

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

CITY OF WILMINGTON, DELAWARE,)	
)	
Petitioner,)	
)	<u>D.S. 19-06-1191</u>
and)	
)	Decision on Petitioner’s Request
INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS)	for Declaratory Statement
LOCAL 1590,)	
)	
Respondent.)	

Appearances

*William W. Bowser, Esq., Scott A. Holt, Esq., and Lauren E.M. Russell, Esq.,
Young Conaway Stargatt & Taylor LLP, for the City of Wilmington*

Aaron M. Shapiro, Esq., Connolly Gallagher LLP, for IAFF Local 1590

BACKGROUND

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 affiliated 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.

Prior to the filing of this petition, both the City and IAFF requested mediation to 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. IAFF Local 1590 filed a response opposing the petition on June 17, 2019.

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. The mediator met with the parties for two full days of mediation 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.

On August 13, 2019, the Executive Director determined the issues concerning the negotiability of specific terms were appropriate for consideration and issuance of a Declaratory Statement under PERB Rule 6. That decision further stated that the factual record provided by the parties was sufficient for the processing of the petition, which would be based upon the provisions in Articles 11 and 17 of the parties' most recent collective bargaining agreement. The parties were specifically advised that their current bargaining positions on these issues would not be considered.

The material facts in this case are not in dispute and the parties were provided the opportunity to file written argument with respect thereto. This decision is based upon consideration of the facts and arguments presented.

ISSUE STATEMENT

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.

FACTS

The Wilmington Fire Department is an agency of the City. It operates six fire stations. Currently and consistent with the terms of the 2012-2016 collective bargaining agreement, fire suppression employees are organized into a four platoon system and provide 24 hour, 7 days per week fire and emergency services to the residents of the City. Each platoon is comprised of 35 members, including two Battalion Chiefs, eight officers (Captains and Lieutenants) and 25 fire fighters. Each platoon works a 24 hour tour, followed by 72 hours off. This is referred to by these parties as the "24/72 Work Schedule."

The 2012-2016 collective bargaining agreement states:

Article 11 – Working Conditions

§11.6 Minimum Manning

No on-duty piece of apparatus¹ will be manned at the start of the shift by less than one (1) Officer and three (3) Firefighters. This level of man-power 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.

¹ The City asserts, without dispute from the IAFF, that the term "on-duty piece of apparatus" currently includes six engines and two ladder trucks.

The City "... has not sought to change the minimum manning requirement at the negotiating table and is *not* seeking a declaration from PERB that it may do so unilaterally." p. 2²

The 2012-2016 collective bargaining agreement also states:

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.

The City is seeking "... a declaration that both the platoon structure used by the City *and* the shift worked by fire-suppression employees are not mandatory subjects of bargaining." ³

DISCUSSION

The purpose of a declaratory statement process is set forth in 14 Del.C. §4006 (h):

(4) To provide by rule a procedure for the prompt 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.

This provision is adopted by reference in §1606 of the POFERA. On appeal of a Declaratory Statement (also involving the City of Wilmington and the union representing its employees), the Chancery Court of the State of Delaware noted,

... [T]he questions addressed in the declaratory statement are important to all parties, and that the determination of those issues is likely to have a

² Opening Brief in Further Support of Petitioner’s Request for Declaratory Statement, August 22, 2019, p. 2

³ *Supra.* p. 3.

material effect on the collective bargaining process. Nothing in the relevant statutes, however, suggests that a declaratory statement under 19 *Del. C.* § 1306 and 14 *Del. C.* §4006(h)(4), constitutes a “decision of the Board under §1308.” Therefore, it is not subject to statutory appeal under 19 *Del. C.* §1309.⁴

The Court further noted the non-binding, advisory nature of a declaratory statement:

The language of 14 *Del. C.* §4006(h)(4) authorizing petitions for declaratory statements implies that the procedure is loosely analogous to declaratory judgment jurisdiction in the courts. *See* 10 *Del. C.* § 6501 *et seq.* A declaratory judgment entered by a court, however, has the force and effect of a final judgment or decree, adjudicating the rights of parties in a specific case or controversy. Moreover, 10 *Del. C.* § 6507 expressly provides that declaratory judgments “may be reviewed as all other orders, judgments or decrees.”

In contrast, the PERB’s declaratory statement procedure is more open-ended and policy-oriented. Although one would expect the PERB to follow the guidelines set forth in a declaratory statement in a subsequent [*unfair labor practice*] or other proceeding, the record suggests that the parties to the later proceeding still might be able to present evidence or argument on those issues. The following excerpt from the PERB Executive Director’s decision supports that view: “There can be no question but that this matter is mature and that a declaratory statement concerning the legality of parity clauses will facilitate the resumption of negotiations.”

Viewing the declaratory statement as a nonbinding advisory opinion, the Court agrees with the City and the FOP that it does not have subject matter jurisdiction over the Locals’ appeal at this stage. An appeal arises out of specific remedial orders, not broad statements of policy or guidance; the decision being appealed must show an intent to terminate the case.⁵

The issuance of this declaratory statement is for the purpose of facilitating effective negotiations by these parties by advising as to the negotiability of platoon structure, shift structure, and minimum manning requirements as those subjects are addressed in §11.6 and §17.1 of the parties

⁴ *AFSCME Locals 1102 and 320 v. City of Wilmington*, CA 026-N, V PERB 3101, 3109 (Del.Chan., 2004), letter opinion of VC Parsons.

⁵ *Supra*, at 3109, FN 19.

2012-2016 collective bargaining agreement.

Turning to consideration of the merits, the POFERA obligates the public employer and the exclusive bargaining representative of a unit of police and/or firefighters "... to confer and negotiate in good faith with respect to terms and conditions of employment, and to execute a written contract incorporating any agreements reached." 19 Del.C. §1602(c). The statute expressly states that neither party may be compelled to agree to a proposal or to make a concession.

The bargaining obligation attaches to terms and conditions of employment, which are defined at §1602(n):

"Terms and conditions of employment" means matters concerning or related to wages, salaries, hours, grievance procedures and working conditions; provided, however, that such term shall not include those matters determined by this chapter or any other law of the State to be within the exclusive prerogative of the public employer.

While the statute does not define the employer's "exclusive prerogative", this term has been determined in previous PERB decisions to mean illegal subjects of bargaining. 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*.⁶ It is also important to note that an "illegal subject of bargaining" is substantively different from a provision of an agreement which implementation "would be otherwise contrary to law". 19 Del.C. §1613(e). Where parties reach an agreement which includes a provision which is contrary to law, that provision is unenforceable.

The statute specifically defines "matters of inherent managerial policy" over which a public employer is not required to engage in collective bargaining:

... [M]atters 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

⁶ Del.PERB, ULP 90-02-048, I PERB 537, 546 (1990)

and direction of personnel. *19 Del.C. §1605.*

Both parties cited to Pennsylvania cases to support their respective positions in this case. Pennsylvania's Act 111 establishes for police and fire fighters the "... right to bargain collectively with their public employers concerning the terms and conditions of their employment, including compensation, hours, working conditions, retirement, pensions and other benefits, and shall have the right to an adjustment or settlement of their grievances or disputes in accordance with the terms of this act."⁷ Act 111 does not limit the right to bargain by statutorily defining matters which are reserved to the public employer's discretion, whereas the POFERA does at §1605. As a result, matters of "managerial prerogative" have been defined and developed in case law by the courts in Pennsylvania.

Further, Delaware's public sector collective bargaining law differs from many of the other states from which both parties have cited case law. PERB has not determined that a matter of inherent managerial policy (i.e., a permissive subject of bargaining) cannot be submitted to interest arbitration because the ultimate decision of the interest arbitrator is limited to the choice of one of the parties' last best final offer, in its totality. The issue of submission of permissive subjects of bargaining to the binding interest arbitration process was addressed in *Laurel Education Association and Laurel School District*:⁸

... A party may withdraw a proposal from negotiations or choose to negotiate to a final position on a particular topic, based on its belief that the matter is a permissive subject of bargaining, or for any other reason. To the extent that parties are able to successfully resolve their disputes through negotiations, why a party has chosen a particular position is irrelevant. The parties' agreement simply reflects their mutual agreement as to terms which will govern their shared work for the term of that agreement.

⁷ Section 1 of Act 111.

⁸ BIA 13-12-934, VII PERB 6131 (2014).

The binding interest arbitration process is implemented when negotiation efforts fail. The statute requires each party to submit a comprehensive last, best, final offer for consideration by the interest arbitrator. There is no option afforded to the parties to create and submit “alternative” offers under the law. Unlike the predecessor fact-finding process (which resulted only in a recommendation and did not require the parties to lock into a final position), binding interest arbitration results in a contract which is imposed on the parties when the arbitration decision is rendered. In order to be effective, the binding interest arbitration process requires each party to clearly set forth its final offer, on which it will ultimately either win or lose.

In *Laurel*, the arbitrator found that the School District had clearly stated in its various communications and its argument that it intended to withdraw from the positions it had taken prior to the initiation of binding interest arbitration which were permissive subjects of bargaining. The District specifically identified nine issues as permissive in the exhibits it presented at the interest arbitration hearing. The arbitrator, therefore, considered the District’s last best final offer without those provisions.⁹

The present petition concerns the parties’ inability to mutually resolve and/or move forward in mediation with respect to issues concerning to the number of platoons, shift structure and equipment staffing for the fire department and is cast as a question of whether the City can be compelled to negotiate on these topics.

Analysis of a scope of negotiability issue begins with the underlying premise that the purpose of the Delaware public employment collective bargaining laws is to promote negotiations concerning a broad and encompassing scope of bargaining.

There is a rebuttable presumption that issues should be negotiated and should only be excluded where it is clear that a matter is “either not a term and condition of employment, unequivocally falls within the definition of inherent managerial discretion, or where the impact of the proposal on the [employer’s operation] as a whole ‘clearly outweighs’ the ‘direct impact’ on employees.” *Laurel Education Association v. Laurel School District*

⁹ *Laurel*, (Supra., p. 6157).

(Supra., p. 6167).

Statutes must be read and applied so as to give full effect to all of the provisions thereof. The terms and conditions of employment defined in §1602(n), which must be negotiated pursuant to §1601(2) and §1602(e), are explicitly limited to exclude matters of inherent managerial policy reserved to the employer's discretion by §1605. Organizational structure and staffing levels are so identified and reserved, as is the selection and direction of personnel. The POFERA explicitly states public employers cannot be required to engage in collective bargaining on these "matters of inherent managerial policy"; consequently, it is within the employer's discretion to choose whether or not to negotiate concerning these matters.

Platoon structure and the related shift schedules are integral to the organizational structure, staffing levels, and selection and direction of personnel. Staffing levels and assignment of personnel to shifts requires the public employer to consider efficient utilization of existing personnel in order to provide and maintain around-the-clock protection at an efficient cost level. The public employer is responsible to insure an adequate level of staffing at all times in the 24/7 operation of the fire department, which includes providing relief coverage for absences due to vacations, illness or other unforeseen or negotiated leave. The employer is also responsible to plan for and cover absences due to on-going training requirements and to minimize the impact of training on efficient operation, particularly where it concerns the health and safety of residents and people working and visiting the City.¹⁰

PERB has previously held staffing levels to mean "... the number and mix of positions

¹⁰ The Maine Labor Relations Board similarly held, "A community's level of overall firefighting protection is a political decision to be made by the municipality's elected officers." *City of Bangor v. Bangor Firefighters Association*, Case 83-06 (Maine LRB, 1983).

necessary to accomplish the [employer's] mission.”¹¹

Section 1305¹² expressly references “staffing” which includes determining the number and type of employees required to perform certain responsibilities required by the Employer.

... Staffing constitutes a fundamental and far-reaching right of management which touches not only the employer's financial and budgetary considerations but also the efficient utilization of its employees. In the absence of any reference to staffing in [*the definition of 'terms and conditions of employment'*], staffing decisions do not constitute a term and condition of employment about which the University was required to bargain but rather remained a matter of inherent managerial policy to be bargained at the University's discretion.¹³

The scope of “staffing level” was clarified and limited in the *Brandywine* decision to not include the method or procedure (whether voluntary or involuntary) by which employees are assigned to or transferred between positions, once the employer determines the composition and complement of positions to be employed. PERB has determined that the process and/or mechanism for adjusting the workforce is a mandatory subject of bargaining.¹⁴

Because the issues of organizational structure, staffing levels, and selection and direction of personnel are explicitly reserved to the discretion of the public employer by §1605, the platoon structure and shifts, as established by Article 17.1 of these parties' 2012 – 2016 collective bargaining agreement, are permissive subjects of bargaining under the POFERA. Consequently,

¹¹ *AFSCME Council 81, Local 218 v. Brandywine School District*, ULP 07-05-570, VI PERB 3857 (Del.PERB, 2007).

¹² PERB has held that a decision issued under one of the three (3) public employment relations statutes constitutes binding precedent for identical provisions under the other two (2) statutes. *Wilmington Firefighters Assn., Local 1590 v. City of Wilmington*, ULP 93-06-085 (Del.PERB, 1994).

¹³ *AFSCME 1007 v. Delaware State University*, ULP 01-06-320, IV PERB 2559, 2567 (Del.PERB, 2002)

¹⁴ *Appoquinimink Education Assn., DSEA/NEA v. Appoquinimink Board of Education*, ULP 1-3-84-3-2A, I PERB 35, 56 (1984).

the City of Wilmington cannot be compelled to negotiate with respect to the retention of or changes to §17.1 of the predecessor collective bargaining agreement.

Since its earliest decisions, the Delaware PERB has differentiated between matters of inherent managerial policy which a public employer is not required to negotiate, and the impact of such matters on terms and conditions of employment, which are mandatorily negotiable. In a 1984 decision, PERB considered the issue of class size in the public school context:

While class size significantly affects the operation of the [school] district as a whole, it also has potential impact upon the working conditions of the individual teacher. The extent of this impact on ‘terms and conditions of employment’ constitutes a mandatory subject of bargaining which must be so bargained, upon the request of the employee representative. *Capital Educators Assn. v. Bd. of Education*.¹⁵

The IAFF argues,

“... [[t]here is no aspect of shift and platoon structures, or minimum manning of fire/hazard response equipment that does not touch upon, implicate or impact hours of work, working conditions, and ultimately wages. The shift/platoon structures at issue here, i.e., the current negotiated 24/72 structure vs. the City’s proposed 24/48 structure, cannot be distinguished from hours of work and working conditions ... It is clear from this context that the subject of a shift structure is inherently a matter of working hours and working conditions. The increase in scheduled work time will directly impact the employees’ lives, safety, performance, personal well-being and family obligations, and therefore cannot be divorced from the broad grant of bargaining authority over working hours and working conditions established by the Delaware General Assembly.¹⁶

This is exactly the type of impact which is referenced in the *Capital* decision. While the determination of organizational structure, staffing levels, and selection and direction of personnel are reserved to the employer (and are, therefore, permissive subjects of bargaining), to the extent

¹⁵ DS 1-11-84-3 CAP, I PERB 95, 105 (1984)

¹⁶ IAFF Local 1590’s Supplemental Argument, August 22, 2019, p.4

those determinations impact terms and conditions of employment, the impacts must be negotiated. Although the initial decision is specifically reserved to the inherent managerial discretion of the public employer, the secondary impacts of that decision on the terms and conditions of employment remain mandatory subjects of bargaining. The Connecticut State Board of Labor Relations expressed this requirement well:

If an employer's exercise of managerial prerogative has substantial secondary impacts 'which encroach deeply and substantially' on the working conditions of employees the employer will be required to bargain the impacts of the decision.¹⁷

The IAFF argues the City has not previously formally objected, asserted bargaining was unsuitably intrusive of its prerogatives, or sought to avoid bargaining with other City bargaining units over shift and platoon structures or minimum manning of equipment. It also asserts the City has failed to show, "... that it has been unable to perform its mission, or that it has been unable to retain control over its budgets"¹⁸ while the existing contractual provisions have been included in successive collective bargaining agreements. These argument, however, miss the mark.

PERB has held a party may delete a permissively negotiated provision from a successor agreement simply by declining to negotiate in the next round of negotiations concerning that issue. Inclusion of a permissive subject of bargaining in an agreement does not convert that issue to a mandatory subject of bargaining in successive negotiations. *Capital Educators Assn.*, (Supra.); *City of Wilmington and FOP Lodge 1, et al.*, DS 02-10-369, IV PERB 2859, 2872 (2003).

The willingness to engage in good faith negotiations concerning a permissive subject of bargaining does not prevent a party from later withdrawing that matter from the negotiations prior

¹⁷ *City of Bridgeport v. Bridgeport Police Union Local 1159*, Decision 4651 (Conn. State Bd. of Labor Relations, 2013) citing *Area Cooperative Educational Services*, Decision 3159 (1997) and *City of Bridgeport*, Decision 3119 (1993).

¹⁸ IAFF Local 1590's Supplemental Argument, p. 9

to or during impasse resolution procedures.¹⁹

Either party may undertake good-faith bargaining concerning a permissive subject of bargaining without forfeiting its right to, at a later point, refuse to bargain further or, in fact, to withdraw its proposals and remove the subject from negotiations entirely. To rule otherwise and sustain a claim of waiver based on a course of collective bargaining would penalize the moving party for endeavoring to reach agreement by consenting to bargain upon such issues as to which the Act does not require him to bargain. *Katz Mfg. Co.*, 9th Cir., 365 F.2d 829 (1966). The Fourth Circuit Court of Appeals held that:

A determination that a subject which is non-mandatory at the outset may become mandatory merely because a party had exercised this freedom [to bargain or not to bargain] by not rejecting the proposal at once, or sufficiently early, might unduly discourage free bargaining on non-mandatory matters. Parties might feel compelled to reject non-mandatory proposals out-of-hand to avoid risking waiver of the right to reject. *NLRB v. Davison*, 4th Cir., 318 F.2d 550 (1963). [*citing Capital Educators Assn., Supra*].

The issue of the negotiability of the minimum manning provision found in §11.6 presents a different consideration. The City has made it abundantly clear in its submissions that “...*neither* party is proposing to change the minimum-manning requirement ... which mandates that all apparatus be staffed by no fewer than one officer and three firefighters.”²⁰ The City challenges the negotiability of the IAFF’s proposal to modify §11.6 to “... increase the number of apparatus used to nine – six engines, two ladder trucks, and one heavy rescue vehicle – and contractually prohibit the use of rolling by-pass to ensure adequate manning of these apparatus in the event of staffing shortages”; and to “... require the City to have two Battalion Chiefs and two Battalion Chiefs’ Aides ‘on duty and ready for deployment at all times, i.e., for all shifts, units, and tours of duty.’”²¹

¹⁹ *City of Wilmington v. FOP Lodge 1, IAFF Local 1590, AFSCME Local 1102 and AFSCME Local 320*, DS 02-10-369, PERB 2859, 2872 (Del.PERB, 2003).

²⁰ City of Wilmington’s Opening Brief in Further Support of Petitioner’s Request for a Declaratory Statement, p. 9.

²¹ *Supra* @ p. 10.

Consistent with the direction for the submission of argument (specifically that it should be limited to the negotiability of the existing contractual provisions) there is no issue currently pending before me as to the negotiability of the existing contractual language. Section 11.6 speaks only to the minimum manning of fire suppression equipment at the beginning of each shift. It does not identify or limit the number or type of equipment which constitute “apparatus” for the purpose of this provision.

The IAFF argues that minimum staffing of equipment is a matter of safety for firefighters. The City does not dispute that assertion. To the extent, however, that an effort is made to change the purpose or nature of §11.6 to mandate the type and compliment of the firefighters and officers the City must hire, the previous discussion of the permissive nature of “inherent managerial policies” is instructive.

PERB has declined through its thirty-five year history to “fashion broad and general rules”, in favor of deciding issues on the narrow basis of the facts presented in order to build a base for the development of more general principles over time.²² Requests for declaratory statements require PERB to act in a prospective and advisory role which is more difficult than reviewing factually and retrospectively whether an action or course of conduct violated the statute. The determinations made herein are limited to the context of this petition, at this time, but are also consistent with PERB’s decisions concerning the application of §1605 of the POFERA and corollary provisions of the Public School and Public Employment Relations acts.²³

Finally, it is clear that the best recourse for these parties is to immediately return to the bargaining table to resume sustained and intensive good-faith negotiations for a successor to the

²² *Seaford Education Assn. v. Bd. of Education*, ULP 2-2-84S, I PERB 1, 5 (Del.PERB, 1984).

²³ 14 Del.C. §4005 and 19 Del.C. §1305.

predecessor agreement which expired over three years ago. There is, quite simply, no good alternative to negotiating. The City's financial limitations should be clearly communicated to the bargaining representatives and the employees interests in terms and conditions of employment should be addressed through the open exchange of information, proposals, and compromise. It is well past time for these parties to enter into a sustained effort to resolve these negotiations for the sake of the City, its firefighters, and the people who live and work in Wilmington.

DETERMINATION

For the reasons set forth herein, it is determined that §17.1, in which the parties agreed to the number of platoons and the definition of a "complete tour of duty" in their 2012-2016 agreement, is a permissive subject of bargaining. Consequently, the City cannot be compelled to negotiate with respect to the retention of or changes to this contractual provision in a successor agreement.

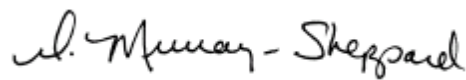
There currently is no issue pending as to the negotiability of the existing contractual language found in Section 11.6 of the 2012 – 2016 collective bargaining agreement. The parties do not dispute that the existing language relates to safety in the working conditions of firefighters when they are engaged in suppression activities. To the extent that a proposal transcends safety concerns to mandate the number and type of apparatus the fire department must have in service and/or the types and number of firefighting positions the City must employ, those proposals are subject to the same analysis of 19 Del.C. §1605 as applied to §17.1.

Inclusion of a permissive subject of bargaining in an agreement does not convert that issue to a mandatory subject of bargaining in successive negotiations. There are many reasons that a public employer might choose to negotiate with respect to a permissive subject of bargaining; but the fundamental choice as to whether to engage in such negotiations and/or to enter into or retain

a contractual provision which is statutorily reserved to the employer's inherent managerial discretion rests with the employer.

Whereas matters of inherent managerial policy, including organizational structure, staffing and the selection and direction of personnel are reserved to the employer's discretion, the secondary impacts of the exercise of such discretion on the terms and conditions of employment remain mandatory subjects of bargaining.

DATE: October 9, 2019



DEBORAH L.MURRAY-SHEPPARD
Executive Director, Delaware PERB