STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

GENERAL TEAMSTERS LOCAL 326,	:	
	:	
Charging Party,	:	
	:	**ULP No. 15-04-995**
v.	:	
	:	Decision on the Merits
CITY OF MILFORD, DELAWARE,	:	
	:	
Respondent.	:	

APPEARANCES

Jeffrey M. Weiner, Esq., for General Teamsters Local 326

Gary L. Simpler, Esq., Shawe & Rosenthal, LLP, and William W. Bowser, Esq., Young Conaway Stargatt & Taylor, LLP, for the City of Milford

BACKGROUND

The City of Milford (City) is a public employer within the meaning of §1602(l) of the Police Officers' and Firefighters Employment Relations Act (POFERA), 19 Del.C. Chapter 16. General Teamsters Local 326 (Teamsters Local 326) is an employee organization within the meaning of 19 Del.C. §1602(g) and the exclusive representative of the bargaining unit of all City of Milford police officers at or below the rank of Sergeant, within the meaning of 19 Del.C. §1602(h).

On February 19, 2014, sworn Milford police officers voted to decertify the Fraternal Order of Police (FOP) and certify Teamsters Local 326 as their exclusive bargaining representative. The existing collective bargaining agreement between the City and the FOP was effective, by its terms, from July 1, 2011 through June 30, 2014.

The parties entered into negotiations in May, 2014, for a successor agreement to the collective bargaining agreement which had been negotiated by the FOP.

On April 2, 2015, Teamsters Local 326 filed an unfair labor practice charge alleging the City violated 19 Del.C. §§1607(a)(5) and (a)(7)[1] by negotiating in bad faith.

The City filed its Answer on April 14, 2015, admitting many of the underlying facts but denying the conclusions reached by Teamsters Local 326 that the City had violated its obligations under the POFERA. The City also included New Matter in its Answer.

Teamsters Local 326 filed its Response to the City's New Matter on April 23, 2015. Thereafter, a hearing was held on June 16, 2015. The record closed following receipt of written argument submitted by the parties.

This decision is based upon review of the record created by the parties and consideration of their arguments as well as related case law.

FACTS

The facts are derived from the documentary and testimonial evidence presented during the hearing. The City of Milford, Delaware, is governed under a council-manager model. The City Manager is hired by City Council and reports directly to the Council (rather than to the Mayor). The City Manager is responsible for hiring the City's staff and for managing the City's services and operations. The Mayor is an elected official but does not vote as a member of the City Council, except to break a tie in votes.

Following the certification of Teamsters Local 326 as the exclusive representative of the

[1] 19 Del.C. §1607 Unfair Labor Practices.
(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;
(7) Refuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting contract.

bargaining unit of Milford police officers in February, 2014, negotiations for a collective bargaining agreement between these parties began in May. During the period of negotiations, the City maintained the *status quo ante* established by the predecessor agreement with the FOP. It is undisputed that the collective bargaining agreements entered into between the predecessor exclusive representative (FOP) and the City were all submitted to the City Council for approval after the tentative agreements were ratified by the union membership.

During the course of these negotiations, the City's negotiating team consisted of the City Manager, Richard Carmean (CM Carmean); the City Human Resources Director, Lisa Carmean (HR Carmean), a Milford Police Lieutenant, Ed Huey (Lt. Huey); and the City's legal counsel and chief negotiator, Gary Simpler (City's Chief Negotiator). Early in the negotiations, the City requested negotiation sessions be scheduled so that its entire team could participate in every negotiation session. The Teamsters agreed and negotiation sessions were scheduled to accommodate this condition. The parties met for purposes of negotiation on May 8, 22, and 23; July 7; August 7, 8, 22 and 28; and September 17, 2014. The breaks in the negotiation schedule was to accommodate the City's negotiating team.

The Teamsters were represented at the table by its Vice President, Len McCartney (Teamster McCartney); its Business Agent, Paul Thornberg (Teamster Thornberg); the bargaining unit's Chief Shop Steward, Tim Welsh; and Assistant Shop Steward, Brandon Hammond.

It is undisputed that at the first negotiation session on May 8, 2014, the City's counsel advised the Teamsters' team that any tentative agreements reached at the table would have to be submitted to the City Council for final approval. Both Teamsters' representatives McCartney and Thornberg testified they were on notice that the final tentative agreement was subject to approval by City Council. The City was also notified that the Union would take a tentative

agreement back to its membership for ratification.

The testimony of CM Carmean illuminated the bargaining practices of the City with the police bargaining unit since initial negotiations in 2000[2]. He was directly involved as part of the negotiating team in two sets of negotiations and oversaw the negotiation of the other agreements through his subordinates. He testified that at the beginning of each negotiation, the union was notified by the City's chief negotiator that "anything we agreed upon would have to go to the City Council for approval." He testified there was no indication given to the Teamsters in these negotiations (nor did he believe) that the City's negotiating team did not have authority to negotiate on behalf of the City. He asserted he and the City's team absolutely had the authorized right to negotiate a comprehensive tentative agreement for approval of the Council.

The negotiations between these parties were active, collaborative and by all accounts of the tenor of the negotiations, conducted in good faith during the period of active negotiations between May 8 and September 17, 2014. Both teams acted in a manner which evidenced a belief that the other side was able and authorized to make offers, to modify those offers, and to compromise in order to reach a complete and comprehensive agreement.

It is undisputed that at no point during the active negotiations did the City's team indicate that the City had an inability to afford the terms of the negotiated agreement. It did request that the cost of the wage increase in the first year of the agreement be limited to the budget which had already been approved. The Teamsters agreed and the wage increase for the first year (July 1, 2014 – June 30, 2015) was limited to the two percent (2%) allocated in the City's budget. Testimony established that CM Carmean did advise the Teamsters that the implementation of a new wage scale for the second year of the agreement (July 1, 2015 – June 30, 2016) would

[2] The City and the police bargaining unit are and have been parties to negotiated collective bargaining agreements with the following terms: 2001-2003; 2003-2006; 2005-2008 (reopener and extension of prior agreement); 2008-2011; and 2011-2014.

require additional funding but also indicated there were at least two options for securing that funding. Specifically, he testified a very slight increase in the property tax rate of 2¢ - 4¢ per $100 of appraised value was a possibility. He identified the other option to be a request by the City to have a minor adjustment to the five year agreement (then 3 ½ years into the agreement) with the State to fix the rate of transfer from the electricity revenue fund. Teamster Thornberg testified and CM Carmean confirmed that there were discussions during the negotiations that the property tax rates had not been increased for 6-8 years and that the City was considering increasing the rates for other purposes as well. CM Carmean also testified that in the past, the City Council had increased the tax rate to fund more costly tentative agreements than the one reached in these negotiations, and that he did not expect there to be a problem in securing the necessary funding in this case.

The parties discussed non-economic proposals first during their negotiating sessions on May 22 and May 23, 2014. At the next negotiating session on July 7, 2014, the parties reviewed a document prepared by the City's Chief Negotiator which set forth a summary of the status of the non-economic proposals as of July 7, 2014. The list included thirty-five (35) items, of which only three were noted as "open". Testimony established tentative agreements had been reached on the other thirty-two items. *Union Exhibit 16.*

During the July 7, 2014, negotiating session, the parties exchanged and discussed economic proposals for the first time. By email dated August 1, 2014, Teamster Thornberg provided the City's Chief Negotiator and City Manager with the union's financial proposals, and promotional procedure addendum proposal. The parties then met for negotiations on four occasions during the month of August. During these negotiations, they agreed upon a two year schedule for paying out existing holiday accruals (allowing for bargaining unit employees to designate all or a portion of their accrual to be deposited in their §457 deferred compensation

accounts) and permitting officers to only accrue up to 40 hours to be carried over in the future. The parties also agreed on a modified version of the Teamsters' promotion process.

The wage scale which had been negotiated between the City and FOP (i.e., the existing wage scale) was composed simply of a salary range assigned to each rank of four ranks (Patrolman, Patrolman First Class, Corporal and Sergeant) designating a minimum, midpoint and maximum salary for each range. The City had proposed an increase for each officer, calculated as 2% of the mid-point of the range for each rank. The Teamsters proposed to implement a new wage scale during the first year of the agreement (7/1/14- 6/30/15) which added three new ranks (Corporal 1, Corporal 2 and Sr. Sergeant) to the schedule and included annual step increases of $500 for each year of service in a rank. The Teamsters proposed across the board increases to the new scale for the second and third years of the collective bargaining agreement.

Through their negotiations, the parties ultimately agreed to the City's 2% increase under the existing scale in the first year[3]; implementation of a new compromise wage scale[4] on July 1, 2015 (adding only two new ranks: Sr. PFC and Sr. Corporal); and 2.5% increase on the new scale effective July 1, 2016.[5]

Teamsters Local 326 and the City of Milford reached a complete tentative agreement on September 17, 2014, which was subject to ratification by the membership of Teamsters Local 326 and approval by the City Council. CM Carmean testified the City's negotiating team believed the tentative agreement reached on September 17, 2014, was reasonable and that he was

[3] The testimony established that the Teamsters acceded to the City's request to limit the first year because the FY 14-15 budget had already been adopted and accepted the City's assertion that it would be hard to find additional moneys in that budget.

[4] Notes from the negotiations placed in the record evidence the parties spent a great deal of time discussing and ultimately compromising to reach agreement on the structure and composition of the new wage scale, ultimately reaching a final agreement on September 17, 2014.

[5] The Teamsters had initially proposed a 5% increase, reduced their proposal to 3.5%, and ultimately agreed to the City's proposed 2.5% across-the-board increase on the wage scale for the third year of the agreement.

optimistic the City Council would approve it. He testified he did not regularly meet with the City Council or advise members on progress during the course of the negotiations because,

> …[T]he practice has been during my involvement in these that the negotiations are done, they're made, the agreement, a tentative agreement is reached. We take the whole package back to Council.
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> We've got eight people there and to try to involve them in the negotiations process is kind of like, on each and every issue as it comes up, would take a lot of time and effort. And they would rather see it as a contract, and then they make a decision whether they can accept it or not.
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> …[M]y experience with the Council and the three person police committee, usually the police committee are doing what they can to support the police effort and the police employees.[6]

The agreement was ratified by the union membership in early October. By email dated October 8, 2014, Teamsters' representative, Paul Thornberg, advised the City Manager Carmean and the City's Chief Negotiator that:

> The 2 day vote is complete and counted. The Officers were very happy with the direction and have agreed to it pending approval from the City Council. I will call tomorrow to check on a minor detail or two. [7]

CM Carmean testified the agreement was first presented to the Council in executive session on October 13, 2014. The City's Chief Negotiator made the presentation to Council and CM Carmean was present at the meeting. The agreement was recommended for approval by the City's negotiating team. The Council did not, however, approve the agreement on October 13. Rather, it directed CM Carmean and the Chief of Police to attempt to identify potential expenditure reductions in the police department budget to mitigate the increased costs of the proposed agreement. This directive and concern about the costs of the agreement were not communicated back to the union at this time.

Thereafter, CM Carmean, the Chief of Police, and the City's Finance Director met to

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[6] Transcript, p. 161.

[7] Exhibit A to the City's Answer.

review the police department's budget. CM Carmean testified the police budget is largely driven by personnel costs; consequently, no significant cost savings were identified. CM Carmean and the Chief of Police reported back to City Council in an executive session in December.

CM Carmean did have a discussion with Teamster McCartney at some point in November[8], during which he advised McCartney that he believed some members of City Council were concerned about the cost of the agreement.

It is unclear from the record when the City Council actually voted to reject the tentative agreement and when the Teamsters were directly notified of the rejection.[9] At some point after Council's executive session in December at which CM Carmean and the Chief of Police reported sufficient cost savings could not be found in the police department budget to fund all of the economic costs of the tentative agreement, City Council voted in a public session to reject the agreement. CM Carmean testified he believed he contacted Teamster Thornberg to notify him of the Council's vote, but he was not certain of the dates.

On January 12, 2015 (more than three months after the union had conducted its ratification vote), counsel for the Teamsters contacted the City's counsel:

> … As you know better than I, the City of Milford's Executive Branch and Local 326 negotiated and reached agreement upon a new Collective Bargaining Agreement which the City's Legislative Branch has not yet passed. Despite the passage of time, Local 326 has not received any information as to any terms and conditions which the City Council would appreciate an explanation or alternatively find objectionable. Therefore, in one word, the parties are at impasse.
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> Accordingly, Local 326 has retained my services to represent the Milford Police Officers in Binding Interest Arbitration, which based upon the agreement achieved with the Executive Branch, will involve City Council and other counsel I assume.

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[8] Union Exhibit 39.

[9] CM Carman testified he recalled that the Council vote may have been in December. The Teamsters assert Council did not reject the tentative agreement until the January 26, 2015 meeting. No documentation was provided to establish when the Council voted to reject the agreement.

> Nevertheless, since before the disagreement between the Executive and Legislative Branches, you apparently represented the City generally, as a professional courtesy I am forwarding to you with this email the Petition which Local 326 has authorized me to file unless tomorrow after tonight's Council Meeting, Local 326 receives a positive response that this impasse is (and how will*[sic]* be) resolved in the very near future to the mutual satisfaction of the parties. [10]

On January 26, 2015, representatives of the City and Teamsters met at which time the City "modified its economic proposal consistent with the instructions provided by the City Council." *City New Matter ¶8.* Teamsters Local 326 assert it was advised at this meeting by city representatives that, "(a) City Council had rejected the agreement in principle; (b) the explanation was that the City could not afford the agreement in principle and would not raise taxes to pay for it; (c) that the entire agreement in principle was not acceptable; (d) that the only acceptable change to the prior Collective Bargaining Agreement was a 2% midpoint at each rank; and (e) the only matter for discussion was a bonus or incentive for officers to move back within the City limits." *Teamsters Response to New Matter ¶8.*

ISSUE

WHETHER THE CITY OF MILFORD VIOLATED ITS STATUTORY OBLIGATION TO NEGOTIATE IN GOOD FAITH AND/OR TO EXECUTE A COLLECTIVELY BARGAINED AGREEMENT IN VIOLATION OF 19 DEL.C. §1307(A)(5) AND/OR (A)(7), AS ALLEGED.

DISCUSSION

The State has declared that it is the policy and purpose of the *Police Officers and Firefighters Employment Relations Act* (POFERA) to promote harmonious and cooperative relationships between public employers and their police and firefighting employees, and to

[10] Exhibit A to the City's Answer.

protect the public interest in orderly and uninterrupted public safety services by:

1) Granting to police officers and firefighters the right of organization and representation;
2) Obligating public employers and organizations of police officers and firefighters which have been certified as representing their employees to enter into collective bargaining negotiations with the willingness to resolve disputes relating to terms and conditions of employment and to reduce to writing any agreements reached through such negotiations; and
3) Empowering the Public Employment Relations Board to assist in resolving disputes between police officers or firefighters and their public employers and to administer this chapter. 19 Del.C. §1601.

The POFERA defines collective bargaining to mean "…the performance of the mutual 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." 19 Del.C. §1602(e). Neither party, however, is compelled by statute to agree to a particular proposal or required to make a particular concession during the course of bargaining.

The mutual duty to enter into good faith negotiations is clearly set forth by the specific prohibition on either side to refuse to bargain collectively in good faith with the representative of the other side. 19 Del.C. §1607(a)(5) and (b)(2). It is also an unfair labor practice for either party to "refuse to reduce an agreement, reached as a result of collective bargaining to writing and sign the resulting contract." 19 Del.C. §1607(a)(7) and (b)(4). There is no statutory requirement for ratification or approval by either party after an agreement is bargained by their designated representatives. Where there is an organizational requirement for final approval by a body other than the negotiating team, that condition is customarily conveyed early in the negotiations process, or may be included in the collective bargaining agreement in an article concerning successor negotiations.

The Charge alleges the City violated its obligations under the POFERA by negotiating in

bad faith to an agreement in principle which included modifications to the wage scale and other economic terms, at no time indicating the City was unable to afford the terms which it negotiated. It also asserts the City Council, by summarily rejecting the agreement which its agents had negotiated on the Council's behalf, violated the statute by refusing to reduce an agreement reached in negotiations to writing and signing that contract. 19 Del.C. §1607(a)(7).

The City argues approval by its City Council is required in order to achieve a final and binding collective bargaining agreement; the Council's rejection of the tentative agreement means there is no final and binding agreement. Consequently, the City argues, the unfair labor practice complaint should be dismissed and the parties should be directed to resolve their impasse through the mediation and, if necessary, the binding interest arbitration procedures set forth in 19 Del.C. §1614 and §1615, respectively.

The current unfair labor practice charge raises a question as to when or if an enforceable agreement came into effect between these parties, following ratification of the tentative agreement by only the union.

A careful review of the Chancery Court of Delaware decision in *Colonial Food Service Workers Association, DSEA/NEA v. Colonial Board of Education*[11], reveals that the issue before the Court in that matter is not identical to the pending unfair labor practice charge. In *Colonial*, the Court was asked to determine whether a binding agreement came into effect at the time of the union's ratification. The Board of Education had rejected approval of the agreement ratified by the union, asserting that the information provided to the union membership concerning the payment of a representation fee to the union was not consistent with its understanding of the negotiated contractual provision; consequently, there was no binding agreement between the parties. Specifically, the Board asserted it did not understand the negotiated provision allowed

[11] 1987 WL 18431, Del.Chan., 1987.

the union to bring suit against an individual bargaining unit employee to recover unpaid representation fees. The suit brought by the union did not allege the Board had not negotiated in good faith and/or in dereliction of its obligations under the Public School Employment Relations Act.[12] Rather, the union sought to enforce what it asserted was the "clear and unambiguous agreement" reached by the parties in collective bargaining.

The Vice Chancellor found the contractual provision in question was not ambiguous and that even if the provision was omitted in its entirety from the collective bargaining agreement, the union would have had the power to bring suits to enforce the representation fee imposed under the clear language of earlier provisions.

The Public Employment Relations Board has previously ruled in cases where one of the negotiating parties has failed or declined to ratify or accept a tentative agreement. In *City of Lewes v. FOP Lodge No. 2*, [13] the FOP argued its ratification of a tentative agreement had been conditioned on subsequent finalization of draft language. The parties had reached a tentative agreement on March 30, 2007, which was ratified by the union's membership on April 4, 2007. Subsequently, the parties worked together on finalizing contractual language and on May 4 were making final arrangements to sign the agreement. However, following a meeting of bargaining unit employees with a new health benefits provider on May 7, the FOP raised a concern, for the first time, about the annual deductible under the newly negotiated health benefit plan for individuals and families. Thereafter, the FOP officers refused to sign the 2007-2010 agreement and sought to renegotiate the deductible with the City.

The PERB Hearing Officer concluded in that case that "…[i]f a mistake was made, it was a unilateral oversight by the FOP for which the City is not responsible." The union was directed

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[12] Public School Employment Relations Act, 14 Del.C. Chapter 40 (1982).

[13] ULP 07-060575, VI PERB 3925 (2008).

to execute the agreement and the City was directed to implement all of the provisions of the agreement, retroactive to its effective date.[14]

In a second case involving the failure of one of the parties to accept the terms of a negotiated agreement, PERB held in *Laurel Education Association, DSEA/NEA v. Laurel School District*[15] a binding agreement came into effect when the tentative agreement reached by the parties was ratified by the union membership. In that case, the agreement included a new provision which required that State funded custodial units could only be used for statutorily recognized custodial positions. The parties resolved their negotiations with the assistance of a PERB mediator. In submitting the impasse to mediation, the union indicated this provision had been tentatively agreed to in negotiations and the employer did not indicate it was an unresolved issue. The issue was not raised by the employer during mediation. Further, upon reaching a mediated settlement, the negotiating teams jointly reviewed and approved all the contract language before it was submitted to the bargaining unit for ratification. The employer's negotiating and review team included, in part, its superintendent and two members of the school board. The employer's argument that the successor agreement was not binding until the full Board of Education approved it at a public meeting was rejected by PERB which held,

> … The Association was reasonably entitled to rely upon the active participation of the District's team (which included two members of the Board) as evidence of that team's authority to act on behalf of the Board.

Unlike the present matter, there was no assertion that the District had placed the union on notice that a tentative agreement was subject to approval by the Board of Education before it could be executed. In fact, the Board of Education advised the union's president more than two months after the union had ratified the agreement, that the "… Board of Education has decided to

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[14] *Supra.*, p. 3941.

[15] ULP 11-11-835, VII PERB 5453 (2012).

take no action on the proposed agreement", asserting the Board needed "… time to thoroughly review the proposed contract."[16]

The acknowledgement by the parties in the present case that they discussed and were aware that a final agreement was conditioned on acceptance by the bodies they represented is a critical distinction. The National Labor Relations Board has a well-established case line addressing this issue:

> Inherent in the obligations specified in Section 8(d)[17] [*of the National Labor Relations Act,* 29 U.S.C. §§ 151-169] is the requirement that parties designate responsible representatives with 'genuine authority to carry on meaningful bargaining regarding fundamental issues." *Teamsters Local 771 (Ready-Mixed Concrete),* 357 NLRB No. 173, slip op at p. 4 (2011).
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> The Board has long recognized that an agent assigned to negotiate a collective bargaining agreement is deemed to have apparent authority to bind his principal in the absence of clear notice to the contrary. Id.; *University of Bridgeport*, 229 NLRB 1074, 1074 (1977). A principal may limit its agent's authority, however, by giving clear and timely notice to the other parties that any tentative agreement is contingent upon subsequent approval or ratification. Id.; see also *Teamsters Local 771*, 357 LRRM No. 173, slip op. at p. 5 (union agent deemed to have full authority to conclude agreement absent clear and timely notice of a limitation). To be timely, the limitations must be disclosed to the other party before an agreement is reached. See *Cablevision Industries*, 283 NLRB 22, 29 (1987) (bargaining agent with apparent authority to bind the employer unlawfully imposed a condition subsequent – approval by the board of directors – after the parties arrived at a tentative agreement); *Maury's Fluorescent,* 226 NLRB 1290, 1292 (1976) (negotiator had apparent authority to enter into a binding agreement in the absence of contrary notice). Where a party refuses to execute a duly negotiated collective bargaining agreement, the Board will direct it to do so and to give retroactive effect to the terms of the agreement. See *Cablevision Industries*, 283 NLRB at 31; *Maury's Fluorescent*, 226 NLRB at 1294.[18]

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[16] *Supra*., p. 5461.

[17] Section 8(d) of the National Labor Relations Act is substantially similar to 19 Del.C. §1602(e). It states:

> [Obligation to bargain collectively] For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

[18] *A.W. Farrell & Son, Inc.,* 359 NLRB 154 (2013).

The Court of Chancery of Delaware has affirmed the wisdom of considering precedent established under the NLRA:

> It is appropriate to look to federal precedent in resolving this novel question of state law because of the similarity in law and policy between the federal and state labor schemes. *See City of Wilmington v. Wilmington Firefighters Local 1590*, 385 A.2d 720, 723 (Del. 1978) ("This kind of controversy has been litigated elsewhere and so we look for guidance to the procedure adopted in the Federal forums and by the Courts and administrative tribunals in other States for dealing with such situations."). Federal precedent is especially useful in cases dealing with labor law given the similarities between the Federal Labor Act and Delaware's Public Employment Relations Act. *See id.* at 724 ('"In cases where problems raised under Delaware's labor law are similar to those that arise under the (federal law), Delaware could be expected to consider and, in all likelihood, follow federal law."') (quoting *Cofrancesco v. City of Wilmington*, 419 F. Supp. 109, 111 (D. Del. 1976)). *See also Del. Correctional Officer's Ass'n v. State*, 2003 WL 23021927, at *7 (Del. Ch. Dec. 18, 2003) ("Federal precedent is also helpful in assessing the appropriateness of the [Public Employment Relations Board's] decision to limit the remedy to a cease and desist order."). [19]

In one of its earliest decisions, the Delaware PERB held:

> In the absence of precedent interpreting the provisions of the Act, there is a natural and logical tendency to look to both the established federal law in the private sector and to the developing public sector law in other state jurisdictions as guidelines. As for private sector precedent, the Delaware Public Employment Relations Board stated in *Seaford Education Association v. Board of Education of Seaford School District,* (ULP No. 2-2-84, I PERB 1, 5 (1984)):
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> > While such decisions may provide such guidance, there are distinctions that exists between the public and the private sector. Experience gained in the private sector, while valuable, will not, however, necessarily provide an infallible basis for decisions in the public sector. *Appoquinimink Education Association v. Bd. of Education of the Appoquinimink School District,* ULP No. 1-3-84-3-2A, I PERB 35, 40-41. (1985).[20]

In the present matter, the Teamsters admit they knew and understood that the final

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[19] *City of Wilmington v. Wilmington FOP Lodge #1 (Captains and Inspectors)*, C.A. 20244-NC, V PERB 3077, 3088 (2004, Chan. Ct).

[20] *Polytech Custodians Assn., DSEA/NEA v. Polytech School District*, ULP 04-03-420, V PERB 3125, 3132 (2004).

agreement would require the approval of the City Council. Both Teamster representatives Thornberg and McCartney testified they were aware that a final agreement was conditioned upon ratification by the bargaining unit and approval by City Council. Because the City Council did not approve the proposed tentative agreement, the precondition was not met and no enforceable agreement was created by the exclusive ratification of the tentative agreement by the union. Consequently, the charge that the City failed to reduce to writing and sign an agreement reached through negotiations in violation of 19 Del.C. §1607(a)(7) is dismissed.

This does not, however, resolve the allegations of bad faith bargaining raised by this Charge. The Delaware PERB has a consistent line of decisions requiring parties to enter into good faith negotiations with a sincere intent to reach agreement on matters concerning and related to terms and conditions of employment. Inherent in this duty is the responsibility to send representatives to the bargaining table with the apparent and actual authority to propose, discuss, modify compromise and agree upon terms which are acceptable to their principals. This is particularly important in negotiations involving Delaware public sector employers and employees:

> The absence of the right of public employee's to engage in concerted activity in support of their positions during collective bargaining is a critical consideration. Unlike the private sector, public employees in Delaware have no meaningful leverage at the bargaining table and must rely upon the bargaining obligation imposed upon both parties to protect their collective interests.[21]

The Union argues the City failed to negotiate in good faith when it agreed to accept the Teamsters' new wage scale in exchange for the union agreeing to accept the City's proposal for a 2% increase on the existing scale for the first year of the agreement in order to stay within the constraints of the adopted budget. It also asserts that it agreed to accept the City's proposal for a

[21] *Appoquinimink Education Association, DSEA/NEA v. Appoquinimink Bd. of Education,* ULP 98-09-243, III PERB 1785, 1804 (1998).

2.5% across the board increase on the new wage scale in the third year of the agreement, moving from the union's 3.5% proposal. At no point in time during the negotiations did the City's team disclose that any wage increases or changes must be funded by a corresponding reduction in costs or expenses. The parties did discuss possible additional funding sources. The union identified salary savings which resulted from unfilled positions during the first year of the agreement and the City's team indicated a tax increase was possible and timely to meet these and other projected expenses the City expected to incur. At no point was there any conversation or disclosure by the City's negotiating team that the City did not have the ability to afford the contractual terms to which they had tentatively agreed during the negotiations.

The duty to bargain in good faith compels meaningful negotiations but does not require "either party to agree to a proposal or require the making of a concession." 19 Del.C. §1602(e). In one of the earliest cases decided by the Delaware PERB, the standard was established for evaluating the quality of negotiations when questioned by one of the parties:

> When deciding failure to bargain in good faith issues, it is necessary to examine the "totality of conduct" of the parties. *NLRB v. Montgomery Ward*, 9th Cir., 133 F.2d 676 (1943)… It is the totality of conduct that tests the quality of negotiations. Absent sufficient proof of an unwillingness by the party charged to maintain an open mind and a willingness to sincerely search for common ground upon which settlement can be based, it is not the Board's prerogative to dictate bargaining strategy. *Seaford Education Association v. Bd. of Education*, ULP 2-2-84S, I PERB 1, 7 (1984).

In *Atlanta Hilton & Tower*,[22] the National Labor Relations Board summarized the obligations of employers and unions under §8(a)(5):

> … It is necessary to scrutinize an employer's overall conduct to determine whether it has bargained in good faith. "From the context of an employer's total conduct, it must be decided whether the employer is lawfully engaging in hard bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement." A party is entitled to stand firm on a position if he reasonably

[22] 271 NLRB 1600, 1603 (1984).

> believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree. . . .
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> Although an adamant insistence on a bargaining position is not of itself a refusal to bargain in good faith . . . other conduct has been held to be indicative of a lack of good faith. Such conduct includes delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, and arbitrary scheduling of meetings.[23]

In *Health Care Services Group*, the NLRB affirmed the administrative law judge's opinion which found the employer's withdrawal from all of the tentative agreements it had reached with the Union and the apparent lack of authority given to its chief negotiator to commit the employer to any proposals in negotiations was an indicia of bad faith. It did not find a lack of good faith in the employer's chief negotiator obligation to keep his supervisor informed of all tentative agreements. Nor was it necessarily an indication of bad faith for the employer's chief negotiator to ask the Union to revisit a limited number of issues after his supervisor's review. What did indicate a lack of good faith was the employer's chief negotiator's lack of authority to commit the employer to any proposals and the delay in raising objections and making counteroffers to union proposals on which there had been tentative agreement.

Repudiating tentative agreements is not bad faith bargaining *per se*, but is a factor that together with others might establish bad-faith, or regressive bargaining. Withdrawing from a comprehensive tentative agreement requires a good cause to do so and the absence of good cause can render the withdrawal an unfair labor practice in violation of Section 8(a)(1) and (5) of the Act.[24]

The City's repudiation of the complete tentative agreement reveals a troubling lack of

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[23] *Health Care Services Group & UFCW Local 1444*, 331 NLRB 333, 335 (2000).

[24] *Homestead Nursing & Rehabilitation Center and District 1199C, National Union of Hospital and Health Care Employees*, 310 NLRB 678, 680 (1993); *Natico, Inc*., 302 NLRB 668 (1991); *Arrow Sash & Door Co*., 281 NLRB 1108 fn. 2 (1980).

communication between the City Council and its negotiating team, and calls into question whether its bargaining team had actual authority to enter into meaningful negotiations. The City's negotiating team was experienced and had successfully negotiated prior collective bargaining agreements, which the Council had approved. CM Carmean testified he approached these negotiations just as he had prior negotiations. CM Carmean also testified the City Council set no limits on its team's authority to negotiate concerning wages or costs.[25] There was a significant expenditure of time (more than five months and nine bargaining sessions) and a sincere effort by the bargaining teams to reach a tentative agreement, which the City's negotiators then recommended to the City Council for approval.

The City Council rejected the comprehensive tentative agreement *in toto*, in essence treating it only as a trial balloon. It is undisputed that after the rejection of the proposed tentative agreement, the Council directed its negotiating team to advise the union that the Council would only accept a 2% midpoint wage increase at each of the four existing ranks. After the extensive negotiations between the parties, and the union's ultimately acceptance of the City's proposals for the first and third years of the contract, as well as the City's proposed modifications to the new wage scale, this direction to its team can only be characterized as regressive.

There is no doubt that the City's legislative body, its Council, is responsible for the expenditure of funds by the City. It is also responsible, however, to authorize representatives to negotiate in good faith on its behalf under the POFERA. It is a slippery slope to send agents into negotiations without instructions or parameters. When the totality of the City's conduct in these negotiations is examined, the record supports the conclusion that the City failed to bargain in good faith when it sent agents into negotiations with apparent but no actual authority to negotiate concerning wages and other terms and conditions of employment, repudiated the entire tentative

[25] Transcript, p. 121.

agreement, and then directed its team to engage in regressive negotiations.

As the statute specifically precludes this agency from entering an order in an unfair labor practice proceeding the effect of which is to compel concessions on any items arising in collective bargaining between the parties involved,[26] the City is hereby ordered to cease and desist from failing or refusing to meet its collective bargaining obligations under the POFERA, to return to the bargaining table with a fully authorized negotiating team, and to enter into good faith negotiations for a successor agreement to the collective bargaining agreement which expired on June 30, 2014.

CONCLUSIONS OF LAW

1. The City of Milford, Delaware, is a public employer within the meaning of 19 Del.C. §1602(l).

2. General Teamsters Local 326 is an employee organization within the meaning of 19 Del.C. §1602(g) and is the exclusive bargaining representative of a bargaining unit of Milford police officers at or below the rank of Sergeant, within the meaning of 19 Del.C. §1602(h).

3. The City Milford, through its bargaining team, gave clear and timely notice to the union's bargaining team that City Council approval was required to effectuate a final agreement on the terms and conditions of a successor collective bargaining agreement.

4. The parties reached a comprehensive tentative agreement on all terms of a

[26] 19 Del.C.§1608(b)(1)(b): If, upon all the evidence taken, the Board shall determine that any party charged has engaged or is engaging in any such unfair practice, the Board shall state its findings of fact and conclusions of law and issue and cause to be served on such party an order requiring such party to cease and desist from such unfair practice, and to take such reasonable affirmative action as will effectuate the policies of this chapter, such as payment of damages and/or the reinstatement of employee; provided, however, that the Board shall not issue:

> b. Any order, the effect of which is to compel concessions on any items arising in collective bargaining between the parties involved.

successor agreement on or about September 17, 2014. That tentative agreement was ratified by the union's membership on or about October 8, 2014.

5. Thereafter, the City Council rejected the tentative agreement.

6. Because the City Council did not approve the tentative agreement, the required precondition was not met and no enforceable contract was created by the exclusive ratification of the union's membership.

7. Consequently, the City did not violate its statutory obligation to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting contract. The charge that the City violated 19 Del.C. §1607(a)(7) is dismissed.

8. The City failed to bargain in good faith when it sent agents into negotiations with apparent but no actual authority to negotiate concerning wages and other terms and conditions of employment, repudiated the entire tentative agreement, and then directed its team to engage in regressive negotiations. By these actions, the City has violated its obligation to bargain in good faith under the Police Officers and Firefighters Employment Relations Act and 19 Del.C. §1607(a)(5).

WHEREFORE, the City of Milford is hereby ordered to take the following affirmative steps:

1. Cease and desist from engaging in conduct which violates 19 Del.C. Section 1607(a)(5).

2. Promptly return to the bargaining table with a fully authorized negotiating team, and enter into good faith negotiations for a successor to the collective bargaining agreement which expired on June 30, 2014.

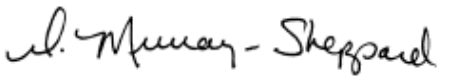
3. Immediately post the Notice of Determination in all areas where notices affecting employees in the bargaining unit represented by General Teamsters Local 326 are normally

posted throughout the City and in its administrative offices. These notices must remain posted for a period of thirty (30) days in order to provide notice to all affected employees of the decision in this matter.

4. Notify the Public Employment Relations Board in writing within thirty (30) calendar days of the steps taken to comply with this Order.

IT IS SO ORDERED.

DATE: January 26, 2016



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