

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

<b>CITY OF WILMINGTON, DELAWARE,</b>	:	
	:	
PETITIONER,	:	
	:	<b><u>DS 19-06-1191</u></b>
V.	:	
	:	
<b>INTERNATIONAL ASSOCIATION OF FIREFIGHTERS,</b>	:	<b>PRELIMINARY DETERMINATION</b>
<b>LOCAL 1590,</b>	:	
	:	
RESPONDENT.	:	

The City of Wilmington, Delaware (“City”) is a public employer within the meaning of 19 Del.C. §1602(l) of the Police Officers and Firefighters Employment Relations Act, 19 Del.C. Chapter 16 (“POFERA”).

The International Association of Firefighters (“IAFF”) is an employee organization within the meaning of 19 Del.C. §1602(g). By and through its Local 1590, the IAFF is the exclusive representative of a bargaining unit of employees of the City of Wilmington Fire Department in the ranks of Firefighter, Lieutenant, Captain and Battalion Chief, as defined in DOL Case 23. 19 Del.C. §1602(h).

The City and IAFF Local 1590 have a long history of collective bargaining. Their most recent agreement had a term of July 1, 2012 through June 30, 2016. The parties have been engaged in negotiations for a successor agreement since January 18, 2019.<sup>1</sup>

Prior to the filing of this petition, both the City and IAFF requested mediation to

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<sup>1</sup> Both parties identified only three negotiation sessions held prior to their concurrent requests for mediation on May 14, 2019, namely January 18, February 28 and March 27, 2019. MED 19-05-1184.

assist the resolution of their negotiations. A mediator was appointed by the Public Employment Relations Board (PERB) on May 21, 2019.

On June 5, 2019, the City filed a Petition for Declaratory Statement. Specifically, the City requested a determination as to whether the following “interrelated” issues are matters of inherent managerial policy under 19 Del.C. §1605, and therefore permissive subjects of bargaining:

- a) Platoon structure;
- b) Shift structure; and
- c) Minimum number of employees required to staff the City’s fire stations and apparatus (commonly referred to by these parties as “minimum manning”)

The City asserts the issuance of a Declaratory Statement in this matter is appropriate under the criteria of PERB Rule 6 because it presents a mature controversy concerning the City’s bargaining obligations with IAFF Local 1590 which is real and adverse and that issuance of the requested declaratory statement will facilitate the resolution of the on-going negotiations for a successor agreement.

IAFF Local 1590 filed its response on June 17, 2019. It argued there was no controversy at that time because the parties had not yet entered into mediation and that during the limited negotiations prior to mediation, the City did not take a position and/or decline to bargain the matters it now asserts are matters of inherent managerial policy. IAFF Local 1590 asserts all three issues raised by the City in this petition are mandatory subjects of bargaining and that the petition is a distraction from productive negotiations.

Prior to the first session convened by the mediator, PERB advised both parties it would hold this petition in abeyance pending good faith mediation efforts, in order to give the parties the opportunity to resolve their negotiations with the assistance of the mediator.

Thereafter, the mediator convened two daylong mediation sessions on June 26 and July 9, 2019. Following the second session, the mediator contacted PERB requesting the mediation process be suspended pending a decision on the City's petition or direction from PERB that the mediation resume. In his letter the mediator stated:

...[T]he parties have now met for purposes of mediation in this matter on two occasions. Each day of mediation has been a full day and I am of the view that mediation has been useful for purposes of identifying and clarifying certain significant issues in dispute as well as the perspectives of the parties on such issues. However, I have been disappointed in the lack of progress toward any agreements on outstanding issues. I am now of the view – and I have shared such with the parties – that the clarity that may result from your processing of, and decision upon, the pending Petition for Declaratory Statement may be useful in moving the negotiations forward.

On August 9, 2019, the PERB Executive Director convened a teleconference with the parties' counsel in order to discuss further the processing of the City's petition. This preliminary determination results therefrom.

### DISCUSSION

PERB Rule 6, Petitions for Declaratory Statement,<sup>2</sup> states that a petition may be filed where a controversy exists concerning (1) a potential unfair labor practice (2) whether a matter is within the scope of collective bargaining as defined by statute; or (3) the application of any statutory provision, regulation or order of the PERB. On its face, the City's petition raises a

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<sup>2</sup> PERB Rule 6 was adopted pursuant to §4006, Public Employment Relations Board, of the Public School Employment Relations Act, which is specifically incorporated by reference into the POFERA at §1606. 14 Del.C. §4006(h) states, in relevant part,

- (h) To accomplish the objectives and to carry out the duties prescribed in this chapter, the Board shall have the following powers:
  - (4) To provide by rule a procedure for the filing and prompt disposition of petitions for a declaratory statement as to the applicability of any provision of this chapter or any rule or order of the Board. Such procedures shall provide for, but not be limited to, an expeditious determination of questions relating to potential unfair labor practices and to questions relating to whether a matter in dispute is within the scope of collective bargaining.

question as to whether platoon structure, shift structure, and/or minimum manning requirements fall within the mandatory scope of bargaining under the POFERA.

Rule 6 further states a “controversy” subject to resolution under the Declaratory Statement provision exists when:

- (1) The controversy involves the rights and/or statutory obligations of a party seeking a declaratory statement;
- (2) The party seeking the declaratory statement is asserting a statutory claim or right against a public employer, an exclusive representative or a public employee who has an interest in contesting that claim or right;
- (3) The controversy is between parties whose interests are real and adverse; and,
- (4) The matter has matured and is in such a posture that the issuance of a declaratory statement by the Board will facilitate the resolution of the controversy.

This petition meets all of the criteria of a controversy as defined by Rule 6. It matured and ripened for resolution as a result of the mediator’s notification that the Declaratory Statement would, in his professional judgment, facilitate settlement of their negotiations.

Having determined the petition meets the regulatory criteria for a Declaratory Statement, Rule 6.4 circumscribes the next steps in the process.

- (a) The Executive Director shall then dispose of the petition by declining to issue a declaratory statement or by requesting that the parties file briefs or by scheduling a hearing, if necessary, which shall be conducted in accordance with Regulation 7, or by issuing a declaratory statement.
- (b) If the Executive Director issues a declaratory statement, it shall be rendered within thirty (30) days from the date upon which the record is formally closed.

There is ample case law under the Delaware PERB concerning scope of bargaining questions. In *Woodbridge Education Association v. Board of Education* (ULP 90-02-048, I PERB 537 (Del.PERB, 1990), a four-part analysis was adopted for examining the negotiability

**1) Is the subject matter expressly reserved to the exclusive prerogative of the public employer?**

Terms and conditions of employment specifically exclude, "...those matters determined by this chapter or any other law of the State to be within the exclusive prerogative of the public employer." PERB has held that in order for a subject to be an "illegal subject of bargaining" an explicit and definitive statutory prohibition must exist. *Woodbridge Education Association v. Bd. of Education*, Supra; *City of Wilmington v. FOP Lodge 1, IAFF Local 1590, AFSCME Locals 1102 & 320*, DS 02-10-369, PERB 2859, 2870 (Del.PERB, 2003).

**2) Does the subject matter fall within the statutory definition of "terms and conditions of employment?"**

"Terms and conditions of employment" are defined in §1602(n) to mean, "matters concerning or related to wages, salaries, hours, grievance procedures and working conditions..." IAFF 1590 asserts that platoon and shift structure and minimum manning requirements are mandatory subjects of bargaining.

**3) Does the subject matter involve a matter of inherent managerial policy as defined in the Employer Rights section of the statute?**

Section 1605 of the POFERA states the public employer is not required to engage in collective bargaining on "...matters of inherent managerial policy which include, but are not limited to, such areas of discretion or policy as the functions and programs of the public employer, its standards of services, overall budget, utilization of technology, the organizational structure and the staffing levels, selection and direction of personnel." PERB has determined issues which fall within the employer's inherent managerial policy are permissive subjects of bargaining over which the employer may not be required to negotiate.

The City asserts platoon and shift structure and minimum manning requirements are matters of inherent managerial policy, and consequently, matters on which it cannot be compelled to bargain.

**4) Does the impact on the employer's operations as a whole clearly outweigh the impact on individual employees?**

Where it may reasonably be concluded that a subject of bargaining may be either a term and condition of employment (i.e. a mandatory subject of bargaining) or a matter of inherent managerial policy (i.e., a permissive subject of bargaining), a balancing test must be applied. In one of PERB's earliest decisions in *Appoquinimink Education Association v. Board of Education* (ULP 1-3-84-3-2A, I PERB 35 (Del.PERB, 1984), guidance was provided in applying this balancing test:

The following comments are provided as guidelines in applying the balancing test. Once established that a given proposal touches a term and condition of employment, it must also be determined whether or not a proposal also touches upon an inherent managerial policy. If so, in order to reduce the level of negotiability from mandatory to permissive, the impact on the school system as a whole must clearly outweigh its direct impact on the individual teacher. Generally, where the subject matter of a given proposal relates to substance or the establishment of criteria for the ultimate decision, it tends toward permissive, as infringing upon the decision-making authority of the employer. Where the subject matter of a proposal relates primarily to matters of procedure or communication, it tends toward being mandatory. However, in determining what constitutes inherent managerial policy, impact is an equally important factor. *Appoquinimink*, at p. 52.

**DETERMINATION**

For the reasons set forth above, the matter raised by the City's petition is determined to meet the criteria for issuance of a Declaratory Statement concerning the scope of negotiability of specific matters and that a controversy exists within the meaning of PERB Rule 6.

For purposes of determining negotiability, the inquiry will be limited to consideration of the contractual language in the 2012-2016 collective bargaining agreement, specifically:

Article 17 – Hours of Work

17.1 (1) All Fire Suppression members of the Fire Department shall work a four (4) platoon system as follows:

One twenty-four (24) hour period 0800 – 0800 hours followed by seventy-two (72) hours off, (24/72 Work Schedule).

The term “A Complete Tour of Duty” in this subsection is defined as twenty-four (24) hours on, followed by seventy-two (72) hours off.

Article 11 – Working Conditions

§11.6 Minimum Manning

No on-duty piece of apparatus will be manned at the start of the shift by less than one (1) Officer and three (3) Firefighters. This level of manpower shall be maintained for the duration of the shift unless affected by (a) sickness or injury of personnel assigned to Suppression; (b) notification of death in the immediate family of personnel assigned to Suppression; (c) personnel assigned to Suppression being immediately relieved from duty for violation(s) of rules and regulations set forth in the Fire Department Rules and Regulations; or (d) any occasion of a temporary nature, which has been a past practice in the Fire Department.

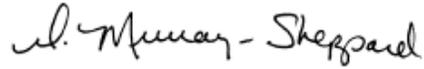
The processing of this Petition will be expedited, as required by Rule 6. During the teleconference of August 9, the parties were advised that PERB has reviewed the factual record and determined it to be sufficient for the limited scope of this petition. The parties were advised that their current bargaining positions are not required.

Both parties have provided legal argument in support of their respective positions as to whether the issues of platoon and shift structure and minimum manning are either permissive or mandatory subjects of bargaining. Neither side, however, addressed the impact, if any, of application of the *Woodbridge* balancing test. Consequently, both sides are now provided the opportunity to simultaneously provide any additional argument they

deem appropriate. The submissions should supplement (not repeat) the argument already in the record and should address the following issue:

**WHETHER PLATOON AND SHIFT STRUCTURE (AS CURRENTLY ESTABLISHED BY §17.1 OF THE PARTIES' 2012-2016 AGREEMENT) AND A MINIMUM MANNING REQUIREMENT (ESTABLISHED BY §11.6 OF THE PARTIES' 2012-2016 AGREEMENT) ARE MANDATORY SUBJECTS OF BARGAINING UNDER THE POLICE OFFICERS' AND FIREFIGHTERS' EMPLOYMENT RELATIONS ACT, 19 DEL.C. CHAPTER 16.**

DATE: August 13, 2019



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