Smyrna Police Employees Ass'n v. **Town** of **Smyrna**
Del.Ch.,2007.
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware,New Castle County.
Re: **SMYRNA POLICE** EMPLOYEES ASSOCIATION
v.
TOWN OF SMYRNA.
Civil Action No. 2570-VCS.

Submitted: Sept. 20, 2007.
Decided: Oct. 17, 2007.

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Erika Schrader, Esquire, Hudson, Jones, Jaywork & Fisher, LLC, Dover, DE.
LEO E. STRINE, JR., Vice Chancellor.
*1 Dear Counsel:

The **Smyrna Police** Employees Association (the "Police Union") has appealed from a decision by the Delaware Public Employees Relation Board (the "PERB") holding that the **Town** of **Smyrna** did not commit an unfair labor practice under the Police Officers' and Firefighters' Employment Relations Act [FN1] The Police Union contends that Smyrna awarded a cost-of-living adjustment ("COLA") to its non-police employees, triggering a contractual provision requiring Smyrna to give police officers a COLA identical to any awarded to other Smyrna employees. The PERB found that the change in the salary scale for non-police employees of Smyrna was not a COLA but instead designed to redress a disparity between the salaries paid by Smyrna to non-police employees and salaries paid by similar municipalities to employees doing similar jobs. Substantial evidence supports the PERB's conclusion. Therefore, I must deny the Police Union's appeal.

FN1. That Act is codified at 19 *Del C.* § 1601, *et seq.*, and states in relevant part that "[i]t is an unfair labor practice for a public employer or its designated representative to ... [r]efuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit."19 *Del. C.* § 1607(a)(5).

I. FACTUAL BACKGROUND

Employees of Smyrna, except for police officers below the rank of Lieutenant, have their salaries determined in the budgeting process of the Smyrna Town Council, a process that as to personnel issues is guided by the Town's Personnel Policy. Smyrna employs police officers under a collective bargaining agreement between the Police Union, the exclusive bargaining representative for the officers, and Smyrna (the "Police CBA"). The Police CBA contains a subsection entitled "Cost of Living Adjustment." It states in its entirety: "The Town agrees to provide the same Cost of Living Adjustment under this contract as it does for other Town employees. This section shall not be construed to include occasional salary adjustments to individual positions. The Town shall not use individual salary adjustments to avoid a Cost of Living Adjustment."[FN2]

FN2. Pet. Op. Br.App. at P218.

During meetings of the Town Council's Personnel Committee, Finance Committee, and Joint Finance & Personnel Committee in November of 2005, and partly in response to a petition by the Town's electrical workers to unionize, Smyrna officials expressed concerns that the Town's non-police employees were not compensated sufficiently compared to workers holding equivalent positions in surrounding towns.[FN3]The Town Manager, David Hugg, III, reported to the committees that there were longstanding vacancies in critical Town positions that could not be filled.[FN4]Because Smyrna is a small municipality, the loss of even one or two employees could interrupt the delivery of municipal services to Smyrna's residents.[FN5]The committees discussed possible remedial measures, including a COLA or overhaul of (he municipal pay scale. At an early point in these discussions, Police Chief Baldwin reminded

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the Council members that any COLA granted to the Town employees would trigger a clause in the Police CBA requiring that the Town match the adjustment in the pay of police officers.[FN6]

FN3. The Personnel Committee met on November 1, 2005, the Finance Committee met on November 10 and December 7, and the Joint Committee met on November 22 and November 30. The record is unclear as to whether the Joint Committee referred to in certain documents was actually a formal committee, or merely a term used when the Personnel Committee and the Finance Committee meet jointly. The parties themselves alternate in their treatment of which committee(s) were meeting, and the meeting minutes similarly obscure the issue. *Compare id.* at P230 (entitled "Joint Finance & Personnel Committee Meeting Notes") *with id.* at P231 (entitled "Meeting Notes: Joint Personnel and Finance Committees"). There is substantial overlap in membership and attendance among what I will treat as three committees, and most witnesses could not remember precisely at which meeting topics were discussed. *Compare id.* at P230*with id.* at P231.

FN4. Hugg testified that the Council recognized, based on information known to the members at that time, that the salaries of half or more of the Town's positions were below or barely at the minimum of the market. *Id.* at P146.

FN5.*Id.* at P148.

FN6.*Id.* at P97, P170-71.

Further discussions among members of the Town Council and its committees of a possible pay increase therefore generally avoided the option and even nomenclature of a Cost of Living Adjustment. Indeed, whenever phrases such as "COLA" or "cost-of-living" were mentioned at subsequent meetings, the speaker would be reminded that the measures being considered did not include a COLA.[FN7] Instead, the PERB found that the Council and Town Manager concentrated their attention on the perceived discrepancy between the pay of Smyrna employees and their counterparts in comparable municipalities doing comparable jobs.

FN7.*Id.* at P210.

*2 To wit, the Joint Finance & Personnel Committee on November 22, 2005 ordered a comparison of corresponding pay and duties between Smyrna employees and those of neighboring municipalities to be completed by their next meeting on November 30, 2005.[FN8]Unsurprisingly, such a study was not fully completed in the week or so before that later meeting. Rather, Town Manager Hugg was only able to gather some data regarding two nearby municipalities, data that confirmed his belief that a substantial gap existed. Hugg therefore reiterated at the November 30 meeting his belief that a large disparity existed.[FN9]Acting on that information at the later meeting, but without the benefit of a detailed salary chart, the Committee voted for an interim increase in the pay scale for non-sworn employees of $1,500.00 or 2%, whichever was higher. So as to have more complete information for further consideration of additional options, the Committee also passed a motion to engage a consultant to conduct a full review of the personnel and compensation system for non-sworn employees, as well as the pay plans of neighboring municipalities.[FN10]

FN8.*Id.* at P30.

FN9.*Id.* at P145, P195-96, P202, P231.

FN10.*Id.* at P177, P232.

Both Hugg and William Hill, a Town Councilman and chair of the Finance Committee, testified before the PERB hearing of lBcer that the Committee members were not motivated by any desire to maintain the purchasing power of current employee salaries or to circumvent the terms of the Police CBA, but instead that this increase was intended to remedy the deleterious effects of uncompetitive pay on the city's ability to attract and retain competent employees.[FN11]This theme pervaded the initial conversations about the salary increase and lasted throughout the budgeting process,[FN12] Upon further review, it turned out that no employee's salary would have increased more with a 2% raise than with a $1,500 raise and thus the 2% aspect of the proposal was dropped.[FN13]On December 19, 2005, the Town Council passed the 2006 budget, which increased the pay scale for each existing and future non-sworn employee by a fixed $1,500.[FN14]

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FN11.*Id.* at P146, P148, P205, P208.

FN12.*Id.* at P145-48, P198-201, P231.

FN13.*Id.* at P177.

FN14.*Id.* at P215.

II. PROCEDURAL HISTORY

On April 26, 2006, the Police Union filed a claim with the Executive Director of PERB claiming that Smyrna had violated its duty under § 1607(a)(5) of the Police Officers' and Firefighters' Employment Relations Act [FN15] to bargain in good faith because Smyrna, in increasing the salary scale by $1,500 for non-sworn employees, had granted what the Police Union viewed as a Cost of Living Adjustment but had not provided that same increase to police officers.

FN15.19 *Del. C.* § 1607(a)(5).

The Executive Director held an evidentiary hearing to determine if there had been a violation. After the hearing, he issued a decision finding that the increase in pay awarded to non-sworn employees was not a Cost of Living Adjustment as defined in the Police CBA. He premised that ruling in important part on his factual finding that the "primary reason" for the salary increase was the comparatively lower salaries of Smyrna employees relative to employees of surrounding communities.[FN16]Relatedly, he found that the increase was not motivated by the Council's desire to maintain the buying power of Smyrna's wages over time in the face of inflation.[FN17]Therefore, the Executive Director reasoned, the Town had not violated its statutory duty of good faith bargaining because the Police CBA only gave the Police Union the chance to share in any COLA granted to other employees rather than sharing in any salary increase whatsoever.[FN18]Because the $1,500 pay scale adjustment was intended to redress the gap between the pay of Town employees in Smyrna and comparable employees in nearby municipalities, he found that the adjustment was not a COLA and did not implicate the Police Union's rights.[FN19]

FN16.*Id.* at P25.

FN17.*Id.*

FN18.*Id.* at P23.

FN19.*Id.* at P25.

*3 In an opinion dated January 17, 2007, the PERB affirmed the Executive Director's decision. In affirming, the PERB found that there was no indication on the record that the pay scale increase was intended to correct for a loss in buying power, that the purpose of the increase was to restore the competitiveness of Smyrna's salaries in comparison to nearby municipalities, and that the increase therefore was not a COLA.[FN20]

FN20.*Id.* at P30-31.

III. LEGAL ANALYSIS

The standard of review this court must apply to rulings of the PERB is familiar. The PERB's conclusions of law are reviewed on a *de novo* basis, but with a deferential bent, which recognizes the expertise of the PERB in adjudicating disputes in the field of labor law.[FN21]The PERB's factual determinations must be affirmed if they are "supported by substantial evidence" in the administrative record.[FN22]Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[FN23]

FN21.*Bd. of Educ. of Colonial Sch. Dist. v. Colonial Educ. Ass'n*, 1996 WL 104231, at *4 (Del Ch.1996), *aff'd*,685 A.2d 361 (Del.1996); *see also*29 *Del. C.* § 10142(d).

FN22.*Breeding v. Contractors One-Inc.*, 549 A.2d 1102, 1104 (Del .1988).

FN23.*Id.*

The Police Union's first argument is based on a misreading of the Police CBA. The Police Union asserts that the Police CBA was intended to prohibit the Town from making any across-the-board salary increase for non-sworn employees without giving the police officers an identical raise. But the language of the Police CBA is not that broad. As the Town points out, and the PERB found, the Police CBA only gives

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the Police Union the right to share in a COLA granted to non-sworn employees.

The Smyrna Pohce CBA is therefore materially different from the contract provision at issue in *Wilmington Firefighters Association v. City of Wilmington,* a case that the Police Union relies upon heavily.[FN24] In *Wilmington Firefighters,* this court held that the PERB had incorrectly concluded that only an across-the-board salary increase would trigger a broad pay parity provision.[FN25] But, in that case, the firefighters had secured a sweeping pay parity clause that required the city to match *any increase in pay* given later to other bargaining units.[FN26] That clause was much more encompassing in scope than the Cost of Living Adjustment provision obtained by the Police Union here.

FN24.2002 WL 418032 (Del. Ch.2002).

FN25.*Id.* at *12.

FN26.*Id.* at *7.

On its face, the Cost of Living Adjustment provision found in the Police CBA only ensures that if the Town Council grants non-police employees a COLA, then Police Union members will receive the same COLA increase in addition to their contractually negotiated pay raise. Admittedly, the Cost of Living Adjustment provision also seems to bar the Town Council from any pretextual evasions, by, among other things, stating that "[t]he Town shall not use individual salary adjustments to avoid a Cost of Living Adjustment."

But admitting of the reality that the Police CBA seems designed to preclude pretextual evasions of the Cost of Living Adjustment clause's reach does not show that the PERB made an error. Rather, it exposes that the essence of the Police Union's argument is factual: what was the real purpose of the salary scale adjustment granted to the non-sworn employees? That issue is important because the Cost of Living Adjustment clause in the Police CBA does not sweep broadly; it leaves Smyrna with the flexibility to grant raises to non-sworn employees unfettered by the Police CBA so long as it is not in fact acting to grant the non-sworn employees protection against inflation under a rubric other than a COLA.

***4** Of course, the Police Union argues that Smyrna simply cloaked a COLA in another garment as a pretext to avoid the Police Union's rights. That is, the Police Union contends the raise granted to non-sworn employees was in fact simply a COLA but that the Town Council used other words precisely to evade the Police Union's right to also enjoy that increase.

The problem for the Police Union is that they did not convince the PERB of the merits of their factual argument. Rather, the PERB accepted the factual findings of its Executive Director that the Town Council was motivated by its concern that its non-police employees were being paid substantially less than workers in nearby municipalities doing similar jobs and that this was affecting the Town's ability to fill positions and its ability to retain and keep up the morale of existing employees.[FN27] Although the Town Council did not have a full-blown study demonstrating that pay gap, it received input from its Town Manager and others indicating that such a disparity existed and that there was a justification for action in advance of a full study.[FN28]

FN27. Pet. Op. Br.App. at P24-25.

FN28.*Id.* at P195, P231.

The finding of the PERB that this perceived gap drove the Town Council's decision is supported by substantial evidence. That evidence includes testimony from the Town Manager, David Hugg,[FN29] and a Councilman, William Hill.[FN30] The evidence supporting the PERB's ruling also includes the very design of the pay ordinance under attack. Rather than being implemented as a percentage increase that would buttress the purchasing of all employees proportionate to their current salaries, the ordinance gave a flat dollar increase to every position on the non-sworn employee pay scale.[FN31] That dollar increase compressed the pay structure, in a way that was beneficial to employees at the lower end of the Town pay scale. Furthermore, because it was a flat dollar increase, the increase did not track in any manner the increase in the cost-of-living index relevant to the Town's employees, per § 3.6 of the Town's Personnel Policy, which specifically addresses COLAs.

FN29.*Id.* at P146.

FN30.*Id.* at P206-07.

FN31.*Id.* at P215.

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Given the presence of substantial evidence supporting the PERB's determination that the Town Council acted for the purpose of taking immediate, but incomplete, action as an interim measure to address a perceived gap between its pay scale for non-police employees and the pay scales for comparable employees in other relevant municipalities, its decision to deny the unfair labor practice charge must be affirmed. In view of the fact that this narrow factual ground is sufficient for affirmance, I need not and do not address some of the broader reasoning of the PERB,[FN32] which could be read to suggest that the Town Council could grant an increase to non-police employees every year in order to increase their purchasing power so long as it was done other than as a formal Cost of Living Adjustment under § 3.6 of the Town's Personnel Policy, without granting a comparable increase to its police officers.

FN32.*Id.* at P31.

*5 In other words, I do not reach the question of whether the Police CBA Cost of Living Adjustment provision would be implicated if the Town Council were to, in substance, grant its non-police employees a pay increase in order to maintain their purchasing power, but were to do so without strict reference to the Cost of Living Adjustment formula referenced in § 3.6 of me Town's Personnel Policy. The far closer question of whether such action might implicate the rights of the Police Union members under the Police CBA can be left for a case when that scenario is genuinely at issue. For now, it is sufficient to find that substantial evidence supported the PERB's finding that the Town Council acted for the reasons it stated, rather than as a pretext to deny the Police Union its contractual bargain.

IV. CONCLUSION

For the foregoing reasons, the decision of the PERB is therefore, **AFFIRMED.**Each side to bear its own costs. **IT IS SO ORDERED.**

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Smyrna Police Employees Ass'n v. Town of Smyrna
Not Reported in A.2d, 2007 WL 3145286 (Del.Ch.)

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