

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS,	:	
LOCAL 1590,	:	
Charging Party,	:	
	:	<u>ULP No. 13-04-895</u>
v.	:	Probable Cause Determination
	:	
CITY OF WILMINGTON, DELAWARE,	:	
Respondent.	:	

BACKGROUND

The City of Wilmington (“City”) is a public employer within the meaning of §1601(l) of the Police Officers and Firefighters Employment Relations Act (“POFERA”), 19 Del.C. Chapter 16 (1986).

The International Association of Firefighters, Local 1590 (“IAFF”) is an employee organization within the meaning of §1602(g) of the POFERA and the exclusive bargaining representative within the meaning of §1602(h) of the bargaining unit of all Wilmington firefighters except the Deputy Chiefs and the Chief of Fire.

The City and IAFF Local 1590 are parties to a collective bargaining agreement which remains in full force and effect at all times relevant to the processing of this Charge.

On or about April 4, 2013, the IAFF filed a consolidated unfair labor practice charge alleging the City has violated 19 Del.C. §1607(a)(1), (a)(5) and (a)(6), which provide:

§1607 (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:

- (1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.

- (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.

Specifically, the IAFF alleges that on or about November 5, 2012, the City “announced a one-time payment to employees in lieu of their not receiving COLA’s in FY 2010, 2011, 2012 and 2013.” At no time prior thereto did the City request to negotiate with the IAFF. The City subsequently refused to make payment to bargaining unit members who were on terminal leave (paid leave prior to retirement) at the time of the distribution although they were receiving paychecks (not pension checks) at that time. The IAFF alleges the City also denied the one-time payment to bargaining unit members who retired in FY 2010, 2011, 2012 and 2013, who had not received a COLA in those years prior to retiring.

The IAFF alleges the City’s Mayor declared December 24, 2012, to be a holiday for all City employees. Despite a contractual requirement “that such other days as the Mayor may designate shall be holidays with pay”, the City has refused to authorize holiday pay for the bargaining unit employees, thereby unilaterally altering a mandatory subject of bargaining.

The Charge also alleges the City’s automated system for tracking and recording time worked and attendance and payroll functions (KRONOS) requires bargaining unit employees to “punch-in” at the start and conclusion of each work period. Failure to do so results in the employee being credited with only one (1) hour of work during the period; consequently, employees receive less than the negotiated rate of compensation as set forth in the collective bargaining agreement. The IAFF asserts that bargaining unit work does not lend itself to pay for actual hours worked in a fixed pay period because firefighters are not hourly employees. Their annual salary is set forth in §16.1 of the collective bargaining agreement; their hours of work in

§17.1; their salary schedule in §17.1(4); and, their total compensation schedule in §§16.1 and 16.2. Rather than receiving an hourly rate for hours worked, the practice has been for employees to be paid the negotiated annual salary averaged over twenty-six pay periods. Although the City may correct improper payments, bargaining unit employees receive a reduction in their negotiated salary as result of the City's practice requiring them to "punch in and out" at the start and end of each shift.

On April 24, 2013, the City filed its Answer to the Charge denying the IAFF's allegations that it violated the POFERA. The City maintains that firefighters on terminal leave and retirees did not receive the one-time payment because neither group qualifies as a "current" employee. The City argues the one-time payment was expressly limited to "current employees" (individuals who were employed by the City at the time the authorizing ordinance was adopted). Under New Matter included in its Answer, the City first avers the one-time payment was, in fact, negotiated by the parties. After the public and private notices were posted and personal notice was provided to the IAFF, the union provided written acceptance of the terms of the Ordinance to the City on November 7, 2012. The City asserts the IAFF failed to object, affirmed its acceptance of the terms by written correspondence on November 7, 2012, and accepted the subsequent distribution of the funds to "current employees". This constitutes a valid and binding agreement between the City and the IAFF. The City also argues that by accepting the one-time payment to "current employees" the IAFF waived any statutory claim.

The City also filed a Countercharge alleging that the amount of money made available by the City for the one-time payment was a "budgetary consideration" based upon the number of "current employees" on the payroll as of the date the Ordinance was adopted by the City Council. Terminal and retired members of the Union were never included in the calculations of the one-time payment. The City argues that if it is determined that City did not negotiate in good faith

or, alternatively, that the IAFF mistakenly accepted the one-time payment, the agreement at issue should be deemed null and void by mutual mistake, rescission should be ordered and the IAFF should be required to return the funds to the City, thereby placing the parties in the position they held prior to the one-time payment.

In its Answer to the other allegations, the City denies that the negotiated collective bargaining agreement obligates the City to compensate bargaining unit members for Mayor designated holidays. The City also asserts bargaining unit firefighters are not salaried employees. Rather, they are paid by the hour, receiving compensation based upon a 212 hour cycle, pursuant to the requirements of the Fair Labor Standards Act (“FLSA”). The requirement to “clock in” and “clock out” is established by City Policy 304.3, which provides, that all hourly wage employees shall “punch in and punch out” using the automated KRONOS system.

On May 2, 2013, the IAFF filed its Response to the City’s New Matter denying the legal conclusions asserted by the City. In response to the Countercharge, the IAFF notes that no statutory charge is alleged and requests the Countercharge be dismissed.

DISCUSSION

Regulation 5.6 of the Rules of the Delaware Public Employment Relations Board requires:

- (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. If the Executive Director determines that there is no probable cause to believe that an unfair labor practice has occurred, the party filing the charge may request that the Board review the Executive Director’s decision in accord with the provisions set forth in Regulation 7.4. The Board will decide such appeals following a review of the record, and, if the Board deems necessary, a hearing and/or submission of briefs.

- (b) If the Executive Director determines that an unfair labor practice may have occurred, he shall where possible, issue a decision based upon the pleadings; otherwise, he shall issue a probable cause determination setting forth the specific unfair labor practice which may have occurred.

For purposes of reviewing the pleadings to determine whether probable cause exists to support the Charge, factual disputes revealed by the pleadings are considered in a light most favorable to the Charging Party in order to avoid dismissing a valid charge without the benefit of receiving evidence in order to resolve factual differences. *Flowers v. DART/DTC*, PERB Probable Cause Determination, ULP 04-10-453, V PERB 3179, 3182 (2004).

The documents included with the pleadings are uncontested and establish the following chronology of events:

On or about November 1, 2012, the Mayor's Chief of Staff, John Rago, sent the following memorandum from the Mayor (by email) to "Presidents of the City Union Locals", concerning "One-Time Payment to Employees in Lieu of COLA":

I am writing to ask for your support for a one-time payment for City employees. The reality of the current fiscal climate is very clear. We must and should do something beyond just telling our employees we cannot provide them with a cost-of-living increase, which is the unfortunate position we have found ourselves in for four years.

The one-time payment issue is not connected in any way to labor negotiations, the arrival of the incoming administration, or projected deficits. It has everything to do instead with fairness for our employees. Also, it's the right thing to do.

These funds will be taken from the unassigned fund balance and will not affect the City's permanent reserve fund. We have been responsible in every way over many years by adhering to sound fiscal principles in order to keep the City's finances as strong as possible. We have maintained our City's stable fiscal position in spite of a bad economy and ever-increasing costs. This one-time payment will not affect our current fiscal position.

Our bond rating remains solid. While other cities have experienced massive layoffs and major cuts in services, we have not. Our

Department Directors, our employees and City Council have worked very hard over several budget cycles to lower our expenses by more than \$15 million to help us weather this economic storm.

This one-time payment takes into account not only our current fiscal position, but today's economic realities that affect all of us. I ask you to support this one-time payment proposal. While it does not affect the City's bottom line or our deficit projections, it will go a long way to assist City employees who have played an important role in helping us to manage our finances and plan our City's future.

Should Council approve this one-time payment plan at tonight's council meeting, each union has until the close of business (5 p.m.) on Thursday, November 8 to voice any objection to the one-time payment plan.

Thank you for your consideration of this important matter for City employees. *Answer, Exhibit 6.*

The IAFF does not deny this email was received by its President.

During its regular meeting on November 1, 2012, the City Council approved Substitute

No. 1 to Ordinance No. 12-066, which states, in relevant part:

AN ORDINANCE CONSTITUTING AMENDMENT NO. 2 TO ORDINANCE NO. 12-019, THE ANNUAL OPERATING BUDGET FOR THE FISCAL YEAR BEGINNING ON JULY 1, 2012 AND ENDING ON JUNE 30, 2013

WHEREAS, in view of the fact that City employees who are not members of a collective bargaining unit (non-union employees) and City employees who are members of collective bargaining units – AFSCME Locals 1102, 1102B, 320 and FOP Lodge #1 (Captains and Inspectors) – have not received cost-of-living (“COLA”) increases for any of the four (4) fiscal years of 2010, 2011, 2012, and 2013; and

WHEREAS, the police and fire unions – FOP Lodge #1 (Rank and File) and IAFF Local 1590 respectively – have not received COLA increases for any of the three (3) fiscal years of 2011, 2012 and 2013; and

WHEREAS, the Administration has recommended and the Wilmington City Council concurs that current employees who worked any part of a fiscal year enumerated above and did not receive a COLA increase shall receive a one-time payment to compensate for lack

of increase in wages; and

WHEREAS, the Administration has recommend and the Council concurs that a one-time payment in lieu of receiving a COLA increase is a fair and appropriate measure; and

WHEREAS, the Administration has recommended and the Council concurs that compensation shall be paid to current employees as set forth in Section 4 of this ordinance, which generally authorized payments of between \$175 to \$500 to each employee for each fiscal year the employee did not receive a COLA increase, up to a maximum of \$2,000; and

WHEREAS, the City Council enacted Substitute No. 2 to Ordinance No. 12-019, an operating budget for fiscal year 2013, and the Council deems it necessary to enact amendment No. 2 to said operating budget for fiscal year 2013 to appropriate the funding to allow compensation to be paid to current employees as set forth in Section 4 of this ordinance.

THE COUNCIL OF THE CITY OF WILMINGTON HEREBY ORDAINS:

SECTION 1: That all City of Wilmington (“the City”) employees who are not members of a collective bargaining agreement (“non-union employees”) and are employed by the City on the date of adoption of this ordinance shall receive a one-time payment, as described in Section 4, if such employee worked any part of the four (4) fiscal years of 2010, 2011, 2012, or 2013 as an employee of the City and did not receive a cost-of-living (“COLA”) increase.

SECTION 2. That all employees of the City who are members of the collective bargaining units (“union employees”) – AFSCME Locals 1102, 1102B, 320 and FOP Lodge #1 (Captains and Inspectors) – and are employed by the City on the date of adoption of this ordinance shall receive a one-time payment, as described in Section 4, if such employee worked any part of the four (4) fiscal years of 2010, 2011, 2012, or 2013 as an employee of the City and did not receive a cost-of-living (“COLA”) increase.

SECTION 3. That all union employees of the City who are members of the police and fire unions – FOP Lodge #1 (Rank and File) and IAFF Local 1590 – and are employed by the City on the date of adoption of this ordinance shall receive a one-time payment, as described in Section 4, if such employee worked any part of the three (3) fiscal years of 2011, 2012, or 2013 as an employee of the City and did not receive a cost-of-living

(“COLA”) increase.

SECTION 4. All current employees of the City who meet the qualification requirements of Sections 1, 2 or 3 above shall receive a one-time payment in an amount determined by the following payment schedule: (1) all non-union employees and union employees of AFSCME Locals 1102, 320 and FOP Lodge #1 (Captains and Inspectors) shall receive \$500 for each fiscal year of 2010, 2011, 2012, or 2013 that such employee worked any part of for a maximum payment of \$2000, (2) all union employees of FOP Lodge #1 (Rank and File) and IAFF Local 1590 shall receive \$500 for each fiscal year of 2011, 2012, or 2013 that such employee worked any part of for a maximum payment of \$1,500, and (3) all employees of AFSCME Local 1102B shall receive \$175 for each fiscal year of 2010, 2011, 2012, or 2013 that such employee worked any part of for maximum payment of \$700.

SECTION 5. Said payments to the said non-union employees of the City shall be payable as of November 9, 2012. Said payments to the said union employees of the City shall be payable as of November 16, 2012 unless an objection to such payment is made by a collective bargaining representative on or before November 8, 2012....

The Mayor signed the Budget Amendment Ordinance the following day, November 2, 2012.

Answer, Exhibit 1.

On November 5, 2012, the City issued a press release relating to the one-time payment to employees which stated:

ONE-TIME PAYMENT TO EMPLOYEES IN LIEU OF NOT
RECEIVING COLA IN FY 2010, 2011, 2012, 2013

Monday, November 5, 2012

- The budget amendment will provide a one-time payment of between \$175 and \$500 to all City employees – some of whom have gone without a cost-of-living increase for four years.
- The highest payment that an employee could receive is \$2,000 based on a formula for an employee receiving between \$175 and \$500 for each of the last four fiscal years (FY 10, 11, 12 and 13) that the employee did not receive a cost-of-living increase.
- The cost of the payment plan is \$2 million. The money would be taken from the City’s unassigned fund balance.

- The one-time payment plan will have **NO** effect whatsoever on the City’s current budget, nor will it have any effect on **any** City budget in **any** future year because the one-time payment will not be *[sic]* added to an employees’ base salary – it is simply a one-time payment only, or a “one and done” payment.
- Because of the economic downturn in recent years, the Baker Administration chose to avoid substantial lay-offs of City employees. That left the Administration in a position of not being able to offer cost-of-living increases to most employees.
- Mayor Baker has concluded that the next Administration will face similar budget constraints in the foreseeable future which may hamper its ability to offer employees a cost-of-living increase.
- Mayor Baker says now is the logical time to give employees a one-time payment to help them support their families and pay their bills.
- Non-Union employees, members of Local 1102 and Local 320, and the WPD Captains and Inspectors will receive a \$2,000 payment for not having a COLA in FY 2010, 2011, 2012, and 2013.
- Members of FOP Lodge #1 (rank and file police officers) and members of IAFF Local 1590 (firefighters) will receive a payment of \$1,500 for not having received a COLA in FY 2011, 2012 and 2013.
- School crossing guards, who are members of Local 1102B, work a part-time day and a part-time year, so they will receive a total of \$700 or \$175 per year for not having received a COLA in FY 2010, 2011, 2012, and 2013.
- Now that the budget amendment was approved at the November 1 Council Meeting, non-union City employees will receive their one-time payment on Friday, November 9.
- Employees affiliated with a union would receive their one-time payment on Friday, November 16 provided that their respective union leaders do not object to the one-time payment by 5 p.m. on Thursday, November 8. *Charge, Exhibit A.*

The IAFF attached this Press Release to its Charge and does not contend that it was not contemporaneously aware of the content of this document.

In an email dated Wednesday, November 7, 2012, IAFF President Craig Black advised

the City's Personnel Director and Director of Labor Relations, "In regards to the bonus to be given to our members that was passed by City Council we accept." *Answer, Exhibit 7.*

The City made a one-time payment to members of IAFF bargaining unit on November 16, 2012.

The documents appended to the pleadings speak for themselves. It is noted that neither the Mayor's initial e-mail of November 1, 2012 nor the November 5, 2012 summary of the one-time payment plan includes the term "current employees". Each document refers simply to "employees". It is further noted that only the Ordinance refers to "current employees" and states those who "are employed by the City on the date of the adoption of this ordinance shall receive a one-time payment".

The question of whether the one-time payment was bargained for or unilaterally implemented raises both factual and legal issues. Evidence and argument will be accepted concerning the omission of a reference to "current employees" in the City's communications to the union, as well as for whether the exclusion of retirees and/or officers on terminal leave constituted a per se violation of the City's statutory obligations under the POFERA.

Concerning the allegations that the City violated its duty to bargain in good faith by failing or refusing to provide holiday pay to bargaining unit employees for a Mayor designated holiday on December 24, 2012, it is well established under Delaware PERB case law that compensation for time not worked is a mandatory subject of bargaining under the POFERA.

The City's assertion that it is not contractually obligated to compensate IAFF bargaining unit members for Mayor-designated holidays is not dispositive of this issue. The Charge raises a statutory issue that the City has instituted a unilateral change in a mandatory subject of bargaining. In order to determine whether the alleged unilateral change in compensation paid to bargaining unit members violated the POFERA as alleged, a record must be established which

includes facts on which argument can be made.

The IAFF has also alleged the City violated its duty to bargain in good faith by instituting a unilateral change in the compensation for bargaining unit employees. It asserts that as a result of requiring firefighters to use “the KRONOS ‘missed punch’ feature, the [City] has been reducing the [bargaining unit] member’s compensation despite the member working the actual number of hours in the work schedule necessary to receive the averaged pay from the full annual base salary dictated by the collective bargaining agreement.” The IAFF further charges that although the City may later correct the improper compensation reduction, “the ‘missed punch’ feature results in a failure to compensate at the rate established by the annual base salary provision of the collective bargaining agreement, failure to abide by the past practice of how these salaried employees receive compensation and results in an improper temporary withholding of compensation.”

In response, the City argues bargaining unit members are hourly employees paid under the provisions of Section 207(k) of the Fair Labor Standards Act (“FLSA”) which requires employees to “clock in and out”. The City maintains that the requirement to “punch in and punch out” with KRONOS is established City policy and that the “clock-in” requirements are an inherent managerial right and constitute direction of personnel.

These allegations raise a statutory issue that the City has instituted a unilateral change in compensation, a mandatory subject of bargaining. In order to determine whether the alleged unilateral change occurred as alleged, a record must be established which includes facts on which argument can be made.

DETERMINATION

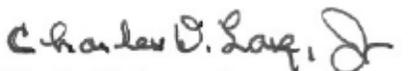
Consistent with the foregoing discussion, the pleadings are sufficient to support a

finding of probable cause to believe that an unfair labor practice, as alleged, may have occurred. The burden falls on the party making the allegations to present facts and argument which support the allegation.

Wherefore, a hearing will be promptly scheduled for the purpose of establishing a factual record upon which a decision can be rendered concerning:

WHETHER THE CITY OF WILMINGTON VIOLATED ITS STATUTORY OBLIGATIONS UNDER THE POLICE OFFICERS AND FIREFIGHTERS EMPLOYMENT RELATIONS ACT AND 19 DEL.C. §1607(A)(1), (A)(5) AND/OR (A)(6) AS ALLEGED, IN IMPLEMENTING A “ONE-TIME” PAYMENT MADE TO BARGAINING UNIT EMPLOYEES ON OR ABOUT NOVEMBER 16, 2012, FAILING OR REFUSING TO PAY BARGAINING UNIT EMPLOYEES FOR A MAYOR-DESIGNATED HOLIDAY ON DECEMBER 24, 2012, AND/OR BY MODIFYING THE COMPENSATION OF BARGAINING UNIT EMPLOYEES BASED ON HOURS WORKED AS RECORDED BY AN AUTOMATED SYSTEM, AS ALLEGED.

Dated: July 9, 2013



CHARLES D. LONG, JR.
Hearing Officer
Del. Public Employment Relations Board