

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS,	:	
LOCAL 1590,	:	
	:	Unfair Labor Practice Charge
Charging Party,	:	<u>No. 23-10-1382</u>
	:	
v.	:	
	:	
CITY OF WILMINGTON, DELAWARE.	:	PROBABLE CAUSE DETERMINATION
	:	
Respondent.	:	

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

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 current collective bargaining agreement has a term of July 1, 2023 through June 30, 2025.

On October 13, 2023, the IAFF filed this unfair labor practice charge with the Public Employment Relations Board (“PERB”) alleging the City had engaged in conduct which violated 19 Del. C. §1607(a) (5) and/or (6) which state:

- (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:

- (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.
- (6) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

Specifically, the Charge alleges the City violated the statute by unilaterally modifying the terms for Military Leave Pay without providing prior notice to the IAFF in order to allow it the opportunity to bargain changes to this mandatory subject of bargaining, i.e., wages.

On or about October 26, 2023, the City filed its Answer in response to the Charge. The City admits that it had not been calculating Military Leave Pay consistent with the clear and unequivocal language of Article 9.3(2). It asserts it took action to comply with both the clear and unambiguous terms of the negotiated collective bargaining agreement and the requirements of Section 40-388 of the City Code.

This probable cause determination results from a review of the pleadings.

DISCUSSION

Regulation 5.6 of the Rules of the Delaware Public Employment Relations Board requires:

- (a) Upon review of the Complaint, the Answer and the Response the Executive Director shall determine whether there is probable cause to believe that an unfair labor practice may have occurred. If the Executive Director determines that there is no probable cause to believe that an unfair labor practice has occurred, the party filing the charge may request that the Board review the Executive Director's decision in accord with the provisions set forth in Regulation 7.4. The Board shall decide such appeals following a review of the record, and, if the Board deems necessary, a hearing and/or submission of briefs.
- (b) If the Executive Director determines that an unfair labor practice may have occurred, he shall where possible, issue a decision based upon the pleadings; otherwise, he shall issue a probable cause determination setting forth the specific unfair labor practice which may have occurred.

For purposes of reviewing the pleadings to determine whether probable cause exists to support the Charge, factual disputes revealed by the pleadings are considered in a light most

favorable to the Charging Party in order to avoid dismissing a valid charge without the benefit of receiving evidence in order to resolve factual differences. *Flowers v. DART/DTC*, PERB Probable Cause Determination, ULP 04-10-453, V PERB 3179, 3182 (2004).

Many of the underlying facts in this charge are undisputed. Section 9.3, Military Leave, of the current collective bargaining agreement between the IAFF and the City states:

- (2) Any employee of the City who is a member of the National Guard or any reserve component of the Armed Forces of the United States will be entitled to a leave of absence without loss of time or annual leave during which they are engaged in the performance of official duty or training in this state, or in the United States, under competent orders. While on such leave they shall be paid their regular salary, less their military pay, not to exceed a total of fifteen (15) working days for Administrative Personnel or seven (7) tours of duty for Suppression Personnel in any one (1) calendar year. Military Leave may be utilized in one (1) unit increments.

The City admits that Section 9.3 (2) has remained unchanged over several prior collective bargaining agreements, with the exception of the last sentence.¹ The IAFF proposed the addition of the final sentence in the most recent negotiations which resulted in the 2023-2025 Agreement.

The IAFF asserts that firefighters who are members of the US Military (including members of the National Guard and Reserves) have been paid the full amount of their regular daily pay from the City for days on which they were otherwise scheduled to work but were instead required to report for mandatory military service and training.² The City admits that, "... notwithstanding the plain language of Article 9.3(2) of the Agreement, Firefighters on Military Leave had erroneously received their full pay from the City without a deduction of their military pay."³

On or about April 18, 2023, the City's Department of Human Resources provided a Memorandum to all City employees, entitled, "Correction to Erroneous Past Military Pay

1 Answer to the Charge, ¶9.

2 Charge, ¶7.

3 Answer to the Charge, ¶7.

Practice”. A copy was also provided directly to Sr. Firefighter Aaron Robinson who is the President of IAFF Local 1590.⁴ The Memorandum stated:

While resolving a military pay issue, the City’s law department discovered that a City practice of compensating employees on mandatory training and annual military training by paying them their full base City pay *in addition to* the compensation they receive from the military was in error because the practice was not authorized by the City Code, the Human Resources Manual or the Collective Bargaining Unit Agreements of the City’s Unionized employees.

In fact, the Wilmington City Code provides that **for all eligible required military pay whether mandatory training, assignment, active duty, or mobilization, the City employee should receive differential pay: that is, the amount of the difference in pay between the employee’s base pay with the City and the military pay paid to the employee if the City base pay is greater than the military pay.**⁵...

While the City does not intend to collect previous overpayments made under the erroneous practice, effective immediately, the payroll department will pay all eligible payments consistent with the Law Department’s advice.

As a reminder, and consistent with the City Code, in order to receive the pay differential for military training, the training must be mandatory and not voluntary. Therefore, military orders, or other adequate documentation reflecting such, should be provided to the City Department of Human Resources (HR) beforehand...

In order to determine the amount of the differential payment to be paid to the employee, the employee must provide HR with a Defense Finance and Accounting Service Military Leave and Earnings Statement (LES)... The employee will be paid the appropriate pay differential after HR receives the LES. For example, if the employee is able to provide HR with the LES *prior* to the scheduled training or other military duty, the employee will receive the pay differential in the pay period the training or military duty occurs. If the employee is not able to provide the LES prior to the training or military duty, the employee will be placed on “Military No Pay” status while attending the training or military duty. After the employee returns to work, they must provide HR with the LES and then they will receive payment of the pay differential. (*emphasis in the original*)

⁴ Exhibit B to the Unfair Labor Practice Charge.

⁵ Citing to Section 40-388 of the City Code – Military leave, military differential pay and mobilization pay. The cited provision was included later in the memorandum.

The IAFF alleges this memorandum was issued while the City and the IAFF were negotiating the 2023-2025 collective bargaining agreement. It alleges:

The City did not notify the IAFF that it was considering the content or actions described in the Memorandum, did not notify the IAFF of the pending release and distribution of the Memorandum, and did not negotiate – or attempt to negotiate – the content and actions described in the Memorandum.⁶

The City admits it did not discuss the April 18, 2023 Memorandum with the IAFF prior to its release or proposed modification to Article 9.3(2), noting no changes to Agreement was required to issue the Memorandum, because it was simply notifying the IAFF that it would be enforcing the agreed-upon contractual provision.

In order to find a violation of the duty to bargain in good faith, the Charging Party must establish both that there was a unilateral change in the status quo and that the change affected a mandatory subject of bargaining.⁷ Compensation is a mandatory subject of bargaining.

DETERMINATION

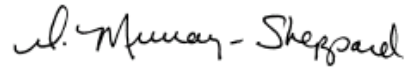
The pleadings raise limited issues of fact, as well as questions of law, on which the parties will be heard prior to a determination. It is the IAFF's burden to establish that the City violated the statute as alleged. The timing of the April 18, 2023 memorandum within the context of the negotiations between the IAFF and the City should be provided. In addition to other legal issues raised in the pleadings (including the impact, if any, of a past practice which is inconsistent with the contractual provision), the parties are requested to provide argument as to why this charge should not be deferred to their negotiated grievance procedure for initial determination.

⁶ Charge ¶16.

⁷ *Fraternal Order of Police Lodge No. 1 v. City of Wilmington*, ULP 89-08-040, I PERB 449 (1989), citing *Collyer Insulated Wire*, NLRB, 129 NLRB 837 (1971); *FOP Lodge 1 v. City of Wilmington*, ULP 10-11-773, VII PERB 4935 (2011); *IAFF Local 1590 v. City of Wilmington*, ULP 20-12-1253, IX PERB 8573 (2022, Probable Cause Determination and Order of Dismissal), affirmed by PERB, IX 8609 (2022).

A hearing shall be promptly scheduled in order to receive evidence and argument as to whether the City violated 19 Del. C. §1607(a)(5) and (a)(6) when it modified the manner in which firefighters represented by IAFF Local 1590 are compensated while on military leave.

DATE: November 27, 2023



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