

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

DELAWARE STATE TROOPERS ASSOCIATION, : Decision of the
 : Binding Interest
and : Arbitrator
 :
 : **BIA 08-01-612**
STATE OF DELAWARE, DEPARTMENT OF SAFETY AND :
HOMELAND SECURITY, DIVISION OF STATE POLICE. :

Appearances

Jeffrey M. Weiner, Esq., for DSTA
Aaron Shapiro, SLREP for the State

Background

The State of Delaware, Department of Safety and Homeland Security (“State” or “DSHS”) is a public employer within the meaning §1602(p) of the Police Officers and Firefighters Employment Relations Act (“POFERA”), 19 Del.C. Chapter 16 (1986). The Division of State Police (“DSP”) is an agency of DSHS.

The Delaware State Troopers Association (“DSTA”) is an employee organization within the meaning of §1602(g) of the POFERA. DSTA was certified in early 1972 to represent a bargaining unit of “All State Police Officers including Recruit Troopers, Troopers, Troopers First Class, Sergeants, Corporals, Detectives, Detective Sergeants, Lieutenants, Captains, Staff Captains and Majors (excluding Civilians, Lt. Colonels and Colonel)”. DOL Case 75.

The State and DSTA have a long-standing collective bargaining relationship. The most recent agreement expired on June 30, 2007. The parties initiated negotiations for a successor agreement on or about May 23, 2007.

On or about September 17, 2007, DSTA requested mediation to facilitate resolution of the issues which had not been resolved in negotiations. A mediator was appointed by the Public Employment Relations Board (“PERB”) and three mediation sessions were conducted. Mediation concluded on January 8, 2008, without settlement.

On January 12, 2008, DSTA requested PERB authorize binding interest arbitration. Last, best, final offers were submitted by both parties on January 30, 2008. On March 1, 2008, without objection by either party, PERB determined “a good faith effort had been made by both parties to resolve their labor dispute through negotiations and mediation and ... the initiation of binding interest arbitration would be appropriate and in the public interest.” *19 Del.C. §1615(a)*. A prehearing conference was conducted on April 10, 2008.

The binding interest arbitration hearing was held before the Executive Director on June 4, July 14 and July 15, 2008, at which time the parties presented testimony and documentary evidence in support of their respective positions. Closing argument was provided in post-hearing briefs, which were received on August 4, 2008, at which time the record closed. The following discussion and decision result from the record thus created.

LAST, BEST, FINAL OFFERS OF THE PARTIES

DSTA:

(a) **Salary Year #1** (7/01/07- 6/30/08):

Article 20 SALARIES

20.1 The pay scale of Employees in effect for 7/01/07 to 6/30/08 shall be increased by 2% effective July 1, 2007, and shall be reflected in an exhibit entitled Exhibit A to this Agreement and initialed by the parties.

(b) Salary Year #2 (7/1/08 – 6/30/09)

Article 20 SALARIES

20.1 The pay scale of Employees in effect for 7/01/08 to 6/30/09 shall be increased by 3.5% effective July 1, 2008, and shall be reflected in an exhibit entitled Exhibit B to this Agreement and initialed by the parties.

(c) First Sergeant

Add new Professional/Administrative position – First Sergeant

(a) Pay Grade 10 – Salary 5% above Sergeant (Pay Grade 9).

(b) 18 years of service AND 5 years time in rank (Sergeant).

(c) 1st Sergeants shall have the option to take compensatory time off in lieu of overtime pay in accordance with Divisional Manual's provisions for Lieutenant; and

(d) Effective 7/1/08.

STATE:

1. Increase recruit salary from \$41,151 to \$43,651, effective July 1, 2008
2. Article 20.1: Increase pay scale 1.5% effective July 1, 2007, and 1.5% effective July 1, 2008.
3. Article 7.1(a) – Grievance Procedure – Expanded Definition of Just Cause

“Just Cause” shall also include any of the following: within 30 days of the conclusion of an administrative investigation, the absence of a review by Management of investigative findings or the failure of Management to inform the officer of the findings; within 15 days of Management's review, the failure by Management to recommend further action; and, within 30 days of the conclusion of any hearing, the failure to issue a decision to impose discipline. These three standards shall only provide grounds for an Employee to bring a grievance under this Article to request the referenced action. They shall have no effect on the underlying investigation, review or decision by Management and the related substantive issues and standards.”

4. New Article 37 – Labor Management Committee: (renumber existing Article 37 to 38)

Insert the following language: “In furtherance of the objectives articulated in Executive Order 81¹, the parties agree to the creation of a joint Labor/Management Committee that will conduct a comprehensive review of the recruitment, selection, and promotional processes within the uniformed ranks of the Delaware State Police. The Committee will be comprised of an equal number of DSTA and management representatives, and will meet at regular intervals commencing no later than 60 days after ratification of this Agreement. After completing its review, the Committee will issue written findings and recommendations to the Director of Labor Relations and Employment Practices, no later than May 31, 2008. These recommendations and findings shall include but not be limited to: (1) recruitment issues; (2) selection criteria; (3) job duties and responsibilities; and (4) compensation. The Director of Labor Relations and Employment Practices shall then meet with the Secretary, Department of Safety and Homeland Security, and Director, Office of Management and Budget, to review the findings and recommendations and determine their feasibility.

Nothing herein shall prevent the Committee from agreeing upon and implementing recommendations prior to the issuance of its written findings and recommendations; provided, however, that no such recommendation may be implemented without having first been jointly agreed upon by the Secretary, Department of Safety and Homeland Security, and Director, Office of Management and Budget.”

MUTUAL AGREEMENTS REACHED BY THE PARTIES²

Article 21.2 – Shift Differential Payment

Increase the annual payment of \$1,750, effective July 1, 2006, to \$2,000, effective July 1, 2007 for the term of this agreement.

Article 21.2 – Pro-rata Shift Differential Payment for Patrol Lieutenants

Insert the following language: “A Lieutenant, assigned to patrol duties, normally working day shift, required to work a night shift either on a permanent, rotating or partial basis, shall receive the above special payment pro rated based upon work performed on each shift.”

¹ Executive Order Number Eighty-One: Continuing Equal Opportunity Hiring Standards And Practices For Delaware Government

² DSTA included in its Closing Argument that modifications to Article 7.1, Grievance Procedure, “to set certain goals (but not deadlines) for Case Review and Decision” were accepted by mutual agreement. It is not clear to this arbitrator whether that general description refers to the State’s proposal for changes to the “Just Cause” definition included in Article 7.1.

Article 21.1 – Special Payment for Certified Bilingual Skills:

5. Certified Bilingual (Any Language) - \$50

STATUTORY PROVISIONS

§ 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. (65 Del. Laws, c. 477, § 1; 70 Del. Laws, c. 186, § 1; 72 Del. Laws, c. 271, §§ 4, 8; 74 Del. Laws, c. 173, § 1.)

PRINCIPAL POSITIONS OF THE PARTIES

DSTA:

DSTA argues the State's proposal to create a Labor-Management Committee which requires that the committee's work be completed no later than May 31, 2008, must be rejected because it cannot be implemented. Because this proposal is impossible to implement, DSTA asserts the State's last, best, final offer must be rejected in its entirety.

DSTA also argues that the State's proposal for increasing the starting Recruit salary by \$2,500 must be rejected because it destroys the internal equity of the negotiated salary matrix. The State's proposed increase decreases the differential between the starting salary for Recruits and Troopers by 3.3%. DSTA argues that the \$2,500 increase should be applied to the entire matrix in order to maintain the negotiated internal equity.

DSTA asserts that the "overwhelming evidence" favors its proposal to create a First Sergeant career step. Changes to the promotional process have resulted in a bias toward less senior officers who "test well" over more senior and experienced officers. It notes that as of July 1, 2007, "approximately 1 out of 3 Lieutenants had less than 20 years of service." *DSTA Argument, p. 6*. It argues that DSP supports DSTA's identified need for career development within the rank of Sergeant and that the DSTA proposal is generally worded to provide management flexibility to use First Sergeants as needed to fill in for Lieutenants and to perform other administrative and supervisory functions. It also notes the states of Virginia, Maryland, and New Jersey, as well as the New Castle County and City of Wilmington Police Departments all have a senior sergeant position.

It argues that its proposal does not include a testing requirement or other competitive or selective criteria because the State did not propose or indicate it desired to include such elements. DSTA argues that the State, in fact, refused to negotiate on this proposal

DSTA argues that the First Sergeant proposal is intended to “address the appearance of African-American State Troopers plateauing at the rank of Sergeant.” *DSTA Closing Argument, p. 14.* It notes that of the 57 highest ranking DSP positions, only 1 appointed Major and 1 Captain (who was promoted before the testing procedures were changed) are African-American. Although the State of Delaware has a 20.9% African-American racial composition, there are currently no African-American DSP Lieutenants; consequently there are no African-American candidates eligible to test for Captain (which requires that officers be Lieutenants in order to qualify to test). DSTA provided the results of the promotional process for 2006-07, and 2008-09 to support its conclusion that the promotional process results in African-American candidates being ranked in promotional bands that are so low as to preclude any real possibility of promotion. *DSTA Exhibits 17 & 20.* It argues that by providing training and career development within the rank of Sergeant, officers would be better qualified to stand for promotion, improving their rankings within the promotional bands.

DSTA argues that evidence supports its salary proposal based on comparable 4% increases granted to New Jersey State Troopers and the expected 3.5% increase for Pennsylvania Troopers. It also notes that the four largest police forces within the State (New Castle County, City of Wilmington, City of Newark and City of Dover) received percentage increases which were closer to DSTA’s proposal than to the State’s proposal.

DSTA asserts the State's Salary Survey of other jurisdictions was incomplete and much of the information contained therein was inaccurate or misleading. It discounts the State's argument that the bi-annual longevity step increase should be included in calculating the individual increases under the two proposals, as those longevity increments are included in both the State's and DSTA's proposals.

For all of these reasons, DSTA argues that its last, best, final offer should be determined to meet the statutory criteria and should be accepted in its entirety.

STATE:

The State argues the arbitrator may not consider DSTA's First Sergeant proposal because it is a discretionary subject of bargaining over which the arbitrator has no authority under 19 Del.C. §1615(a). It moved to have the arbitrator consider this argument as a preliminary matter on the first day of hearing, arguing a decision as to whether the First Sergeant proposal constituted a discretionary subject of bargaining would be dispositive of the scope and outcome of the interest arbitration hearing. It argues that because the statute requires the arbitrator to accept one of the last, best, final offers "in its entirety", if the First Sergeant proposal is held to be discretionary and outside of the arbitrator's authority to consider, DSTA's entire offer must be rejected. The arbitrator ruled to proceed with the hearing, noting that the "discretionary subject" question would be dealt with preliminarily in the decision.

The State argues DSTA bears the burden of demonstrating that the creation of the First Sergeant and the standards and process for placing employees into that position are mandatory subjects of bargaining over which the State is obligated to bargain. It asserts "nearly every aspect of DSTA's First Sergeant proposal implicates matters of inherent

managerial policy and discretion for which the State cannot be compelled to bargain under the POFERA.” *State closing arg.*, p. 9.

The State maintains DSTA has committed a *per se* unfair labor practice by insisting to impasse on the negotiation of a permissive subject of bargaining, i.e. the First Sergeant proposal. It argues that the arbitrator should “decline to accept DSTA’s last, best, final offer as it would be improper to support a course of action that grows out of a failure to bargain in good faith...” *State closing arg.*, p. 26.

The State argues in the alternative that DSTA has failed to meet its burden of demonstrating there is a compelling reason to alter the status quo by adding a new First Sergeant rank to the organizational structure of the Delaware State Police. The State notes that the creation of a non-competitive and non-selective rank is without precedent in DSP.

The State argues that acceptance of its 1.5% salary increase in each of the two years of the agreement maintains a competitive salary structure with comparable police agencies. It asserts the relevant comparison should be between actual salary and total compensation rates rather than a comparison of across-the-board percentage increases. The State also includes in its salary comparison the bi-annual longevity increases received by uniformed DSP officers for purposes of comparison.

The State argues that application of the statutory criteria results in a finding that its last, best, final offer is the most reasonable and appropriate.

DISCUSSION

The role 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 arriving at 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)

I. Preliminary Legal Arguments

The State argues the arbitrator may not consider DSTA's First Sergeant proposal because it is a discretionary subject of bargaining over which the arbitrator has no authority under 19 Del.C. §1615(a), which states,

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. (*emphasis added*).

I note that the term "discretionary subject" does not appear anywhere in the POFERA except in the section cited above, nor is it defined in this statute. The term is, however, defined in the Public Employment Relations Act ("PERA"):

"Discretionary subject" means, for the State as an employer only, any subject covered by merit rules which apply pursuant to §5938(c) of Title 29, and which merit rules have been waived by statute. 19 Del.C. §1302(h).

“Discretionary subjects” only concern negotiations involving State merit employees and they are specifically excluded from the State’s duty to bargain in good faith with units of State merit employees at §1307(a)(5). Both the definition and the exclusion of discretionary subjects from the employer’s obligation to bargain in good faith were included in the PERA when it was initially enacted in September, 1994.

The impasse resolution procedures in the PERA and the Police Officers and Firefighters’ Act were simultaneously amended on March 28, 2000, at which time binding interest arbitration replaced advisory fact-finding as the final step in the impasse resolution procedure under each of these statutes.³ The bills which modified these laws were identical, specifically with respect to the use of the term “discretionary subject” in subsection (a) of Section 4 of each bill.⁴ Both bills were introduced by the same primary sponsor. It is logical to conclude under generally accepted standards of statutory construction that the inclusion of the final clause of subsection (a), “except that any discretionary subject shall not be subject to binding interest arbitration”, was intended to have the same effect under both laws.

There is, however, a fundamental difference between the PERA and the POFERA which has a dispositive impact on the application of this phrase. Section 1602(k) of the Police Officers and Firefighters’ Act specifically excludes from “public employees” subject to the provisions of that statute, “... any State employee covered under the State Merit System.”⁵ Because “discretionary subject” relates only to State employees covered by the merit system, the phrase has no application under the POFERA. Further, in this

³ 140th General Assembly, HB 373 (amending the POFERA) and HB 375 (amending the PERA)

⁴ HB 373, 4(a) became 19 Del.C. §1615(a) and §4(a) of HB 375 became 19 Del.C. §1315(a).

⁵ 19 Del.C. §1602(k).

specific case, it is undisputed that Delaware State Police officers are not subject to the State Merit Rules, and are “exempt” employees.

The State alternatively argued that a “discretionary subject” as used in §1615(a) equates to a “matter of inherent managerial policy” (as defined in §1605, *Employer Rights*). The State’s interchange of these two terms as synonyms must be rejected for the reason set forth above. The term “matters of inherent managerial policy” has been addressed many times since PERB’s earliest decisions which defined “matter of inherent managerial policy” to be permissive subjects of bargaining:

...[E]mployer rights, creates a category of subjects which are designated as matters of inherent managerial policy and constitute permissive subjects of bargaining. An employer is not required to bargain with respect to matters of inherent managerial policy, but neither is the employer statutorily prohibited from bargaining such matters. *Woodbridge Education Association v. Board of Education*, ULP No. 90-02-048, I PERB 537, 545 (8/8/90).⁶

PERB has also previously ruled that a party desiring to withdraw a permissive subject of bargaining from the impasse resolution procedure and which does so in a timely manner, effectively removes that subject from consideration by a fact-finder. *Capital Educators Association v. Board of Education*, Del.PERB, DS 1-11-84-3CAP, I PERB 95,105 (1984). There is nothing, however, which precludes parties from voluntarily submitting permissive subjects of bargaining to binding interest arbitration, as evidenced in prior cases and decisions.

The instant case presents for the first time a position taken by a party that the last, best, final offer of the opposing party must be rejected because that party has submitted a

⁶ Prior PERB rulings decided under the Public School Employment Relations Act, 14 Del.C. Chapter 40 (1982) and/or the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994) are controlling to the extent that the relevant provisions of those statutes are identical to those of the Police Officers and Firefighters Employment Relations Act, 19 Del.C. Chapter 16 (1986). *Council 81, AFSCME, AFL-CIO v. State of Delaware, Department of Transportation, Division of Highways*, ULP No. 95-01-111A, II PERB 1279, 1289 (7/17/95).

permissive subject of bargaining for consideration, in violation of its duty to bargain in good faith under 19 Del.C. §1607(a)(5).

The statute conditions the initiation of binding interest arbitration on a determination that the parties have engaged in good faith negotiations and mediation. 19 Del.C. §1615(a). In this case, neither party raised an allegation of bad faith in response to PERB's January 17, 2008, request for information concerning the negotiations upon which the §1615(a) determination was to be made. In fact, much later, in late May, 2008, the State filed an unfair labor practice charge alleging DSTA had violated its duty to bargain in good faith by insisting to impasse on a non-mandatory subject of bargaining. DSTA responded by counter-charging that the State had violated its duty to bargain in good faith by refusing to bargain with respect to a mandatory subject of bargaining.

Both charges were dismissed by the Executive Director who concluded that they were not filed within the 180 day statutory time frame for unfair labor practice charges.

The decision was based upon the following:

The State became aware of DSTA's proposal for adding a First Sergeant step in the salary progression when the proposal was made on June 7, 2007, more than one year ago. As of the date of DSTA's request for mediation on September 17, 2007, the State was aware that DSTA's First Sergeant proposal was part of its positions going forward to the statutory impasse resolution proceedings. In fact, on or about October 3, 2007, the State responded to DSTA's request for mediation by admitting that DSTA,

...stated at the conclusion of the last bargaining session, September 5, 2007, that there was no need to schedule an additional negotiation sessions as neither party appeared willing to modify its proposals that had been rejected by the other party. The State agreed that there would be little purpose served by scheduling another session if the Union continued to demand that the State agree to specific Union proposals on non-mandatory subjects of bargaining.

At that point in time, both parties were clearly on notice that there was a concern that at least one of the issues in the negotiations was not

a mandatory subject of bargaining, and the statute of limitations for filing an unfair labor practice began to run. From October 3, 2007, the 180-day period closed on March 31, 2008, almost two months prior to the State's filing of this Charge, and DSTA's filing of its Counter-Charge.

The PERB is specifically charged with promoting harmonious and cooperative relationships and to protect the public interest through oversight of the collective bargaining process. The POFERA requires that charges of unfair labor practices be brought in a timely manner so that the resolution of those charges does not adversely affect the orderly and uninterrupted operations and functions of public safety services. 19 Del.C. §1601. *Delaware DSHS, Division of State Police v. Delaware State Troopers Association*, ULP 08-05-624, VI PERB 4003, 4006 (2008)

The full PERB affirmed the Executive Director's dismissal of the Charge and Counter-Charge, finding:

The State argues the 180 day statute of limitations did not begin to run until there is a final action resulting in an adverse action or until some final action is taken which is not subject to change. It asserts that this cannot occur in the collective bargaining process until the parties are required to submit their "last, best, final offers" just before hearing in the binding interest arbitration process.

Adoption of this standard, while it may be applicable in other types of unfair labor practice proceedings, would thwart the purpose of the statute and obstruct the collective bargaining process. When there is a genuine dispute as to whether a proposal is or is not a mandatory subject of bargaining, as long as the parties stay in their respective corners without seeking resolution of the issue, the bargaining process cannot effectively move forward. The policy favoring negotiation of the terms and conditions of employment is undermined unless there is resolution of this question early in the process. The parties could not conduct meaningful negotiations while this issue remained unresolved as it would permit one or both parties to hide behind a position as to its negotiability.

Further, 19 Del.C. §1615 (g) clearly states that the parties are always free, and encouraged, to resolve their impasse voluntarily: "[i]f 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." Parties may always change their positions to reach an agreement at any point in the process. There is no point at which a final position is taken "which is

not subject to change.” For example, in this case, either party could advise PERB that it accepts the other party’s offer, even though the BIA hearing has been concluded, argument made, and the record is before the arbitrator for decision. Should that occur, by statute, the impasse resolution process is terminated.

To adopt the State’s argument would unduly delay the mutual resolution of disputes and would also lead to undue delay, confusion and disruption of the binding interest arbitration process. The statute is also clear on this point.

(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. *19 Del.C. §1615.*

The statute provides that the binding interest arbitration process cannot move forward unless the parties have engaged in a good faith effort to resolve their labor dispute. The State’s Charge was filed well after the January 17, 2008 request for binding interest arbitration; at the latest, its assertion of bad faith in negotiations should have been made in response to DSTA’s binding interest arbitration request. *Delaware DSHS, Division of State Police v. Delaware State Troopers Association*, ULP 08-05-624, VI PERB 4067, 4070.⁷

The binding interest arbitration proceeding is not an alternative to an unfair labor practice proceeding. As the arbitrator, I am constrained to consider the last, best, final offers of the parties and determine which should be accepted in its entirety, based upon the enumerated criteria. Binding interest arbitration is the final step in the collective bargaining and negotiation process; not an alternative for resolution of unfair labor practice charges.

⁷ On or about September 17, 2008, the State appealed the Board’s decision to Chancery Court, consistent with 19 Del.C. §1609(a). As of the date of this decision, no decision has been rendered in that matter.

II. Consideration of last, best, final offers

The record created by the parties addressing the statutory criteria of 19 Del.C. §1615 was cursory at best. While each side presented some information on comparables, little or no information was provided to validate the selection of those comparables or to illuminate for the arbitrator how the employers each chose compared to DSP in terms of jurisdiction, size of force, crime statistics⁸, responsibilities, rank structure or other traditional bases for comparison. In its closing argument, the State requested that the arbitrator “take administrative notice” of the magnitude of difference in population and geographic scales, “despite the absence of any other factual information.” I cannot take administrative notice of information that is not before me or within PERB records. It is the responsibility of the parties to create a complete record and the statute is quite clear as to what must be considered. Additional guidance is also found in prior PERB binding interest arbitration decisions. The statute clearly requires a consideration of “overall compensation presently received by employees inclusive of direct wages, salary, vacations, holidays, excused leaves, insurance and pension, medical and hospitalization benefits, the continuity and stability of employment and all other benefits received.” 19 Del.C.§1615(d)(3).

The listed criteria constitute a checklist which the arbitrator must consider and on which the parties are required to present evidence. Despite the conclusions argued by the parties, a lack of record evidence neither proves nor disproves a point. A party cannot argue that there is no issue of trooper retention based on a document which details the residency of applicants over the past six years. There is no nexus between the data and

⁸ A single exhibit was offered into evidence by the State which included 2006 statistics from the Bureau of Justice website. *State Ex. 5*. No testimony was offered as to why or how the states in this exhibit were selected or the bases on which it was concluded that they were comparators. There was no testimony concerning whether the crime statistics were statewide or only for State Police in each of the selected jurisdictions. In fact, no testimony was offered to explain the exhibit or its materiality to this proceeding.

the conclusion. Nor do I credit conclusions based upon the testimony of witnesses who admitted under oath that they had not reviewed anything other than a summary of data compiled by another unidentified person. Where documents were presented into evidence which were drawn from other documents, without either providing the source documents or citing that source, they are of limited value to my analysis and consideration.

The statute does not provide a formula for weighting the criteria, except to state that the proven inability of the public employer to afford a given offer (as defined in 19 Del.C. §1615(d)(6)) is dispositive of the case. The State has not argued in this case that it does not have the financial ability to afford either offer. The ultimate decision, therefore, requires the arbitrator to exercise judgment in determining which facts are most important to resolution of the case before her. The evidence in this case, such as it is, has been considered and evaluated against the criteria of 19 Del.C. §1615.

A. First Sergeant/Labor Management Committee proposals

DSTA has not met its burden of providing clear and convincing evidence that the creation of the First Sergeant position (whether it is a new rank or simply creating a career development step within the existing rank of Sergeant), will address the problem it identifies, i.e., the lack of diversity in the upper ranks of Delaware State Police. *State Exhibit 18*. It has also not provided evidence or argument sufficient to conclude that the force is suffering from an inability to retain its officers at these higher ranks.

The FY06 Governor's Council on Equal Employment Opportunity ("EEO Council") report indicates that the number of uniformed officers leaving DSTA that year

included 13 (26%) minority officers and 4 (39%) female officers.⁹ The report concluded:

In view of the Delaware State Police's current workforce data, not much has changed in view of improving minority and female representation in comparison to the relevant labor market. The [Governor's Council on Equal Employment Opportunity] is recommending that the State Police explain why there is no notable progress made based upon their comprehensive recruitment efforts and changes made in the promotional process. *DSTA Ex. 18, p. 33*¹⁰

It is clear from the record that more senior officers are frustrated by changes to the promotional system which appear to weigh a written exam more favorably than years of service on the force. DSTA's concerns are supported by evidence that officers with fewer years of service are being promoted to higher ranks than in the past. *State Exhibit 2*. Choosing to alter the mix and relative importance of various inputs into a promotional process often leads to the perception that the "game has changed" for employees seeking promotion. What is missing from the analysis in this case, however, is convincing evidence that the change (or perceived change) has had a negative impact on the force and its officers to the extent that justifies the creation of the First Sergeant position (as proposed by DSTA) to remedy that problem.

There is a danger that failure or delay in addressing the concerns of the senior officers will have a detrimental effect in the longer term on the morale and composition of the DSP. One of the many benefits of collective bargaining is to provide management with the opportunity to hear from the exclusive representative of its employees about their current and future concerns. The message was loud and clear in this case that officers were concerned both about the lack of diversity in DSP's upper ranks and that senior officers are frustrated with a promotional process that appears to credit experience

⁹ It is not clear from the record how many of these officers left the upper DSP ranks which are in issue in this case.

¹⁰ The EEO Council's report was dated February 28, 2007, and was issued pursuant to Executive Order 81. No follow-up report was offered into evidence.

less than it has in the past. Both are real, if perhaps opposing, concerns that warrant consideration.

The State's Labor Management Committee proposal also raises concerns. The fact that the proposal includes a date certain of May 31, 2008, for the issuance of the committee's recommendations is not, however, a fatal flaw. The proposal requires the committee (comprised of an equal number of DSTA and management representatives) to "...meet at regular intervals commencing no later than 60 days after ratification of this Agreement." Given that the State's last, best, final offer was provided on January 30, 2008, it is logical to presume that the State was committed to completing this committee's work in four months.

A concern with the State's proposal is that it delegates to this committee responsibility to make recommendations concerning mandatory subjects of bargaining, specifically, compensation. The proposal does not, however, authorize the State to unilaterally implement the final version of the recommendations, but rather requires the agreement of the committee. Management committee members have a responsibility to secure commitment to any such agreement from both the Secretary of DSHS and the Director of OMB.

The State also argues DSTA's last, best, final offer must be rejected because the First Sergeant proposal is unlawful and therefore violates both the "interest and welfare of the public" and the "lawful authority of the public employer" criteria. *19 Del.C. §1615(d)(1) and (5)*. It offered the arbitration decision in *Portland Fire Fighters Association, Local 43 and City of Portland* (IA-01-11 (2001)) to support its conclusion.

The State's analysis and application of the arbitrator's decision in *Portland Fire Fighters* falls short on two points. First, the issue in the *Portland* case involved a

proposal by the Fire Fighters which would have required the City to violate the Fair Labor Standards Act by requiring it to calculate overtime pay rates in contradiction of that federal statute. Implementation of that proposal would have required the City to knowingly violate the law and subject itself to suit by individual fire fighters, as well as severe penalties by the federal government. Nothing in the present case is remotely similar to that set of circumstances.

Secondly, the State questions whether the First Sergeant proposal violates the lawful authority of the public employer. *19 Del.C. §1615(d)(5)*. Nothing in either the State or DSTA proposal is alleged to be an illegal subject of bargaining.

Based on the record before me, I conclude that in the absence of compelling evidence that the change sought by DSTA is required to meet the public interest, is necessary to maintain comparability or is compelled by consideration of any of the other statutory factors, that the State's proposal must be accepted.

B. Salary Increase for FY 2008 and FY 2009

The relative merits of the parties' salary proposals are very difficult to compare under the statutory criteria, based on this record. Little evidence was submitted or argument made on the jurisdictions used as comparators. Both parties presented evidence relating to five common comparators, namely the states of Pennsylvania and New Jersey; New Castle County, Delaware; and the Delaware municipalities of Wilmington and Newark. PERB has previously determined that the Newark Police are not an appropriate comparator to the Delaware State Police. *FOP Lodge 4 v. City of Newark*, Executive Director's Decision on Remand, BIA 02-01-338, IV PERB 2735, 2744 (2003).

The only argument made as to why the other four forces were comparators was

that New Jersey and Pennsylvania are contiguous to Delaware and the New Castle County and Wilmington police forces are the next largest in Delaware, behind DSP. At best, this is a very limited and elementary base for choosing comparators and appears to assume that all police officers perform the same or similar services and require similar skills under similar working conditions. The analysis in the Newark BIA (Supra., p. 2743) established that the determination of comparability must be supported by more than just geographic proximity and presumptions of similar work.

Further, comparing only the negotiated percentage increases or the individual cells of salary matrices¹¹ does not meet the statutory requirement to consider,

- (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.

The testimony of DSTA's witnesses from both the City of Wilmington and the New Jersey State Troopers revealed that simply comparing salary matrices or reading contractual language of current collective bargaining agreements does not give a complete picture of the "overall compensation" received within police forces. State's Exhibits 2 (p. 9 -13) and 3 do not contain information from the same jurisdictions and DSTA successfully challenged the completeness and accuracy of these documents, as well as the credibility of the witness in her conclusions as to comparability based on her

¹¹ There appears to be a calculation error in the preparation of the State's matrix for its proposed 1.5% increase to be effective July 1, 2008. The matrix presented in State Exhibit 2, p. 5, reflects a 2% increase over the State's July 1, 2007 proposed matrix found on p. 4 of that Exhibit.

admission that she had neither created the summary documents nor reviewed the documents on which the summaries were based. The parties are required under the POFERA to present evidence and create a record based upon 19 Del.C.§1615. To the extent the record does not address the criteria, the arbitrator's analysis will be limited.

The State also argued that the salary increase proposals should be compared to the increases granted to State merit and merit comparable employees by the General Assembly for the current (0%) and prior (\$750) fiscal years, asserting:

To the extent that other State employees perform similar duties, require similar skills and are in the same or similar geographic areas, they are comparable employees. *State Argument, p. 29*

No evidence was presented which would identify which State merit or merit comparable positions the State considered or the wages, salaries, benefits, hours and conditions of work, or overall compensation currently received by those employees.. I also note that no State merit or merit comparable positions have collectively bargained with respect to their salaries or other forms of compensation to date. This is a relevant factor in considering comparability as negotiations under Delaware's public sector collective bargaining laws require parties to consider comparables in designing and arguing in support of compensation proposals. Comparability is not clearly set forth as a consideration in the unilateral design of overall compensation increases by the legislature, nor are proposed increases subject to challenge in a public forum comparable to binding interest arbitration.

Based on the limited record before me, I cannot conclude that either offer more closely meets the statutory criteria. As previously noted, the State has not asserted that it does not have the financial ability to fund either offer, so criteria (6) is not a factor. I

conclude that consideration of the salary offers of the parties is a neutral analysis in this case, and not dispositive of the ultimate outcome of this binding interest arbitration.

III. Other Issues in last, best, final offers

No evidence was received in support of or opposition to the other proposals included in the State's last, best, final offer; specifically, the State's proposal to increase Recruit salaries and proposal to expand the definition of just cause under the grievance procedure. DSTA did note in its argument that although it had initially supported an increase in the starting salary for recruits, it opposed the State's specific proposal to only increase the recruit salary because it acts to compress the scale between the Recruit and Trooper ranks. Again, however, evidence and argument were not made as the relative comparability of the DSP salaries within the context of total compensation or the relative impact vis-à-vis recruitment, retention, or other indicators of lack of comparability.

In the absence of evidence and argument on these proposals, they are also neutral to an overall determination in this proceeding when considered under the statutory criteria.

DECISION

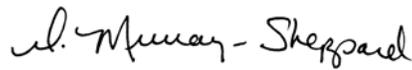
For the reasons discussed above, based on the record created by the parties in this proceeding, the last, best, final offer of the State is determined to be the more reasonable based upon the statutory criteria set forth in 19 Del.C. §1615. The relative merits of the last, best, final offers were considered in their totality and balanced according to the statutory criteria. *FOP Lodge 4 v. Newark*, PERB Review of Arbitrator's Decision on Remand, IV PERB 2789, 2793 (2003). All of the exhibits, testimony, arguments and cases cited by the parties were reviewed in their entirety in reaching this decision.

It is clear that a significant amount of time, energy and resources was expended by these parties throughout the negotiation, mediation and binding interest arbitration process arguments and counter-arguments concerning the First Sergeant issue. DSTA has a valid and substantiated underlying concern about the heterogeneity of the upper ranks of the Delaware State Police. It is unfortunate that these parties did not spend their energies in identifying their common interest and creatively engaging in discussions to address a joint concern. The saving grace in this situation may be that the new agreement will expire on June 30, 2009 (a little more than six months from the date of this decision), and the parties will have the opportunity to approach their concerns with renewed resolve to reach mutually acceptable answers.¹²

WHEREFORE, the parties are directed to implement the tentative agreements and proposals set forth in the State's last, best, final offer. The parties are to notify the Public Employment Relations Board of compliance with this Order within thirty (30) days of the date below.

IT IS SO ORDERED.

Date: October 20, 2008



DEBORAH L. MURRAY-SHEPPARD
Executive Director, Delaware PERB

¹² 19 Del.C. §1613(a) requires that negotiations begin not later than 90 days prior to expiration of a collective bargaining agreement.