

**STATE OF DELAWARE**

**PUBLIC EMPLOYMENT RELATIONS BOARD**

<b>FRATERNAL ORDER OF POLICE,</b>	)	
<b>LODGE NO. 1,</b>	)	
	)	
<b>Charging Party,</b>	)	
	)	<b><u>ULP No. 12-12-881</u></b>
<b>v.</b>	)	<b>Decision on the Merits</b>
	)	
<b>CITY OF WILMINGTON,</b>	)	
	)	
<b>Respondent.</b>	)	

**Appearances**

*Jeffrey M. Weiner, Esq., for FOP Lodge 1*

*Tara DiRocco, Esq., Assistant City Solicitor, for the City*

**BACKGROUND**

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

The Fraternal Order of Police, Lodge # 1, (FOP) is an employee organization and the exclusive bargaining representative, within the meaning of 19 Del.C. §§1602(g) and 1602(h) of all police officers employed by the City excluding the rank of Chief. FOP Lodge #1 represents two bargaining units: one which includes only WPD Captains and Inspectors, and the second which includes rank and file WPD officers below the rank of Captain.

The evidence of record established the following material facts: On or about late

afternoon on October 15, 2012, the Office of the Mayor released a news release which stated in relevant part:

Addressing the need to give employees a one-time payment in lieu of receiving a cost-of-living increase, the Mayor said while his Administration chose to forego pay increases largely in order to prevent employees from being laid off, he has concluded that the new Administration taking office in January will also be faced with some very tough budget choices that will make cost-of-living increases difficult to achieve without layoffs or reductions in City services.

“City employees should receive some additional compensation to help them support their families and pay their bills,” said Mayor Baker. “The City’s budget outlook is bleak for the next few years at least, so I have concluded that a one-time payment to employees in lieu of receiving a cost-of-living increase is a fair and appropriate step. A one-time payment in this fiscal year will not add to projected budget deficits in future years and could represent the only chance for City employees to receive some amount of compensation for some time to come.”

Under the Mayor’s proposal, a one-time payment of between \$175 and \$500 would be given to each employee for each fiscal year the employee did not receive a COLA<sup>1</sup>. The most money that any employee could receive is four payments of \$500 or a maximum of \$2,000 for the four years that an employee did not receive a pay increase.

Non-union City employees would receive their one-time payment on November 2. Employees affiliated with a union would receive their payment on November 9 as long as their respective union representatives have not rejected the one-time payment as part of the City’s collective bargaining process by October 25.

Under the Mayor’s plan, employees would receive a one-time payment based on the following schedule: Non-Union employees, Local 1102 members, Local 320 members and the FOP Captains and Inspectors have not received a pay raise for four fiscal years, so they would be given a \$2,000 payment. Members of FOP Lodge #1 (rank and file police officers) and members of IAFF Local 1590 (firefighters) have not had a raise for three of the four previous fiscal years, so they would receive a payment of \$1,500. The City’s crossing guards, members of Local 1102B, work part-time and part of the year, so they

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<sup>1</sup> Cost of Living Adjustment

would be given a total of \$700 for not receiving a cost-of-living increase for the past four years.

“The hardworking employees of the City of Wilmington deserve much more than this one-time payment I am recommending to City Council,” said Mayor Baker. “But this is the only way I know of at this time, and for the foreseeable future, to reward their efforts without creating any long-term, ongoing negative effect on the City’s already challenged budget outlook.” *FOP Exhibit 1.*

No evidence was presented in the unfair labor practice proceedings that this press release was ever provided directly to FOP Lodge #1 representatives or that there were any discussions between the City and the FOP concerning the one-time payment referenced in this press release.

Substitute No. 1 to City Ordinance No. 12-066 (“Ordinance”) was introduced and had its first and second reading during the City Council meeting of October 18, 2012. The Ordinance provides that City employees who worked all or part of fiscal years 2010, 2011, 2012, or 2013 and who did not receive a Cost-of Living Increase (“COLA”) during those years and who were “current employees” as of November 2, 2012, were eligible to receive \$500 per year, or a maximum of \$2000 in the form of a one-time Payment in Lieu of COLA (“PILOC”).<sup>2</sup> The PILOC was not prorated for the proportionate period worked in any single fiscal year. Consequently, any employee who worked at any time during one of the designated fiscal years was eligible to receive the full PILOC for that fiscal year. No evidence was provided that any representative of FOP Lodge #1 attended this meeting. It is undisputed that no discussion was entertained on Ordinance 12-066 at this meeting.

The Ordinance was on the agenda for the Health, Aging & Disabilities, Housing and Licenses and Inspections, and Finance Committees meeting for October 24, 2012; and was on

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<sup>2</sup> The bargaining unit of Captains and Inspectors did not receive a wage increase in Fiscal Years 2010 - 2013; consequently, they were eligible for up to \$2,000. The bargaining unit of rank and file officers did receive a wage increase in Fiscal Year 2010, but did not receive a wage increase in any of the following three years, Fiscal Years 2011 – 2013; consequently, those officers were eligible to receive up to \$1,500.

the agenda of the City's Administrative Board for November 1, 2012. It is undisputed that no FOP representative attended any of these meetings.

Ordinance 12-066 was passed by City Council during its November 1 evening meeting and was signed into law by the Mayor on November 2, 2012.

On the morning of November 1, 2012, the Mayor, through his Deputy Chief of Staff, sent a memo to the Presidents of City's Unions announcing the one-time payment "in lieu of their not having received cost of living adjustments ("COLAs") in FY 2010, 2011, 2012, 2013." The memo further stated,

...It will go a long way to assist City employees who have played an important role in helping us 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 objections to the one-time payment plan. *City Exhibit 10*

At the Union's request, on November 5, 2012, the Deputy Chief of Staff provided the FOP President with the following "bullet point summary of the one-time payment issue."

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 being [*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. *FOP Exhibit 3, City Exhibit 12.* [emphasis in original]

Neither the November 1, 2012 communication from the Mayor's office nor the power-point summary provided on November 5, 2012, included a copy of or reference to Ordinance 12-066. Based primarily upon the power point summary, the FOP Executive Board voted to accept the one-time payment for the rank-and-file and Captains and Inspectors on November 6, 2012. By e-mail to the Deputy Chief of Staff, the FOP President notified the City of the union's acceptance in the late evening of November 6, 2012.

Only after the PILOC payments were made did the FOP learn for the first time that

bargaining unit members who retired during FY 2010, 2011, 2012 or 2013 did not receive the one-time payment or a proportional payment for any fiscal year in which the retired employee worked prior to retirement. Nor was the one-time payment made to officers who were on terminal leave (i.e., “paid leave prior to retirement”) on November 2, 2012. The FOP President sent an email to the Deputy Chief of Staff on November 17, 2012, in which he questioned, “I do not understand why [officers on terminal leave] or any current retiree who was employed at the time of the FY 2011, 2012 and 2013, are not eligible for the payment.” *FOP Exhibit 5.*

Before forwarding the inquiry to the Human Resources Department, the Deputy Chief of Staff responded, “...I can tell you that the mayor determined that only those employees who were currently employed at the time of passage and signing of the ordinance (approved by council November 1 and signed by the mayor on November 2) would be eligible for the one-time payment...” *FOP Exhibit 6.* The City’s Director of Labor Relations and Classification also responded by email on November 20, 2013:

... The wording of the ordinance specifically stated that to be eligible, an individual had to be employed by the City on the date of adoption of the ordinance. This ordinance was approved by the City Council on 11/1/12 and was signed by the Mayor on 11/2/12. In Mr. Sammon’s case, he retired from the Wilmington Police Department on 11/1/12, while Mr. Howell retired on 10/19/12. Both individuals were on terminal leave, and were not employed, when the ordinance was signed by the Mayor. Thus they are not eligible for the monies. *FOP Exhibit 7.*

The record establishes that at no time prior to November 5, 2012, did the City request to open the parties’ collective bargaining agreement for the purpose of negotiating the one-time payment with the FOP. In the November 1 memo to the Presidents of City Union Locals, the Mayor stated,

The one-time payment issued is not connected in any way to labor negotiations, the arrival of the incoming administration, or projected

deficits. It has everything to do with fairness for our employees. Also, it's the right thing to do. *City Exhibit 10*.

Section 4 of the Ordinance 12-066 provides that the payments would be made to all *current* employees of the City. (*Emphasis added*). It is undisputed that Ordinance 12-066 was publicly available at all times on or after October 18, 2012 (when it was introduced) to anyone who wanted to read it.

On December 7, 2012, the FOP filed an unfair labor practice charge with the State Public Employment Relations Board (“PERB”), alleging conduct by the City in violation of 19 Del.C. §1607 (a)(1), (5) and (6).<sup>3</sup>

The City filed its Answer, New Matter and a Countercharge on or about January 31, 2013, denying the factual assertions and legal conclusions contained in the Charge. On February 8, 2013, the FOP filed its Answer and New Matter to the City’s Countercharge and New Matter, denying the factual assertions and legal conclusions asserted therein. The City filed a Response to the New Matter raised by the FOP in answering the City’s Countercharge on March 5, 2013.

A probable cause determination was issued on April 4, 2013, finding the pleadings were sufficient to determination that unfair labor practices, as alleged, may have occurred. A hearing was convened on October 3, 2013, for the purpose of receiving evidence. The parties filed written argument thereafter.

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<sup>3</sup> 19 Del.C. §1607. Unfair labor practices – Enumerated.

(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.

This decision results from review and consideration of the record thus created by the parties.

### **ISSUE**

**WHETHER THE CITY AND/OR FOP LODGE 1 FAILED OR REFUSED TO BARGAIN IN GOOD FAITH IN VIOLATION OF THEIR RESPECTIVE DUTIES UNDER THE POLICE OFFICERS AND FIREFIGHTERS EMPLOYMENT RELATIONS ACT, 19 DEL.C. CHAPTER 16, IN THE IMPLEMENTATION OF THE “ONE-TIME” PAYMENT MADE TO BARGAINING UNIT EMPLOYEES ON OR ABOUT NOVEMBER 16, 2012.**

### **PRINCIPAL POSITIONS OF THE PARTIES**

FOP: The FOP contends the City violated 19 Del.C. §1607(a)(1), (5), and/or (6) when it failed to make one-time payments to rank and file police officers who were employed at any time during FY 2011, 2012 and 2013, and to Captains and Inspectors who worked in FY 2010, 2011, 2012, 2013, but who resigned, retired or were on terminal leave on or before November 2, 2012.

The FOP asserts the Mayor’s November 1, 2012, memo (issued by his Deputy Chief of Staff) did not expressly or implicitly limit application of the PILOC to “current employees”. Neither did the memo state that officers who had resigned, retired or were on terminal leave would not receive pro-rated PILOC payments nor did the memo append or reference Ordinance 12-066.

Further the Deputy Chief of Staff responded to the FOP’s request for additional information on November 5, 2012 with a bulleted summary that simply stated, in relevant part,

... WPD Captains and Inspectors will receive a \$2,000 payment for not having received a COLA in FY 2010, 2011, 2012 and 2013.

...Members of FOP Lodge #1 (rank and file police officers)... will receive a payment of \$1,500 for not having received a COLA in FY 2011, 2012 and 2013.

... Employees affiliated with a union would receive their one-time payment on Friday, November 16, provided their respective union leaders do not object to the one-time payment by 5 p.m. on Thursday, November 8. *FOP Exhibit 3*.

Neither the term “current employees” nor reference to those “employed by the City on the date of adoption of the ordinance” is included in this summary. Again, Ordinance 12-066 was neither appended nor referenced in this summary or the transmittal email.

Delaware law requires an enforceable contract consists of three essential components: 1) an offer; 2) the unconditional acceptance of the offer and; 3), valid consideration. *Patel v. Patel*, 2009 WL 427977 (Del. Super.) The FOP contends that the offer made by the City did not limit the PILOC to “current employees” and that the City, in fact, deceived the unions by not providing this information.

Delaware law is clear that it is the “outward and objective manifestations of the parties, as opposed to their undisclosed and subjective intentions, that matter.” [*Spruill v. The Body Beaute Inc.*, 2001 WL 1456872 at \*1 (Del.Super.)] The City’s position that the one-time payment was always intended to apply only to “current” employees was never communicated to the Union. A valid and binding contract existed by which the City was committed to make one-time payments to each bargaining unit member employed by the City between July 1, 2009/2010 and November 1, 2012.

City: The City contends that Ordinance 12-066 expressly limits the PILOC to “current employees.” Because there is no ambiguity in the term “current”, it must be accorded its plain meaning. The City argues, *inter alia*, that the term was intended to identify employees who

regularly report for work and clock in and out on a daily basis.

The City argues that because the term was not defined in the Ordinance, the next most appropriate guide in determining its meaning is the collective bargaining agreement. Although the parties' most recent collective bargaining agreement defines the term "employee", it does not reference or use the term "current employee". Because the agreement does not address what constitutes a "current employee", the City asserts the City Personnel Code should be considered.

Although the City Personnel Code does not use or define the term "current employee," it defines the term "regular employee" as an "employee who is assigned to a position on the position allocation list and works a 40-hour week." Sec. 40-9. The City argues that neither retirees nor officers on terminal leave meet either of these conditions and therefore do not qualify as regular employees.

The Police Department Rules and Regulations (commonly referred to as the "white book") Directive 7.2(Q) supports the conclusion that retirees and those on terminal leave are not "current employees". Officers are required to surrender all departmental property, such as their badge and gun, upon separation from service. The City asserts both retirement and terminal leave status are considered separation from service; consequently, these employees cannot be called into work.

Alternatively, City argues that even if the term "current employee" is considered ambiguous, the intended meaning of the term excludes retirees and those on terminal leave. The City bases its conclusion upon the generally accepted principle of statutory construction which states:

[E]ach part or section [of a statute] should be read in light of every other part or section to produce an harmonious whole. Undefined words in a statute must be given their ordinary, common meaning.

Additionally, words in a statute should not be construed as surplusage if there is a reasonable construction which will give them meaning, and courts must ascribe a purpose to the use of statutory language, if reasonably possible.

The term “current employee” in Ordinance 12-066 should be read in conjunction with the sections stating, “employed by the City on the date of adoption of this ordinance.” When read together, it is clear that to qualify for the PILOC employees had to be reporting for work on November 2, 2012. Not only do retirees and those on terminal leave not report to work daily, they have also vacated the positions they formerly held and the City initiates the process for filling those vacancies.

The meaning of the term “current employees” must also take into account the financial and budgetary sections of the Ordinance. If retirees are included in the term “current employee” the cost to the City would be significantly greater than the projected cost of \$2,015,348 based on the live payroll which does not include retirees.

Furthermore, deference must be afforded to the intent of the Ordinance which was that only “current employees” qualified for the one-time payment. This intent is consistent with the fact that neither retirees nor those on terminal leave were included in the actual disbursement of the funds.

The City also argues the FOP failed to exercise due diligence by failing to obtain a copy of the Ordinance or attend any of the three legislative or administrative sessions at which the one-time payment was discussed before accepting the City’s offer constitutes a waiver of any right the FOP may have had to challenge the meaning or application of the PILOC.

The City argues that if it is determined that the Union mistakenly accepted the PILOC or that the City committed an unfair labor practice, the agreement for the PILOC should be considered null and void and the parties returned to their pre-PILOC positions which would

require the money to be returned. It is also important to note that in its pleadings the Union asserts a claim only for retirees and those on terminal leave. The Charge did not include employees who separated from employment for other reasons such as resignation, termination, medical layoff or death.

### **DISCUSSION**

The Charge filed by the FOP specifically alleges that the City unilaterally implemented a one-time payment to bargaining unit employees and,

- (a) Failed to make payments to members of Petitioner FOP Lodge #1 who retired in FY 2010, 2011, 2012, and/or 2013 even though they did not have the benefit of COLA during their employment in these fiscal years; and/or
- (b) Did not pay members of Petitioner FOP Lodge #1 who were on terminal leave as of November 2 even though these members are considered employed by Respondent City and receiving pay, not pension, checks from Respondent City. *Charge, ¶5.*

Although some testimony and evidence was offered at hearing concerning police officers who left service in the period of fiscal years 2010 – 2013 (e.g., resignations, etc.), those individuals were not addressed in the correspondence between the parties prior to the filing of the Charge and the Charge was not properly amended to include those individuals. Accordingly, this decision will be limited to the issues raised in the Charge, and specifically to the impact of the PILOC on officers who were on terminal leave as of November 2, 2012, and those who retired between fiscal years July 1, 2009 and November 2, 2012 for Captains and Inspectors, and between July 1, 2010 and November 2, 2012, for rank and file police officers.

The Charge alleges the City violated its obligations under the POFERA by failing or refusing to bargain in good faith in the required negotiation of the PILOC. §1602(e) of the POFERA defines “collective bargaining” as “the performance of the 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. . . . However, this obligation does not compel either party to agree to a proposal or require the making of a concession”.

§1602(n) defines “terms and conditions of employment” as “matters concerning or related to wages, salaries, hours, grievance procedures and working conditions; provided, however, that such term shall not include those matters determined by this chapter or any other law of the State to be within the exclusive prerogative of the public employer.” Terms and conditions of employment are mandatory subjects of bargaining which may not be unilaterally altered but must be bargained for by the parties. *Appoquinimink Ed. Assn. v. Bd. of Ed.* ULP No. 1-3-84-3-2A, I PERB 35 (1984). There can be no question but that a bonus payment which was designed to reward employees for the three or four year period in which they did not receive any general wage increases is “a matter concerning or related to wages”, and therefore a mandatory subject of bargaining under the POFERA.

The Public Employment Relations Board concluded in one of its first decisions in 1984 that alleged violations of the duty to bargain in good faith are best resolved based upon an examination of the totality of the conduct of the parties. *Seaford Education Association v. Bd. of Education*, ULP 2-2-84S, I PERB 1, 7 (Decision of Executive Director, 1984). The totality of the circumstances standard for evaluating whether the good faith obligation has been met must include consideration of all of the surrounding circumstances. *Wilmington Firefighters Assn., Local 1590 v. Wilmington*, ULP 09-06-686, VII PERB 4593, 4598 (Decision of the PERB on Review, 2010)

It is clear that City executives spent a significant amount of time deliberating and

determining what the scope of eligibility would be for receiving a PILOC payment and that they all clearly understood that receipt of the payment was conditioned on two criteria:

- (1) That the individual had to have been employed by the City of Wilmington for at least part of the period of FY 2010 – FY 2013; and
- (2) Had to be a “current employee” as of the date the Ordinance was signed.

What is also clear is that one of these conditions was not clearly communicated to the FOP, even after its President specifically requested a summary to present to his Executive Board for its consideration. That summary failed to specifically identify the two conditions for receipt of the PILOC and Ordinance 12-066 was neither appended nor referenced in the summary. The record does not support the conclusion that the City communicated the PILOC proposal to FOP Lodge #1 at any time prior to November 1, 2012, although the Ordinance had been discussed within the executive branch since at least October 15, 2012.

Although the City relies upon a series of public meetings at which Ordinance 12-066 was on the agenda, its witnesses and sign-in sheets from those meetings confirm that there were no FOP representatives present at any of these meetings. The fact that the FOP could have attended the meetings or could have requested a copy of the Ordinance does not relieve the City of its obligation to bargain with the FOP in good faith concerning changes in a mandatory subject of bargaining. Under the POFERA, the City was not free to unilaterally grant the PILOC without FOP agreement; neither could it encourage the FOP to accept its proposal by only providing a portion of the relevant information.

A binding agreement is premised upon an offer and acceptance and consideration. One can only accept the specific terms of the offer given. The acceptance can neither delete, modify nor add a term to the offer. In this case, the offer made to the FOP did not expressly limit

distribution of the PILOC to “current” employees. The City did not produce any evidence that this information was ever communicated directly to the FOP. In fact, all of the evidence of record supports the conclusions that it was only discussed among the City executives and was never explicitly or specifically communicated to the FOP.

It is the obligation of the party proposing to change a mandatory subject of bargaining to make a good faith effort to affirmatively provide critical information, and to respond to information requests and questions of the other side. The FOP did make a good faith request to the City for a summary of the PILOC; the City responded with partial information, leaving out one of only two conditions for receipt of the payment. Nothing in the record suggests there was any information provided to the FOP or put forth by the City which would have provided a basis to question the information provided by the Mayor’s Chief of Staff, until after the payment was actually made.

In that way, this case differs on its facts from the context of the decision in *Wilmington Firefighters v. Wilmington* (supra.) In that case, the City clearly and repeatedly made the IAFF aware of economic difficulties that were going to necessitate immediate and dramatic reductions in expenses. The City, in that case, specifically requested the IAFF engage in negotiations to identify mutually acceptable alternatives to lay-offs. The parties did attempt to reach an agreement, but the agreement was subsequently rejected by the union’s membership. Ultimately, lay-offs were implemented.

In the instant case, there was no effort by the City to reach out to negotiate with the FOP. Rather, the City chose to offer a take-it or leave-it option to the FOP, but left out a critical piece of information in communicating its offer. Although communicating that only “current employees” would be eligible to receive the PILOC may not have resulted in the FOP rejecting

the offer, the fact that the information was not communicated placed the FOP in the position of appearing to not know that to which it had agreed. The very tight time frame for accepting or rejecting the City's take-it or leave-it offer (between November 1 and November 8, 2012) also does not support the City's assertion that it was attempting to make a good faith offer.

For these reasons, the record supports the conclusion that the City violated its duty to bargain in good faith, in violation of 19 Del.C. §1607(a)(1), (5), and (6), as alleged.

The record does not, however, support a similar conclusion with regard to the FOP. Within the context of good faith collective bargaining the FOP was entitled to rely upon the information provided by the City. The FOP did seek clarification of the City's offer and asked for a summary of the offer to present to its executive board for consideration. The summary provided by the City included all of the "salient" points, except the one that limited payment to "current employees". The FOP was entitled to rely upon the City's communication concerning the one-time payment and was not required to verify its accuracy by comparing it to the actual Ordinance. There is no evidence of record that the FOP failed to meet its good faith obligations under the POFERA.

The question raised by this Charge and Countercharge is not whether retirees or officers on terminal leave qualified for a new benefit during their retirement, but whether the PILOC was a benefit that accrued to them during their employment in the designated period, i.e., when they were City employees. Based upon the information provided to the FOP, and on which it accepted the City's offer, they were. In order to remedy its dereliction of its good faith obligation and violations of the POFERA, the City is directed to make the required payments to eligible retirees and officers who were on terminal leave on November 2, 2012.

Finally, this decision turns on the specific circumstances of this case. It is not an overall

condemnation of the good intent of the Mayor or his staff to try to provide some measure of monetary thanks to the employees who continued to perform their duties and to serve the citizens of Wilmington to the best of their abilities during a very difficult period. The error in this case results from a lack of understanding by the City of its obligations to deal directly, openly and in good faith with the exclusive bargaining representative of its police officers.

### **CONCLUSIONS OF LAW**

1. The City of Wilmington is a public employer within the meaning of §1602(l) of the Police Officers' and Firefighters' Employment Relations Act.

2. Fraternal Order of Police Lodge #1 is an employee organization within the meaning of §1602(k) POFERA and is the exclusive bargaining representative of the City's police officers (excluding the Chief) within the meaning of 19 Del.C. §1602(h).

3. Matters concerning wages and salaries are a "term and condition of employment" as defined at 19 Del.C. §1602(n) over which the public employer and the exclusive representative are obligated to collectively bargain under 19 Del.C. §1602(e).

4. By failing to provide the PILOC to retirees for the fiscal years in which they were actively employed during the period of FY 2010- FY 2013 and in which they did not receive a wage increase and to officers who were on terminal leave on November 2, 2012, the City violated its duty to bargain in good faith and violated 19 Del.C. §1607(a)(1), (5) and (6), as alleged.

5. The record does not support the Countercharge that the FOP failed to meet its good faith obligations under the POFERA by not independently verifying that the City had clearly communicated its offer by comparing it to Ordinance 12-066.

**WHEREFORE, THE CITY 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 police officers.

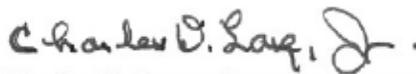
2. To make the appropriate PILOC payments to the retired police officers for any fiscal years in which they were actively employed between FY 2010 and FY 2013 for Captains and Inspectors, and between FY 2011 and FY 2013 for rank and file officers. It is also directed to provide the appropriate PILOC payment to any officers who were on terminal leave on November 2, 2012.

3. Immediately post a copy of the Notice of Determination in all places where notices of general interest to the bargaining unit members are usually posted. The notice shall remain posted for a period of thirty (30) days.

4. Notify the Public Employment Relations Board within forty-five (45) calendar days from the date of this Order of the steps taken to comply herewith.

**IT IS SO ORDERED.**

Dated: April 21, 2014



Charles D. Long, Jr., Hearing Officer  
Del. Public Employment Relations Board