STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 1590,	:	
	:	**PERB Review of Executive Director's Decision on the Merits**
Charging Party,	:	
v.	:	
	:	**ULP No. 13-04-895**
CITY OF WILMINGTON, DELAWARE,	:	
	:	
Respondent.	:	

Appearances

Jeffrey M. Weiner, Esq., for IAFF Local 1590

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

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.

On 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).[1] Specifically, the IAFF alleged the City "announced a one-time payment to employees in lieu of their not receiving COLAs[2] in FY 2010, 2011, 2012 and 2013." The parties refer to this one-time payment as the "PILOC" which is the acronym for "payment in lieu of COLA." The IAFF asserted the City failed to request to negotiate with the IAFF and 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, as well as 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 Charge also alleged 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.

On April 24, 2013, the City filed its Answer to the Charge denying the IAFF's allegations that it violated the POFERA. Specifically, the City maintained firefighters on

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[1] § 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.

[2] Cost of Living Adjustments

terminal leave and retirees did not receive the one-time payment because neither group qualified as a "current" employee. The City asserted 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). The City also denied the negotiated collective bargaining agreement obligated the City to compensate bargaining unit members for Mayor designated holidays. Under New Matter included in its Answer, the City asserted the PILOC was, in fact, negotiated by the parties. The City also filed a countercharge asserting the IAFF failed to bargain in good faith.

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 noted that no statutory charge was alleged and requested the Countercharge be dismissed.

Upon review of the pleadings, the Executive Director issued her decision on May 13, 2014, finding the City violated its duty to bargain in good faith and 19 Del.C. §1307(a)(1), (5), and (6) 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. She dismissed the countercharge filed by the City that the IAFF had failed to bargain in good faith and found the record did 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 Mayor-designated holiday on December 24, 2012.

On May 19, 2014, the IAFF requested the full Public Employment Relations Board review the Executive Director's decision, asserting she erred in finding the City did not commit an unfair labor practice when it failed to compensate firefighters who were not scheduled to work on December 24, 2012 with eight hours of straight time holiday pay

(which could be used as a vacation day). The IAFF did not request review of the Executive Director's finding concerning the PILOC.

The City filed a response to the IAFF's request for review on May 29, 2014, asserting the IAFF failed to assert the decision below was arbitrary, capricious, contrary to law or unsupported by the record. Consequently, there is no valid basis on which the Board could act to overturn the Executive Director's decision. It also argues the Executive Director correctly found payment for a Mayor-designated holiday is governed by Article 5 of the parties' negotiated collective bargaining agreement. The City asserts it appropriately and faithfully followed the negotiated provisions and did not unilaterally alter a mandatory subject of bargaining. The City requests the IAFF's appeal be denied and the Executive Director's decision be affirmed.

A copy of the complete record in this matter was provided to each member of the Public Employment Relations Board. A public hearing was convened on June 18, 2014, at which time the full Board met in public session to hear and consider the IAFF's request for review. The parties were provided the opportunity to present oral argument.

DISCUSSION

The Board's scope of review is limited to the record created by the parties and consideration of whether the decision is arbitrary, capricious, contrary to law, or unsupported by the record. After consideration of the record and the arguments of the parties on appeal, the Board must vote to affirm, overturn, or remand the decision to the Executive Director for further action.

The IAFF asserts on appeal that the Executive Director erred by ignoring in her analysis the second paragraph of Article 5, Section 5.1 of the parties collective bargaining

agreement, which states:

> …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 subpoena or as a juror; or (c) death in the family as defined by this contract. The stipulations of this paragraph are not applicable if the employee actually works on the holiday.

The IAFF argues this paragraph implicitly provides that firefighters who are not scheduled to work on a holiday will receive eight hours of holiday pay because this section enumerates the conditions under which firefighters will not receive holiday pay.

The firefighters work a considerably different shift schedule from all other City employees. Their schedule consists of one twenty-four (24) hour period on duty, followed by seventy-two (72) hours off. Perhaps due in part to this unusual schedule and the essential nature of firefighter responsibilities 24 hours a day, 365 days each year, at some point prior to July 1, 2010, holiday pay for firefighters was rolled into the base salary calculation.

The first paragraph of Section 5.1 establishes covered holidays by specifically naming eleven holidays and also including "and such other days as the Mayor may designate as holidays." In Sections 5.2 and 5.3 the collective bargaining agreement explicitly sets forth how firefighters (both those working suppression and those in administration) are to be compensated if they are required to work on a holiday.

The record is devoid of any evidence to support the IAFF's interpretation of Article 5, specifically the second paragraph of section 5.1. There is no evidence in the record as to how this provision has been applied in the past or that the parties discussed this possible scenario during negotiations.

The Personnel Code sets forth how City employees who are not covered by collective bargaining agreements are to be paid for holidays. It explicitly states that employees "… whose regularly scheduled day off falls on a holiday shall be entitled to (8) hours of straight time holiday pay." Section 40-332 (b). The Personnel Code also provides that "any eligible employee who is required to work on a holiday … shall be compensated at double his/her regular rate for time actually worked on the holiday" and that those employees shall also receive eight hours of straight time holiday pay. Section 40-332 (c).

The City and IAFF Local 1590 are entitled to the full benefit of their collectively bargained agreement. Despite any arguments of fairness or equity with other City employees, the parties' collective bargaining agreement does not include language which mirrors or incorporates section 40-332 of the City Personnel Code.

The negotiated grievance procedure is the appropriate forum for resolving disputes concerning application or interpretation of the collective bargaining agreement. The IAFF conceded a grievance was not filed concerning the holiday pay issue, although it did file a grievance concerning the City's failure to pay the PILOC to some bargaining unit employees.

An alleged contractual violation may rise to the level of a statutory unfair labor practice if the contract establishes the status quo concerning a mandatory subject of bargaining and it can be proven that the employer instituted a unilateral change to that status quo without providing the opportunity to bargain. Wages and compensation, including holiday pay, are undisputedly mandatory subjects of bargaining.

This charge, however, fails to establish that the City instituted a unilateral change to the status quo, because the contract does not, on its face, support the interpretation offered by the IAFF. There is no need to go beyond the plan language of the contract unless it is ambiguous on its face. This language is not. Had the parties wished to include the

protections of the Personnel Code, they could certainly have done so through their negotiations.

Finally, the Board finds the IAFF failed to establish the Executive Director acted in an arbitrary or capricious manner in reaching her decision, or that she rendered a decision that was unsupported by the record or contrary to law. Simple disagreement with the outcome of a decision is insufficient to justify the overturning or remanding of that decision by this Board. The conclusions of equally reasonable people may differ. While the Board or any member thereof may have reached a different conclusion had he or she been initially presented with the case, unless the Board finds the decision below to be unreasonable (because it is arbitrary and/or capricious) or that it is unsupported by the record or contrary to law, the decision will stand.

DECISION

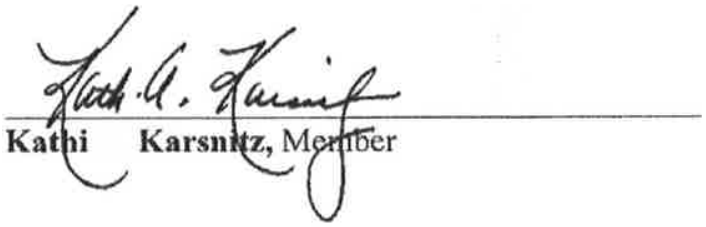
After reviewing the record, hearing and considering the arguments of the parties, the Board unanimously affirms the decision of the Executive Director finding the City did not commit an unfair labor practice when it failed to compensate firefighters who were not scheduled to work on December 24, 2012 with eight hours of straight time holiday pay.

Wherefore, the appeal of the dismissal of the Charge is denied.

IT IS SO ORDERED.

Elizabeth D. Maron, Chairperson

R. Robert Currie, Jr., Member



Kathi Karsnitz, Member

DATE: June 24, 2014