

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS,	:	
LOCAL 1590,	:	
	:	Unfair Labor Practice Charge
Charging Party,	:	<u>No. 23-01-1341</u>
	:	
V.	:	
	:	
CITY OF WILMINGTON, DELAWARE.	:	DECISION ON THE MERITS
	:	AND ORDER OF DISMISSAL
Respondent.	:	

Appearances

Aaron M. Shapiro, Esq., Connolly Gallagher, for IAFF Local 1590
Laura T. Hay, Esq., Sr. Assistant City Solicitor, for the City

BACKGROUND

The City of Wilmington, Delaware (“City”) is a public employer within the meaning §1602(13)(a) of the Police Officers’ and Firefighters’ Employment Relations Act (“POFERA”), 19 Del. C. Chapter 16.

The International Association of Firefighters (“IAFF”) is an employee organization within the meaning of 19 Del. C. §1602(7). 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 holding the ranks of Firefighter, Lieutenant, Captain and Battalion Chief, as defined in DOL Case 23. 19 Del. C. §1602(8).

The City and IAFF Local 1590 were parties to a collective bargaining agreement with a term of July 1, 2019 through June 30, 2023.¹

¹ Administrative notice is taken that a successor agreement was successfully negotiated by these parties and executed on June 1, 2023. IAFF Exhibit 3.

On January 31, 2023, the IAFF filed this unfair labor practice charge with the Public Employment Relations Board (“PERB”) alleging the City had violated 19 Del. C. §1607(a)(1), (a)(2), (a)(3), (a)(5) and/or (a)(6) which state:

- (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 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 unilaterally established and adopted a Tardiness and Attendance Policy which violated the status quo of mandatory subjects of bargaining, including sick leave and discipline.

On or about February 21, 2023, the City filed its Answer and New Matter in response to the Charge. On or about February 28, 2023, the IAFF filed its Response to the New Matter denying all the allegations included in the City’s Answer.

A probable cause determination was issued on December 26, 2023, and hearing dates were offered. The scheduled February 23, 2024 hearing was continued at the joint request of the parties to pursue settlement discussions, which were ultimately unsuccessful.

A hearing on the merits was conducted on September 30, 2024, during which the parties were afforded the opportunity to present both testimonial and documentary evidence, and to cross examine the opposing party’s witnesses. The hearing record remained open for submission of

training records referenced by the City's witnesses. On or about October 29, City Exhibits 7 – 10² were admitted into evidence, over the IAFF's objections. Thereafter the parties provided written closing arguments and rebuttal arguments. This decision results from the record thus created by the parties.

FACTS

The WFD is governed by General Rules which include Article 15, Medical, which states at Section 15:11:

No member of the Fire Department shall abuse sick leave. In the Fire Department, abuse of sick leave shall mean that a member has developed and/or established a set pattern of being absent from his/her assigned tour of duty through the wrong or improper use of sick leave, and such abuse can be documented. *Class F Violation.*³

It is not disputed that Section 15:11 of the Fire Department's General Rules has been in effect for at least 30 years.⁴

At some point prior to September 1, 2019, the City's Department of Human Resources approved Policy 208.1⁵, Tardiness and Attendance. The stated objective of the policy is "... to promote the efficient operation of the departments of the City to minimize tardiness and unapproved and unscheduled absences."⁶ The Tardiness and Attendance Policy states, in relevant part:

PURPOSE: The purpose of this Policy is to establish written guidelines

² It is noted that City Exhibit 10 was not relied upon in reaching this decision as it included no information which referenced the Tardiness and Attendance policy.

³ City Exhibit 1, p. 46

⁴ Transcript ("TR"), p.51.

⁵ The Tardiness and Attendance Policy is properly numbered HR Policy 208.1. In all the Fire Department documentation provided, it is and has been referred to as "Policy 207.1". What the Fire Department referred to as Policy 207.1 is the same Tardiness and Attendance Policy referred to by the Human Resources Department as Policy 208.1. The mistaken reference to the Policy number has no impact on consideration of this charge.

⁶ City Exhibit 8.

pertaining to procedures for handling instances of tardiness and unapproved and unscheduled absences. This Policy is not all inclusive, and the City has the authority and sole discretion to appropriately address unacceptable behavior.

Punctual and regular attendance is an essential responsibility of each employee of the City. Tardiness or unapproved and unscheduled absences adversely impact operations, fellow employees, supervisors, and the services provided to the residents of the City. When an employee is absent, it may be necessary for others to perform his or her work, which diminishes the efficient functioning of the City.

Employees are expected to report to work as scheduled, on time, and prepared to begin the workday.

Employees are also expected to be present for their entire work schedule so that they may perform the essential functions of their position. Late arrival, early departure or other unscheduled absences are disruptive and should be avoided.

Conflicting provisions contained in a collective bargaining agreement shall supersede this Policy. Where a collective bargaining agreement is silent, this Policy shall govern.

Tardiness: All employees have a responsibility to report timely to work as scheduled. Reporting to work late or returning late from a scheduled break can negatively impact operations, service delivery and morale. Supervisors shall regularly monitor an employee's tardiness and consistently address unsatisfactory behavior through counseling and the progressive discipline process.

Tardiness is defined as the failure to arrive at work at the scheduled start time, including returning late from a scheduled break.

ATTENDANCE: All employees have a responsibility to regularly report to work as scheduled. Absences can hinder productivity, require unbudgeted overtime and impact employee morale. Supervisors shall regularly monitor an employee's attendance and consistently address unsatisfactory behavior through counseling and the progressive discipline process.

UNAPPROVED AND UNSCHEDULED ABSENCES: This Policy makes a distinction between scheduled and unscheduled time off. If an employee is absent from work, arrives late or leaves early and has advanced approval from a manager, the absence, lateness or early departure is considered scheduled and approved. If the employee is absent from work, arrives late, or leaves early and does not have advance approval from the manager, it is generally considered unscheduled and unapproved. This applies to absences relating to sick/family illness, combined leave, vacation, compensatory or floating days, as well as leave without pay. Payment for an absence is not necessarily based on whether the absence is approved. In other words, provided the employee has accrued leave, he or she may nevertheless be paid for an absence that is unapproved and unscheduled.

For purposes of this Policy, absences indicative of abuse may be determined by, but are not limited to, usage that is, or reflects a pattern of the following:

- Repeatedly on any one specific day(s) of the week and/or occurring over an extended period of time in a reoccurring pattern. This may take the form of, but is certainly not limited to, absences that repeatedly occur after the accrual of additional sick time;
- Following overtime worked;
- Before or after a holiday, pay day, or weekend;
- In such a way to maintain zero/near zero leave balances, or failure to accumulate;
- Scheduled during peak work periods or for undesirable temporary or permanent shifts/assignments;
- An absence for which leave has previously been denied; and
- Involving peculiar and/or increasingly improbable excuses.

Absences protected by applicable law (e.g., Family and Medical Leave Act, the Americans with Disabilities Act) are not considered unapproved absences for disciplinary reasons.

REPORTING PROTOCOL: Employees who are unable to arrive to work on time, must depart from work early, or must be absent from a scheduled shift, must contact their supervisor or designee in advance of their scheduled shift. General best practice is for employees to obtain at least twenty-four (24) hours' advanced approval of late arrival, early departure, or absence, unless such advance notice is impractical given the situation.

When possible, employees are expected to schedule routine medical and dental appointments outside of scheduled work hours. When this is not possible, employees are expected to notify their supervisor or designee at least twenty-four (24) hours in advance, except for urgent or emergency care that cannot be delayed.

DISCIPLINE: Discipline shall be administered according to progressive discipline as outlined in applicable collective bargaining agreements, departmental work rules, Human Resources Policy Manual, and/or the City Code. Management has the responsibility to ensure employees comply with work rules, regulations and policies established by the City. Supervisory personnel may utilize discipline to correct behavioral deficiencies and issues of non-compliance. While discipline is punitive, the desired goal is corrective action.

Progressive discipline is the process of using increasingly severe steps/measures when an employee fails to correct behavior after being given a reasonable opportunity to do so. The City may choose, as its sole discretion, to bypass the progressive discipline process in certain circumstances based upon employee conduct.

Violations of this Policy for tardiness are subject to progressive discipline beginning with the fourth (4th) tardiness in a rolling 12-month period.

Violations of this Policy for absences are subject to progressive discipline beginning with the fourth (4th) unapproved and unscheduled absence in a rolling 12-month period.

This policy shall be effective September 1, 2019.⁷

All Human Resources policies must be approved by the City's Administrative Board in a public hearing before being adopted and implemented. The agenda for each meeting, including a list of the policies to be considered, is posted in advance and the proceedings are subject to the Freedom of Information Act ("FOIA") disclosure.⁸ The Board noticed consideration of the HR Tardiness and Attendance Policy for its June 25, 2019 public meeting.

Following the Administrative Board's adoption of Policy 208.1, Tardiness and Attendance, it was distributed to the City's workforce by the Mayor's Director of Communications and Policy on August 29, 2019.⁹ Following the electronic distribution of the policy, the Human Resources Department provided training opportunities to City employees on September 4, 2019 and September 11, 2019. The email also states, "additional sessions may be conducted as needed".¹⁰

On or about August 28, 2019, the Chief of Fire issued General Order 2019-24 to all Fire Department members, under the heading, "RE: Tardiness and Attendance Policy; Human Resources Policy 207.1". Although GO 2019-24 included an incorrect HR Policy number, the policy was identified by name. GO 2019-24 stated:

The City of Wilmington's Human Resources Department has established Policy 207.1 [*sic*] – Tardiness and Attendance. The Policy will be effective starting September 1, 2019. The provisions of this Policy will apply and be enforced except where specifically outlined in the Collective Bargaining Agreement. Company Officers will review the Policy with their personnel.¹¹

⁷ City Exhibit 6.

⁸ TR. p. 99 – 100.

⁹ Exhibit 4 to the City's Answer to the Charge. This appears to be the first time the Tardiness and Attendance Policy was incorrectly referred to a "Human Resources Policy 207.1"

¹⁰ Supra.

¹¹ City Exhibit 7.

Hereinafter the Tardiness and Attendance policy shall be referred to in this decision as “207.1/208.1” in order not to cause confusion as it is referred to by both numbers throughout the record.

The four copies of GO 2019-24 entered into the record as City Exhibit 7 include in the lower right corner a grid with initials. The grid has four columns, identified as “A”, “B”, “C”, and “D”, under which are six boxes, which contain 58 sets of “Members” initials. The IAFF confirmed that General Orders are normally posted at each company or duty unit but are not individually distributed to employees or to the IAFF. The City did not contest the IAFF’s assertion that there are 13 posting areas for General Orders: six engine companies, two ladder companies, the Marine Company, Headquarters, Fire Marshall’s Office, and Districts 1 and 2.

Training was individualized for the WFD by the Deputy Director of Human Resources and the Battalion Chief of Support Operations. The training was delivered at WFD Headquarters in 2019. The training power point was introduced as Union Exhibit 5, and states on the second page:

For purposes of this Policy, absences indicative of abuse may be determined by, but are not limited to, usage that is, or reflects a pattern of the following:

- Repeatedly on any one specific day(s) of the week and/or occurring over an extended period of time in a reoccurring pattern. This may take the form of, but is certainly not limited to, absences that repeatedly occur after the accrual of additional sick time;
- Before or After a Vacation, Exchange Day or Kelly Day;
- Before or after a holiday, pay day or weekend;
- In such a way to maintain zero/near zero leave balances, or failure to accumulate;
- Scheduled during peak work periods or for undesirable temporary or permanent shifts/assignments;
- An absence for which leave has previously been denied; and
- Involving peculiar and/or increasingly improbable excuses.

Absences protected by applicable law (e.g., Family Medical Leave Act, the Americans with Disability Act) are not considered unapproved absences for disciplinary reasons.

The Power Point presentation also included Regulation 15:11, prohibiting abuse of sick leave as a Class F Violation, noting a First Offense would result in a Reprimand, a Second Offense would result in a Reprimand up to a 2-day suspension, a Third Offense would result in a 2 – 5 day suspension. Consequences for violations were also defined, “Violations of this Policy for absences are subject to progressive discipline beginning with the fourth (4th) absence in a rolling 12-month Period.” The training also included examples of absences which would constitute a “Sick Holiday Pattern”, a “Same Day of the Week Pattern”, a “Weekend Pattern”, a “Vacation Pattern”, an “Exchange Pattern”; a “Kelly Day Pattern”; and a “Failure to Accumulate Sick Leave” pattern. All the calendars used in the examples are for Calendar Year 2019, which began on Tuesday, January 1 and ended on Tuesday, December 31.¹²

Deputy Chief Davis testified he attended in-person training on the Tardiness and Attendance Policy in 2019, when he served as a Captain in Suppression. He went for departmental training on the policy with his company twice in the fall of 2019, once during the regular shift and once on overtime.¹³ He further explained he completed the Departmental Training Form (F-33) which documents the personnel in his company who attended the training.

[A]ny time that there’s training, whether that’s at the company level or department-wide training, the company officer at – in 2019, was required to do that in paper form.¹⁴

Both the Chief and the Deputy Chief testified, without refute, that the Department transitioned its training records from paper to an electronic format in 2020, using the Target Solutions application. Training assignments were sent to all WFD members by email, with a due date to complete the training on-line. Supervisors were responsible to ensure their subordinates

¹² IAFF Exhibit 5.

¹³ TR. p. 123

¹⁴ TR. pp. 123-125, City Exhibit 7.

were completing training in a timely manner.¹⁵ City Exhibit 9 is an electronic record generated in Target Solutions which reflects that training was assigned electronically to WFD employees, including officers, both in August 2020, and in January 2023. Firefighter Robinson (who testified as the IAFF’s sole witness) was assigned the training on August 18, 2020, and completed the training on August 22, 2020.¹⁶

The City provided copies of three summary disciplines which were issued under the Tardiness and Attendance Policy. The first was issued on August 18, 2020 for repeatedly using sick leave “before or after a holiday, pay day or weekend”. The Lieutenant acknowledged his violation of the Policy, admitted he was not keeping track of his occurrences, and accepted the discipline without grieving.¹⁷ The second incident resulted in an Official Reprimand to a different Lieutenant on August 12, 2021, for reporting off on sick leave on four or more occasions in conjunction with his assigned Kelly Days. That discipline was also accepted and not grieved.¹⁸ The third example involved a Battalion Chief who accepted an Official Reprimand on August 12, 2021, who also had established a pattern of four or more uses of sick leave in conjunction with his assigned Kelly Days.¹⁹

On or about January 19, 2023, the Fire Chief issued General Order 2023-01 to all Department Members, entitled “Human Resources Policy 201.7 ‘Tardiness and Attendance’”.

As an Officer in the Wilmington Fire Department, one of your duties is to enforce the Department’s Rules, Regulations, and Policies. All Officers are responsible for enforcing the City of Wilmington’s Human Resource Policy 207.1 [201.8] “Tardiness and Attendance” for those members assigned to them. Effective immediately, Officers will:

1. Complete the assignment in Target Solutions for Human Resource Policy

¹⁵ TR. pp. 124-125.

¹⁶ City Exhibit 9, p. 5.

¹⁷ City Exhibit 2.

¹⁸ City Exhibit 3.

¹⁹ City Exhibit 4.

207.1 [201.8] by reviewing the PowerPoint presentation assigned to you.

2. Review the 2022 attendance cards we provided you for violations of the Policy.
3. You are required to track your subordinate's time and attendance for 2023 and identify future violations of the Policy. There is a blank attendance card in the Human Resource Policy 201.7 folder located in Target Solutions to aid you in tracking time and attendance.
4. As an Officer, you should counsel and document a subordinate before they receive a violation. An example would be an Official Warning (Article 5:00 Disciplinary Procedures) on the third occurrence.
5. If there is a violation in 2022 or 2023 and it has not already been addressed, you shall take the appropriate actions as outlined in the Rules and Regulations for a violation of the Rules and Regulations.
6. After a member has violated the Policy and has been disciplined, any continued absences of the same pattern in the rolling period would be a separate violation.

Any absence that approved FMLA covers is not to be counted against the member. Any absence that is not covered and is to care for a family member is counted as an occurrence.

Any questions should be directed to Battalion Chief Zipfel in an email.²⁰

Article 12, Rules and Regulations, of the parties' 2019 – 2023 collective bargaining agreement states:

Section 12.1 Management Rights The employees' representative agrees that the Employer has complete authority over the policies and administration of the Fire Department which it exercises under this agreement, including all statutory and inherent managerial rights, prerogative and functions. Any matter involving the management of department operations, except as expressly modified or restricted by a specific provision of this Agreement remains within the exclusive province of the Employer. This provision is not intended to cover, however, a fixed and established past practice of the parties that has been unequivocally accepted by both parties over a reasonable period of time but has not been reduced to writing in this Agreement. Should the Union object to any work rule or regulation as being in violation of this Agreement, it may resort to the Grievance Procedure outlined in this Agreement.²¹

²⁰ IAFF Exhibit 1.

²¹ IAFF Exhibit 4, p. 31.

This section of the parties' agreement is not changed in the current agreement.²²

Article 22, Application of Rules and Regulations of the Fire Department, is also unchanged in the current collective bargaining agreement:

Section 22.1 Articles 4 through 12 of the Rules and Regulations of the Department are incorporated into this Agreement by reference and made a part thereof. All other Rules and Regulations of the Department, General Orders, Standard Operating Procedures, and other internal directives are not part of this Agreement and are subject to Article 12.1 of this Agreement. The parties agree, however, that the classification of offense for Rules and Regulations not incorporated into this Agreement shall remain unchanged during the term of this Agreement. In the event that the Rules and Regulations, General Orders, Standard Operating Procedures, or other internal directives conflict with this Agreement, then the provisions of this Agreement shall govern.²³

The collective bargaining agreement also includes a Maintenance of Standards clause in Article 23:

Section 23.1 The City agrees that all conditions of employment relating to wages, salaries, hours, insurance, vacations, sick leave, grievance procedures and all other terms and conditions of employment shall be maintained at not less than the highest standards in effect at the time of the signing of this Agreement, and the same shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement. The parties agree that this provision in no way precludes the City from making reasonable, non-arbitrary modifications and additions to the Department's Rules and Regulations, General Orders, and Standard Operating Procedures which are no longer incorporated by reference in this Agreement.²⁴

POSITIONS OF THE PARTIES

IAFF Local 1590:

The IAFF asserts sick leave and discipline are mandatory subjects of bargaining under 19 *Del. C.* §1602 (5) and (15). The City's adoption of the Tardiness and Attendance policy unilaterally modified the status quo of sick leave and discipline because it includes enforcement

²² IAFF Exhibit 3, p. 29.

²³ IAFF Exhibit 3, p. 25.

²⁴ IAFF Exhibit 3, p. 35.

criteria and mechanisms which are specifically tailored to how firefighters use sick leave. It argues firefighters had never been subject to discipline for sick leave use prior to Policy 207.1/208.1.

By not providing the IAFF with official notice of its intent to make changes to the status quo, never requesting to bargain with the IAFF, and never requesting the IAFF review and discuss the policy prior to implementation, the City violated its good faith bargaining obligation. To the extent the City attempted to implement its policy, its efforts were inconsistent and done without providing the IAFF notice, and were not done in a manner that materially informed the IAFF of the City's intent to modify the status quo of sick leave and discipline.

The IAFF argues it did not waive its statutory right to bargain, nor was this Charge untimely. There was "no mutual agreement that the IAFF unequivocally ceded unilateral authority to the City over this subject matter, whether by reference to the bargaining agreement or practice and history, and the IAFF took immediate steps to challenge the City's unilateral action once it received actual notice of the City's intent."²⁵

City of Wilmington:

The City argues the IAFF failed to provide evidence sufficient to establish a violation of the POFERA. Policy 207.1/208.1 has been in effect since September 1, 2019. It was adopted after a public hearing by the City's Administrative Board. The policy was shared with and presented to City employees in informational sessions in September, 2019, and specific training for the Fire Department was provided in the fall of 2019, in 2020 and again in 2023. At no time since the September 2019 implementation has the IAFF objected to the policy or sought to negotiate concerning implementation prior to the filing of this charge.

The IAFF waived any right it might have had to negotiated following the issuance of GO

²⁵ IAFF's Opening Brief in Support of ULP Charge, @ p. 7-8.

2023-01 because it was issued pursuant to the same policy as GO 2019-24. There has been no change to Policy 207.1/208.1 since its implementation in September 2019; hence, there is no change to the status quo of either sick leave or discipline. The fact that all members of the bargaining unit were provided documented training in 2019 and 2020 provided the IAFF with ample notice to file a demand to bargain or to file a grievance pursuant §12.1 of the parties negotiated agreement. It failed to do either.

The charge is untimely as it was filed more than three years after Policy 207.1/208.1 was implemented and should be dismissed.

ISSUE

WHETHER THE CITY UNILATERALLY MODIFIED THE TERMS AND CONDITIONS OF THE FIREFIGHTERS' USE OF SICK LEAVE AND ESTABLISHED SUMMARY DISCIPLINE FOR ALLEGED INFRACTIONS, IN VIOLATION OF ITS DUTY TO BARGAIN IN GOOD FAITH CONCERNING MANDATORY SUBJECTS OF BARGAINING, AND 19 *DEL. C.* §1607 (A)(1), (A)(2), (A)(3), (A)(5) AND/OR (A)(6), AS ALLEGED.

DISCUSSION

Preliminarily, the record does not include any evidence on which it can be reasonably concluded that the City engaged in any conduct which dominated, interfered or assisted in the formation, existence or administration of the IAFF; or that it engaged in any conduct which encouraged or discouraged membership in the IAFF by discrimination regarding hiring, tenure or other terms and conditions of employment. Nor is the record sufficient to support a finding that the City refused or failed to comply with any provision of the POFERA or with PERB's rules and regulations regulating the conduct of collective bargaining. Consequently, the charges that the City has violated 19 *Del. C.* §1607 (a)(2), (a)(3), and (a)(6) are dismissed.

There is no dispute that the City's Tardiness and Attendance Policy addresses abuse of sick leave by bargaining unit employees and includes a disciplinary matrix for infractions and that it was not negotiated with the IAFF. The City's assertions that the Charge is not timely, and that the IAFF waived its right, if any, to negotiate concerning implementation of Policy 207.1/208.1, are addressed preliminarily.

Timeliness:

Once an exclusive bargaining representative is on notice that a change is proposed or initiated which impacts a mandatory subject of bargaining, the union has a right to demand to bargain with respect to the impact of the proposed or implemented change in terms and conditions of employment.²⁶ The failure or refusal of an employer to engage in negotiations, upon demand, violates its statutory duty to negotiate terms and conditions of employment in good faith.

But the right to demand to bargain such change does not exist in perpetuity. In the interest of promoting stable workplaces and productive working relationships, the POFERA requires that charges of unfair labor practices be brought within 180 days of the alleged violation or 180 days from when a party could reasonably have knowledge of an alleged violation. 19 *Del. C.* §1608(a).

A limitations period has two purposes. The first is to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of a stale claim. . . . The second purpose is "to penalize dilatoriness and serve as a measure of repose" by giving security and purpose to human affairs.²⁷

The greater weight of the evidence supports the conclusion that the Tardiness and Attendance Policy was introduced in the fall of 2019, when General Order 2019-24 was issued by

²⁶ "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. 19 *Del. C.* §1602(t).

²⁷ *FOP Lodge 15 v. City of Dover*, ULP 98-02-225, III PERB 1709, 1717 (1998), internal citations omitted.

the Chief and was circulated through all members of the Department, consistent with the practice at that time. The record establishes a training presentation was created which was specific to the Fire Department, which contained references to “exchange days” and “Kelly Days” which are unique to the Fire Department. Firefighter Robinson’s testimony that he had never received training on the Tardiness and Attendance Policy is undermined by the electronic training records which indicate he completed training in August 2020.²⁸

The City provided credible testimony that unions representing other bargaining units of City employees requested and were provided the opportunity to meet with City representatives concerning implementation of Policy 207.1/208.1 when it was implemented City-wide in 2019.²⁹ The IAFF did not request to meet concerning the Tardiness and Attendance policy. Additionally, the IAFF was not able to credibly explain why it did not raise a concern and request to bargain if it believed the adoption of Policy 207.1/208.1 constituted an infringement on terms and conditions of employment.

Waiver:

The duty to bargain arises when a request to bargain is made, but when an occasion for bargaining arises and no request is made, a waiver may result. Lack of diligence by a union to request to bargain a change of conditions amounts to a waiver of its right to bargain.³⁰

The IAFF argues that any time the City adopts or implements a policy that may affect terms and conditions of employment of bargaining unit members, it must first 1) provide notice directly to the IAFF (rather than to all bargaining unit members) and then 2) invite the IAFF to negotiate with respect to the proposed change. The IAFF’s interpretation of the City’s obligations are too

²⁸ City Exhibit 9, p. 5

²⁹ TR at p. 105.

³⁰ *In re Clarkwood Corp.*, 233 NLRB 1172 (1977).

limited. As discussed above, constructive notice can be provided to the union and the obligation to enter into negotiations as to a mandatory subject of bargaining is triggered by a request to bargain.

The City argues the IAFF waived its right to negotiate by its failure to challenge the implementation of the policy. This Board has held that an effective waiver of the statutory right to negotiate a mandatory subject of bargaining must be clear and unmistakable. *Local 1590, IAFF, et al., v. City of Wilmington*, ULP 89-09-041, I PERB 457, 465 (1990).³¹ Such waiver may be evidenced by express contractual provisions, the parties' bargaining history or a combination of the two. No evidence was presented that the IAFF sought to negotiate any portion of the Tardiness and Attendance policy in the parties' successor collective bargaining agreement, which was executed by the parties on June 1, 2023, or at any time prior to the filing of this Charge.

Having found this Charge was not timely filed, it is unnecessary to make a determination as to whether the IAFF also waived its right to negotiate.

The parties do not dispute that sick leave benefits and discipline are mandatory subjects of bargaining. This agreement does not, however, establish that the development, adoption and implementation of Policy 207.1/208.1 effected a unilateral change in either sick leave benefits and/or discipline, to which a duty to bargain attaches.

Abuse of sick leave has been prohibited in the Wilmington Fire Department for more than thirty years³² and there is no dispute that the abuse of sick leave is and has been a Class F Violation, per WFD General Rule 15:11. The Rule states that "abuse of sick leave shall mean that a member has developed and/or established a set pattern of being absent from his/her assigned tour of duty

³¹ Citing *American Distributing Co., Inc. v. NLRB*, 715 F.3d 446 (9th Cir., 1983).

³² TR at p. 51.

through the wrong or improper use of sick leave and such abuse can be documented.”

The evidence of record is insufficient to establish that Policy 207.1/208.1 substantively modified the definition of “abuse of sick leave”. It did not modify the penalty for abusing sick leave. The IAFF did not establish how the adoption of the Policy adversely impacted the terms and conditions of employment of bargaining unit members. The right to abuse sick leave by establishing a pattern of being absent from assigned duties is not protected by the terms of the collective bargaining agreement and it has been subject to discipline as a Class F Violation for at least 30 years. A documented abuse of sick leave is still subject to discipline as a Class F Violation.

Human Resource Policy 207.1/208.1 was adopted following a public hearing before the City’s Administrative Board and became effective on September 1, 2019. The evidence supports finding a PowerPoint presentation explaining what constitutes abuse of sick leave and the progression of discipline was prepared by the City’s Human Resources Department in conjunction with the Support and Administration Battalion Chief in 2019. That presentation was specific to the Fire Department. The record is also sufficient to conclude that bargaining unit employees were required to attend training on the policy in-person after it was introduced in the fall of 2019 and were required to complete training on the policy electronically in August 2020 and again in January 2023. On at least three occasions, summary discipline was issued to bargaining unit members and accepted based on the policy in 2020 and 2021. At the very least, the IAFF should have reasonably been on notice that the Tardiness and Attendance policy had been implemented by not later than August 2020, nearly two and a half years before this Charge was filed.

PERB has held that, “... prior to initiating any change to the conditions of employment for the police officers, the City must notify FOP Lodge 1 and engage in negotiations, if requested.”³³ There is no evidence in this case that the IAFF made a timely request to negotiate concerning the

³³ *FOP Lodge 1 v. City of Wilmington*, ULP 23-12-1389, IX PERB 8849, 8859 (2024).

Tardiness and Attendance policy. Further, it is not clear that the implementation of the policy effectuated a unilateral change to terms and conditions of employment. As discussed above, Firefighters were prohibited from abusing sick leave prior to the implementation of Policy 207.1/208.1, and the discipline established under the Tardiness and Attendance policy remains a Class F Violation. There is no change to the contractual provisions for accruing paid sick leave or to the requirements for properly requesting and being paid for use of sick leave under Article 7 of the parties' collective bargaining agreement. In fact, the training provided to firefighters states, "Absences protected by applicable law (i.e., Family and Medical Leave Act, the Americans with Disabilities Act) are not considered unapproved absences for disciplinary reasons."³⁴

Only the long-standing General Rule 15:11 addresses "sick leave abuse". When the IAFF objects to any work rule or regulation, it has committed itself to resolve those objections through the grievance procedure.³⁵ This Board has long held that where parties have agreed to resolve disputes through negotiated procedures, this Board should accord weight to that agreement.

CONCLUSIONS OF LAW

For the reasons stated herein, the Charge is found to be untimely. Any claim the IAFF may have had to demand to negotiate concerning the 2019 Tardiness and Attendance policy required a timely request to negotiate and/or the timely filing of a charge within 180 days of August 2020 when it should have, at the very latest, reasonably known of the implementation of the policy.

Consequently, the City is not found to have violated 19 *Del. C.* §1607 (a)(1), (a)(2), (a)(3), (a)(5) and/or (a)(6), as the IAFF alleged in this Charge.

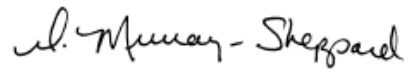
WHEREFORE, the charge is dismissed in its entirety.

³⁴ IAFF Exhibit 5.

³⁵ §12.1 "Should the Union object to any work rule or regulation as being in violation of this Agreement, it may resort to the Grievance Procedure outlined in this Agreement." IAFF Exhibit 4.

IT IS SO ORDERED.

DATE: May 27, 2025

A handwritten signature in black ink, reading "D. Murray-Sheppard". The signature is written in a cursive, flowing style.

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