IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

FRATERNAL ORDER OF POLICE, LODGE 5,	)	
Appellant-Below, Appellant,	)	C.A. No. 7676-VCP
v.	)	Citation On Appeal From The Decision Of The Public Employment Relations Board Dated June 22, 2012 (BIA No. 11-10-826)
NEW CASTLE COUNTY, DELAWARE, DELAWARE PUBLIC EMPLOYMENT RELATIONS BOARD,	)	
Appellees-Below, Appellees.	)	

MEMORANDUM OPINION

Submitted: October 9, 2013
Decided: January 29, 2014

Ronald Stoner, Esq., RONALD STONER, P.A., Wilmington, Delaware; *Attorney for Appellant*.

William W. Bowser, Esq., Scott A. Holt, Esq., YOUNG CONAWAY STARGATT & TAYLOR, LLP, Wilmington, Delaware; *Attorneys for Appellee, New Castle County*.

PARSONS, Vice Chancellor.

This action is an appeal from a decision of the Public Employee Relations Board ("PERB") upholding the findings of a binding interest arbitrator in a statutorily mandated arbitration proceeding between the Appellant, Fraternal Order of Police, Lodge 5 ("FOP 5"), and Appellee New Castle County (the "County").[1] After failing to reach a collective bargaining agreement, both FOP 5 and the County submitted their last, best, final offers ("LBFO") to a binding interest arbitrator pursuant to the Police Officers' and Firefighters' Employment Relations Act (the "POFERA").[2] Based on the POFERA's specified criteria, the binding interest arbitrator found the County's LBFO to be the more reasonable proposal. PERB upheld that conclusion after an initial appeal by FOP 5.

FOP 5 contends that both the binding interest arbitrator and PERB committed legal and factual errors in their decisions. According to FOP 5, those errors provide this Court sufficient grounds to reverse those holdings, or alternatively, to remand this action for further proceedings. The County responds that both the binding interest arbitrator and PERB applied correctly the provisions of the POFERA, and that this Court should affirm their respective findings.

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1 PERB also is an Appellee in this action.

2 19 *Del. C.* §§ 1601-1623.

Having considered the evidentiary record presented to the binding interest arbitrator and PERB and the parties' briefs and oral arguments in this appeal, I conclude that the decision of PERB should be affirmed.

I. BACKGROUND

A. Facts[3]

1. Failed negotiations

FOP 5 is an employee organization within the meaning of 19 *Del. C.* § 1602(k) and is the certified exclusive bargaining representative of New Castle County Police Officers of the rank of Patrol Officer, Corporal, Senior Corporal, Sergeant, Senior Sergeant, Lieutenant, and Senior Lieutenant. FOP 5 and the County, a public employer within the meaning of Section 1602(l) of the POFERA, were parties to a collective bargaining agreement with a term of April 1, 2008 through June 30, 2011. As a result of deterioration in the County's finances precipitated by the 2008 financial crisis, in June 2009, the parties entered into a Memorandum of Understanding in which FOP 5 agreed to concessions that equated to a 5% reduction in wages. The parties further agreed that FOP 5's

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[3] Unless otherwise noted, the facts recited herein are drawn from the earlier decisions in this dispute of the binding interest arbitrator and PERB.

concessions would remain in effect during the entirety of the County's 2010 and 2011 fiscal years[4] and would expire on June 30, 2011.

On May 5, 2011, the parties began negotiating a successor collective bargaining agreement. The successor agreement was to cover the period from July 1, 2011 to June 30, 2013, *i.e.*, fiscal years 2012 and 2013. After failing to reach an agreement, on July 8, 2011, the County requested that the parties engage in mediation. PERB appointed a mediator, and on September 6, 2011, the parties participated in mediation. Nine days later, on September 15, the mediator recommended that the parties resolve their dispute through binding interest arbitration pursuant to 19 *Del. C.* § 1615. On request from PERB, each party submitted its LBFO for consideration.

2. Binding interest arbitration

The parties' LBFOs differed in only one respect material to this appeal. FOP 5 proposed a 0% increase in compensation, whereas the County proposed a 2.5% reduction in FOP 5's compensation. Stated differently, FOP 5 proposed essentially to continue the parties' prior collective bargaining agreement, with its previous 5% concession eliminated completely based on its June 30, 2011 expiration, and the County proposed essentially to continue the parties' prior

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[4] The County's fiscal year runs from July 1 through June 30.

collective bargaining agreement, with only 2.5% of FOP 5's 5% concession restored.

An arbitrator, Deborah L. Murray-Sheppard (the "Arbitrator"), Executive Director of PERB, was appointed by PERB pursuant to 19 *Del. C.* § 1615(b) and charged with choosing either FOP 5's or the County's LBFO. The Arbitrator conducted a two-day evidentiary hearing on January 4 and 9, 2012, to determine which party's LBFO was most consistent with the statutory factors contained in 19 *Del. C.* § 1615(d).[5] During the hearing, the County argued that even with the 2.5%

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[5] The seven enumerated factors to be considered under 19 *Del. C.* § 1615(d) are:

(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 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

concession, FOP 5 members still were well compensated relative to comparable police officers in Delaware, and that the County could not afford to restore fully FOP 5's initial concessions based on existing revenues. FOP 5 challenged as speculative the County's assertions that it would experience a budget deficit in fiscal years 2012 and 2013, noting that the County had experienced budget surpluses in recent years and was projecting a budget surplus for fiscal year 2012. In addition, FOP 5 averred that the County had other sources of funds sufficient to finance its proposal, such as the savings the County enjoyed because of unfilled vacancies in the County police force and the County's large financial reserves, which at approximately $80 million, amounted to nearly half of the County's $164 million operating budget.

Ultimately, the Arbitrator, charged with the task of picking either the County's or FOP 5's LBFO in its entirety and without modification,[6] chose the County's LBFO. In her written findings of fact, the Arbitrator stated that: (1) FOP

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experienced by such public employer as a result of a strike shall not be considered by the 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 arbitration or otherwise between parties, in the public service or in private employment.

[6] 19 *Del. C.* § 1615(d).

5 members remained well compensated relative to their peers even with a 2.5% concession; (2) the fact that all of the County's other unionized employees had agreed to a 2.5% concession weighed against FOP 5's proposal; and (3) the County could not afford FOP 5's proposal based on "existing revenues" because, under the statute, that term does not include financial reserves, and any savings created by vacancies in the police department had been eliminated by unbudgeted severance obligations.

3. PERB's decision

On March 8, 2012, three days after the Arbitrator issued her decision, FOP 5 appealed that decision to PERB under 19 *Del. C.* § 1615, arguing that the Arbitrator failed to apply properly the factors listed in Section 1615(d) of the POFERA. Specifically, FOP 5 asserted that its proposal was more reasonable, *per se*, under Section 1615(d) because it sought only to maintain the status quo established by a predecessor collective bargaining agreement. FOP 5 also asserted that the evidentiary record did not support the Arbitrator's finding that the County could not afford to pay for FOP 5's LBFO.

On June 22, 2012, PERB unanimously affirmed the Arbitrator's decision. First, PERB rejected FOP 5's argument that its proposal to have its original 5% concession restored fully was a maintenance of the status quo, and instead found that it was tantamount to a 5% increase in compensation. Next, PERB rejected

FOP 5's contention that the Arbitrator was obligated statutorily to determine first which proposal was more reasonable, and only then examine the County's ability to pay for FOP 5's proposal. Rather, PERB found that the Arbitrator acted properly in considering the factors in Section 1615(d) simultaneously. Finally, PERB concluded that the Arbitrator correctly analyzed whether the County could afford FOP 5's proposal. That analysis included the Arbitrator's reliance on the binding interest arbitration decision in *City of Seaford v. FOP Lodge*[7] to support her refusal to consider the County's financial reserves. Therefore, PERB determined that the Arbitrator had executed her responsibilities in conformance with the statutory mandate.

B. Procedural History

On July 6, 2012, FOP 5 filed its initial notice of appeal from PERB's decision seeking review in this Court pursuant to 19 *Del. C.* § 1609(a). FOP 5 filed an Amended Complaint on Appeal on April 10, 2013. The grounds for appeal stated in FOP 5's Amended Complaint were that: (1) PERB erred as a matter of law; (2) PERB erred in matters of fact; (3) PERB acted in an arbitrary and capricious manner; and (4) PERB decisions are not supported by substantial evidence. After full briefing, I heard argument on FOP 5's appeal on October 9,

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[7] Decision of the Interest Arbitrator on Remand, IV PERB 2659 (July 15, 2002).

2013. This Memorandum Opinion constitutes my ruling on FOP 5's appeal from PERB's June 22, 2012 decision.

C. Parties' Contentions

FOP 5 challenges three aspects of the Arbitrator's, and thus PERB's, decision. First, FOP 5 argues that the Arbitrator committed errors of law and fact with respect to her determination that the County could not afford to pay for FOP 5's LBFO. According to FOP 5, the Arbitrator committed legal error in adopting the definition of "existing revenues," an important term in Section 1615(d)(6) of the POFERA, from a prior binding interest arbitration decision and applying it to the facts of this case to support her refusal to consider the County's financial reserves in her ability-to-pay analysis. FOP 5 avers further that even if the Arbitrator had used the correct definition of "existing revenues," her factual finding that the County could not pay for FOP 5's LBFO was not supported by the evidentiary record presented at the Arbitration hearing. Second, FOP 5 contends that the Arbitrator committed legal error in failing to specify adequately the basis for her findings, as required by Section 1615(d). FOP 5 further asserts that because of the Arbitrator's failure, this Court cannot review properly the Arbitrator's findings and conduct an independent assessment of whether those findings are supported by substantial evidence. Finally, FOP 5 claims that the Arbitrator committed legal error by considering the compensation concessions of

County employees other than police officers, and finding that those concessions weighed against accepting FOP 5's proposal.

The County responds that the Arbitrator's adoption of the definition of "existing revenues" from a prior, well-reasoned arbitration decision was both permissible and proper. The County also avers that the evidentiary record relating to the County's ability to pay for FOP 5's LBFO, which consists largely of the County's unchallenged financial projections, contains substantial evidence supporting the Arbitrator's conclusion that the County could not afford FOP 5's proposal. With respect to FOP 5's argument that the Arbitrator failed to specify adequately the bases for her findings, the County points to the Arbitrator's statement that she considered all the criteria required by the POFERA and to her explicit discussion of some of the relevant factors listed in the statute. Thus, the County contends that the Arbitrator's decision contains adequate information for this Court to conduct an informed review of the Arbitrator's findings. Finally, the County dismisses as unreasonable FOP 5's assertion that the POFERA prohibited the Arbitrator from considering the compensation concessions of the non-police County employees upon which she relied. The County construes the POFERA as mandating that the Arbitrator make such a comparison, or at a minimum, permitting the Arbitrator to do so under the circumstances of this case.

II. ANALYSIS

A. Standard of Review

"On appeal of an administrative agency's adjudication, this Court's sole function is to determine whether the Board's decision is supported by substantial evidence and is free from legal error."[8] In reviewing a decision of PERB, the Court of Chancery is bound to accept as correct all relevant factual findings that are supported in the record by "substantial evidence."[9] "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[10] The issues presented on this appeal that are purely legal, however, are subject to this Court's *de novo* review.[11] In undertaking such a review the Court accords due weight to PERB's "expertise and specialized

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8 *Angstadt v. Red Clay Consol. Sch. Dist.*, 4 A.3d 382, 387 (Del. 2010).

9 *See Bd. of Educ. of Colonial Sch. Dist. v. Colonial Educ. Ass'n,* 1996 WL 104231, at *4 (Del. Ch. Feb. 28, 1996), *aff'd*, 685 A.2d 361 (Del. 1996).

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

11 *Fraternal Order of Police, Lodge No. 15 v. City of Dover,* 1999 WL 1204840, at *2 (Del. Ch. Dec. 10, 1999), *aff'd*, 755 A.2d 388 (Del. 2000) (TABLE) (citing *AFSCME, Council 81, Local 2004 v. State*, 1996 WL 435432, at *3 (Del. Ch. July 29, 1996), *rev'd,* 696 A.2d 387 (Del. 1997)); *Colonial Educ. Ass'n,* 1996 WL 104231, at *4.

competence" in labor law.[12] In the end, however, the Court remains obligated to conduct a plenary review of a PERB decision when the issue is the proper construction of statutory law and its application to undisputed facts.[13]

"Delaware courts do not accord agency interpretations of the statutes which they administer so-called *Chevron*[14] deference, as do federal courts in reviewing administrative decisions under the federal Administrative Procedures Act."[15] In interpreting a statute, Delaware courts must "ascertain and give effect to the intent of the legislature."[16] "If the statute is found to be clear and unambiguous, then the plain meaning of the statutory language controls."[17] "The fact that the parties

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12 *See Fraternal Order of Police, Lodge No. 15,* 1999 WL 1204840, at *2; *Seaford Bd. of Educ. v. Seaford Educ. Ass'n,* 1988 WL 8773, at *1 (Del. Ch. Feb. 5, 1988).

13 *Lewis v. State,* 2007 WL 315359, at *4 (Del. Super. 2007) (quoting *Welding & Boiler Repair Co. v. Zakrewski,* 2002 WL 144273 (Del. Super. 2002)).

14 *Chevron, U.S.A., Inc. v. Natural Res. Def. Council,* 467 U.S. 837 (1984) (holding that an agency's interpretation of a statute that it administers is entitled to deference so long as Congress has not spoken directly on that issue).

15 *Del. Comp. Rating Bureau, Inc. v. Ins. Comm'r,* 2009 WL 2366009 (Del. Ch. July 24, 2009).

16 *In re Adoption of Swanson,* 623 A.2d 1095, 1096 (Del. 1993).

17 *Ins. Comm'r v. Sun Life Assurance Co. of Can. (U.S.),* 21 A.3d 15, 20 (Del. 2011).

disagree about the meaning of the statute does not create ambiguity."[18] Rather, a statute is ambiguous only if it "is reasonably susceptible of different interpretations,"[19] or "if a literal reading of the statute would lead to an unreasonable or absurd result not contemplated by the legislature."[20] If a statute is ambiguous, however, courts should consider the statute as a whole, rather than in parts, and read each section in light of all others to produce a harmonious whole.[21] Courts also should ascribe a purpose to the General Assembly's use of statutory language, and avoid construing it as surplusage, if reasonably possible.[22]

B. Neither PERB nor the Arbitrator Erred as a Matter of Law in Adopting the Meaning of "Existing Revenues" from the *Seaford* Decision

FOP 5 argues first that PERB and the Arbitrator impermissibly refused to consider the County's sizeable financial reserves in determining whether the County could pay for FOP 5's LBFO. Of the seven factors that a binding interest arbitrator is statutorily bound to consider under Section 1615(d), only one, "the financial ability of the public employer, based on existing revenues, to meet the

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18 *Chase Alexa, LLC v. Kent Cty. Levy Ct.*, 991 A.2d 1148, 1151 (Del. 2010).

19 *Centaur P'rs, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 927 (Del. 1990).

20 *LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 933 (Del. 2007).

21 *Taylor v. Diamond State Port Corp.*, 14 A.3d 536, 538 (Del. 2011).

22 *Id.*

costs of any proposed settlements,"[23] is dispositive. In her decision below, the Arbitrator declined to consider the County's sizeable financial reserves in determining whether the County could "afford" FOP 5's proposal on the ground that those reserves were not "existing revenues." In support of her decision, the Arbitrator relied on a 2002 arbitration decision in *City of Seaford v. FOP Lodge 9*.[24] In affirming the Arbitrator's decision, PERB not only endorsed the Arbitrator's reliance on, and proper application of, the *Seaford* definition of existing revenues, but also held that "the analysis undertaken [in *Seaford*] is well-reasoned and should be applied in subsequent cases under the POFERA, unless and until it is successfully challenged and overturn[ed]."[25]

FOP 5 contends that PERB and the Arbitrator erred in adopting the *Seaford* decision's interpretation of "existing revenues" because prior arbitration decisions are not binding authority. According to FOP 5, the Arbitrator's adoption of the "existing revenue" definition from the *Seaford* decision also conflicts with the Arbitrator's citation to that same decision for the proposition that, "[i]n assessing

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23 *See* 19 *Del. C.* § 1615(d)(6).

24 Decision of the Interest Arbitrator on Remand, IV PERB 2659 (July 15, 2002).

25 *Fraternal Order of Police, Lodge No. 5 v. New Castle Cty.*, Board Decision on Request for Review of the Decision of the Interest Arbitrator, VIII PERB 5517, 5521 (June 22, 2012) (hereinafter "PERB Decision").

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."[26] Characterizing "existing revenues" as an employer-specific term, FOP 5 avers that the Arbitrator was required to make an independent assessment of the County's "existing revenues," including whether its reserves should be considered "revenues." The FOP's argument on this issue is unpersuasive.

1. The *Seaford* decision

In *Seaford*, the City of Seaford and the Fraternal Order of Police Lodge 9 ("FOP 9") engaged in POFERA-mandated binding interest arbitration after failing to arrive at a collective bargaining agreement. After a full hearing, the arbitrator in that matter held that the City of Seaford's LBFO was more reasonable. FOP 9 appealed to PERB, which after its own hearing, remanded the case back to the arbitrator. PERB's order directed the arbitrator "to specifically address what constitutes 'existing revenues' within the meaning of 19 *Del. C.* § 1615(d)(6)."[27] In that context, on remand, the arbitrator accepted additional evidence and

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26 *New Castle Cty. & Fraternal Order of Police Lodge No. 5*, Decision of the Binding Interest Arbitrator, VII PERB 5415, 5429 (Mar. 7, 2012) (hereinafter "Arbitrator's Decision").

27 *Fraternal Order of Police Lodge 9 v. City of Seaford,* Decision of the Interest Arbitrator on Remand, IV PERB 2659, 2660 (July 15, 2002).

argument regarding Seaford's financial ability, based on existing revenues, to meet the costs of the competing LBFOs.

After considering the dictionary definitions of "revenues" and "income,"[28] the arbitrator stated:

> Revenue is dynamic in character. It constitutes a flow of moneys, in this case, into the City [of Seaford]'s coffers. Revenues from the electricity, water and sewer enterprise funds consist of net income (operating and non-operating revenues less operating expenses), or "profits" in the vernacular. Included in the non-operating revenues is "interest earned" which may include interest earned on the investment of reserved funds.
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> Reserves, on the other hand, are moneys which have been set aside, saved, or "reserved." While they may originate from excess revenues and be allocated to reserves in a given year, they do not constitute an active revenue stream. Funds are reserved or allocated to reserves through an affirmative act of the governing body. Likewise, how those reserves are expended, invested, or allocated is also within the exclusive authority of the City's governing body.
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> 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

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28 "Revenues" were defined as "the yield of sources of income that a political unit collects and receives into the treasury for public use." "Income" was defined as "a gain or recurrent benefit, usually measured in money that derives from capital or labor; also, the amount of such gain received in a period of time." *Id.* at 2674 (citing Merriam Webster's Collegiate Dictionary (10th ed. 1996)).

> 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 those choices subject to the political will of its citizenry, it is not within the province of the Interest Arbitrator under the Police Officers' and Firefighters' Employment Relations Act.[29]

The arbitrator in *Seaford* continued:

> There is a very clear and logical reason the General Assembly limited the Interest Arbitrator to consider only "existing revenues" in reaching a determination as to whether a public employer can afford a proposed settlement. Many costs, including those for wages and benefits, are recurring and generally tend to automatically increase annually, either as a result of negotiated provisions of a collective bargaining agreement or due to inflationary pressure on the costs of services or goods an employer has agreed to provide. Consequently, they constitute an on-going and frequently increasing financial obligation.
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> 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,

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[29] *Id.* at 2675-76.

> expand existing revenue sources, or find alternative funding sources.[30]

It does not appear that either this Court, or courts in jurisdictions with legislation analogous to the POFERA, such as Illinois and Wisconsin, have addressed directly the question of how the statutory phrase "existing revenues" should be defined. In the absence of such precedent, and having considered independently the relevant statutory language and the POFERA as a whole, I conclude that the *Seaford* arbitrator's discussion of what constitutes "existing revenues" within the meaning of 19 *Del. C.* § 1615(d)(6) is well-reasoned and persuasive. The arbitrator's approach to defining "existing revenues" was guided by,[31] and consistent with, this Court's precedent regarding statutory interpretation. In addition to finding no error with the reasoning or logic of the *Seaford* arbitrator's process, I agree independently with his conclusion that, based on the plain meaning of the word "revenues," the POFERA excludes unambiguously a public employer's financial reserves from consideration in an analysis under Section 1615(d)(6).

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30 *Id.* at 2676.

31 *Id.* at 2673 (citing *Seaford Bd. of Educ. v. Seaford Educ. Ass'n*, 1988 WL 8773 (Del. Ch. Feb. 5, 1988); *Haddock v. Bd. of Pub. Educ.*, 84 A.2d 157 (Del. Ch. 1951)).

2. The Arbitrator was entitled to rely on the *Seaford* decision

FOP 5 contends that regardless of whether the *Seaford* definition of "existing revenues" is legally correct, prior arbitration decisions are not binding, and, as such, the Arbitrator had an obligation to make an independent determination as to whether New Castle County's reserves should be considered "existing revenues" under the specific circumstances of this arbitration. To the extent FOP 5 argues that the Arbitrator committed legal error by considering or relying on the *Seaford* decision in her ruling, that argument is without merit.

As an initial matter, an arbitrator's authority in the POFERA context to treat each matter individually is subject to the restrictions imposed by the statute. This includes determining a public employer's ability to pay, "based on existing revenues." Second, in adopting the definition of "existing revenues" articulated in the *Seaford* decision, the Arbitrator did not preclude herself impermissibly from considering the County's unique financial circumstances. The fact that consideration of reserves is beyond an arbitrator's statutory authority does not foreclose the arbitrator from evaluating a host of other factors that are relevant under Section 1615 and could provide a sufficient basis to make a meaningful determination of a public employer's ability to pay. Nor does *Seaford*'s definition of "existing revenues" tilt the binding arbitration process unfairly in public employers' favor. While eliminating the consideration of reserves narrows

somewhat the scope of funds that a union can point to as evidence that a public employer can afford its proposal, FOP 5 has not presented any cogent evidence or argument that the General Assembly intended reserves to be a factor in the binding interest arbitration context in the first place.

Third, there is nothing inherently problematic about relying on a prior arbitration decision as persuasive authority. The Arbitrator cited to *Seaford* in support of her decision to exclude the County's reserves from "existing revenues." In doing so, the Arbitrator did not state that she was bound by the *Seaford* decision or that she would have considered the reserves but for the holding in that decision. Rather, the Arbitrator apparently agreed with *Seaford's* definition of "existing revenues" and then applied its logic to the facts before her. Even assuming FOP 5 is correct that arbitration decisions lack precedential value, FOP 5 has not cited any authority or articulated any logical reason for precluding arbitrators from incorporating the persuasive reasoning of prior decisions in their rulings.

Finally, the scope of the *Seaford* decision is neither explicitly nor implicitly limited to the facts of that case. When PERB remanded that case, they directed the arbitrator "to specifically address what constitutes "existing revenues" within the meaning of 19 *Del. C.* § 1615(d)(6)," "upon receipt and consideration of argument

from the parties."[32] Thus, the arbitrator had to address a legal question, namely, the proper construction of "existing revenues" in Section 1615(d) of the POFERA, a statute enacted on March 28, 2000, less than two years before PERB remanded the *Seaford* decision. Because Section 1615(d) was relatively new when *Seaford* was decided, it makes sense that PERB was asking the *Seaford* arbitrator to provide a broadly applicable meaning for "existing revenues." Furthermore, the arbitrator's actual discussion of Section 1615(d)(6) demonstrates that he intended his definition of "existing revenues" to be applicable generally. For example, the arbitrator's statement of what he believed the General Assembly's intent was in limiting binding interest arbitrators to consider only "existing revenues" indicates that the arbitrator was analyzing the provision in a general, and not a case-specific, sense. Although the arbitrator also mentioned the specific facts of the *Seaford* case in his discussion of the definition of "existing revenues," he referred to those facts to explain the definition's application, not to limit its reach. In sum, the definition of "existing revenue" pronounced in *Seaford* was not case-specific. Therefore, neither the Arbitrator nor PERB erred in applying the *Seaford* definition of "existing revenues" to the facts of this case.

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32 *Fraternal Order of Police Lodge 9 v. City of Seaford,* Decision of the Interest Arbitrator on Remand, IV PERB 2659, 2660 (July 15, 2002).

In this regard, I also note that, in upholding the Arbitrator's findings in this case, PERB declared explicitly that the meaning of "existing revenues," as stated in the *Seaford* decision, should be applied in "cases under POFERA, unless and until it is successfully challenged and overturn[ed]."[33] Section 1601 of the POFERA, states that Delaware's policies with respect to labor relations between public employers and police officers and firefighters are best effectuated, in part, by "[e]mpowering the [PERB] to assist in resolving disputes between police officers or firefighters and their public employers and to administer this chapter." Section 1606, entitled "Public Employment Relations Board," mandates that PERB "shall be empowered to administer this chapter under rules and regulations which it shall adopt and publish." As PERB itself has recognized, "[i]t is the responsibility of [PERB] to administer the [POFERA] and to provide for the fair and consistent application of its provisions."[34]

While PERB's authority to administer the POFERA is not unlimited, FOP 5 has not demonstrated that PERB's decision to mandate the use of the *Seaford* definition of "existing revenues" is impermissible. First, as discussed above, the arbitrator in *Seaford* correctly interpreted the language of Section 1615(d)(6).

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33 PERB Decision at 5521.

34 *Id.*

Second, although "existing revenues" is not a defined term in the POFERA, it nevertheless is a statutory term. Because the POFERA applies with equal force to all eligible police officers, firefighters, and public employers throughout Delaware, sound policy dictates that the term be applied consistently in every pertinent jurisdiction.

Third, mandating the use of the *Seaford* definition of "existing revenues" does not restrict impermissibly the ability of binding interest arbitrators to evaluate the facts and circumstances unique to the matter before them.[35] It is conceivable that a municipality could have a regular, recurring source of revenue that cannot be categorized as either a tax or a fee. The *Seaford* definition of "existing revenues" does not necessarily preclude a binding interest arbitrator from finding that such income constitutes "existing revenue" within the meaning of Section 1615(d)(6). Rather than deprive arbitrators of their authority and discretion under the

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[35] In this case, the fiscal year 2012 budget was the first County budget in at least ten years in which financial reserves were not used to balance an anticipated deficit. Thus, in the past, the County repeatedly chose voluntarily to use its reserves for that purpose. Nevertheless, the Arbitrator and PERB did not err in finding that such use did not convert the County's reserves into "existing revenues" under the meaning of the POFERA. While the parties were free to negotiate a collective bargaining agreement that included the use of the County's reserves, once the issue was submitted to binding interest arbitration, the Arbitrator was allowed to consider only the County's "existing revenues," which generally do not include a public employer's financial reserves.

POFERA, PERB's adoption of the *Seaford* decision's definition of "existing revenues" provides arbitrators more helpful guidance on the nature of their statutorily defined role. Therefore, neither PERB nor the Arbitrator erred as a matter of law in adopting the *Seaford* definition of "existing revenues," and applying that definition to the facts of this case.

C. PERB and the Arbitrator's Holdings that the County Could Not Afford FOP 5's LBFO Are Supported by Substantial Evidence

Having determined that PERB and the Arbitrator refused properly to consider the County's financial reserves in conducting their analysis under Section 1615(d)(6), the next relevant inquiry is whether the decision by the Arbitrator and PERB that the County could not afford FOP 5's LBFO is supported by the record. Whether the record contains "substantial evidence" of the County's inability to pay for FOP 5's proposal is a question of fact that I review under the deferential abuse of discretion standard.

FOP 5 contends that the County predicated its allegations of inability to pay on speculative budget projections that were unsupported by the County's actual financial position at the time of the negotiations. In support of its argument that the County was able to pay, FOP 5 cites to evidence in the record that: (1) the County had a budget surplus for fiscal years 2010 and 2011 and (2) the County was projecting a surplus of approximately $800,000 for fiscal year 2012 six months into that fiscal year, when the arbitration hearing was conducted. The County

responds that its unchallenged projections for fiscal years 2012 and 2013 showed that the County would experience a budget deficit, especially if FOP 5 did not accept a 2.5% concession. In addition, the County avers that its projections resulted from a detailed and audited financial analysis that produced credible results. Finally, the County notes that any "surplus" it was projecting at the time of the initial arbitration decision reflected only a "snapshot" that was subject to change in the final six months of the fiscal year based on any number of variables.

In resolving this question, it is not this Court's role to determine whether it would have reached the same conclusion as the Arbitrator. Rather, the Court must decide whether the record contains "such relevant evidence as a reasonable mind might accept as adequate to support" the Arbitrator's conclusion that the County could not afford FOP 5's LBFO. Having reviewed the record presented to the Arbitrator and PERB, I conclude that a "reasonable mind," in fact, could find that the evidence submitted supports the conclusion that the County was unable to afford FOP 5's proposal.

When FOP 5 and the County began negotiating, a new County Executive was attempting to implement his fiscal plan for the County. That plan called for balancing the budget, without the use of financial reserves, in an environment where the County faced a "structural deficit" in which its expenses were growing four times faster than its revenues. Based on my review of the record, I concur

with PERB's conclusion that at the time of the arbitration "[t]he County provided evidence that it is and has been facing a very difficult economic situation which necessitated new decisions and approaches."[36]

Whereas the County presented evidence that it was expecting to experience budget deficits in fiscal years 2012 and 2013, FOP 5 did not offer any financial projections of its own. Instead, FOP 5 chose to challenge the credibility of the County's projections based on the County's recent financial history and performance in the 2012 fiscal year up to early January 2012, when the arbitration was held. FOP 5's evidence and arguments, however, do not show that the Arbitrator's findings regarding the County's ability to pay were not supported by substantial evidence.

Evidence that a public employer had a history of understating its financial position conceivably could undermine the probative value of pessimistic budget projections that that employer presented to a binding interest arbitrator. In this instance, the County had experienced budget surpluses in each of fiscal years 2010 and 2011. These prior surpluses, however, do not render the Arbitrator's decision as to the County's ability to pay unreasonable. First, the County had a new Chief Executive. It is not clear from the record that the new County Executive took the

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[36] PERB Decision at 5523.

same approach to preparing the budget as his predecessor. Second, the budget surplus for fiscal year 2011 appears to have been driven by over $4.5 million in unexpected revenues and $3.3 million in unbudgeted expense savings.[37] The unexpected revenues came from one-time transactions such as sheriff sales of seized property and the sale of County property. The unexpected expense reductions came from the former County Executive's cost-cutting initiative in which he instructed each department to underspend its budget. While the goal was to cut expenses by one million dollars, the various departments were able to find over three million dollars in savings.[38] A reasonable arbitrator could have determined, therefore, that the County's prior budget surplus resulted from unique circumstances, and did not reflect a penchant by the County to understate its fiscal health. Thus, a reasonable arbitrator could have found the County's projections of a budget deficit in fiscal year 2012 credible even though it had experienced a budget surplus in each of the two years preceding the negotiations.

The fact that the County was projecting another budget surplus at the time of the arbitration also does not render the Arbitrator's decision unreasonable. It is undisputed that as of January 2012, the County was projecting a surplus of

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37 Record of the Public Employment Relations Board Docket No. 11-10-826, FOP Lodge Ex. 5.

38 *Id.*; Tr. of the Interest Arbitration Hr'g at 27-28 (Jan. 4, 2012).

$800,000 for fiscal year 2012 despite the fact that it had been paying FOP 5 2.5% more than the County had budgeted since July 1, 2011. In response to this evidence, the County stated the $800,000 was just a "snapshot" and that there was no guarantee that the County would end the fiscal year with a budget surplus. Although the County was unable to offer any specific reason beyond "unforeseen events" that would cause the projected surplus to turn to a deficit, the record contains some evidence that the County's concerns were legitimate. In October 2011, the County's "checkbook" projected a surplus of $1.2 million.[39] Soon after, however, the County learned that one department had underestimated its gasoline needs by approximately $400,000, causing a reduction in the projected surplus to the $800,000 figure that was presented at the arbitration.[40] A reasonable arbitrator, therefore, could have found credible the County's testimony that the projections in its "checkbook" were speculative and not a reliable indication of an ability to pay for FOP 5's proposal.

Even assuming that FOP 5 is correct that no reasonable arbitrator could have concluded that the County was unable to afford FOP 5's proposal for the 2012 fiscal year, there is no evidence that the County could have paid for the proposal in

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39 Tr. of the Interest Arbitration Hr'g at 265-66 (Jan. 9, 2012).

40 *Id.*

fiscal year 2013. Each party submitted a two-year proposal to the Arbitrator. Therefore, the relevant inquiry was whether the County could afford FOP 5's proposal throughout its entire two-year duration. The County submitted unchallenged evidence that it was projecting a $5.1 million deficit in the 2013 fiscal year if FOP 5 accepted the 2.5% concession and a $5.7 million deficit if it did not. An actual deficit of even half that amount would have exceeded the County's projected 2012 budget surplus.[41] Because a reasonable arbitrator could have found the County's budget forecasts credible, it follows that the record before the Arbitrator and PERB contained evidence sufficient to support a reasonable determination that the County could not afford to pay for FOP 5's proposal over the entirety of its two-year duration. Therefore, the factual findings of the Arbitrator and PERB with respect to the County's ability to pay are supported by substantial evidence.

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[41] The County initially projected a $10.1 million deficit for fiscal year 2012. After cutting $8.1 million from the operating budget, the County sought to balance the remaining $2 million deficit through personnel cost reductions (*i.e.*, 2.5% compensation concessions from all County employees) or layoffs. Because FOP 5 was the only group not to agree to the 2.5% concession, the County projected that it would incur a deficit of approximately $613,000, the equivalent of a 2.5% concession from FOP 5.

D. The Arbitrator Explained Adequately the Grounds for Her Decision

Section 1615 of the POFERA requires that the binding interest arbitrator give "due weight" to each of the relevant factors specified in Section 1615(d). FOP 5 argues that the Arbitrator's decision fails to specify the bases for her conclusions in such a way that this Court could determine whether each statutory factor actually was considered and, thus, whether there is substantial evidence to support her ultimate decision. FOP 5's argument is without merit.

With respect to a binding interest arbitrator's decision, this Court has held that "written findings of fact are not required for each of the factors [in Section 1615(d)] so long as each factor is considered."[42] The Arbitrator's decision does not provide written findings for each factor. The Arbitrator did make, however, written findings of fact regarding: (1) the overall compensation received by County police officers compared with police officers for the State of Delaware and the City of Wilmington; (2) the compensation received by other County employees during the period covered by the parties' LBFOs; and (3) the County's ability to pay for FOP 5's LBFO based on "existing revenues." In addition, in determining that the County had the more reasonable LBFO, the Arbitrator stated that: "the relative merits of each of the last, best final offers were considered in their totality and

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42 *Fraternal Order of Police Lodge No. 4 v. City of Newark*, 2003 WL 22256098, at *2 (Del. Ch. Sept. 29, 2003).

balanced according to the statutory criteria. All of the exhibits, testimony, arguments and cited cases were considered in reaching this decision."[43]

Having reviewed the Arbitrator's decision and the evidentiary record presented to her and PERB, I am satisfied that the Arbitrator met her statutory duties to consider all the statutory factors. Of particular importance is the Arbitrator's factual findings regarding whether the County could afford FOP 5's LBFO, the only factor that the POFERA explicitly indicates shall be dispositive.[44] In a footnote in her decision, the Arbitrator stated that she did not need to conduct an "apples-to-apples" analysis of FOP 5 and police departments in various neighboring states, "[b]ecause the analysis in this case ultimately turns on the viability of the County's ability to pay argument."[45] The Arbitrator went on to determine that "the record supports the conclusion that the additional cost of the FOP's offer cannot be funded based on existing revenues during the two year term

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43 *New Castle Cty. & Fraternal Order of Police Lodge No. 5*, Decision of the Binding Interest Arbitrator, VII PERB 5415, 5437 (Mar. 7, 2012) (citations omitted).

44 As discussed *supra* note 5, the "financial ability" of the public employer is the sixth of the seven factors enumerated in 10 *Del. C.* § 1615(d) that the binding interest arbitrator must consider. Section 1615(d) further states: "with the exception of paragraph (d)(6) of this section, no single factor in this subsection shall be dispositive."

45 Arbitrator's Decision at 5432 n.7.

of the collective bargaining agreement."[46] Thus, at a minimum, the Arbitrator determined that Section 1615(d)(6) supports the County's position. Because Section 1615(d)(6) is dispositive, I begin my review of the Arbitrator's decision with that provision of the POFERA.

As discussed, the Arbitrator's decision that the County could not afford FOP 5's LBFO is supported by substantial evidence. Moreover, had the Arbitrator made written findings that every other statutory factor favored FOP 5's proposal, her ultimate conclusion presumably still would have been the same. Consequently, had the Arbitrator failed to consider each of the other statutory factors, which she did not, it is unclear what, if any, purpose would be served by remanding the case to the Arbitrator when she has determined already, based on substantial evidence, that the statutorily dispositive factor weighs in the County's favor. Thus, remanding this case to the Arbitrator for a more full description of her findings would serve no purpose, and I decline FOP 5's initiation to order a remand on such a basis.

E. The Arbitrator Did Not Err as a Matter of Law in Considering FOP 5's "Internal Comparators"

FOP 5's final argument is that the Arbitrator erred in considering the concessions made by other County employees regarding the same contractual time

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[46] *Id.* at 5437.

period as to which FOP 5 and the County were negotiating. According to FOP 5, the POFERA precludes a binding interest arbitrator from considering the wages or working conditions of any non-police officers or firefighters. Because I would affirm the Arbitrator's and PERB's decisions regardless of the merits of FOP 5's contentions on this point, it is not strictly necessary to address it. As this issue likely will arise again, however, it may be worthwhile for this Court to explain why it considers FOP 5's argument to be without merit.

Section 1615(d)(2) requires a binding interest arbitrator to "take into consideration" a:

> 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.[47]

The POFERA defines "employees" as police officers or firefighters employed full-time by a public body. As such, FOP 5 contends that the word "employees" in Section 1615(d)(2) could be replaced with the phrase "police officers or firefighters employed full-time by a public body." Upon making this substitution,

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[47] 19 *Del. C.* § 1615(d)(2).

FOP 5 asserts that the statute, by its own terms, does not permit an arbitrator to consider the wages and working conditions of non-police officers and firefighters when conducting an analysis of Section 1615(d)(2).

The flaw I perceive with this interpretation of the POFERA is that it appears to render some of the language in Section 1615(d)(2) meaningless. The unambiguous language of the statute requires a comparison of three different groups: (1) employees involved in the arbitration; (2) employees performing the same or similar services in the same community and in comparable communities to the employees involved in the arbitration; and (3) other employees generally in the same community and in comparable communities as the employees involved in the arbitration. FOP 5 argues that the third group should be read to include only "other [police officers or firefighters employed full-time by a public body] generally in the same community and in comparable communities as the employees involved in the arbitration." If FOP 5's interpretation of the statute is correct, the third group would include every entity in the second group and, potentially, vice versa. Consequently, it is unclear what, if any, purpose is served by having both the second and third groups specified in the statute when the third group overlaps substantially with the second group.

At argument, FOP 5 averred that its interpretation would not render part of Section 1615(d)(2) superfluous because various other police organizations have

sufficiently different duties from the members of FOP 5. For example, highway patrol officers first would be compared to other highway patrol officers in Delaware (group two), and then to police officers generally throughout the state (group three). If it were necessary to decide this issue, I question whether the record is developed sufficiently to enable this Court to decide the issue definitively. In addition, I am skeptical that, as they currently are organized, there are enough meaningful differences between the various police officer and firefighter fraternal organizations in Delaware to warrant statutory recognition of those differences in the manner suggested by FOP 5. In that regard, the Legislature's use of the phrase "other employees generally" in describing the third group implies that it intended that aspect of Section 1615(d)(2) to be read more broadly, as the County maintains it should be.

Assuming for purposes of argument that FOP 5's interpretation of Section 1615(d)(2) is correct, however, that still does not compel the conclusion that the Arbitrator erred in considering the concessions made by other County employees. Section 1615(d)(7) states that the binding interest arbitrator shall take into consideration "[s]uch other factors not confined to the foregoing [six factors] 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." On its face, Section 1615(d)(7) is broadly written. FOP 5 has not advanced any persuasive basis for excluding the other County employees' concessions from Section 1615(d)(7)'s broad scope. At a minimum, the language of that section undermines FOP 5's claim that, as a matter of law, the statute prohibited the Arbitrator from considering the results of the County's negotiations with its other unionized employees.

FOP 5 further contends that, if the County's interpretation of Section 1615(d)(7) as a "catch-all" provision is correct, then the Arbitrator also should have considered the County's reserves. This argument, however, ignores the plain language of the POFERA. By statute, a binding interest arbitrator's analysis of a public employer's ability to pay is limited to consideration of the public employer's "existing revenues." Any interpretation of Section 1615(d)(7) that permits a binding interest arbitrator to consider something other than "existing revenues" in determining whether a public employer can afford a union's proposal would contravene the unambiguous language and meaning of Section 1615(d)(6), thereby rendering such an interpretation unreasonable. In contrast, there is no explicit or implicit restriction in the POFERA that would preclude a binding interest arbitrator from considering a union's "internal comparators," such as the compensation of other unionized employees in the same community, so long as the comparison is "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."

FOP 5 has failed to establish that the Arbitrator or PERB erred as a matter of law in considering the concessions made by other County employees. In this case, however, if it were necessary to reach the issue, I would find that the Arbitrator did act unreasonably as far as the manner in which she considered the results of the County's other employees' collective bargaining. While finding it relevant that every other County employee had agreed to a 2.5% reduction in their compensation, the Arbitrator appears to have ignored the fact that every other County employee either: (1) did not have the right to negotiate about their compensation; or (2) faced the prospect of layoffs if they did not agree to a reduction in compensation. Among the County's employees represented by collective bargaining units, FOP 5 was unique in that the County Executive had stated publicly that there would be no layoffs of County police officers, regardless of whether or not they agreed to compensation concessions. Thus, the County apparently elected to forego in its negotiations with FOP 5 its primary source of leverage in negotiations with its other unions, *i.e.*, the threat of layoffs. Under these circumstances, it was unreasonable for the Arbitrator to consider the concessions made by the County's other unionized employees without taking into

account FOP 5's different negotiating position vis-à-vis those other employees. The Arbitrator's failure to give due weight to FOP 5's relatively strong bargaining position does not constitute reversible error in this case, however, because the Arbitrator found, based on substantial evidence, that the County could not afford FOP 5's LBFO. Because vacating or reversing the Arbitrator's decision regarding the internal comparators based on the "no layoffs" point would have no bearing on her decision with respect to Section 1615(d)(6), the statutorily dispositive factor, the ultimate conclusions of the Arbitrator and PERB still must be affirmed.

III. CONCLUSION

For the foregoing reasons, the decision of PERB is affirmed.

IT IS SO ORDERED.