

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

<b>IUE-CWA Local 315, AFL-CIO</b>	:	
	:	
<b>CHARGING PARTY,</b>	:	
	:	
<b>v.</b>	:	<b><u>ULP No. 03-05-391</u></b>
	:	
<b>City of Dover, Delaware,</b>	:	
	:	
<b>RESPONDENTS.</b>	:	

*Appearances*

*Perry F. Goldlust, Esq., Heiman, Aber, Goldlust & Baker for IUE-CWA Local 315  
Sheldon N. Sandler, Esq., Young, Conaway, Stargatt & Taylor, LLP, for the City*

**BACKGROUND**

The City of Dover, Delaware (“City”) is a public employer within the meaning of section 1302(p)<sup>1</sup> of the Public Employment Relations Act, 19 Del.C. Chapter 13.

IUE-CWA Local 315, AFL-CIO (“Union”) is an “employee organization” within the meaning of 19 Del.C. §1302(i)<sup>2</sup> and was the “exclusive bargaining representative” of

---

<sup>1</sup> 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.

<sup>2</sup> 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.

the bargaining unit of City employees as defined by DOL Case 194 at all times relevant to this dispute. 19 Del.C. §1302(j).<sup>3</sup>

On May 9, 2003, the Charging Party filed an unfair labor practice complaint against the Respondent alleging that by failing and refusing to process a grievance and to promptly supply requested information, the City violated 19 Del.C. §1307(1)(5) and §1307(a)(8), which provide:

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

- (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.
- (8) Refuse to disclose any public record as defined by Chapter 100 of Title 29.

The Complaint requested that the Public Employment Relations Board (“PERB”) find the City had violated the statute and committed unfair labor practices as alleged, and order the City to proceed with arbitration and supply the information requested by the Union.

The City filed its Answer on May 20, 2003, denying the allegations, asserting new matter and requesting the charge be dismissed.

The Union filed its Answer to the New Matter on May 29, 2003.

This decision results from the record created by the parties as described above.

### **FACTS**

The material facts in this case are not in dispute.

---

<sup>3</sup> 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.

The City of Dover and IUE-CWA Local 315 are parties to a collective bargaining agreement which has a term of July 1, 2000 through June 30, 2003. Article 35, Grievance Procedure, provides in relevant part:

A grievance is defined as a disagreement or dispute between the City and an employee or the Union over application, interpretation or meaning of this Agreement, and shall be acted upon in accordance with the procedures outlined below:

a) Processing Grievances

Grievances shall be processed during normal working hours; however, no meeting or discussion shall exceed one hour in duration, unless otherwise agreed between the parties. An employee may request his/her Steward be present at the initiation of a grievance at Step 1. A Union Representative shall be present at meetings in Step 2 and above. An International Union Representative may be present at any Step of the grievance procedure after Step 1.

Grievances of a policy nature or which effect all similarly situated employees may be submitted directly to Step 3. . .

Step 3 – If the grievance is not settled at Step 2, it may be referred in writing to the Human Resource Director within seven (7) calendar days after the receipt of the Department Head's written answer in Step 2. The Human Resource Director shall review the grievance and decide to hold a meeting or render a written decision with no meeting. The written decision should be completed within seven (7) days of the meeting, if held, or within seven (7) days after receipt of the written grievance.

Step 4 – If the grievance is not settle at Step 3, it may be referred to the City Manager and/or designated representative within seven (7) calendar days after the receipt of the Human Resources Director's written answer in Step 3. The City Manager or designated representative shall review the grievance and render a written decision within seven (7) days.

Step 5 – If the Union is dissatisfied with the City's Manager's decision, it may submit the grievance to the FMCS within thirty (30) calendar days of the completion of Step 4. A grievance submitted to the FMCS shall be processed in accordance with the rules and regulations of FMCS. The

arbitrator shall have no power to add to, subtract from or otherwise modify the express written terms of this agreement.

Each party shall be responsible for any and all of its costs which it incurs as a result of participating in any FMCS proceeding, including all costs of witnesses, attorneys or other persons who may attend the proceeding. The cost of the arbitrator will be split by the parties.

The decision of the arbitrator, in a manner concerning contractual interpretation, shall be final and binding on the parties. In matters concerning grievances of a Personnel/disciplinary nature the arbitrator's decision shall not be final nor binding. In the event such decision does not resolve the dispute, it is understood that the aggrieved party shall have the right to submit the dispute to a court of competent jurisdiction.

b) Time Limits for Filing

No grievance shall be entertained or processed unless it is submitted at Step 1 within seven (7) calendar days after the occurrence of the event giving rise to the grievance or within seven (7) calendar days after the employee knows or through the exercise of reasonable diligence should have known of the occurrence of the event giving rise to the grievance. If the grievance is not presented within the time limits set forth above, it is considered "waived". If a grievance is not appealed to the next step within the specified time limit or any agreed extension thereof, it shall be considered settled on the basis of the City's last answer. If the City does not provide a written response to the grievance or appeal thereof within the specified time limits, the grievant and/or the Union may elect to treat the grievance as denied at that step and immediately appeal the grievance to the next step in accordance with the procedure set forth in this Article.

The time limits at any step may be extended by the mutual agreement of the parties involved at that particular step, which consent shall not be unreasonably denied.

On October 18, 2002, the Local Union President filed a grievance at Step 3 pursuant to Article 35 of the collective bargaining agreement. Specifically, the grievance alleged a violation of Article 24, Retirement Health Care Insurance Payments,:

It has come to the attention of the Union that City representatives erroneously and improperly told employees that they would not be covered by retiree health insurance unless they waive coverage in the Dover General Employees Pension (Defined Benefit or Regular) Plan and choose participation in the Deferred Compensation (Defined Contribution to 457) Plan to induce them to select the 457 Plan. This misrepresentation is in direct violation of Article 24 of the Collective Bargaining Agreement. The remedy is to provide proper, accurate and rectified notice to employees, allow affected employees to correct their option and choose inclusion in the Regular Plan if they desire, and pay them any losses, costs or damages suffered as a result of the misrepresentation and contract violation and other appropriate relief. *Complaint, Exhibit 1.*

On October 18, 2002, IUE-CWA Business Agent Farnsworth requested 40 pieces of information from the City Clerk and a separate list of 50 pieces of information from the City's Human Resources Director. The letter to the City Clerk requested the information "in preparation for a discussion with the City Manager's Office", while the information was requested from the Human Resources Director to prepare for the grievance involving "health and pension benefits." *Answer Exhibit D.*

By letter dated October 24, 2002, the City's Human Resources Director responded to the IUE-CWA Business Agent:

I have received your request for information as outlined above and have also received a letter from [Local Union President] Vicky Runyon, which mentions an alleged violation of our present Labor Agreement. In order to investigate the Union's claim of a contract violation, I have asked Vicky to provide the basic information that should be provided in any grievance such as names of employees affected, dates of alleged occurrences, and names of the City representatives involved in the Union's claim. I have not yet received a response from Vicky.

As far as the information you requested, the Freedom of Information Act does not require the City to create documents or answer questions. I will make every effort to supply the information required by FOIA as soon as possible. *Answer, Exhibit E.*

By e-mail dated October 24, the Union President provided the names of employees and the City representative on whose interactions the grievance was based.

On October 31, 2002, the City's Human Resource Director rejected the grievance by letter addressed to the Union President:

This letter is in response to the alleged grievance you filed concerning that "City representatives" misrepresented the Defined Benefit Plan and Retiree Health Insurance and therefore was a violation of Article 24 of the Collective Bargaining Agreement.

I requested basic information in order to investigate your claim and you responded on October 24, 2002, claiming that former Human Resource Director . . . was the City Representative and the Employees, "as of right now" are . . . Since both of these Employees were hired on July 1, 1998, I am denying your grievance on the basis that it was not filed in a timely manner as outlined in Article 35 of our Collective Bargaining Agreement. *Answer, Exhibit G.*

Subsequently, the Union submitted the grievance to the Federal Mediation and Conciliation Service ("FMCS") requesting to invoke the arbitration process. By letter dated December 3, 2002, FMCS provided the Union and City with a panel of potential arbitrators and instructed them to advise the agency of their joint selection. *Complaint, Exhibit 4.*

On or about December 13, 2002, the City's Human Resources Director faxed a memo to FMCS, which stated:

My records do not show any grievance submitted to Arbitration. There has been no grievance meeting scheduled to discuss this topic. [*Underlining in original*] *Answer, Exhibit H.*

Human Resource Director Szyjka and IUE-CWA Director of Servicing Farnsworth met on January 29, 2003. On January 31, 2003, Mr. Szyjka sent a letter to Mr. Farnsworth to follow-up:

As mentioned in our meeting of Wednesday, January 29, 2003, I need additional information to proceed with your request for information concerning the City of Dover Health and Welfare Benefits under the Freedom of Information Act.

Attached find copies of your original request with my comments. Please note most items are questions or require creation of documents. Please advise on questions raised as to what you need. Once I receive the information from you I need to see how much time will be needed to copy this information and provide you with a total cost to produce the requested material.

By letter dated January 23, 2003, which was received by the City on February 5, 2003, Local Union President Runyon responded to Human Resources Director Szyjka:

We write in support of the Union's Grievance contesting misrepresentations to employees about their rights to retirement insurance and pension participation, and the claims presented by these employees to participate in the Dover General Employees Pension Plan (GEPP). We understand that the Grievance has been referred by mutual agreement to Step 4 of the Grievance Procedure. We also understand that the Dover General Employees Pension Plan has delegated these employees' claims to you for initial processing. This letter will attempt to persuade you to resolve and remedy this matter at or in advance of the Step 4 meeting.

The claim is that there were misrepresentations, which have the effect of excluding these individuals from the GEPP, a defined benefit pension plan. There were told that they would not receive retiree medical insurance if they joined the GEPP but only if they opted for the Deferred Compensation Plan (DCP), a defined contribution plan. However, it appears that this representation was and is false, is contrary to the Collective Bargaining Agreement and, we believe, the Health Insurance Plan. We have asked and again ask for a copy of the Health Insurance Plan to determine whether, in fact, this representation was true or false. These employees were told they were too old to participate in the GEPP but we believe this was and is false. We have asked for a copy of the GEPP and ask if you can point out any provision in the GEPP, which would make these individuals too old to participate in the GEPP. These employees were discouraged from participating in the GEPP and steered toward the DCP to their [sic] detriment. The copies of materials distributed about the

pension options, which we have seen are at best confused and at worst misleading. We have asked and ask you for all records of communications to employees to ascertain whether there was deception.

The Union provided you with the details including the names of four of the employees affected (we no believer there may be two more), the representations made to them, the persons who made the representations, the pertinent dates. We asked you for information to properly evaluate, analyze and intelligently present both the Grievance and the claims of the individuals involved. You stated in writing that you do not have to give us information other than that available under the Freedom of Information Act, but that is erroneous. You are required to provide the Union with this information, which is pertinent to the merits of its Grievance as part of the duty to bargain under the Public Employment Relations Act, 19 Del.C. Section 1307(a)(5). The employees are also entitled to this information as plan participants. You verbally indicated that you would send us the information requested, and we look forward to receiving it from you so we can intelligently analyze the Grievance and claims. The urgent documents are the Health Insurance Plan, the GEPP Plan Rules and Regulations, and any records of communications between the City, the Plans and these employees concerning pension, but the other information requested is important as well.

The solution to the matter is to put these individuals in the GEPP as they desire. You evidently have the power to do this, which would resolve the Grievance and the Plan issues. The DCP apparently has no objection to having these individuals revoke their participation in the DCP and joining the GEPP, and any questions of transfer of contributions can surely be accomplished administratively without controversy. The ancillary remedies would follow.

If you believe that no misrepresentations were made and that complete and proper information was disclosed, the Union will hear you with an open mind. However, the City should drop its attempt to avoid resolution of the underlying complaints by any technical objection to the timeliness of the Grievance for several reasons. First, these individuals are actively employed and have not yet retired, so the limitation periods on their Grievances or claims did not begin and certainly have not expired. Second, misconduct including outright fraud or misrepresentation by management stops the City from objecting to the timing of an attempt to remedy the wrong, and

Third, the time limit under our Collective Bargaining Agreement applies after an employee knows or through the exercise of reasonable diligence should have known of the violation, and since the information given to the individuals was wrong, they cannot be held to know of the violation or held to the requirement of uncovering the deception. If fact, they and their Union have asked for pertinent information to determine whether in fact a violation occurred and have still not been given the basic documents and facts, so it is simply wrong to attempt to time-bar the Grievance. Fourth, the contractual time limit applies to employees and not the Union. The Union's learning of a possible violation and attempt to seek information from employees, management, and the Plans is reasonable and ongoing, and cannot be used to bar the Grievance. (It is, for instance, still unclear to us whether you claim the Health Insurance Plan does or does not cover GEEP retirees). Fifth, this is a continuing Grievance and is not untimely so long as it can be remedied prior to retirement. Sixth, it is well established that any objection to procedural arbitrability is a question for the arbitrator, and may not be used to prevent or stay arbitration.

In addition, the affected individuals have a separate right to a proper investigation and decision by the GEPP and DCP, with a right to appeal any adverse decision under Plan procedures and laws, and these rights may not be avoided or delayed by objecting to the timeliness of the Grievance under the Collective Bargaining Agreement. We again ask that you forward a copy of the GEPP Rules and Regulations including its claims and appeals procedures, under which you have evidently been delegated initial authority to respond to and hopefully remedy the claims.

In conclusion, we request that you forward to us the pertinent documents, and that we meet at Step 4 to resolve this problem by putting the affected individuals in the GEPP, assuring them of their right to retirement Health Insurance, and discussing better written and verbal communications to prevent this problem from recurring, without the necessity of arbitration or Plan appeals.

I will call you upon your receipt of this letter to set up a meeting. Thank you for your attention. *Answer, Exhibit J.*

By letter dated February 27, 2003, City Human Resource Director Szyjka responded to Local Union President Runyon:

This letter is in response to the above letter, which was postmarked 2/1/03 and received 2/5/03. The purpose of my response is to correct what I believe to be misstatements of fact in your letter which is filled with misstatements.

The letter states that “the grievance has been referred by mutual agreement to step 4 of the grievance procedure.” This is not true. In a conversation with Marlin Farnsworth, I agreed to meet him to clarify what exactly is the issue and who is involved in this issue. Secondly, you stated that the “GEPP has delegated the employee claims to me for initial processing”. This is not true. The City Clerk has suggested that the employees contact me for further inquiries. I have not been contacted by any employee concerning this issue.

As far as your request for information, I sent a letter to Marlin on 1/31/03 asking for clarification of his request for information and have not received a reply. Your letter further states you provided me “with details” concerning the persons who made alleged “misrepresentations and pertinent dates.” This is not true. The union gave me the names of employees and keeps changing who in the HR Department conducted the employee indoctrination. The Public Employment Relations Act, 19 Del.C Section 1307(a)(5) which you quoted refers to a refusal to bargain in good faith and not to the City being “required to provide the Union with information” which at this point is still unclear as to what the Union wants and what exactly took place. The documents requested, if they exist, will be given to the Union but again the City is not obliged to create documents for the Union’s convenience.

Your letter also states “the DCP apparently has no objection to individuals revoking their participation in the DCP and joining the GEPP ... who said this? I am unaware of any decision to allow employees to switch from the DCP to the Defined Pension Plan.

Again, your letter is filled with misstatements and rather than continue line for line on the balance of the Union’s letter, the City will wait until our face to face meeting to discuss this issue. *Answer, Exhibit K.*

City and Union representatives, including four employees affected by this controversy, met on March 13, 2003, “in an unsuccessful effort to resolve this matter.”

Following that meeting, the Union's attorney addressed the following letter to the City's Human Resource Director on March 13, 2003:

Thank you and your Assistant . . . for meeting with IUE-CWA Local 315, AFL-CIO and [*the four grievants*] yesterday to discuss the Union's grievance and these members' claims that misrepresentations made to them, by representatives of City of Dover and Dover General Employees Pension Plan (GEPP) and Deferred Compensation Plan (DCP) caused them not to enroll in the GEPP, that they are entitled to be included in the GEPP with full credit from the date of their employment, and that materials and presentations to employees need to be revised.

Per your request at the meeting, here is a recap of the main information we requested which you agreed to provide:

1. You gave us a copy of the City of Dover Ordinance which you indicated was the only GEPP Plan Document. (There does not appear to be anything in that Document which made these employees "too old" to participate in the GEPP, unless you can point out some provision we are missing.)
2. The GEPP Claims and Appeals Procedure, Summary Plan Description or other booklet, if this exists.
3. The materials given to the above four employees concerning pension and health insurance. You confirmed that no written statements exist by or from Cheryl Jackson or Judy Rigby concerning what they told these four employees, although they orally dispute that they made any misrepresentations. You confirmed that you already had copies of these employees' written statements concerning what was stated to them, along with their written claims seeking inclusion in the GEPP.
4. The materials currently distributed to employees concerning pension and health insurance.
5. An answer to our question: what is the basis for your statement at the meeting that GEPP participants are precluded from participating in the 401 Plan? You stated at the meeting that an employee may be a participant in both the GEPP and the DCP.

6. An answer to our question: would a retiree who fulfilled the "Rule of 80" criteria (age and service totally 80, at least 55 years old) be entitled to City-paid retiree insurance whether s/he received pension benefits under the GEPP or DCP (as we believe would be the case under the Collective Bargaining Agreement Section 24)? You clarified that there is no document which is the Health Insurance Plan. You confirmed that City-paid (100% individual and 75% for dependents) retiree health insurance is provided to normal retirees (age 65 with 10 years of service) regardless of whether they receive pension benefits from the GEPP or DCP, and that early retirees (who receive a reduced benefit before age 65) are only entitled to pay for retiree insurance themselves.

As promised, after the meeting I looked over your January 31, 2003, markup of the Union's October 18, 2002 information request and am not sure exactly what various notations mean, but do think provision of the five items listed above will go a long way toward providing the basic information needed. We clarified that the request was made pursuant to the duty to provide information pertinent to bargaining over the Grievance, and pursuant to the participant's Plan rights.

We appreciate your consideration of the matters raised and your attempt to achieve a remedy satisfactory to the City, GEPP, DCP, Union and four affected employees as soon as possible. I would ask you to call me next week to let me know where you are on this, as it does appear possible to resolve this matter without Arbitration or further formal Plan appeals. Union President Vicky Runyon asks that you provide the above pieces of information within a week, and give us an answer or arrange another meeting (with you and whomever else you feel should be involved) within two weeks so that, if the matter cannot be resolved, the Arbitrator selection and processing of the next step in the Plan and appeal processes may be completed. *Answer, Exhibit L.*

Human Resources Director Szyjka responded by letter dated March 25, 2000, to

IUE-CWA counsel:

This letter is in response to your letter of March 13, 2003 concerning the meeting held on March 12, 2003 at the City of Dover regarding four City of Dover Employees claim of prior misrepresentations made to them which affected their choice of Pension Plan.

As stated in my letter of October 31, 2002 to Vicky Runyon, President of IUE-CWA Local 315, I am denying your grievance on the basis that it was not filed in a timely manner as outlined in Article 35 of our current Collective Bargaining Agreement. *Answer, Exhibit M.*

### **ISSUE**

WHETHER THE CITY COMMITTED AN UNFAIR LABOR PRACTICE IN VIOLATION OF 19 DEL.C. §1307(A)(5) AND/OR (A)(8) BY FAILING OR REFUSING TO PARTICIPATE IN THE PROCESS OF SELECTING AN ARBITRATOR AND PROCESSING THE UNION'S GRIEVANCE AND/OR BY REFUSING TO SUPPLY PUBLIC INFORMATION REQUESTED BY THE UNION?

### **POSITIONS OF THE PARTIES**

#### **Charging Party, IUE-CWA Local 315 ("Union"):**

The Union asserts that by refusing to participate in the selection of an arbitrator and refusing to process the grievance through the procedure agreed upon in the collective bargaining agreement, the City has effected a unilateral change in the negotiated terms and conditions of employment in violation of 19 Del.C. §1307(a)(5).

Further, it argues the City has violated 19 Del.C. §1307(a)(5) and (a)(8) by refusing to provide public information properly requested by the Union.

#### **Respondent City of Dover("City"):**

The City denies the grievance was processed through the grievance procedure and demands the Charge be dismissed, asserting,

The entire claim that is the subject of the purported grievance, and the information being sought pursuant to the grievance, relates to facts that allegedly occurred as far back as 1995 and were never grieved at that time even though the Union was

fully aware of the claim being made by one or more of the grievants. Since the grievance is untimely, the burdensome requests for information relating to the untimely grievance did not have to be honored. *City's New Matter ¶18*.

### DISCUSSION

Regulation 5.6 of the Rules and Regulations of the Delaware Public Employment Relations Board, Decision on Probable Cause Determination, states:

- a) Upon review of the Complaint, the Answer, and the Response, the Executive Director shall determine whether there is probable cause to believe that an unfair labor practice may have occurred. . .
- b) If the Executive Director determines that an unfair labor practice has, or may have occurred, he shall, where possible, issue a decision based upon the pleadings.

The essential allegations of this Complaint are not in dispute and the pleadings provide the basis for a decision on the merits.

Section 1302(t) of the Public Employment Relations Act specifically includes matters concerning and related to the grievance procedure within the defined “terms and conditions of employment”, which 19 Del.C. §1302(e) requires that public employers and exclusive representatives must confer and negotiate in good faith and include in an executed collective bargaining agreement. This obligation is further reinforced by §1313(c) of the PERA:

- (c) The public employer and the exclusive bargaining representative shall negotiate written grievance procedures by means of which bargaining unit employees, through their collective bargaining representatives, may appeal the interpretation or application of any term or terms of an existing collective bargaining agreement; such grievance procedures shall be included in any agreement entered into between the public employer and the exclusive bargaining representative.

The PERA clearly and unequivocally establishes the grievance procedure as a mandatory subject of bargaining.

The Delaware PERB has consistently held that a unilateral change in a mandatory subject of bargaining constitutes a *per se* violation of the on-going duty to bargain in good faith. In order to determine whether one party has violated its obligation, a determination must be made as to the status quo of the issue. “In determining the status quo in cases where parties are bound by a valid collective bargaining agreement, contractual language which is clear and unambiguous on its face effectively establishes that status quo.” Local 1590, IAFF, et al., v. City of Wilmington, Del. PERB, ULP 89-09-041, I PERB 469 (1990).

The obligation to faithfully administer the grievance procedure is well-established:

The grievance procedure lies at the heart of the continuous collective bargaining obligation and constitutes the primary vehicle by which the parties’ agreement is defined and refined during its term. For the agreement as a whole to have real meaning, it is incumbent upon the parties to administer the grievance procedure in accordance with the agreed upon contractual terms. Indian River Education Association v. Bd. of Education, Del.PERB, ULP 90-09-053, I PERB 667, 674 (1991).

A determination as to whether a dispute falls within the contractual definition of a grievance does not require review of the underlying substantive merits of the issue. The proper forum for resolution of substantive disputes arising under the collective bargaining agreement is the parties’ grievance procedure. Indian River (Supra., 676).

Similarly, a dispute concerning the applicability of Article 35 (b) of the City of Dover and IUE-CWA Local 315 agreement, Time Limits for Filing [Grievances], is also subject to the negotiated grievance procedure which, in this case, terminates in binding

arbitration by a neutral arbitrator. The City's Human Resources Director first denied the Step 3 grievance on the basis of timeliness on October 31, 2002, and subsequently renewed this denial on March 25, 2003. While timeliness is an appropriate consideration for a decision-maker in rendering a decision at any step in the grievance process, such a decision is subject to review at the subsequent levels of the grievance process if the Union chooses to appeal that decision.

The Union had the negotiated right to advance this grievance following the denial by the Human Resources Director at Step 3 in accordance with the procedure set forth in Article 35 to the next step following its receipt of the grievance denial. Failure by the City to comply with the negotiated grievance procedure by participating in the selection of an arbitrator, however, constitutes a unilateral change in the contractual grievance procedure, and is a *per se* violation of 19 Del.C. §1307(a)(5).

The fact that the parties were engaged in efforts to try to resolve this matter does not relieve the City of its obligation to process the grievance in accordance with Article 35 of the collective bargaining agreement, which specifically provides, "The time limits at any step may be extended by the mutual agreement of the parties involved at that particular step, which consent shall not be unreasonably denied." *Emphasis added.* The correspondence on the record clearly indicates an intent by the Union to pursue resolution of the substance of the underlying grievance.

Additionally, the City has an obligation to provide information to the Union which is necessary to the Union in fulfilling its obligation as the exclusive representative of the bargaining unit employees, under the PERA. Requests for information do not, however, obligate the City to prepare or create documents which do not exist. If requested information does not exist, the City has only to state as much to the Union.

The Union's March 13, 2003, letter requests a limited number of specific documents which are reasonably related to the grievance. The City is obligated to provide these documents, if they exist, and the parties must then move forward in resolving the grievance based upon the information which does or does not exist.

For the reasons discussed above, the City of Dover is found to have committed a *per se* violation of its duty to bargain in good faith by failing or refusing to abide by the parties' contractual grievance and arbitration procedure.

### **CONCLUSIONS OF LAW**

1. The City of Dover, Delaware is a public employer within the meaning of 19 Del.C. §1302(p).

2. IUE-CWA Local 315, AFL-CIO 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 of Dover employees defined in DOL Case 194 at all times relevant to this Charge.

3. The City of Dover and IUE Local 315 are parties to a collective bargaining agreement which term extends from July 1, 2001 through June 30, 2003.

4. The grievance procedure is a "term and condition of employment" as defined at 19 Del.C. §1302(t) over which the public employer and the exclusive representative are obligated to collective bargain under 19 Del.C. §1302(e).

5. By refusing to process the complaint filed by the Union alleging a violation of Article 24 of the parties collective bargaining agreement, the City unilaterally altered the status quo as it relates to the grievance procedure, a mandatory subject of bargaining.

6. By unilaterally altering the status quo of a mandatory subject of bargaining, the District violated 19 Del.C. §1307(a)(5).

7. By failing to provide the Union with public information necessary to process the grievance, the City violated 19 Del.C. §1307(a)(5) and (a)(8).

**WHEREFORE**, the City of Dover is hereby ordered to take the following affirmative actions:

1. To cease and desist from engaging in conduct in dereliction of its duty to collectively bargain in good faith with the exclusive representative of its employees as defined in DOL Case 194.

2. To forthwith afford the Union access to grievance arbitration procedure provided for in Article 35 of the collective bargaining agreement.

3. To provide the Union with the information requested in its March 13, 2003, letter, to the extent that such information exists.

4. Within ten (10) calendar days from the date of receipt of this decision, post a copy of the Notice of Determination in each location in the City where notices of general interest to bargaining unit employees are normally posted. The Notice must remain posted for a period of thirty (30) days.

5. Notify the Public Employment Relations Board within thirty (30) calendar days from the date of this Order of the steps taken in order to comply herewith.

**IT IS SO ORDERED**

DATE: 11 July 2003

*/s/Deborah L. Murray-Sheppard*  
DEBORAH L. MURRAY-SHEPPARD  
DELAWARE PERB