

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS,	:	
LOCAL 1590,	:	
Charging Party,	:	
	:	<b><u>ULP No. 13-04-895</u></b>
v.	:	<b>Decision on the Merits</b>
	:	
CITY OF WILMINGTON, DELAWARE,	:	
Respondent.	:	

**Appearances**

*Jeffrey M. Weiner, Esq., for IAFF Local 1590*  
*Tara DiRocco, Esq. and Brenda James-Roberts, Esq.,*  
*Assistant City Solicitors, 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 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.

The evidence of record establishes 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 (COLA) is the phrase these parties customarily use to denote what is commonly referred to as a “general” or “across the board” annual wage or salary increase.

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.” *IAFF Exhibit 1.*

No evidence was presented in the unfair labor practice proceedings that this press release was ever provided directly to IAFF representatives or that there were any discussions between the City and the IAFF 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 firefighters represented by the IAFF who worked all or part of fiscal years 2011, 2012, or 2013, who did not receive a “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 \$1,500 in the form of a one-time Payment in Lieu of COLA (PILOC).<sup>2</sup> The PILOC was not prorated for a 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 the IAFF attended this meeting. It is undisputed that no discussion of Ordinance 12-066 occurred during 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 the agenda of the City’s Administrative Board for November 1, 2012. It is undisputed that no IAFF representative attended either of these meetings.

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<sup>2</sup> City Exhibit 1.

On the morning of November 1, 2012, the Mayor, through his Deputy Chief of Staff, sent a memo to the City's Union Presidents 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*

The November 1, 2012 communication from the Mayor's did not include a copy of or reference to Ordinance 12-066. 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.

By e-mail to the City's Director of Labor Relations and Classification, the IAFF President notified the City, "In regards to the bonus to be given to our members that was passed by City Council we accept." The email was sent at 2:37 p.m. on Wednesday, November 7, 2012.

*IAFF Exhibit 11.*

The record establishes that at no time prior to November 7, 2012, did the City request to open the parties' collective bargaining agreement for the purpose of negotiating the one-time payment with the IAFF. In the November 1 memo to the Presidents of City's unions, 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.*

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.

The IAFF did not learn until after the PILOC payments were made that bargaining unit members who retired during FY 2011, 2012 or 2013 did not receive the one-time payment or a proportional payment for any fiscal year in which the firefighter worked prior to retirement. Nor was the one-time payment made to firefighters who were on terminal leave (i.e., “paid leave prior to retirement”) on November 2, 2012.

On or about November 21, 2012, a grievance was filed on behalf of a firefighter who was on terminal leave on November 2, 2012, who had been employed by the City in FY 2011 – FY 2013, and who did not receive the \$1,500 PILOC payment. At the time the PILOC was paid, the firefighter was on the City’s payroll, was not retired, and was not receiving pension payments. The grievance was denied at Step 2 by the City’s Chief of Fire and Director of Labor Relations and Classification, stating:

When [he]... began his terminal leave on October 5, 2012, he did not meet the criteria outlined in the [sic] Article 3, as well as the ordinance. He no longer occupied a position on the allocation list, nor did he perform any services in order to be paid for a 40 hour work week. In addition, his name was removed from any platoon roster and city seniority lists and he would not be called into service should the need arise to have all firefighters report for duty. In essence, he was no longer a “current employee.” *City Exhibit 20.*

On or about Monday, December 17, 2012, a press release was issued by the Mayor’s Office which stated:

Mayor Baker is pleased to announce he has declared Monday, December 24, 2012, as a holiday for City employees so you can enjoy a long holiday weekend.

An employee who was approved PRIOR TO NOON TODAY by their immediate supervisor for a vacation day on the 24<sup>th</sup> will have that vacation day restored so they can use it during calendar year 2013. The Department of Human Resources will provide further instructions in the days ahead regarding the restoration of the 24<sup>th</sup> for your use next year as a vacation day provided you have already been approved for vacation on the 24<sup>th</sup> PRIOR TO NOON TODAY. *City Exhibit 21.*

Thereafter, on December 24, 2012, the Mayor issued Executive Order 2012-4, which mandated (in relevant part):

1. On Monday, December 24, 2012, all regular employees who are considered non-essential (i.e., not required to work by their Commissioner or Department Head) shall be excused from work with pay; and
2. Employees who are required to work on Monday, December 24, 2012, shall be appropriately compensated in accordance with Chapter 40 of Wilmington City Code and/or their respective collective bargaining agreements and with the approval of their Commissioner or Department Head. *City Exhibit 22.*

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), (5), and (6).<sup>3</sup> The charge alleged the City had violated its statutory obligations by unilaterally implementing a “one-time payment” to bargaining unit employees, failing or refusing to pay bargaining unit employees for a Mayoral 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.<sup>4</sup>

On April 24, 2013, the City filed its Answer to the Charge denying the IAFF’s allegations that it violated the POFERA. The City’s Answer included a Counter-Charge alleging the IAFF failed or refused to bargain in good faith by failing to exercise due diligence prior to accepting the one-time payment which was specifically offered only to “current employees”. On May 2,

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<sup>3</sup> §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.

<sup>4</sup> The Charge also included allegations that the City violated its statutory obligations in the manner in which it had implemented the automated KRONOS system for tracking and recording time worked, attendance and payroll functions for firefighters (Count III). At the beginning of the hearing on October 15, 2013, the parties stipulated that all aspects of this Charge were being withdrawn, without prejudice and without any precedential impact for future proceedings that may involve a similar issue.

2013, the IAFF filed its Response to the City's New Matter denying the legal conclusions asserted by the City.

A probable cause determination was issued on July 9, 2013, finding the pleadings were sufficient to determine that unfair labor practices, as alleged, may have occurred. A hearing was convened on October 15, 2013, for the purpose of receiving evidence. The parties filed written argument thereafter.

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

### **ISSUE**

**WHETHER THE CITY AND/OR IAFF LOCAL 1590 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 AND/OR BY FAILING OR REFUSING TO PAY BARGAINING UNIT EMPLOYEES FOR A MAYOR-DESIGNATED HOLIDAY ON DECEMBER 24, 2012.**

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

IAFF: IAFF Local 1590 argues the City extended an offer through the Mayor's November 1, 2012, memo for a one-time payment in lieu of the cost-of-living adjustments which were unavailable due to budgetary constraints in FY 2011, 2012 and 2013. The memo explicitly stated the purpose of the offer was to "assist City employees who have played an important role in helping [the City] manage our finances and plan our City's future." *IAFF Exhibit 2; City Exhibit 10.*

The November 1, 2012 offer did not indicate or state that firefighters who had worked a portion of FY 2011- FY 2013, but who left service prior to November 2, 2012, would not receive a prorated one-time payment. It did not limit the offer to “current employees” and did not direct the IAFF to Ordinance 12-066 for details. The Ordinance was neither referenced nor appended to the Mayor’s offer of November 1, 2012.

The IAFF asserts it relied upon the offer conveyed in the November 1 offer and acted in good faith when it accepted the Mayor’s offer on November 7, 2012. By later conditioning payment of the PILOC on terms that were not conveyed in the November 1, 2012 offer, the City violated its obligation to bargain in good faith and the PERA. Consequently, the IAFF request the City be required to pay the appropriate one-time payment to all Local 1590 bargaining unit members who resigned, retired, and/or went on terminal leave between July 1, 2010 and November 2, 2012.

Holiday Issue: The IAFF argues that prior to July 1, 2012, holiday pay for the twelve holidays specified in Article 5 of the parties’ collective bargaining agreement was rolled into salaries. This change made the holiday benefit for firefighters consistent with Chapter 40 of the City Personnel Code, as applied to all other City employees. Under this structure, the IAFF asserts that on any holiday designated by the Mayor (above the twelve identified in Article 5.1 of the collective bargaining agreement), all firefighters are entitled to receive additional holiday payment. Under §5.2 of the collective bargaining agreement, Fire Suppression personnel who report for duty receive up to sixteen hours of holiday pay (including those scheduled on vacation) and all administrative personnel who are required to report for duty receive up to eight hours of compensation (§5.3).

On January 1, 2013, the IAFF asserts the City paid the firefighters who worked on December 24, 2012, the additional holiday compensation required by §5.2 and §5.3, but failed to

pay an additional holiday payment to any firefighter who was not scheduled to work. By this action, the IAFF alleges the City violated its good faith obligations and the PERA. It requests the City be required to pay all firefighters who did not receive payment for the Mayor's designated holiday of December 24, 2012.

City: The City argues Ordinance 12-066 expressly limits the PILOC payment to current employees. Although the Ordinance does not define "current employees", the term "employee" is defined in the parties' negotiated collective bargaining agreement to mean:

... an individual who is (a) assigned to a position on the position allocation list; (b) is compensated on a 40 hour work week which constitutes full remuneration for all services rendered regardless of the number of hours worked; (c) has completed a probationary period; and (d) occupies a position recognized by PERB. *City Exhibit 19; §3.1.*

Because the term is defined in the conjunctive, an individual must meet all four criteria to be an "employee". Retirees and firefighters on terminal leave do not occupy positions on the City's position allocation list. They are also neither rendering services to nor actively working for the City. Retirees and firefighters on terminal leave do not meet the contractual definition of "employees", they also cannot logically be considered "current employees".

Ordinance 12-066 was publicly available at all times relevant to this dispute. The City asserts the IAFF did not exercise the due diligence necessary to meet its good faith obligation under the POFERA prior to accepting the PILOC offer because it did not read and review the Ordinance. The IAFF stipulated it did not communicate with the City between November 1, 2012 (when the PILOC offer was extended to the unions) until the IAFF accepted the PILOC by email dated November 7, 2012.

The City also argues that if it is ordered to pay the PILOC to firefighters who were retired between FY 10 – FY 13, and to firefighters who were on terminal leave on November 2, 2012, it

will cost the City \$8,500. It also asserts this may require the City to pay all similarly situated City employees, with an estimated cost of \$90,850.

Holiday Issue: The City denies it unilaterally modified a mandatory subject of bargaining and asserts it acted in full compliance with its statutory and contractual obligations in implementing the Mayoral-designated holiday on December 24, 2012. Articles 5.2(a) and 5.3(a) of the parties' negotiated collective bargaining agreement require the City to pay firefighters who work on a designated holiday straight time (above and beyond their normal compensation) for the hours they work. Firefighters who were required to report for duty and worked on December 24, 2012 received this additional compensation at the straight time rate for the hours worked.

Firefighters who were not required to report for duty were compensated for the day, in that they received their customary and normal weekly wages. The City asserts it is not obligated to provide additional payments for hours not worked because the negotiated provisions of the collective bargaining agreement do not require that.

Consequently, there was no unilateral change to the status quo as it relates to payment to firefighters who did not work on December 24, 2012, and there is no statutory violation. The City requests the Charge be dismissed.

## **DISCUSSION**

### I. Payment in Lieu of Cost-of-Living Adjustments (PILOC)

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

- (a) Refused to make payments to members of Petitioner who retired in FY 2010, 2011, 2012, and/or 2013 even though these members did not have the benefit of COLAs during their employment in these fiscal years; and/or

- (b) Refused to pay members of Petitioner who were on terminal leave as of November 5 [sic], even though these members were considered employees of Respondent and were receiving paychecks, not pension checks from Respondent. *Charge, ¶6.*

This decision is limited to the issues raised in the Charge (i.e., firefighters who retired in FY 2011, 2012, or 2013 and firefighters on terminal leave on November 2, 2012) and the impact of the PILOC on the identified retirees and firefighters on terminal leave.

The Charge alleges the City violated its obligations under the POFERA by failing or refusing to bargain in good faith concerning 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 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 (PERB Decision on Review, 2010)

It is clear that City executives<sup>5</sup> spent a significant amount of time deliberating and determining the scope of eligibility for receiving a PILOC payment and that they 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 IAFF in the November 1 memo from the Mayor seeking union support for Ordinance 12-066. The record does not support the conclusion that the City communicated the PILOC proposal to the IAFF at any time prior to November 1, 2012, although the Ordinance had been discussed within the executive staff 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 IAFF representatives present at any of these meetings. The fact that the IAFF could have

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<sup>5</sup> Members of the 2012 executive staff who testified during the October 3, 2013 hearing in *FOP Lodge 1 v. City of Wilmington* (ULP 12-12-881) included the then Mayor’s Chief of Staff, Deputy Chief of Staff, Budget Director and Director of Labor Relations and Classification. The parties in this matter stipulated that the record in that proceeding was to be specifically incorporated and included in the record of the instant proceeding as both Charges arose under the same set of circumstances.

attended the meetings or could have requested a copy of the Ordinance does not relieve the City of its obligation to bargain with the IAFF 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 IAFF agreement; neither could it encourage the IAFF to accept its proposal by only providing a portion of the relevant information.

A binding agreement is premised upon an offer, 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 IAFF 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 IAFF. In fact, all of the evidence of record supports the conclusion that it was extensively discussed among the Mayor’s staff but was never explicitly or specifically communicated to the IAFF.

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. Nothing in the record suggests there was any information provided to the IAFF or put forth by the City which would have provided a basis to question the information provided in the Mayor’s November 1 memo, 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 IAFF. Rather, the City chose to offer a take-it or leave-it option to the IAFF, but left out a critical piece of information in communicating its offer. 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 City's Countercharge that the IAFF failed in its good faith obligations by not exercising due diligence. Within the context of good faith collective bargaining the IAFF 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, particularly where the City's communication neither appended or referenced the Ordinance. Further, the City was aware that no representative of the IAFF had attended any of the committee or other meetings convened by City Council to discuss Ordinance 12-066 prior to November 1, 2012. There is no evidence of record that the IAFF failed to meet its good faith obligations under the POFERA.

The question raised by this Charge and Countercharge is not whether retirees or firefighters 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 by the City in Fiscal Years 2011, 2012 and 2013. Based upon the information contained in the City's email offer and the IAFF's acceptance of that 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 firefighters

who were on terminal leave on November 2, 2012.

II. Payment for Mayor designated holiday, December 24, 2012.

The IAFF alleges the City violated its statutory obligations and 19 Del.C. §1607(a)(5) when it failed to compensate firefighters for the holiday designated by the Mayor on December 24, 2012. According to the unrefuted document provided by the City<sup>6</sup>, 39 firefighters worked suppression on December 24, 2012, and one firefighter worked in an administrative capacity. Of those 40 firefighters, 3 were paid for the eight hours they worked and 37 were paid for the sixteen hours they worked. This compensation was in addition to their regular wages for this pay period (essentially constituting “double time” for the hours worked). Firefighters who did not work received only their regular wages for 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 Charge raises a statutory issue as to whether the City instituted a unilateral change in a mandatory subject of bargaining.

The Mayor’s Executive Order 2012-4 specifically states that bargaining unit employees who were required to work would be “compensated in accordance with Chapter 40 of Wilmington City Code and/or their respective collective bargaining agreements.”

The parties’ collective bargaining agreement provides at Article 5, in relevant part:

**Section 5.1** The following and such other days as the Mayor may designate shall be holidays with pay: New Year’s Day, Martin Luther King Day, President’s Day; Good Friday; Memorial Day; the Fourth day of July, known as Independence Day; the first Monday in September, known as Labor Day; Veteran’s Day; Thanksgiving Day, whenever proclaimed; Christmas Day; and the day of the general election as it biennially occurs.

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<sup>6</sup> City Exhibit 24.

Employees shall not be paid for a holiday (8 hours pay) if they are absent from work on the employee's last scheduled workday before the holiday, the holiday (if scheduled to work for the holiday), or the employee's next scheduled workday following the holiday unless excused for one of the following reasons: (a) medical absence, verified by a physician; (b) attending court as a witness under a subpoena or as a juror; or (c) death in the family as defined by this contract. The stipulations in this paragraph are not applicable if the employee actually works the holiday.

The deletion of Lincoln's Birthday and Columbus Day holidays shall not reduce the salary rates set forth in Article 16 of this Agreement. In the case of Administrative Personnel only, these deleted holidays will be replaced or converted into two (2) floating holidays which will be scheduled off in accordance with departmental regulations within the calendar year they are earned.

**Section 5.2** Fire Suppression Personnel

- (a) Whenever civilian employees are excused from work by an Executive Order of the Mayor, or for any weather emergency for any day not covered by ordinance or statute the firefighters shall receive payment at straight time rates for those who are required to report for duty for that tour. No firefighter shall be compensated for more than 16 hours (8 hours per unit as defined in Article 3) in any one tour. Any member who was scheduled on vacation on a holiday not designated in Section 5.1 shall receive 16 hours pay at straight time rates...

**Section 5.3** Administrative Personnel

- (a) Whenever civilian employees are excused from work by an Executive Order of the Mayor, or for any weather emergency for any day not covered by ordinance or statute the firefighters shall receive payment at straight time rates for those who are required to report for day. No firefighter shall be compensated for more than *[sic]* (8 hours per unit as defined in Article 3) in any one tour. Any member who was scheduled on vacation on a holiday not designated in Section 5.1 shall receive 8 hours pay at straight time rate...

This section shall apply only to those employees of the Fire Department who are scheduled to work during the day/tour or portion of the day/tour covered by the Executive Order. *City Exhibit 23.*

Section 5.1 specifically identifies eleven days and includes "such other days as the Mayor may designate" as holidays. Section 5.2 (a) and section 5.3(a) then provide for the premium

payment to be made to firefighters who work on a designated or identified holiday. Additional compensation for firefighters who are not required to work is neither addressed nor required in Article 5. The language is clear and unambiguous on its face.

Other than the introduction of the contractual language, the IAFF offered no other evidence in support of its position. The record is insufficient to support the conclusion that the City made a unilateral change to a mandatory subject of bargaining or otherwise failed or refused to meet its obligations in implementing the Mayoral designated holiday on December 24, 2012.

### **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. 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.

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 2011 - FY 2013 and in which they did not receive a wage increase and to firefighters 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 IAFF 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.

6. The record also does not support a finding that the City violated its obligations under the POFERA by not providing additional compensation to firefighters who did not work on the Mayoral-designated holiday on December 24, 2012.

**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 firefighters .

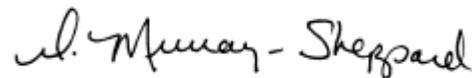
2. To make the appropriate PILOC payments to the retired firefighters for any fiscal years in which they were actively employed between FY 2011 and FY 2013. It is also directed to provide the appropriate PILOC payment to any firefighter who was on terminal leave on November 2, 2012.

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: May 13, 2014



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DEBORAH L. MURRAY-SHEPPARD  
Executive Director  
Del. Public Employment Relations Bd.