procedures will be compromised, neither history nor current practice support this contention. Captains, and to a somewhat lesser extent, Lieutenants are very involved in the disciplinary proceedings of the Department, without apparent sacrifice of the process. The unsubstantiated concerns expressed by the City are insufficient to establish that Battalion Chiefs do not share a community of interest with other officers in the bargaining unit.

The City also asserts that Battalion Chiefs "have access to information that they could use during negotiations that the Union may not be entitled to under normal circumstances." The City concludes including Battalion Chiefs in the existing unit would be devastating to the efficient operation of City government.

The record establishes that Battalion Chiefs serve no role in the area of labor relation and/or in the contractual grievance procedure. During the contractual Labor/Management meetings, the City is represented by the Chief of Fire and the Director of Public Safety. No evidence was presented that the Battalion Chiefs are involved in the negotiation of the collective bargaining agreement or otherwise had access or input to the process.

**DECISION**

In reviewing the record, it is clear that Battalion Chiefs share strong similarities of duties and working conditions with other officers of the Wilmington

Fire Department, namely Captains and Lieutenants, who are currently represented in the bargaining unit.

For the reasons stated above, it is determined that Battalion Chiefs are appropriate for inclusion in the bargaining unit with Firefighters, Lieutenants and Captains of the Wilmington Fire Department.

A secret ballot election will be conducted within thirty days of this decision in order to determine whether Battalion Chiefs of the Wilmington Fire Department desire to be represented within this bargaining unit by Local 1590, IAFF.

**IT IS SO ORDERED.**

/s/Deborah L. Murray-Sheppard  
Principal Assistant/Hearing Officer  
Del. Public Employment Relations Bd.

/S/CHARLES D. LONG, JR.  
Executive Director  
Del. Public Employment Relations Bd.

Dated: November 22, 1995