

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

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| DELAWARE STATE TROOPERS ASSOCIATION, | : | Board Review of |
| | : | the Binding Interest |
| and | : | Arbitrator’s Decision |
| | : | on Remand |
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| STATE OF DELAWARE, DEPARTMENT OF SAFETY AND | : | <u>BIA 08-01-612</u> |
| HOMELAND SECURITY, DIVISION OF STATE POLICE. | : | |

APPEARANCES

Jeffrey M. Weiner, Esq., for Delaware State Troopers Association

Aaron Shapiro, Office of State Labor Relations and Employment Practices, for DSHS/DSP

Background

The State of Delaware, Department of Safety and Homeland Security (“State” or “DSHS”) is a public employer within the meaning §1602(p) of the Police Officers and Firefighters Employment Relations Act (“POFERA”), 19 Del.C. Chapter 16 (1986). The Division of State Police (“DSP”) is an agency of DSHS.

The Delaware State Troopers Association (“DSTA”) is an employee organization within the meaning of §1602(g) of the POFERA. DSTA was certified in early 1972 to represent a bargaining unit of “All State Police Officers including Recruit Troopers, Troopers, Troopers First Class, Sergeants, Corporals, Detectives, Detective Sergeants, Lieutenants, Captains, Staff Captains and Majors (excluding Civilians, Lt. Colonels and Colonel)”. DOL Case 75. DSTA is the exclusive bargaining representative of that unit within the meaning of 1602(h) of the POFERA.

On January 12, 2008, DSTA requested PERB authorize binding interest arbitration. The impasse was certified for binding interest arbitration and the hearing was held before the Executive Director on June 4, July 14 and July 15, 2008.

Following receipt and consideration of written post-hearing argument, the Decision of the Binding Interest Arbitrator was issued on October 20, 2008, holding:

...based on the record created by the parties in this proceeding, the last, best, final offer of the State is determined to be the more reasonable based upon the statutory criteria set forth in 19 Del.C. §1615. The relative merits of the last, best, final offers were considered in their totality and balanced according to the statutory criteria. *FOP Lodge 4 v. Newark*, PERB Review of Arbitrator's Decision on Remand, IV PERB 2789, 2793 (2003). All of the exhibits, testimony, arguments and cases cited by the parties were reviewed in their entirety in reaching this decision... *DSTA v. DSHS/Div. of State Police*, BIA 08-12-612, VI PERB 4083, 4106 (2008).

The parties were directed to implement the tentative agreements and proposals set forth in the State's last, best, final offer and to notify the Public Employment Relations Board of compliance with this Order within thirty (30) days.

DSTA filed a Request for Review of the Executive Director's decision by the full Board, on October 24, 2008. The State filed a cross-request for review on October 24, 2008. Both parties were afforded the opportunity to file written argument in support of their appeal to the Board.

The full Board met on December 17, 2008 to consider the arguments of the parties on review. As a result of that hearing, the Board remanded this case to the Executive Director with direction to accept additional evidence and/or argument, as to:

WHETHER THE INTEREST ARBITRATOR WAS FREE TO IGNORE THE MAY 31, 2008 DATE FOR ISSUANCE OF THE WRITTEN FINDINGS AND RECOMMENDATIONS OF THE LABOR/MANAGEMENT COMMITTEE ON ITS COMPREHENSIVE REVIEW OF THE RECRUITMENT, SELECTION, AND

PROMOTIONAL PROCESSES WITHIN THE UNIFORMED RANKS OF THE
DELAWARE STATE POLICE?¹

A hearing was convened by the Executive Director on March 4, 2009, at which time one additional piece of evidence was introduced², without objection, and the parties were provided a full opportunity to present oral argument on the issue remanded for consideration. The Executive Director's decision on remand was issued on June 1, 2009, in which she held:

Under the POFERA, the interest arbitrator is required to consider the last, best and final offer of each party in its entirety. This statutory mandate can only be meaningful (when read in conjunction with §1615(d)(7)), if applied to require that individual proposals included in a last, best and final offer be considered within the context of the entire offer...

When considered in its entirety and based upon the testimony adduced during the interest arbitration hearing, the State's offer must be understood to include a commitment to establish the LMC as set forth in its Article 37, within sixty days after the date on which this Agreement is instituted and to complete the work of the committee with written findings of fact and recommendations expeditiously thereafter.

... the "blue pencil" prohibition argued by DSTA is not applicable to the interpretation or evaluation of the last, best, final offers of either party in the interest arbitration process established by 19 Del.C. §1615. The record in this case supports the conclusion that the State's LMC proposal is not contrary to law, nor is it legally defective such that the State's entire last, best, final offer must be dismissed in its entirety.

The binding interest arbitrator must consider each proposal contained in each party's offer within the context of the entire offer, and balance the relative merits of the last, best, final offers based upon the factors set forth in 19 Del.C. §1615.

Pursuant to the Remand Order and consistent with the foregoing discussion and consideration, the decision reached herein is consistent with the determination that the State's last, best, final offer is

¹ *DSTA v. DSP*, PERB Remand on Review of Arbitrator's Decision, BIA 08-01-612, VI PERB 4129 (2009).

² The record was supplemented by the State with the addition of a single document entitled "DSTA Proposals 1-03-08".

determined to be the more reasonable based upon the statutory criteria set forth in 19 Del.C. §1615.³

On June 4, 2009, DSTA renewed its for review of the Executive Director's Binding Interest Arbitration Decision. The State also renewed its request for review on June 8, 2009. The Board afforded the parties the opportunity to provide written argument prior to hearing in support of their respective requests for review. Written argument was received from both DSTA and the State on July 1, 2009.

The Board convened a public hearing on Wednesday, July 15, 2009 to consider the Request and Cross-Request for Review following Remand. A copy of the complete record below as well as the argument on appeal was provided to and reviewed by each Board member.

DISCUSSION

The scope of the Board's review in this matter includes the issue on remand and the Binding Interest Arbitrator's decision finding the State's last, best, and final offer to be the more reasonable under 19 Del.C. §1615. The Board's review is limited to the record created by the parties and addresses whether the decision rendered by the Executive Director is arbitrary, capricious, contrary to law or unsupported by the record.

The Executive Director, when serving as the Binding Interest Arbitrator pursuant to 19 Del.C. §1615, is statutorily constrained to make "...written findings of facts and decision for the resolution of the dispute; provided, however, that the decision shall be limited to a determination of which of the parties' last, best, final offers shall be accepted in its entirety ...” *FOP Lodge 10 and State Dept. of Correction*, BIA 07-02-552, Board Decision on Review, VI PERB 4023, 4024 (2008).

³ *DSTA v. DSP*, Arbitrator's Decision on Remand, BIA 08-01-612, VI PERB 4245 (2009)

On remand, the issue sent back to the Executive Director and the parties for further development was the scope of the interest arbitrator's authority to construe a proposal within one party's last, best, final offer including consideration of implementation concerns. Upon consideration of the arguments and cases cited by the parties, the Board finds the Arbitrator did not modify the State's proposal, but rather found that the State's last, best, final offer, in its entirety, was the more reasonable, notwithstanding that there was a proposal within that offer for which the proposed implementation date had passed. The totality analysis was proper and the impact of that single date as part of the total offer does not negate the last, best, final offer in its totality. The Board is satisfied that the Arbitrator was within her statutory authority and that her decision on this issue is legally sufficient.

During the December 17, 2008, initial hearing on review before the Board, the question of negotiability of DSTA's First Sergeant proposal was discussed and considered. The Board notes that changes in police rank structure have been considered in prior binding interest arbitration proceedings, including appeals to both this Board and Chancery Court. *FOP Lodge 4 v. City of Newark*, 2003 WL 2256098 (Del.Ch., 2003), IV PERB 2959,2972.

Permissive subjects of bargaining (as defined in §1605 of the Act) have been submitted to impasse resolution proceedings with regularity. The State has admitted it offered its Labor-Management Committee language as a counter to DSTA's First Sergeant proposal. During this binding interest arbitration process, the State prevailed and its last, best, final offer was determined to be the more reasonable of the two. Consequently, it is unnecessary for the Board to consider the State's argument on negotiability of DSTA's First Sergeant proposal in this case because it does not impact

the Board's ultimate decision or the resolution of these negotiations.⁴

Delaware's public sector collective bargaining statutes were created and adopted to promote harmonious and cooperative labor-management relationships and to support collective bargaining in order to protect the public by assuring the orderly and uninterrupted operations and functions of the public employer. Both labor and management are expected to approach negotiations in good faith with an intent to reach agreements which will facilitate effective and efficient operations. The rights and responsibilities granted by statute are mutual and premised on the concept that reasonable people (representing both the employer and the employees) should be able to identify and resolve issues within the collective bargaining framework. This Board (PERB) was established to support and promote this mutual dispute resolution process, not to provide an alternative to good faith negotiations or a process by which parties can delay and avoid negotiations. When a party continues to appeal a decision in which it prevailed on the merits, the Board questions whether its purpose and process has been subverted.

It is disappointing and frustrating to review a case, which has been subject to prolonged litigation in order to address issues raised in negotiations, more than a year after the new collective bargaining agreement to which those negotiations pertain should have become effective. In this case, both parties agree there is a problem and agree that

⁴ The Board notes, however, that the State attempted to raise the issue of negotiability very late in the negotiation process, just prior to the first day of the binding interest arbitration hearing, asserting DSTA had failed to bargain in good faith because it was insisting to arbitration on a non-mandatory subject of bargaining, i.e., the creation of First Sergeant. DSTA filed a Counter-Charge asserting the State had failed or refused to bargain over a mandatory subject of bargaining by refusing to bargain over the First Sergeant proposal. Either party could have filed its charge within 180 days of the time that it became aware there was an issue of negotiability and preserved its argument as a bar to proceeding to binding interest arbitration until that issue was resolved. (Or alternatively, could have filed a Request for Declaratory Statement which is specifically designed to address questions concerning the scope of bargaining). The Executive Director rejected both the Charge and Counter-Charge as untimely, and the Board affirmed, finding that "saving" the issue of negotiability until very late in the negotiation process (in this case, more than 180 days after the State became aware of DSTA's proposal) thwarts the purposes of the Act. That decision was appealed to Chancery Court. The appeal and cross-appeal were subsequently withdrawn without prejudice by the parties. *State v. DSTA*, CA 4040-VCS (Del.Ch., 2009).

the problem needs to be addressed. Unfortunately, they are still arguing and litigating over technicalities rather than expending their energies and resources in addressing their shared concern. Neither the public's, the government's nor employee's interest are served by prolonging a procedural dispute rather than addressing a shared substantive concern.

Finally, the Board was advised during the July 15, 2009 hearing that the State and DSTA have now entered into negotiations for a successor to the 2007 – 2009 collective bargaining agreement in issue in this binding interest arbitration matter. The Board offers the following wisdom, adopted from the Appeals Court of Wisconsin to guide these parties:

The overriding purpose of the final-offer procedure ... is to induce the parties to make their own compromise by posing potentially severe costs if they do not agree. In other words, a successful final-offer procedure is one that is not used; one that induces direct agreement during the proceedings; or, using a less rigorous definition of success, one that substantially narrows the area of disagreement.⁵

DECISION

Based on the record presented and considering the arguments of the parties, it is the decision of this Board, upon unanimous vote, to accept the Binding Interest Arbitrator's original decision of October 2, 2008, as clarified by the Remand decision of June 1, 2009, finding that the last, best, final offer of the State is the more reasonable based upon the criteria set forth in 19 Del.C. §1615.

The Arbitrator appropriately considered the relative merits of the State's and DSTA's offers in their totality, without modification. The record supports her

⁵ *LaCrosse Professional Police Association v. City of LaCrosse, Wisconsin*, Petition 96-2741, Court of Appeals of Wisconsin, 212 Wis 2d 90, 102; 568 NW 2d 20, 25; 157 LRRM 2876 (1997)

conclusion and the Board finds no reversible error in the method by which she balanced the merits according to the statutory criteria.

WHEREFORE, the parties are directed to immediately implement all tentative agreements and proposals as set forth in the State's last, best, final offer.

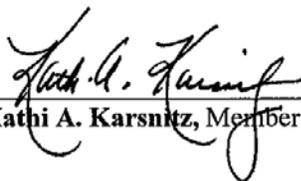
IT IS SO ORDERED.



Elizabeth D. Maron, Chairperson



R. Robert Currie, Jr., Member



Kathi A. Karsnitz, Member

Date: August 19, 2009