

**PUBLIC EMPLOYMENT RELATIONS BOARD**

**STATE OF DELAWARE**

CITY OF WILMINGTON, DELAWARE,	:	
	:	<b>BOARD DECISION ON REQUEST</b>
Appellant,	:	<b>FOR REVIEW OF THE DECISION</b>
	:	<b>OF THE INTEREST ARBITRATOR</b>
v.	:	
	:	
FRATERNAL ORDER OF POLICE,	:	<b><u>BIA 14-01-939</u></b>
LODGE NO. 1,	:	
	:	
Appellee.	:	

*Appearances*

*David H. Williams, Esq., Morris James LLP, for the City of Wilmington*

*Jeffrey M. Weiner, Esq., for FOP Lodge No. 1*

**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, Lodge No. 1 (“FOP”) is an employee organization within the meaning of 19 Del.C. §1602(g). The FOP is the exclusive bargaining representative of a unit of Captains and Inspectors employed by the Wilmington Police Department.

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. Following an unsuccessful mediation

effort, binding interest arbitration procedures were initiated and hearings were held on May 6 and May 7, 2014, before the Executive Director of the Public Employment Relations Board, acting as the Interest Arbitrator pursuant to 19 Del.C. §1615.

The Interest Arbitrator issued her decision on or about September 8, 2014, in which she determined the last, best final offer of FOP Lodge 1 to be the more reasonable based upon the statutory criteria set forth in 19 Del.C. §1615.<sup>1</sup> The parties were directed to implement the FOP's offer within sixty (60) days and to advise PERB of compliance with the Order.

On or about September 15, 2014, the City filed a Request for Review of the Arbitrator's Decision. In its appeal, the City requested the Interest Arbitrator's decision be stayed pending completion of the Board's review of the decision.

The FOP submitted its response to the City's request for review on September 25, 2012.

A copy of the complete record in this matter was provided to each member of the Public Employment Relations Board. A public hearing was convened on October 9, 2014, at which time the full Board met in public session to consider the merits of the FOP's Request for Review. The parties were provided the opportunity to present oral argument and the decision reached herein is based upon consideration of the record and the arguments presented to the Board.

## **DISCUSSION**

The Board reviews an interest arbitration decision to determine whether the decision and award are arbitrary, capricious, otherwise contrary to law, or unsupported by the record. Following its deliberations, the Board must vote to either uphold or overturn the decision, or it

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<sup>1</sup> *FOP Lodge 1 v. City of Wilmington*, BIA 14-01-939, VII PERB 6213 (Decision of the Interest Arbitrator, 9/8/14).

may choose to remand it for further action.

After review of the record and consideration of the arguments of the parties in this case, the Board unanimously affirms the Arbitrator's decision for the reasons that follow.

The City's appeal is limited to a question of law. It asserts the Arbitrator committed a legal error by applying an improper standard to evaluate the City's inability to meet the costs of the FOP's proposal, and by failing to apply this Board's precedent in *City of Seaford v. FOP Lodge 9*.<sup>2</sup>

The City bases its argument on the Arbitrator's conclusion, found at the end of the "Ability to Pay" subsection of the decision: "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." *Arbitrator's Decision at pg. 6230*. The City argues the Arbitrator applied an "ability to afford" standard without considering the statutory restriction that the employer's "financial ability" be based upon "existing revenues."

The City's argument is contrary to the record and the established precedent of this Board. The *Seaford* decision analyzed what constitutes "existing revenues" under the law, and held that reserves are excluded from existing revenues, *because* they are not an active revenue stream. The Board noted in *Seaford* that, "funds are reserved or allocated to reserves through an affirmative act of the governing body... and how those reserves are expended, invested or allocated is within the exclusive authority of the City's governing body."

The City argues its Unassigned Fund Balance is not a revenue stream; therefore, it cannot be considered "existing revenue" within the meaning of 19 Del.C. §1615(d)(6).

Directly applying the *Seaford* rationale to the facts of this case, the Arbitrator determined:

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<sup>2</sup> Decision of the Interest Arbitrator on Remand, IV PERB 2659, 2675 (2002). The rationale of this decision was adopted by the Chancery Court in *FOP Lodge 5 v. New Castle County, Delaware & PERB*, C.A. 7676-VCP, VIII PERB 5927 (Del.Ch. 2014).

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. *Arbitrator's Decision at pg. 6227.*

The Arbitrator explicitly determined that the Unassigned Fund Balance was not a reserve; consequently, it is not excluded as "existing revenues" under *Seaford*. We concur.

The Arbitrator determined, based on the City's evidence, the Unassigned Fund Balance constitutes the account or fund in which the City accumulates its excess revenues and from which the City draws funds to meet unanticipated or unfunded expenses in its budget. The Unassigned Fund Balance is in addition to the reserve which is calculated and allocated as part of the budget process. There is no question that the Unassigned Fund Balance's cash or cash equivalent is comprised of funds from existing revenues. It is and has been a stable source of funding.

The City conflates "current revenues" with "existing revenues" and argues that it cannot meet the cost of the FOP's proposal based on "current revenues." It asserts the decision in *Seaford* requires a current stream of revenue to meet the additional costs of the last, best, final offer. The statute, however, focuses on the public employer's "existing revenues." We construe that to mean that the analysis must focus on the City's financial landscape based on the sources of revenue it has at the time the analysis is undertaken without regard to its ability to raise additional revenue through taxation or other means. Nothing in the statute requires that the consideration of revenues be limited to the current fiscal year or to any other specific, limited period of time. The logical extension of the City's argument would result in the preclusion of any wage increase unless the City offered it.

The City asserts the decision whether to expend funds from the Unassigned Fund Balance is within the exclusive province of the City Council, not the Arbitrator or this Board. Again, we concur. The statute requires the Arbitrator to determine whether the public employer has the financial ability, based on existing revenues, to meet the costs of either offer. The determination was made that there are sufficient existing revenues available to the City to fund the FOP's offer. How the City chooses to allocate, reallocate or modify its current budget plan is within its control.

Finally, the City argues the Arbitrator erred by not considering the continuing nature of the FOP's salary increases beyond June 30, 2014, the end of the contract term under the FOP's offer. Specifically, the City argues it is obligated to continue to pay the increased salary costs at least until a new collective bargaining agreement is negotiated. The City asserts a new agreement cannot realistically be negotiated before June 30, 2015.

The POFERA requires parties to enter into negotiations with a willingness to resolve disputes relating to terms and conditions of employment and to reduce those agreements to writing. 19 Del.C. §1601. It also contemplates that a reasonable period for negotiating a successor agreement is 90 days. 19 Del.C. §1613. Although a public employer may not unilaterally alter the wages or salaries paid to bargaining unit employees after expiration of collective bargaining agreement, it is not prohibited (and is in fact encouraged) to engage in negotiations which may modify wages and/or allow for savings in other areas which are necessary to fund or to continue to fund negotiated wage rates.

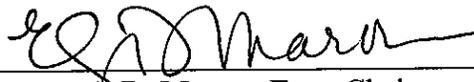
We echo the Arbitrator's encouragement to these parties to actively engage in successor negotiations expeditiously, rather than to prolong them.

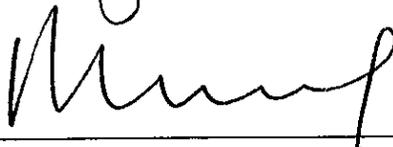
**DECISION**

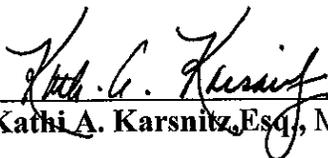
After reviewing the record and considering the arguments of the parties, the Board unanimously affirms the decision of the Interest Arbitrator awarding the FOP Lodge No. 1's proposal over that of City of Wilmington.

Further, the City's request to stay implementation of the Arbitrator's award is denied. The City is directed to notify the Public Employment Relations Board promptly of its compliance with this decision and order.

**IT IS SO ORDERED.**

  
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Elizabeth D. Maron, Esq., Chairperson

  
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R. Robert Currie, Jr., Member

  
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Kathi A. Karsnitz, Esq., Member

DATED: October 23, 2014