PUBLIC EMPLOYMENT RELATIONS BOARD

FOR THE STATE OF DELAWARE

WILMINGTON FRATERNAL ORDER OF POLICE,	)	
LODGE NO. 1,	)	
Petitioner**,**	)	**ULP No. 03-10-408**
v.	**)**	
CITY OF WILMINGTON,	**)**	
Respondent**.**	)	

Appearances

Jeffrey M. Weiner, Esq., for FOP Lodge No. 1
Martin C. Meltzer, Esq., Assistant City Solicitor

BACKGROUND

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

Fraternal Order of Police Lodge No. 1 ("FOP Lodge 1") is an employee organization which admits to membership police officers employed by the City of Wilmington and which has as a purpose the representation of such employees in collective bargaining, pursuant to 19 Del.C. §1602(g). FOP Lodge 1 represents a bargaining unit of City of Wilmington Police Captains and Inspectors (as defined by DOL Case #79) and is certified as the exclusive bargaining representative of that unit. 19 Del.C. §1602(h).

The City of Wilmington and FOP Lodge 1 were parties to a collective bargaining agreement which had a term of July 1, 1998 through June 30, 2001. The parties are engaged in negotiations for a successor agreement.

On or about October 15, 2003, FOP Lodge 1 filed an unfair labor practice charge alleging the City violated 19 Del.C. §1607(a)(5) and/or (a)(6), which provide:

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

The Charge alleges that the parties' 1998- 2001 collective bargaining agreement included a Performance Incentive Program ("PIP") as defined by Section 9.4 and Appendix B of that agreement. FOP Lodge 1 asserts that no PIP payments were made to Police Captains and Inspectors on either September 30, 2002 or September 30, 2003. By failing to maintain the status quo of a mandatory subject of bargaining, the FOP charges the City violated 19 Del.C. §1607(a)(5) and (a)(6).

The City filed its Answer to the Charge on or about October 20, 2003, in which it admits that the City did not pay any PIP payments beyond the June 30, 2001, expiration of the collective bargaining agreement and denies that it had an obligation to do so. Under New Matter, the City alleged FOP Lodge 1 also violated 19 Del.C. §1607(a)(5) and (a)(6) by demanding a continuation of PIP payments after the expiration of the agreement. The City asserts the Charge should be dismissed because the PIP issue should be resolved through the parties' negotiations for a successor agreement.

FOP Lodge 1 filed an Answer to the City's New Matter on or about October 29, 2003. It denies all of the City's alleged points of new matter.

A Probable Cause determination was issued on December 1, 2003, and a hearing was conducted by the Executive Director on January 9, 15, and 21, 2004. Post hearing briefs were filed by the parties, with the final brief received on April 20, 2004. The following discussion and decision result from the record thus compiled.

BACKGROUND

The testimony of the witnesses and the numerous exhibits establish the following material facts:

On or about August 18, 1999, the City and FOP Lodge 1 executed a collective bargaining agreement for the unit of Captains and Inspectors of the Wilmington Police Department for the period of July 1, 1998 through June 30, 2001. This agreement retroactively provided for Performance Adjustments to Captains and Inspectors for the first year of the agreement in §13.1

> For Fiscal Year 1999 (July 1, 1998 – June 30, 1999), each Captain and Inspector will receive a Performance Adjustment of $1,584.00 and $1,689.00, respectively. In addition, Captains will also receive a $3,000.00 Performance Adjustment and Inspectors will receive a $3,500.00 Performance Adjustment which will be rolled into their salaries effective July 1, 1998. . . *FOP Hearing Exhibit 1, p. 15.*

The collective bargaining agreement also included a new Performance Incentive Plan for the second and third years of the agreement:

> **Section 9.4 Performance Incentive Plan.** All Captains and Inspectors are eligible for annual Performance Incentive Program (PIP) payments based on their Overtime Budget Marks, Individual Performance Marks, and Agency Performance Marks as conceptually outlined in Appendix "B". This program will become effective July 1, 1999, and employees will be evaluated annually beginning July 1, 2000

for Fiscal Year 2001 and July 1, 2001 for Fiscal Year 2002. These Performance Incentive Program (PIP) payments will not be included in pension calculations.

The employee may appeal to the Director of Public Safety any or all of the performance incentive payment which is denied. The decision of the Director of Public Safety will be in writing. This appeal is final and binding and will not be subject to the grievance and arbitration proceedings set forth in Article 3 of this Agreement. *FOP Hearing Exhibit 1, p. 10.*

Appendix "B" of the parties' collective bargaining agreement further the Performance Incentive Program:

Appendix "B" Performance Incentive Program

The Performance Incentive Program for Captains and Inspectors is included as an attachment to this appendix. The categories and maximum monetary amounts payable in each category will remain fixed during the second and third year of the Agreement, as follows:

First Tier – Overtime Budget Marks	
Department does not exceed overtime mark	$2,000
Inspector or Captain does not exceed overtime mark	$,2000
Second Tier – Individual Performance Marks	
Individual Performance Rating of "Meets Expectations"	$1,000
Individual Performance Rating of "Exceeds Expectations"	$2,500
Individual Performance Rating of "Far Exceeds Expectations"	$3,500
Third Tier – Agency Performance Marks	
Possible Maximum	$2,500

Performance Incentive Program payments will be made by September 30, 2000, for the second year and September 30, 2001, for the third year of the Agreement.

Overtime Budget Marks

Two account lines will fall outside the accounting system for the Performance Incentive Program: (1) $150,000 earmarked for special events, which will be split between the Office of Cultural Affairs and the Department of Parks and Recreation and (2) $40,000 earmarked as the Public Safety Director's account, which will cover overtime for the Mayor's Security Detail and City-wide public safety occurrences (such

as demonstrations, possible natural disasters, and activities associated with Y2K).

The police department will be responsible for the administration of the remaining $797,000 as follows:

Chief of Police *$35,000*
Staff meetings, CMT call-outs, and specialized training initiatives

Captain, Eastern Division *$80,000*
Captain, Northern Division *$80,000*
Captain, Western Division *$80,000*
Shift vacancies, in-service training and recertification, arrest and other matters continued past routine check-off, field training costs, K-9 officer call-backs, community meetings, and scheduled tactical activities not covered by grant funds. The Captain assigned responsibility for the traffic unit will be allocated an additional $10,000.

Captain, Administrative Services *$25,000*
Shift vacancies, in-service training, Central Booking costs

Captain, Support Services *$181,000*
Shift vacancies, in-service training and other costs associated with the Communications Division ($175,000) and the Records Division ($6,000)

Captain, Criminal Investigations Division *$211,000*
Detective and vice shift vacancies, in-service training and recertification, arrests and other matters continued past check-off, detective and vice call-backs, community meetings, scheduled tactical activities (including high-risk warrant service) not covered by grant funds.

Captain, Human Resources
Captain, Professional Standards *$25,000*
Joint administration of "administrative overtime" - - the activities of the Public Information Officer, costs for the police academy, police recruiting and selection, internal investigations, trial boards, and costs associated with the police staff assigned to each of the two divisions. The $80,000 earmarked for "Court" will be *monitored* by the Office of Professional Standards, but is the responsibility of each Captain whose personnel attend Court.

The specific overtime amounts included in this section will remain in effect for the second year of the Agreement. Following adoption of the FY2001 Budget, these amounts will be modified to fit with new budgeted overtime amounts. Recognizing that the police department's overtime budget is not negotiable, this will be done in *consultation* with Captains and Inspectors. When overtime spending is summarized at the

end of Fiscal Year 2000, salary increases for rank and file bargaining unit police will be included, for budget accounting purposes only. (Example: Assuming 3% raises in each of three years, in the second year of the Agreement, 6% will be added to each Captain's overtime budget.)

Overtime money cannot be moved from one account to another (the two account lines for the Support Captain are combined for this purpose), except under unusual circumstances as directed by the Public Safety Director and approved by the Administrative Assistant to the Mayor. Quarterly, overtime marks will be established to monitor budget performance. (As used in this Agreement, "quarterly" means September 30th, December 31st, and March 31st. Captains or Inspectors transferred during the rating period will be accountable only for quarters or portions of quarters for which they are responsible. The $2,000 incentive line for individual performance will be prorated to reflect performance in different assignments.

Individual Performance Ratings

Captains and Inspectors will utilize an Individual performance rating system similar to that currently in use for executive-level City employees. Five accountabilities will account for 85% of the rating, as follows:

(1) Works in support of Department of Police objectives (20%).
(2) Works in support of assigned Division/Bureau objectives. (15%)
(3) Manages staff and resources to achieve Department of Police and Division/Bureau objectives while maintaining teamwork and high morale. (20%)
(4) Maintains high ethical and professional standards, both personally and for Department of Police employees. (15%)
(5) Undertakes self-initiated actions and projects to improve Department of Police and Division/Bureau operations and to resolve unanticipated problems and challenges. (15%)

Four components will make up each accountability: an accountability statement, performance objectives, measurement criteria, and results. The first three components will be agreed upon by the ratee and the rater, and approved by a reviewer, at the beginning of the rating period. The last component (results) and the rating itself will be completed by the rater and *reviewed* (as opposed to approved) by the reviewer at the conclusion of the rating period, prior to being served on the ratee.

The remaining 15% will be determined by the Performance Factors section of the evaluation. (The categories "controlling", "cost/profit

consciousness", "developing people", and "resource utilization" are moved to Accountability #3, leaving 10 performance factors).

Performance assessments will be conducted quarterly between raters and ratees; reviewers will be included in this process in a consulting capacity. This assessment does not constitute a rating, only an advisory assessment. A transfer or promotion will automatically prompt a full-blown individual performance rating. That rating will be prorated as it is incorporated in the Captain's/Inspector's final rating. Inspectors rate Captains; the Chief of Police is the reviewer. The Chief of Police rates Inspectors; the Public Safety Director is the reviewer. Ratings may be appealed to the reviewer. The reviewer's action on the appeal constitutes final agency action with regard to the rating and will not be subject to the grievance and arbitration procedures set forth in Article 3 of the Agreement.

Agency Performance Marks

Agency performance marks will be determined by a citizen satisfaction survey. The initial survey was conducted in the Spring 1998 by the University of Delaware; a follow-up survey will be conducted in the Fall of calendar year 1999. A comparison between these two surveys will determine agency performance marks for the second year of the Agreement. A third survey conducted during Fiscal Year 2001 will determine agency performance marks for the third year of the contract. Unless determined otherwise through negotiations between Captains and Inspectors and the City, agency performance marks will be recalculated in the same manner for the third year of the contract; i.e., agency performance objectives will be set at 33 percent improvement over previous survey marks and the incentive will be paid when the three percent margin for error is reached. If the survey is not conducted in the second and third year of this Agreement, each Captain and Inspector will receive the $2,500 maximum payment for the Third Tier of the Performance Incentive Program. *FOP Hearing Exhibit 1, pages 21-23.*

The Performance Incentive Program provided incentives worth up to $10,000 for each Captain and Inspector in the each of the second and third year of the 1998-2001 collective bargaining agreement.

Performance Incentive Program payments were made to individual Captains and Inspectors totaling $73,270 for Fiscal Year 2000 (the second year of the agreement), in which two Inspectors and six Captains each received $7,627,

and two Captains each received $6,127. *FOP Hearing Exhibit 2.* PIP payments for FY 2001 were made in August, 2002, for Fiscal Year 2001 as a result of a grievance settlement between the parties under which each Captain and Inspector received $8,000. *FOP Hearing Exhibit 15.*

Following the June 30, 2001 expiration of the collective bargaining agreement, the parties entered into negotiations for a successor agreement, beginning not later than October 1, 2001. *FOP Hearing Exhibit 9, p. 2.*

On or about October 7, 2002, FOP Lodge #1 President Robert Donovan filed a grievance on behalf of the Captains and Inspector with Chief of Police Michael Szczerba alleging the City had violated the Performance Incentive Program by not providing PIP payments to the bargaining unit members for Fiscal Year 2002.

By letter dated October 7, 2002, the City's Director of Personnel, Monica Gonzalez-Gillespie, responded to Inspector James Wright, "The City is of the opinion that this [PIP] program is not in effect at this time since the contract was specific as to the time periods for this program and its payments." *FOP Hearing Exhibit 17.*

The FOP continued to advance this grievance and filed a Demand for Arbitration with the American Arbitration Association on October 11, 2002. *FOP Hearing Exhibit 18.* The City then filed a Motion for a Temporary Restraining Order in the Court of Chancery on or about April 4, 2003, seeking to enjoin the arbitration hearing scheduled for April 25, 2003, on the basis that issue was not arbitrable. *FOP Hearing Exhibit 19.* There was no evidence placed in the record that this arbitration was held or that the Court issued a decision on the City's Motion.

On or about October 1, 2003, FOP President Donovan filed another grievance on behalf of the Captains and Inspectors asserting the City had again failed to make Performance Incentive Program payments on September 30, 2003, for Fiscal Year 2003. *FOP Hearing Exhibit 22.* City Director of Personnel responded by letter dated November 4, 2003:

> A grievance brought forth by FOP President Donovan on behalf of Lodge #1 Captains and Inspectors was heard on October 24, 2003. The grievance alleges violation of the collective bargaining agreement (CBA), Appendix "B" entitled Performance Incentive Program. Per Article 3, Section 3.3, this grievance response follows.
>
> The union representative alleged that according to page #21 of the CBA, payments were due to these union members on September 30, 2003. At the hearing, the City representatives pointed out and the union representative agreed that the sentence on page #21 of the expired contract actually states, "Performance Incentive Program payments will be made by September 30th, 2000, for the second year and September 30, 2001, for the third year of the agreement." With the exception of a statement regarding performance evaluation forms being handed in by September 30th, there was no other evidence presented to substantiate this grievance.
>
> The collective bargaining agreement was specific as to the time periods for this program and its payments. Since this program is not in effect at this time, the grievance is denied. *FOP Hearing Exhibit 23*

Again, the FOP continued to pursue the grievance and filed a Demand for Arbitration with the American Arbitration Association on or about November 11, 2003.

ISSUE

DID THE CITY OF WILMINGTON VIOLATE ITS DUTY TO BARGAIN IN GOOD FAITH OR ANY OTHER PROVISION OF THE POLICE OFFICERS AND FIREFIGHTERS EMPLOYMENT RELATIONS ACT WHEN IT DID NOT AWARD PERFORMANCE INCENTIVE PROGRAM PAYMENTS TO WILMINGTON

POLICE DEPARTMENT CAPTAINS AND INSPECTORS IN OCTOBER, 2002, AND OCTOBER, 2003, AFTER EXPIRATION OF THE COLLECTIVE BARGAINING AGREEMENT BUT DURING THE COURSE OF NEGOTIATIONS FOR A SUCCESSOR AGREEMENT?

POSITIONS OF THE PARTIES

FOP Lodge 1:

The FOP asserts the Performance Incentive Program is a mandatory subject of bargaining and therefore cannot be unilaterally modified, even after expiration of the collective bargaining agreement. The City committed an unfair labor practice by failing to maintain the status quo as to the Performance Incentive Program after the expiration of the collective bargaining agreement.

In response to the City's arguments, the FOP asserts it did not waive any rights to PIP payments in Fiscal Years 2002 and/or 2003 by its conduct prior to or during negotiations. It argues the City waived its right to argue that the payment of PIP after the expiration of the collective bargaining agreement would have been illegal because the funds were not appropriated under the City Code, by not raising this argument until its Opening Brief.

City of Wilmington:

The City argues the Performance Incentive Program is not a mandatory subject of bargaining and it did not, therefore, have an obligation to maintain the status quo. The PIP was incorporated into the 1998-2001 collective bargaining agreement with specific dates which did not create an on-going obligation past the contract expiration.

Further, the Community Policing System created and applied by the prior Mayoral administration was the sole basis for the Performance Incentive Program. When the FOP actively assisted the new Administration in reconfiguring the Wilmington Police deployment to return to a Quadrant system and did not actively seek to discuss the Overtime and Survey standards under PIP, the FOP waived all rights to PIP payments in Fiscal Years 2002 and 2003.

The City asserts the Public Employment Relations Board has no subject matter jurisdiction over this case because the controversy in question is actively being negotiated as part of the collective bargaining process. It also argues the City could not be held to have committed an unfair labor practice because post-expiration PIP payments would have been illegal under Section 2-159 of the City Code.

DISCUSSION

Section 1608, Disposition of Complaints, under the Police Officers and Firefighters Employment Relations Act, states:

> (a) The Public Employment Relations Board is empowered and directed to prevent any unfair labor practice described in § 1607(a) and (b) of this title and to issue appropriate remedial orders. Whenever it is charged that anyone has engaged or is engaging in any unfair practice described in § 1607(a) and (b) of this title, the Board or any designated agent thereof shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice charge and including a notice of hearing containing the date and place of hearing before the Board or any designated agent thereof. Evidence shall be taken and filed with the Board; provided, that no complaint shall issue based on any unfair labor practice occurring more than 180 days prior to the filing of the charge with the Board.

Consistent with the PERB decision in Sussex County Vocational Technical Teachers Assn. v. Bd. of Education, Del.PERB, ULP 88-01-021, I

PERB 287, 295 (1988) [1], the alleged violation of the statute must have occurred within 180 days of the filing of the charge; in this case, in the 180 day period between April 18, 2003 and October 15, 2003.

The evidence in this case establishes the charge was filed more than 180 days after the Charging Party was aware of the alleged unfair labor practice. The FOP knew no later than October 7, 2002, that the City considered the Performance Incentive Program to have ended with the expiration of the collective bargaining agreement on June 30, 2001. On or about October 7, 2002, FOP Lodge #1, through its President Robert Donovan, filed a grievance with Chief of Police Michael Szczerba, stating:

> Per the Captains and Inspectors Contract, FOP Lodge No. 1, Grievance Procedure, Section 3.1, I am requesting the opportunity to discuss the below matter per the contractual agreement set forth by Appendix "B", entitled the Performance Incentive Program.
>
> The Performance Incentive Program in the contract (page 21) states that payments will be made by September 30, 2002. Payments have not been received by any member of this bargaining unit. Therefore, such payment is now past the due date, which is a direct violation of the agreed contract.
>
> It should be noted that all evaluations for Captains and Inspectors were completed and submitted prior to 9/30/02. The City has withdrawn any tentative agreements reached in negotiations. Please refer to Mediator DiLauro's letter to PERB attached to this memo. Status Quo under the last Collective Bargaining Agreement remains in effect thru binding interest arbitration. *FOP Hearing Exhibit 16*

On or about October 7, 2002, the City's Director of Personnel Monica Gonzalez-Gillespie, wrote to the chief of the FOP Negotiating Team, Inspector

[1] The Sussex Vo-Tech decision applies a ninety (90) day statute of limitations which was changed to a 180 period with the amending of both the Public School Employment Relations Act and the Police Officers and Firefighters Employment Relations Act in 1996. The application of the statute of limitations is relevant and applicable here and is not compromised by the extension of the period.

James Wright:[2]

> I understand you inquired about payment associated with the Performance Incentive Program under the Captains and Inspectors collective bargaining agreement.
>
> The City is of the opinion that this program is not in effect at this time since the contract was specific as to the time periods for this program and its payments. This has been communicated across the table on several occasions, including the last mediation session held on September 25, 2002.
>
> In addition, I also informed you of this personally when we met on July 26, 2002 and resolved the PIP arbitration case of last year. . . *FOP Hearing Exhibit 17.*

In "Defendant Wilmington FOP Lodge #1's Response to Plaintiff City of Wilmington's Request for Admissions", filed in Chancery Court C.A. 20244-NC, filed on or about July 31, 2003, the FOP "admitted that within several days of October 7, 2002, Inspector Wright received a copy of the letter" from Director Gonzalez-Gillespie. *City Exhibit 13,¶2.*

This unfair labor practice charge was not filed until October 15, 2003, more than a year after the City Personnel Director's letter to Inspector Wright clearly stating the City's position that the Performance Incentive Program expired with the collective bargaining agreement on June 30, 2001. The City again expressed its position in its April 4, 2003 Motion to Enjoin Arbitration; again more than 180 days prior to the filing of this charge.

The stated purpose of the Police Officers' and Firefighters' Employment Relations Act is to promote harmonious and cooperative relationships between public employers and their employees through collective bargaining. There is nothing in the

[2] A copy of the letter was also provided to FOP President Donovan, Administrative Assistant to the Mayor Montgomery, Public Safety Director Mosley, Chief of Police Szczerba, Labor Relations Manager Gimbel, City Chief Negotiator Capone, and Assistant City Solicitor Meltzer.

statute which is intended or designed to thwart good faith bargaining, nor are mechanisms provided to avoid that obligation on either side. The requirement that charges be filed within 180 days is designed to insure that matters are quickly brought forth for resolution, rather than permitting a party to hold onto and accumulate issues. Timely resolution is designed to facilitate the resolving of issues, rather than to provide a barrier to establishing and continuing functioning labor and management relationships.

Consistent with the PERB decision in Sussex County Vocational Technical Teachers Assn. v. Bd. of Education, Del.PERB, ULP 88-01-021, I PERB 287, 295 (1988), the alleged violation of the statute must have occurred within 180 days of the filing of the charge; in this case, on or after April 18, 2003.

* * *

Having determined that this charge is time barred because it was not filed within 180 days as required by statute, the fact remains that these parties are still mired in negotiations which have continued without resolution for nearly three years since the expiration of their prior agreement. The three days of hearing in this case made it abundantly clear that the decision of the Chancery Court in Wilmington Firefighters Association, Local 1590 v. City of Wilmington, 2002 WL 418032 (Del.Ch.) had a significant impact on the course of the current negotiations. The evidence of record indicates these parties had made progress in reaching a conceptual agreement on incorporating part of the expired Performance Incentive Program into a revised salary matrix. This concept was abandoned, however, following the City's decision to provide negotiated increases for its employees represented by AFSCME Locals 320 and 1102, its

non-unionized employees and elected officials, as well as to firefighters represented by WFFA Local 1590, as a result of the Chancery Court's parity decision.[3]

The FOP asserts that it had a tentative agreement with the City on revising the salary matrix and argues,

> . . . as long as the City maintained the tentative agreement as to converting Performance Incentive Compensation to Steps and Performance Evaluation payments (with the open issues, whether Captains Step 3 would be paid at $79,300 to $80,200, whether Inspectors Step 2 would be paid at $88,365 or $89,460, and the minimum Performance Evaluation payment between $0 and $2,500 (to be resolved in mediation or binding interest arbitration)), irrespective of whether the City offered any wage or salary increase, a tentative agreement had been achieved in this regard which would have excused the City from post-CBA PIP payments. *FOP Opening Brief, p. 31-32.*

The fact that the parties were in active mediation belies the assertion that a tentative agreement had been achieved. Under the FOP's reasoning, the City would have avoided committing an unfair labor practice so long as it continued to agree with the FOP on converting the PIP into salary steps. This argument is in direct contradiction of the statutory obligation to collectively bargain:

> "Collective bargaining" means the performance of the mutual obligation of a public employer through its designated representatives and the exclusive bargaining representative 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. <u>However, this obligation does not compel either party to agree to a proposal or require the making of a concession.</u> *19 <u>Del.C.</u> §1602(e)/*

In an effort to facilitate the resolution of the continuing impasse, this decision will also address the status quo issue raised by the FOP. It is well established under Delaware PERB case law that it is a violation of the duty to bargain in good faith for a party to

[3] The Vice Chancellor's decision related only to the parity agreement memorialized in a June 24, 1999 letter signed by representatives of the City and IAFF Local 1590. The parties were directed by the Court to work out the practical issue of implementing the decision at the bargaining table and to present an implementing order to the Court within ten days. <u>WFFA v. City of Wilmington</u>, 2002 WL 418032, p. 13,14. The scope of any other existing parity agreements was not before the Court.

unilaterally implement a change in a mandatory subject of bargaining following expiration of the parties' collective bargaining agreement. Appoquinimink Ed. Assn. v. Bd. of Education, Del. PERB, ULP 1-2-84A, I PERB 23 (1984); Brandywine Affiliates, DSEA/NEA v. Brandywine School District, Del.PERB, ULP 1-9-84-6B, I PERB 83 (1984); New Castle County Vo Tech Education Assn. v. New Castle County Vo-Tech School District, Del. PERB, ULP 88-05-025, I PERB 309 (1988); Smyrna Educators' Assn. v. Bd. of Education, Del. PERB, ULP 88-12-032, I PERB 403; (Indian River Education Assn. v. Bd. of Education, Del. PERB, ULP 90-09-053, I PERB 667 (1991).

Mandatory subjects of bargaining are ". . . matters concerning or related to wages, salaries, hours, grievance procedures, and working conditions." 19 Del.C. §1602(n). In Local 1590, IAFF v. City of Wilmington, Del.PERB, ULP 89-09-041, I PERB 457, 469 (1990), PERB held "matters concerning or related to wages and salaries" include non-wage benefits because they constitute consideration for work performed and provide direct and immediate economic benefit to employees flowing directly from the employment relationship. The Performance Incentive Program provided an annual stipend based upon three levels of performance in FY 2000 and FY2001; consequently it is a matter concerning and related to wages.

The analysis next turns to defining the status quo[4] which must be maintained following expiration of the collective bargaining agreement until new terms are established by a successor agreement. PERB previously rejected the concept of a "dynamic status quo" in Smyrna Educators' Assn v. Bd. of Education, (Supra @ 409), in which case the Association argued that a formulation for increases to a salary matrix

[4] Status quo means the existing state of matters immediately following expiration of the parties' agreement.

(established for the second year of the expired agreement) should be continued and applied after expiration.

The status quo maintains and preserves a level playing field for negotiations. The statute is clearly intended to move parties toward resolving their negotiations prior to expiration of the prior agreement. Undoubtedly the best agreements will be those mutually negotiated by the parties, rather than those imposed or sustained by statutory rule. The defined status quo should not work to undermine the incentive and duty to bargain for either party.

In this case, both the FOP and the City argue that the status quo is established by the Section 9.4 and Appendix "B" of the expired agreement. Where a prior agreement specifically addresses the term or condition of employment at issue, it may provide insight into the nature of the underlying relationship itself. New Castle County Vo-Tech Education Assn., (Supra @ 320).

The language and history as established by the record, however, support the City's interpretation that the Performance Incentive Program was limited in duration to the second and third year of the 1998 – 2001 agreement. The introduction of the plan in §9.4 states, "This program will become effective July 1, 1999, and employees will be evaluated annually beginning July 1, 1000 for Fiscal Year 2000 and July 1, 2001 for Fiscal Year 2002." Appendix "B" to the agreement also makes repeated references to Fiscal Years 2000 and 2001.

The FOP's argument that the "City's failure to pay PIP was inconsistent with past practice when the City had repeatedly paid Performance Adjustment Compensation to Inspectors and Captains after a CBA had expired and before a new CBA was agreed upon" is not persuasive. *FOP Lodge #1's Opening Brief, p. 28.* PERB addressed the

impact of "past practice" in Brandywine Affiliate, NCCEA/DSEA/NEA v. Bd. of Education, Del.PERB, ULP 85-06-005, I PERB 131, 144 (1986):

> The nature of a past practice is such that one must first establish a given course of conduct occurring in response to a specific set of facts. Once this is accomplished, the question becomes whether or not the established course of conduct is sufficient to qualify as a past practice. To do so, several conditions must be present: first, the course of conduct must be clear and unambiguous; secondly, it must involve a period of time sufficient for it to be established on a consistent basis; and thirdly, those involved must have knowledge of the conduct and accept it as the appropriate means of handling the given situation.

The FOP's past practice argument is nullified by the explicit language of Section 13.1 of the 1998 – 2001 Agreement. *FOP Hearing Exhibit 1, p. 15.* It is clear that the Performance Incentive Program was not simply an alternative compensation method to the Performance Adjustment Program contained in the three prior collective bargaining agreements between these parties. [5] Referring to the first year of the agreement, the 1998-2001 Agreement states at §13.1, "In addition, Captains will also receive a $3,000.00 Performance Adjustment and Inspectors will receive a $3,500.00 Performance Adjustment which will be rolled into their salaries effective July 1, 1998." Because the prior Performance Adjustments were rolled into the base salaries beginning in the first year of the 1998-2001 contract, the City did maintain the status quo as it related to Performance Adjustments by continuing to pay Captains and Inspectors throughout the period of negotiations according to the contractual salary provisions set forth in the expired agreement. This lends further credence to the conclusion that the Performance

[5] The 1990-1993, 1993 – 1995, and 1995 -1998 agreements each provided at §9.4, "All Captains and Inspectors are eligible to receive a performance adjustment on an annual basis as of the occurrence of his or her anniversary date with the department in the amounts indicated below:

	FY '91	FY '92	FY '93	FY '94	FY '95	FY '96	FY '97	FY'98
Captains	$1,092	$1,147	$1,215	$1,400	$1,500	$1,500	$1,545	$1,584
Inspectors	$1,196	$1,256	$1,331	$1,500	$1,600	$1,600	$1,648	$1,689

Incentive Program was, in fact, clearly distinguishable from the prior Performance Adjustment program.

There is no precedent (other than the two years of PIP in Fiscal Years 2000 and 2001) for a salary supplement program based upon achievement of specific performance on departmental objectives in the long collective bargaining history of these parties. The language of Appendix "B" is very specific in limiting its application to Fiscal Years 2000 and 2001 performance. Consequently, any continuation or extension of the PIP had to be negotiated by the parties.

DECISION

For the reasons set forth above, this Charge is dismissed because it was not filed within the statutory time frame of 180 days after the Petitioner should have reasonably known of the action complained of.

IT IS SO ORDERED.

DATE: 8 June 2004

/s/ Deborah L. Murray-Sheppard

DEBORAH L. MURRAY-SHEPPARD
Hearing Officer
Del. Public Employment Relations Bd.