STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

City of Wilmington, Delaware,	:	
	:	
PETITIONER,	:	**Request for**
	:	
v.	:	**Declaratory Statement**
	:	
Fraternal Order of Police, Lodge 1, IAFF, Local 1590, AFSCME Local 1102, and AFSCME Local 320,	:	**D.S. No. 02-10-369**
	:	
RESPONDENTS.	:	

Appearances

Martin C. Meltzer, Esq., Assistant City Solicitor, and Jerome M. Capone, Esq., for the City of Wilmington
Jeffrey M. Weiner, Esq., for FOP Lodge 1
Perry F. Goldlust, Esq., Aber, Goldlust, Baker & Over for AFSCME Locals 1102 & 320
Ronald Stoner, Esq., for IAFF Local 1590

BACKGROUND

The City of Wilmington, Delaware ("City") is a public employer within the meaning of section 1302(p)[1] of the Public Employment Relations Act, 19 Del.C. Chapter 13 ("PERA") and within the meaning of section 1602(l)[2] of the Police Officers' and Fire Fighters' Employment

[1] 19 Del.C. §1302(p): "Public employer or "employer" means the State, any county of the State or any agency thereof, and/or any municipal corporation, municipality, city or town located within the State or any agency thereof, which upon the affirmative legislative act of its common council or other governing body has elected to come within the former Chapter 13 of this title or which hereafter elects to come within this chapter, or which employs 100 or more full-time employees.

[2] 19 Del.C. §1602(l): "Public employer" or "employer means the State or political subdivisions of the State or any agency thereof, any county or any agency thereof, of any municipal corporation or municipality, city or town located within the State or any agency thereof, which (1) upon the affirmative legislative act of its common council or other governing body has elected to come within Chapter 13 of this title, (2) hereafter elects to come within this chapter, or (3) employs 25 or more full-time employees. For the purposes of paragraph (3) of this subsection, "employees" shall include each and every person

Relations Act, 19 Del.C. Chapter 16 ("POFFERA").

Fraternal Order of Police Lodge 1 ("FOP") is an "employee organization" within the meaning of 19 Del.C. §1602(g) [3] and was the "exclusive bargaining representative" of the bargaining unit of City employees at all times relevant to this dispute. 19 Del.C. §1602(h).[4]

The City and the FOP were parties to a collective bargaining agreement covering the unit of Captains and Inspectors[5] of the Wilmington Police Department which had a contractual term extending from July 1, 1998, through June 30, 2001. The City and the FOP were also parties to a collective bargaining agreement covering the bargaining unit of Wilmington Police Officers in the ranks of Patrolperson, Corporal, Senior Corporal, Sergeant, Master Sergeant, and Lieutenant[6] which also had a term of July 1, 1998 through June 30, 2001.

International Association of Firefighters, Local 1590 ("IAFF Local 1590") is an "employee organization" within the meaning of 19 Del.C. §1602(g) and is the "exclusive bargaining representative" of the bargaining unit of City firefighters at all times relevant to this dispute. 19 Del.C. §1602(h). IAFF Local 1590 represents a bargaining unit of Wilmington Fire Department firefighters in the ranks of Firefighter, Lieutenant, Captain and Battalion Chief as defined in DOL Case 23. The City and IAFF Local 1590 were parties to a collective bargaining agreement which had a contractual term of July 1, 1998, through June 30, 2001.

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employed by the public employer except (A) any person elected by popular vote; and (B) any person appointed to serve on a board or commission.

[3] 19 Del.C. §1602(g): "Employee organization" means any organization which admits to membership police officers or firefighters employed by a public employer and which has as a purpose the representation of such employees in collective bargaining, and includes any person acting as an officer, representative or agent of said organization.

[44] 19 Del.C. §1602(h): "Exclusive bargaining representative" or "exclusive representative" means the employee organization which as a result of certification by the Board has the right and responsibility to be the collective bargaining agent for all employees in that bargaining unit.

[5] As defined by DOL Case 79.

[6] As defined in DOL Case 54.

AFSCME Council 81, Local 320 ("Local 320") is an "employee organization" within the meaning of 19 Del.C. §1302(i) [7] and was the "exclusive bargaining representative" of the bargaining unit of City employees as defined by DOL Case 20 at all times relevant to this dispute. 19 Del.C. §1302(j).[8] The City and AFSCME Local 320 were parties to a collective bargaining agreement covering the bargaining unit commonly referred to by the parties as the "blue collar unit" which had a term of January 1, 1998, through December 30, 2000.

AFSCME Council 81, Local 1102 ("Local 1102") is an "employee organization" within the meaning of 19 Del.C. §1302(i) and was the "exclusive bargaining representative" of the bargaining unit of City employees at all times relevant to this dispute. 19 Del.C. §1302(j). The City and AFSCME Local 1102 were parties to a collective bargaining agreement covering the bargaining unit commonly referred to by the parties as the "white collar unit"[9] which had a term of July 1, 1998, through June 30, 2001.

At the time this petition was filed, the City was engaged in negotiations with the FOP, IAFF Local 1590, AFSCME Local 320 and AFSCME Local 1102 concerning successors to their respective expired collective bargaining agreements.

On October 18, 2002, the City filed a Petition for Declaratory Statement asserting the following:

> ¶6. The City is presently involved in contract negotiations with the collective bargaining units representing uniformed and non-uniformed municipal employees. The previous bargaining contracts for the years 1999, 2000, and 2001 (except for the F.O.P No. 1) contained parity provisions related to salary increases. The parity provision provided all respondent unions, except for F.O.P. No. 1, the same salary increase obtained by any individual union through the collective bargaining process.

[7] 19 Del.C. §1302(i): "Employee organization" means any organization which admits to membership employees of a public employer and which has as a purpose the representation of such employees in collective bargaining, and includes any person acting as an officer, representative or agent of said organization.

[8] 19 Del.C. §1302(j): "Exclusive bargaining representative" or "exclusive representative" means the employee organization which as a result of certification by the Board has the right and responsibility to be the collective bargaining agent for all employees in that bargaining unit.

[9] As defined in DOL Cases 36, 43 and 51.

¶7. In the negotiation sessions between the F.O.P. No. 1 and the City on August 14, 2002, the F.O.P. No. 1 presented the City with a position statement. This statement letter from counsel for F.O.P. No. 1, declared that the F.O.P. would file an unfair labor practice complaint against the City if it granted a parity provision to any of the unions presently in negotiations.

¶8. Several of the municipal workers' unions, particularly Local 320 and Local 1102, have expressed and demanded that the parity terms of their respective contracts be continued during negotiations and part of any future contract. Presently, Local 1590 has not expressed an opinion about the parity provisions. However, Local 1590 did have a parity provision in its previous contract.

¶9. A controversy exists concerning a potential unfair labor practice, i.e., whether the City violates its duty to bargain in good faith by recognizing and/or granting parity provisions with the other unions or in the alternative, whether the City violates its duty to bargain in good faith by refusing to continue and/or negotiate parity provisions with all of the municipal unions, except for F.O.P. No. 1.

¶10. Certain rights and/or statutory obligations of the City are being adversely impacted by this controversy; to wit, the City's statutory obligations to negotiate in good faith with an employee representative which is the exclusive representative of employees in the appropriate units, pursuant to 19 Del.C. §1307(a)(5) and 19 Del.C. §1607 (a)(5).

¶11. Providing a parity provision in the collective bargaining contracts of the uniformed and non-uniform City unions is a real and adverse issue. The F.O.P. No. 1 has taken the position that any parity provision provided to any municipal employees union would be an unfair labor practice committed by the City. This position is opposed by the non-uniform unions who are actively negotiating for a parity provision in their contract. The parity provision has become one of the major issues which has resulted in a negotiation impasse with all of the contracts.

¶12. The issues in this controversy are clear and focused:

(a) Do parity provisions of the contracts for 1999, 2000, 2001, presently exist even though the contracts have expired?

(b) Is a parity provision in collective bargaining contracts an unfair labor practice?

(c) Are parity provisions in a public employment collective bargaining contracts mandatory or permissive subjects for negotiations?

> ¶13. The City, therefore, maintains that these issues in dispute have matured and are in such a posture that the issuance of a declaratory statement by PERB will facilitate a resolution to this controversy and promote contract negotiations with collective bargaining units of the City .

Each of the respondent unions responded to the City's petition. FOP Lodge 1 asserted as New Matter:

> 1. Upon information and belief, "parity", as asserted by the other Exclusive Bargaining Representatives, is not limited as to scope and/or duration and impacts adversely upon the ability of FOP No. 1 to bargain effectively on behalf of its members.
>
> 2. The existing and prospective parity sought by the other Exclusive Bargaining Representatives causes the interests of the uniform and non-uniform employees to be significantly and inseparably entwined to the detriment of FOP No. 1.
>
> 3. The dispute resolution procedures available to FOP No. 1 under Chapter 16 of Title 19, are rendered ineffective because the cost of its proposals must be calculated based not only on the cost when applied to its members, but also to the members of the other Exclusive Bargaining Representatives. *FOP #1 Response & New Matter, p. 4.*

FOP Lodge 1 requested PERB issue a declaratory statement holding that "any parity clause is unenforceable to the extent that the interests of uniform and non-uniform employees are significantly and inseparably entwined and/or to the extent that the costs of a Collective Bargaining Agreement with one Exclusive Bargaining Representative must be calculated not only on the cost when applied to the members of that Collective Bargaining Agreement, but also to the members of any other Exclusive Bargaining Representative."

A hearing was convened before the Executive Director of the Public Employment Relations Board on March 18, 2003, at which time all parties were provided the opportunity to present evidence and to examine witnesses. The parties were afforded the opportunity to file post-hearing opening and responsive briefs, with the final briefs received by PERB on May 22, 2003.

This decision is based upon the record created by the parties as described above.

FACTS

Parity clauses first appeared in collective bargaining agreements between the City of Wilmington and AFSCME Local 320 in 1993, and with AFSCME Local 1102 in 1994.

Article XXVI of the collective bargaining agreement between the City and AFSCME Local 1102 for the period of July 1, 1998, through June 30, 2001, provides:

> 26.1 The following outlines the salary increases for this Agreement:
> (a) Effective July 1, 1998 – a 3% across-the-board increase.
> (b) Effective July 1, 1999 – a 3% across-the-board increase.
> (c) Effective July 1, 2000 – a 3% across-the-board increase.
> Employees' salaries shall be set forth in Exhibits "F-1", "F-2" and "F-3".
>
> 26.2 If the Employer provides a higher negotiated across-the-board wage increase or cash bonus to other bargaining units, it shall provide the same increase or cash bonus to Local 1102. *City Hearing Exhibit 2.*

Article XXV of the collective bargaining agreement between the City and AFSCME Local 320 (the "blue collar unit") for the period of January 1, 1998, through December 30, 2000, provides:

> 25.1 There are eight paygrades, A through H, with five steps in each grade. Each job title in the Union is assigned to a pay grade. The parties agree that employees will be eligible to move through the five steps of their respective grades as follows:
>
> Step 1 – Entry Level
> Step 2 – at end of 1 year
> Step 3 – at end of 2 years
> Step 4 – at end of 4 years
> Step 5 – at end of 6 years
>
> The list of Union job titles, with the corresponding pay grades for each job title, is found on Exhibit "A", which is attached hereto.
>
> The following outlines the salary increases for this collective bargaining agreement:
>
> (a) Effective January 1, 1998 3.0% across-the-board increase
> (b) Effective January 1, 1999 3.0% across-the-board increase
> (c) Effective January 1, 2000 3.0% across-the-board increase

> It is agreed that there will be parity with regard to salary increases and cash bonuses given to other City bargaining units.
> *City Hearing Exhibit 3.*

On or about June 24, 1999, following resolution of their substantive negotiations, representatives of IAFF Local 1590 and the City entered into the first parity agreement affecting City firefighters. Representatives of the parties were signatories to the following letter, which was addressed to the City's Personnel Director:

> This letter will act as conformation *[sic]* for a tentative agreement between the City of Wilmington and Local 1590 Wilmington Firefighters Association. It is understood that the changes to the current contract are those that we have worked on at the bargaining table. All other Articles in the contract will remain as is current contract language.
>
> If any other Union receives wages or benefits greater than what, Local 1590 bargained for Local 1590 will receive those grater*[sic]* wages, and benefits. (Parity with other locals)
>
> Upon the signing of the contract the City and the Union will share an equal coast *[sic*] of the printing of the contract. As in the past we will print 200 contracts Union will keep 175 and give the remainder to the City for future employees. *City Hearing Exhibit 1.*

The 1998 – 2001 collective bargaining agreements between the City and the FOP covering the two bargaining units of Police Officers do not include parity clauses.

In July, 2000, IAFF Local 1590 filed an unfair labor practice charge with the PERB in an effort to compel the City of Wilmington to enter into negotiations concerning wage and benefit increases in the City and FOP 1 agreement which the IAFF alleged violated its parity agreement with the City. The PERB Executive Director found the June 24, 1999, letter did constitute a binding parity agreement which was limited to "wages and benefits". The decision further found that the additional monies received by the FOP were economic adjustments unique to the positions and responsibilities of specific police ranks, and therefore, were not subject to the IAFF parity agreement. The Executive Director's decision was affirmed by the full Public Employment Relations Board.

On appeal, Chancery Court reversed PERB's findings and broadly construed the IAFF parity language and found that the average increase to police officers exceeded the 3.0% across-the-board increase to firefighters, and therefore invoked the parity protection. The Court ordered the City and the IAFF to negotiate implementation of its order. The City initially appealed the Court's reversal to the State Supreme Court, but later withdrew that appeal.

As a result, the City and the IAFF entered into negotiations which resulted in an agreement to distribute just under $1 million to bargaining unit members. The City subsequently entered into negotiations and reached agreements with AFSCME Locals 1102 and 320 which also resulted in additional wages being paid to these bargaining unit employees pursuant to the parity clauses of their collective bargaining agreements. Additionally, the City also provided lump sum adjustments to its employees who were not represented or covered by collective bargaining agreements in May and June of 2002. The total cost of these adjustments, which the City asserts were made as a result of the Court's decision in the IAFF case, was $5.1 million.

During this period of time, the City, AFSCME Locals 320 and 1102, FOP Lodge 1, and IAFF Local 1590 were engaged in negotiations for successor agreements to the contracts which had expired on December 30, 2000 and June 30, 2001. Shortly after the issuance of the Chancery Court decision, the City withdrew its monetary proposals to the two FOP units. In its offers to AFSCME Locals 320 and 1102, the City declined to include parity clauses. FOP Lodge 1 and the City did engage in mediation efforts to facilitate the resolution of their negotiations, as did AFSCME Local 320. However, all negotiations between the parties to this matter were suspended in the fall of 2002 pending resolution of the parity issue raised herein.

ISSUE

I. *Does this case present a controversy which is ripe for declaratory relief?*

II. *Are parity agreements illegal subjects of bargaining under Delaware's public sector collective bargaining law?*

III. *Are parity provisions mandatory subjects of bargaining under Delaware law?*

IV. Do the parity provisions in the most recent collective bargaining agreements survive the expiration of those agreements?

DISCUSSION

I. Does this case present a controversy which is ripe for declaratory relief?

Section 4006 of the Public School Employment Relations Act, Public Employment Relations Board, establishes this Board and defines its composition and scope of responsibilities. This section is specifically incorporated by reference into both the PERA and the POFFERA. 19 Del.C. §1306; 19 Del.C. §1606. Subsection 4006(h)provides, in relevant part:

> (h) To accomplish the objectives and carry out the duties prescribed in this chapter, the Board shall have the following powers:
>
> (4) To provide by rule a procedure for the filing and prompt disposition of petitions for declaratory statement as to the applicability of any provision of this chapter or any rule or order of the Board. Such procedures shall provide for, but not be limited to, an expeditious determination of questions relating to potential unfair labor practices and to questions relating to whether a matter in dispute is within the scope of collective bargaining.

PERB Rule 6.1(c), adopted pursuant thereto, requires that a petition for declaratory statement meet the following criteria:

> 1. The controversy involves the rights and/or statutory obligations of a party seeking a declaratory statement;
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> 2. The party seeking the declaratory statement is asserting a statutory claim or right against a public employer, and exclusive representative or a public employee who has an interest in contesting that claim or right;
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> 3. The controversy is between parties whose interests are real and adverse;
>
> 4. The matter has matured and is in such a posture that the issuance of a declaratory statement by the Board will facilitate the resolution of the controversy.

The instant petition unquestionably meets the regulatory criteria for issuance of a declaratory statement. It was filed by the public employer and concerns both a potential unfair

labor practice and whether the wage parity provisions fall within the scope of collective bargaining as defined by the PERA and the POFFERA. A controversy exists in that the issue concerns the statutory obligations of the employer, and the respective exclusive representatives of public employees. The interests of the parties in resolving their negotiations are undoubtedly real and adverse between the various parties. Currently, the negotiations between the City and each of the five bargaining units of City employees represented in this case have been suspended pending resolution of this matter. There can be no question but that this matter is mature and that a declaratory statement concerning the legality of parity clauses will facilitate the resumption of negotiations. City employees have been without collective bargaining agreements for at least two years; this matter must be resolved and moved forward in order to effectuate the purposes of the PERA and POFFERA.

II. Are parity agreements illegal subjects of bargaining under Delaware's public sector collective bargaining law?

"Collective bargaining" is defined in both the PERA and POFFERA to mean, "… the performance of the mutual obligation … to confer and negotiate in good faith with respect to terms and conditions of employment, and to execute a written contract incorporating any agreements reached." 19 Del.C. §1302(e); 19 Del.C. §1602(e). It is well established that matters "concerning or related to wages [and] salaries" are mandatory subjects of bargaining. Appoquinimink Education Assn. v. Bd.of Education, Del.PERB, ULP 1-2-84A, I PERB 23 (1984); Brandywine Affiliate, NCCEA/DSEA/ NEA v. Brandywine School District, Del.PERB, ULP 1-9-84-6B, I PERB 83, 87 (1984); Smyrna Educators Association v. Bd. of Education, Del.PERB, ULP 87-08-015, I PERB 207, 215 (1987).

Parity provisions, on the other hand, constitute an option on which parties might agree in order to resolve negotiations concerning wages or other mandatory bargaining issues. Generically, parity clauses are not particularly different from a conditional increase or reopener

for negotiations on which parties might agree in order to resolve an issue upon which the employer and the union have different "crystal balls" with which they endeavor to predict the future. Delaware's Chancery Court found that there can be "sensible business reasons" for entering into an collective bargaining agreement which includes a conditional reopener for salary issues [10] Seaford Bd. of Education v. Seaford Education Association, Del.Chan., C.A. 9491, I PERB 243, 249 (1988).

In FOP Lodge 5 v. New Castle County, Del.PERB, ULP 91-06-064; -066, I PERB 715, 724 (1991), this Board held that parity clauses are not illegal subjects of bargaining, stating:

> To determine parity clauses are *per se* illegal would mean that where multiple bargaining units exist, any given Union would be either unwilling or hesitant, at best, to settle first. Such a situation carries the potential to create protracted and difficult negotiations resulting in uncertainty, unrest and even open hostility between the parties. Clearly these ends are inconsistent with the declared policy of the State and the primary purposes of the Act.

It is important to note that the FOP 5 decision was decided based upon the specific terms of the parity clause at issue, which in that case applied to "general salary increases" and was limited to the first year of the contractual period.

The statutory framework under which that decision was issued has, however, changed. At the time of the FOP Lodge 5 (Supra.) decision, the final step in the impasse resolution procedure was advisory fact-finding. In March, 2000, both the PERA and the POFFERA were modified to include binding interest arbitration as the final step in the impasse resolution procedure. Unlike fact-finding, "the decision of the binding interest arbitrator shall become an order of the Board within 5 business days after it has been served on the parties." 19 Del.C. §1315(e); 19 Del.C. §1615(e).

[10] The Court was considering whether the conditional salary reopener was subject to mandatory mediation under the Public School Employment Relations Act. The reopener language stated: "The local supplement schedule for FY 1988 will be as provided in Appendix "B", unless the Board passes a current expense tax referendum during FY 1987, in which case Article XV will be automatically reopened for negotiations as of July 1, 1987.

Consequently, both the employer and the exclusive bargaining representative have a statutory means to move negotiations forward toward a final resolution based upon the unique merits and circumstances of their negotiations. It is less likely that an unwillingness or hesitancy to reach agreement without a parity guarantee could hold up a negotiation or create a hostile working relationship as a result of the addition of binding interest arbitration as the final step in the statutory impasse resolution procedure.

PERB has held that in order for a subject to be an "illegal subject of bargaining" an explicit and definitive statutory prohibition must exist. Woodbridge Education Association v. Bd. of Education, Del.PERB, ULP 90-02-048, I PERB 537, 546 (1990). There is nothing in this record that suggests or supports a conclusion that parity provisions are statutorily precluded from the scope of collective bargaining and, therefore, illegal.

It is important to note that an "illegal subject of bargaining" is substantively different from a provision of an agreement which implementation "would be otherwise contrary to law". 19 Del.C. §1313(e); §1613(e). Where parties reach an agreement which includes a provision which is contrary to law, that provision is unenforceable.

The Connecticut Supreme Court clearly defined this distinction in Local 1219, International Association of Firefighters v. Connecticut Labor Relations Bd, Conn. Supr., 370 A. 2d 952, 958, 93 LRRM 2098 (1976):

> The plaintiff's argument is that the act requires the municipal employer and the employee organization to bargain collectively in good faith. Part of the requirement to bargain in good faith is to confer in good faith with respect to wages, hours and other conditions of employment. §7-470(c). A parity clause, the argument continues, falls within the area of wages, hours and other conditions of employment. The conclusion, then, is that the parity clause is a subject required by the act to be bargained over, and is proper and legally enforceable. This argument omits another duty found in the same statute (§7-470) that creates the duty to bargain: the duty of both a municipal employer and an employee organization to refrain from interfering, coercing or restraining the §7-468(a) rights of all employees. Suffice it to say that the duty to bargain does not make legal those clauses which, if found in the contract, would constitute practices prohibited by the act.

A parity agreement between a public employer and an exclusive representative of its employees could be entered into which constitutes a violation of both the employer and the union's obligation under the PERA and/or POFFERA not to interfere with, restrain or coerce any other employee in the exercise of any right guaranteed under the statutes. 19 Del.C. §1307 (a)(1) and (b)(1); 19 Del.C. §1607(a)(1) and (b)(1). Public employees are guaranteed the right to negotiate collectively through representatives of their choosing and to be represented by their exclusive representative. To the extent that a parity agreement impacts the ability of a third party exclusive representative to effectively negotiate on behalf of its bargaining unit members, it may violate the rights of the members of that other bargaining unit and therefore be unenforceable as contrary to law. It is the nature of the triggering event, the responsive action mandated by a specific parity provision and its impact upon employees who are not subject to the agreement which determines whether a particular agreement is contrary to law. This analysis must be conducted on a case-by-case basis.

The logic employed by the New York Public Employment Relations Board in Plainview – Old Bethpage Central School District (17 NY PER ¶3077 (1995)), is succinct and compelling:

> A parity agreement is improper only to the extent that it trespasses upon the negotiation rights of a union that is not a party to the agreement. It does so by making it more difficult for the non-party union to negotiate some benefits for employees it represents while imposing upon it a burden of negotiating for employees it does not represent.

There is no reason in this case to stray from this Board's prior ruling in FOP Lodge 5 v. New Castle County (Supra), holding parity clauses are not *per se* illegal subjects of bargaining, but may, depending on the circumstances presented be contrary to law as affecting the bargaining rights of employees not party to the parity agreement.

III. Are parity provisions mandatory subjects of bargaining under Delaware law?

As stated above, wages and salaries are mandatory subjects of bargaining; parity provisions are an option for resolving negotiations on wages or other issues. As such parity

clauses are permissible bargaining positions to the extent that they do not interfere with the rights of employees not party to that agreement to engage in untrammeled bargaining. Local 1219, IAFF (Supra., at 956).

PERB has held that a willingness to engage in good faith negotiations concerning a permissive subject of bargaining does not prevent a party from later withdrawing that matter from the negotiations prior to or during impasse resolution procedures.

> Either party may undertake good-faith bargaining concerning a permissive subject of bargaining without forfeiting its right to, at a later point, refuse to bargain further or, in fact, to withdraw its proposals and remove the subject from negotiations entirely. To rule otherwise and sustain a claim of waiver based on a course of collective bargaining would penalize the moving party for endeavoring to reach agreement by consenting to bargain upon such issues as to which the Act does not require him to bargain. Katz Mfg. Co., 9th Cir., 365 F.2d 829 (1966). The Fourth Circuit Court of Appeals held that:
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> > A determination that a subject which is non-mandatory at the outset may become mandatory merely because a party had exercised this freedom [to bargain or not to bargain] by not rejecting the proposal at once, or sufficiently early, might unduly discourage free bargaining on non-mandatory matters. Parties might feel compelled to reject non-mandatory proposals out-of-hand to avoid risking waiver of the right to reject. NLRB v. Davison, 4th Cir., 318 F.2d 550 (1963).
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> Capital Educators Assn. v. Bd. of Education, Del.PERB, DS 1-11-84-3CAP, I PERB 95, 105 (1984).

PERB has also held that permissive subjects of bargaining remain in effect only during the term of the agreement. A party can delete a permissive item from a successor agreement simply by refusing to negotiate with respect to that item. Inclusion of a permissive subject of bargaining in an agreement does not convert that issue to a mandatory subject of bargaining in successive negotiations. Capital Educators Assn., (Supra.)

IV. Do the parity provisions in the most recent collective bargaining agreements survive the expiration of those agreements?

In order to create and maintain a positive and supportive environment for collective bargaining, it is important to maintain the prevailing terms and conditions of employment during the period of negotiations until those mandatory subjects of bargaining are modified by agreement of the parties or imposed through binding interest arbitration. Appoquinimink Education Assn. v. Bd. of Education, Del.PERB, ULP 1-2-84A, I PERB 23, 27 (1984). The issue is not a question of extending the provisions of an expired agreement, but rather maintaining the status quo of a mandatory subject of bargaining after expiration until a successor agreement is implemented.

It has been determined in this decision that parity provisions are permissive subjects of bargaining. Consequently, there is no obligation for a public employer to maintain a parity provision beyond the expiration of the agreement. This does not, however, mean that an employer could revoke an increase which was provided during the term of the agreement pursuant to a parity clause. The wage rates at contract's expiration constitute the status quo of that mandatory subject of bargaining.

To find otherwise would be contrary to the express purposes of Delaware's public sector collective bargaining statutes. If the parity provisions existing in the expired AFSCME Locals 320, 1102 and IAFF 1590 agreements were found to survive the expiration of those agreements, and given that wage parity has been herein found to be a permissive subject of bargaining, there would be a clear incentive for these units to forestall negotiations, with the assurance that their members would receive whatever FOP Lodge 1 negotiated. These new "parity" wage rates would become the floor for the negotiations. There would be a clear disincentive to enter into negotiations, and that result would obviously improperly interfere with, coerce and restrain the negotiations between FOP 1 and the City.

Counsel is commended for the development and presentation of well-reasoned and well-documented argument in this matter. Each case cited was reviewed, as well as many others. Because of the broad and general nature of the parity concept presented, this matter was not

easily disposed of as future consequences of the decision were also at stake. PERB has declined through its nearly twenty year history to "fashion broad and general rules", in favor of deciding issues on the narrow basis of the facts presented in order to build a base for the development more general principles over time. Seaford Education Assn. v. Bd. of Education, Del.PERB, ULP 2-2-84S, I PERB 1, 5 (1984). Requests for declaratory statements require this agency to act in a prospective and advisory role which is more difficult than reviewing factually and retrospectively whether an action or course of conduct violated the statute.

Finally, it is clear that the only recourse in this matter is for the parties to immediately return to the bargaining table and to engage in sustained and intensive good-faith negotiations to reach agreements on successors to their long-expired collective bargaining agreements. There is, quite simply, no alternative to negotiations. The City's financial limitations should be clearly communicated to the bargaining representatives and the employees interests in terms and conditions of employment should be addressed through the honest give-and-take of information, proposals, and compromise.

The negotiations between the City and the five bargaining units represented in this case have been suspended for far too long. It is well past time for the parties to enter into a sustained effort to resolve them for the sake of the City, its employees, and the citizens of Wilmington.

DECISION

Wages and salaries are mandatory subjects of bargaining. Parity clauses are not *per se* illegal topics of bargaining and represent permissive bargaining positions to the extent that they do not interfere with the rights of other bargaining units to engage in bargaining under the PERA and the POFFERA.

Negotiated parity provisions are unenforceable and contrary to law to the extent that they trespass on the negotiation rights of a third party exclusive representative which is not a party to the parity agreement. Whether the provisions of a particular parity agreement violate an

employer's and/or an exclusive representative's statutory obligations will be determined on a case by case basis.

A party's willingness to engage in good faith negotiations concerning a permissive subject of bargaining does not prevent that party from later withdrawing that matter from the scope of negotiations prior to or during impasse resolution procedures. Inclusion of a permissive subject of bargaining in an agreement does not convert that issue to a mandatory subject of bargaining in successive negotiations.

An employer is not obligated under its duty to bargain in good faith to maintain the status quo as it relates to permissive subjects of bargaining after the expiration of a collective bargaining agreement where the parties have not entered into a successor agreement. The wage rates at the expiration of the agreement constitute the status quo at that time, and parity clauses are not applicable to triggers which occur after the expiration of the agreement, unless explicitly extended by agreement of the parties.

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

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

DATE: 25 July 2003