Received by PERB - 10/13/15

DELAWRE PUBLIC EMPLOYMENT RELATIONS BOARD

BIA 14 12 985
Ralph H. Colflesh, Jr., Esq.
Arbitrator

FRATERNAL ORDER OF POLICE,
LODGE #1
and
CITY OF WILMINGTON

Appearances
For the City:
David H. Williams, Esq.
Morris James LLP
Wilmington, Delaware
For the FOP:
Jeffrey M. Weiner, Esq.
Wilmington, Delaware

DECISION AND AWARD

Procedural and Statutory Background:

Pursuant to Delaware law and the directions of the Delaware Public Employment Relations Board ("the PERB"), the above named arbitrator was appointed to hear and resolve through final and binding interest arbitration the impasse described below between the City of Wilmington ("the City") and Fraternal Order of Police, Lodge #1 ("the FOP").

As directed by 19 Del. Code 1615[1] an impasse in collective bargaining for public police officers which is advanced to arbitration, must be determined by an application of the following statutory factors and an award must be made of one party or the other's last best final offer ("LBFO") as entire package of proposals.

The applicable statutory factors are set forth at 19 Del. Code 1615 (d) (1) through (7) and can be summarized as follows:

[1] This statute is known as the "Delaware Police Officers' and Firefighters' Employment Relations Act," or "POFERA."

1. Interests and welfare of the Public.
2. Comparison of wages, salaries, benefits, hours and conditions of employment of employees involved in the arbitration proceeding with wages, salaries, benefits, hours and conditions of employment of other employees performing the same or similar services or requiring similar skill 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. Overall compensation presently received by the employees inclusive of direct wages, salary, vacations, holiday, excused leaves, insurance and pensions, medial and hospitalization benefits, the continuity and stability of employment and other benefits received.
4. Stipulations of the parties.
5. Lawful authority of the employer.
6. Financial ability of the employer, based on existing revenues, to meet the costs of any proposed settlement; provided that any enhancement to such financial ability derived from saving experienced by the employer as a result of a strike shall not be considered by the arbitrator.

The FOP represents police officers from the rank of Patrol Officer through Senior Lieutenant in a collective bargaining unit employed by the City. The unit is commonly referred to as the R&F (Rank and File) unit to distinguish it from the FOP's other Wilmington bargaining unit, which is comprised of Captains and Inspectors.

Beginning in February 2012 and several times thereafter through January 31, 2014, the parties held negotiating sessions for a new collective bargaining agreement (hereinafter referred to as "the New Agreement") which would succeed the contract between them that nominally expired on June 30, 2011 (hereinafter referred to as "the Current Agreement").

Failing to arrive at a settlement, the parties submitted to mediation on July 15, 2014. When that effort failed, the FOP petitioned the Delaware Public Employment Relations Board for binding interest arbitration (hereinafter "BIA") pursuant to the above statute, and both

parties were directed by PERB Executive Director Deborah L. Murray-Sheppard to submit their LBFO's.

Thereafter the above named arbitrator was duly appointed, and, upon due notice, interest arbitration hearings were convened on May 19 and 21, 2015 at the offices of the PERB in Wilmington. At those hearings both parties had the opportunity to produce and confront witnesses, present documentary and demonstrative evidence, and offer oral arguments in support of their LBFO's. Following the preparation of notes of testimony taken at the sessions, the parties submitted post-hearing briefs and, subsequently, answering briefs. At that point the record closed, and this matter is now ready for an award of either the LBFO of the FOP, as a total package, or the LBFO of the City, as a total package.

Last Best and Final Offer of the FOP:

The LBFO of the FOP consists of a package of 4 elements, as follows:

1. Term of Agreement: 4 years, consisting of Fiscal Years 7/01/11 through 6/30/15.

2. Wages:
    a. FY 2012- No increase in pay by rank over FY 2011;
    b. FY 2013-2% increase in pay by rank over FY 2013;
    c. FY 2014—No increase in pay by rank;
    d. FY 2015 1% increase in pay by rank over FY 2014.

3. Hours of Work: Editorially amend Section 19.7 of the current agreement such that the effective date becomes reads "2013"; substantively amend the same section by increasing the number of "shooting days" from 4 to 6, effective July 1, 2013.[2]

4. Maintenance of *Status Quo*: Except for the three items above and necessary non-substantive date/editorial changes in the text, maintain all provisions of the current agreement through the four year term of the New Agreement.

Last Best Final Offer of the City:

The City's LBFO consists of eleven elements, as follows:

1. Holiday Pay: Require that employees work the last scheduled workday prior to and the next scheduled workday following a holiday as a condition for receiving holiday pay; and, require that an employee who is scheduled to work a holiday actually work that day as a condition to receiving holiday pay.

2. Compensatory Time:

(a) Eliminate provisions in the Current Agreement that would allow the accumulation of compensatory leave time in lieu of direct pay for days when, under Section 6.2 and section 12.9, employees can currently get compensatory time.

[2] "Shooting days" are compensated days off awarded under the current agreement to officers who successfully qualify with their service weapons. *See,* 1NT 131.

(b) Reduce the cap on compensatory time that can be accumulated from 440 hours to 400 hours by paying for those hours currently accumulated over 400.

(c) Provide that the agency to which monthly reports of compensatory time accumulated by each employee shall be referred to as the City's Department of Human Resources and Finance.

3. Doctor's Note: Mandate the presentation to the City's dispensary of a doctor's note to substantiate any condition for which an employee is absent from work 24 hours or more (3 work days).[3]

4. Payment for Accumulated Sick Leave upon Retirement:

(a) Effective July 1, 2015, eliminate the allowance in the Current Agreement for employees retiring with 20 years of service and who have at least 100 days of accumulated sick leave to take 40% of such leave as paid "terminal leave" prior to their actual retirement date, such that employees retiring after 20 years of service will receive 40% of their sick days in cash.

(b) In addition provide for payment of 50% of sick days if the retiring employee has more than 200 sick days, none of which could be used in the form of paid "terminal leave" prior to their retirement date.[4]

5. Health Care Contributions: Effective July 1, 2015, change the current flat-dollar amounts employees are required to pay for care under the three health care options (*i.e.*, the POS I Plan, the POS II Plan, and the EPO Plan) offered under the Current Agreement to a percentage for each plan as follows: 6% of the premium cost for the

[3] The current agreement at section 8.6(b) states the City "may" require such a note.
[4] The cap on sick leave accumulation of 440 days under the current agreement would not change.

POS I Plan; 5% for the POS II Plan; and 4% for the EPO Plan. Provide for publication of rates for each plan annually during the open enrollment period.

6. Term of Agreement:

a. Provide for a 5- year term for the New Agreement, beginning 7/01/12 and ending 6/30/16.

b. Change dates for notice of negotiations and the "endeavored" start of negotiations for a successor to March 15, 2016 and April 1, 2016, respectively.

7. Retiree Health Care:

(a) Amend Section 10.1 b of the Current Agreement to require that, pursuant to ordinance, employees hired after July 1, 2012 must be 65 years of age—rather than the current 55 years of age—to qualify for retiree healthcare benefits; and,

(b) reduce the City's contribution for retiree health care benefits to $4,000 from the current $5,000 per retiree per year for those who are less than 65 years of age.[5]

8. Medical/Dental Insurance Opt Out: Provide that, effective July 1, 2015, the $200 per month payment for employees who are eligible for but choose to decline coverage

[5] The dollar amounts referred to above are maxima that do or would cap the City's payment of 80% of the "blended rate," *i.e.*, the average cost to the City of all employees enrolled in the City's retiree coverage. The maximum in the current agreement for retirees who are 65 or over is $2,000. The City is not proposing to change that amount.

under the City's medical and dental healthcare coverage be split into a payment of $120 for opting out of the medical coverage and $20 for opting out of the dental coverage.[6]

9. Reductions in Force (Layoffs):

(a) Amend the title of Article 15 so that in the New Agreement it would read "Layoff and Reductions in Force";

(b) Provide that in the event of a reduction in force or reorganization in which the City reduces the number of lieutenants and/or sergeants, those lieutenants and/or sergeants to be reduced in rank or laid off will be chosen in reverse order of seniority computing such seniority from the date of promotion to lieutenant or sergeant, respectively; provided that time in rank as lieutenant, if any, will be credited as time in rank as sergeant.

10. Implementation of Twelve Hour Shift: Eliminate as superfluous Section 19.1A of the current agreement which provides for an 18-month trial period of 12-hour shifts and for suggestions or proposals for changes within 90-days of the expiration of the said trial period.

[6] In its submissions, including its post hearing brief, the City has constantly characterized the proposal as described above. However, the actual wording of the City's LBFO proposal as to medical benefits proposes language in the New Agreement that would read: "Any employee who can show proof of other medical insurance coverage from a source *other than the City* shall be eligible for a $180 per month opt out effective July 1, 2015." (Emphasis supplied). The City proposes the same language for dental insurance. The emphasized phrase, which would be an addition to the Current Agreement's language, would eliminate the buy back for officers who have spouses also working for the City and would cost them up to $2,400 per year. The FOP represents that there are at least 3 such officers.

11. Maintenance of *Status Quo:* The City proposes that except as set forth above and necessary editorial changes, the provisions of the Current Agreement continue in full force through the term of the new agreement.

Analysis of the FOP's LBFO and Arguments:

The FOP argues that its LBFO is sanctioned by the statutory criteria and that an application of those criteria should result in the FOP's LBFO being awarded over the LBFO of the City.

As to its salary proposal, the FOP implies that its LBFO would encourage Wilmington officers to remain in service for longer tenures than otherwise, presumably because of the increase in pay and 'shooting days" offered in its proposal. The FOP argues that this enhancement in longevity satisfies the "interest and welfare of the public" criterion in two ways: first, it would encourage officers with experience to remain in the City's service; second, it would encourage officers to remain in their jobs longer rather than taking earlier retirement. The premise of both arguments is that more experienced officers better serve the public, and, at least to some extent, their service is improved in proportion with their experience.

The FOP further contends that precedent holds for a comparison of the FOP's R&F bargaining unit here with the salaries of officers in the New Castle County Police Department ("NCCP") and the Delaware State Police ("DSP"). The FOP points out that in an earlier BIA case, *New Castle County and Fraternal Order of Police, Lodge #5, BIA 11-10-826*, both New Castle County and FOP Lodge #5 cited the Delaware State Police and the City of Wilmington as comparators, and that PERB Executive Director Murray-Sheppard concurred. Further, the FOP says that in the recent BIA between the FOP and the City for the police Captains and Inspectors bargaining unit the parties stipulated that the DSP and NCCP police were proper comparators.

Additionally, the FOP underscores the undisputed fact that for the last two years Wilmington Police are sworn members of the NCCP and NCCP officers are sworn as members of

the Wilmington department. As for the DSP, until January 2015 they had been assigned patrol work in the City.

Adopting the NCCP and DSP as comparators, the FOP details the substantial salary differences between its bargaining unit and the other two departments.[7]

Starting salaries among the three agencies disclose that the Wilmington unit begins at slightly over $300 less than New Castle County, but over $11,300 less than the Delaware State Police. Between the City and NCCP salient differences arise in the later ranks and years of service. For example, large differences exist between the salaries of Wilmington Senior and Master Corporals[8] and Senior and Master Corporals in both the NCCP and the DSP. The FOP underscores that after 20 years of service, a Wilmington Master Corporal[9] has cumulatively earned $51,948 less than a NCCP Corporal and $170,439 less than a DSP Master Corporal with the same length of tenure. At 25 years, the FOP points out, the cumulative discrepancy between a Wilmington Master Corporal and an officer of the same rank in the NCCP and DSP units is $86, 636 and $307,666 respectively. The corresponding figures for 30 years of service are $121,325 and $494,262 for the NCCP and the DSP, respectively.

That difference in cumulative pay is reflected in pensions paid to holders of the Master Corporal rank who retire. Pensions are calculated as 50% of the last year's salary. Extrapolated over thirty years of retirement life, a twenty-year veteran of Wilmington who retired as a Master Corporal would receive $104,065 less than a similarly situated NCCP Master Corporal and $284,200 less than a corresponding Senior Corporal retiree from the DSP. As with salary, the differences in pension benefits, only increase with length of service. A Wilmington Master Corporal retiring with 25 years of service receives $49,733 less than his/her NCCP counterpart and $564,092 less than his/her DSP counterpart over 25 years of retirement. At 30 years of

[7] All salary comparisons are for salaries effective 01/01/15 in Wilmington, 01/10/15 for the Delaware State Police, and 04/01/14 for the New Castle County Police.

[8] According to the City's unrebutted evidence, 25% of the R&F unit held the rank of Master Corporal as of May 2015 an another 12% held the rank of Senior and 21% held the rank of Corporal.

[9] Two-thirds of retirees from the FOP's bargaining unit in this case retiree with the rank of Master Corporal. (NT 408-409). Thus, that salary can be considered the "career salary," *i.e.*, the highest salary generally attained for the bargaining unit.

service, the respective difference is $33, 953 in favor of the NCCP retiree over his/her Wilmington counterpart after only 20 years of retirement.

These differences in cumulative salary and pension benefit between the FOP's R&F unit and the NCCP and DSP persist throughout the ranks. Assuming that promotions to sergeant usually occur when a Wilmington Officer is at Step 16 of the City's current salary guide (NT 412), the difference in salary between a Wilmington Sergeant and a similarly situated New Castle County Sergeant is about $14,000 and nearly $14,000 for a similarly situated DSP Sergeant. At the Wilmington Master Sergeant level there is an even more striking disparity, with a range in Wilmington for Master Sergeant salaries of $78,354 to $81, 933 compared to a range of $97,485 to $120,000 for the DSP and a salary of $93,324 for all NCCP Sergeants.[10]

This difference is again reflected in the retirement benefits. A 20-year Wilmington retiree at the rank of Master Sergeant would receive $224,539 less over a 30-year retirement period than a 20-year retiree from New Castle County with the rank of Senior Sergeant. The same assumptions for a DSP 20-year sergeant would yield an extra $292,354 over a 25 year retirement period compared to the Wilmington Master Sergeant. Retirement with 25 years of service expands these differences. For instance, a Wilmington Master Sergeant retiree with 25 years of service would receive $526,688 less over a 25-year retirement period than his/her State Police counterpart. A 30-year of service retiree would receive $647,736 less over a 20-year retirement period than his/her DSP counterpart.

An examination of the Lieutenant rank reveals the same pattern of difference. Starting lieutenant salaries in Wilmington are $81,965 compared to $102,656 for NCCP starting lieutenants and $102,608 for DSP starting lieutenants. The highest paid Wilmington lieutenant position, which is designated as "Senior" Lieutenant, earns $88,868 as opposed to the highest paid NCCP and DSP lieutenant positions which earn $107,789 and $125,884, respectively. More specifically, at 19 years of service, which is the average service for promotion to lieutenant in Wilmington (NT 412), an officer holding that rank in the NCCP makes annually and the

[10] Neither the NCCP nor the DSP have Master Sergeant ranks. The rank in the NCCP that most closely corresponds to the Wilmington Master Sergeant is the rank of Senior Sergeant. The DSP have neither a senior nor master sergeant rank. For those reasons, the ranges cited for the NCCP and the DSP include all sergeants.

corresponding position pays $102,608 more in the DSP. A Wilmington lieutenant with 19 years of service makes $81,965.

Pension payments differ accordingly. A Wilmington lieutenant retiring with 20 years of service would receive $310,359 less than a similarly situated NCCP lieutenant over a 30-year retirement period and $309,639 less than a corresponding State Police lieutenant over the same interval. After 25 years of service, assuming a Wilmington lieutenant retired as a "Senior Lieutenant," he would receive $$413,774 less than a "Senior Lieutenant" in the NCCP and $527,908 less than a corresponding State Police lieutenant over a 25-year retirement.[11]

The FOP asserts that its proposal for a cumulative 3% increase over the four-year term of the New Agreement reduces, but does not eliminate, the salary disparity between its bargaining unit and those in the NCCP and the DSP.

As for fringe benefits considered as part of the overall compensation package the R&F unit receives, the FOP points out that only in the area of shift differential and contributions for healthcare premiums are members of the R&F unit better off than their counterparts in the NCCP and DSP. Wilmington officers get 11% of pay for hours worked on the 8:00 a.m. to 8:00 p.m. shift and 10% for hours worked on the 4:0 p.m. to 6:00 a.m. shift and pay about $1,325 per year less for health care than their DSP and NCCP counterparts. In the area of retiree healthcare, Wilmington police are worse off than officers in the New Castle County department and the State Police because retired Wilmington officers have to wait until age 55 before receiving benefits[12], whereas the two other agencies grant health benefits upon retirement, regardless of age.

Regarding the City's ability to pay the FOP's proposed salary increases, the FOP contends that the City had an operating surplus of just over $6.0 million in FY 2011, $10.365 million in FY 2012 which after adjustments netted to $7.444 million; $1,327 million in FY 2013 and an operating deficit of $0.515 Million in 2014. Thus, for the above 4 years the City had a net

[11] The Delaware State Police have only one lieutenant designation.
[12] Under the City's LBFO this would increase to 65 for officers hired after July 1, 2012.

operating surplus of $14.3 Million. For FY 2015 the City has projected an operating surplus of $2.83 million. The FOP's salary proposal would effectuate a 2% increase in FY 13, a year included in the above figures. The parties have stipulated that the FOP's LBFO would cost $3,566,030. In *City of Wilmington v. Fraternal Order of Police Lodge 1*, (2015 WL 4035616 (Del. Chan.) the Delaware Chancery Court held that the phrase "existing revenues" for the purpose of determining the governmental entity's ability to pay is the net operating revenues in the fiscal years covered by the proposed contract, taken as a whole. Given that holding, and the above data, the City concedes in its post-hearing brief that "the City is not in a position to demonstrate an inability to pay for the FOP's LBFO based on existing revenues." (City's brief at pp. 2-3).

Analysis of the City's LBFO and Arguments:

The City agrees that where a governmental agency is not found unable to afford one of two competing LBFO's, the employer's ability to pay cannot become the dispositive factor in BIA analysis. Where that is the case, an arbitrator must give due weight to all relevant statutory factors and determine which of the two LBFO's is the more reasonable, based on those standards. *Fraternal Order of Police, Lodge 5 v. New Castle County,* 2014 WL 351009 (Del Ch.); 19 Del. Code Sec 1615; *Fraternal Order of Police Lodge 1 and City of Wilmington,* BIA 14-01-939 VII PERB 6213 (9/4/14).

Agreeing that it cannot show an inability to pay for the FOP's LBFO, the City generally advances the argument that the POFERA statutory factors favor its LBFO over the Union's. In summary, the City's general position rests on three broad contentions.

First, and perhaps the most important is the fact that the FOP has proposed a four year term for the New Agreement, beginning with FY 2012 and ending with FY 2015, rather than the five year deal offered by the City. If accepted, the FOP's LBFO would impose a New Agreement that would have already expired. Thus, a successor to it would already be on the bargaining table. This offers no "hiatus of labor peace," the City says, which is deleterious to the interest

and welfare of the public, particularly given the fact that the City has other contracts to negotiate and could be bargaining or arbitrating more than one at a time. In addition, the City cites several decisions in which arbitrators or courts, or the PERB generally held that a longer contract is better than a shorter one. *Fraternal Order of Police, Lodge 4 v. City of Newark*, BIA 02-01-338 (2002); *Fraternal Order of Police Lodge No. 4 v. City of Newark*, 2003 WL 22256098, p. 9 (Del Ch.); *Fraternal Order of Police Lodge 9 v. City of Seaford*, Decision of the Interest Arbitrator on Remand, IV PERB 2659 (July 15, 2002).

Second, the FOP's LBFO—unlike the City's--does not address health care costs. Under the City's offer, employee contributions to premiums would be moved to a percentage of the premium rather than the current flat dollar amount. Such a change, the City argues, would help the financial ability of the City by securing a greater share of health care costs from employees' participation in health care costs.

Third, the City's proposal for a one-time $4,000 off-base flat dollar payment to each bargaining unit member, followed by a 2% salary increase in 2015, as well as its proposal to substitute cash pay-outs for certain accumulations of compensatory time would assist the City's plan to adopt a "pay-as-you-go" philosophy far more than the fully retroactive 2% the FOP would impose for FY 2012 and the additional 1% in base the FOP proposes for FY 2015. It should be noted, though that even under the Current Agreement compensatory time must be cashed out so that no more than 100 hours are left upon reaching the rank to Corporal or Master Corporal and absolutely no hours are left upon reaching Sergeant or Lieutenant.

The City's claims its LBFO is favored by the criterion at 19 Del.C. 1615 (d) ((2), the "comparison of wages, salaries, benefits...of the employees involved in the binding interest arbitration with the wages, salaries, benefits...of other employees...generally in the same community..."

To that end the City looks back to 2009 and compares contract changes from then through FY 2014 between the City and (1) the R&F unit, (2) the police Captains and Inspectors unit, (3) the International Association of Fire Fighters ("the IAFF"), (4) AFSCME Local 320, and (5) AFSCME Local 1102. An analysis of yearly salary changes for those units discloses a 2.5%

increase for the Captains and Inspectors unit in FY 2009, a 2% increase for the R&F unit involved in this matter, as well as a 2% increase for the IAFF and both the above AFSCME units in FY 2009.[13] Moreover in FY 2009 another AFSCME bargaining unit, represented by Local1102 B got a 1.75% increase while non-union and executive and managerial employees also got a 2% increase. In FY 2010 the R&F bargaining unit received a further 2.5 increase, effective June 30, 2010 (the last day of that fiscal year), and the IAFF unit got a 2.25% increase, presumably effective 7/1/09. None of the City's other bargaining units got increases in FY 2010. Thereafter, not a single bargaining unit employed by the City received a salary increase, although in FY 2011 the R&F unit had its holiday pay rolled into base pay as of January 1, 2011, so that holiday pay would count for purposes of overtime, shift differential, and pension calculations. (NT 270). And, as a result of a BIA decision issued September 8, 2014, the Captains and Inspectors unit got flat dollar "step" increases ranging between $3,000 for the Inspector 2 and Captain 3 ranks, $2,000 for the Inspector 1 and Captain 2 ranks, and $1,000 for the Captain 1 rank for both FY 2012 and FY 2013.

Looking at a comparison with other employees generally in the same community, as is also directed by statutory criterion, (2) the City points out that current median earnings of the R&F bargaining unit is $82,762 (JX 5, p. 8; NT 125-26), while median earnings of all Wilmington residents is $33, 510, median earnings of Wilmington residents with bachelor degrees is $50,645, and median earnings of Wilmington residents with graduate degrees is $67,739. (JX 5, p. 9; NT 127-28).

Given these data, the City vigorously disputes the FOP's position that NCCP and DSP are the best comparators for purposes of statutory criterion 19 Del, C. 1615 (d) (2)'s directive to examine wages and benefits, etc. in "comparable communities." In making this point, the City cites *Fraternal Order of Police, Lodge #4 and City of Newark*, BIA -02-01-338 and *Fraternal Order of Police, Lodge #15 and City of Dover*, BIA 11-07-820, wherein union contentions that New

[13] The AFSCME Local 320 bargaining unit increase was effective 1/1/09; consequently, the City only absorbed a 1% increase for that unit in FY 2009.

Castle County Police and the State Police were comparables to the municipalities involved in those cases were unsuccessful. The City also asserts that its stipulation to use New Castle County Police and the State Police, which has three times the membership the Wilmington department has, as comparables in an earlier BIA case is not a recognition that they are the *only* comparables. In fact, the City says there is no material similarity between it and the County and the State of Delaware in terms of any commonly observed metrics such as population, population growth, unemployment, median household income, or median home values. (CX 5, pp. 22, 55-58). At the same time, the City, perhaps ironically, observes that large, urban municipalities typically pay less than their more affluent suburban neighbors. (CX 5, pp. 52-58; NT 155-157).

What the City proposes as comparable communities are Dover, as well as Reading Pennsylvania and Vineland, New Jersey. (CX 5, pp. 22, 41). However, the latter two are not only in different states but quite dissimilar from Wilmington in that they have no financial or technological workforce as does Wilmington nor do they have a seaport.

The City further asserts that compared with many regional and municipal departments which, by implication, it posits as comparables, Wilmington is at or near the top in wages, healthcare, retirement and net compensation. (CX 5, pp. 42-50). This is why, as the City correctly avers, application for jobs openings in the FOP's bargaining unit is strong and the voluntary non-retirement attrition rates is quite a bit lower than for other state and local police departments and agencies roughly the size of Wilmington's. (CX 5, p. 19).

In further support of its LBFO, the City says acceptance of its LBFO would result in needed savings and efficiencies for the City. For example its proposal to eliminated compensatory time under certain circumstances would save the City from on-going financial liabilities that only grow when compensatory time is later cashed in at higher dollar rates than paid when it was accrued. Its "doctor's note" proposal would curb frivolous or completely baseless sick time absences by requiring some proof of incapacity. The proposal to force retiring employees to take pay for accumulated sick leave instead of taking such leave as part of

"terminal leave" is an attempt to avoid payment of overtime to replace an employee who is still on the books but who is no longer actively working.

The City argues its healthcare proposal is also an attempt to alleviate the burden on the City for ever-increasing health care premiums. Currently the City pays $21,016 annually for family coverage under the POS I Plan—the one in which over 80% of the R&F unit is enrolled—and the employees pay about $1100. The City's cost has gone up 31 over the last four years (CX 5, p. 11,; NT 129) and has cost the City over $1 million in increases. (CX 5, p. 12; NT 130).[14] The R&F unit employees' contribution has remained static as a flat dollar amount.

As of now, that dollar amount equals only between 2.1% and 5.1% of the premiums, which contrasts sharply with the 24% for single and 30.8% for family coverage paid by private sector Delaware workers (CX 5, p. 13; NT 130) and the 13.25% contributed by members of the DSP. (CX 5, p. 31; NT 143). The modest increases generated by the City's proposal would amount to $401.32 annually for the POS I family plan. (CX 3; NT 284). Most compelling for the City is the fact that the Captains and Inspectors unit accepted a City proposal of 10% contribution to healthcare and included it in the FOP's LBFO that was accepted in the recent BIA decision between the City and the FOP. (NT 328-330).

As regards the City's retiree healthcare proposal, it is admittedly aimed not at current expenses but future costs faced by the City as more and more members of the bargaining unit retire. The current estimate of the City's future liability for the program stands at $73 million (NT 466) which cannot be funded by the current City contribution in the FY 2016 budget of $2.75 million. (NT 466). Further, even if the City increases its funding of the retiree health benefit at the rate of $250,000 per year it is estimated there could be a $40 to $50 million unfunded liability remaining. (NT 476). The City concedes that even if it secures the changes it seeks, its liability will continue to grow for many years before being curbed (NT 468-470), and that the first employees who would be affected (those hired on or after July 1, 2012) would not be affected until 2033, assuming they retire then. Even then, they would not be affected by the proposed change, however, until they reach age 55 and can get benefits. (NT 394-95). Thus,

[14] For all employees, the City's health care costs have risen modestly. Between FY 2013 and 2014, the costs were nearly $1 million less (CX 1), and the City's projections for FY's 2015, 2016, and 2017 are actually slightly *less* than its actual FY 2013 actual healthcare expenses of $14.5 million). (Id.).

there would be no savings for the City until 2043 at the earliest, which is well beyond the proposed term of the new agreement under either party's LBFO. The City maintains that because of this, its proposed change cannot be considered a negative factor in weighing the equities of the two LBFO's, citing *City of Wilmington v. Fraternal Order of Police Lodge 1, supra* at 15 for the proposition that the costs of a LBFO only includes money the City would have to spend during the term of the agreement proposed in that LBFO.

Finally, it must be recognized that the City's LBFO is made in the face of CPI increases forecasted for 2015 of 0.7% and for 2016 of 2.1% and the City's admission that salary increases across the FOP's pay scale fell behind CPI increases from 2008 to the present time. Somewhat counteracting that is the fact that officers can increase their salaries without across-the-board increases in contractual salaries by length –of-service step progression and by movement into higher paying ranks as shown in CX 5, pp. 60-61; NT 159-160.[15]

Looking further ahead, the City says it must be acknowledged that the City's revenue has been and seems to be destined to be relatively flat in the future, with actual revenues in FY 2014 being $145.3 million while projected revenues for FY 2015 and 2016 are $151.4million and $153, 2 million, respectively. (CX 1). At the same time, the City's cost factors are relentlessly increasing. (CX5, p. 64; NT 162-63; 202-03). Losses in City earned income tax revenue, due to the departure of much or all of DuPont's work force, as well as losses in transfer taxes and investment income have forced the City to increase property taxes by 15% in both FY 2010 and 2011, and 5% in FY 2015. (NT 202-209) and to restructure debt in FY 2011, and cut budgets in FY 2012 ($8.3 million) and FY 2015. (NT 205-206, 219-220). Although the City does have a net

[15] "Step movement" refers to salary level progression in rank as a result of longevity. Under the current agreement, and as implicitly proposed in both parties' LBFO's, such movement generally occurs annually for most ranks, with several exceptions. Newly hired patrol officers begin at Step 1 and remain there for 18 months before progressing to Step 2. Patrol officers with five years of service remain at that salary level for three consecutive years before moving to Step 8 on the salary guide in their 8th year of service. Similarly, Senior Corporals remain at the same salary without progression as do Master Corporals during their first two years in that rank, after which they move on the guide to a new level where they also remain for two years before moving to the maximum salary for Master Corporal. The same is true for the ranks of Sergeant and Master Sergeant as well as Lieutenant and Senior Lieutenant. The R&F's salaries end with the rank of Senior Lieutenant after seven years of service in that rank. As a consequence of the above regimen, officers in the R&F unit do not advance in salary each year simply because of longevity.

operating surplus for FY 2011 through FY 2014 of $14.3 million, the FOP's LBFO would absorb between 25 and 30% of that amount. Moreover, if awarded, the City says there is no doubt the FOP's LBFO would create tremendous pressure on the City to give similar raises to other employees, nearly all of whom have received small increases than the R&F unit over the years covered by the FOP's LBFO. Yielding that amount would put the City in a projected operating deficit for FY 2016 in an amount estimated by the City to be $515, 186. Such a consequence is real, given that the Captains and Inspectors as well as the IAFF bargaining unit have recourse to binding interest arbitration in which increases such as the FOP seeks here would be difficult for an arbitrator to resist.

Opinion:

From the LBFO's presented, it is obvious that to a great degree the POFERA law did what the legislature intended. The parties have moved to positions that are achingly close when viewed from an overall perspective. Regrettably, they could not coalesce their positions into an agreement and therefore avoid the expense, effort, and time necessitated by arbitration which imposes on them a contract that at least one side disfavors.

Ironically, the proximity of the parties' overall positions here makes my task extremely difficult, especially channeled, as I am, by the statutory criteria. Nevertheless, I must choose one or the other of the LBFO's as a whole while rejecting the other and do so, ever conscious of POFERA's constraints.

First, there are two stipulations by the parties that must be considered under **19 Del. C. 1615 (d) (4).** One is difference in the costs of their competing LBFO's. That amount is $1, 777,725, the FOP's cost being stipulated as $3,566,030 and the City's being stipulated as $1,788,305. The second, as conceded by the City, is that the City can fund the FOP's LBFO. As stated in its opening post-hearing brief, the City cannot argue that it lacks the financial ability to pay for the FOP's LBFO, based on existing revenues as that term is understood to mean for POFERA purposes. *City of Wilmington v. Fraternal Order of Police, Lodge 5,* 2015 WL 4035616

(June 30, 2015).This second stipulation means that the City's ability to pay the cost of either LBFO, which is the one statutory factor that may be dispositive under 19 Del C. 1615 (d), cannot singly control this case. Instead, I must consider all the statutory factors, *including* the financial ability of the City. I would also note that the lawful authority of the employer, which is the criterion mandated by **19 Del. C. 1615 (d) (5)** is not in question here, since no item in either party's LBFO reaches beyond what the City can lawfully do.

The first of the remaining statutory criteria is **19 Del. C. 1615 (d) (1)** which focuses on the interests and welfare of the public. In the context of this dispute, the public's chief interest is in having a competent, stable and sufficient cadre of police officers working for a City that can afford them for the foreseeable future without additional tax burdens.

Regarding the latter consideration, there no indication that the FOP's LBFO would presently force an increase in taxes and no indication the City's LBFO would presently result in a tax decease.

As for the quality, size and stability of employment[16] the evidence discloses that stability in the R&F unit is not in jeopardy. Among incumbent R&F members, the City had a "quit" rate of just 3.2% for FY 2015 through the end of March. And that rate was high compared to the three previous years in which it never got above 1.6%. Nor is there any indication that the City's force is less competent than it should be.[17] Third, there is no indication that candidates who would replace retiring or disabled officer avoid applying to the City or that such candidates fail to accept employment once it is offered. To the contrary, the City's exhibits show that it had 552 applicants for its latest police academy class of record and hired 34 of those. In short, nothing suggests the City has a hard time recruiting or retaining officers.

At the same time, the record does not disclose that either LBFO would affect other factors impacting the interests and welfare of the public. There is no proof that the Department would be forced to downsize if the FOP's LBFO were accepted, and no showing that the

[16] Stability of employment, of course, is also a consideration under 19 Del. C. 1615 (d) (3).

[17] I note that the City does not require post-secondary education for applicants, although the DSP and NCCP both demand about 2 years of college work, or, in the case of NCCP, 2 years of prior work as a Delaware police officer. Contrary to popular opinion, I am unaware of any evidence that academic experience produces more competent patrol work, which is the bulk of the R&F unit's mission.

Department would be significantly increased under the City's LBFO. Nor is there anything in either party's LBFO that would impact scheduling or deployment such that direct public safety measures would be better or worse.

As for the criteria listed at **19 Del. C. 1615 (d) (2) and (3)**— a "comparison of wages, salaries, benefits, hours and conditions of employment with those of similarly employed workers in the same or comparable communities and overall compensation presently received including benefits and the continuity and stability of employment"—the parties have produced ample evidence.

Much of that evidence has been reviewed above, in the analysis of the parties' LBFO's. Before returning to some of it, I point out that I consider the New Castle County Police ("NCCP") to be the closest comparators to the FOP's Rank and File ("R&F") bargaining unit in the record. Not only are the officers of the R&F unit here and the NCCP sworn in as members of each other's department, the proximity of the two departments and the fact that police work is not significantly differentiated between cities and their close-in neighbors make them apt for comparison. Additionally, NCCP has roughly the same number of officers as Wilmington. The fact that the County is better off financially than the City—with a higher per capita and median household income, greater median home value and a slightly better Moody's rating[18]—does not affect the work that police have to perform. The fact of the matter is that police work in contiguous communities, other than those with dramatically difference demographics, presents generally the same challenges.

Far less comparable is the DSP, which has three times as many officers as the City and which can be more accurately characterized as a highway patrol rather than a municipal force.

In any event, there are never perfect comparators, and the NCCP is far more comparable than the out-of-state agencies such as the Exeter Township, Pennsylvania, Reading, Pennsylvania, or Vineland, New Jersey police departments offered by the City. Having worked as a labor lawyer in all of those municipalities and as an arbitrator in Reading several times, I

[18] The County's population growth rate is 1.4%, its median household income is $63,755, its median per capita income is $32,199, and its median home value is $240,700. The comparable numbers for Wilmington are 0.6%, $39, 343, $24,742, and $163,400, respectively.

take arbitral notice that those communities are entirely unlike Wilmington. Exeter is little more than a Reading suburb. Vineland is a very large city geographically in the middle of what is a rural southern New Jersey whose economy still largely revolves around agriculture. Reading is a former industrial city with none of Wilmington's banking, commercial, medical, maritime or governmental entities, other than a regional office of Santander Bank. In fact, it no more resembles Wilmington than Wilmington resembles Baltimore.

As for the City's insistence on Dover as a comparator, I note that Dover has about ½ of Wilmington's population, 1/3 the size of Wilmington's police force, and enjoys the per-capita income advantage of being the state capitol.

Given that, it is obvious why the City itself agreed with the FOP in their recent BIA case involving the FOP's Captains and Inspectors unit that NCCP was a useful comparator for the City's police.

As demonstrated above in my analysis of the parties' LBFO's, examination of the NCCP and City police reveals similarities in benefits but striking differences in salary compensation which, of course, drives pension benefits. Examined in terms of cumulative earnings over years of service, the FOP has demonstrated that after the first ten years of service, during which period the City officers actually earn cumulatively[19] about $8,200 *more* than their NCCP counterparts, the difference in salary reverses sharply. At about 15 years of service there is about a $13,000 cumulative difference *in favor* of the NCCP.

The latter difference is less than the difference between the two departments at the Master Corporal rank, which can be attained in both after about 15 years of work. This rank is important because it is the rank at which most (2/3) of Wilmington officers retire. At the 20 year mark, when pension is first available to Wilmington police, there is a $7,000 difference in annual salary and a cumulative earnings difference of more than $50,000 at the Master Corporal rank in favor of the NCCP. Put differently, the variance between the two departments at that rank and experience level in terms of cumulative salary is greater than the first year

[19] Cumulative earnings are the total amounts of salary added over a term of an officer's service. The calculation assumes no year-to-year changes in the salary guide used for the calculation

starting salary for either department. It is as though, compared to Wilmington, the NCCP officers have been paid for more than extra year that they did not work.

The effect this has on pensions is obvious and important. Policing is essentially a younger person's profession. Beyond the onset of middle age average physical capacities are hardly within reach of the demands of patrol work. Realizing that, most police pension systems in the United States provide for relatively early retirement. Yet retirement often comes when an individual's financial responsibilities are greatest, considering college tuitions and the need to assist elderly parents. For that reason, pensions are terribly important for those who have chosen police work.

Compared to NCCP officers, with whom they are cross-sworn, a 25 year Wilmington Master Corporal, because of the differences in salary, will receive pension benefits over a 30 year retirement period that are $104,00 less than his NCCP counterpart. As set forth above, similarly unfavorable treatment is accorded those who retire at 25 years and enjoys a 25 year retirement and at 30 years with a 20 year retirement. It follows mathematically that the above difference in salary, cumulative earnings, and pension payouts only grow larger at the Sergeant, Master Sergeant, Lieutenant, and Senior Lieutenant ranks.

Given the above data, which is more thoroughly developed above in the analysis of the FOP's LBFO, any difference—assuming one can be discerned—in contractual benefits is meaningless. For instance, the smaller amount Wilmington officers pay toward health care coverage ($1532 annually for family coverage the top-tier POS I Plan versus $2886 for the NCCP), is consumed by the difference in annual salary. Similarly, retiree health care begins only at 55 for Wilmington officers. NCCP retirees gest health care benefits whatever their age. Uniform, clothing allowances, and shoe allowances are capped in Wilmington at $400 and only $90 for plainclothes officers as opposed to being fully paid (with an allowances of $1,000 per year for plain clothes officers in NCCP). NCCP provides full payment for shoes, whereas Wilmington only pays $100. And NCCP provides take-home vehicles while Wilmington does not. (NT 416, 418). All these elements balance or overcome any advantage Wilmington officers have in regard to shift differential, shooting days, and having their holiday pay rolled into regular salary.

While the FOP's LBFO would not completely close the gap between the R&F unit and the NCCP, it comes closer to doing so than the City's offer.

The final two statutory criteria are found at **19 Del. C. 1615 (d) (6) and (7)**. The first of those, which has already been partially addressed, is the financial ability of the employer, based on existing revenues, to meet the costs of the LBFO's. As mentioned above, the City has stipulated that it does not lack the ability to fund the FOP's LBFO. That does not mean, however, that the City's financial condition can be ignored. A municipality could have the ability to fund a contemporary proposal but only at the expense of other fundamental needs or at the expense of future solvency.

However, in this case there does not appear to be a threat from the FOP's LBFO. This is so, even though the City claims that the FOP's LBFO cost of $3,566,030 is about 32% of the City's net operating surplus during the period covered by the LBFO. However the City's own LBFO would cost $1,788, 305, or about one-half of the FOP's proposed settlement.[20] Thus the *net* cost of the FOP's LBFO over the City's would account for about 16% of the net operating surplus for the period of the FOP's proposal.[21] Moreover, the City's evidence at hearing was that the Police Department, which admittedly consists of more than the R&F unit, is slightly more than 25% of the City's budget, at least as projected for 2016.Therefore the amount of increase in the FOP's LBFO would not have a significantly disproportional effect on the net operating surplus.

The **19 Del. C. 1615 (d) (7)** criterion is a mandate for arbitrators to consider factors other than those set forth in Sections (d) (1) –(6) that "are normally or traditionally taken into

[20] The difference between the costs of the LBRO's is $1,777,725 is equal to 1.15% of the City budgeted general fund revenues ($153,532,112) for FY 2016. This observation is only for purposes of illustration since FY 2016 is outside the relevant budgetary period for the FOP's LBFO but it does indicate that that the FOP's proposal would not mean certain financial crisis for the City in the present (2016) Fiscal Year..

[21] I am aware this observation has more conceptual than real significance in that a good portion of the City's LBFO lies in the 2% salary increase that would not take effect until the start of FY 2016 and is therefore outside the four year period of the contractual term sought by the FOP. Nevertheless the point is instructive as to future impact on the City.

consideration in the determination of wages, hours and conditions of employment through...binding interest arbitration."

One of the most important of those factors is the degree of inflation expected or experienced over the term of a new contract. The City has argued that during the term of the New Agreement, whether 4 or 5 years in duration, the popularly recognized Consumer Price Index rose between 12% and 12.5% from 2008 to the present. That period would incorporate the four years covered by the FOP's LBFO which would raise salaries cumulative only 3%. The City has also asserted increases of 0.7% or 1.1% for 2015 and 2.1% for 2016.

Whether these CPI estimates are too high or too low or do or do not reflect the actual cost of living, it must be recognized that to some degree at least the cost of living has risen between July 2011 and the present. During that period of time there has been no increase in salaries in the R&F bargaining unit other than step increases for years of service for some members of the unit and promotional increases for others. The step increases have no means been evenly distributed among the bargaining. At the Corporal and above ranks, where more than half the bargaining unit is situated, there are only 3 step increases available, and for the 27% of the unit who are patrol officers there are only 4 step increases.[22] Thus, generally speaking, step increases have had a small effect on the bargaining unit and therefore have offered a small redress for the growth in the cost of living during the four years since July 1, 2011.

Although the FOP LBFO would not completely address this, the City's LBFO would do less for to make up for the past cost-of-living impacts or for the anticipated 2016 increase. The City would provide a one-time only payment of $4000 to each bargaining unit member for the four fiscal years between 2011 and 2015. That payment would not increase base salaries. The City's proposed 2% salary increase effective July 1, 2015 would help, but it would do nothing to offset the increase in cost of living for the preceding four years. In addition, as shown above, the City's LBFO would increase employee shares of the health insurance premium effective July 1, 2015

[22] Superior ranks have very few step increases. There are none for the Sergeant rank, 3 for the Master Sergeant rank, none for the Lieutenant rank, and 3 for the Senior Lieutenant rank.

and by converting the contribution to a percentage amount, would guarantee increases to the bargaining unit in the future.

In summary considerations of **19 Del. C. 1615 (d) (6) and (7)** both jointly and individually lead me to the conclusion that the City could afford the FOP's LBFO without jeopardizing its future solvency and that the FOP's LBFO better addresses the effect of the cost-of-living on bargaining unit salaries. At the same time, the FOP'S LBFO moves the R&F unit's overall compensation closer behind the one particular comparable of record that I believe is most applicable, the NCCP.

Conclusion:

To quote Commissioner Charles Ramsey of the City of Philadelphia Police Department, policing is the only profession, outside of the military, in which one may be asked on any given day to save a life, take a life, or give a life. For that reason, it is difficult to conceive of police as being overpaid.

Yet the reality is that no city, county, or state has limitless resources for police compensation. Government has to address an ever-increasing number of citizen concerns aside from providing police services, and that is recognized in the LBFO put forward here by the City. The City's LBFO is a well-intentioned effort to compensate its officers within the context of its constraints and in a manner consistent with those of agencies it believes are comparable. But applying the directives of POFERA, I am convinced the FOP's LBFO better meets the joints needs of the officers and the public.

Put differently, I find that the evidence, taken as a whole, when applied to the criteria found at 19 Del. C. 1615 (d) (1)-(7) leads to a determination that the FOP's LBFO should be accepted in its entirety. An Award will be entered accordingly.

Award:

The Last Best Final Offer of the FOP, in its entirety, is accepted.

10/11/15
Date

Ralph H. Colflesh, Jr., Esq., Arbitrator