

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS,	:	
LOCAL 1590,	:	
	:	Unfair Labor Practice Charge
Charging Party,	:	
	:	<u>No. 22-06-1307</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 N. Najemy, Esq., Senior Assistant City Solicitor, for the City

The City of Wilmington, Delaware (“City”) is a public employer within the meaning of §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 uniformed 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(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

On June 22, 2022, the IAFF filed this unfair labor practice charge with the Public

¹ Joint Exhibit 7.

Employment Relations Board (“PERB”) alleging the City had violated 19 Del. C. §1607(a)(1), (a)(2), (a)(3), (a)(5) and (a)(6).² The Charge alleges the City acted in bad faith by failing or refusing to fully implement the March 18, 2022, final and binding arbitration award and thereby unilaterally implementing a change in a mandatory subject of bargaining, i.e., the negotiated grievance procedure. It alleged the City compensated the Grievant³ for only one of five dates on when he was required to report to the City’s Medical Dispensary while out on injury leave.

On July 6, 2022, the City filed its Answer and New Matter in response to the Charge, admitting some facts and denying all legal assertions by the IAFF. Under New Matter, the City asserts that the issue is moot because, following receipt of this charge, it voluntarily issued compensation to the Grievant for the additional four incidents in order to settle the matter. The City, however, continues to deny that compensation was required under either the arbitration award or the negotiated terms of the collective bargaining agreement.

On July 14, 2022, the IAFF filed its Response to the New Matter denying the legal defenses raised by City in its Answer.

In October 2024, the IAFF advised PERB that it did not believe that its allegations had

² (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.
- (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.

³ The identity of the grievant is not material or relevant to this charge and he will be referred to herein only as “the Grievant”.

been resolved by the City's payment of the additional call-back which the IAFF sought on behalf of the Grievant in this Charge.

A probable cause determination was issued on October 31, 2024, finding the pleadings were sufficient to establish probable cause to believe that violations of 19 *Del. C.* §1607(a)(1) and/or (5) may have occurred.⁴

Pursuant to the direction in the probable cause determination, a prehearing conference was held on November 14, 2024. Eight (8) joint exhibits were admitted into the record, as were three (3) exhibits submitted by the IAFF. The parties submitted responsive written argument.

The decision results from the record created by the parties.

FACTS

The facts set forth herein are derived from the documentary evidence.

On August 19, 2020, the Grievant was authorized for injury leave by the City's Medical Dispensary. During the period of time he was on injury leave, the Grievant was required to periodically report to the Dispensary for a re-evaluation of his injury.

On September 9, 2020, the Grievant filed a Step 1 grievance (alleging a violation of Article 11, §11-3(a) of the parties' collective bargaining agreement), which stated:

In the event a Firefighter is called back outside their regular shift and having after logged out, they shall be paid a minimum of four (4) hours pay at the time of reporting. Said pay shall be calculated at the rate of time and one-half. In the event the Firefighter is required to work any period in excess of four (4) hours, they shall be paid at the rate of time and one-half for all hours actually worked. Member was told to report to Dispensary on August 28, 2020.⁵

The grievance specifically requested four hours of compensation at the overtime rate for reporting

⁴ The pleadings were found to be insufficient to establish that violations of 19 *Del. C.* §1607(a)(2), (3), and/or (6) may have occurred; consequently, those charges were dismissed.

⁵ Joint Exhibit 2.

to the Medical Dispensary and then traveled to the Fire Headquarters to submit his Work Status Form, as directed, on August 28, 2020.⁶

The grievance was denied at Step 1 by the WFD Deputy Chief of Operations on September 9, 2020,⁷ and again at Step 2 on October 30, 2020, by a decision issued jointly by the WFD Fire Chief and the City's Director of Human Resources.⁸

The Grievant submitted travel reimbursement forms to the City for trips to the Dispensary on September 2 and 18, 2020, on September 18, 2020; and for August 20, 21, and 28, 2020 on September 23, 2020.

By email dated November 6, 2020, the Grievant notified the City by email that the IAFF intended to appeal the Step 2 decision to arbitration, pursuant to Article 4, Section 4.7 of the parties' collective bargaining agreement.⁹

On March 30, 2021, the IAFF submitted a demand for arbitration to the American Arbitration Association, in which it summarized the demand as raising a contractual demand for "Failure to pay firefighters for being ordered to report to work."¹⁰

Following two days of hearing on July 7, 2021, and January 12, 2022, the mutually selected arbitrator issued his decision on March 18, 2022, holding:

The Association's grievance is sustained as to [*the Grievant*]. In light of the contractual requirement that grievances be brought within 10 calendar days of the grievance or an allegedly aggrieved employee's knowledge of a grievable event, in this case the failure of the City to provide pay when injured bargaining unit personnel are required to report to the dispensary and deliver RTW forms to the Department, this Award shall not apply to

⁶ Joint Exhibit 3. The Work Status Form is also referred to as a Return to Work ("RTW") form in the arbitration award.

⁷ Joint Exhibit 2.

⁸ Joint Exhibit 3.

⁹ Joint Exhibit 4.

¹⁰ IAFF Exhibit 1. It is noted that more than 4 ½ months (145 days) passed between the IAFF's notice to the City of its intent to advance the grievance to arbitration and its filing of the Demand for Arbitration with the American Arbitration Association.

firefighters who have not or do not file grievances within that time.¹¹

By emails beginning on April 6, 2022, counsel for the IAFF began inquiring as to when the Grievant might expect payment as directed by the arbitration award.¹² At some point prior to May 16, 2022, the City paid the Grievant for four hours of overtime for reporting to the Dispensary on August 28, 2020.¹³

This unfair labor practice charge was filed on June 22, 2022. On July 1, 2022, the City issued the Grievant a payment for the additional 16 hours at the rate of time and one-half, for the additional four dates (beyond August 28, 2020) he was directed to report to the Dispensary while on injury leave.

POSITIONS OF THE PARTIES

IAFF Local 1590:

The IAFF charges the City violated its duty to bargain in good faith by failing or refusing to implement the final and binding arbitration award, in a manner consistent with the IAFF's understanding of that award, issued pursuant to the parties' negotiated grievance procedure. The IAFF also alleges that the City's limited payment in response to the Arbitrator's award was unjustified and that the City's compliance with the award only after this Charge was filed is an indicium of bad faith. It charges the City's actions interfere with and restrain the Grievant's statutory right to file and seek redress through grievances. The IAFF asserts it was compelled by the City's conduct to incur the burden and expense of initiating this Charge in order to enforce the award and the Grievant's statutory and contractual rights. It argues that the Charge is not moot with respect to the full scope of the relief requested, including the recovery of fees and costs

¹¹ Joint Exhibit 6, at p. 11.

¹² IAFF Exhibit 3.

¹³ *Supra*.

associated with bringing the Charge and responding to the City's New Matter.

City of Wilmington:

The City argues there is no statutory basis for fee shifting under the POFERA, which only authorizes the “payment of damages and/or reinstatement of an employee” as an affirmative action PERB may direct when it finds an unfair labor practice has been committed. The City challenges the “mootness rule”¹⁴ the IAFF asks PERB to adopt. The City asserts the Delaware Supreme Court has applied this rule exclusively in the context of corporate equity issues and that there is no analogous statute or policy under the POFERA to the corporate benefit exception to the American Rule for fee shifting.

The City avers that to award any damages, it must first be found that there has been bad faith or that the action taken was fraudulent, inequitable or resulted from an untenable legal position. As the IAFF has failed to support its position with either facts or cogent legal argument, this Charge should be dismissed in its entirety.

ISSUE

Whether the City of Wilmington unilaterally modified the terms of the parties' negotiated grievance procedure when it did not implement a grievance arbitration award in the manner asserted by the IAFF in violation of its duty to bargain in good faith concerning mandatory subjects of bargaining and 19 *Del. C.* §1607(a)(1) and/or (a)(5), as alleged.

DISCUSSION

The grievance procedure is a mandatory subject of bargaining over which the parties are

¹⁴ *EMAK Worldwide, Inc.*, 50 A.2d 429 (Del. 2012).

obligated to negotiate under the POFERA. The status quo of a mandatory subject of bargaining is subject to change only through the collective bargaining process.¹⁵ A unilateral change in the status quo of a mandatory subject of bargaining constitutes a *per se* violation of the duty to bargain in good faith.¹⁶ Unilateral disruptions of the status quo violate the good faith bargaining obligation because they frustrate the statutory objective of establishing terms and conditions of employment through negotiations.

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. The IAFF bore the burden to establish facts and provide argument sufficient to prove its Charge and to establish that it is entitled to recover the fees and costs associated with the processing of this Charge. It has not met either burden here.

The arbitration decision was received by the IAFF on March 22, 2022.¹⁷ Seven weeks later, on May 10, 2022, IAFF Counsel requested an update on payment pursuant to the award. At some point between May 10 and May 16, 2022, the City paid the Grievant for four (4) hours of call-back pay for his August 28, 2020 report to the Dispensary. The IAFF again contacted the City on May 16, asserting the arbitrator's award required call-back pay of 20 hours for the five separate dates on which the Grievant was directed to report to the City's Dispensary while he was out on paid injury leave. In this email, the IAFF threatened the City, "If the City does not provide [the Grievant] with the full measure and benefit of the arbitration award by Friday, May

¹⁵ *New Castle County Vo-Tech Education Assn. v. Bd. of Education*, ULP 88-05-025, I PERB 257, 259 (1988); *Christina Education Assn. v. Bd. of Education*, ULP 88-09-026, I PERB 359, 366 (1988).

¹⁶ *AFSCME Council 81 v. Delaware Dept. of Transportation*, ULP 95-01-111, II PERB 1279, 1290 (1995), affirmed by full Board at II PERB 1201 (1995); *CWA Local 13101 v. Kent County Levy Court*, ULP 14-08-971, VIII PERB 6321, 6326 (2014); *AFSCME 218 v. Christina School District*, ULP 15-03-994, IX PERB 7031, 7036 (2018); *IAFF Local 1590 v. City of Wilmington*, ULP 20-12-1253, IX PERB 8573 (2022, Probable Cause Determination and Order of Dismissal), affirmed by full Board at IX PERB 8609, 8611 (2022).

¹⁷ IAFF Exhibit 3.

20, 2022, the IAFF will initiate [unfair labor practice] proceedings against the City to compel its compliance, and to seek the recovery of all costs and fees associated with the IAFF's efforts to remediate the City's inexcusable non-compliance."¹⁸

This Charge was filed 37 days later on June 22, 2022. In its July 6, 2022, Answer to the Charge, the City included in New Matter that the substance of the dispute is moot, stating:

Although the City's position on the interpretation of the Award remains unchanged, in the interest of resolving this matter in an expeditious manner, on June 29, 2022, a payroll adjustment was ordered by the City's Department of Human Resources, and on Friday, July 1, 2022, the City issued payment to [the Grievant], for the remaining 16 hours of overtime at the rate of time and one-half as delineated in Section 11.3 of the CBA.¹⁹

In its Response to the City's New Matter, the IAFF denied the Charge was mooted by the payment of the remedy it sought, stating:

...The IAFF's Charge is meritorious, the City's fulfilling its obligations under the Award produced the same or a similar benefit that was sought – in part – by the Charge, and there is a direct causal relationship between the advent of the Charge and the City's payment to [the Grievant], i.e., the City admits in its Answer and New Matter that it fulfilled the Award in an effort to terminate this litigation. Though it is important that the City took steps to fulfill its obligations, its dilatory approach and consistent refusal to do so prior to the Charge warrants an award of fees and costs to the IAFF for bringing the Charge and securing a portion of the relief it requested through the Charge, and for responding to the New Matter.²⁰

The IAFF's claim that the City's settlement payment to the Grievant was "dilatory" is not supported by the record. There was a genuine disagreement between the parties as to whether the arbitration award applied only to the August 28, 2020 incident, which was the limited subject of the September 9, 2020, grievance or whether it applied more broadly to all five dates on which the Grievant was directed to report to the Dispensary. That the City chose to pay the Grievant

¹⁸ Supra.

¹⁹ Answer to the Charge ¶57, at p. 8. It is noted that the settlement payment was issued 101 days after receipt of the Arbitration Award on March 22, 2022.

²⁰ IAFF Response to New Matter, ¶60, p. 5.

the nominal sum involved, rather than continue to litigate, is the antithesis of bad faith. The City's obligation under the POFERA is to willingly seek to resolve disputes relating to terms and conditions of employment. There is no evidence the City interfered with either the Grievant's rights or the IAFF's rights and obligations to effectively represent the Grievant.

The only remaining issue raised by this Charge is whether the IAFF is entitled to recovery of its fees and costs in filing this Charge and in responding to the New Matter raised in the City's Answer to the Charge. There is no need to interpret the arbitration award nor is there a residual claim that the substance of the grievance, as asserted by the IAFF, was not satisfied when the City paid the Grievant the full measure of the IAFF's claim. As in many settlements, the City did not accede to the IAFF's demand but paid the small amount in dispute to avoid further disruption.

There are no fees for filing an unfair labor practice charge with the Delaware Public Employment Relations Board. Consequently, the only "costs" the IAFF is seeking to recover is its internal costs to retain counsel to pursue this charge, i.e., attorney's fees. Under Delaware law, litigants are ordinarily responsible to pay the costs of their own representation in litigation.²¹ The Delaware Supreme Court has found a limited exception for awarding the payment of attorney's fees where a losing party has "acted in bad faith, vexatiously, wantonly, or for inappropriate reasons."²²

PERB has addressed the awarding of attorney's fees in prior decisions:

Awarding attorney's fees is an extraordinary remedy reserved for situations in which a party engages in egregious misconduct amounting to bad faith. In such cases, equity may require a party to pay the litigation expenses of its opponent.²³ In applying this standard to an unfair labor practice proceeding

²¹ *Dover Historical Society, Inc. v. City of Dover Planning Commission*, 902 A2d 1084 (Del. 2006) citing *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1164 (Del.1989).

²² *Slawik v. State*, 480 A.2d 636, 639, n. 5 (Del. 1984).

²³ Citing *American Specialty Retailing Group, Inc.*, Del. Chan., No. 19239, Lamb, V.C. (July 25, 2003)(Mem.Op.) at p. 13.

in which attorney's fees were requested by the union, which asserted the State terminated an agreement in bad faith and then engaged in bad faith litigation tactics to defend its actions, Master in Chancery Glasscock opined:

...The type of bad faith which justifies fee shifting, however, is not to be found in so facile a manner, or else every successful unfair labor practice complaint would bring with it attorney's fees:

This Court has suggested that in certain egregious circumstances, a party's fraudulent behavior that underlies or forms the basis of the action may justify an award of attorney's fees against that party. The Court has recognized, however, that an award of attorney's fees is "unusual relief," and that the American Rule would be eviscerated if every decision holding the defendant liable for fraud and the like also awarded attorney's fees. For that reason, this quite narrow exception is applied only in the most egregious instances of fraud or overreaching.²⁴

In order to find that the State's initial action was taken in bad faith requiring the shifting of fees, I must find far more than that the State breached a contract with the Union or decided to argue a position which ultimately is found to be unsuccessful. I must find that the motives of the State in abrogating the Agreement were to act in a way which was fraudulent or inequitable, in a callous disregard of its obligations and for an improper purpose.²⁵ *AFSCME Council 81, Local 3936 v. State of Delaware, DOS/DVH*, ULP 10-09-765, VII PERB 5313, 5334 (1/3/2012).

This record fails to establish a basis on which it can reasonably be concluded that the City violated its duty to bargain in good faith or that it interfered with the rights of bargaining unit employees when it initially issued payment to a Grievant consistent with its understanding of an arbitration award issued pursuant to the parties' negotiated grievance procedure. Despite the IAFF's arguments to the contrary, the City's decision to pay the disputed 16 hours of overtime rather than spend time and resources to defend against this Charge does not, without something more, support a finding of bad faith or interference with any rights of bargaining unit members guaranteed under the POFERA.

²⁴ Citing *Arbitrium Handels AG v. Johnston*, Del. Ch., 705 A.2d 225, 231 (1997).

²⁵ *Delaware Dept. of Corrections v. Delaware Correctional Officers Association*, C.A. 19115, Del. Ch., Glasscock, Master (August 28, 2003); also found at IV PERB 2909, 2916 (2003).

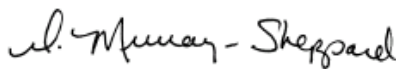
CONCLUSIONS OF LAW

For the reasons discussed herein, the record fails to establish a basis on which it can reasonably be concluded that the City violated its duty to bargain in good faith or that it interfered with rights of bargaining employees which it initially issued payment to a Grievant consistent with its good faith understanding of an arbitration award issued pursuant to parties' negotiated grievance procedure. Further, that the City voluntarily paid the Grievant the additional 16 hours of overtime compensation, as the IAFF demanded, is not an indicium of bad faith. The City maintains the award did not require the additional payment but issued it in the interest of resolving the matter. The settlement payment was issued less than seven weeks after the IAFF first raised the issue on May 16, 2022, and within nine days of the filing of this Charge.

Having found the City did not violate the statute, there is no basis on which to consider any shifting of fees or the payment of the IAFF's attorney for filing and processing the Charge.

WHEREFORE, this charge is dismissed in its entirety.

DATE: June 13, 2025



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