

**STATE OF DELAWARE**  
**PUBLIC EMPLOYMENT RELATIONS BOARD**

<b>FRATERNAL ORDER OF POLICE, LODGE 1,</b>	:	Decision of the Binding
	:	Interest Arbitrator
and	:	
	:	<b><u>BIA 14-01-939</u></b>
<b>CITY OF WILMINGTON, DELAWARE.</b>	:	

*Appearances*

*Jeffrey M. Weiner, Esq., for FOP Lodge 1*  
*David H. Williams, Esq., Morris James LLP, for City of Wilmington*

**BACKGROUND**

The City of Wilmington, Delaware (“City”) is a public employer within the meaning of §1602(l) of the Police Officers and Firefighters Employment Relations Act (“POFERA”), 19 Del.C. Chapter 16 (1986).

Fraternal Order of Police (“FOP”) is an employee organization within the meaning of §1602(g) of the POFERA. The FOP, by and through its affiliated Lodge No. 1, is the exclusive bargaining representative of the bargaining unit of Captains and Inspectors employed by the City of Wilmington Police Department (“WPD”).

The City and FOP Lodge 1 were parties to a collective bargaining agreement which had a term of July 1, 2007 through June 30, 2010.

The parties entered into negotiations for a successor agreement on or about November 5, 2010 and subsequent negotiation sessions were conducted on April 19, May 12, August 17, October 18 and November 30, 2011. Unable to reach agreement, on or about February 23, 2012,

the FOP requested mediation. A mediator was appointed by the Public Employment Relations Board (“PERB”) and mediation sessions were conducted on June 4 and July 3, 2012, at which point the mediation was held in abeyance by mutual agreement of the parties. On or about November 20, 2013, the FOP requested mediation be reinstated and a final mediation session was conducted on January 17, 2014.

By letter dated January 20, 2014, the mediator recommended the impasse be submitted to binding interest arbitration. Upon request from PERB, each party submitted its last, best, final offer for consideration.

PERB determined “a good faith effort had been made by both parties to resolve their labor dispute through negotiation 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. §1615(a)*. A prehearing conference was conducted on March 17, 2014.

Two days of hearing were conducted by the Executive Director on May 6 and May 7, 2014, during which the parties were afforded the opportunity to present testimony and documentary evidence in support of their respective positions. Closing argument was provided in written post-hearing submissions and the record then closed. The following discussion and decision result from the record thus created.

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

#### FOP Lodge 1:

1. Term: July 1, 2010 – June 30, 2014
2. Healthcare and Dental: FOP Lodge #1 Captains and Inspectors accept the City’s Healthcare proposal dated June 4, 2012.
3. Holidays: The parties agree the following holidays will be converted to Floating Holidays
  - a. First Monday in February, known as Lincoln’s Birthday

- b. Good Friday
  - c. Second Monday in October, known as Columbus Day
4. Bereavement Leave:
- a. All employees will continue with 4 days but add “consecutive”. Note that the hours paid will equal the shift hours regularly worked.
  - b. In the event of a death of a near relative not listed, Employees may take up to 3 vacation days but add “consecutive”. Note that the hours paid will equal the shift hours regularly worked.
5. Classifications and Salaries: There will be no COLA increases for each year of this agreement. The salary tables for each year are as follows:
- a. The FOP Lodge 1 Captains and Inspectors Salary Schedule (“Schedule”) for Fiscal Year 2011 (07/01/10 – 6/30/11) shall be zero (0%) percent increase to the base salaries in the Schedule effective July 1, 2009.

**FY 11**                      Zero (0) percent COLA

	Munis	Annual	Bi-weekly	Hourly	1.5 Hourly Rate
Inspector 2	Step 3	\$ 107,606.34	\$ 4,138.71	\$ 51.73	\$ 77.60
Inspector 1	Step 2	\$ 105,147.13	\$ 4,044.12	\$ 50.55	\$ 75.83
Inspector 1	Step 1	\$ 105,147.13	\$ 4,044.12	\$ 50.55	\$ 75.83
Captain 3	Step 5	\$ 96,829.92	\$ 3,724.23	\$ 46.55	\$ 69.83
Captain 2	Step 4	\$ 94,983.27	\$ 3,653.20	\$ 45.67	\$ 68.50
Captain 2	Step 3	\$ 94,983.27	\$ 3,653.20	\$ 45.67	\$ 68.50
Captain 1	Step 2	\$ 93,138.85	\$ 3,582.26	\$ 44.78	\$ 67.17
Captain 1	Step 1	\$ 93,138.85	\$ 3,582.26	\$ 44.78	\$ 67.17

- b. The FOP Lodge 1 Captains and Inspectors Salary Schedule (“Schedule”) for Fiscal Year 2012 (07/01/11 – 6/30/12) includes a salary adjustment increase to the base salaries in the Schedule effective July 1, 2010.

**FY 12**                      Inspector 2 and Captain 3 - \$3,000 Step increase  
Inspector 1 and Captain 2 - \$2,000 Step Increase  
Captain 1 - \$1,000 Step Increase

	Munis	Annual	Bi-weekly	Hourly	1.5 Hourly Rate
Inspector 2	Step 3	\$ 110,606.34	\$ 4,254.09	\$ 53.18	\$ 79.76
Inspector 1	Step 2	\$ 107,147.13	\$ 4,140.27	\$ 51.75	\$ 77.63
Inspector 1	Step 1	\$ 107,147.13	\$ 4,140.27	\$ 51.75	\$ 77.63
Captain 3	Step 5	\$ 99,829.92	\$ 3,839.61	\$ 48.00	\$ 71.99
Captain 2	Step 4	\$ 96,983.27	\$ 3,630.13	\$ 46.39	\$ 69.95

Captain 2	Step 3	\$ 96,983.27	\$ 3,730.13	\$ 46.63	\$ 69.95
Captain 1	Step 2	\$ 94,138.85	\$ 3,620.73	\$ 45.26	\$ 67.89
Captain 1	Step 1	\$ 94,138.85	\$ 3,620.73	\$ 45.26	\$ 67.89

- c. The FOP Lodge 1 Captains and Inspectors Salary Schedule (“Schedule”) for Fiscal Year 2013 (07/01/12 – 6/30/13) includes a salary adjustment increase to the base salaries in the Schedule effective July 1, 2011.

**FY 13** Inspector 2 and Captain 3 - \$3,000 Step increase  
Inspector 1 and Captain 2 - \$2,000 Step Increase  
Captain 1 - \$1,000 Step Increase

	Munis	Annual	Bi-weekly	Hourly	1.5 Hourly Rate
Inspector 2	Step 3	\$ 113,606.34	\$ 4,369.47	\$ 54.62	\$ 81.93
Inspector 1	Step 2	\$ 109,147.13	\$ 4,197.97	\$ 52.47	\$ 78.71
Inspector 1	Step 1	\$ 109,147.13	\$ 4,197.97	\$ 52.47	\$ 78.71
Captain 3	Step 5	\$ 102,829.92	\$ 3,955.00	\$ 49.44	\$ 74.16
Captain 2	Step 4	\$ 98,983.27	\$ 3,807.05	\$ 47.59	\$ 71.39
Captain 2	Step 3	\$ 98,983.27	\$ 3,807.05	\$ 47.59	\$ 71.39
Captain 1	Step 2	\$ 95,138.85	\$ 3,659.19	\$ 45.74	\$ 68.61
Captain 1	Step 1	\$ 95,138.85	\$ 3,659.19	\$ 45.74	\$ 68.61

- d. The FOP Lodge 1 Captains and Inspectors Salary Schedule (“Schedule”) for Fiscal Year 2014 (07/01/13 – 6/30/14) shall be zero (0%) percent increase to the base salaries in the Schedule effective July 1, 2012.

**FY 14** Zero (0) percent COLA

	Munis	Annual	Bi-weekly	Hourly	1.5 Hourly Rate
Inspector 2	Step 3	\$ 113,606.34	\$ 4,369.47	\$ 54.62	\$ 81.93
Inspector 1	Step 2	\$ 109,147.13	\$ 4,197.97	\$ 52.47	\$ 78.71
Inspector 1	Step 1	\$ 109,147.13	\$ 4,197.97	\$ 52.47	\$ 78.71
Captain 3	Step 5	\$ 102,829.92	\$ 3,955.00	\$ 49.44	\$ 74.16
Captain 2	Step 4	\$ 98,983.27	\$ 3,807.05	\$ 47.59	\$ 71.39
Captain 2	Step 3	\$ 98,983.27	\$ 3,807.05	\$ 47.59	\$ 71.39
Captain 1	Step 2	\$ 95,138.85	\$ 3,659.19	\$ 45.74	\$ 68.61
Captain 1	Step 1	\$ 95,138.85	\$ 3,659.19	\$ 45.74	\$ 68.61

NOTE: Captains are eligible for Step 2 (MUNIS Step 3) after 2 years

Captains are eligible for Step 3 (MUNIS Step 5) after 2 years in Step 2  
Inspectors are eligible for Step 2 (MUNIS Step 3) after 2 years

Movement through the steps is dependent upon the employee having an overall rating of "Meets Expectations" on his/her annual performance evaluations.

All salary adjustments are retroactive.

The City is entitled to credit for any one time payments to any Captain or Inspector, including if made while an officer was serving at a lower rank.

6. Hours of Work:

- a. The Employee's regular work week shall consist of 40 hours and their work schedule shall be one of the following as designated by the Chief of Police:
  - 1) Eight (8) hours in a five (5) day work week with a lunch period of one (1) hour.
  - 2) Ten (10) hours in a four (4) day work week with a lunch period of one (1) hour.

NOTE: Deduction of sick, vacation and compensatory time will reflect the employee's assigned work schedule. However, accumulation of sick and vacation time will continue to be at eight (8) hours.

- b. One Captain will be assigned to work a regular shift between the hours of 4:00 PM and 2:00 AM as the Staff Duty Captain. The duty work shift and being on-call will begin at 4:00 PM on Tuesday and end one (1) week later at 8:00 AM Tuesday morning. This weekly duty officer will be on-call and available for the duration of the duty week and will receive sixteen (16) hours of compensatory time for the entire week. All Captains will rotate through as the Duty Officer.

7. Shift Differential: Effective with the implementation of the work schedule outlined in Item #7, the shift differential will change to 10% between the hours of 1600 and 0600 and requires working two (2) hours of the shift.

8. Grievance and ULP: Withdraw grievance and ULP dealing with the alleged changes to the Dental Plan as soon as possible.

9. Pension Plan:

- a. Section 39-210 was revised to extend the term of the City of Wilmington Police Pension Act of 1984 to 30 years, whereby the contributing officer could receive a maximum of 75% of their salary at the time of retirement.

FOP Lodge #1 Captains and Inspectors withdraws its request for the amendment to the pre-1984 pension plan.

10. Sick Leave: Effective January 1, 2014, an employee, upon retirement after 20 years of service will be eligible for one of the following:

- a. Accumulated at least 100 but less than 200 days of unused sick leave, shall be granted the right to retire active duty by 40% of the unused sick leave days earlier than the employee's normal effective date of retirement.
- b. Accumulated 200 or more days of unused sick leave shall be granted the right to

retire from active duty by 50% of the unused sick leave days earlier than the employee's normal effective date of retirement.

11. The City agrees that for the consideration offered by the Union in Terms 1 through 11 of this agreement, there will be no lay-offs of any Employees represented by the Union during the remainder of Fiscal Year 2014.

City of Wilmington:

1. Term: July 1, 2014 – June 30, 2016
2. Effective Date: 30 days after the arbitrator's decision or July 1, 2014, whichever occurs later.
3. Healthcare and Dental: The following changes to the medical and dental plans on the effective date (see ¶2)
  - a. Choice of 3 medical plans (POS 1, POS 2, and EPO) with increased Employee contributions as outlined in Exhibit 1 (*attached to end of decision*)
  - b. Choice of 2 Dental Plans with Employee contributions as outlined in Exhibit 2 (*attached to end of decision*)
  - c. Annual City contribution to FSA account for those Employees who choose either POS 2 or EPO Plans. These contributions shall be as follows:
    - Family - \$750.00
    - Employee +1 - \$500.00
    - Single - \$250.00

However, will be prorated the first year based on final passage of a new collective bargaining agreement by City Council and signature of the Mayor.

4. Holidays: Revise §5.1 as follows:

**Section 5.1** The following and such other days as the Mayor may designate shall be holidays with pay: New Year's Day; Martin Luther King Day; Washington's Birthday; Good Friday; Memorial Day; the fourth of July, known as Independence Day; the first Monday in September, known as Labor Day; Veterans Day; Thanksgiving Day, whenever it is proclaimed; Christmas Day; the day of the general election as it biennially occurs; and 2 Floating Holidays. The Floating Holidays must be scheduled as days off per departmental regulations; used in the calendar year earned; will not be calculated as part of termination leave payouts; cannot be donated to other employees; and must be used in half or whole day increments.

5. Bereavement Leave: Revise §7.8 as follows:

**Section 7.8:** All employees shall be granted up to four (4) consecutive working days off for a death in the Police Officer's immediate family. Death in the employee's immediate family shall be construed to mean the death of one (1) of the following: spouse, children, parents, step-parents, brother, sister, grandparents, spouse's grandparents, mother-in-law, and father-in-law. Additional time off will be granted for necessary travel to distant states for funeral services. The time off allowed in case of death in the employee's immediate family shall not be chargeable to either sick leave or

vacation time. In the event of a death of a near relative not list above, up to three (3) consecutive days' vacation time may be taken. The Chief may allow time off as prescribed above at the death of other relatives, provided that they are residing at the time with the employee or the employee is residing with them. In the event of the death of a near relative not listed above and with whom the employee is not residing, up to three (3) days' of vacation time may be taken. The hours paid under Section 7.8 shall equal the shift hours regularly worked.

6. Retiree Medical: Employees hired on or after July 1, 2011, shall be subject to the increased eligibility requirements of the Retiree Medical Program as amended by the Ordinance 11-018.
7. Classifications and Salaries: There will be no COLA increases for each year of this agreement.

NOTE: Captains are eligible for Step 2 (MUNIS Step 3) after 2 years  
Captains are eligible for Step 3 (MUNIS Step 5) after 2 years in Step 2  
Inspectors are eligible for Step 2 (MUNIS Step 3) after 2 years

Movement through the steps is dependent upon the employee having an overall rating of "Meets Expectations" on his/her annual performance evaluations.

### STATUTORY PROVISIONS

19 Del.C. §1615. 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.

### DISCUSSION

The authority of the binding interest arbitrator under the POFERA 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 making 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.§1615(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 statute does not provide a formula for weighing the relative merits of the statutorily enumerated criteria, except to the extent that the proven inability of the public employer to afford an offer is dispositive of the case. 19 Del.C. §1615(d). *DSTA and Delaware DSHS/DSP*, BIA 08-01-612, VI PERB 4083, 4100 (2008). The arbitrator must evaluate the two offers based on

internal and external comparisons and costs, within the specific workplace and with comparable employers (in the same and similar communities), economic conditions and the labor market, generally, in the same and comparable communities. The arbitrator's decision must result from an objective evaluation of the statutory criteria, based upon the record created by the parties. *Fraternal Order of Police Lodge 15 and City of Dover*, BIA 11-07-820, VI PERB 5345, 5359 (2012).

Turning to the consideration of the criteria of 19 Del.C. §1615, each statutory factor was considered to be relevant and given due weight in the following analysis.

Stipulations:<sup>1</sup>

The Wilmington Police Department has an authorized strength of 320 officers. At the time of the hearing, the City employed a total of 306 officers (actual strength) of which seven 7 were Captains and one was an Inspector. There were 298 offices in the rank and file bargaining unit also represented by FOP Lodge 1.

There was one Inspector vacancy at the time of the hearing. At some point in either FY 2010 or FY 2011, the City reduced the number of Captains from eight to seven through attrition. The record established this reduction of one Captain position resulted in the redistribution of work among the seven remaining Captains.

The parties stipulated appropriate comparators to the Wilmington Police Department for purposes of this proceeding are the New Castle County Police and the Delaware State Police.

The City proposed to modify Section 7.8 of the parties' collective bargaining agreement to require the three days of bereavement upon the death of a near relative be "consecutive". The

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<sup>1</sup> The Stipulations of the parties were set forth in the FOP's Closing Argument. The City did not contest any of these stipulations in its responsive argument.

FOP adopted this proposal in its last, best, final offer; consequently, this provision is no longer in issue and will be included in the final agreement.

The City also proposed to include language concerning eligibility requirements for the Retiree Medical program. The FOP concedes the terms of retiree eligibility are addressed in City Ordinance 11-018, and not subject to negotiation. As this matter is specifically addressed by Ordinance, it is also not in dispute here.

Ability to Pay:

The City asserts “the undisputed evidence dictates the conclusion that the City does not have the financial ability, based on existing revenues, to meet the costs of the FOP’s last, best, final offer”. It argues the City has a structural deficit which will continue into the foreseeable future.

The City’s budgets over the four years of the FOP proposal resulted in net operating surpluses or deficits<sup>2</sup> of:

FY 2011	\$ 10,394,496 <sup>3</sup>
FY 2012	\$ 7,444,088
FY 2013	\$ 1,326,984 <sup>4</sup>
FY 2014	(\$ 1,170,833) <sup>5</sup>
FY 2015 <i>(projected)</i>	\$ 1,400,905
FY 2016 <i>(projected)</i>	(\$ 333,508) <sup>6</sup>

The evidence does not establish the “structural deficit” asserted by the City. Rather, it

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<sup>2</sup> Deficits are indicated within ( ).

<sup>3</sup> FOP Exhibit 2, Annual Budget FY 2013, p. 54.

<sup>4</sup> City Exhibit 3.

<sup>5</sup> City Exhibit 15, 5/29/14 revised Actual, Budgeted and Projected Revenues and Expenditures.

<sup>6</sup> The City’s offer only extends until the end of FY 2016; consequently, projections beyond that point have limited impact as the parties will have the opportunity to renegotiate prior to June 30, 2016 and to address any consequent economic impacts and/or changes at that time.

establishes that the City (like most local governments) has faced reduced revenues due in large part to national and state economic downturns. It has faced expense increases in funding pension plans which have been underfunded in the past. These are commonly understood to be cyclical, rather than structural, deficits because they occur as a result of downturns in the economy. Structural deficits result from large and persistent imbalances in expenditures to revenues. In this case, the City has been effective in addressing the projected revenue declines and expense increases in a proactive manner, by increasing property taxes, implementing budget cuts, and restructuring debt service, as evidenced by the surpluses in FY 2011 – 2013, and a projected surplus for FY 2015.

The City's FY 2014 Annual Budget<sup>7</sup> sets forth the various accounts and fund balances:

<b>Fund Balance &amp; Net Assets Activity</b>	<b>Actual FY 2012</b>	<b>Estimated FY 2013</b>	<b>Projected FY 2014</b>
Fund Balance & Net Assets as of July 1	\$135,426,265	\$147,342,829	\$156,370,441
Excess of Revenues Over/(Under) Expenditures	20,549,624	13,216,902	11,777,114
Total Other Financing Sources/(Uses)	(2,920,991)	375,000	275,000
Total Non-Operating Revenues/(Expenses)			
Water Fund	(5,712,069)	(4,564,290)	(4,922,159)
Operating Transfer to Water Fund from General Fund	-	-	-
<b>Change in Fund Balance &amp; Net Assets</b>	<b>11,916,564</b>	<b>9,027,612</b>	<b>7,129,955</b>
<b>Total Fund Balance &amp; Net Assets as of June 30</b>	<b>\$147,342,829</b>	<b>\$156,370,441</b>	<b>\$163,500,396</b>

**Summary of Fund Balance & Net Assets**

Non-spendable	\$9,988,293	\$7,238,293	\$4,488,293
Budget Reserve	14,292,802	14,537,625	15,123,967
Unassigned	20,964,373	25,917,354	28,520,703
Invested in Capital Assets, Net of Related Debt	118,391,959	120,391,959	122,391,959
Unrestricted	(16,294,598)	(11,714,789)	(7,024,526)
<b>Total Fund Balance &amp; Net Assets as of June 30</b>	<b>\$147,342,829</b>	<b>\$156,370,441</b>	<b>\$163,500,396</b>

The City is required to maintain a Budget Reserve Account, equal to 10% of its General

<sup>7</sup> FOP Exhibit 5.

Fund operating budget. Moneys may only be withdrawn from this reserve account in the event of an “emergency” and such withdrawal requires the approval of a supermajority of 2/3 of the Council. There is no dispute that the Budget Reserve Account constitutes “reserves”.

The City Budget Director testified the City is required to pass and maintain a balanced budget. The Mayor does not have the power or authority to appropriate funds; that authority is reserved to City Council. When expenses exceed projections and/or revenues in any given fiscal year, Council may approve a modification to the approved budget to insure the budget remains balanced. This was done in FY 2014 to cover the unanticipated expenses due to severe winter weather. The budget was also adjusted in FY 2012 due to increased expenses related to Hurricane Sandy. The Budget Director explained how budget adjustments are made :

...[T]he City cannot deficit spend. So, in other words, Council has to appropriate any expenditures. If we do not have the revenues what is in essence happening is you are using cash on hand. There are assets there. We always have more cash than we need. I mean [the City Treasurer] never gets it down to zero every month. There is working capital there.

... What happens when you deficit spend, all else being equal, you, it will flow down to the calculation of your unassigned fund balance. It's not like we went and said, Oh, let's go to the unassigned fund balance and get it from there. He actually got it from his assets. Again, it's a calculation, assets minus liabilities, minus your reserve accounts, whatever amount is left mathematically, that's the dollar amount that goes into the year-end reserve --- or the year-end balance sheet statement. It changes from day to day, year to year.<sup>8</sup>

He explained that when the City has a deficit at the end of the year, the unassigned fund balance decreases and that it increases if there is a surplus. He also testified the Council does not “reserve” or allocate moneys or assets to the unassigned fund balance. Rather, it simply is a balance or accounting for unallocated or unassigned assets at any point in time. The assets included in the unassigned fund balance include cash, savings, CD's, etc.

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<sup>8</sup> Transcript, p. 58-59.

The City's year-end Fund Balance includes the following subcategories:

*Non-spendable Fund Balance* – amounts that cannot be spent either because they are in a non-spendable form or because they are legally or contractually required to be maintained intact.

*Restricted Fund Balance* – amounts that can be spent only for specific purposes because of the City Charter, City Code, State or federal laws, or externally imposed conditions by grantors or creditors.

*Committed Fund Balance* – amounts that can be used only for specific purposes determined by a formal action by City Council Ordinance or resolution. This includes the Budget Reserve Account.

*Assigned Fund Balance* – amounts that are allocated for a future use by the Mayor, but are not spendable until a budget ordinance appropriating the amounts is passed by City Council.

*Unassigned Fund Balance* – all amounts not included in other spendable classifications.<sup>9</sup>

The FOP argues its offer increases longevity steps for Captains and Inspectors only in FY 2012 and FY 2013, years in which the City accrued surpluses and increased its unassigned fund balance. It asserts the unassigned fund balance is not a reserve as defined by statute and as interpreted in prior decisions. Consequently, because the unassigned fund balance is comprised of surpluses from previous years, the FOP argues it can serve as a source of funding for its proposal which extends only from July 1, 2010 through June 30, 2014. The revenue, expenditure and fund balances are known for FY 2011 through FY 2014, with the FY 2014 unassigned fund balance projected to be \$28,520,703<sup>10</sup>, which includes \$5,699,343 in cash.<sup>11</sup>

It is well-established (as recently affirmed by V.C. Parsons in *FOP Lodge 5 v. New Castle County*<sup>12</sup>) that reserves do not constitute revenues. Reserves are defined as:

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<sup>9</sup> Appendix to City Exhibit 14, Fiscal Year 2014 Annual Budget.

<sup>10</sup> FOP Exhibit 5.

<sup>11</sup> FOP Exhibit (c).

<sup>12</sup> VIII PERB 5927, 2014 WL351009 (Del.Ch., 2014).

... 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 within the exclusive authority of the City’s governing body.

... 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 [*interest arbitration*] proceedings, whether these revenue sources have the probability of being sufficient to fund the “built-in” increases in expenses associated with the agreement.... [T]he 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 final alternative funding sources.<sup>13</sup>

Based on this record and the City’s financial documents, the unassigned fund balance does not constitute a reserve because assets are not “allocated” to this fund by an affirmative act of the Council, nor are there restrictions upon its use. Council has allocated moneys from unassigned fund balance to adjusted projected budgets to conform to actual revenues and expenditures in the same manner that all funds are allocated each fiscal year.

The City has offered no additional compensation for Captains and Inspectors through June 30, 2016, consequently, its offer does not incur any additional costs to the City. In fact, the City’s offer actually decreases total compensation to bargaining unit employees by increasing the employee contribution to healthcare costs annually. Two additional healthcare options are offered to bargaining unit employees, but the contribution for Captains and Inspectors to remain in their current “Cadillac” plan essentially triples. The City did not assert that its Medical Flexible Spending Card (which can only be used with the two new healthcare plans) will cover the increases in costs to employees.

The FOP’s last, best, final offer has increased costs in retroactive salary increases in FY

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<sup>13</sup> *City of Seaford v. FOP Lodge 9*, IV PERB 2659, 2675 (2002, Decision of the Interest Arbitrator on Remand).

2012 and FY 2013, including salary roll-up costs (overtime and shift differential<sup>14</sup>), eight additional hours of compensatory time each week for the Staff Duty Captain, and increased sick leave usage for Captains or Inspectors who retire with an accumulated total of 200 or more days. The FOP's offer mitigates some of these costs by crediting the City for the one-time payment received by all City employees in November, 2012, and by significantly increasing employee contributions to healthcare costs to 10%, effective January 1, 2013.

The City projected the total cost of the FOP's last, best, final offer to be \$184,658 over the term of an agreement which extends through June 30, 2015 (although the FOP's offer terminates on June 30, 2014). *City Exhibit 5*. The FOP estimates the total cost of its proposal to be \$45,653.56.

There are inconsistencies in both sets of calculations. The City's estimate of \$127,648 for FY 2011 through FY 2014 (backing out the estimated cost for FY 2015 of \$57,010), however, are closer to accurate. The FOP's cost projection does not include the continued cost of the bumps, e.g., for a Captain 3 is eligible for the \$3,000 bump in FY 2012 and FY 2013 and would receive an retroactive salary of \$3,000 for FY 2012, \$6,000 for FY 2013 (after the second bump). The officer's base salary would continue that \$6,000 increase for FY 2014 because the bumps go into base and are not "one-time" increases. This can be verified by comparing the salary scales included in the FOP's offer:

<b><u>Captain 3</u></b>	FOP Proposal	Actually paid	Difference
<i>FY 2011</i>	\$ 96,829.92	\$ 96,829.92	0
<i>FY 2012</i>	\$ 99,829.92	\$ 96,829.92	\$ 3,000.00
<i>FY 2013</i>	\$102,829.92	\$ 96,829.92	\$ 6,000.00
<i>FY 2014</i>	\$102,829.92	\$ 96,829.92	\$ 6,000.00

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<sup>14</sup> The City concedes that the proposed changes to the shift differential will have a negligible impact on total cost, if any.

<b><u>Inspector I</u></b>			
<i>FY 2011</i>	\$105,147.13	\$105,147.13	0
<i>FY 2012</i>	\$107,147.13	\$105,147.13	\$ 2,000.00
<i>FY 2013</i>	\$109,147.13	\$105,147.13	\$ 4,000.00
<i>FY 2014</i>	\$109,147.13	\$105,147.13	\$ 4,000.00

As an example, the FOP's calculation understates the retroactive amount due to Inspector Ayala for Fiscal Year 2013. This officer was a Captain 3 for the first 24 weeks of FY 2013. The difference between the FOP's proposed salary for a Captain 3 in FY 2013 from the salary paid is \$6,000. Ayala was in the Captain 3 position for 24 weeks; his FY 2013 retroactive pay for the 24 weeks he was a Captain 3 is \$2,769.23 ( $\$6,000/52 \text{ weeks} \times 24 \text{ weeks}$ ). He was then promoted to Inspector 1 in which he served for the remaining 28 weeks of FY 2013. The retroactive pay in the Inspector 1 position is \$2,153.85 ( $\$4,000/52 \text{ weeks} \times 28 \text{ weeks}$ ). Consequently, the total retroactive pay due to Inspector Ayala for FY 2013 is \$4,923.08.

The total retroactive salary payment is understated in the FOP's cost estimates for both active and retired officers. *FOP Exhibit 16.*

The City's calculations, on the other hand, overestimate the costs of the FOP step increases by estimating them past the end of the term of the FOP proposal. While the City projects that if the FOP offer is adopted, the longevity increases included therein will continue into the future without change that is purely speculative. Should the FOP prevail in this matter, the parties would be required to enter into negotiations for a successor agreement to be effective on July 1, 2014. If the City is able to establish that its fiscal situation has deteriorated, the next agreement could include cost savings and/or a change in either the structure or amounts of step increases for this bargaining unit. The City's presumption that all step increases are immutable into the future is overly simplistic and not persuasive. Indeed, the 2012 binding interest arbitration decision involving the New Castle County police is an example of negotiations where

reductions in base salaries were made.

The FOP also notes that the FY 2014 budget included expenses for a full year's salary for the Chief of Police and two Inspectors. It projects the City will realize salary savings because the Chief retired the third week of January, 2014, and had not been replaced as of the date of these hearings in early May. Additionally, one Inspector retired on March 21, 2014, and had not been replaced as of the hearing date. The FOP projected these salary savings totaled approximately \$107,606. The City did not dispute this argument or these numbers.

For all of these reasons, I conclude that the City has not established that it has either a structural deficit or an inability to afford the costs of the FOP's last, best, final offer. The analysis must, therefore, turn to a consideration of the merits of two last, best, final offers presented by the parties.

Internal Comparables:

Testimony established that all of the City's collective bargaining agreements with its employees are past expiration and that the City was only in successor negotiations with FOP Lodge 1 (for both this unit and the rank and file unit) and the IAFF (for the firefighters' bargaining unit) at the time of the hearing. The recent history of wage increases for the City's bargaining units is:

<b>Employee Group</b>	<i>Term of most recent CBA</i>	<i>FY 2009</i>	<i>FY 2010</i>	<i>FY 2011</i>	<i>FY 2012</i>	<i>FY 2013</i>	<i>FY 2014</i>
Police Captains & Inspectors (FOP 1)	7/7/07 - 6/30/10	2.5%	0.0%	0.0%	0.0%	0.0%	0.0%
Police Rank & File (FOP 1)	7/1/10 - 6/30/11	2.0%	2.5% effective 6/30/10	Holiday pay rolled into base effective 1/1/11	0.0%	0.0%	0.0%
Firefighters (IAFF Local 1590)	7/1/07 - 6/30/10	2.0%	2.25%	0.0%	0.0%	0.0%	0.0%

Blue Collar Employees (AFSCME Local 320)	1/1/07 - 12/31/09	2.0% effective 1/1/09	0.0%	0.0%	0.0%	0.0%	0.0%
White Collar Employees (AFSCME Local 1102)	7/1/07 - 6/30/10	2.0%	0.0%	0.0%	0.0%	0.0%	0.0%
P/T Crossing Guards (AFSCME Local 1102B)	7/1/07 - 6/30/10	1.75%	0.0%	0.0%	0.0%	0.0%	0.0%
Non-Union Employees	<i>none</i>	2.0%	0.0%	0.0%	0.0%	0.0%	0.0%
Executive & Managerial	<i>none</i>	2.0%	0.0%	0.0%	0.0%	0.0%	0.0%

Bargaining unit members currently are afforded the following benefits, in addition to negotiated salaries:

- Healthcare insurance
- Life Insurance
- Dental insurance
- Long-term Disability benefits
- Retiree healthcare and dental care options (including a spousal option)
- Annual uniform/clothing allowance
- Meal allowance
- Shoe allowance
- Educational leave option
- Shift differential for hours worked outside of 6 a.m. to 6 p.m.
- 12 annual paid holidays plus election day biennially
- Paid vacation between 12 – 25 days/year based on longevity
- Paid sick leave accrued at 1 day/month over length of service
- Compensation at 1.5x regular rate for approved overtime hours worked
- Compassionate leave benefit
- Defined benefit pension plan

External Comparators:

Both the City and the FOP used the Delaware State Police and City of Wilmington Police as comparators or “peers” to evaluate their last, best, final offers. The FOP did not dispute the information contained in the City’s comparability chart (*City Ex. 11*):

	Wilmington Police	New Castle Co.	Del. State Police
Population (2010)	70,851	538,479	897,934
# of Sworn Officers (2014)	306 <sup>15</sup>	360	669
# of Captains	7	6	18
# of Inspectors	1 (plus one vacancy)	2 (Majors)	4 (Majors)
Minimum Educational Requirements	<u>Captain</u> Graduation from an accredited 4 year college, with a degree in Criminal Justice or related field.  <u>Inspector:</u> Graduation from an accredited 4 year college with a degree in Criminal Justice or related field.	<u>Captain:</u> Completion of some college courses in political science, business admin., management, finance, or related field and some advanced training courses in police admin. or supervision.  <u>Major:</u> Bachelor's degree from an accredited college or university	<u>Captain:</u> 4 year degree.  <u>Major:</u> 4 year degree.

<sup>16</sup>

The City included in its exhibits a chart comparing the average<sup>17</sup> salaries of Captains and Inspectors/Majors in the Wilmington Police Department to those in the New Castle County Police and the Delaware State Police:

Average Salary	City of Wilmington	New Castle County	Delaware State Police
Captain	\$94,614.83	\$114,266	\$116,563.31
Inspector/Major	\$105,966.87	\$130,668	\$130,532.50
Overtime Rate	1.5x regular hourly rate	No overtime	1 x regular hourly rate

<sup>18</sup>

This chart indicates the base wages of WPD Captains and Inspectors lag those of similar positions in stipulated comparable police forces by approximately 18% – 20%.

The City argues that the base salary of its Captains and Inspectors is increased by the

<sup>15</sup> Transcript, p. 233. The WPD has an authorized force of 320.

<sup>16</sup> FOP Exhibit 11.

<sup>17</sup> It is unclear how the “average” was calculated and no testimony was provided on this point.

<sup>18</sup> City Exhibit 12.

availability of overtime at a higher rate than is available to either NCC or State Police Captains and Majors. This argument is discredited by the record, in which no comparative data is provided as to when overtime compensation is available to State Police Captains and Majors or the annual amount paid to these officers (collectively or individually) for overtime.

The City provided data in its Exhibit 5 which allows for a comparison of overtime costs to salary costs for its Captains and Inspectors for FY 2012 – FY 2014:

<i>Fiscal Year</i>	<i>Total Regular Salaries</i>	<i>Total Overtime</i>	<i>OT as % of Salary</i>
FY 2012	\$ 936,217	\$ 50,245	5%
FY 2013	\$ 1,138,599	\$ 148,481	13%
FY 2014 <sup>19</sup>	\$ 891,446	\$ 109,742	12%

The increases in overtime expenditures for FY 2013 and FY 2104 were explained both by the reduction in the number of Captains (from 8 to 7) and the increased demand for services during the winter storms of 2014. It is noted that the additional compensation in overtime is not equal to the base wage differentials of the stipulated comparable police forces.

Healthcare and Dental: Section 8.1; Appendix A

The City’s offer increases contributions by bargaining unit employees to the costs of their healthcare benefits at the same rate as other City employees. While the Police Captains and Inspectors currently only contribute \$5, \$10, and \$15 bi-weekly for employee, employee plus one and family coverage under the POS (Point of Service) 1 plan, all other City employees make the following contributions:

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<sup>19</sup> The FY 2014 overtime and salaries were “annualized” through the end of the fiscal year.

		CITY LAST, BEST, FINAL OFFER		
<i>C &amp; I current cost</i>		POS 1	POS 2	EPO
EE only	<i>\$5.00</i>	\$14.50	\$9.50	\$4.50
EE + one	<i>\$10.00</i>	\$29.00	\$19.00	\$9.00
Family	<i>\$15.00</i>	\$43.50	\$28.50	\$13.50

The City's offer also includes an Employee Sponsored Medical Flexible Spending Account (MFSA) which can be used to offset some of the premiums costs for POS 2 and EPO options. The MFSA makes \$250 available to those who choose employee only coverage, \$500 to those who choose employee + one coverage, and \$750 to those who choose family coverage. The City's healthcare cost sharing proposal would be effective thirty days after issuance of the this award.

The FOP's offer "accepts the City's Healthcare Proposal dated June 4, 2012," which stated:

- a) Effective January 1, 2013, the City shall fund 90% of the premium of the medical plan selected by the employee. The employee shall pay the remaining 10%.

Attached to the City's June 4, 2012 proposal was the following chart:

**Employee Contribution for January 1, 2013 – June 30, 2013**

<u>Plan</u>		<u>Emp Cost Per Pay</u>	<u>Annual Cost – EMP</u>
POS 1	Single	\$27.74	\$721
	Employee +1	\$49.57	\$1,289
	Family	\$72.85	\$1,894
POS 2	Single	\$21.59	\$561
	Employee +1	\$38.58	\$1,003
	Family	\$58.60	\$1,524
EPO	Single	\$18.17	\$472
	Employee +1	\$32.48	\$844
	Family	\$47.73	\$1,241

There is no reference to an MFSA in the FOP proposal. During the hearing, the FOP witness testified his team believed the June 4, 2012 proposal fixed the 10% contribution at the numbers included in the chart.

The City included in its Exhibit 10 the contribution costs for 10% of the current premium for each of the three medical plan options. The difference in annual costs to bargaining unit employees by plan from the January 1, 2013 rates to the current rates are:

	Annual cost of 10% plan (1/1/13)	Annual cost of 10% plan (current)	Increase in Employee Cost
<b><u>POS1</u></b>			
EE only	\$721.00	\$767.75	6.48%
EE + one	\$1,289.00	\$1,372.07	6.44%
Family	\$1,897.00	\$2,016.38	6.29%
<b><u>POS2</u></b>			
EE only	\$561.00	\$597.55	6.52%
EE + one	\$1,003.00	\$1,067.92	6.47%
Family	\$1,524.00	\$1,569.38	2.98%
<b><u>EPO</u></b>			
EE only	\$472.00	\$503.00	6.57%
EE + one	\$844.00	\$898.94	6.51%
Family	\$1,241.00	\$1,321.06	6.45%

The FOP's assertion that the rates are fixed at the January 1, 2013 rate is inconsistent with the clear language of the proposal and the specific title on the appended chart. Comparison to the existing contractual language is significant. Section 8.1 of the predecessor agreement set the employee bi-weekly pre-tax contribution at a specific figure.<sup>20</sup> The FOP's proposal clearly establishes the employees will contribute a percentage of total cost.

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<sup>20</sup> Section 8.1: Individual (E) \$5.00, Employee +1 \$10.00, and Family \$15.00.

For this reason, the only reasonable and logical understanding of the FOP's offer is that the bargaining unit employees will contribute 10% of the annual cost of the premium of the medical plan selected by the employee, effective January 1, 2013. The increased cost to bargaining unit employees between their current contribution and the 10% cost of the current premiums is significant:

	Current bi-weekly cost for BU employees	Annual cost (x 26)	Annual 10% cost (current)	Increased Cost to Employee
<b><u>POS1</u></b>				
EE only	\$5.00	\$5.00	\$130.00	\$767.75
EE + one	\$10.00	\$10.00	\$260.00	\$1,372.07
Family	\$15.00	\$15.00	\$390.00	\$2,016.38
<b><u>POS2 **</u></b>				
EE only	\$5.00	\$130.00	\$597.55	\$467.55
EE + one	\$10.00	\$260.00	\$1,067.92	\$807.92
Family	\$15.00	\$390.00	\$1,569.38	\$1,179.38
<b><u>EPO **</u></b>				
EE only	\$5.00	\$130.00	\$503.00	\$373.00
EE + one	\$10.00	\$260.00	\$898.94	\$638.94
Family	\$15.00	\$390.00	\$1,321.06	\$931.06

\*\* POS 2 and EPO options are not currently available to Captains and Inspectors.

The 10% cost is also significantly greater than the cost of the City's last, best, final offer (which equals the cost currently paid by other City employees):

	City LAST, BEST, FINAL OFFER	Annual contribution City LBFO (x 26)	Annual cost of 10% plan (current)	Additional cost to BU employees over cost of City LBFO
<b><u>POS1</u></b>				
EE only	\$14.50	\$377.00	\$767.75	\$390.75
EE + one	\$29.00	\$754.00	\$1,372.07	\$618.07
Family	\$43.50	\$1,131.00	\$2,016.38	\$885.38

<b><u>POS2</u></b>				
EE only	\$9.50	\$247.00	\$597.55	\$350.55
EE + one	\$19.00	\$494.00	\$1,067.92	\$573.92
Family	\$28.50	\$741.00	\$1,569.38	\$828.38
<b><u>EPO</u></b>				
EE only	\$4.50	\$117.00	\$503.00	\$386.00
EE + one	\$9.00	\$234.00	\$898.94	\$664.94
Family	\$13.50	\$351.00	\$1,321.06	\$970.06

This difference in healthcare contribution for the period of January 1, 2013 through June 30, 2014 also offsets a portion of the additional costs of the step increases proposed by the FOP.

The current rate of contribution for healthcare for bargaining unit employees is low compared to both internal and external comparables. The FOP concedes in its offer that its contributions should be increased. The City's proposal to increase the current contribution to be equal to that of other City employees is, however, the more reasonable of the two offers, based upon a consideration of internal and external comparators.

**Holidays:** Article 5; §5.1

It was initially a City proposal to convert three paid holidays (Lincoln's Birthday, Good Friday and Columbus Day) to floating holidays. The FOP adopted this proposal in its last, best, final offer.

The City's last, best, final offer, however, only converts two holidays (Lincoln's Birthday and Columbus Day) to floating holidays. The City's Director of Labor Relations and Classification testified the City changed its proposal after City Council rejected prior agreements with other City unions to convert Good Friday to a floating holiday.

It is undisputed there is no economic difference between these proposals and the issue is not of sufficient import or weight to influence the ultimate decision in this matter.

Sick Leave: Article 7; §7.12

Currently a bargaining unit employee who retires after 20 years of service and who has accumulated at least 100 days of unused sick leave, can convert 40% of the officer's total accumulated sick days to time in service for purposes of calculating the officer's effective retirement date. The maximum number of days an officer can accumulate is 240 (12 days/year x 20 years).

The FOP proposes to modify this provision to provide an additional incentive to officers who accumulate 200 or more days of accrued sick leave over their careers. Officers who accrue between 100 and 200 days would be eligible to convert 40% of those days to time in service, and officers who accrue 200 or more days can convert 50% of those days to time in service for purposes of effective retirement date. Currently, officers who accrue more than 100 days can receive between 40 and 96 days of credited time in service (40% of 100 – 240 days). The FOP proposal would credit officers who accumulate 200 or more days between 50 and 120 days (50% of 100 – 240 days).

The financial impact of this proposal was not calculated by either party. Nor was information provided as to how many, if any, officers met the 200 day threshold during the retrospective term of the FOP's proposal. Because this should have been an easy determination, it is assumed that no officers would have qualified between July 1, 2010 through June 30, 2014.

There is a benefit to any employer to have employees regularly and consistently report for duty and to have its employees not use sick leave. Obviously when officers are absent from work due to illness it is often unplanned and the City incurs costs to cover the work normally provided by the absent employees (either in overtime compensation to other officers or in lost work which is not reassigned), in addition to providing the benefit of paid sick leave. In order to accumulate 200 days of unused sick leave over 20 years of service, an officer would have to

average two or fewer sick days annually.

Without the benefit of any information on the number of sick days used by Captains and Inspectors and/or the average number of accumulated days at retirement, it is difficult to determine the impact, if any, of this proposal. It does, however, provide an incentive to officers to minimize sick leave use over the duration of their entire careers (assuming new officers aspire to become Captains and Inspectors). For this reason, this proposal favors acceptance of the FOP's offer.

Shift Differential: Article 9, §9.6

The FOP proposes to modify the current shift differential payment as follows:

Current Shift Differential		FOP Proposal	
1800 to 2400	10%	1600 to 0600	10%
2400 to 0600	13%		

The FOP proposal requires an employee work two (2) hours during the hours of 4:00 p.m. to 6:00 a.m. in order to receive the shift differential.

The City's witness (Razze) testified Captains and Inspectors do not work shifts and consequently very little shift differential is earned and the FOP's proposed change in shift differential was essentially inconsequential. Consequently, this proposal does not impact the ultimate determination in this case.

Pension Plan: Article 11

The FOP's witness clarified that §11(a) of its last, best, final offer was addressed in City Ordinance 39-210 and the FOP withdrew its proposal to increase the accrual rate for Captains and Inspectors in the pre-1984 pension plan. Consequently, there is no proposal to change the existing pension provisions.

Classification and Salaries: Article 13; §13.1 <sup>21</sup>

The City has proposed no changes to the wages of this bargaining unit through June 30, 2016. Adoption of the City's offer would mean the WPD Captains and Inspectors would receive no additional compensation for the six year period of July 1, 2010 through June 30, 2016, but would be required to pay additional and significant increases for healthcare.

The FOP has proposed to increase the step increases for Captains and Inspectors on July 1, 2011 and July 1, 2012:

Inspector 2 and Captain 3 - \$3,000 Step increase  
Inspector 1 and Captain 2 - \$2,000 Step Increase  
Captain 1 - \$1,000 Step Increase

During the period of July 1, 2010 through June 30, 2014, the only City employees who received wage increases were the other two units of public safety employees. Rank and file Wilmington Police officers received a 2.5% across the board increase effective June 30, 2010 and rolled holidays into their base pay effective January 1, 2011. This change, while not increasing base wages, did result in increases of approximately 5%<sup>22</sup> in all salary roll-ups (overtime, shift differential, pension, etc.) Wilmington Firefighters received a negotiated wage increase of 2.25% in FY 2010.

New Castle County Police Captains and Majors are not represented for purposes of collective bargaining so there are no collective bargaining agreements for comparative purposes. All Delaware State Police Officers (excluding the Colonel and Lieutenant Colonel) are represented in a single bargaining unit by the Delaware State Troopers Association. State Troopers have received the following across the board wage increases since FY 2011:

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<sup>21</sup> The FOP's witness (Browne) testified the language included in its last, best, final offer, "all salary adjustments are retroactive" has the same meaning as the sentence in §13.1 of the predecessor agreement, "Retroactivity will be on all salaried items, including but not limited to, salary, overtime, shift differential, etc." *TR p. 267-269.*

<sup>22</sup> Using 12.5 annual paid holidays, divided by 260 work days/year (12.5/260 = .48%).

Date of Increase	% increase
7/1/11	2%
1/1/12	2%
7/1/12	2% <sup>23</sup>
1/1/14	.75%
7/1/14	1.25%
1/1/15	1.5%

Consideration of internal and external comparables favors the FOP's offer, particularly where that offer includes significant increases in costs in healthcare contributions and a credit for the PILOC payment which mitigate the cost impact of these increases to the City.

Hours of Work: Article 14; §14.1, §14.2

Currently, WPD Captains and Inspectors are eligible for overtime compensation at one and a half (1.5) times their regular hourly rate for hours worked beyond their regular work day or work week. To be compensated, the overtime must have the prior authorization of the Chief of Police and does not include hours spent on administrative duties and responsibilities. Captains and Inspectors may choose to take compensatory time in lieu of paid overtime up to a maximum of 440 accumulated hours. All accumulated compensatory hours must be paid to employees prior to promotion to a higher rank.<sup>24</sup>

Hours of work are fixed at eight hours per day in §14.1 of the predecessor agreement. The FOP proposes to provide an option to the Chief of Police to designate an alternate schedule, specifically either (1) five 8-hour days per week or (2) four 10-hour days per week.<sup>25</sup>

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<sup>23</sup> The July 1, 2012 salary package also included upward adjustments to step increments and an increase to the base wage for recruits.

<sup>24</sup> FOP Exhibit 1, p. 15.

<sup>25</sup> Each alternative includes a one hour lunch period. The FOP offer clarifies in a note, "Deduction of sick, vacation, and compensatory time will reflect the employee's assigned work schedule. However, accumulation of sick and vacation time will continue to be at eight (8) hours."

The FOP clarified at the hearing that overtime would not apply to any of the hours of the 10-hour shift. Its witness (Browne) testified, “We realized there was language in there that said we would be compensated in excess of an eight-hour day, so we struck that from our proposal. We are not asking for any time and a half pay for those extra two hours at all.”<sup>26</sup>

The impact of the 10-hour day option is also limited by the FOP’s shift differential proposal which provides in order to qualify for the 10% differential an officer must work a minimum of two hours between the hours of 4 p.m. and 6 a.m. The FOP asserts the implementation of a 10 hour day may save the City in overtime compensation, although it will result in the need to redistribute responsibilities because Captains and Inspectors assigned to 10-hour shifts will only work four, rather than five, days each week they are so assigned.

Given that the proposal provides the Chief of Police with the choice as to whether to exercise his discretion to choose an alternate schedule for some or all of the Captains and Inspectors (and therefore does not limit the hours of work to the eight hour daily limit of the predecessor agreement) this proposal weighs in favor of the FOP.

Staff Duty Captain Assignment: Article 14; §14.3

Currently, one Captain is assigned to serve as the weekly duty officer for an eight hour shift from Tuesday through Saturday between 4:00 p.m. and 2:00 a.m. Additionally, the assigned Staff Duty Captain is on-call from midnight on Saturday through 8:00 a.m. on the following Tuesday. The assigned Captain receives eight hours of compensatory time for the 56 hours he or she is on-call.<sup>27</sup>

Although the City did not project the cost of this proposal, it argues it is not in the public

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<sup>26</sup> Transcript, p. 242.

<sup>27</sup> FOP Exhibit 1, p.15.

interest to increase the amount of compensatory time available to Captains and Inspectors. It asserts that because overtime is not statutorily required for these officers by the federal Fair Labor Standards Act, it is, therefore, unreasonable. The FOP projected the cost to equal \$19,136 based on an average Captain's salary of \$46/hour (x 8 hours x 52 weeks).<sup>28</sup>

No comparators were offered either justifying or in opposition to this proposal, except that the FOP's witness testified that other WPD units are on-call for much shorter periods of time. Because this proposal incurs an additional cost to the City for which there is no corresponding additional benefit (i.e., it is additional compensation for the same work with no compelling justification), the FOP has not established this proposal is more reasonable under the criteria of 19 Del.C. §1615.

Term of Agreement: Article 17; §17.1

These parties have been unsuccessful in reaching a successor agreement since the expiration of the predecessor agreement on June 30, 2010. The FOP has proposed a contract term of July 1, 2010 through June 30, 2014, with retroactivity as set forth in individual proposals. The City's offer has a prospective term of July 1, 2014 through June 30, 2016, with an effective date thirty days after issuance of the decision.

In *FOP Lodge 4 v. City of Newark*<sup>29</sup>, the arbitrator found sending the parties back into negotiations immediately was unreasonable and defeated the purpose of the POFERA. He reasoned that the situation required a period during which the binding interest arbitration decision could be implemented while allowing the parties to reassess their positions and strategies in order to avoid a reoccurrence of the need to resolve their negotiations in binding

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<sup>28</sup> Transcript, p. 248.

<sup>29</sup> BIA 02-01-338, IV PERB 2445, 2555 (2002).

interest arbitration. In that case, however, the proposed contract terms were coextensive, with the FOP proposing a two year term and the Newark proposing an additional year, i.e., a three year term. The instant case presents a very different factual context. There is no overlap between the two proposals. The FOP's offer would apply retroactively and the City's would apply prospectively. Consequently, the *Newark* decision does not provide compelling guidance in this case.

The extended period of time over which these negotiations have occurred is inconsistent with the purposes of the POFERA. Both parties are responsible. They did not initiate negotiations until five months after expiration and neither requested impasse resolution support until nearly two years after expiration. The mediation efforts were suspended by mutual agreement for eighteen months. Neither party should profit from this dereliction of statutory obligations. The fact that there is no overlap in the proposed contractual terms evidences a lack of effort by these parties to determine an appropriate means by which to address this extended period without a current collective bargaining agreement.

Considered within the context of this proceeding, the terms of agreement proposed by these parties are so disparate as to provide no impact upon the ultimate decision. The consequences of these disparate terms are further addressed in the subsection addressing wages.

No Lay-off Provision:

The FOP's last, best, final offer includes a no-layoff provision for the term of the agreement. Because the FOP's offer is retrospective and no Captains or Inspectors have been laid-off, this proposal has no impact on the ultimate determination in this matter.

Grievance and ULP:

The FOP included in its offer the withdrawal of the grievance and unfair labor practice

charge alleging the City unilaterally changed the employee Dental Plan. This issue is not of sufficient import or weight to influence the ultimate decision in this matter.

### DECISION

For the reasons discussed above, based on the record created by the parties in this proceeding, the last, best, final offer of FOP Lodge 1 is determined to be the more reasonable based upon the statutory criteria set forth in 19 Del.C. §1615. The relative merits of each 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 the Arbitrator's Decision on Remand, IV PERB 2789, 2793 (2003). All of the exhibits, testimony, arguments and cited cases were considered in reaching this decision.

The record does not support the conclusions that the City has an inability to afford the limited costs of the FOP offer.

The extended period of time which has elapsed since the expiration of the last agreement is not reasonable and is contrary to the purposes of the POFERA and the interests and welfare of the public in the efficient and effective operation of government. This decision will require the parties to initiate successor negotiations immediately. They are encouraged to enter into those negotiations with the full and complete awareness of the City's financial projections as well as the recent and continuing fiscal concerns. The parties are further encouraged to actively engage in these negotiations quickly and expeditiously rather than allowing them to drag on to the detriment of their relationship and their capacity to move forward to proactively and cooperatively address the public safety challenges facing the City and its residents.

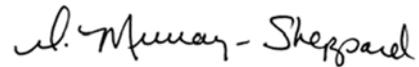
Finally, this decision is limited to the specific circumstances involving this very small

bargaining unit of police Captains and Inspectors. It does not set a “floor” for resolution for any other negotiations the City may be engaged in now or in the future, nor does it establish an immutable floor for the next negotiations for this bargaining unit.

WHEREFORE, the parties are directed to implement FOP Lodge 1’s last, best, final offer as set forth herein. The parties are directed 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: September 8, 2014



DEBORAH L. MURRAY-SHEPPARD  
Executive Director, Delaware PERB