

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.	:	ORDER OF DEFERRAL
	:	
Respondent.	:	

On November 27, 2023, a Probable Cause Determination was issued on the pleadings of the parties concerning this Charge. The determination stated:

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 [International Association of Firefighters, Local 1590’s (“IAFF”)] burden to establish that the [City of Wilmington, DE (“City”)] 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.

Thereafter, a hearing was scheduled and noticed for February 5, 2024.

On January 4, 2024, the City filed a Motion to Amend its Answer to the Charge to include New Matter. In the amended Answer, the City asserted the Public Employment Relations Board should defer resolution of this unfair labor practice charge until the parties have exhausted their contractual grievance and arbitration procedure. The New Matter noted the IAFF had filed a grievance alleging a violation of §9.3 of the current collective bargaining agreement on August 23, 2023. It further noted that the grievance is currently being scheduled to be heard by a mutually selected arbitrator.

On January 12, 2024, the IAFF filed a Response to the City's Amended Answer and New Matter, in which it admitted that there is currently a pending grievance concerning application of §9.3 of the negotiated Agreement. The IAFF argues, however:

The City has failed to offer a reason or analysis for why the PERB should defer a determination of its November 27, 2023, probable cause finding on the IAFF's Charge. The City has only offered a bare citation to case decisions that reflect the PERB's decision in those matters to exercise its discretionary deferral policy. It has not offered any reason why this Charge should be deferred. As the IAFF outlined in its Charge the City's unlawful action extends to statutory bargaining violations beyond the scope of one employee's grievance concerning a matter of compensation under the parties' collective bargaining agreement.

DISCUSSION

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 for Suppression Personnel in any one (1) calendar year. Military Leave may be utilized in one (1) unit increments.

The Charge alleges the City unilaterally modified the negotiated terms for Military Leave Pay without providing prior notice to the IAFF in order to allow it the opportunity to bargain changes, in violation of its duty to bargain in good faith.

In order to find a violation of the good faith duty to bargain, the IAFF must establish both that there was a unilateral change in the status quo and that the change affected a mandatory subject of bargaining. The parties do not dispute that compensation is a mandatory subject of bargaining.

To establish there has been a change in the status quo, it must first be determined there has been a material change in the negotiated terms and conditions of employment of bargaining unit

employees.

It is undisputed that the IAFF submitted a grievance pursuant to the parties' negotiated Agreement, on behalf of one of its members, asserting a claim that the City had violated §9.3 when it changed its method of compensation for firefighters who were out of work on military leave. The parties agree that grievance process is on-going, that an arbitrator has been selected, and that an arbitration hearing is pending.

This Board has held that where resolution of an alleged statutory violation directly relates to a contractual issue which is subject to resolution through the parties' negotiated grievance and arbitration procedure, PERB may invoke a discretionary, limited deferral policy. When parties have contractually committed themselves to procedures for resolving contractual disputes, it is prudent and reasonable for this Board to afford those procedures the full opportunity to function.¹

The question of whether PERB should withhold its processes arises only when a charge presents a set of facts which not only allege statutory violations but also allege a breach of the collective bargaining agreement which is subject to resolution through the grievance procedure. The collective bargaining agreement between these parties includes a negotiated grievance procedure that culminates in the submission of unresolved issues of contractual interpretation and/or application to final and binding arbitration before an impartial arbitrator.

The purpose of the POFERA to support and promote collective bargaining is not furthered by allowing parties to sidestep the grievance procedure by casting a dispute in statutory terms. Because there is a pending grievance which is actively being processed, staying the further processing of this Charge and deferring resolution of the underlying issue of whether there was a

¹ Fraternal Order of Police Lodge No. 1 v. City of Wilmington, ULP 89-08-040, I PERB 449 (PERB, 1989), citing Collyer Insulated Wire, NLRB, 192 NLRB 837 (1971); FOP Lodge 1 v. City of Wilmington, ULP 10-11-773, VII PERB 4935 (2011); FOP Lodge 1 v. City of Wilmington, ULP 22-01-1294, IX PERB 8593 (2022).

change to the negotiated terms and conditions of employment of bargaining unit employees gives full force and effect to the parties' agreement.

Deferral of a charge to processing through the negotiated grievance and arbitration process does not constitute a final resolution of the pending unfair labor practice charge nor deprive PERB of jurisdiction or responsibility to resolve the charge. Where deferral is directed, the PERB retains jurisdiction over the charge for the express purpose of reconsidering the matter upon application by either party for any of the following reasons: 1) the arbitration award failed to resolve the statutory claim; 2) the arbitration has resulted in an award which is repugnant to the applicable statute; 3) the arbitral process has been unfair; and/or 4) the dispute is not being resolved by arbitration with reasonable promptness.

Wherefore, the processing of this Charge is stayed pending the exhaustion of the parties' grievance and arbitration procedure.

DETERMINATION

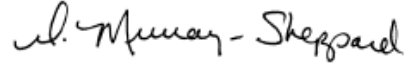
Because the resolution of the allegations of this Charge requires a determination that there has been a change in the application of the collective bargaining agreement, the Charge is deferred to the negotiated grievance and arbitration procedure. The hearing scheduled for February 5, 2024 is postponed and the notices may be removed from the workplace.

Without prejudice to either party and without deciding the merits of the controversy, PERB retains jurisdiction over the Charge for the limited purpose of entertaining a timely and appropriate motion for further consideration by either party that:

- 1) the arbitration award failed to resolve the statutory claim;
- 2) the arbitration resulted in an award which is repugnant to the applicable statute;
- 3) the arbitral process has been unfair; and/or
- 4) the dispute is not being resolved by arbitration with reasonable promptness.

The parties are directed to notify the Public Employment Relations Board within sixty (60) days from the date of this decision as to the status of the underlying grievance.

DATE: January 22, 2024



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