

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

NEW CASTLE COUNTY, DELAWARE,	:	Decision of the Binding
	:	Interest Arbitrator
and	:	
	:	<u>BIA 11-10-826</u>
FRATERNAL ORDER OF POLICE, LODGE 5.	:	

Appearances

*Scott M. Holt, Esq. and William W. Bowser, Esq., Young Conaway Stargatt & Taylor, LLC,
for New Castle County
Ronald Stoner, Esq. for Fraternal Order of Police, Lodge No. 5*

BACKGROUND

New Castle County, Delaware (“County”) 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. 5, is the exclusive bargaining representative of the bargaining unit of all sworn police officers employed by the New Castle County Police Department at and below the rank of Senior Lieutenant.

The County and FOP Lodge 5 were parties to a collective bargaining agreement which had a term of April 1, 2008 through June 30, 2011. The parties entered into a Memorandum of Agreement on or about June 25, 2009, which included concessions equal to the cost of a 5% wage decrease during Fiscal Years 2010 (July 1, 2009 – June 30, 2010) and 2011 (July 1, 2010 –

June 30, 2011). Those concessions included, in relevant part:

2. In Fiscal Year 2010 and 2011 overtime payments by the County shall be reduced by \$600,000, which is an annual cap of \$783,000 (“Overtime Cap”) per fiscal year. Once the Overtime Cap is reached in Fiscal Year 2010 or 2011, Police Officers shall receive compensatory leave time in lieu of overtime pay, except as otherwise provided in Paragraph 3, below. The Parties agree that compensatory leave time shall not be used by Police officers during Fiscal Year 2010. The Parties further agree that the County may impose reasonable restrictions on the use of compensatory leave time to insure adequate staffing levels and to avoid the payment of overtime or the accumulation of additional compensatory leave time. Such restrictions shall be specified in the collective bargaining agreement. The Parties estimate that this change will result in a savings of \$600,000 per fiscal year.
3. In Fiscal Years 2010 and 2011, Police Officers shall not receive Court Standby Pay as provided in the collective bargaining agreement. Police Officers shall receive compensatory time or overtime pay in lieu of Court Standby Pay. The Parties estimate that this change (“Court Standby Waiver”) will result in cost savings of \$270,000 per fiscal year.
4. In Fiscal Years 2010 and 2011, active Police Officers shall make an additional monthly premium contribution for health insurance coverage (“Health Insurance Surcharge”). In Fiscal Years 2010 and 2011, the Health Insurance Surcharge for all active Police Officers shall total \$121,500 per fiscal year. The amount of the Health Insurance Surcharge paid by each Police Officer shall be the same for each officer, regardless of the type of coverage selected by the Police Officer (single, family, etc.) and regardless of whether coverage is declined. The Health Insurance Surcharge shall be paid “pre-tax” in the form of deductions in each paycheck issued in Fiscal Years 2010 and 2011. The Health Insurance Surcharge shall be in addition to any health insurance premium required in the collective bargaining agreement.
5. For Fiscal Years 2010 and 2011, Police Officers will waive Holiday Premium Pay in the amount of \$208,500 per year.
6. The County shall not lay off Police Officers (except as previously planned) in Fiscal Year 2010. There shall be no layoffs of Police Officers, including officers in the Academy and any other officers in probationary status, in Fiscal Year 2011. For purposes of this Agreement, in Fiscal Year 2010, any police officer, including any officer in the Academy or in probationary status, who is laid off shall be immediately rehired with no break in service or interruption in pay, via utilization of Justice Assistance Grant (“JAG”) federal funds. Funds

resulting from FOP concessions set forth in this Agreement will be limited in use to those purposes for which JAG funds may be expended.

The Memorandum of Agreement also provided that in the event the County received and accepted federal funds after the effective date of the Agreement which could be used instead of JAG funds to retain currently employed police officers, those moneys would be used to reduce the FOP concessions.

The terms of the Memorandum of Agreement were ratified by the FOP membership, approved by the County Council and included in the collective bargaining agreement which was executed on October 20, 2009. The Agreement did not include any across the board wage increases during its term. It specifically stated that all of the FOP concessions would expire with the termination of the Agreement on June 30, 2011.

The parties entered into negotiations for a successor agreement on or about May 5, 2011. Unable to successfully reach agreement, on or about July 8, 2011, the County requested mediation. A mediator was appointed by the Public Employment Relations Board and a mediation session was conducted on September 6, 2011.

By letter dated September 15, 2011, 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 November 14, 2011.

Two days of hearing were conducted by the Executive Director on January 4 and January 9, 2012, during which the parties were afforded the opportunity to present testimony and

documentary evidence in support of their respective positions. Closing argument was provided by both parties in written post-hearing submissions and the record closed after its receipt. The following discussion and decision result from the record thus created.

LAST, BEST, FINAL OFFERS OF THE PARTIES

New Castle County:

1. Revise paragraph 24(c) to read as follows:

There shall be no layoffs of Police Officers, including officers in the Academy and any other officers in probationary status, in Fiscal Years 2012 and 21013.

2. Revise paragraph 25 to read as follows:

- (a) The following shall be holidays with pay each year:

New Year's Day
Martin Luther King's Birthday
Veterans' Day
Lincoln's Birthday
Thanksgiving Day
Day after Thanksgiving Day
Washington's Birthday
Good Friday
Christmas Eve Day (Normal work day to be 4 hours)
Christmas Day
Memorial Day
Independence Day
Labor Day
Columbus Day
Election Day (every other year)

The above specified holidays with pay shall be scheduled for celebration each year and the dates of observance shall be those specified by the State of Delaware for holidays.

- (b) In Fiscal Year 2012, the following days shall not be considered holidays: Lincoln's Birthday (February 13, 2012), Washington's Birthday (February 20, 2012), and Good Friday (April 6, 2012). In Fiscal Year 2012, employees shall receive one day of leave upon passage of each of the foregoing days. Such leave must be scheduled off prior to June 30, 2012.

(c) In Fiscal Year 2013, the following days shall not be considered holidays: Lincoln's Birthday (February 11, 2013), Washington's Birthday (February 18, 2013), and Columbus Day (October 8, 2012). In Fiscal Year 2012, employees shall receive one day of leave upon passage of each of the foregoing days. Such leave must be scheduled off prior to June 30, 2013.

(d) Special Holidays

Such other days as the Governor and/or County Executive may designate as holidays with pay shall be known as special holidays.

3. Rates of pay contained in paragraph 61(b) shall remain unchanged for the duration of the Agreement.
4. Revise the last paragraph of 64(g) to read as follows:

Beginning on or after July 1, 2011, and continuing through June 30, 2013, all active employees shall make an additional monthly contribution for health care insurance coverage ("Health Insurance Surcharge"). The amount of the Health Insurance Surcharge shall be \$1,022.00 per Fiscal Year (July 1 through June 30) regardless of the type of insurance selected by the employee (single, family, etc.) and regardless of whether coverage is declined. The Health Insurance Surcharge shall be paid in the form of deductions from the first and second paycheck of each month. The deductions shall be "pre-tax" if the employee is participating in a County health insurance plan. The amount deducted from paychecks during Fiscal Year 2012 shall be determined by dividing \$1022.00 by the number of paychecks from which the deduction is made. The amount deducted during Fiscal Year 2013 shall be determined by dividing \$1,022.00 by the number of paychecks from which the deduction is made.

5. Revised paragraph 85 to read as follows:

DURATION OF AGREEMENT

(85) This agreement is effective from July 1, 2011 until 12:00 midnight, June 30, 2013. It shall be automatically renewed from year to year thereafter, unless either party shall give the other party written notice of desire to terminate, modify or amend this agreement. Such notice shall be given to the other party in writing, by registered mail on or before January 1, 2013.

6. All changes contained in the Tentative Agreements.

Fraternal Order of Police, Lodge No. 5:

Salary

First Year (7/1/2011 – 6/30/2012) – Zero (0) % General Increase

Second Year (7/1/2012 – 6/30/13) - Zero (0) % General Increase

The 2008-2011 Collective Bargaining Agreement Section 61 provides the police salary schedule (Rates of Pay) for pay grades for members of this bargaining unit. No changes are proposed.

All provisions of the April 1, 2008 – June 30, 2011 Collective Bargaining Agreement between the parties remain in effect and are incorporated into the successor agreement unless modified as stated herein. All provisions of the Collective Bargaining Agreement that reflect modifications unique to Fiscal Years 2010 and 2011 have automatically expired and should not be incorporated into the successor agreement.

The parties stipulated they had reached the following tentative agreements during the course of their negotiations and submitted them into the record of this arbitration proceeding:

1. Revise Section 6(a) to read as follows:

The employees in the bargaining unit shall be represented for purposes of grievance adjustment by a Grievance Committee of not more than four (4) employee members which shall consist of the President of the FOP, Chairperson of the Grievance Committee, and two (2) grievance representatives. The County agrees to recognize grievance representatives in accordance with the following:

Squad A – ~~One~~ **Up to two (2)** Grievance Representatives

Squad B – ~~One~~ **Up to two (2)** Grievance Representatives

Squad C – ~~One~~ **Up to two (2)** Grievance Representatives

Squad D – ~~One~~ **Up to two (2)** Grievance Representatives

Squad E – ~~One~~ **Up to two (2)** Grievance Representatives

Criminal Investigation Unit – Two (2) Grievance Representatives

Headquarters Personnel - ~~One~~ **Up to two (2)** Grievance Representatives

Middletown Facility – One Grievance Representatives

Mounted Unit/Parks – One Grievance Representatives

Duncan Road Sub Station – One Grievance Representatives

2. Revise Section 9(a) to read as follows:

The Chairperson of the Grievance Committee, and grievance representatives directly involved, may leave their assigned duty without loss of salary in order to investigate and process grievances and attend **Step Three and Four** police grievance hearing officer and arbitration hearings as specified in the grievance procedure herein.

3. Revise Section 44 to read as follows:

Each employee is entitled to sick leave with full pay in accordance with the following provisions:

Effective on the first day of the month after ratification of this contract, an employee shall be credited with one (1) day of sick leave for each completed month of service. Accumulation of sick leave is unlimited.

Upon retirement or involuntary separation (for reasons other than for cause) from the service, an employee shall be paid for sick leave time accumulated not to exceed one hundred (100) workdays.

4. Revise Section 60(c) to read as follows:

The premium rate of time and one-half of the employee's regular base rate of pay shall be paid for all duty hours performed in excess of ten (10) hours during day and evening shifts and eight (8) hours during the midnight shift in any continuous twenty-four hour period or for all duty hours worked in excess of the regular duty pay cycle.

5. Revise Section 71(b) to read as follows:

Standby for Court: On each occasion when an employee is scheduled for a court appearance, the employee may elect to be placed on standby, or be placed on standby by a proper authority (i.e. court officer, supervisor or representative of the Attorney General's Office). An employee will not, however, have the right to elect to be placed on standby if the proper authority directs the employee to appear in court. When an employee is on standby for a scheduled court appearance, such employee will be paid at one-half (1/2) of the employee's regular base rate for three (3) hours, unless notified to appear in Court at which time standby pay shall cease. In such a case, the employee shall be provided with a time when the employee is required to appear, and the employee shall, commencing at the time the employee is required to appear, be paid for court time pursuant to Paragraph **60 (e)**.

6. Delete the following sections:

Section 24 (g), (h) and (i)
Section 26 (c)
Section 27
Section 60 (j)

Section 64(g)
Section 71 (c)
Appendix B

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.

PRINCIPAL POSITIONS OF THE PARTIES

New Castle County:

New Castle County asserts its last, best, final offer is the more reasonable because it promotes the interests and welfare of the public and does not jeopardize the competitive compensation package currently enjoyed by NCC police officers. Over the past five years the County's structural deficit has resulted from operating expenses (fueled primarily by an annual 4% growth in personnel costs) outpacing revenues 4:1. The budget for Fiscal Year 2012 (which projected a \$10 million deficit) was balanced by recovering \$8 million in cuts to the operating budget and concessions from County employees equal to 2.5% of their compensation for the remaining \$2 million.

The County argues implementation of its offer is in the best interest and welfare of the public because it will continue to face difficult economic circumstances during the life of the agreement, including significant reductions in revenues related to real estate (the County's primary source of revenue), continuing high levels of unemployment of County residents, and steady growth in personnel costs (which constitute approximately 75% of the County's total General Fund expenses). It is in the public interest to develop and implement a plan for fiscal responsibility. The County developed its FY2012 budget and last, best, final offer after extensive analysis. Its plan eschewed any increase in property taxes as residents had absorbed a 25% increase in 2010. The County also determined that drawing down reserves for normal and recurring operational expenses was not a prudent approach to balance the budget and continuing to do so would jeopardize the County's ability to respond to future economic emergencies and its

ability to borrow money by reducing its favorable AAA bond rating. By engaging the cooperation of its employees to address the projected deficit, the County was able to maintain services to its residents and to retain its current workforce.

The County contends the record demonstrates it will not be able to afford the FOP's last, best, final offer based on existing revenues, as defined by the statute. The FOP's offer would add \$613,000 to the County's expenses in FY2012, creating a deficit and would add \$613,000 to the projected deficit of \$5.1 million for FY2013. Even if, based on the County Checkbook (which at the end of December, 2011, projected an \$800,000 surplus for the end of FY2012), there may be sufficient funds to cover the FY2012 cost of the FOP's proposal, there is a sizeable deficit projected for FY2013. The County cannot be required to expend its reserves to meet the cost of the FOP's offer in the second year. The statute does not require the employer to either raise taxes or expend reserves to meet the cost of a last, best, final offer. While an employer may choose to exercise either option, the arbitrator is limited to considering the employer's ability to pay based on existing revenues.

The concessions included in the County's last, best, final offer are no greater or less proportionally than those which have been given by every other County employee. Implementation of the FOP's offer would be unfair to all other County employees who sacrificed to help address the structural deficit and would foment discord and discontent among the County's employees, potentially making future negotiations more difficult.

When the parties were unable to reach agreement on the terms of this agreement, the County structured its last, best, final offer in a manner which it believed was least onerous on the police. Converting three holidays to floating holidays provides the officers with three additional vacation days and is consistent with the trend for holiday conversion in the Wilmington and State

police departments. The healthcare surcharge is based on a concession the FOP proposed and agreed to in the last negotiations. The surcharge has the added benefit of providing a concession with pre-tax dollars for officers who use the County's healthcare plan. Consequently, this concession does not impact pension calculations. The County's offer also guarantees no lay-offs during the term of the agreement.

The County also argues its offer is supported by both internal and external comparators. The County's offer continues the internal equity between all County employees. Extensive evidence was presented at hearing that the NCCPD compensation package is highly competitive with police officers in the same and comparable communities. The County's offer would not significantly change the relative competitiveness of that package and there is no evidence that the County has a retention problem within the NCCPD.

For these reasons, the County asserts its last, best, final offer is the more reasonable under the statutory criteria.

Fraternal Order of Police, Lodge No. 5:

FOP Lodge 5 argues its last, best, final offer should be selected because it requires no change to the status quo. Its offer seeks no wage increases and does not change the benefits or working conditions currently in effect for bargaining unit employees. It asserts that a status quo offer is *per se* reasonable as it requires no movement by either party and simply extends the terms of the existing agreement for another two years. The FOP argues the County's offer is unreasonable because it requires a reduction in compensation based on the evidence presented during the arbitration proceeding.

The FOP argues it has negotiated concessions in previous agreements with the County to help address financial deficits. During Fiscal Years 2010 and 2011, the FOP negotiated terms

with the County which resulted in a 5% decrease in compensation for bargaining unit members, in an exchange for saving the jobs of 20 recruits (who were in the Police Academy in 2009) from layoffs. The FOP asserts that maintaining a full complement of 364 officers is critical to public and officer safety. Prior to the Fiscal Year 2010 concessions, the County had raised property taxes, used reserves, and asked for a similar sacrifice from all County employees. By these actions, the County clearly demonstrated the scope of the financial crisis at that time and took appropriate steps on all fronts to address the deficit.

In this case, however the County Executive announced a projected \$10.1 million deficit for Fiscal Year 2012 in his budget address in March, 2011. He stated he would not raise taxes or use reserve funds to address the projected deficit. Rather, he announced (and County Council subsequently passed) a budget for FY2012 based on operational savings totaling \$8 million (including not filling and underfunding 76 positions) and requiring concessions in employee compensation totaling \$2.1 million, an amount equal to 2.5% of employment costs. There were no collective bargaining agreements in effect in March 2011 with any of the County's bargaining units to support a balanced budget based on these concessions. The FOP asserts the concessions the County is demanding do not result from an unforeseen emergency or dramatic change in the economy. It asserts balancing the budget on the backs of County employees is an election year strategy to avoid any additional costs to voters and to maintain current levels of service.

The FOP disputes the County's contention that it cannot afford the union's last, best, final offer. It argues the County has presented little if any evidence that there is an inability to pay when the County's reserves as of December, 2011 equal 50% of its FY2012 General Fund budget of \$164 million. The FOP provided evidence that the savings derived in FY2011 from vacancies in the police department were \$841,472, and these savings continue to accrue in

FY2012 at a rate of \$83,040 each month. These savings, the FOP argues, more than offset the \$613,000 the County seeks in compensation concessions.

The FOP argues that a direct comparison cannot be made between the agreements the County reached with its other bargaining units and the offer made to the FOP. All of the other bargaining units accepted the 2.5% compensation concessions for FY2012 and 2013 in exchange for “no layoff” guarantees. The County made it clear to the FOP that it did not intend to lay off any police officers during the term of the agreement. Consequently, the County has offered no consideration to this bargaining unit for the concessions it seeks.

Although the Grand Lodge of the FOP concluded there are no pure comparators with the NCCPD, the union asserts that its closest “peers” are the police forces of the City of Wilmington and the State of Delaware. These are the three largest police forces in Delaware and all three share overlapping geographical jurisdictions in New Castle County. The FOP notes that while both the City and State police gave wage concessions during FY 2010, they were one year concessions which were subsequently restored. City and State police officers have and will receive wage increase during the period in which the County seeks to continue compensation concessions from its police force. Under either the County or the FOP offer, County police will have gone without a wage increase for more than five years at the end of this agreement in June, 2013. During the same period of time, County police officers suffered 5% reductions in compensation for two years and, if the County’s offer is implemented, will suffer a 2.5% reduction in compensation for the each of the next two years. During this period, State police officers received a 6% increase in wages and Wilmington police officers received a more than a 4.5% increase in wages.

The FOP concludes that it has always been willing to make the sacrifices necessary to

weather a demonstrated financial or economic crisis, but the County has not established that such a situation currently exists. The County presented a “take-it-or-leave-it” position in negotiations. No evidence was presented that the FOP’s offer will harm the public interest. The County’s offer, however, will hasten retirements and cause retention problems as County police fall behind their comparable counterparts. The FOP offer, which seeks no changes to current wages, benefits, or working conditions, is the more reasonable offer under the statutory criteria and should be accepted in order to fairly resolve this impasse.

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), and economic conditions and the labor market, generally, in the same and comparable communities. The arbitrator's decision must be based upon the objective statutory criteria, based upon the record presented 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 statutory criteria of 19 Del.C. §1615, there were no stipulations by the parties or argument presented that either of the last, best, final offers exceeded the lawful authority of the public employer. Each statutory factor was considered to be relevant and given due weight in the following analysis.

The New Castle County Police Department ("NCCPD") has an authorized staff compliment of 364 uniformed officers. As of November 28, 2011, 341 of those positions were filled. Of those 341 bargaining unit positions, 88.3% were in non-competitive, non-supervisory, rank and file positions, including Police Officers and Officers First Class (174 positions), Corporals (65) and Senior Corporals (62). The remaining 11.7% of the bargaining unit consists of the supervisory ranks of Sergeant (12), Senior Sergeant (17), Lieutenant (7), and Senior Lieutenant (4). *New Castle County Exhibit 4, p. 3*.

Bargaining unit members advance through the non-competitive ranks when they meet minimum time in rank. New Castle County police recruits are hired at a base salary of \$44,889, and advance to \$47,134 after successful completion of training at the police academy (after approximately 6 months). After three years of continuous service, Police Officers receive the stripes of an Officer First Class (without a compensation adjustment). After nine years of service as an Officer First Class with four satisfactory performance evaluations, an officer is promoted to the rank of Corporal and receives a pay grade increase of 5%. After four years of service as a

Corporal (normally 16 years of total service), an officer with four satisfactory performance evaluations is promoted to the rank of Senior Corporal and receives a 5% increase and pay grade advancement. The maximum base salary for a Senior Corporal is \$76,778.

In addition to promotional increases, NCCPD officers are advanced through ten steps of the salary matrix with 5% annual step increases. They also received additional compensation over and above base salary through overtime premiums, holiday pay¹, shift premium², clothing allowance³, and other specialized payments.⁴*New Castle County Exhibit 4, p. 7.* The average compensation received for all non-supervisory ranks in FY 2011 was \$74,620.

Bargaining unit members enjoy health and welfare benefits including healthcare insurance, life insurance, prescription co-pays, pension and post-retirement medical benefits. Officers also receive paid annual leave (between 0 and 25 days per year based on years of service, plus an additional day for each year of service beyond 15 years); 12 days of sick leave annually; 13 ½ holidays per year (plus Election Day every other year); and other leaves.⁵ The

¹ If a holiday falls on an officer's regularly scheduled day off, the officer is entitled to a day of vacation or 8 hours of pay at their base rate. If an officer works on a holiday, the officer is paid for 1.5x the overtime rate. In FY 2010 and FY 2011, holidays were paid at the straight time rate, as agreed to by the County and the FOP as part of the 5% concessions in compensation. Average holiday pay in FY 2011 equaled \$2,311 per officer (excluding holiday pay taken as vacation).

² Officers receive 6% of their regular hourly rate for all hours worked during shifts that begin between 2:00 p.m. and midnight. The average shift premium earned by bargaining unit officers in FY 2011 was \$1,808.

³ Uniforms and shoes are provided by the County, which also covers the cost of cleaning; non-uniformed officers receive a \$500 annual clothing allowance.

⁴ Call-in Pay, Call-up Pay, Stand-by Pay, Court Stand-by Pay (which was suspended in FY 2010 and 2011 as part of the concessions), bilingual bonus, and educational attainment bonus.

⁵ Military Training Leave, Civil Leave, Educational Leave, Disability Leave, and Bereavement Leave.

average cost of benefits for all New Castle County employees was 49.7%⁶ of payroll in FY 2011. The total average cost of employment of a non-supervisory bargaining unit officer was \$111,706 in FY 2011. *New Castle County Exhibit 4, p. 14.*

Both the County and the FOP used the Delaware State Police and City of Wilmington Police as comparators or “peers” to evaluate their last, best, final offers.⁷ The FOP did not dispute the information contained in the County’s comparability factors:

	New Castle Co.	Del. State Police	Wilmington Police
Population (2010)	538,479	897,934	70,851
Number of Sworn Officers (2010)	351	662	334
Minimum Educational Requirements	2 yrs military experience + 30 college credits, or Associate degree	2 yrs military experience + 30 college credits, or 60 college credit hrs	High school graduation or equivalency
Violent Offenses Known by Agency per Sworn Officer (2010)	3.6	2.7	4.2
Property Offenses Known by Agency per Sworn Officer (2010)	18.9	18.4	12.4
Unemployment Rate (2011)	7.7%	7.5%	11.4%
Median Household Income (2010)	\$ 59,959	\$ 55,847	\$ 32,884
Per Capita Income (2010)	\$ 39,259	\$ 24,861	\$ 27,729
Median Home Value (2010)	\$ 256,700	\$ 243,600	\$ 200,000
Moody’s Credit Rating (2011)	Aaa	Aaa	Aa2

New Castle County Exhibit 4.

The County’s economic expert presented the 20 and 25 year averages in direct cash

⁶ Includes the employer cost of medical insurance, life insurance, unemployment insurance, FICA, pension, OPEB and workers compensation.

⁷ The County also presented evidence concerning other external comparators including: Philadelphia City/County, PA; Anne Arundel County, MD.; Baltimore City, MD.; Baltimore County, MD; Harford County, MD.; and Howard County, MD. While this information was comprehensive and well presented, the differences between these various police forces were significant and made apples-to-apples comparisons difficult. Because the analysis in this case ultimately turns on the viability of the County’s ability to pay argument, analysis of the limits of the applicability of this information is unnecessary.

compensation for non-competitive, non-supervisory ranks in each department as of July 1, 2011 (which would reflect the effect of the FOP's last, best, final offer):

	New Castle Co.	<i>NCCPD less 2.5%</i>	Del. State Police	Wilmington Police
20 Year Average	\$ 72,460	<i>\$70,649</i>	\$ 68,667	\$ 67,369
25 Year Average	\$ 75,002	<i>\$ 73,127</i>	\$ 73,882	\$ 69,524

Even with the County's offer, the NCCPD non-supervisory officers retain their first place position over the course of a 20 year career, and fall only slightly behind the State Police over the course of a 25 year career.

The FOP argued subsequent wage increases negotiated by the State and City of Wilmington Police will impact the relative standing of its bargaining unit members, vis-à-vis its peers. The FOP's concerns about the impact of potential wage increases during the term of this agreement for its comparators will undoubtedly be subject to scrutiny and consideration in future negotiations between the County and FOP Lodge 5.

The FOP asserts the agreements reached with the other County bargaining units are not relevant to these proceedings because each of those groups agreed to the 2.5% concessions in exchange for no lay-offs guarantees during the two year term of these agreements. I note that the County's last, best, final offer in this case also includes a no lay-off guarantee. The FOP argued (and the County agreed) that they had been told from the beginning of the negotiations that there would be no lay-offs of police officers.

The issue before this arbitrator, however, is not whether the concessions the County seeks in its offer are offset by guarantees of equal value to the FOP. While that may be a consideration during the course of negotiations, once the impasse reaches interest arbitration, it

... is the final stage of the impasse resolution procedure and is

implemented only when the negotiation and mediation processes have failed and the parties have abdicated their statutory responsibility to collectively bargain to the arbitrator to determine the terms of the labor/management relationship for the period in issue...The arbitrator does not stand in the place of either negotiating team or act on behalf of either party. Positions which may foster or support movement toward resolution of negotiations and/or mediation (and are reasonable negotiating positions) may not stand up when evaluated under the statutory criteria for interest arbitration set forth in 19 Del.C. §1615(d). FOP Lodge 15 and the City of Dover, BIA 11-07-820, VII PERB 5345, 5388 (2012).

Internal comparability is a relevant factor which must be considered under the statute. There is no dispute in this case that every other County employee has conceded 2.5% of their compensation (albeit in various manners) during FY 2012 and FY 2013. I find this to be a relevant and material consideration in evaluating the reasonableness of the last, best, final offers in this case. It is a consideration which mitigates against acceptance of the FOP's offer.

New Castle County argues the record supports its conclusion that the County will not be able to meet the cost of the FOP's last, best, final offer, due to the County's structural deficit, which will continue through the term of this agreement. The County's Chief Financial Officer testified the revenue increases in FY 2012 and 2013 are projected to be at or below one percent (1%), while projected recurring expenses are projected to increase by four percent (4%) annually. The increases in expenses are primarily attributable to annual growth in personnel expenses, based on structural step and merit increases for County employees and increasing costs for healthcare, workers compensation, pension and OPEB⁸ costs. Approximately 73.4% of the County's \$164 million in FY 2012 expenses are personnel related, while approximately 75% of the County's General Fund revenues are generated by real estate property taxes and real estate transfer taxes. *Joint Exhibit 3, p. 58, 59, 78.* Neither the projections nor the existence of a structural deficit as described by the County were refuted by the FOP.

⁸ Other Post-employment Benefits.

The FOP argues the \$613,000 concessions the County proposes are available through annual salary savings within the NCCPD. When officers retire or leave service for any other reason, the vacant positions are usually not filled until the next class of recruits graduates from the Police Academy. The FOP introduced Exhibit I which estimates salary savings over the period of September 2010 through December, 2011. In conservatively calculating salary savings, the FOP based its analysis simply on an entry level salary plus 48% benefit roll-up to estimate a “replacement savings” for each vacant position of \$5,536 per month. The FOP calculated the total estimated salary and benefits savings for September, 2010⁹ through June, 2011 was \$664,320 and was \$841,472 for the period of July through December 2011. The FOP concludes the County could finance the additional cost of the FOP’s last, best, final offer (which the County estimates would be \$613,000) with salary savings it has already accrued. *FOP Exhibit I.*

The County countered the FOP’s calculations by establishing that NCCPD salaries are funded annually at 98% of total salary¹⁰, with the assumption that there will be some departures during the fiscal year resulting in vacancies which may extend until a new Academy class graduates. The County documented that when officers leave service, they are contractually entitled to a “severance pay-out” which includes payment for unused sick and vacation leave and accumulated compensatory time. CFO Milowicki testified severance expenses are not budgeted

⁹ All of the listed vacancies occurred after the last Academy formed on or about September 7, 2010 and are vacant positions within the authorized strength of NCCPD. The graduation of the 35th Academy class on March 31, 2011 did not fill any of the vacant positions listed in FOP Exhibit I. *Testimony of Merrill, p. 437-438.*

¹⁰ The 2% is deducted from budgeted salary as an “Attrition Adjustment” in the Fiscal Year 2012 Budget. *Joint Exhibit 4, p. 116.* NCC CFO Milowicki testified total salaries for all NCC positions are budgeted at 98%. The Attrition Adjustment for NCCPD for FY 2012 is \$502,734.

annually¹¹ although the average annual cost is \$2.5 million for all County employees. He further testified that any salary savings (above the 2% which is not budgeted) are used to fund severance expenses and may also be used to fund overtime costs which exceed budget.

County Exhibit 7 detailed Police Severance Payouts for Fiscal Year 2011 and the first half of Fiscal Year 2012. Deducting from the totals on the exhibit the payouts to non-bargaining unit employees¹², payouts in Fiscal Year 2011 totaled \$685,514.86 and \$798,965.13 in the first half of Fiscal Year 2012. Comparison of the FOP's projected salary savings and the severance payouts supports the County's contention that there are not sufficient funds in the budget to cover the additional cost of the FOP's last, best, final offer.

The FOP also argues the County has more than adequate reserves to cover the 2.5% concessions it asserts it needs to balance the budget. The County has conceded that the FY2012 budget was the first County budget in at least ten years that has not been balanced either by the expenditure of reserves or with tax increases. PERB has previously addressed the impact of potential transfers from reserves and tax increases on an interest arbitration determination:

Revenue is dynamic in character. It constitutes a flow of moneys, in this case, into the City's coffers. Revenues from electricity, water and sewer enterprise funds consist of net income (operating and non-operating revenues less operating expenses), or "profits" in the vernacular. Included in non-operating revenues is "interest earned" which may include interest earned on the investment of reserved funds.

Reserves, on the other hand, are moneys that 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

¹¹ Approximately \$300,000 is budgeted annually to cover severance costs for grant funded positions throughout the County because federal moneys do not cover severance expenses.

¹² There was no dispute that employees Schmid, Bannon, and Kelleher were not bargaining unit employees or that Colonel McGowan (who retired in Fiscal Year 2012) was not in the bargaining unit

are expended, invested, or allocated is within the exclusive authority of the City's governing body.

The term "existing revenues" limits the Interest Arbitrator to considering revenues based on existing fee and taxation rates. It is beyond the scope of the Arbitrator's authority to consider whether such rates should or could be increased, whether other expenses should or could be decreased or reallocated, and/or whether existing reserves should or could be allocated to fund the proposals. While it is certainly within the authority of the governing body of a public employer to make any of those choices subject to the political will of its citizenry, it is not within the province of the Interest Arbitrator under the Police Officers' and Firefighters' Employment Relations Act. *Fraternal Order of Police, Lodge 9 v. City of Seaford*, Decision of the Interest Arbitrator on Remand, IV PERB 2659, 2675 (2002).

The record supports the conclusion that the additional cost of the FOP's offer cannot be funded based on existing revenues during the two year term of the collective bargaining agreement.

DECISION

For the reasons discussed above, based on the record created by the parties in this proceeding, the last, best, final offer of New Castle County 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.

WHEREFORE, the parties are directed to implement New Castle County'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: March 5, 2012

D. Murray-Sheppard

DEBORAH L. MURRAY-SHEPPARD
Executive Director, Delaware PERB