

**STATE OF DELAWARE**

**PUBLIC EMPLOYMENT RELATIONS BOARD**

AMERICAN FEDERATION OF STATE, COUNTY AND :  
MUNICIPAL EMPLOYEES, LOCAL UNION 1670-001, : Decision of the  
and : Binding Interest  
: Arbitrator  
: **BIA 11-07-815**  
TOWN OF SMYRNA, DELAWARE. :

**Appearances**

*Phillip S. Williams, Sr., Staff Representative, for AFCME*  
*David H. Williams, Esq., Morris James LLP, for the Town of Smyrna*

**Background**

The Town of Smyrna, Delaware (“Town”) is a municipal corporation, municipality, city or town located within the State of Delaware, and is a public employer within the meaning §1302(p) of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13 (1994).

The American Federation of State, County and Municipal Employees, AFL-CIO, (“AFSCME”) is an employee organization within the meaning of §1302(i) of the PERA. AFSCME, by and through its affiliated Local Union 1670-001, is the exclusive bargaining representative of the bargaining unit of the Town’s Electric Department, Public Works Department and clerical, technical and administrative employees as defined in DOL Case 1000, within the meaning of 19 Del.C. §1302(j).

AFSCME and the Town entered into their first collective bargaining agreement effective January 1, 2007. The term of that agreement extended through December 31, 2010. During the term of the agreement, the bargaining unit (which included only Electric Department employees at that time) was modified to also include public works,

clerical, technical and administrative employees. The parties initiated negotiations for a successor agreement on or about October 27, 2010.

On or about February 3, 2011, the Town requested mediation to facilitate resolution of the negotiations. A mediator was appointed by the Public Employment Relations Board (“PERB”) and three mediation sessions were conducted. Mediation concluded on June 15, 2011, without settlement.

By letter dated June 17, 2011, the mediator recommended the impasse be submitted to binding interest arbitration. Upon request from PERB, last, best, final offers were submitted by both parties. By letter dated July 19, 2011, PERB determined “a good faith effort had been made by both parties to resolve their labor dispute through negotiations and mediation and ... the initiation of binding interest arbitration would be appropriate and in the public interest”, without objection by either party. *19 Del.C. §1315(a)*. A prehearing conference was conducted on August 8, 2011.

The binding interest arbitration hearing was held before the Executive Director on October 7, 2011, at which time the parties presented testimony and documentary evidence in support of their respective positions. Closing argument was provided in written post-hearing submissions. The record closed upon receipt of written argument. The following discussion and decision result from the record thus created.

### **LAST, BEST, FINAL OFFERS OF THE PARTIES**

#### **AFSCME Local 1670-001’s last, best, final offer:**

##### **1.2 UNION RECOGNITION**

- a) The Town of Smyrna recognizes the American Federation of State, County and Municipal Employees, AFL-CIO Council 81, **and its affiliated Local 1670-001** as the sole and exclusive collective bargaining agent for the employees certified the Department of Labor and Industrial Relations, State of Delaware for the purpose of collective bargaining with

respect to rates of pay, wages, hours of employment in accordance with Title 19, Delaware Code, Chapter 13.

- b) For the purpose of this agreement, the terms “Employee” and “Employees” shall include all employees employed as “Town of Smyrna Election Department Employees, including Lead Lineman, Apprentices, Journeyman Lineman, Meter Readers, **Tele-Communication Specialist, Public Works Employees, and Clerical, Technical and Administrative Employees**, excluding all others.” (hereafter “Union Members”)

## **1.6 REPRESENTATION**

The employees in this bargaining unit shall be represented for the purpose of grievance adjustment by a Grievance Committee of ~~one (1)~~ **four (4)** employee members selected by the Union (hereafter “Stewards”) whose names shall be submitted in writing to the Town Manager of the Town of Smyrna within thirty (30) days of the signing of this agreement.

## **ARTICLE III UNION CONVENTIONS AND TRAINING**

- a) The Town of Smyrna will grant leave to ~~one (1)~~ **up to seven (7)** employees to attend and serve as Delegates to Union Conventions and to attend any training Council 81 might offer.

## **ARTICLE IV**

### **4.0 SICK BENEFITS**

#### **ACCUMULATION OF SICK LEAVE**

- G. Absences for a fraction of a day that is chargeable to sick leave in accordance with those provisions shall be charged proportionately but charged in an amount not smaller than ~~one-quarter~~ **sixteenth** of a day. **Employees shall be permitted to combine lunch breaks with leave time to cover time away from work due to appointments.**
- M. Excessive sick leave shall be defined as the use of ~~sick leave at a rate which exceeds the average usage rate of all Town employees during the previous~~ **eight (8) or more sick leave occurrences in a calendar year; an occurrence is defined as an absence of one or more continuous sick days.** Supervisors shall take the following measures with an employee whose sick leave use exceeds the average usage rate of a Town employee:
  - a) Counseling

### **4.1 DEATH IN THE FAMILY**

- B. If additional days off are needed, such time may be charged to vacation **and/or sick time.**
- J. Department Heads shall schedule vacation leave with particular regard to the operating requirements of the Department. The

scheduling of vacation periods shall be based on seniority **or at the discretion of the supervisor** and is always subject to be changed at the discretion of the Town Manager or the Department Head in the event of changing circumstances or emergency needs.

**The Town agrees to make whole any employee who suffers proven financial loss (i.e., non-refundable deposits) due to any change in approved vacation. The affected employee shall notify the Town Manager or Department Head of such situation within twenty-four (24) hours of their knowledge of the projected change.**

## **5.1 HOLIDAYS**

A. All full-time employees shall receive a regular days pay for the following holidays:

- |                           |                                    |
|---------------------------|------------------------------------|
| 1. New Year's Day         | 2. Martin Luther King Jr. Birthday |
| 3. President's Day        | 4. Good Friday                     |
| 5. Memorial Day           | 6. Independence Day                |
| 7. Labor Day              | 8. Veteran's Day                   |
| 9. Day After Thanksgiving | 10. <b>Christmas Eve (1/2 day)</b> |
| 11. Christmas Day         |                                    |

**A regular days pay shall be defined as eight (8) hours pay for eight employees and twelve (12) hours pay for twelve hour employee.**

## **5.5 HOURS OF WORK – PREMIUM RATE**

For the purpose of computing overtime premium pay, the regular working day is eight (8) hours and the regular work week is forty (40) hours. The work schedule of each Town employee shall be ~~established by the department supervisor~~ as follows:

*(Current Practice)*

**The Public Works and Electrical Department working hours are 7:00 a.m. to 3:30 p.m. with thirty (30) minutes for lunch and one ten (10) minute break in the morning and one ten (10) minute break in the afternoon. The Tele-Communication Specialists working hours are 6:30 a.m. to 6:30 p.m. and 6:30 p.m. to 6:30 a.m. The administrative personnel work schedule is from 8:00 a.m. to 4:30 p.m. (with the exception of certain IT department personnel who are scheduled to report to work earlier than the departments that they support) with one (1) hour for lunch and two ten (10) minute breaks. Administrative personnel shall be paid forty (40) hours per week.**

**Employees will be paid weekly on Friday. Employees will be paid the day before the Holiday if it is observed by the Town on Friday.**

The normal work hours shall include a one-half (1/2) our period for lunch and two ten minute breaks as scheduled by the department supervisor.

B. **Time and One-Half and Double Time**

**Add the following language after sentence #2.**

**An employee will be paid double time and one-half:**

- 1. When required to work during periods when the Town is closed during a State of emergency.**

**State of Emergency** *(current practice)*

**If the Town requires personnel to work during a state of emergency, the Town, at the employee's request, will provide transportation to and from work.**

**Stand-by Pay** *(current practice)*

**Employees who are required to be on stand-by status during periods other than their regularly scheduled work hours will receive seven (7) hours of pay at their regular straight time.**

**ARTICLE VI**

**6.0 CLOTHING ALLOWANCE** *(current practice)*

**Add the following language after paragraph #1.**

- 1. Building Inspectors and Code Enforcement Officers will receive annually eight shirts (four long sleeves and four short sleeves) and eight pants. They also will receive a \$100 boot allowance annually and Car Hartt jackets and bibs every two years if needed (e.g. damage or size change).**
- 2. Electric Department employees will receive annually: Five (5) fire retardant long sleeves shirts, five (5) fire retardant short sleeves shirts, five (5) fire retardant pants, one (1) fire retardant coat, one (1) fire retardant set of bib coveralls and a \$100 boot allowance. Boots shall be purchased by the employee and receipts shall be submitted to The Town for reimbursement. Personal protective gear (i.e., rubber goods, work gloves, safety vest) and anything else deemed necessary by the electric department supervisor shall continue to be purchased by the Town.**
- 3. Public Works employees and the Purchasing and Safety Officer will receive five uniforms annually which consist of five pants, five each of long sleeves and short sleeves shirts. They will also receive a \$200 Car Hartt allowance and a \$100 boot allowance.**
- 4. Dispatchers shall receive five (5) uniforms annually which shall consist of five (5) pairs of pants, five (5) long sleeves and five (5) short sleeves shirts and a \$100 shoe allowance.**

**ARTICLE VIII**

**8.2 ANNUAL PERCENTAGE SALARY INCREASE**

The Union agrees to the Town's proposed annual salary increases on the condition that the salary of bargaining unit members shall be increased to

match increases agreed to for any other employee group that receives a higher increase than those agreed to below:

**2011 No increase**

**2012 2% increase effective 1/1/12**

**2013 2% increase effective 1/1/13**

#### **ARTICLE IX DURATION**

This Agreement shall become effective on January 1, **2011** (regardless of the date of its formal and complete execution), and shall remain in effect until 12:00 midnight on December 31, **2013**. This Agreement shall be automatically renewed from year to year thereafter, unless either party shall give the other party written notice of their desire to terminate, modify, or amend this Agreement. Such notice shall be given to the other party in writing by certified mail, on or before November 30, 2013, or on or before November 30 of any subsequent year. In the event either party shall elect to open the Contract for negotiations, those negotiations shall begin no later than thirty days after the December 31, date. Any such notice by the Union shall be sent to the Town Manager addressed to the Town Office, and any notice to the Union shall be sent to the then current address of AFSCME, Council 81. This Agreement shall be binding upon the successors of the parties hereto.

#### **EMPLOYEE BENEFITS**

The employee contribution to the health care premium shall be 15% for the duration of this agreement

#### **PENSION**

- a) All current employees of the Town who are members of the bargaining unit shall retain all benefits and provisions of the existing pension plan through December 31, 2011. There will be no change in the applicable multipliers, or any service requirements for service prior to December 31, 2011. At that date, the current plan will be revised as stated in paragraph b. All previously earned benefits will be secured.
- b) On January 1, 2012, all current Town employees who are members of the bargaining unit will be covered by the revised pension plan. Under this revised pension plan employees will be required to make a contribution of 3% of their respective annual base salary above the first \$6,000 of earnings in a calendar year. The multiplier for credited service for pension purposes after January 1, 2012 shall be 2%. All other pension provisions remain unchanged.
- c) All bargaining unit employees hired on or before December 31, 2011 will be covered by the current plan and the revised plan. All employees hired after January 1, 2012 will be eligible to participate in a 457(b) plan. The Town will make no contribution to this 457(b) plan.

**Town of Smyrna's last, best, final offer:**

1. **Current Agreement:** Maintain current contract language from 2007-2009 Agreement except to the extent the current Agreement is modified by this final offer.

2. **Duration:** January 1, 2011 through December 31, 2013. None of the revisions shall be retroactive.

3. **Holidays:** Revise Article 5.1A. to eliminate Columbus Day as a paid holiday. Add a paid holiday for ½ day on Christmas Eve, unless the Christmas holiday is observed on Christmas Eve.

4. **Salary:** Delete Articles 8.0 through 8.3, and substitute the following: There shall be general salary increases as follows:

2011	No increase
2012	2% increase effective 1/1/12
2013	2% increase effective 1/1/13

5. **Healthcare:** Delete Article 8.5 and substitute the following:

The Town shall provide full-time employees individual employee coverage under a major group medical insurance plan. The employee shall have the option of covering eligible dependents under the same group plan. The cost of the individual and dependent coverage shall be allocated as follows:

<u>Year</u>	<u>Town's Contribution</u>	<u>Employee Contribution</u>
2011	85%	15%
2012	80%	20%
2013	75%	25%

6. **Pension:**

a) All current employees of the Town who are members of the bargaining unit shall retain all benefits and provisions of the existing pension plan through December 31, 2011. There will be no change in the applicable multipliers, or any service requirements for service prior to December 31, 2011. At that date, the current plan will be closed and all previously earned benefits will be secure.

b) On January 1, 2012, all current Town employees who are members of the bargaining unit will be covered by a revised pension plan. Under this revised pension plan employees will be required to make a contribution of 3% of their respective annual base salary above the first \$6,000 of earnings in a calendar year. The multiplier for credited service for pension purposes after January 1, 2012 shall be 1.67%. All other pension provisions remain unchanged.

c) All bargaining unit employees hired on or before December 31, 2011 will be covered by the current plan and the revised plan. All employees hired after January 1, 2012 will be eligible to participate in a 457(b) plan. The Town will make no contribution to this 457(b) plan.

No mutual agreements were submitted by the parties; however, the verbiage of the final offers indicate the parties are using the January 1, 2007 through December 31, 2010 collective bargaining agreement between the Town and AFSCME Local 1670-001 (which covered only Electric Department employees at that time) as a base document. Although not directly addressed in the last, best, final offers of the parties, it is presumed that any provisions of the predecessor agreement not changed by the last, best, final offer which is imposed as a result of this decision, remains in the successor agreement.

### **STATUTORY PROVISIONS**

#### **19 Del.C. §1315. Binding interest arbitration.**

(a) Within 7 working days of receipt of a petition or recommendation to initiate binding interest arbitration, the Board shall make a determination, with or without a formal hearing, as to whether a good faith effort has been made by both parties to resolve their labor dispute through negotiations and mediation and as to whether the initiation of binding interest arbitration would be appropriate and in the public interest, except that any discretionary subject shall not be subject to binding interest arbitration.

(b) Pursuant to §4006(f) of Title 14, the Board shall appoint the Executive Director or his/her designee to act as binding interest arbitrator. Such delegation shall not limit a party's right to appeal to the Board.

(c) The binding interest arbitrator shall hold hearings in order to define the area or areas of dispute, to determine facts relating to the dispute, and to render a decision on unresolved contract issues. The hearings shall be held at times, dates and places to be established by the binding interest arbitrator in accordance with rules promulgated by the Board. The binding interest arbitrator shall be empowered to administer oaths and issue subpoenas on behalf of the parties to the dispute or on the binding interest arbitrator's own behalf.

(d) The binding interest arbitrator shall make written findings of facts 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 its entirety. In arriving at a determination, the binding interest arbitrator shall specify the basis for the binding interest arbitrator's findings, taking into consideration, in addition to any other relevant factors, the following:

- (1) The interests and welfare of the public.
- (2) Comparison of the wages, salaries, benefits, hours and conditions of employment of the employees involved in the binding interest arbitration proceedings with the wages, salaries, benefits, hours and conditions of employment of other employees performing the same or similar services or requiring similar skills under similar working conditions in the same community and in comparable communities and with other employees generally in the same community and in comparable communities.
- (3) The overall compensation presently received by the employees inclusive of direct wages, salary, vacations, holidays, excused leaves, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
- (4) Stipulations of the parties.
- (5) The lawful authority of the public employer.
- (6) The financial ability of the public employer, based on existing revenues, to meet the costs of any proposed settlements; provided that any enhancement to such financial ability derived from savings experienced by such public employer as a result of a strike shall not be considered by the binding interest arbitrator.
- (7) Such other factors not confined to the foregoing which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, binding interest arbitration or otherwise between parties, in the public service or in private employment.

In making determinations, the binding interest arbitrator shall give due weight to each relevant factor. All of the above factors shall be presumed relevant. If any factor is found not to be relevant, the binding interest arbitrator shall detail in the binding interest arbitrator's findings the specific reason why that factor is not judged relevant in arriving at the binding interest arbitrator's determination. With the exception of paragraph (6) of this subsection, no single factor in this subsection, shall be dispositive.

(e) Within 30 days after the conclusion of the hearings but not later than 120 days from the day of appointment, the binding interest arbitrator shall serve the binding interest arbitrator's written determination for resolution of the dispute on the public employer, the certified exclusive representative and the Board. The decision of the binding interest arbitrator shall become an order of the Board within 5 business days after it has been served on the parties.

(f) The cost of binding interest arbitration shall be borne equally by the parties involved in the dispute.

(g) Nothing in this chapter shall be construed to prohibit or otherwise impede a public employer and certified exclusive representative from continuing to bargain in good faith over terms and conditions of employment or from using the services of a mediator at any time during the conduct of collective bargaining. If at any point in the impasse proceedings invoked under this chapter, the parties are able to conclude their labor dispute with a voluntarily reached agreement, the Board shall be so notified, and all impasse resolution proceedings shall be forthwith terminated. (65 Del. Laws, c. 477, § 1; 70 Del. Laws, c. 186, § 1; 72 Del. Laws, c. 271, §§ 4, 8; 74 Del. Laws, c. 173, § 1.)

**PRINCIPAL POSITIONS OF THE PARTIES**

**AFSCME Local 1670-001:** The Union argues the City of Newark should be considered the only comparable for purposes of evaluating the last, best, final offer of the parties in this matter. It provides the following comparison between its last, best, final offer and the provisions of the April 1, 2011 – March 31, 2014 collective bargaining agreement between the City of Newark and AFSCME Local 1670<sup>1</sup> in its closing argument:

	AFSCME 1670-001 Last, Best Final Offer	City of Newark CBA
Wages:		
2011	0%	0%
2012	2%	2%
2013	2%	2%
Union Leave	7 members to attend conventions and training	10 man days during any 2 consecutive years
Employee Healthcare Plan Contribution		
2011	15%	15%

<sup>1</sup> AFSCME 1670 represents a bargaining unit of City of Newark employees which includes “all hourly, non-supervisory employees working in the Water and Waste Water Department, the Electric Department, the Parks and Recreation Department, the Maintenance Division, the Street Division, the Refuse Division, the Police Department (custodial staff only), and the Planning and Development Department in the bargaining unit covered hereby and excluding all other employees of the municipality.” *Union Exhibit 2*, Article 1.1 B.

2012	15%	15%
2013	15%	15%
Employee Pension Contribution		
2011	0%	2.5%
2012	3%	2.5%
2013	3%	2.5%
Employee Pension Multiplier		
2011	2.5%	2.1%
2012	2.0%	2.1%
2013	2.0%	2.1%

AFSCME asserts its last, best, final offer demonstrates its willingness to work with the Town on pension reform, but notes that the existing pension plan is currently funded at 89% (as compared to the Newark pension plan which is funded at 66.62%).

The Union argues the Town has failed to meet its burden to establish it cannot meet the cost of the union's offer based on existing revenues. It argues the Town has based its argument on testimony concerning financial obligations that do not affect existing revenues.

Finally, AFSCME notes the financial impact of the Town's offer on bargaining unit members by increasing pension contributions more than the wage increase is worsened by the increase in healthcare contributions which are included in the Town's offer. It concludes, "even when the additional one percent (1%) that the Town agreed to give the Fraternal Order of Police is factored in the calculation, the total bargaining unit compensation, excluding the cost of the medical health care contribution, will amount to (-\$5,236.07)."

**Town of Smyrna:** The Town asserts the record establishes it does not have the financial ability, based on existing revenues, to meet the cost of AFSCME's last, best, final offer. The statute states the financial ability of the public employer (based on existing revenues) to meet the cost of a proposed settlement, is the only factor

which can be dispositive for the arbitrator's decision. Citing the remand decision in *Fraternal Order of Police Lodge 9 and City of Seaford* (IV PERB 2659 (2002)), it argues a review of the Town's current and projected revenues and expenditures supports its conclusion that existing revenues are insufficient to meet the cost of AFSCME's proposal.

Specifically, the Town points to the testimony of its chief financial officer who testified to the following:

- The Town had an actual deficit of \$43,042 in 2010 and is expecting a deficit of approximately \$40,000 in 2011.
- The Town has experienced unstable and declining revenues in real estate transfer taxes since 2006. This trend is expected to continue into the future. While it was projected the transfer tax would generate \$600,000 in revenue in 2011, the Town's witness testified he expects it will only generate \$350,000 by the end of the year.
- The Town anticipates it will be required to make an additional contribution to the non-police pension of \$70,000 in 2012.
- The Town expects to begin debt service on the \$1.8 - \$1.9 million dollar bonds for a nearly completed water project in 2012, at an annual projected cost of \$110,000. Although the exact date on which this will occur is unknown, the Town's witness expected it will be during the next calendar year.
- A 1% increase in salaries for this bargaining unit is estimated to cost approximately \$20,000 (including other employment costs). Although the union's last, best, final offer is for a 2% salary increase effective January 1, 2012, it also requires the Town to match any higher increases received by any other employee group. The current collective bargaining agreement with the Town's police officers includes a wage reopener for 2012 that guarantees a salary increase of between 3% and 5%. Consequently, if AFSCME's last, best, final offer is adopted, the minimal cost to the Town will be \$60,000, but could be as high as \$100,000. This increase would be continued for 2013, with an additional 2% increase.

The Town projects at least a \$90,000 shortfall in its ability to pay for AFSCME's proposal for 2012. That shortfall will increase in 2013 as a result of the need to fund a full year of debt service and additional salary increases. Consequently, the Town argues because it is unable to meet the cost of AFSCME's

offer (based on existing revenues), the arbitrator must accept the Town's last, best, final offer.

It also argues that if AFSCME's offer is accepted, the Town will be forced to commit an unfair labor practice because AFSCME's salary proposal imposes a broad parity provision on the Town, requiring it to pay to this bargaining unit a salary increase equivalent to the highest increase paid to any other group of employees. By including the parity language, AFSCME violates the PERA by forcing the FOP (which represents the only other bargaining unit of Town employees) to bargain salary increases for this bargaining unit as well as the police, in its current salary reopener for 2012 and for salaries in 2013.

The Town asserts it has established the wages currently paid to Town employees are competitive with wages paid to employees performing the same or similar services in comparable communities. The chief financial officer performed a salary survey in 2007, in which he compared the wages and salaries paid to Town employees, with those of employees of Kent County, Middletown, Dover, Milford, Newark and Seaford. These municipalities were chosen because they also employ persons who perform duties related to the sale of electricity, water and sewer. As a result of this survey, salaries for Smyrna employees who were being paid less than the average of those paid to comparable employees of the identified employers were increased.

More recently, the Town retained a consultant to perform a second salary survey. Each of the Town's employees was interviewed concerning their job duties and responsibilities in order to more closely match comparators. The Town argues that although this survey compares current wages for Smyrna employees to 2009 wages of comparable employers, "2010 and 2011 have been relatively flat years for

salary increases.” This survey, it asserts, has confirmed the Town is paying competitive wages.

It also argues that the Town’s pension offer is comparable to the State pension plan for Counties and Municipalities, in which many comparable communities<sup>2</sup> are enrolled. The State plan requires an employee contribution of 3% after the first \$6,000 in annual wages and uses a multiplier of 1.67 to calculate pension benefits. The Town asserts it also compares favorably to other municipalities which are not in the State plan, many of which have voluntary contribution (rather than defined benefit) pension plans.

The Town argues AFSCME failed to present any comparable information and that simply submitting collective bargaining agreements from the City of Newark and the New Castle Municipal Services Commission does not meet the statutory requirement. Insufficient evidence was presented to allow the arbitrator to make comparisons between Smyrna and the positions covered by those collective bargaining agreements. Additionally, AFSCME provided no support for its presumption that only comparators with unionized work forces should be considered. The statute requires the comparison of wages, salaries, benefits, hours and conditions of employment to “other employees performing the same or similar services requiring similar skills under similar working conditions in comparable communities.” AFSCME has not addressed this key component; consequently, its offer should be rejected because it is not supported under the statutory criteria.

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<sup>2</sup> Town of Georgetown, City of New Castle, Town of Millsboro, City of Harrington, Town of Cheswold, Town of Ocean View, Town of Wyoming, Town of South Bethany, Town of Milton, City of Milford, Town of Felton, Town of Bethany Beach and Town of Camden all participate in the State of Delaware County and Municipal Pension Plan established by 29 Del.C. Chapter 55A.

## DISCUSSION

The authority of the binding interest arbitrator under the PERA is narrow in scope. The arbitrator is limited to choosing between the last, best, final offers of the parties, in their entirety. *FOP Lodge 4 v. City of Newark*, Del.Ch., Civ.A. 20136, 2003 WL 22256098, IV PERB 2959 (2003). In arriving at that determination, the arbitrator must consider the statutory criteria and must specify the basis for the findings, giving appropriate weight to each relevant factor. 19 Del.C. §1315(c). In assessing the viability of the parties' offers, each proposal must be considered within the context of its underlying purpose or logic, and the issue or problem it seeks to address. It is the responsibility of the party making a proposal to clearly establish the purpose and reasonableness of that proposal, based upon the binding interest arbitration criteria. *Fraternal Order of Police, Lodge 9 and City of Seaford*, BIA, IV PERB 2421, 2430 (2001)

The record created by the parties addressing the statutory criteria of 19 Del.C. §1315 was cursory at best. While each side presented limited information concerning comparables, little or no information was provided to validate the selection of those comparables or to illuminate for the arbitrator how the employers each selected compared to Smyrna in terms of size, budget, revenues, similarity of services provided and duties of employees, or other traditional bases for comparison. It is the responsibility of the parties to create a complete record and the statute is quite clear as to what must be considered.

Additional guidance is also found in prior PERB binding interest arbitration decisions. The statute clearly requires a consideration of "overall compensation presently received by employees inclusive of direct wages, salary, vacations, holidays, excused leaves, insurance and pension, medical and hospitalization benefits, the continuity and stability of employment and all other benefits received." 19 Del.C. §1315(d)(3). No

testimony or documentary evidence was presented by either party to address this criterion.

The listed criteria constitute a checklist which the arbitrator must consider and on which the parties are required to present evidence. The lack of record evidence neither proves nor disproves a conclusion argued for by the parties. Nor do I credit conclusions based upon the testimony of a witness who admitted under oath that he was not familiar with the methodology used or data relied upon by a consultant or actuary who was not presented for examination. When, as here, summaries were presented into evidence which are drawn from other documents, without either providing the source documents or citing that source, they are of limited value to valid analysis and consideration.

The statute does not provide a formula for weighting the criteria, except to state that the proven inability of the public employer to afford a given offer (as defined in 19 Del.C. §1315(d)(6)) is dispositive of the case. The ultimate decision, requires the arbitrator to exercise judgment in determining which facts are most important to resolution of the case before her. The evidence in this case, such as it is, has been considered and evaluated against the criteria of 19 Del.C. §1315.

Pension:

The Town of Smyrna currently provides a defined benefit pension plan for its non-police employees. This pension plan covers all AFSCME bargaining unit employees, as well as approximately ten non-bargaining unit administrative employees. Pension benefits are calculated by multiplying the number of years of service by the employee's highest average compensation, which is then multiplied by a pension multiplier. That multiplier is 2.0 for all years of service prior to January 1, 2006, and is 2.5 for all years of

service after December 31, 2005. None of the provisions of the existing pension were negotiated with AFSCME.

The Town asserts its pension offer is the more reasonable because it adopts the same employee contribution and employs the same multiplier (1.67) as the State's County and Municipal Employee Pension Plan, effective January 1, 2012. The Town's offer does not directly mirror the State plan. The benefit under the State Plan is calculated based on final average compensation which means "1/60 of the compensation paid to an employee during any period of 60 consecutive months or any 60 months comprised of 5 periods of 12 consecutive months in his or her credited service in which his or her compensation was the highest." 29 Del.C. §5551 (7). The Pension Plan for Full-Time Employees of the Town of Smyrna January 1, 2010 Actuarial Valuation reflects the highest average compensation is defined as "the average of the highest three consecutive calendar years of compensation." *Town Exhibit 4, Appendix - Exhibit 2.*

Neither party provided data or information on which a comparability determination can be made as to the fairness of its pension proposal. The Town's argument that the pension is an escalating and uncontrolled cost which requires a reduction in the multiplier beyond that proposed by the union is not supported by the evidence presented. Nor was any support offered for excluding bargaining unit employees hired after January 1, 2012 from the pension plan. AFSCME's offer would restore the 2.0 multiplier which the Town had applied prior to January 1, 2006. The evidence presented and application of the statutory criteria support AFSCME's pension proposal.

### Parity

The Public Employment Relations Board has held that parity clauses are not *per*

*se* illegal subjects of bargaining but represent permissive bargaining positions to the extent that they do not interfere with the rights of other bargaining units to engage in bargaining under the PERA. *City of Wilmington v. FOP Lodge 1, et al.*, DS 02-10-369, VI PERB 2991, 2992 (PERB, 2003). A specific contractual parity provision, however, may be unenforceable and contrary to law if it would interfere with the negotiation rights of a third party who is not party to that parity agreement. The Board affirmed the Executive Director's decision in which he held:

A party's willingness to engage in good faith negotiations concerning a permissive subject of bargaining does not prevent that party from later withdrawing the matter from the scope of negotiations prior to or during impasse resolution procedures. Inclusion of a permissive subject of bargaining does not convert that issue to a mandatory subject of bargaining in successive negotiations. *City of Wilmington, Supra*, p. 2992.

In this case, AFSCME's wage offer includes a parity provision for each year of the agreement that provides "...the salary of bargaining unit members shall be increased to match increases agreed to for any other employee group that receives a higher increase than those agreed to" for 2011, 2012 and 2013. No employee groups received wage or salary increases in the current year (2011). The FOP, however, entered into a collective bargaining agreement which provides a salary reopener for 2012 which guarantees "a salary increase of no less than 3%, and no more than 5%." Town Exhibit 7. That contract extends through December 31, 2012.

For obvious reasons, the parity provision proposed by AFSCME cannot affect negotiations between the Town and the police bargaining unit for 2011 as the Town and the FOP agreed to no wage increase. Imposition of AFSCME's offer could, however, have an impact on both the salary reopener for 2012 and negotiations for a successor agreement and 2013 salary rates between the FOP and the Town. The effect of implementation of the proposed parity provision would be a downward pressure on those

salary negotiations, as the Town would be compelled to consider the impact of any wage increases on the AFSCME represented bargaining unit in formulating its position in the FOP negotiations.

It is important to note that AFSCME did not propose a salary reopener, but simply proposes that this bargaining unit automatically receive any wage or salary increase which is greater than the 2% it offers. This is precisely the type of parity provision which concerned PERB in the *City of Wilmington* declaratory statement decision, finding "... the new "parity" wage rates would become the floor for negotiations ... [and] ...there would be a clear disincentive to enter into negotiations, and that would result would obviously improperly interfere with, coerce and restrain negotiations between the FOP and the City." *City of Wilmington*, Supra., p. 2873.

AFSCME does not establish the basis upon which it concludes that an automatic right to whatever increase the FOP negotiates is the more reasonable position. It appears to premise its offer on a belief that every employee of the Town should be entitled to the same wage or salary increase annually, regardless of the employees' positions. The statute, however, clearly establishes that this is but one of the comparables which must be considered by the interest arbitrator. The arbitrator must consider "wages, salaries, benefits, hours and conditions of employment of the employees involved in the binding interest arbitration proceedings with the wages, salaries, benefits, hours and conditions of employment of other employees performing the same or similar services or requiring similar skills under similar working conditions in the same community and in comparable communities and with other employees." 19 Del.C. §1315, *emphasis added*.

As previously stated, it is the responsibility of the party making a proposal to clearly establish the purpose and reasonableness of that proposal, based upon the binding

interest arbitration criteria. AFSCME has not met that burden with respect to its parity offer.

Healthcare Premiums:

The Town proposes to increase the employee contribution to healthcare premiums from the current 15% to 20% in 2012 and to 25% in 2013. The Town's witness explained:

... We obtain our health care through the State of Delaware as a non-payroll group member. The employee currently contributes 15 percent of the premium and then the employer or the Town contributes 85 percent. So what I did was look at what it costs the employee currently on a weekly and monthly basis [*in Town Exhibit 8*] at 15 percent, what it would cost the employee the same monthly and weekly in 2012 under the Town's proposal and then also in 2013, the same monthly and weekly. I did not factor any cost increases that the Town may have to be hit with, passed on by the State... Generally last year there was zero percent [*increase in premiums*] Generally the price increase is fairly modest. I would say a few percent. It's usually not a big number.. *Transcript p. 66-67.*

No evidence or argument was offered as to why the employee contribution to healthcare premiums should be increased or the amount of savings this change will generate. I note that the recent tentative agreement between the Town and the FOP included a five percent increase in employee contribution to healthcare premiums for 2012. This increase was negotiated and agreed to within the context of the total agreement. The Town has not met its burden to provide justification or comparable support for its proposal to require a greater employee contribution for healthcare insurance premiums.

Ability to pay

It is undisputed that the under the Town's offer, the paycheck of each and every bargaining unit employee will include less take home pay beginning January 1, 2012 and

by that, as of that date, bargaining unit employees will also have a lesser pension benefit. While the employees will receive (under the Town's offer) a 2% across the board wage increase effective January 1, 2012 and a 2% increase on January 1, 2013, they will also be required to contribute more toward their healthcare insurance premium costs (an additional 5% on January 1, 2012, and an additional 5% (for a total of 25%) on January 1, 2013).<sup>3</sup> The Town's offer also requires bargaining unit employees to contribute 3% of their salaries (after the first \$6,000 of annual earnings) toward their pension for the first time. To this point, pension contributions have only been made the Town.

AFSCME's offer includes the same wage and pension contributions but maintains employee's current 15% contribution toward healthcare insurance premiums. AFSCME proposes reducing the pension multiplier from 2.5 to 2.0, while the Town proposes reducing the multiplier to 1.67.

AFSCME established its proposals for Article 5.5, Premium Rates, and Article 6.0, Clothing Allowance, reflect wage rates and clothing allowances currently provided by the Town to bargaining unit employees. The Town did not offer any contradictory testimony; consequently those portions of AFSCME's offer have no impact on the Town's current or projected expenses for this bargaining unit.

Extrapolating from the numbers provided by the Town in its Exhibit 2<sup>4</sup>, the

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<sup>3</sup> No calculations or projections were provided by either the Town or AFSCME of the impact on either the Town's expenses or members' costs for this offer.

<sup>4</sup> The Town's witness testified the numbers in Town Exhibit 2 were taken from numbers provided by the actuary in 2010, and are based on the 2009 pension numbers. Town Exhibit 1 establishes the Town's recommended pension contribution fell by more than \$7,000 in 2010. Additionally, the numbers included in Town Exhibit 2 cover the entire non-police pension pool, which is larger than the bargaining unit. The Town's witness testified he never asked the actuary to calculate numbers for just the bargaining unit. Exhibit 2 also states employee contribution of 3% would generate \$67,500 which the Town would not have to contribute to pension. The Town's witness testified this number was generated simply by calculating 3% of the total salaries paid to employees in this pension plan in 2009, and did not take into account that the proposal was that the 3% would only be applied to earnings after the first \$6,000. Consequently, all of the numbers in Town Exhibit 2 for savings realized from changes to the multiplier and employee contributions are overstated.

additional decrease in the multiplier from 2.0 to 1.67 equates to a savings of \$53,700 in annual pension contribution for the Town. The question of ability to pay comes down to a consideration of this difference plus the additional cost of AFSCME's proposals for paid leave for up to seven (7) employees to attend union training or to act as delegates to Union conventions, the costs associated with additional sick leave and making sick leave available to used at the death of a family member, and the cost of making any employee whole who suffers a financial loss due to a change made by the Town in his or her scheduled annual vacation. Unfortunately, neither party provided any projected costs for these items.

AFSCME's proposal for paid leave for up to seven (7) employees to attend union training or to act as delegates to Union conventions is particularly troubling. This proposal is open ended and does not limit the use to a fixed number of work days nor does it provide for any consideration of operational need. No rationale was provided as to why this proposal is either necessary or reasonable. It is much broader than the contractual agreement between the City of Newark and AFSCME 1670, which the union proffered as its comparable, which states:

### 3.5 Union Conventions

The City agrees to grant a leave of absence to no more than three (3) employees at any time to attend the regular biennial convention convened by AFSCME International Union, Delaware Council 81, or the Delaware State Labor Council. The Union agrees to notify the City in writing prior to the use of this leave. The leave shall not exceed for the entire Union, ten (10) man days during any two (2) consecutive calendar years. Each employee shall only receive fifty percent (50%) of the employee's regular compensation while absent on this leave.

The Town's witness testified he anticipates the Town may have additional expenses for debt service in 2012, but was unable to specifically estimate the size of that expense or when it would be due. Certainly at the time of the hearing, less than three

months prior to the start of the next fiscal year, the Town was in a position to project these expenses for the next year. It is very troubling that at no point in this proceeding was a precise estimate made of the oft-cited “deficit”.

The Board has previously addressed the issue of “existing revenues” as that term is defined in 19 Del.C. §1315 (d)(6):

The term “existing revenues” limits the Interest Arbitrator to considering revenues, based on existing fee and taxation rates. It is beyond the scope of the Arbitrator’s authority to consider whether such rates should or could be increased, whether other expenses should or could be decreased or reallocated, and/or whether existing reserves should or could be allocated to fund the proposals. While it is certainly within the authority of the governing body of a public employer to make any of these choices subject to the political will of its citizenry, it is not within the province of the Interest Arbitrator. *Seaford, p. 2675*

... In order to evaluate whether these costs are within an employer’s ability to afford, the Interest Arbitrator must assess existing, stable and continuing sources of revenue. He or she must assess, based on what is known at the time of the proceeding, whether these revenue sources have the probability of being sufficient to fund the “built-in” increases in expenses associated with the agreement. As discussed above, the Arbitrator cannot base his decision on whether there is a possibility or probability that the legislative body will create new revenue sources, expand existing revenue sources, or find alternative funding sources. *Seaford, p. 2676.*

Without the benefit of supported and valid expense and savings projections for the offers, this arbitrator is unable to conclude that the Town is “unable” to meet the costs of the union’s offer. This is particularly true where the union’s offer includes reasonable and substantial concessions in pension provisions.

The statute requires the arbitrator to consider the last, best, final offers of the parties in their totality and does not provide the opportunity for creation of a more reasonable hybrid to resolve the dispute. In considering the offers as a whole, the statutory criteria set forth in 19 Del.C. §1315 have been considered separately and collectively, based on the record before me. The parties were advised during the

prehearing conference of the need to address each criteria in their presentations. Unfortunately, this did not occur.

While I am concerned about the future, long-term impact of the Town's change to the pension multiplier and increases in healthcare premiums which are not supported by a demonstrated need, I am very narrowly convinced that the Town's offer, if not better, is less destructive of the operational needs of the municipality, and is, therefore more in the interest and welfare of the public. The Union's offer simply seeks too many changes which affected operations, includes an overly broad parity provision, had the potential to increase costs in an uncontrolled manner and was not justified with comparable support.

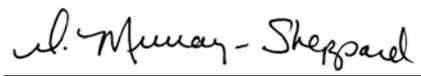
### **DECISION**

For the reasons discussed above, based on the record created by the parties in this proceeding, the last, best, final offer of the Town is determined to be the more reasonable based upon the statutory criteria set forth in 19 Del.C. §1315. 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, although sparse, were considered in their entirety in reaching this decision.

WHEREFORE, the parties are directed to implement the tentative agreements and proposals set forth in the Town's last, best, final offer. The parties are to notify the Public Employment Relations Board of compliance with this Order within sixty (60) days of the date below.

**IT IS SO ORDERED.**

Date: December 2, 2011



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DEBORAH L. MURRAY-SHEPPARD  
Executive Director, Delaware PERB