

**STATE OF DELAWARE**  
**PUBLIC EMPLOYMENT RELATIONS BOARD**

<b>INTERNATIONAL ASSOCIATION OF FIREFIGHTERS,</b>	:	
<b>LOCAL 1590,</b>	:	
	:	<b>PERB REVIEW OF THE</b>
Appellant,	:	<b>HEARING OFFICER'S</b>
	:	<b>ORDER OF DISMISSAL</b>
<b>v.</b>	:	<hr/>
	:	
<b>CITY OF WILMINGTON, DELAWARE,</b>	:	<b>ULP 16-01-1028</b>
	:	
Appellee.	:	

**APPEARANCES**

*Jeffrey M. Weiner, Esq., for Charging Party, IAFF Local 1590*  
*Tara M. DiRocco, Esq., Assistant City Solicitor, City of Wilmington*

**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, ("IAFF") is an employee organization within the meaning of 1602(g) of the POFERA. By and through its affiliated Local 1590, the IAFF is the exclusive bargaining representative of all uniformed employees of the City of Wilmington Fire Department, except for the Chief and Deputy Chiefs, within the meaning of 19 Del.C. 1602(h).

At all times relevant to the processing of this Charge, the City and the IAFF were parties to a collective bargaining agreement which had a term ending June 30, 2012 but which remained in effect.

On January 19, 2016, the IAFF filed an unfair labor practice charge with the Delaware Public Employment Relations Board alleging the City had violated 19 Del.C. §1607(a)(5).<sup>1</sup> The City filed its Answer and New Matter on January 29, 2016, denying the material allegations contained in the Charge. On February 8, 2016, the IAFF filed its Response to New Matter denying that the City's assertion that the Charge was untimely.

An order of dismissal was issued by the Hearing Officer on May 2, 2016, finding the pleadings failed to support a finding of probable cause to believe that a violation of 19 Del.C. §1607(a)(5), as alleged, may have occurred.

On May 9, 2016, the IAFF requested review of the Hearing Officer's decision by the full Public Employment Relations Board ("Board"). On May 20, 2016, the City filed a written Response to the IAFF's request for review.

A copy of the complete record in this matter was provided to each member of the Board. A public hearing was convened on June 15, 2016 to hear and consider this request for review. The parties were provided the opportunity to present oral argument. The decision reached herein is based upon consideration of the record and the arguments presented to the Board.

### **DISCUSSION**

The Board's scope of review is limited to the record created by the parties and consideration of whether the decision of the Hearing Officer (acting as the Executive Director's designee) is arbitrary, capricious, contrary to law, or unsupported by the record. After review and consideration of the record and the arguments of the parties, the Board must vote to affirm,

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<sup>1</sup> §1607 (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:

- (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit.

overturn or remand the decision to the Executive Director for further action.

In order to establish probable cause to believe an unfair labor practice may have been committed, a Charging Party must set forth in its Charge facts with sufficient specificity upon which it may be concluded that the Respondent engaged in conduct in violation of its statutory obligations. This Board addressed the sufficiency of pleadings in its decision in *AFSCME Council 81, Local 3911 v. New Castle County*:<sup>2</sup>

PERB Rule 5.2(c)(3) clearly states that a Charge must include “a clear and detailed statement of the facts constituting the alleged unfair labor practice, including the names of the individuals involved in the alleged unfair labor practice, the time, place of occurrence and nature of each particular act alleged, and reference to the specific provisions of the statute alleged to have been violated.” The Rule also requires the submission of supporting documentation, where applicable. When a Charging Party chooses not to include specific information which addresses this requirement in its Charge, it acts at its peril. Sufficient information must be included in pleadings to allow a preliminary assessment of the procedural and substantive viability of the charge, i.e., the probability that there is sufficient cause to continue to process the charge.

Here, the IAFF charges the City implemented a unilateral change in a mandatory subject of bargaining, without providing notice and the opportunity to negotiate. Specifically, the Charge alleges the Chief of the Fire Department was opening the sealed envelopes containing Certification of the Health Care Provider form (which the IAFF believes to be confidential information) before the information was forwarded to the City’s Human Resources Department, which is responsible for determining employee eligibility for Family and Medical Leave.

It is undisputed that sick leave, vacation leave and other types of paid leave are matters concerning or related to wages and hours, and therefore constitute mandatory subjects of bargaining within the meaning of 19 Del.C. §1602(n).<sup>3</sup> Article 7.7(c) of the parties’ collective

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<sup>2</sup> ULP 09-07-695, VII PERB 4445, 4450 (PERB, 2009).

<sup>3</sup> “Terms and conditions of employment” means matters concerning or related to wages, salaries, hours, grievance procedures and working conditions... 19 Del.C. §1602(n).

bargaining agreement states:

If an employee is absent from work due to personal illness or illness of an immediate family member for longer than nine (9) consecutive calendar days, the firefighter shall telephone the immediate or on-duty supervisor to inform him/her of the anticipated length of continued absence due to illness. A Family and Medical Leave Act Certification of Health Care Provider Form and a City Leave of Absence Form must be received by the immediate or on-duty supervisor by the fifteenth (15) calendar day as written confirmation of the anticipated length of absence.

The pleadings establish that the forms submitted pursuant to Article 7.7(c) are placed in a sealed envelope and sent up the chain of command within the Fire Department, and then forwarded to the City's Human Resources department, where a decision is made as to whether an employee's absence from work is protected by the federal Family Medical Leave Act ("FMLA").<sup>4</sup>

The pleadings do not support the IAFF's assertion that the Fire Chief instituted a unilateral change to a mandatory subject of bargaining (i.e., paid leave of absence) when he reviewed the Certification of Health Care Provider Forms, which are referenced in Article 7.7(c). The Charge does not establish how the review of documentation by the Chief, who sits at the top of the Fire Department chain of command, has any impact on a bargaining unit employee's access to leave, or how it in any manner modifies or affects Article 7.7(c) of the parties' agreement. Article 7.7(c) is silent as to who may, or may not, have cause to review the information provided.

The IAFF concedes there was a change in the processing of the Certification of Health Care Provider Forms, and argues that this change is as important as a substantive change in the operation of the leave procedures. It also argues that because this Charge was not processed to hearing, it is unable to determine if the change has negatively affected bargaining unit members.

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<sup>4</sup> The Board takes administrative notice the Family and Medical Leave Act of 1993 is a federal law which requires covered employers to provide their employees job-protected, unpaid leave for qualifying medical and family reasons. There is no dispute in this case that the City of Wilmington is covered by the FMLA.

The Charge is, at best, speculative. If the IAFF believes that the change in the review process violates Article 7.7(c), its recourse is to the negotiated grievance procedure. The pleadings do not establish the requisite nexus between a mandatory subject of bargaining and the Fire Chief's review of records submitted for the purposes of applying for FMLA.

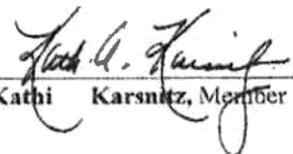
For these reasons, a majority of the Board affirms the Hearing Officer's finding that the Charge fails to allege facts with sufficient specificity on which it can be concluded there is a probability that the POFERA may have been violated.

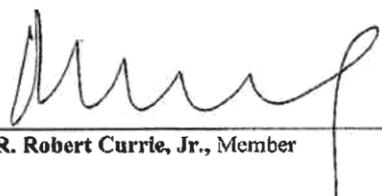
In dissenting, Chairperson Maron concludes the pleadings, when viewed in a light most favorable to the IAFF, raise sufficient factual questions to support a finding that probable cause exists to believe an unfair labor practice, as alleged, may have been committed. She would remand the charge to the Executive Director to create a record on which a decision on the merits could be made.

### **DECISION**

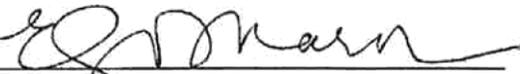
After reviewing the record, hearing and considering the arguments of the parties, the majority of the Board affirms the Hearing Officer's decision to dismiss the unfair labor practice charge because, even when viewed in a light most favorable to the Charging Party, it fails to establish probable cause to believe a violation of 19 Del.C. §1607(a)(5) may have occurred.

**IT IS SO ORDERED.**

  
Kathi Karsnitz, Member

  
R. Robert Currie, Jr., Member

Dissenting:

  
Elizabeth D. Maron, Chairperson

DATE: July 5, 2016