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Re: City of Wilmington v. Wilmington FOP Lodge #1,
Inspectors and Captains; C.A. No. 20244-NC
Date Submitted: October 29, 2003

Dear Counsel:

Plaintiff City of Wilmington (the "City") seeks to enjoin permanently an arbitration before the American Arbitration Association (the "AAA") involving a dispute with Defendant, Fraternal Order of Police, Lodge No. 1, Captains and Inspectors (the "FOP").[1] The principal issue is whether arbitration under a collective bargaining agreement may be compelled after the agreement's expiration when all facts giving rise to the dispute occurred after the expiration date. While this appears to be an issue of first

[1] *Wilmington Fraternal Order of Police, Lodge #1 v. City of Wilmington*, AAA #14390 00011 02 ALVA.

impression in Delaware, I am guided by the teachings of the United States Supreme Court in *Litton Financial Printing Division v. NLRB*.[2] For the reasons set forth in this post-trial letter opinion, the arbitration will be enjoined.

I. FACTUAL BACKGROUND

On or about August 18, 1999, the City and the FOP entered into a collective bargaining agreement (the "CBA"), which covered the period between July 1, 1998 and June 30, 2001. Article 3 of the CBA contained the grievance procedures which were "established in order to provide adequate opportunity for Captains and Inspectors of the Police Department to bring forth their views relating to any unfair or improper aspect of their employment situation and seek correction thereof."[3] If, after certain initial steps, any grievance was left unresolved, the procedure entitled the FOP to "appeal to an impartial arbitrator."[4]

Section 9.4 of the CBA prescribed a Performance Incentive Program ("PIP") as a method of providing for bonus payments to the Captains and Inspectors. The bargaining unit members were eligible for payments under PIP based upon their overtime budget marks, individual performance marks, and agency performance marks as outlined in the

[2] 501 U.S. 190 (1991).
[3] Collective Bargaining Agreement § 3.1.
[4] *Id.* § 3.4.

CBA. The Captains and Inspectors were first to be evaluated from July 1, 1999 to June 30, 2000, and PIP payments would then be made by the City for that period on September 30, 2000. The next (and, according to the City, final) PIP payment, as provided for in the CBA, would be made for the CBA's last year on September 30, 2001.

The PIP authorized bonuses on a three-tiered basis. The first tier concerned overtime budget marks. If the entire Wilmington Police Department did not exceed its targeted overtime budget within the fiscal year, the Captains and Inspectors were each eligible to receive up to $2,000. Furthermore, each individual Captain or Inspector whose division did not exceed its divisional overtime budget mark could receive up to an additional $2,000.

The second tier involved individual performance marks. If the individual officer "met expectations, was above expectations, or far exceeded expectations" he or she could receive an additional sum ranging between $1,000 and $3,500.

The last tier consisted of agency performance marks related to the Wilmington Police Department in general. These marks were based on citizen satisfaction surveys to be conducted by the University of Delaware in the spring of 1998, the fall of 1999, and fiscal year 2001. The PIP payments were premised on the improvements of these marks in each subsequent survey.

The total PIP payment was the aggregate of these three components. The first of these payments was made on October 18, 2000, for a total payout of $73,273. The final PIP payment called for under the CBA was to be made on September 30, 2001. However, the City and the FOP disagreed on the amount of the percentages of improvement that would be reflected in the 2001 survey. Negotiations between the two parties to resolve the dispute did not prove fruitful and the FOP filed a grievance which was submitted to arbitration on July 26, 2002. During this arbitration, a settlement was reached under which each member received an additional $8,000 performance and incentive payment.

The CBA contained a provision providing that it "shall remain in full force and effect until June 30, 2001, and thereafter from year to year, unless either party to this Agreement gives notice prior to March 15, 2001."[5] Prior to that deadline, the FOP gave the required notice, and negotiations for a new bargaining agreement began.

In September 2002, the Captains and Inspectors presented the City with unsolicited evaluations for the period between July 1, 2001 and June 30, 2002 and requested PIP payments be made on September 30, 2002. The City, taking the position that the PIP program had expired along with the CBA on June 30, 2001, rejected the request for payments.

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[5] *Id.* § 17.1.

On October 15, 2002, the FOP filed for arbitration on the issue of PIP for fiscal year 2002. While the City initially participated in the arbitration, even helping to select the arbitrator, it noted that it did so under protest. The arbitration was initially scheduled for April 25, 2003.

This was not the first instance of a grievance arising between the FOP and the City after the expiration of their collective bargaining agreement. Similar events had occurred on at least four previous occasions and each time the dispute had been submitted to binding arbitration. Specifically, the agreement, effective between July 1, 1993 and June 30, 1995, was not executed until March 15, 1996 and the successor agreement which was to govern the period commencing on July 1, 1995, was not executed until June 25, 1997. Between June 30, 1995 and June 25, 1997, when no agreement was in place, two disputes were resolved through arbitration. The first involved extra job restrictions placed solely on the rank of Captain, and the second involved three Captains who were removed from their usual responsibilities and reassigned to different work shifts.

Similarly, the collective bargaining agreement between the City and the FOP governing Patrolpersons to Lieutenants, effective between July 1, 1995 and June 30, 1998, was not executed by the parties until December 4, 1996. When the City initiated

changes in shift time compensation in January 1996 for Detectives, the bargaining unit representative filed a grievance which resulted in an arbitration award.

The FOP also points to another, more recent instance in which a grievance between it and the City was arbitrated without an effective bargaining agreement in place. This grievance concerned allowing twenty officers to take a promotional test without sufficient seniority. The City honored the award that resulted from this arbitration as it had on the prior occasions.

In March 2003, with negotiations over a successor agreement to the CBA at an impasse, the City sought a preliminary injunction in this Court to enjoin the arbitration proceedings in this matter. When the arbitration was voluntarily rescheduled, that motion was denied as moot. Trial was then scheduled, and discovery went forward. At trial, the parties stipulated to the facts.[6]

[6] This factual background is largely taken from the undisputed facts as set forth in both parties' opening briefs. In its brief, the FOP has pointed to three facts the City used in its brief concerning negotiations over a new series of PIP payments which the FOP argues is not supported by the record. These three areas of contention are (1) whether Inspector Wright, the FOP's chief negotiator, informed the City that the FOP would wait until the new administration took over to begin negotiations on new percentages; (2) whether during negotiations the FOP acknowledged that the PIP program ended with the expiration of the CBA, and proposed a new bonus program; and (3) whether the FOP or a representative inquired about overtime budget marks during the earlier arbitration or the preceding year. While the City disputes whether or not its version of the facts has support in the record, it does note that they are "irrelevant to the issue at bar." City of

II. CONTENTIONS

This case, however argued, essentially turns on a narrow question of law: whether arbitration under the CBA may still be compelled when the facts and occurrences leading to the dispute arose after the CBA, by its terms, had expired. Specifically, the City asks this Court to enjoin the arbitration before the AAA which, if it goes forward, would resolve the question of whether the Captains and Inspectors are entitled to PIP payments for fiscal year 2002.

The City, relying heavily on the United States Supreme Court's decision in *Litton*, argues that arbitration, which is contractual in nature, cannot be compelled after expiration of the enabling contract when the dispute is based on facts occurring after expiration. It also argues that since it would be injured by any negative ruling in an arbitration to which it did not agree, it has met all requirements for a permanent injunction.

The FOP replies by arguing that *Litton* is not on point, and, even if it is, at least one of its exceptions is met in this case. It also argues that grievance procedures are

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Wilmington's Corrected Reply Br. in Supp. of its Mot. for a Permanent Inj. at 8. I agree with the City, and therefore, these factual issues are not resolved in this letter opinion.

mandatory bargaining subjects and thus the status quo with respect to them must be maintained while a new agreement is worked out. Finally, it argues that the City can still be compelled to arbitrate based either on its past performance of arbitrating disputes after expiration of the collective bargaining agreement, and that the City waived its rights to object to the arbitration by acquiescing in the arbitration of the PIP claim and participating in the arbitration process.

III. ANALYSIS

A. *Applicable Standard*

In order to obtain a permanent injunction, the City must demonstrate: "(1) it has proven actual success on the merits of its claims; (2) irreparable harm will be suffered if injunctive relief is not granted; and (3) the harm that will result if an injunction is not entered outweighs the harm that would befall the [FOP] if an injunction is granted."[7] With respect to irreparable harm, a "party facing the imminent prospect of arbitrating a non-arbitrable claim has been found to be threatened by sufficiently irreparable harm to justify an injunction."[8] Thus, this letter opinion will only address further whether the

[7] *Christiana Town Ctr., LLC v. New Castle County*, 2003 WL 21314499, at *2 (Del. Ch. June 6, 2003) (footnote omitted). *See also Draper Communications, Inc. v. Del. Valley Broadcasters LP*, 505 A.2d 1283, 1288 (Del. Ch. 1985).

[8] *Bd. of Educ. of the Appoquinimink Sch. Dist. v. Appoquinimink Educ. Ass'n*, 1999 WL 826492, at *4 (Del. Ch. Oct. 6, 1999). *See also Bd. of Educ. of Sussex County Vocational-Technical Sch. Dist. v. Sussex Tech Educ. Ass'n*, 1998 WL 157373, at *5

City has met its burden with respect to showing success on the merits and the balance of the harms.

B. *The Import of Litton*

The general rule is that certain provisions of a collective bargaining agreement known as "mandatory bargaining subjects" may not be unilaterally changed upon the expiration of the collective bargaining agreement.[9] In Delaware, these mandatory bargaining subjects include all "terms and conditions of employment" or those "matters concerning or related to wages, salaries, hours, grievance procedures, and working conditions."[10] The importance of maintaining the status quo for mandatory bargaining subjects has been explained by the Delaware Public Employment Relations Board as follows:

> Maintaining stability during the negotiation process is a crucial factor in continuing the orderly and uninterrupted operations of [public agencies] and to maintaining an environment where the parties are free to negotiate in good faith on an equal basis. To permit one of the parties to impose a unilateral change in a mandatory subject of bargaining, without prior negotiation at least to the point of impasse, jeopardizes the desired stability and permits one party to effectively

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(Del. Ch. Mar. 18, 1998); *Del. Pub. Employees v. New Castle County*, 1994 WL 515291, at *4 (Del. Ch. Aug. 25, 1994).

[9] *See, e.g., Laborers Health & Welfare Trust Fund for N. Cal. v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.6 (1988); *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

[10] 19 *Del. C.* § 1602(n).

> circumvent the collective bargaining process, thereby creating the potential for unfair advantage.[11]

One example of a mandatory bargaining subject, as conceded by the City, is PIP.[12] Likewise, "arrangements for arbitration of disputes are a term or condition of employment and a mandatory subject of bargaining."[13]

Certain mandatory bargaining subjects are excluded from this prohibition on unilateral change for statutory or policy reasons.[14] For example, in a regime where employees have the statutory right to strike "no-strike clauses are excluded from the unilateral change doctrine, except to the extent other dispute resolution methods survive the expiration of the agreement."[15] The question here is not whether PIP, as a mandatory bargaining subject, would survive expiration of the CBA, but, instead, is whether the

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[11] *Brandywine Affiliate/NCCEA/DSEA/NEA v. Brandywine Sch. Dist. Bd. of Educ.*, U.L.P. No. 1-9-84-6B, slip. op. at 87 (Del. P.E.R.B. Nov. 20, 1984).

[12] Pl.'s Op. Br. in Supp. of its Mot. for Permanent Inj. at 7 & n.3. I note that this concession is for the purposes of this proceeding only, and the City has reserved the right to argue in any collateral proceedings that the PIP program is not a mandatory subject of negotiations.

[13] *Litton*, 501 U.S. at 199.

[14] *Id.*

[15] *Id.*; *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986). Other examples include "union security and dues check-off provisions [which] are excluded from the unilateral change doctrine because of the statutory provisions which permit these obligations only when specified by the express terms of a collective-bargaining agreement." *Litton*, 501 U.S. at 199.

parties remain bound to contractual arbitration as the mechanism for resolving disputes under the CBA.[16]

The United States Supreme Court in *Litton*[17] concluded that arbitration, as a matter of both contract and consent, could not be compelled upon a party to a collective bargaining agreement if the facts of the grievance did not arise out of the contract.[18] In *Litton*, the operator of a check printing plant and the union representing its employees entered into a collective bargaining agreement which contained an arbitration provision for handling certain disputes between the parties. After the agreement expired, but before

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[16] The FOP argues that the status quo must be maintained as to all mandatory bargaining subjects after the expiration of the CBA and the dispute resolution mechanism — in this case, arbitration — is one such subject which must be maintained.

[17] It is appropriate to look to federal precedent in resolving this novel question of state law because of the similarity in law and policy between the federal and state labor schemes. *See City of Wilmington v. Wilmington Firefighters Local 1590*, 385 A.2d 720, 723 (Del. 1978) ("This kind of controversy has been litigated elsewhere and so we look for guidance to the procedure adopted in the Federal forums and by the Courts and administrative tribunals in other States for dealing with such situations."). Federal precedent is especially useful in cases dealing with labor law given the similarities between the Federal Labor Act and Delaware's Public Employment Relations Act. *See id.* at 724 ('"In cases where problems raised under Delaware's labor law are similar to those that arise under the (federal law), Delaware could be expected to consider and, in all likelihood, follow federal law."') (quoting *Cofrancesco v. City of Wilmington*, 419 F. Supp. 109, 111 (D. Del. 1976)). *See also Del. Correctional Officer's Ass'n v. State*, 2003 WL 23021927, at *7 (Del. Ch. Dec. 18, 2003) ("Federal precedent is also helpful in assessing the appropriateness of the [Public Employment Relations Board's] decision to limit the remedy to a cease and desist order.").

[18] *Litton*, 501 U.S. at 201–02.

a new agreement had been reached, Litton, the employer, laid off ten workers without notice to the union. The union filed a grievance for this action and the employer refused to submit to the grievance and arbitration provisions of the collective bargaining agreement. The union filed an unfair labor practice charge with the NLRB, which then ordered Litton to process the grievance, but did not require arbitration. Upon appeal by the union, the Ninth Circuit Court of Appeals reversed the NLRB and ordered the arbitration.[19] The Supreme Court, however, overturned the Court of Appeals and held that arbitration could not be compelled in that instance.

In reaching its decision, the Supreme Court looked to a ruling of the NLRB which held that arbitration clauses, while being mandatory bargaining subjects, were excluded from the prohibition on unilateral change because "the commitment to arbitrate is a 'voluntary surrender of the right of final decision which Congress . . . reserved to [the] parties . . . . [A]rbitration is, at bottom, a consensual surrender of the economic power which the parties are otherwise free to utilize."'[20] The Court also acknowledged "the basic federal labor policy that 'arbitration is a matter of contract and a party cannot be

[19] *NLRB v. Litton Fin. Printing Div.*, 893 F.2d 1128 (9th Cir. 1990).
[20] *Litton*, 501 U.S. at 199–200 (quoting *Hilton-Davis Chemical Co.*, 185 N.L.R.B. 241, 242 (1970)).

required to submit to arbitration any dispute which he has not agreed so to submit."'[21] The Court concluded that its ruling in *Litton* was "grounded in the strong statutory principle . . . of consensual rather than compulsory arbitration"[22] and conformed with its previous holding that '"[n]o obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so."'[23]

Thus, as a general matter, arbitration of disputes after expiration of the collective bargaining agreement establishing arbitration as part of the grievance procedure will be ordered only if the dispute can be said to arise under the contract. *Litton* established the three instances in which the post-expiration grievance can be said to arise under the contract:

> where it involves facts and occurrences that arose before expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement.[24]

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[21] *Id.* at 200 (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)).
[22] *Id.*
[23] *Id.* (quoting *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 374 (1974)).
[24] *Id.* at 206.

I am persuaded that *Litton* also fairly and accurately sets forth the proper analysis for resolving the question under Delaware law. I reject the FOP's argument that *Litton* is not on point because it involved a private employer whose employees were not prohibited from striking while the FOP's members are prohibited from striking by 19 *Del. C.* § 1616. Although members of the FOP do not have the same option to strike as private employees, they have the full panoply of rights conferred by Delaware's Police Officers' and Firefighters' Employment Relations Act.[25] Further, the dispute resolution device of litigation remains an option. More crucial, however, is that the right to strike has no bearing on the fundamental premise supporting *Litton*: that a party may not be required to submit to a dispute resolution process beyond that to which it agreed.

C. *The Facts and Occurrences Did Not Arise Before Expiration of the CBA.*

In this case, as it was with the employer in *Litton*, all of the facts and occurrences of the dispute arose after the expiration of the CBA. There is no dispute that the CBA

[25] 19 *Del. C.* Ch. 16. In a broad policy sense, the unilateral change doctrine is a practical approach to the question of: if the collective bargaining agreement does not govern the employer-employee relationship, then what? For example, after expiration of the collective bargaining agreement, if its terms did not control, then what would the salary of the employees be? For this type of question, there is no default standard for the parties to rely upon. With respect to dispute resolution and arbitration, the courts, for example, are able to answer those questions that arbitrators otherwise would be expected to answer. This alternative process may be more cumbersome or expensive, but it is accessible and serviceable.

expired on June 30, 2001 and called for the last PIP payment to be made for fiscal year 2001 on September 30, 2001. The FOP seeks arbitration concerning PIP payments for fiscal year 2002 based on performance that was given between July 1, 2001 and June 30, 2002. Thus, the PIP payments would be based on job performance and actions, or facts and occurrences, that occurred after the expiration of the CBA. Under the logic of *Litton*, arbitration cannot be compelled in this instance.[26]

D. *There Are No Vested Rights Involved in this Dispute*

While *Litton* did not give a definition of "an action taken after expiration [that] infringes a right that accrued or vested under the agreement,"[27] it does use deferred compensation as an example of a vested right.[28] Thus, it can be inferred that an "accrued or vested right" is one as to which a party has satisfied all material conditions required in order to be entitled to the particular right even though he or she has not yet actually received the benefit of the right.

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[26] The FOP also argues that the rationale of *Litton* should be rejected because it was decided in 1991 and the City cannot point to a single decision in which the Delaware Public Employment Relations Board (the "PERB") has adopted its rationale. While this may be true, neither counsel has directed this Court to a decision of the PERB which rejects this rationale either.

[27] *Litton*, 501 U.S. at 206.

[28] *Id.* at 210.

The FOP's invocation of the vested rights doctrine fails simply because there are no vested rights with respect to PIP payments for fiscal year 2002. The work or performance that was to be rewarded was to occur during that fiscal year; thus, no right to be determined based on events in that fiscal year could have become vested before expiration. The FOP has cited one judicial decision and one administrative decision from other states in support of its position; neither is helpful to its cause.

In the first case relied on by the FOP, *City of Fort Wayne v. International Association of Machinists and Aerospace Workers, Lodge 2569*,[29] the Indiana Court of Appeals affirmed a trial court's ruling compelling the City of Fort Wayne to arbitrate a dispute with a union after the collective bargaining agreement had expired. The Court so ruled because, at the time the collective bargaining agreement was entered into, the City Code had an ordinance which provided that during negotiations for a new contract the existing labor agreement stayed in full force and effect, and this ordinance thereby encompassed the arbitration clause. This case is readily distinguishable from the case at bar because Delaware has no such legislative provision. Furthermore, *Fort Wayne* mentions *Litton* only in passing and provides no discussion of the second exception which would help demonstrate a vesting of rights in this case.

[29] 644 N.E.2d 133 (Ind. Ct. App. 1994).

Similarly, the second case relied upon by the FOP, *Illinois Nursing Association v. Board of Trustees of the University of Illinois*,[30] is readily distinguishable and provides no support for its argument. In the case, the Illinois Nurses Association filed an unfair labor practice charge alleging that the University committed an unfair labor practice when it ceased paying step increases to the unit employees after the expiration of their collective bargaining agreement. The University's request to refer the suit to arbitration was granted over the Association's protest, because the Illinois Administrative Law Judge found that "[e]ven though the dispute arose after expiration of the collective bargaining agreement, the dispute clearly arose under the contract."[31] The reasoning of this case is not entirely clear;[32] however, it is worthy of note that the collective bargaining agreement in question provided that the "wages specified herein have been and shall in the next subsequent Agreement be, established in negotiations by and between the Parties who shall determine . . . levels of compensation." Thus, this collective bargaining agreement called for a continuing duty to negotiate the levels of compensation for the next agreement, and there was at least an argument that the right to receive the step increases

[30] 8 PERI P 1054 (Ill. E.L.R.B. May 28, 1992).
[31] *Id.*
[32] The opinion cites *Litton* but provides no subsequent discussion. Furthermore, it is not clear which of the three *Litton* exceptions the court applied in reaching its decision.

was a vested right that continued until negotiations reached another result. This is very different from the present situation where the CBA specified when the last year's PIP payment was to be made and was silent about PIP payments after the expiration of the CBA.

Thus, there is no "vested right" to post-expiration PIP payments.

E. *Under the Usual Principles of Contract Interpretation, the Arbitration Provision Did Not Survive Expiration of the CBA*

The FOP finally argues that the third exception to *Litton* is also met, in that, under recognized principles of contract interpretation, the City has waived its right to object to the arbitration.[33] This waiver argument has two aspects: first, that the City's prior practice of continuing to arbitrate disputes beyond the expiration of the CBA mandates this case proceed to arbitration; and second, the City, by its participation in the arbitration process, has waived any objection that it may have. I reject both arguments.

[33] The FOP does not contend that the CBA can be read to allow specifically for continuance of the arbitration process. It would have been a simple drafting exercise to accomplish that result, if it had been the parties' intention.

1. Waiver Based on Course of Dealing

While extrinsic evidence, such as course of performance or course of dealing may be used to aid a court in interpretation of an ambiguous contract,[34] it may also be used to supply an omitted term when a contract is silent on an issue.[35] The FOP has correctly pointed out that the CBA is silent as to whether post-expiration arbitration should occur and, thus, seeks to use the City's prior conduct in previous agreements to suggest that arbitration is required by the contract. While the FOP has pointed to four instances during the last ten years in which the City has agreed to arbitrate disputes after expiration of their collective bargaining agreement, this evidence does not amount to a course of dealing which would mandate that this dispute be sent to arbitration. Three of these instances relate to agreements between the City and the FOP in the course of its representation of Captains and Inspectors,[36] and two of those arbitrations occurred after the expiration of the same collective bargaining agreement.[37] These few instances,

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[34] *Wilmington Firefighters Ass'n, Local 1590 v. City of Wilmington*, 2002 WL 418032, at *****10–*11 (Del. Ch. Mar. 12, 2002); *Appoquinimink Educ. Ass'n*, 1999 WL 826492, at *8–*9.

[35] RESTATEMENT (SECOND) OF CONTRACTS § 223 & cmt. b. (1979); 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.13 (2d ed. 2001).

[36] The fourth related to the FOP's representation of Patrolpersons and Lieutenants.

[37] The City has argued in its brief that its practice is to object to post-expiration arbitration. Because it is not critical to my decision, this is not addressed.

spread out over a decade, do not amount to the evidence necessary to compel a party to arbitrate a dispute when there is otherwise no contract mandating arbitration occur.

This holding, that the City is not bound to arbitrate simply because it has done so in the past, is entirely in keeping with the rationale of *Litton* that "arbitration is not compulsory."[38] As the United States Supreme Court noted:

> If . . . parties who favor labor arbitration during the term of a contract also desire it to resolve postexpiration disputes, the parties can consent to that arrangement by explicit agreement. Further, a collective-bargaining agreement might be drafted so as to eliminate any hiatus between expiration of the old and execution of the new agreement, or to remain in effect until the parties bargain to impasse.[39]

This Court has previously stated this principle by holding that "[d]isputes arising under agreements that are collateral or separate from the collective bargaining agreement are not grievable or arbitrable unless expressly so made."[40] In this case, no such agreement was made, and no such right to arbitrate was secured by the FOP. Thus, there is no basis to mandate that the City arbitrate this dispute based on a few past instances in which it did agree.

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[38] *Litton*, 501 U.S. at 201.
[39] *Id.*
[40] *Del. Pub. Employees*, 1994 WL 515291, at *3.

2. Wavier Based on Participation in the Arbitration

The FOP's last argument is that the City has waived its right to object to the arbitration by assisting in the selection of the arbitrator and the place and time of its arbitration. This argument is equally without merit.

'"Waiver is the voluntary and intentional relinquishment of a known right."'[41] A party can waive its right to arbitrate when it "actively participate[s] in a lawsuit or take[s] other action inconsistent with the right to arbitration."[42] Such conduct includes initiating a lawsuit instead of proceeding to arbitration, actively participating in discovery, and unreasonably delaying in requesting arbitration.[43]

The FOP argues that the corollary to the above rule must be true, that at some point a situation arises in which a party who has participated in the arbitration process has manifested an intent to be bound by any accompanying decision, and waives the right to initiate a lawsuit. While there may be a situation in which FOP's argument has merit, this clearly has not happened in this case. Here, the City only participated in the selection of the arbitrator and in setting the place and time of arbitration. It did not

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[41] *Am. Family Mortgage Corp. v. Acierno*, 640 A.2d 655 (Del. 1994) (TABLE) (quoting *Realty Growth Investors. v. Council of Unit Owners*, 453 A.2d 450, 456 (Del. 1982)).
[42] *Falcon Steel Co. v. Weber Eng'r Co.*, 517 A.2d 281, 288 (Del. Ch. 1986).
[43] *Russykevicz v. State Farm Mut. Auto. Ins. Co.*, 1994 WL 369519, at *4 (Del. Ch. June 29, 1994).

initiate the arbitration discovery related to the matter, factors which were crucial in the cases which held that a party was estopped from pursuing their right to arbitrate. The limited participation the City had with this arbitration, as matter of preserving its rights and avoiding any prejudice to it, is not enough to find that the City waived its right to object to the arbitration, especially as there was no contractual agreement to arbitrate in this instance.

F. *Balance of the Hardships*

The FOP also argues that it has suffered prejudice as a result the City's delay in seeking injunctive relief in this matter, in that it is now time barred from seeking relief in other forums, such as filing an unfair labor practice charge with the PERB or filing a complaint in the appropriate jurisdiction.[44] These effects however are easily avoided because the relief in this case will be expressly conditions upon the City's agreement not to assert the statute of limitations (or other time bar defense) as a defense should the FOP seek to file these or related actions in the near future.[45]

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[44] That these other alternatives may not be as efficient or may not lead to the same substantive result that the FOP may expect in arbitration is not prejudice. The FOP has not demonstrated that it cannot obtain a fair hearing in an available forum.

[45] This condition also accommodates the FOP's arguments regarding laches. The elements of laches are (1) that the plaintiff has knowledge of the claim and (2) the defendant suffers prejudice as the result of an unreasonable delay. *Fike v. Ruger*, 752 A.2d 112, 113 (Del. 2000). With the City precluded from asserting the statute of

With this condition, the balancing of the hardships favors the City. Compelling the City to arbitrate a dispute that it is not otherwise obligated to arbitrate would work a hardship on the City that outweighs any consequence to the FOP resulting from having to resolve the dispute in a forum that was not its first choice.

IV. CONCLUSION

The City has demonstrated that it will have actual success on the merits of its claim in that it has shown that the dispute related to the PIP payments is not now arbitrable under the CBA. Further, the City would suffer irreparable harm if it were forced to arbitrate this otherwise non-arbitrable claim. Lastly, the balancing of the hardships favors the City. Thus, the arbitration will be permanently enjoined for the reasons stated in this letter opinion and subject to the condition set forth. I ask counsel to confer and submit within ten days an order to implement this letter opinion.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-NC

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limitations as a defense, the FOP will not suffer any prejudice and, thus, does not have the defense of laches available to it.