

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

WILMINGTON FIREFIGHTERS ASSOCIATION, LOCAL 1590,	:	
	:	
Charging Party,	:	
	:	
v.	:	<u>U.L.P. No. 93-06-085</u>
	:	
CITY OF WILMINGTON,	:	
	:	
Respondent.	:	

The Wilmington Firefighters Association, IAFF, (hereinafter "WFFA" or "Charging Party") is an employee organization within the meaning of §1602(f) of the Police Officers' and Firefighters Employment Relations Act, 19 DeL.C. Chapter 16 (hereinafter "Act").

The City of Wilmington (hereinafter "City" or "Respondent") is a public employer within the meaning of §1602(1) of the Act.

On June 4, 1993, Charging Party filed an unfair labor practice complaint with the Public Employment Relations Board (hereinafter "Board"). The charge alleges a continuing course of conduct by the Chief and the Deputy Chief of the Wilmington Fire Department which constitutes a campaign of harassment and intimidation of the union president, and other officials of the WFFA in violation of §§1607 (a)(1), (a)(2), (a)(3) and (a)(5) of the Act, which provide:

(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.
- (2) Dominate, interfere with or assist in the formation, existence or administration of any labor organization.
- (3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or

other terms and conditions of employment.

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

The WFFA amended its charge on August 4, 1993.

On June 16, 1993, the Respondent filed its Answer denying the charge. Its Answer to the Amended Charge was filed on August 13, 1993.

The Public Employment Relations Board (hereinafter "PERB" or "Board") issued a Probable Cause Determination on July 28, 1993, holding that the pleadings were sufficient to establish that an unfair labor practice may have occurred, pursuant to Rule 5.6 of the Rules and Regulations of the Delaware Public Employment Relations Board.

The PERB rejected the City's argument that the charge should be dismissed because the specific incidents alleged in the complaint were proper subject matter for the grievance procedure and/or constituted the exercise of rights reserved to management by §1605, Employer Rights, of the Act. The City's assertion that the PERB's limited discretionary deferral policy should be expanded to apply to the immediate charge was also rejected.

The hearing in this matter was conducted on September 15, September 16, October 4 and October 8, 1993. The parties filed responsive simultaneous briefs with the final briefs being received on February 18, 1994.

BACKGROUND

Wayne R. Warrington is the President of Wilmington Firefighters Association, Local 1590, IAFF, the exclusive bargaining representative of the firefighters in the ranks of Firefighter, Lieutenant and Captain (except for the Chief's Aide, regardless of his/her rank) employed by the Fire Department of the City of Wilmington. Michael McNulty serves as the WFFA's Vice President and Vincent Carroccia as the

Secretary-Treasurer for the Union. John Trzcinski served on the current WFFA bargaining team prior to his leaving the Fire Department on August 20, 1993.

On January 8, 1993, James T. Wilmore was sworn in as the Chief of the Wilmington Fire Department, having been appointed by the newly elected mayor of the City. In February, 1993, Chief Wilmore appointed Clifton Armstead to the position of Deputy Chief of Operations. Mr. Armstead is the immediate past Vice President of the WFFA having relinquished that post upon appointment Deputy Chief of Operations for the Department.

The WFFA and the City of Wilmington were parties to a collective bargaining agreement for the term of July 1, 1990 through June 30, 1993. The parties have been and continue to be engaged in negotiations for a successor agreement at the time of this decision.

Following a January 25, 1993, Labor-Management meeting, Chief Wilmore met privately in his office with President Warrington. During their discussion, Mr. Warrington informed Chief Wilmore that approximately one half hour after a residential fire at 35th and Madison Streets, he had taken a reporter from a local newspaper through the fire scene in order to explain the effects of a "flashover". Citing the provisions of the Rules and Regulations of the Fire Department which state that only the officer in charge of a fire has the right to make statements to the press, Chief Wilmore verbally reprimanded Mr. Warrington for his conduct and admonished him not to speak with the press in this manner in the future.

On January 30, 1993, President Warrington went to the scene of the American Appliance fire while he was off duty, consistent with his contractual right to inspect the work site of bargaining unit members. It was a very cold night and the fire fighting effort had been on-going for some time. The City acknowledged that when President Warrington arrived, the fire fighting effort was in a defensive mode and numerous firefighters were at rest from their duties. As a result of his conversations

with these firefighters, President Warrington inquired of Chief Wilmore about the availability of dry gloves. Upon a second request, the Chief responded that gloves were being taken care of. A short time later, Mr. Warrington approached the Chief's Aide, again requesting dry gloves and also coffee for the firefighters. Mr. Warrington's conversation with the Chief's Aide was overheard by Battalion Chief Giles, the operational officer at this fire scene, who reported the conversation to Chief Wilmore. Following Battalion Chief Giles' brief conversation with Chief Wilmore, the Chief directed President Warrington to refrain from talking to anyone but him at the fire scene. At that point, Mr. Warrington departed.

Following this incident, President Warrington wrote a letter to Chief Wilmore protesting the Chief's directives of January 25th and January 30th, as described above. WFFA Exhibit A. Mr. Warrington requested that "... if it is your [Wilmore's] wish not to have me on the fire grounds on my own time and not to talk to my union members and not to talk with reporters about anything, then I would like it in writing". Referring to his conversation with the Chief on January 25, Mr. Warrington also requested a meeting with Chief Wilmore and Deputy Chief Armstead to discuss this and other issues, in an effort to comply with the Chief's request that they sit down and discuss problems prior to the implementation of the grievance procedure. Mr. Warrington received no response to his request.

Thereafter, President Warrington was transferred from Station 3, Engine Company 3 to Station 4, Engine Company 4. At Station 3, the City had afforded him the convenience of a small area with a desk and typewriter in which he was permitted to conduct union business. Similar facilities were not made available at Station 4.

Stations 3 and 4 are both located in District 1, where the commanding officer is Battalion Chief Giles. These stations normally respond together to fire alarms and house fires. No rationale was requested or given for this transfer.

On March 22, 1993, during a WFFA meeting, union members discussed requesting a formal investigation of a December 29, 1992, residential fire in which Firefighter James Brown had been badly injured. Then Lieutenants Wilmore and Armstead were the officers in charge of managing that fire. Lieutenant Edward Hojnicky, Jr., was among the firefighters supporting the request for investigation. On March 23, Deputy Chief Armstead approached Lt. Hojnicky and advised him that "people who make waves don't get ahead". During the course of a conversation on March 24, Chief Wilmore told Lt. Hojnicky that he should have talked to the Chief before asking for an investigation of the fire. On March 26 while at Lt. Hojnicky's worksite at Station 4, Deputy Chief Armstead and Chief Wilmore both advised Lt. Hojnicky it was not in his best interest to have the WFFA involved in the investigation of the fire.

At 4:00 p.m. on March 22, President Warrington received a phone call at home from an officer at Station 4, ordering him to report to the Rescue Squad at Station 1 for his regularly scheduled night shift. He was advised that the Chief had ordered him detailed to the Rescue Squad. Mr. Warrington went to Station 4 to pick up his equipment. When he questioned Battalion Chief Giles, he was told him that he did not know the reason Firefighter Warrington was detailed to the Rescue Squad. Firefighter Warrington then reported to his new assignment at Station 1. Battalion Chief Patrick, the officer in charge of the Rescue Squad advised Warrington that he would require extensive training on the apparatus used by the Rescue Squad because he was unfamiliar with this equipment and had very limited experience in its operation.

Within two days of his detail to the Rescue Squad, Firefighter Warrington telephoned Deputy Chief Armstead at his home to ask why he was transferred. Deputy Chief Armstead allegedly told Mr. Warrington never to question his orders but did not provide a reason for the reassignment. At a later time, Deputy Chief Armstead

told Warrington he had been transferred to "booster" the Rescue Squad. Mr. Warrington received no other explanation for his transfer.

The Rescue Squad responds to every alarm, including fires and accidents. The firefighters assigned to the Rescue Squad undertake search and rescue functions, emergency medical procedures, assist engine and ladder companies in fighting fires and otherwise provide additional manpower to augment the operations of the engine companies. Because they respond to every alarm, firefighters assigned to the Rescue Squad are generally released from a fire scene before the engine companies. The Rescue Squad responds to approximately twice the number of alarms as Engine Companies 3 and 4. The average age of the firefighters assigned to the Rescue Squad was 28 years old prior to Firefighter Warrington's reassignment. At the time of his transfer, Firefighter Warrington was 54 years of age and had a known medical history of heart problems.

Under prior administrations, transfers were normally effective on or about the first of January in order to enable the companies to coordinate the vacation schedules of the firefighters. Other transfers and details occurred throughout the year generally as a result of personnel problems. Firefighter Warrington's transfer was one of six made on March 22, including that of Firefighter Danylow, who was displaced from the Rescue Squad to Engine 4 by Firefighter Warrington's reassignment. Firefighter Danylow had served his entire four to five year tenure with the Fire Department assigned to the Rescue Squad.

On March 30, Firefighter Warrington filed a grievance, alleging that his transfer from Station 4 to the Rescue Squad was a violation of Article XX, §1 of the contract, which prohibits discrimination because of union activity. While the City acknowledges receipt of this grievance in its Answer to the charge, no hearing was ever held on this grievance. The grievance was ultimately dismissed by Chief Wilmore upon Firefighter Warrington's retirement from the Department.

Between April 1 and April 30, 1993, the WFFA filed at least four grievances. These grievances involved questions concerning the alleged misapplication of bereavement benefits, contractual overtime provisions, docking of a firefighters pay upon exhaustion of sick leave days, and an alleged violation of the Fair Labor Standards Act ("FLSA") for failure to compensate firefighters who attended training sessions on their scheduled days off. No hearings were convened on the first three grievances described above. The fourth grievance concerning compensation of attending training sessions (the "HazMat grievance") was heard at the Step 1 on May 20.

By letter to Chief Wilmore dated April 13, 1993, the WFFA formally requested an investigation of the fire in which Firefighter Brown was injured. On April 16th, President Warrington sent to Chief Wilmore a second request for an investigation.¹ By letter dated April 20, Chief Wilmore responded to the WFFA's request with a memo detailing the results of the investigations which the Department had undertaken to that point. President Warrington responded in a letter dated April 20 that the questions raised by the WFFA were not adequately addressed by the Chief's letter. He again requested a complete investigation of the fire. On April 23, Chief Wilmore sent a memo to President Warrington requesting that he set up an appointment to meet with the Chief to discuss the investigation. President Warrington never scheduled this appointment.

On April 30, the WFFA filed the "HazMat" grievance which alleged that the City had violated the FLSA and the contract by failing to compensate Firefighters Whye, Dempsey, Cooper, Donahue and Lt. Hojnicky for their attendance at a hazardous

¹ This second request for an investigation contains a typographical error in that it is dated April 26, 1993. President Warrington testified that this correspondence was prepared and sent on April 16.

materials training course on their scheduled days off. The grievance was filed by the WFFA as group grievance.

On May 7, 1993, Chief Wilmore sent a memorandum to President Warrington requesting that the WFFA discontinue the use of the phrase "Wilmington Firefighters" in its on-going telephone fund raiser. The memo concluded:

Under the advice of the City Law Department, in all future solicitations, please state that you are representing Local #1590 of the Wilmington Fire Department.

On May 9, subsequent to the City's receipt of the April 30 HazMat grievance in which Lt. Edward Hojnicky is a named party, the WFFA alleges that Deputy Chief Armstead approached Lt. Hojnicky and told him the grievance would not be successful. Deputy Chief Armstead is further alleged to have told Hojnicky that the Fire Department was a dictatorship and that, under penalty of discipline, Hojnicky should never question Armstead's orders.

By memoranda dated May 12 and May 13, respectively, Firefighters Fredrick Cooper and Michael Donohue advised Deputy Chief Armstead that neither had agreed to be a named grievant in the HazMat grievance.

On May 20, 1993, a Step 1 grievance hearing was convened by Deputy Chief Armstead on the HazMat grievance. Deputy Chief Armstead ordered the five persons named in the grievance to attend the hearing. He opened the hearing by reading the memoranda from Firefighters Cooper and Donahue and then asked each named firefighter his position on the grievance. The WFFA took the position that this was a group grievance and that it, therefore, was the grievant and the representative of the affected parties. The hearing became contentious with Deputy Chief Armstead and President Warrington engaging in heated arguments over the proper filing of the grievance and the application of the FLSA and the contract.

President Warrington ultimately stated his intention to pursue the grievance to Step 2 as it was not being resolved at Step 1. As he was preparing to leave, he asked

Deputy Chief Armstead to read and familiarize himself with the contract. Deputy Chief Armstead responded by advising the union president that he was familiar with the contract and that it was in President Warrington's best interest to shut his "big fat mouth". President Warrington responded by calling Deputy Chief Armstead an "asshole".

Deputy Chief Armstead told President Warrington he would have him suspended for insubordination because of the remark. Warrington argued with Armstead that the charges could not be brought because the comment was made during the course of the grievance meeting.

Following this exchange, President Warrington left the hearing room and went directly to Battalion Chief Doyle's office on the opposite side of the Public Safety Building. Deputy Chief Armstead returned to his office.

When President Warrington arrived at Doyle's office he was escorted into the Internal Affairs Office by Battalion Chief Wright. Firefighter Warrington was visibly upset and began explaining Deputy Chief Armstead's threat to place charges against him to Battalion Chief Doyle. At some point during the conversation, Battalion Chief Wright left the room.

Within a short time, Deputy Chief Armstead also arrived at Battalion Chief Doyle's office. Battalion Chief Wright followed him into the room. Deputy Chief Armstead was also visibly upset and ordered Battalion Chief Doyle to suspend Firefighter Warrington for insubordination, relating that Warrington had called him an "asshole". At Armstead's order, Doyle told Warrington he was suspended with pay and that a presuspension hearing would be convened. At this point, Firefighter Warrington got up from his chair and approached Deputy Chief Armstead, arguing that he could not be suspended for comments made during a grievance meeting. He and Deputy Chief Armstead stood "toe-to-toe" arguing loudly. The argument resulted in President Warrington being shoved backwards by Deputy Chief Armstead. At that

point, Battalion Chief Doyle physically placed himself between the two men and instructed Battalion Chief Wright to escort Deputy Chief Armstead from the office.

Following the shoving incident on May 20, President Warrington reported to the City's medical dispensary, complaining of shoulder pains. On May 21, he was placed on injured leave and remained on leave through May 24, 1993.

On May 21, Chief Wilmore convened the presuspension hearing on the insubordination charge. This hearing resulted in President Warrington being returned to duty without loss of pay and all charges being dropped. The parties also agreed to a "cooling off" period during which Deputy Chief Armstead would be replaced as the Fire Department officer responsible for hearing Step I grievances. President Warrington memorialized this agreement to remove Deputy Chief Armstead from the Step 1 hearing in a letter to Chief Wilmore dated May 22, 1993.

On May 21, 1993, following the presuspension hearing, President Warrington and his attorney went to Municipal Court to file criminal charges against Deputy Chief Armstead. The Court Clerk told them he had been advised not to allow Mr. Warrington to file charges and to refer them to the City Solicitor's Office. The City Solicitor's office instituted a request for investigation by the Wilmington Police Department in order to ascertain whether the charge was substantial and worthy of prosecution. Following numerous conversations and correspondence, Mr. Warrington was permitted to file the criminal charges on August 30, 1993.

On May 25, Chief Wilmore determined that, based upon his medical report, Firefighter Warrington was eligible for a light duty assignment. Firefighter Warrington was assigned to Station 7, where the department's supplies and fire boat are housed. The only other employee working Station 7 was a part-time civilian, Mr. Dehadaway. While at Station 7, Chief Wilmore admittedly made numerous telephone calls to Dehadaway to ensure that Warrington was on the job site and performing his job duties.

On June 1, Chief Wilmore telephoned Firefighter Warrington at Station 7 and ordered him to report for duty at the Fire Marshall's office in the Public Safety Building on June 2.

Firefighter Warrington reported to the Fire Marshall's office as directed. During the day of June 2, Chief Wilmore telephoned Deputy Chief Eoppolo (the officer in charge of the Fire Marshall's office) and told him to have Firefighter Warrington report to his Assistant, Lt. Tickner. Deputy Chief Eoppolo conveyed the Chief's directions to Firefighter Warrington as Warrington was on his way to Battalion Chief Doyle's office. Firefighter Warrington requested and received permission from Deputy Chief Eoppolo to report to Lt. Tickner after he finished his business with Battalion Chief Doyle. As Firefighter Warrington was leaving Battalion Chief Doyle's office, he encountered Chief Wilmore. Firefighter Warrington then reported to Lt. Tickner.

Later that day, Chief Wilmore called President Warrington into his office and told him he had a problem with Warrington speaking with Doyle, the Internal Affairs Officer for the Department. He further told President Warrington that Warrington had a problem with which hat he was wearing and that Warrington did not know when to take off his union hat and put on his firefighter's hat.

During the afternoon of June 2, Chief Wilmore telephoned President Warrington and told him that he was again being placed on sick leave and was no longer eligible for light duty assignments, effective June 3.

During the period of May 20 through July 26, 1993, the parties met only once on a grievance matter. The WFFA received no response from the employer on the other grievances filed during this period. On June 15, the Step 2 hearing on the HazMat grievance was held. The Fire Chief and the Personnel Director hear Step 2 grievances under the terms of the parties' agreement. Deputy Chief Armstead also attended this Step 2 hearing.

After exhausting all of his accumulated sick leave and annual leave, Firefighter Warrington was advised by the department that he could request an additional thirty (30) days of sick leave at half pay, and an additional thirty (30) days of unpaid sick leave beyond that were available upon request. Mr. Warrington did not apply for the sick leave extension. On July 16, 1993, Wayne Warrington retired from the Wilmington Fire Department, upon exhaustion of his accumulated sick days and annual leave.

On July 18, 1993, President Warrington posted a notice to all WFFA members on the union bulletin board, which read as follows:

TO ALL MEMBERS OF LOCAL 1590 I.A.F.F.

I retired officially from the Wilmington Fire Department after thirty years as of July 16th, 1993 as a result of my personal injury caused by D/C Armstead after a grievance hearing.

The Department put me on forced sick leave and then put me on forced vacation in order to starve me out. I had no other alternative but to retire because of no-pay status as of July 17th, 1993.

This is how thirty year members get treated? Pushed, then pushed out the door, what a price to pay for being your President, however, I wouldn't have it any other way.

I will remain as your President, as long as you want me. I will still do my duty as an election International Association of Firefighters officer and I will do as is expected of me as President of Local 1590. I will continue to fight for a decent wage and decent beny's for a decent affordable retirement at the contract table. I will fight for any violations of the contract and your rights as a firefighter. I have more time than ever now that I retired as a Firefighter.

To Chief Wilmore,

Nothing has changed, only thing is that we are now sure of what hat I am wearing. Be not mistaken, it is President of Local 1590, I.A.F.F. at all times.

Sincerely and in Brotherhood,
/s/ Wayne Warrington, President

Article XXI, Bulletin Boards, §1 of the collective bargaining agreement provides:

The Employer agrees to provide reasonable bulletin board space labeled with the Union's name where notices of official Union matters may be posted by the Union.

While visiting Station 6 within a few days after July 18, Deputy Chief Armstead observed President Warrington's memo to the WFFA members. Upon reading it, he

order the battalion chiefs to remove the letter. He further issued a standing order to the battalion chiefs that all items placed on the union bulletin board had to be reviewed by the Department before being posted. Deputy Chief Armstead threatened to place disciplinary charges against any battalion chief who allowed information to be posted on the Union bulletin board which he knew to be false or for which the approval of either Deputy Chief Armstead or Chief Wilmore had not been obtained.

President Warrington grieved the removal of his retirement notification to WFFA members from the Union bulletin board. A Step II decision, dated August 26, 1993, was issued by Chief Wilmore and Deputy Director of Personnel Yanonis in which the City denied the grievance and concluded, "... an employee who misuses the bulletin board in such a manner may be subject to disciplinary action."

Chief Wilmore sent a letter to President Warrington, dated July 27, 1993, which stated:

Be aware that according to the agreement between the City of Wilmington and Local 1590 of the I.A.F.F., Article II Section I, gives clear, defined and precise guideline as to who is able to file grievances.

The above mentioned section only allows for an "opportunity for members of the Fire Department to bring forth their views relating to any unfair or improper aspect of their employment situation."

As you are now retired, please adhere to the letter of the agreement.

On June 22, 1993, Union Vice President Michael McNulty filed with Chief Wilmore for he and the WFFA Secretary-Treasurer, Vincent Carroccia, to be granted the use of union days to attend the Redman Symposium on August 7 through August 12. In a letter dated June 25, Chief Wilmore denied that request and suggested that the firefighters apply for the use of educational exchange days or exchange schedules with co-workers. On June 29, the WFFA grieved the Chief's refusal to grant the union days.

On July 27, Vice President McNulty filed a request to use educational exchange days to attend the Redman Symposium. Included on the request form was the following language:

This request for educational exchange is being submitted under protest without prejudice to the pending Union grievance involving Union days off for this organizational conference. I will pay back with my November allotted nights 5, 6, 7th.

When the request reached Deputy Chief Armstead, he telephoned Firefighter McNulty and asked why the additional language was included on the request. The Deputy Chief ordered Lieutenant Kerlin, who was assigned with Firefighter McNulty to Station 6, to listen to the telephone conversation. McNulty responded that the language was included at the recommendation of the union's attorney.

A short time after this telephone conversation, Vice President McNulty received a call from Chief Wilmore who apologized for Deputy Chief Armstead's behavior, acknowledging that it never should have happened. The Chief stated that he understood the reason for the inclusion of the language on the form. Towards the end of the shift that afternoon, Deputy Chief Armstead came to Station 6 and he and Firefighter McNulty further discussed the request for days. Deputy Chief Armstead told McNulty that he had no knowledge of Chief Wilmore's denial of union days to attend the conference.

ISSUE

1. Did the City discriminate against employees because they engaged in protected activities, as asserted in the charge, in violation of 19 Del.C. §1607(a)(3)?
2. Did the City of Wilmington interfere with, restrain or coerce employees or the Wilmington Firefighters Association, Local 1590, in the exercise of rights protected by the Police Officers' and Firefighters' Employment Relations Act violation of 19 Del.C. §1607 (a)(1) and/or (a)(2)?

3. Did the City violate its duty to bargain in good faith by failing to process grievances in accordance with the agreed upon procedure, in violation of 19 Del.C. §1607 (a)(5)?

POSITIONS OF THE PARTIES

WFFA:

The Union asserts that in a case where the employer is charged discrimination based on union activity, the test for considering whether the employer acted with "dual motives" in violation of (a)(3) was established by the National Labor Relations Board in Wright Line (251 NLRB 1083, 105 LRRM 1169 (1980), enf'd NLRB v. Wright Line, 662 F.2d 899 (1st Cir., 1981), cert. denied, 455 US 989 (1982)) and approved by the United States Supreme Court in NLRB v. Transportation Management Corp. (462 US 393, 113 LRRM 2157 (1983)) should be adopted by the PERB. The NLRB held that where the charging party establishes a *prima facie* case that the employer acted, at least in part, based upon anti-union animus, the burden shifts to the employer to prove that the same action would have taken place even in the absence of the prohibited motive. The NLRB adopted its shifting burden test based upon the proposition that the employer is best situated to make a case regarding its true motive.

The WFFA cites numerous cases supporting the proposition that an employer's discriminatory motive can be inferred from circumstantial evidence. The WFFA argues that relevant factors to be considered in assessing the employer's motivation include whether the employer had knowledge of the employee's protected activity, whether the employer was hostile towards the union, the timing and reasons given by the employer for its action. NLRB v. Omnitest Inspection Services, Inc., 937 F. 2d 112 (3rd Cir., 1991) It asserts that the record in this case is replete with episodes from which the PERB can reasonably infer that the City's actions were taken, at least in part, with an unlawful discriminatory motive.

The Union argues that the inference of an employer's unlawful motive is strongly supported by the proximity of the employee's participation in a protected activity and measures taken by the employer against that employee. The WFFA asserts that great weight should be accorded the timing of an adverse employment action. The WFFA asserts that the record in this case establishes a "stunningly obvious" link between WFFA officials engaging in protected conduct and the City's anti-union conduct. It further argues that not only the timing of the City's actions but also the nature of the actions and the pretextual explanations offered by the City compel a finding the City has engaged in unlawful acts of coercion, discrimination and retaliation against the WFFA and its leaders.

Finally, the WFFA argues that by failing to abide by the contractual grievance procedure, a mandatory subject of bargaining under the Act, the City committed a per se violation of its duty to negotiate in good faith in violation of 19 DeL.C. §1607(a)(5).

City of Wilmington:

The City argues that the Union must prove by a preponderance of the evidence on the record as a whole that the employer has engaged in conduct which may reasonably be said to interfere with the free exercise of employee rights under the Act. The City maintains that in order to prove the charge, the WFFA must show that the employees in question were engaging in protected activities, that there is a reasonable probability that the City's conduct would interfere, restrain, or coerce employees, and that the employer did not have a legitimate motive for taking the actions in question, but rather was motivated by a desire to penalize an employee for engaging in protected activities. Laidlaw Corp., 171 NLRB 1366, 68 LRRM 1252 (1968).

The City agrees with the WFFA that the decision in Wright Line (Supra.) establishes the standard for review in this case. It maintains, however, that in applying this standard of review, any inferences drawn must be supported by

substantial evidence. Citing NLRB v. Garner Tool and Dye (493 F.2d 263 (8th Cir., 1974)), defines substantial evidence as relevant evidence sufficient to support a conclusion in a reasonable mind and cautions that an inference may not result from "suspicion, surmise, implication or plainly incredible evidence", or the mere suspicion that the employer may have acted on unlawful motives.

The City denies its actions were driven by prohibited motivations. The City contends that what the WFFA asserts is union animus is merely a difference of opinion between the City and the Union over the role of management and the administration and interpretation of the collective bargaining agreement. It argues that general hostility towards the union alone does not create an inference of unlawful motive. It concludes that because the union has failed to establish that the City acted on an unlawful motive, it has failed to establish its *prima facie* case and the charge must be dismissed.

In the alternative, should the PERB find that the WFFA provided sufficient substantial evidence to establish its *prima facie* case, the City argues it has established its actions were undertaken for legitimate business reasons, regardless of the affected employees protected activities.

Finally, the City reasserts its preliminary objection to the processing of this charge, arguing that the disputes between the parties in this case should properly be settled through the contractual grievance procedure. The PERB should not be a substitute for the resolution of disputes subject to the parties' agreed upon grievance procedures. The PERB should, therefore, refrain from exercising any jurisdiction in this matter until the parties have exhausted the contractual grievance procedure.

OPINION

- I. *Did the City discriminate against employees because they engaged in protected activities, as asserted in the charge, in violation of 19 Del.C. §1607(a)(3)?*
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The WFFA charges that the City acted upon unlawful motives in violation of §(a)(3) by discriminating against employees with regards to their terms and conditions of employment for engaging in protected union activity. The WFFA alleges that the City was motivated, at least in part, by union animus and its resultant actions therefore violate the Act. While §(a)(3) prohibits employers from taking adverse actions with regard to the terms of employment of employees who have engaged in protected activities, it does not prohibit employers from applying their established rules and disciplinary standards to union activists in a manner consistent with that in which these same standards are applied to other employees. Colonial Education Assn. and Pry v. Bd. of Education, ULP 88-05-023 (Del.PERB, 1988).²

While it is unlawful under the Act to discriminate against an employee because of union activity, an employer is not prohibited from acting in the best interest of the enterprise for other reasons. In deciding (a)(3) cases the right of the employees to engage in activity protected by the Act without retaliation by the employer must be balanced against the employer's right to manage the public agency. Often, an employer charged with union animus attempts to justify its actions by claiming legitimate and substantial reasons unrelated to the employee's alleged protected activity. The issue thus becomes whether the employee's conditions of employment were adversely affected because the employer was motivated to retaliate because of

² Prior PERB holdings decided under the Public School Employment Relations Act ("PSERA"), 14 Del.C. Chapter 40, are controlling to the extent that the relevant provisions of the PSERA are identical to those of the Police Officers' and Firefighters Employment Relations Act, 19 Del.C. Chapter 16. Local 1590 v. City of Wilmington, ULP 89-05-037 (Del.PERB, 1989) at p. 8.

the employee's protected activity or for legitimate business reasons. The protections of the Act should not be construed to provide affirmative protection to the extent that an employee can place himself in a position such that legitimate employer action cannot be implemented which would otherwise affect him simply because he has engaged in protected activity. Rather, the law requires that such employee not be penalized because he has engaged in protected conduct. Wright Line, 251 NLRB 1083, 105 LRRM 1169 (1980), enforced NLRB v. Wright Line, 662 F.2d 899 (1st Cir., 1981), cert. denied, 455 US 989 (1982).³

In Wright Line, the National Labor Relations Board initially distinguished between "pretextual" and "dual motive" (a)(3) violations, noting that it is in situations involving an employer's dual motives of discrimination and legitimate business purposes that the interests of the parties most clearly conflict. The NLRB defined a "pretextual" case as one wherein the employer's asserted justification for the adverse employment action taken is "a sham, in that the purported rule or circumstance advanced by the employer did not exist, or was not, in fact, relied upon... Since no legitimate business justification for the discipline exists, there is, by strict definition, no dual motive." Id. The PERB has previously found an employer in violation of §(a)(3) in what essentially is a "pretextual case" under the Wright Line analysis. Colonial Education Association v. Bd. of Education (Supra.).⁴

³ The PERB has often repeated during its ten years of case law that decisions rendered under federal labor statutes are often useful in providing guidance and background for decisions rendered by this Board. Seaford Education Assn. v. Bd. of Education, ULP 2-2-84S (Del.PERB, 1984). It should be noted that §§1607(a)(1), (2), (3) and (5) parallel §§8 (a)(1), (2), (3), and (5) of the National Labor Relations Act, while §1603 of the POFFERA is materially similar to §7 of the federal statute.

⁴ Where the disparaging comments and threats to limit the Union President's use of contractual "association days" were prefaced by the employer's reference to the employee's protected activities and where these adverse actions were directly counter to the employer's customary method of dealing with similar situations where no protected activity was involved, the PERB found the employer's asserted justifications were clearly not relied upon by the employer in taking action against the Union President. Colonial E.A. v. Bd. of Education (Supra.)

In deciding "dual motive" cases, the charging party has the burden of proving that the employee's protected conduct was a substantial or motivating factor in the employer's adverse employment action. Even if this is the case, the employer can avoid being found in violation of the Act by proving that its action was based upon the employee's unprotected conduct as well and would have occurred even absent the protected conduct. In cases involving such complex motives, the interest of the employees in concerted activity must be weighed against the employer's legitimate business interests. In evaluating these respective interests, the NLRB adopted a shifting burden test of causality in Wright Line.⁵ The burden of proof is initially upon the charging party to establish that the employee's conduct was protected by the Act and that this conduct was a substantial or motivating factor in the employer's adverse actions. The charging party is not required to prove that the employer's action rests solely on discriminatory purposes. In order to establish what equates to a *prima facie* case of unlawful employer motivation, the employee must establish that the employee engaged in protected activity, that the employer had knowledge of the employee's protected activities, and that employee's activity was a substantial or motivating factor for the employer's actions. Goldtex v. NLRB, 145 LRRM 2326 (4th Cir., 1994). Proof of these elements warrants an inference that the employee's protected conduct was a motivating factor in the adverse personnel action and that a violation of the Act occurred.

⁵ This "shifting burden" analysis was first applied by the Supreme Court in Mt. Healthy City Bd. of Education v. Doyle (429 US 274 (1977)) to decide a case where a teacher charged that he had been discharged in retaliation for his exercise of his 1st Amendment right of free speech. While the Court acknowledged that the Doyle's constitutionally protected conduct may have played a substantial part in the school district's decision not to rehire him, that fact does not necessarily amount to a constitutional violation justifying remedial action. The Court noted, rather, that the constitutional protection is adequately afforded to the employee so long as he was placed in no worse position because of the exercise of his rights with respect to his employment than if he had not engaged in the protected conduct.

Once the charging party establishes its *prima facie* case, the burden shifts to the employer to prove that the same action would have been taken even in the absence of the employee's protected activities. Wright Line (Supra.). This shifting of the burden to the employer recognizes the fact that it is the employer who has best access to proof of its motivations. The employer can rebut the *prima facie* case either by establishing by a preponderance of the evidence that prohibited motivations played no part in its decision or by demonstrating that the same action would have occurred for a legitimate business reason, regardless of the employee's protected activity. NLRB v. Transportation Management Corp., 462 US 393, 113 LRRM 2157 (1983). The shifting of the burden to the employer to show that the same personnel action would have taken place in the absence of union activity merely requires the employer to make out what equates to an affirmative defense. Wright Line (Supra.), at note 11). The Supreme Court held the shifting of the burden to the employer once the charging party has established its *prima facie* case to be reasonable. Transportation Management, (Supra.). The Court determined it was fair the employer "should bear the risk that the legal and illegal motives cannot be separated because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing." Id.

Based upon the similarities between the Police Officers and Firefighters Employment Relations Act and the NLRA with respect to the employer prohibition from discriminating against employees because of protected activities, the analysis established by the NLRB in Wright Line and as affirmed by the Supreme Court in Transportation Management is adopted by the Delaware PERB as the standard of review to be applied in considering (a)(3) violations. In adopting this test, the PERB accepts the premise that by establishing its *prima facie* case, the charging party has produced enough evidence which, if left unexplained or uncontradicted, is sufficient to warrant the conclusion for which it was offered.

The employer is then afforded the opportunity to rebut the presumption created by the prima facie case and to establish that the action was justifiable on grounds independent of the employee's protected activity.

Having established the appropriate test for evaluating the relationship between the employee's protected activity and the employer's detrimental action, the question becomes one of evaluating the evidence presented. Several considerations are of particular significance. The charging party's prima facie case must be based upon substantial evidence. In so determining, this Board is not prohibited from drawing reasonable inferences from the evidence presented. The courts and the NLRB have held circumstantial evidence to be substantially supportive of the reasonable inference that an employer acted on prohibited motivations. An employer's shifting justification for its adverse actions was cited as strengthening the inference that the true reason for the employer's action was union activity. Abbey Transportation Services, Inc. v. NLRB (837 F.2d 575 (2d Cir., 1988)). The proximity in time between an employees protected activity and adverse employment actions have also been used to lend support to the inference that an unfair labor practice has been committed. NLRB v. Tennessee Packers, Inc., 390 F.2d 782 (6th Cir., 1968); Jim Causley Pontiac v. NLRB, 620 F.2d 122 (6th Cir., 1980); NLRB v. Aquatech, 926 F.2d 538 (6th Cir., 1991). Union animus can be inferred from the inconsistencies between the proffered justifications and other actions taken by the employer. Turnbull Cone Baking Company, 778 F.2d 292 (6th Cir., 1985). Any inferences drawn by the PERB must be supported by substantial evidence on the record as a whole such that the evidence is adequate in a reasonable mind to support the conclusion reached. Aquatech; GSX Corp. v. NLRB, 918 F.2d 1351 (5th Cir., 1990). However, while reasonable inferences can be drawn from both the direct and circumstantial evidence, such inferences may not be accumulated and assembled to reach a finding which constitutes no more than educated conjecture. NLRB v. Garner Tool and Dye,

494 F. 2d 263 (8th Cir., 1974). Consequently, circumstances that merely raise a suspicion that an employer may have acted on prohibited motives are not sufficient to support that inference. Id.

The WFFA charges that the Chief and Deputy Chief of Operations of the Fire Department have engaged in numerous and repeated acts which adversely affected the employment conditions of WFFA officers and members which were undertaken in response to the employees' protected union activities. In satisfying the criteria necessary to establish a *prima facie* case, it is undisputed that when they took office, the new administration of the Fire Department knew the identities of the union officers and were aware that these employees engaged in activities representing the union. This case differs from many of the cases cited by the parties in that the City of Wilmington and the Wilmington Firefighters Association have a long standing and effective collective bargaining relationship. The WFFA charges that this relationship changed when the administration of the Department changed. If proven, these charges are particularly troubling as both the new Chief and Deputy Chief are long time employees of the Department. The Deputy Chief is the immediate past Vice President of the union and could have served to provide the new administration with a liaison to the union leadership to foster an even more successful and cooperative relationship between the parties. The record makes it abundantly clear that this has not occurred; but rather, the relationship has seriously deteriorated in the period defined by this charge.

The third requirement of the *prima facie* case requires the charging party to establish that the employer has acted upon union animus. The record as a whole evidences that from the beginning, the present administration has harbored concerns that established union activities would have a negative impact on the operations of the Fire Department. Chief Wilmore testified the initial transfer in February of 1993 of President Warrington from Engine Company 3 to Engine

Company 4 was undertaken as a result of conversations between himself, Deputy Chief Armstead and Battalion Chief Giles wherein they discussed a concern that Engine Company 3 would be shorthanded because two of the employees assigned to that company were union officials.⁶ The Chief testified that the union functions of concern were regularly scheduled union meetings of which the administration admittedly had advance notice sufficient to schedule alternative manning. The City produced no evidence that the problem of undermanning at Engine 3 was an issue which negatively impacted the operations of the department in the past. It is uncontroverted that while at Station 3 the union president was provided access to a small area with a desk and other office conveniences where he was permitted to conduct union business. Union members were aware of this arrangement and often made use of it in bringing concerns to the union officers. The City did not refute the WFFA's assertion that Station 4 did not afford these conveniences or access for union members.

Further and perhaps most telling is the admitted failure of the transfer of the union president to accomplish the goal of correcting the perceived manning problem identified by the Chief as the reason for the transfer. Even accepting the City's justification for Mr. Warrington's transfer from Engine 3 to Engine 4 as plausible, it is inconceivable that in addressing the administration's perceived problem the Chief of the Department, the Deputy Chief of Operations and the Battalion Chief responsible for District 1 (which includes both Stations 3 and 4) lost sight of the fact that Engines 3 and 4 primarily respond to the same fire alarms. Chief Wilmore and Deputy Chief Armstead admit that the transfer of the union president had negligible, if any, impact on the problem of reduced staff at the stations during union functions.

⁶ The two employees in question were Union President Warrington and a Lieutenant who was a member of the WFFA's Executive Board.

The same rationale was relied upon by the administration to support its detailing ⁷ of President Warrington to a second new assignment in March, 1993. The detail of President Warrington to Rescue Squad 1 occurred immediately following a union meeting at which the union members first discussed requesting a formal investigation of a fire at which a firefighter had been seriously injured. Battalion Chief Doyle, the officer of the Fire Department responsible for Data and Statistics, testified that the Rescue Squad responds to approximately twice the number of calls as Engine Company 4. It is undisputed that until Mr. Warrington's detail, the staff of the Rescue Squad was composed of younger members of the Fire Department in their late 20's and 30's. Mr. Warrington had been a member of suppression companies throughout his thirty years with the Fire Department and had limited, general experience with the equipment and procedures of the Rescue Squad. He was advised by the Battalion Chief in charge of the Rescue Squad that his detail to the squad required that he undergo extensive training in order to become an effective working member of that squad.

At the time of this second reassignment, President Warrington requested of his Battalion Chiefs to know the reason for his detailing to Rescue Squad. They did not know. He next called Deputy Chief Armstead and inquired about the reasons for his transfer. He was told only that his presence would "booster" the company.⁸ President Warrington filed a grievance protesting his detail to Rescue Squad on March 30, 1993.

⁷ During the hearing it was explained that when an employee is transferred, it is a permanent assignment and his records are also transferred to the new station. A detail on the other hand was described as a temporary situation where the employee's records remain at his "home" station and he serves for a period of time at the new location. This distinction was less clear in this instance as Mr. Warrington asserted, without refutation by the City, that his records were transferred to the Rescue Squad. His detail was also termed a "long-term detail", a phrase which apparently is not a generally understood term with in the WFD.

⁸ At the time of his detail to the Rescue Squad, Firefighter Warrington was at least fifteen years the senior of other employees assigned to the Squad.

The City admits receiving the grievance in its Answer, although during his testimony Deputy Chief Armstead, to whom the grievance was addressed denied its receipt. President Warrington never received a response to this grievance nor was a hearing convened within the contractual procedures. Further, Chief Wilmore initially testified that he had advised President Warrington of the reasons for his transfer in a conversation. However, he changed his testimony on redirect admitting that he never gave the union president any reason underlying the detail and had no knowledge that anyone else in the department had done so. Such shifting and unsubstantiated justifications for an employer's actions strengthen the inference that the true motivating factor was the employees protected union activity. Abbey Transportation (Supra.) Further, it is impossible to ignore the fact that President Warrington's second transfer occurred on the same day that the union began discussing formal investigation of a fire which could be construed as calling into question prior actions of top officers of the current administration. The timing of the City's action further supports the inference that the employer acted with animus.

Based upon the fact that the Firefighter Warrington's initial transfer from Engine 3 to Engine 4 was initiated by the Fire Department administration shortly after it took office and was premised upon the unsupported concern of top administration officials that normal and regular union functions would negatively impact the efficient operations of the department, the transfer of the union president from Station 3 to 4 constitutes a violation of §1607 (a)(1) and (a)(3). Given that the administration justified the second reassignment with the same rationale which was found to be unlawful above, the detail to the Rescue Squad is also found to constitute a violation of §1607 (a)(1) and (a)(3).

Chief Wilmore's apparent lack of understanding of President Warrington's role as president of the exclusive bargaining representative of the employees and

resulting distrust of the union president is evidenced by the Chief's testimony regarding his surveillance of Firefighter Warrington while he was assigned to light duty at Station 7 in late May. The Chief acknowledged that he called to "check on" President Warrington while he was assigned to light duty at Station 7, because the Chief:

... didn't want anything to happen as a result of Mr. Warrington having been there [at Station 7]. As a result of his not ... or just taking it upon himself to leave whenever he wanted to because he was president of the union. Saying he had union business to take care of or whatever. I wanted to know... I thought somebody should know where Mr. Warrington was. [Transcript, p. 281]

The City provided no evidence of a history of inappropriate use of union office by Mr. Warrington to avoid work or disregard orders. The Chief testified that the only other employee at Station 7 was a part-time, civilian employee with no supervisory responsibilities. It is illogical that the Chief would have assigned Mr. Warrington to this site under these circumstances if supervision was a valid concern. As evidenced by Firefighter Warrington's subsequent reassignment to the administrative offices of the Fire Department in the Public Safety Building, other assignments were available. Consequently, the Chief's justification for his surveillance of President Warrington while he was assigned to Station 7 was unsupported by the record.

Based on the circumstances discussed above, relevant evidence exists to support the inference that an anti-union motive existed sufficient to support the WFFA's prima facie case. Garner Tool and Dye (Supra.). The facts establish that 1) the employer knew who the union officers were, 2) knew these union officers engaged in protected activities, and 3) the new administration harbored a basic and unsupported distrust of the union and believed that normal union functions constituted a threat to the operational efficiency of the department. Having established the requisite elements of the WFFA's prima facie case, the remaining allegations will be considered under the Wright Line analysis adopted herein.

The union alleges that the City issued "gag orders" to the union president on two occasions. The first incident involved Chief Wilmore's reprimand of President Warrington for taking a reporter through the remains of a residential fire in order to explain to the reporter the effects of a "flashover". It is undisputed that the Rules and Regulations of the Fire Department specifically prohibit any employee other than the officer in charge of a fire from making statements to the press. President Warrington testified he personally advised Chief Wilmore that he had taken the reporter through the fire scene not to explain the cause of that particular fire but rather to provide the reporter with background information for an article he was doing on the fire in which Firefighter Brown was injured. Firefighter Warrington's explanation of his rationale is irrelevant. The prohibition is clear and is justified by the Department's need to provide consistent information and to protect the integrity of its investigations. The testimony suggests that Chief Wilmore may have been lenient by merely ordering Firefighter Warrington not to interact with the press in this manner in the future.

On January 30, President Warrington alleges that Chief Wilmore ordered him to refrain from speaking to firefighters at the scene of the American Appliance fire. President Warrington testified that his conversations were with firefighters who were not actively involved with fighting the fire and that he did not interfere with the officers in charge of the fire when requesting gloves and coffee. The Chief's directive to President Warrington to speak only with him at the fire scene resulted from a conversation between Chief Wilmore and Battalion Chief Giles. Giles testified that when he overheard Warrington pursue the issue of gloves and coffee with the Chief's Aide, he felt that Warrington was interfering with one of his responsibilities. Admitting that Warrington was not interfering with the active fighting of the fire, Giles testified:

... when he [Warrington] tried to deviate from my priorities, which is my responsibility ... I went to the Chief and asked him to have him

stop doing that and we'll, you know, take care of it. And we'll notify him that we're going to take care of their needs. But at that time I didn't think they were a priority. [Transcript at p. 450]

Considered in the context of the accumulated testimony, it is clear that Chief Wilmore was attempting to manage a variety of concerns at one of the first major fires under his administration. It is reasonable to infer from the evidence that the Chief's intent in directing President Warrington to speak directly with him was to relieve his staff from having to deal with the issues which Warrington raised. While it is acknowledged that President Warrington was engaging in union activities in representing the interests of the firefighters, there is insufficient evidence that Chief Wilmore's directive was based, even in part, on union animus.

A second series of incidents surround a grievance which resulted in a physical altercation between Deputy Chief Armstead and President Warrington. The union president filed a grievance with the Deputy Chief of Operations dated April 30, 1993, on behalf of five firefighters who did not receive overtime or compensatory time off for reporting on their days off to a five day hazardous materials training course. When the grievance was heard at the 1st Step on May 20, 1993, Deputy Chief Armstead raised the issue of whether the grievance was properly brought as a group grievance as opposed to a group of individual grievances. He ordered all five persons named in the grievance to attend the hearing. Deputy Chief Armstead opened the hearing by reading the statements which he had ordered Firefighters Cooper and Donahue to write wherein they stated they had not consented to being included as part of the grievance. He then proceeded to ask all of the other persons named in the grievance to state their position with respect to the grievance.

It is clear from the testimony that this grievance meeting was adversarial in nature and emotionally charged. Deputy Chief Armstead and President Warrington argued over the application of the Fair Labor Standards Act. At some point

thereafter, President Warrington stated that the union would appeal the grievance to Step 2 of the procedure.

The filing and processing of employee grievances is a fundamental day to day part of collective bargaining and constitutes protected activity. U.S. Postal Service v. NLRB 652 F.2d 409, 107 LRRM 3251 (5th Cir., 1981). In this case, the Deputy Chief contacted and counseled members of the bargaining unit in order to raise the issue of whether the WFFA's grievance was a group or an individual grievance. Deputy Chief Armstead testified he construed the HazMat grievance as individual grievances" based on information [he] had received that some of the members were not part of the grievance and didn't want to be a part of the grievance. He further testified that he ordered all the employees named in the grievance to attend the Step 1 hearing, although he knew that some were reluctant to do so.

The manner in which a union grievance is brought to hearing is a matter of internal union business. Article III, Grievance Procedure, §16 of the collective bargaining agreement clearly establishes that the union has the right to bring a grievance on behalf of a group of employees where the issue involves a matter of general application. It cannot be disputed that the applicability of overtime payments and/or compensatory time earned by firefighters for attendance at training courses is a matter which directly affects and would be of economic concern to both bargaining unit members and the union. The Deputy Chief of Operations' erroneous determination that it was his job to resolve the issue of how the union should have brought the grievance and his obstruction of a meaningful discussion of the merits of the grievance during the hearing evidences his disregard for the representation status of the WFFA and its officers.

After President Warrington stated that the union would to proceed to Step 2 on the HazMat grievance, he suggested that Deputy Chief Armstead reread and familiarize himself with the contract. The testimony of numerous witnesses supports

the conclusion that this comment offended Deputy Chief Armstead who responded by commenting on President Warrington's "big fat mouth". President Warrington responded by calling Deputy Chief Armstead an "asshole" whereupon Deputy Chief Armstead told Firefighter Warrington he was suspended for insubordination.

The courts and the NLRB have consistently recognized that because tolerance is necessary to insure the success of grievance meetings, "bruised sensibilities may be the price exacted for industrial peace". Crown Central Petroleum Co. v. NLRB, 430 F.2d 724, 74 LRRM 2855 (5th Cir., 1970). In U.S. Postal Service, (Supra.), the employer reprimanded the union representatives for insubordination because of comments which were made after the informal grievance meeting was declared closed. The Court, in finding that the employees comments were protected, held:

Surely the principals involved in a heated exchange cannot be expected to suppress their emotions at a moment's urging by one who has been their adversary. ... The Act's protection of employee participation in grievance meetings would be seriously threatened if the employer could at any emotional and argumentative point during the meeting call an immediate halt to the operation of the Act. We hold therefore that the Board may extend the Act's protections to a cooling off period of brief duration at the termination of grievance meetings. Id.

The fact that it was the union representative, in this case, who determined the hearing closed does not alter the logic of the court's holding.

While the substance of an employee's complaint may be protected, insubordinate conduct is not. Benjamin Electrical Engineering, 264 NLRB 139, 111 LRRM 1407 (1982). In order to determine whether speech or conduct falls outside of the protections of the Act, the right of the employer to maintain discipline in the workplace must be balanced against the protected rights of employees to engage in concerted activity. To fall outside of the protections, the employee's language "must actually be indefensible in the context of the grievance involved". NLRB v. Southern Bell, 694 F.2d 974, 112 LRRM 2526 (5th Cir., 1982). There is no question that in this case, the union president's calling the deputy chief an "asshole" did not constitute

indefensible speech when viewed in the context of a confrontational grievance hearing and where the employer's agent provoked the response by referring to the president's "big, fat mouth".⁹

Here, the union president's comments were protected because they arose within the context of the grievance hearing and did not constitute indefensible conduct. For this reason, Deputy Chief Armstead's attempt to place insubordination charges against President Warrington were in violation of (a)(1) and (a)(3).

A physical confrontation subsequently arose from Deputy Chief Armstead's attempt to discipline President Warrington for his comment at the end of the grievance hearing. How the physical contact occurred, however, is less important to this case than the events which followed. Having found that the insubordination charge against President Warrington violated the Act, the resolution of responsibility for the shoving incident is best left to the court's determination.

Prior to the physical confrontation in Battalion Chief Doyle's office, Deputy Chief Armstead ordered Battalion Chief Doyle to suspend Firefighter Warrington for insubordination. In accordance with the disciplinary code of the Fire Department, Firefighter Warrington was suspended with pay and a presuspension hearing was scheduled for the following day. Chief Wilmore convened the hearing on May 21, 1993. This hearing resulted in President Warrington being returned to duty without loss of pay and all charges being dropped. The parties also agreed to a "cooling off" period during which Deputy Chief Armstead would be replaced as the Fire

⁹ Although Deputy Chief Armstead alleged during his testimony that Firefighter Warrington had threatened to physically assault him by "inviting him outside", this contention was not supported by Armstead's statement which was contemporaneously prepared in support of the insubordination charge against Firefighter Warrington. The testimony of Firefighter Cooper, who admittedly did not want to be represented by the Union in the grievance and that of Elaine Smith, Secretary to Chief Wilmore, who was sitting outside of the conference room and some distance away does not lend credibility to the Deputy Chief's assertion. Deputy Chief Armstead's testimony is contradicted by his own statement and the testimony of the other witnesses present during the HazMat grievance.

Department officer responsible for hearing Step I grievances. Chief Wilmore testified that the primary reason the charges were dropped was the determination that because the alleged insubordinate behavior occurred after the close of the grievance hearing, Firefighter Warrington was off duty and therefore not subject to insubordination charges.

Following the shoving incident on May 20, President Warrington reported to the City's medical dispensary, complaining of shoulder pains. On May 21, he was placed on injured leave and remained on leave through May 24, 1993. On May 25, Chief Wilmore determined that Firefighter Warrington's injury was an on-duty injury and he was given a light duty assignment. Firefighter Warrington's first light duty assignment was to Station 7, where the department's supplies and fire boat are housed. The only other employee assigned to Station 7 was a part-time civilian, Mr. Dehadaway. While at Station 7, Chief Wilmore admittedly made numerous telephone calls to Dehadaway to ensure that Warrington was on the job site and performing his duties.

The City maintains that Firefighter Warrington was not treated differently from other department employees while on light duty. It is not enough, however, for the employer to assert that the same rules and standards "would apply to anyone", without supporting evidence of how those standards had been applied in the past. NLRB v. Frick, 397 F. 2d 956, 68 LRRM 2541 (3rd. Cir., 1968). Based on the Chief's acknowledge reasons for checking on Mr. Warrington, as previously described, and the lack of evidence supporting the City's equal treatment defense, the surveillance of Firefighter Warrington while assigned to light duty at Station 7 constitutes a violation of (a)(3) of the Act.

On June 1, Chief Wilmore telephoned Firefighter Warrington at Station 7 and ordered him to report for duty at the Fire Marshall's Office in the Public Safety

Building the following day. ¹⁰ Firefighter Warrington reported as directed. During the day of June 2, Chief Wilmore instructed Deputy Chief Eoppolo (the officer in charge of the Fire Marshall's office) to have Firefighter Warrington report to the Chief's Assistant, Lt. Tickner. Deputy Chief Eoppolo conveyed the Chief's directive to Firefighter Warrington as Warrington was on his way to Battalion Chief Doyle's office to discuss whether disciplinary charges would be placed against a bargaining unit employee.. Firefighter Warrington requested and received permission from Deputy Chief Eoppolo to report to Lt. Tickner after he finished his business with Battalion Chief Doyle. President Warrington testified he went to Doyle's office. Upon leaving Battalion Chief Doyle's office, Firefighter Warrington encountered Chief Wilmore. The Chief was upset that Firefighter Warrington had not yet reported to Lt. Tickner, as ordered. After explaining he had received permission to speak with Battalion Chief Doyle from Deputy Chief Eoppolo, Firefighter Warrington reported directly to Lt. Tickner who wanted him to pick up some new uniforms for the Department's training officer.

Later that day, Chief Wilmore called President Warrington into his office and told him he had a problem with Warrington speaking with Doyle, the Internal Affairs Officer for the Department. He further accused President Warrington of not knowing when to take off his union hat and put on his firefighter's hat.

Later in the afternoon of June 2, Chief Wilmore telephoned President Warrington and told him that he was again being placed on non-occupational sick leave and was, therefore, no longer eligible for light duty assignments. Chief Wilmore testified that this decision was reached after reviewing the facts and circumstances surrounding Firefighter Warrington's injury during the physical altercation with Deputy Chief Armstead. Chief Wilmore advised Firefighter

¹⁰ Chief Wilmore and Deputy Chief Armstead's office are also located in the Public Safety Building.

Warrington that the decision was based upon his determination, in consultation with the City Law Department, that Firefighter Warrington was not on duty at the time of his injury. This decision was directly counter to the Chief's earlier testimony wherein he stated that at the time of the presuspension hearing, it was determined that Firefighter Warrington was not subject to insubordination charges because he was off duty at the time.

The WFFA alleges that the change in Firefighter Warrington's leave status was retaliation for his engaging in protected activity in speaking with Battalion Chief Doyle on June 2. The union cites the Chief's admitted frustration with Firefighter Warrington for not reporting directly to Lt. Tickner and his admonishment that Firefighter Warrington needed to know when to take off his "union hat" and put on his "firefighter's hat". Firefighter Warrington defended his failure to report to Lt. Tickner by stating that Deputy Chief Eoppolo never "ordered" him to report to Lt. Tickner and further gave Firefighter Warrington permission to speak with Battalion Chief Doyle before checking in with Tickner. The City never presented Deputy Chief Eoppolo or otherwise solicited his testimony to refute Firefighter Warrington's testimony. The proximity in time between Chief Wilmore's expression of his frustration with President Warrington's union activity and his failure to follow orders by not reporting directly to Lt. Tickner supports the inference that an unfair labor practice occurred.

Further, Chief Wilmore's shifting determinations as to Firefighter Warrington's eligibility for sick leave and/or light duty assignments also supports the conclusion that Chief Wilmore acted upon prohibited motives. He testified that the determination of whether President Warrington was on duty at the time of the injury centered on whether the grievance hearing was on-going at the time. In U.S. Postal Service (Supra.), the court rejected the employer's argument that because alleged insubordinate acts occurred immediately following the close of a grievance

hearing, they were outside of the Act's protections. The NLRB has been lenient in accepting employee behavior which could be construed as spontaneous and does not disrupt other employees or the operation of the enterprise. The Act's protections do not necessarily terminate the instant the employer ends the discussion. The prohibition against an employer attempting to call a halt to the operation of the protections of the Act is even more important where the employer attempts to do so retroactively and where it attempts to retaliate for employee conduct which it interprets to fall just outside of the protected activity envelope.

For the reasons stated above, the Board finds that the change in President Warrington's working status from light duty to injured leave constitutes a violation of (a)(1) and (a)(3) of the Act.

The union charges that the City further violated (a)(3) and (a)(1) of the Act through a series of actions which culminated in President Warrington's retirement from the Fire Department. It asserts that Mr. Warrington was constructively discharged because the City imposed burdens on his working conditions intended to make his work more difficult and unpleasant in retaliation for his union activities, including:

...the City repeatedly transferred Warrington to more onerous working conditions; it then abruptly and arbitrarily switched him between sick leave and light duty, requiring Warrington to exhaust his sick and vacation leave; it harassed him by close surveillance during his light duty employment; it chastised him for conducting permissible union activities while on light duty; and finally, it condoned a physical assault upon Warrington by a member of management. [Charging Party's Opening Brief, at p. 54]

The standard for finding that a constructive discharge has occurred is composed of two elements. First, the burden imposed on the employee must cause and be intended to cause a change in working conditions so difficult or unpleasant as to force an employee to resign, and second, it must be shown that the employer imposed these burdens because of the employee's protected activities. American Licorice Co., 299 NLRB 145, 135 LRRM 1003 (1990). The test of the employer's intent,

however, is not limited to whether the employer specifically intended to compel the employee to resign, but also includes whether the employer could have reasonably foreseen that its actions would have that result under the circumstances. Id.

The record clearly evidences that between February and late June of 1993, the union president experienced a number of employer initiated actions which adversely affected his personal working conditions. His first transfer from Station 3 to Station 4 resulted in the loss of the employer afforded convenience of a work space and office equipment for his use in conducting union business. The detail from Station 4 to the Rescue Squad, by the City's admission, placed the union president in a situation where more time was spent out of the fire station responding to calls. Further, it is undisputed that his limited, general experience required Firefighter Warrington to undergo detailed training on the apparatus used by the Rescue Squad as he had. It was not disputed that the assignment of a firefighter of Mr. Warrington's age and background on the Department to the Rescue Squad was unprecedented. Following the physical altercation with Deputy Chief Armstead,¹¹ the City admits that the uncertainty as to the union president's eligibility for light duty assignments originated in the office of the Chief and resulted in the union president being assigned to light duty first at Station 7 and subsequently to the Public Safety Building and ultimately in his being denied the right to a light duty assignment. It is further undisputed that while assigned to light duty, the Chief took a personal interest in Firefighter Warrington's activities. The totality of this conduct evidences the succession of assignments in February through June of 1993 made it progressively more difficult for President Warrington to accomplish his union responsibilities while on the job.

¹¹ It should be noted that the medical evidence submitted fails to establish a clear causal link between the shoving incident and Mr. Warrington's shoulder problem. The testimony revealed that Mr. Warrington's discomfort is due primarily to an arthritic condition.

After Firefighter Warrington exhausted his accumulated sick leave and annual leave, the Fire Department advised him that he could request an additional thirty (30) days of sick leave at half pay, and an additional thirty (30) days of unpaid sick leave beyond that were available upon request. Had Mr. Warrington taken advantage of this option, it would have allowed him another sixty (60) days to recover from his injuries and return to work. Mr. Warrington testified that he declined to apply for the sick leave extension and instead chose to retire because he would receive more income upon retirement, he felt he could not "do firefighting" anymore and because he felt he was being harassed.

Review of the entire set of circumstances, however establishes there is insufficient evidence to conclude Firefighter Warrington's working conditions became "so difficult or unpleasant" so as to force his resignation. Failure to satisfy this element of the test requires a determination that President Warrington was not constructively discharged for union activity. As stated above, however, the actions which constitute the totality of the conduct with respect to Firefighter Warrington's working conditions do violate (a)(3) of the Act.

Immediately following the presuspension hearing on May 21, Mr. Warrington and his attorney attempted to file criminal charges against Deputy Chief Armstead in Municipal Court. They were advised that the court could not accept the charge and they would have to speak with the City Solicitor's office. At some point, an investigation by the Wilmington Police Department was undertaken. Approximately one hundred days later, the City Solicitor indicated that Mr. Warrington was permitted to file the charges against Deputy Chief Armstead. Armstead subsequently filed counter charges against Warrington.

The WFFA argues that because the physical confrontation between Warrington and Armstead arose as a result of a protected grievance hearing and because employees have the right to engage in protected activity from coercion and

intimidation, the City has violated 19 Del.C. §1607(a)(1) by interfering with Mr. Warrington's right to file charges against his alleged assailant. The City contends the filing of criminal charges was a personal matter between Warrington and Armstead and had nothing to do with protected activity. The City argues that it has a legitimate and substantial reason supporting its policy of instituting an investigation prior to allowing criminal charges to be filed against City employees ¹² and that Mr. Warrington was treated no differently than any other City employee.

While the PERB can draw reasonable inferences from the evidence presented, it cannot use the inference that the employer acted upon unlawful motives in unrelated actions to cast aspersions on the entire sphere of alleged violations. Goldtex (Supra.). ¹³ In assessing the sufficiency of the evidence, the information which militates against an inference must be considered as well as that information which supports it. TRW, Inc. v. NLRB, 654 F. 2d 307 (5th Cir., 1981). In this particular instance, the lack of corroborating evidence mitigates against finding that the employer violated §(a)(1). Application of the City Solicitor's policy under these circumstances does not violate the Police Officers and Firefighters Employment Relations Act.

The extensive and conflicting testimony regarding when and why the police investigation into the physical confrontation was instituted is irrelevant to a determination on the charge.

¹² Arlene Minus Coppadge, Assistant City Solicitor and Chief Prosecutor for Municipal Court, testified that it is the policy of the Solicitor's Office to exercise caution and conduct an independent investigation before making the decision as to whether to prosecute when a case involves City employees in their professional capacities or when it involves a "high profile" defendant.

¹³ In Goldtex, the Fifth Circuit Court held that because an employer discharged an employee with good job performance because of his pro-union stance, this result does not taint the lay-off of three other employees whose union support or activities were never established as being known by the employer.

II. Did the City of Wilmington interfere with, restrain or coerce employees or the Wilmington Firefighters Association, Local 1590, in the exercise of rights protected by the Police Officers' and Firefighters' Employment Relations Act in violation of (a)(1) and (a)(2)?

It is an unfair labor practice under the Police Officers' and Firefighters' Employment Relations Act (19 Del.C. Chapter 16) for an employer to either interfere with, restrain or coerce any employee in or because of the exercise of any guaranteed right (§1607(a)(1)), or dominate, interfere with or assist in the formation, existence or administration of any labor organization (§1607(a)(2)). Among the rights guaranteed employees by the Act are those enumerated at §4003, Employee Rights:

Employees shall have the right to:

- (1) Organize, form, join or assist any employee organization, provided that membership in, or an obligation to pay any dues, fees, assessments or other charges to, an employee organization shall not be required as a condition of employment.
- (2) Negotiate collectively or grieve through representatives of their own choosing.
- (3) Engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection insofar as any such activity is not prohibited by this chapter or any other law of the State.
- (4) Be represented by their exclusive representative, if any, without discrimination.

The PERB held in Sussex Vo-Tech Teachers Association v. Bd. of Education (ULP 88-01-021 (Del.PERB, 1988)) that where an (a)(1) and/or (a)(2) violation is alleged, direct evidence that any employee was actually intimidated, coerced or restrained is unnecessary for a finding that an unfair labor practice was committed. Rather, an objective standard is to be applied when determining whether the conduct in question reasonably tended to interfere with either the free exercise of employee rights or the administration of the labor organization. The issue in Sussex Vo-Tech (Id.) concerned employer speech and the PERB held that in order for that speech to constitute an (a)(1) and/or an (a)(2) violation, it must either on its face or through

surrounding circumstances reasonably tend to exert undue influence and/or coerce employees or the labor organization. The PERB held in Seaford E.A. v. Bd. of Education (ULP 88-01-020 (1988)) that the balancing of the employer's right to free expression and the protections of (a)(1) and (a)(2) of the Act must take into account the economic dependence of the employees on their employer and the necessary tendency of the employees because of that relationship to pick up intended implications of the employer that might be more easily dismissed by an uninterested ear. Citing NLRB v. Gissel Packing Co., 395 US 575 (1969).

The WFFA alleges that Chief Wilmore and Deputy Chief Armstead made several coercive and intimidating statements to bargaining unit members in violation of 19 Del.C. §1607 (a)(1) and/or (a)(2). During the union meeting of March 22, Lieutenant Hojnicky originally raised the issue of investigation of the fire in which Firefighter Brown was injured.¹⁴ The WFFA alleges that on March 23, Deputy Chief Armstead approached Lieutenant Hojnicky and advised him "that people who make waves don't get ahead" in the Fire Department and told Hojnicky that he should get the facts before he started asking questions. Lieutenant Hojnicky testified that on March 24, Chief Wilmore told him that he should have approached the Chief to ask his questions before going to the union with questions about the Brown fire. He further testified that both Chief Wilmore and Deputy Chief Armstead came to Station 4, where Hojnicky was assigned, on Friday, March 26 and again advised him that it was not in his best interest to have the union involved. Lieutenant Hojnicky was a credible witness.

¹⁴ The PERB finds no violation of the Act in either the WFFA discussion of and request for the investigation of the Brown fire or in the City's response to this request. Rather, the Union's request has relevance to this charge in that the discussion by employees during a union meeting constitutes protected concerted activity under the Act. Whether Chief Wilmore actually sent his April 22 memo, whether President Warrington's second request for the investigation was sent on April 16 or April 26, and/or the reasons underlying President Warrington's failure to meet with Chief Wilmore subsequent to his April 23 offer are therefore not material to the resolution of this charge.

Neither Chief Wilmore nor Deputy Chief Armstead specifically denied making the alleged comments from which Hojnicky concluded they were discouraging him from participating in union activities. Deputy Chief Armstead had no recollection of this incident. Lt. Hojnicky, on the other hand, specifically recalled numerous details. Deputy Chief Armstead acknowledged that he was aware that the request for a formal investigation of the fire was discussed during the March 22 union meeting. Having such knowledge, it is reasonable to infer from the subsequent comments of Armstead and Wilmore that they also knew that Lt. Hojnicky was a proponent of the investigation. As the top management officials of the Fire Department, Chief Wilmore and Deputy Chief Armstead were in positions of authority to significantly impact the path of Lt. Hojnicky's career. It is reasonable to infer that Lt. Hojnicky would have construed these comments as warning him against engaging in union activity which could have the effect of bringing criticism upon the administration of the department.

On May 9, subsequent to his receipt of the HazMat grievance, the union alleges that Deputy Chief Armstead again approached Lieutenant Hojnicky (who was named in the grievance) and told him that the grievance would not be successful. It is further alleged that during this conversation the Deputy Chief told Hojnicky that the Fire Department was a dictatorship and that Lt. Hojnicky should never question Armstead's orders under penalty of discipline. Although Deputy Chief Armstead had no recollection of having made these specific statements, he testified,

I don't know if I said it in that manner. Maybe in a passing conversation he [Hojnicky] might have said something to me and I had some remark. Transcript, at page 353.

The City contends that Deputy Chief Armstead's testimony constitutes a "flat denial" that the alleged statements were made. In the alternative, it argues that even if the statements were made, they do not rise to the level of a violation of the Act because

they were trivial and ambiguous, and contain no threat of reprisal or force, or promise of benefit.

The WFFA asserts that the message Deputy Chief Armstead was sending was that the union representation was meaningless and that the union's efforts in filing the grievance was futile. However, when viewed in the context of the Administrations failure to convene Step 1 hearings and the fact that Deputy Chief Armstead was responsible for adjudicating the grievance at Step 1, it is again reasonable to infer that this comment would lead Lt. Hojnicky to understand that the representation provided by the union was ineffective and useless. This comment is particularly troubling when viewed in the context of Deputy Chief Armstead's processing of the HazMat grievance and his active solicitation of other employees named in the grievance to attempt to reject representation by the WFFA. For these reasons, the comments of Deputy Chief Armstead are determined to violate §(a)(1) and (a)(2) of the Act.

On July 27, the day after the PERB convened an informal conference with the parties to discuss this unfair labor practice charge, Union Vice President McNulty filed a request to use educational exchange days to attend the Redman Symposium. This request resulted from Chief Wilmore's denial of the use of union days for this event. The denial of the use of union days was the subject of a pending grievance at the time of Vice President McNulty's request for educational exchange days. On the request form which McNulty prepared and submitted for approval, he included a statement that the request was without prejudice to the pending grievance. Upon receiving the request for the days, Deputy Chief Armstead telephoned Vice President McNulty, verbally berating him for including unnecessary language on the form and repeatedly questioning McNulty as to why it was included. The Deputy Chief ordered Lieutenant Kerlin, who was assigned with Firefighter McNulty to Station 6, to listen to the telephone conversation. When the union vice president responded that

he had included the language at the suggestion of the union's attorney, Firefighter McNulty testified that Deputy Chief Armstead responded that the union attorney was running the union. He further testified that Deputy Chief Armstead told him that if he saw further unnecessary language on requests in the future, he would deny all such requests for educational exchange days. Deputy Chief Armstead testified that he said that the Union attorney did not run the Fire Department and that he, Armstead, made the rules.

A short time after this telephone conversation, Vice President McNulty received a call from Chief Wilmore who apologized for Deputy Chief Armstead's behavior, acknowledging that it never should have happened. The Chief stated that he understood the reason for the inclusion of the language on the form. Towards the end of the shift that afternoon, Deputy Chief Armstead came to Station 6 and, according to Firefighter McNulty, called the vice president into Lt. Kerlin's office to further discuss the request for days. Deputy Chief Armstead told McNulty that he had no knowledge of Chief Wilmore's denial of union days to attend the conference.

Deputy Chief Armstead recalls that it was McNulty who solicited him to further discuss this matter when Armstead happened to be at Station 6 that afternoon. Deputy Chief Armstead testified that this second conversation was characterized by Firefighter McNulty's sudden recollection of the reason for including the language on the form and his conveying of this information to Armstead in a understandable and satisfactory manner.

It is apparent Deputy Chief Armstead takes his job seriously but tends to react verbally and quickly to situations which he perceives as disruptive of the operations and procedures of the Fire Department. The evidence presented concerning the union vice president's request for the use of educational exchange days indicates that Deputy Chief Armstead did not have knowledge of Chief Wilmore's refusal to grant union days to the employees to attend the Redman Symposium and therefore

did not understand the context of the Firefighter McNulty's qualification on the request form. While Deputy Chief Armstead's comments and demeanor may have been abrupt and confrontational, they are not found to be coercive or intimidating when viewed in the surrounding circumstances. The Chief's quick reaction to Deputy Chief Armstead's treatment of Firefighter McNulty and his direct apology further supports the conclusion that this incident was an overreaction by Deputy Chief Armstead rather than an attempt to influence union activities.

The WFFA alleges that Chief Wilmore's comment to WFFA negotiating team member Jack Trzcinski questioning whether the union's attorney "got his law degree out of a Cracker Jack's box" was a further attempt to undermine the union. This comment was admittedly made during the course of an informal conversation at one of the fire stations, where the Chief's intended purpose in engaging in the discussion was to assure employees that although the union president had retired, his administration would continue in its "dealings with the union".

Chief Wilmore's comment was made in the context of explaining to Firefighter Trzcinski that he did not have the authority to grant to Mr. Warrington a disability pension as requested by his attorney. The Chief testified the comment was made in a one on one discussion and was asked tongue in cheek. Although Firefighter Trzcinski testified on other matters, he did not refute the Chief's testimony with regard to this incident. The comment itself is of general parlance and is understood to be rhetorical. Considering the totality of these circumstances, it is determined that the Chief's comment in this instance does not violate (a)(3).

The WFFA argues that Chief Wilmore attempted to illegally interfere with the administration of the union when he advised President Warrington in a May 7 memo that the WFFA should identify itself as "Local #1590 of the Wilmington Fire Department" in its fund raising solicitations. President Warrington testified that this request was directly contradictory to the Chief's request in March that the union not

use the phrase "Wilmington Fire Department" in identifying itself for fund raising purposes. The Chief testified that he had received a complaint from the chiefs of the volunteer fire companies that the solicitation was being conducted by the Wilmington Fire Department rather than by the union. Because the City relies upon the volunteer fire companies from the surrounding suburbs for back-up support under some circumstances, the Chief went directly to President Warrington to clear up the phraseology which was being used. The City submitted a May 25 letter to Mayor Sills from the NCC Volunteer Fireman's Association in support of its action. The WFFA argues that because Chief Wilmore's memo to the union predates the complaint to the mayor by two and a half weeks, the Chief's proffered reason is merely pretextual. The fact that the letter to the mayor was received after May 7 does not preclude the possibility that the Chief was made aware of the concern prior to the formalizing of the complaint into a letter. Further, the Chief has a legitimate operational concern regarding the relationship between the Wilmington Fire Department, the only paid firefighters in Delaware, and the surrounding volunteer fire companies. Where an issue was raised regarding whether the Wilmington Fire Department was soliciting contributions from neighboring communities, the Chief was justified in taking the limited action of requesting that the WFFA alter its solicitation script, after consultation with the City's legal department. Even when the Chief's memo is viewed in the context of the many other incidents at issue in this charge, there is nothing in the May 7 memo which suggests that it constitutes either a direct or implicit threat or that it otherwise constitutes interference with the administration of the union in violation of §§(a)(1) and/or (a)(2).

On July 18, two days after his retirement, President Warrington posted a notice on the Union bulletin boards advising the WFFA membership of his retirement from the Department and his intent to continue his tenure as president of the union. The letter includes specific references to what President Warrington considered to be

discriminatory actions against him by the City. Upon seeing the letter several days later, Deputy Chief Armstead ordered its removal from the bulletin boards in each station. Deputy Chief Armstead testified he had it removed because "... it was slanderous towards individuals. It was unfair ... It wasn't respectful enough to be up there, it wasn't respectful enough to be in the stations." Deputy Chief Armstead also took a copy to Chief Wilmore who approved Armstead's order to remove the letter from the bulletin board. Captain Malloy, the acting Battalion Chief in District 1 at the time, testified that Battalion Chief Giles ordered him to go to all the stations in District 1 and "remove the notice, tear it up and throw it away." He further stated that Giles instructed him not to be secretive about what he was doing and to make certain that the firefighters were aware that he was removing and destroying the document.

Deputy Chief Armstead admitted issuing an order that any items the WFFA wanted to place on the union bulletin boards had to be approved by the Department before posting. Battalion Chief Giles testified that Deputy Chief Armstead instructed him that any Battalion Chief who allowed anything to be put on the bulletin boards which they knew to be untrue or which was not approved by either the Chief or Deputy Chief Armstead would be placed on disciplinary charges. When firefighters attempted to post PERB notices of the hearing at the direction of the Union president, they were denied access to the bulletin boards because the notices did not have departmental approval.

It is undeniable that President Warrington's letter to the membership contains inflammatory remarks which do not cast the employer in a favorable light. While the basic message that the union president will remain on and continue to serve the membership is included, much of the letter is devoted to President Warrington's perception of the circumstances leading to his retirement. The employer was within its right to remove the correspondence which it found to be slanderous as the union was within its rights to grieve that removal.

The problem occurs with Deputy Chief Armstead's order that only departmentally approved documents may be posted on the bulletin board and his threat to discipline Battalion Chief's if this order was not followed. Further, there can be little doubt as to the message Deputy Chief Armstead intended when he ordered that the Battalion Chief ensure that firefighters in the stations were aware of the City's removal and destruction of the union president's correspondence. By attempting to directly interfere with the union's communication with its members on a contractually required bulletin boards, the employer violated (a)(2) and (a)(1) of the Act.

The WFFA also charges that at the beginning of negotiations for a successor agreement to the collective bargaining agreement which expired on June 30, 1993, the City took the position that the union could not use five on-duty firefighters to participate in negotiations. In a letter dated May 27, 1993, union attorney Barry M. Willoughby requested of Wilmington Personnel Director Wayne Crosse that the City make arrangements with the Fire Chief to allow up to five members of the union negotiating team to have time off after the start of the shift to attend negotiations. The management of the Fire Department allegedly objected to the release of five firefighters during a shift because of operational concerns.

The City's position does not appear to be unreasonable in light of the union's request that the five designated firefighters be provided with time off after the start of their shift. While the union argues that releasing five firefighters has not been a problem in the past, they did not produce any evidence to show that such a practice existed. The union argues that this action clearly evidences union animus because the WFFA was advised of the City's position within one week after the May 20 HazMat grievance hearing and altercation between President Warrington and Deputy Chief Armstead. Without more, the correlation in time alone does not constitute sufficient

evidence to support the inference that the employer was attempting to interfere with the administration of the union.

III. *Did the City violate its duty to bargain in good faith by failing to process grievances in accordance with the agreed upon procedure, in violation of 19 Del.C. §1607 (a)(5)?*

Under the POFFERA the grievance procedure is a mandatory subject of bargaining. Indian River E.A. v. Bd. of Education (ULP 90-09-053 (Del.PERB, 1991)). The PERB has held that any unilateral change in the grievance procedure by a party constitutes a per se violation of the duty to bargain in good faith. The PERB affirmed the importance of the grievance procedure in a collective bargaining relationship in Indian River E.A. v. Bd. of Education (Supra.), where it held:

The grievance procedure lies at the heart of the continuous collective bargaining obligation and constitutes the primary vehicle by which the parties' agreement is defined and refined during its terms. For the agreement as a whole to have any meaning it is incumbent upon the parties to administer the grievance procedure in accordance with the agreed upon terms. [at p. 674]

Motive or intent in effecting a unilateral change in a mandatory subject of bargaining is presumptively irrelevant where a per se violation of §(a)(5) is alleged.

In determining whether a party has effected a unilateral change, the status quo which existed prior to the alleged change must be determined. Where there is a valid and binding collective bargaining agreement in effect, its terms establish the status quo. In this case, the language is clear and unambiguous on its fact. Article III, §4 of the parties' agreement provides:

The respective Deputy Chief shall hold a hearing within three days of receipt of a grievance, excluding Saturdays, Sundays, holidays, or, if the grievant is not on day work during these three days, the hearing shall be held the next time the grievant is scheduled for day work.

... The Deputy Chief shall respond in writing within three (3) days, excluding Saturdays, Sundays and holidays.

The WFFA filed at least five grievances in the period between March 30 and April 30, 1993. Although Deputy Chief Armstead denied receiving all or part of these grievances during his testimony, the City admitted their receipt in its Answer. An admission by Deputy Chief Armstead of receipt of the grievances would support an inference that he neglected his duties as the Deputy Chief assigned to hear Step 1 grievances under the contract and would be admission against his personal interest. For these reasons, Armstead's testimony on this matter is rejected.

During the course of his testimony Deputy Chief Armstead also described difficulties he had in scheduling grievances resulting from President Warrington's demand that all such matters be accomplished in writing rather than orally. Deputy Chief Armstead testified that the scheduling of grievances between the WFFA and past administrations had always been accomplished by telephone conversations. Contrary to this assertion, he also admitted that while serving as a WFFA officer, he had never scheduled a grievance hearing and he had no knowledge as to whether written confirmation was sent of the scheduled grievance meetings. President Warrington, on the other hand, who had scheduled numerous hearings throughout his five years as WFFA president, testified that while grievance meetings had indeed been scheduled by telephone in the past, these conversations were always followed by written confirmation by the employer. Deputy Chief Armstead's testimony on this matter was contradictory and self serving and therefore cannot be relied upon to support the City's position.

The City argues that the outstanding grievances concerning bereavement leave, overtime under the collective bargaining agreement and the HazMat grievance were all resolved prior to the initiation of or through the grievance procedure. There is no evidence on the record to support this position. While the WFFA attached copies of these grievances to the charge, the City produced no documentation of decisions reached at any level of the grievance procedure nor

documents relating to any hearings scheduled, held or agreements reached through which these grievances were resolved.

The City argues it cannot be held responsible for the failure of the grievance process because it was unprepared to handle the volume of grievances filed, no system existed for routinely handling grievances and because it was impossible to comply with the union's demand that hearings be scheduled in writing and still comply with the three day contractual time constraints. The credibility of Deputy Chief Armstead's testimony that he could not get President Warrington to return his telephone calls during this period of time is questionable. He knew where Firefighter Warrington was assigned to work and there is ample evidence on the record that the Deputy Chief personally visited the fire stations on a regular basis and also ordered employees to his office. Excuses aside, the City was bound by the status quo defined by the clear and unambiguous contractual language. Once a grievance was filed, the responsibility rested with the City to schedule and convene the hearing in a timely manner. There is no evidence that the parties were unable to process and resolve grievances prior to April of 1993. This problem apparently results from the change in administration and the lack of understanding on the City's part of its obligations under the contract and under the law.

Based upon the evidence presented, the City violated its duty to bargain in good faith by failing to process grievances filed in April 1993 in accordance with the provisions of the agreed upon procedure and in violation of §1607(a)(5).

A Step 1 grievance hearing on the HazMat grievance was conducted on May 20, 1993. As previously described this meeting ultimately resulted in insubordination charges being placed against President Warrington at Deputy Chief Armstead's order. On May 21, Chief Wilmore convened a presuspension hearing to consider the merits of the disciplinary charges. As a result of this meeting, the charges against President Warrington were dropped and the Chief agreed to withdraw Deputy Chief

Armstead from hearing Step 1 grievances. President Warrington memorialized his understanding of this agreement in a May 22 memo to Chief Wilmore in which he requested, because the agreement differed from the parties practice under the terms of their collective bargaining agreement, that the Chief confirm his intent in writing. While the Chief did not provide the written verification requested, he did acknowledge during his testimony that he had agreed to either hear Step 1 grievances or designate another officer to do so in order to provide a cooling off period between President Warrington and Deputy Chief Armstead. Deputy Chief Armstead testified that he was never notified that he was not to hear Step 1 grievances or that the parties had agreed to a "cooling off period".

During the period of May 20 through July 26, 1993, the parties met only once on a grievance matter. The WFFA received no response from the employer on grievances filed during this period. The only grievance meeting convened was the June 15 Step 2 hearing on the HazMat grievance. The Fire Chief and the Personnel Director hear Step 2 grievances under the terms of the parties' agreement. Deputy Chief Armstead also attended this Step 2 hearing, although he took no active part during the hearing. Deputy Chief Armstead was responsible for hearing the grievance at Step I and his opinion on the merits should have been a matter of record. The City failed to refute the WFFA's assertion that no one other than the persons designated by the contract to hear Step II grievances had ever attended these hearings in the past. Rather, the City argues that the contract did not preclude Deputy Chief Armstead from attending this hearing. The Chief testified that he and the Deputy Director of Personnel had decided to include Deputy Chief Armstead in this meeting because Armstead had "... direct knowledge of what was going on and what was said" and they "... wanted him to maybe offer some advice as to what direction we should take as a result of hearing Step 2." By the City's admission, its intent in having the Deputy Chief attend the Step 2 hearing, only 17 days after the

Chief had agreed to provide a cooling off period and in the same matter which had resulted in the May 20 melee, was to obtain his input in ruling on the merits of the grievance. His mere presence at this particular grievance in light of his conduct in seeking to undermine the union's representative status on this grievance as previously described, could only reasonably have the effect of intimidating and coercing the union representatives. For this reason, the inclusion of Deputy Chief Armstead at the Step II HazMat grievance hearing violates §§(a)(1), (a)(2) and (a)(5) of the Act.

The WFFA contends that the City violated (a)(1), (a)(3) and (a)(5) by refusing to allow the Vice President and Secretary/Treasurer of the WFFA to use union days, provided for under the contract, to attend the Redman Symposium August 7 through August 12, 1993. Vice President McNulty requested the use of union days on June 22. On June 25, 1993, Chief Wilmore denied the request stating in his letter that Article VII, §1 of the contract ,which grants to the union

... thirty personnel days with pay each contract year to serve as delegates at conventions, organization conferences, seminars, and 'special functions'. The language in this section is clear, in that it defines 'special functions'. The other leaves of absence with pay are comprehended to mean Union oriented events.

I trust you are aware of the privilege of using educational days when attending functions which are educational in nature. My suggestion is that you utilize the privilege of exchanging educational days, or exchanging with a co-worker.

The Chief concludes his letter with the statement that the use of days for Union activities should be negotiated before those days are granted. He also reserved the right to review each case. The Chief testified that the intent of his letter was to convey to Firefighter McNulty that he could not grant the use of union days after the expiration of the collective bargaining agreement on June 30, 1993, unless and until the parties agreed upon a successor agreement which included a union days provision.

It is not unreasonable that the WFFA construed Chief Wilmore's denial of the request for union days as being based upon the symposium not constituting a "special function" within the meaning of the contract. While the WFFA presented evidence that union days had been granted to Deputy Chief Armstead while he was the union vice president to attend this same symposium in the past, there is also merit to the Chief's argument that he could not grant days off under a collective bargaining agreement which was to expire in five days where there was no assurance that the contractual provision would be included in the successor agreement. The successor negotiations were at that point in their infancy, having only been initiated on June 21. Firefighter McNulty's submission of the denial of the union days to the grievance procedure was the proper avenue for addressing this concern. Although Chief Wilmore's basis for denying the use of the days was not set forth very clearly in his memorandum, his justification was reasonable and legitimate. Further, his denial of the use of the union days did not constitute a refusal to bargain in good faith as alleged. The City's problem in this instance is linked directly to its failure to process the WFFA's grievances during this period of time as discussed above.

President Warrington retired from the Wilmington Fire Department on July 16, 1993. In a letter dated July 27, 1993, Chief Wilmore reminded President Warrington that Article III, Grievance Procedure, §1 of the contract "... only allows for an opportunity for members of the Fire Department to bring forth their views relating to any unfair or improper aspect of their employment situation". President Warrington grieved this letter on the basis that the Chief was attempting to prohibit him from any involvement in the grievance procedure. At the Step 2 hearing, Chief Wilmore explained that the intent of the letter was to make clear that Mr. Warrington could no longer file personal grievances as he was no longer an employee of the Department. Mr. Warrington testified that at the close of this meeting, he understood

the Chief's purpose in writing the letter and considered the matter resolved. Once this understanding was reached the issue was resolved. Although the WFFA argues that the Chief only provided his explanation of the purpose of the letter after the union filed its amended charge, there is no evidence here to suggest that the intent in sending the letter was anything other than that expressed by the Chief.

The WFFA argues the City's continued failure to process grievances after President Warrington's retirement in July evidences a further violation of (a)(5). Testimony was provided by Deputy Personnel Director Yanonis that the problem stemmed from an inability to reach President Warrington because phone calls were either not returned or the numbers on the WFFA letterhead were incorrect. President Warrington, on the other hand, testified that the City knew that the union's telephone in the fire station had been removed and that he received no phone messages at his home from Mr. Yanonis. Based upon the preceding findings and discussion, the PERB declines to make a factual determination on whether messages were indeed left or whether it was reasonable for Mr. Yanonis to repeatedly call an erroneous number on the union letterhead. It must be repeated that the City had an obligation to process grievances in accord with the status quo grievance procedures clearly described in the collective bargaining agreement. It was incumbent upon the City once a grievance was received to make every reasonable effort to meet its obligation to convene a hearing on the merits of the dispute. The City will be well advised to do so in the future rather than risk being found to have violated the statutory provisions again.

Finally, while this charge covers the first eight months of a new administration of the Wilmington Fire Department, the employer's conduct cannot be disposed of lightly. The tenor of the communications, the City's failure to adhere to the grievance procedure and its interference with the functioning of the union

violate not only the letter of the law but also the spirit of the Act. The Police Officers and Firefighters Act has been in effect since 1986. The employer's agents were not new to this situation. Chief Wilmore and Deputy Chief Armstead progressed to their present positions through the ranks of the Wilmington Fire Department and Deputy Chief Armstead had served as the Vice President for the WFFA. Employees should not have to resort to charges of this magnitude in order to secure the rights to which they are entitled and to make the employer aware that its agents are acting to the detriment of the relationship and the collective bargaining process.

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, 19 DeL.C. Chapter 16.

2. The Wilmington Firefighters Association, Local 1590, IAFF, is an employee organization within the meaning of §1602(f) of the Act.

3. The Wilmington Firefighters Association, Local 1590, IAFF, is the exclusive bargaining representative within the meaning of §1602(g) of the Act.

4. Consistent with the foregoing opinion and findings, it is determined that the City's conduct, as specified violates §1607 (a)(1) of the Act.

5. Consistent with the foregoing opinion and findings, it is determined that the City's conduct, as specified violates §1607 (a)(2) of the Act.

6. Consistent with the foregoing opinion and findings, it is determined that the City's conduct, as specified violates §1607 (a)(3) of the Act.

7. Consistent with the foregoing opinion and findings, it is determined that the City's conduct, as specified violates §1607 (a)(5) of the Act.

WHEREFORE, the City of Wilmington is hereby ordered to take the following

affirmative actions:

- I. Cease and desist from:
 - a. Engaging in conduct which tends to interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under the Police Officers and Firefighters' Employment Relations Act.
 - b. Engaging in conduct which tends to dominate or interfere with the formation, existence or administration of the WFFA;
 - c. Engaging in conduct which tends to encourage or discourage membership in any employee organization by discrimination in regards to hiring, tenure, and other terms and conditions of employment; and
 - d. Refusing to bargain collectively in good faith with the WFFA.
- II. Within ten (10) days of receipt of the Notice of Determination from the Public Employment Relations Board, post the Notice in all areas where notices of general interest to the affected employees are normally posted, including but not limited to each fire station and the Public Safety Building.
- III. Refrain from taking any retaliatory actions against members of the WFFA.

FURTHER, consistent with the provisions of 19 Del.C. §1608 (b)(1), the City of Wilmington is hereby ordered to reimburse the WFFA fifty percent (50%) of the reasonable costs it incurred pursuing this matter to date, including attorney's fees.

IT IS SO ORDERED.

/s/ Deborah L. Murray-Sheppard
DEBORAH L. MURRAY-SHEPARD
Principal Assistant
Del. Public Employment Relations Bd.

/s/ Charles D. Long, Jr.
CHARLES D. LONG, JR.
Executive Director
Del. Public Employment Relations Bd.

DATED: April 20, 1994