

**PUBLIC EMPLOYMENT RELATIONS BOARD**

**STATE OF DELAWARE**

AMERICAN FEDERATION OF STATE, COUNTY, :  
AND MUNICIPAL EMPLOYEES, COUNCIL :  
81, AFL-CIO, : **BOARD DECISION ON**  
: **REQUEST FOR REVIEW OF**  
Appellant, : **THE DECISION OF THE**  
: **INTEREST ARBITRATOR**  
v. : **CONCERNING STATE MERIT**  
: **UNIT #11**  
THE STATE OF DELAWARE, :  
: **BIA 08-05-625**  
Appellee. :

Appearances

*Perry F. Goldlust, Esq., for AFSCME Council 81*  
*Aaron Shapiro, Senior Labor Relations Specialist, SLREP, for the State*

**BACKGROUND**

The American Federation of State, County and Municipal Employees, Council 81, AFL-CIO (“AFSCME”) is an employee organization within the meaning of section 1302(i) of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13. AFSCME was certified as the exclusive bargaining representative of a unit of State of Delaware merit system employees defined by 19 Del.C. §1311A (b)(11)<sup>1</sup> on or about November 9, 2007.

The State of Delaware is a public employer within the meaning of 19 Del.C. §1302(p).

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<sup>1</sup> 19 Del.C. §1311A (b)(11) defines this bargaining unit as “Correctional Supervisors which is composed of correctional lieutenants, staff lieutenants, correctional captains, and similar occupations.”

AFSCME and the State engaged in unsuccessful negotiations for a collective bargaining agreement for the Unit 11 bargaining unit, pursuant to 19 Del.C. §1311A. Binding interest arbitration procedures were initiated and hearings were held on September 6, October 4, and October 7, 2011, before Arbitrator Ralph H. Colflesh, Jr., Esq.

On or about October 12, 2011, the parties were electronically provided with the Arbitrator's Decision, which was dated October 11, 2011.

On or about October 20, 2011, AFSCME filed a Request for Review of Arbitrator's October 11, 2011 Award and Decision, in which the Arbitrator awarded the State's last, best, final offer over the last, best, final offer of AFSCME.

The State responded by filing a timeliness objection to AFSCME's Request for Review. The PERB considered the State's objection at a hearing on November 16, 2011, and denied the State's Motion to Dismiss the appeal in an interim decision issued on November 21, 2011. *AFSCME Council 81 v. State of Delaware*, BIA 08-05-625, VII PERB 5273 (PERB Interim Decision on Preliminary Motion to Dismiss, 2011).

On or about November 29, 2011, the State filed a Response in Opposition to AFSCME Council 81's (Unit 11) Request for Review of the Arbitrator's October 11, 2011 Award and Decision.

On or about December 5, 2011, AFSCME filed a Motion to Strike State of Delaware's Response in Opposition to the Union's Request for Review of the Arbitrator's October 11, 2011 Award and Decision, asserting the State improperly raised questions of fact which were irrelevant to the resolution of the legal issue of the Arbitrator's authority raised in the Request for Review.

A copy of the complete record in this matter was provided to each member of the Public Employment Relations Board. A public hearing was convened on December 6, 2011, at which time the full Board met in public session to hear and consider AFSCME's motion and to consider the merits of its Request for Review. The parties were provided the opportunity to present oral argument and the decision reached herein is based upon consideration of the record and the arguments presented to the Board.

### **DISCUSSION**

As a preliminary matter, the Board heard AFSCME's Motion to Strike the State's Response to the Request for Review. AFSCME argued the Response should be stricken because it asserted facts and relied on testimony which is not relevant to consideration of the scope of the interest arbitrator's authority. The State asserted its Response did not raise any new issues of fact, or provide testimony, but was based solely on the record below and was responsive to the issues raised on appeal.

Upon consideration of the arguments, by unanimous vote, the Board denied the Motion to Strike and advised the parties it would accord appropriate weight to the relevancy of the arguments in reaching its decision on the merits.

AFSCME argues in its Request for Review that the interest arbitrator's decision should be reversed because he exceeded his statutory authority when he determined the State's last, best, final offer was more consistent with the criteria set forth in 19 Del.C. §1315 than was AFSCME's offer. It asserts the State's offer could not be accepted because it included a provision that required bargaining unit employees to pass an annual

physical fitness test in order to receive a negotiated wage increase.<sup>2</sup> AFSCME argues this provision is excluded from the scope of permissible bargaining because it affects “position classification”.

Section §1311A (a) of the PERA states:

§ 1311A. Collective bargaining in the state service.

(a) Notwithstanding any other provision in this Code, exclusive representatives of state merit employees, who are in the classified service and not working in higher education, shall collectively bargain in the units provided pursuant to subsection (b) of this section. The scope of bargaining shall include:

- (1) Compensation, which shall be defined as the payment of money in the form of hourly or annual salary, and any cash allowance or items in lieu of a cash allowance to a public employee by reason of said employee's employment by a public employer, as defined in this chapter, whether the amount is fixed or determined by time, task or other basis of calculations. Position classification, health care and other benefit programs established pursuant to Chapters 52 and 96 of Title 29, workers compensation, disability programs and pension programs shall not be deemed to be compensation for purposes of this section; and
- (2) Any items negotiable for state merit employees pursuant to § 5938 of Title 29.<sup>3</sup>

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<sup>2</sup> Physical Performance Standards:

The parties recognize that employees may be required to maintain levels of accomplishments in the areas of physical training, CPR and firearms usage.

Any employee hired into or promoted into a Correctional Officer series position in Unit 11 on or after [the effective date of the Award] will be required to pass the Department's PT Test.

The elements of the test will be identical to the CEIT PT Test.

The test will be offered on an annual basis (in a month to be specified by the parties) for the employees in Unit 11, with the exception of employees excused from the test by the employer because of disability, sickness, or other extenuating circumstances.

Employees will be required to pass the test in order to receive any annual contractual pay increase.

Employees who do not pass the test will be permitted to take one re-test within six months after taking the initial test. Employees who pass the re-test will receive the annual contractual pay increase, pro-rated to the date of the re-test.

Employees in DOC Unit 11 before [the effective date of the Award] will not be required to pass the PT test.

<sup>3</sup> 29 Del.C. § 5938. Collective bargaining. (continued)

(a) Except as expressly provided in subsection (c) of this section, nothing contained in this chapter or in the rules shall deny, limit or infringe upon the right of any employee in the classified service or any exclusive bargaining representative under Chapter 13 of Title 19.

To the extent or where any of these items are covered by existing collective bargaining agreements, the provisions negotiated pursuant to subsection (c) of this section shall supersede those agreements.

The Board finds that the State's proposal does, in fact, constitute a matter concerning compensation, as it addresses the conditions under which an annual wage increase (which is clearly "the payment of money") may be earned.

The Board does not find merit in AFSCME's argument that the physical fitness provision places an impermissible prerequisite on Correctional Officers who seek promotion into the Unit 11 bargaining unit because those officers are represented by the Correctional Officers Association of Delaware ("COAD"), in a separate and distinct bargaining unit. The proposal does not alter the minimum qualifications for any Unit 11 position, nor does it affect the classification of unit positions or the application process. The provision affects only employees in Unit 11 bargaining unit positions (prospectively) by establishing a condition under which annual wage increases will be awarded, not

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(b) Except as expressly provided in subsection (c) of this section, nothing contained in this chapter or in the rules shall deny, limit or infringe upon any collective bargaining agreement or the authority and duty of this State or any agency thereof to engage in collective bargaining with the exclusive bargaining representative under Chapter 13 of Title 19.

(c) The rules adopted or amended by the Board under the following sections shall apply to any employee in the classified service represented by an exclusive bargaining representative or covered by a collective bargaining agreement under Chapter 13 of Title 19, except in the case of collective bargaining agreements reached pursuant to § 1311A of Title 19: §§ 5915 through 5921, 5933, 5935 and 5937 of this title.

(d) The rules adopted or amended by the Board under the following sections shall not apply to any employee in the classified service represented by an exclusive bargaining representative to the extent the subject thereof is covered in whole or in part by a collective bargaining agreement under Chapter 13 of Title 19: §§ 5922 through 5925 of this title, except where transfer is between agencies or where change is made in classification or pay grade, §§ 5926 through 5928 of this title, except where an employee laid off by 1 agency is reemployed by another, §§ 5929 through 5932, 5934 and 5936 of this title.

(e) The Director and the Board shall meet with the exclusive bargaining representative at reasonable times to negotiate in good faith with respect to any rule to be adopted or amended under §§ 5915 through 5921, 5933, 5935 and 5937 of this title and, to the extent the subject thereof is not covered in whole or in part by a collective bargaining agreement under Chapter 13 of Title 19, §§ 5922 through 5932, 5934 and 5936 of this title.

whether any individual may apply for a position. Consequently, it does not impact any other bargaining unit.

The question presented for resolution on appeal to this Board is whether the decision and award of the arbitrator is arbitrary, capricious, otherwise contrary to law, or unsupported by the record. In a 2003 decision, Vice Chancellor Lamb discussed the statutorily defined role of an interest arbitrator under Delaware's public sector interest arbitration process:

The role of the arbitrator is narrow in scope. It is limited to a choice between the last, best and final offers of the parties, in their entirety.<sup>4</sup> The record shows that the interest arbitrator complied with his statutory duties.<sup>5</sup> The interest arbitrator held hearings, both in making his initial decision and on remand, in which each party presented evidence. The interest arbitrator made his decision in the form of a written opinion that included his findings of fact. Although the interest arbitrator did not provide written findings of fact for each of the seven factors required to be considered in 19 *Del.C.* §1615(d), he stated that his findings were based upon the record and "consideration of the statutory factors."<sup>6</sup>

AFSCME argues the interest arbitrator's award in this case was not supported by the facts because the arbitrator did not provide sufficient information in his decision to enable the reviewer to determine what evidence the arbitrator considered. It asserts the statute requires the arbitrator to make specific findings of fact, based on the statutory

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<sup>4</sup> 19 *Del.C.* §1615(d) ("The binding interest arbitrator shall make written findings of fact and a 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 their entirety").

<sup>5</sup> 19 *Del.C.* §1615(d) (requires that the binding interest arbitrator consider the following seven factors, listed here in brief, in addition to any other relevant factors: (1) public interest and welfare; (2) comparison of conditions and status of employment of employees affected by the binding, interest arbitration to other employees in similar fields or skill level in the same community and in comparable communities; (3) overall compensation, including benefits, currently received by the employees; (4) stipulations of the parties; (5) lawful authority of the public employer; (6) financial ability of the public employer; and (7) other relevant factors).

<sup>6</sup> *Fraternal Order of Police Lodge No. 4 v. City of Newark and Public Employment Relations Board*, C.A. 20136, BIA 02-01-338, 2003 Westlaw 22256098, IV PERB 2959, 2963 (2003)

criteria. This argument was expressly rejected by Court in *FOP Lodge 4 v. Newark supra.*:

The FOP argues that the interest arbitrator is required to provide written findings of fact for each statutory factor. This argument, however, is contrary to the plain text of the statute, which only requires the interest arbitrator to “*take into consideration*” the statutory factors. Thus, written findings of fact are not required for each of the factors so long as each factor is considered. In this case, the interest arbitrator, as is demonstrated by his written findings and by his statement in his opinion, met his statutory duties by considering all of the statutory factors.

In his decision, Arbitrator Colflesh explicitly addressed wage comparators:

[The arbitrator] is also of the opinion, given the evidence of both parties as to comparable employees inside and outside of State government and particularly the evidence presented by Mr. Nados that the lieutenants, who make up the bulk of the Unit 11 bargaining unit, are competitively compensated in wages and benefits among similarly situated employees performing a corrections supervisory service and with ‘other employees generally in the same community and in comparable communities.’ 19 Del.C. §1315(d)(2). A wage increase, even one as small as the State is offering, will most likely maintain the bulk of the unit in its position relative to the comparator group.<sup>7</sup>

The record contains information concerning comparators which the arbitrator expressly considered. The Board finds the award is supported by the record.

The interest arbitration process is not a continuation of collective bargaining, but rather is the method by which a contract is imposed upon parties who have failed in their negotiation efforts. The standards which the arbitrator must apply and the factors he or she must consider in reaching a determination as to which of the parties’ last, best final offers should be accepted in its entirety are clearly set forth by statute. The content of the actual offers which the arbitrator must consider, however, are within the exclusive control

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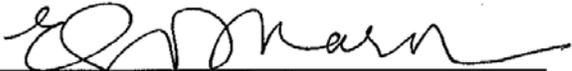
<sup>7</sup> *State of Delaware and AFSCME Council 81 (Unit 11)*, Decision of the Binding Interest Arbitrator - Ralph Colflesh, BIA No. 08-05-625, VII PERB 5193, 5201 (10/10/11)

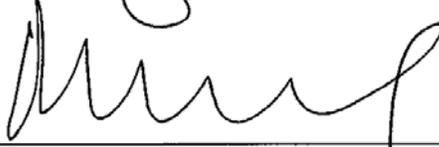
of the parties. The PERA requires the arbitrator to choose between the offers crafted by the parties, as they are presented. This requirement places a burden on each party to fashion a reasonable and supportable offer based upon the statutory criteria, and to present compelling evidence and argument to the arbitrator. It is clear from the record, that the arbitrator executed his responsibilities in conformance with the statutory mandates.

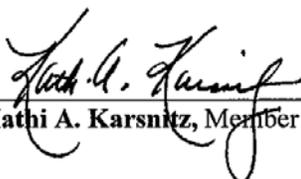
**DECISION**

After reviewing the record and considering the arguments of the parties, the Board unanimously affirms the decision of the Interest Arbitrator awarding the State's proposal over that of the Union.

**IT IS SO ORDERED.**

  
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**Elizabeth D. Maron, Chairperson**

  
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**R. Robert Currie, Jr., Member**

  
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**Kathi A. Karsnitz, Member**

DATE: December 28, 2011