

**STATE OF DELAWARE**  
**PUBLIC EMPLOYMENT RELATIONS BOARD**

**IN THE MATTER OF:**

<b>DELAWARE STATE TROOPERS ASSOCIATION,</b>	:	
	:	<b>Decision of the Binding Interest</b>
<b>and</b>	:	<b>Arbitrator on Remand</b>
	:	
<b>STATE OF DELAWARE, DEPARTMENT OF SAFETY</b>	:	<b><u>BIA 08-02-612</u></b>
<b>AND HOMELAND SECURITY, DIVISION OF</b>	:	
<b>POLICE.</b>	:	

**Appearances**

*Jeffrey M. Weiner, Esq., for Delaware State Troopers Association*  
*Aaron Shapiro, Office of State Labor Relations & Employment Practices, for DSHS/DSP*

**BACKGROUND**

Following unsuccessful attempts to mediate the impasse between the Delaware State Troopers Association (“DSTA”) and the State of Delaware, Department of Safety and Homeland Security, Division of State Police (“State”), the impasse was referred to binding interest arbitration pursuant to 19 Del.C. §1615.<sup>1</sup>

Public hearings were conducted on June 4, July 14, and July 15, 2008, before the Executive Director of the Public Employment Relations Board (“PERB”). Following consideration of the record and the post-hearing argument of the parties, the Executive Director’s decision was issued on October 20, 2008, holding:

... [B]ased 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

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<sup>1</sup> Police Officers and Firefighters Employment Relations Act, 19 Del.C. Chapter 16 (“POFERA” or “statute”).

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.

On October 24, 2008, DSTA filed a Request for Review of the Executive Director's decision by the full Board. The State filed a cross-request for review on October 24, 2008. Both parties submitted written argument in support of their respective requests and in response to the opposing request for review.

The Public Employment Relations Board convened a public hearing on December 17, 2008, to consider the requests for review, at which time the parties were afforded the opportunity to present oral argument. Upon consideration of the complete record created below and the arguments of the parties, the Board remanded the following issue to the Executive Director to accept additional evidence and/or argument:

WHETHER THE INTEREST ARBITRATOR WAS FREE TO IGNORE THE MAY 31, 2008 DATE FOR ISSUANCE OF THE WRITTEN FINDINGS AND RECOMMENDATIONS OF THE LABOR/MANAGEMENT COMMITTEE ON ITS COMPREHENSIVE REVIEW OF THE RECRUITMENT, SELECTION, AND PROMOTIONAL PROCESSES WITHIN THE UNIFORMED RANKS OF THE DELAWARE STATE POLICE?

The Executive Director was further directed to provide her conclusions in writing to the parties and to the Board.<sup>2</sup>

A hearing was convened by the Executive Director on March 4, 2009, at which time one additional piece of evidence was introduced<sup>3</sup>, without objection, and the parties were

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<sup>2</sup> *DSTA & DSHS, DPS, Division of State Police*, Remand on Review of the Decision of the Binding Interest Arbitrator, BIA 08-01-612, Delaware PERB, VI PERB 4129, 4131 (2009)

<sup>3</sup> The record was supplemented by the State with the addition of a single document entitled "DSTA Proposals 1-03-08".

provided a full opportunity to present oral argument on the issue remanded for consideration. This decision results from review of the entire record created by the parties, the arguments made on that record and on remand, and a review and consideration of the cases cited by both parties in support of their respective positions.

### **DISCUSSION**

The specific State proposal at issue in this remand is proposed Article 37, Labor Management Committee (“LMC”), which states:

In furtherance of the objectives articulated in Executive Order 81<sup>4</sup>, 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.

The Executive Director’s October 20, 2008 decision considered the State’s proposal and found, in relevant part:

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<sup>4</sup> Executive Order Number Eighty-One: Continuing Equal Opportunity Hiring Standards And Practices For Delaware Government

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. *p. 4102*

In its request for review, DSTA asserts that the Executive Director erred in "blue penciling" the State's Labor Management Committee proposal to convert the fixed date of May 31, 2008 to a "floating" four month period. *Petitioner DSTA's Opening Argument on Appeal*, p. 4. It asserted that because 19 Del.C. §1615 (d) limits the interest arbitrator to "a determination of which of the parties' last, best, final offers shall be accepted in its entirety", the State's entire last, best, final offer must be rejected because it includes a proposal to conclude the LMC process on or before May 31, 2008, an action which was impossible to perform.

In support of its position, DSTA cites two cases: *John Roane, Inc. v. Tweed*, 89 A.2d 548 (Del. 1952) and *Knowles-Zeswitz Music, Inc. v. Cara*, 260 A. 2d 171 (Del.Ch., 1969), both of which address the application of a restrictive covenant in an employment agreement. The "blue pencil test" is defined in the *Roane* decision:

... if the excessive restraint is severable in terms, it may be disregarded and the remaining part of the covenant enforced; but if the covenant is not severable in terms, the entire covenant falls. Thus, in *Green v. Price*, 13 M. & W. 695, 153 Eng.Rep. 291, it was held that a covenant not to compete within the cities of London and Westminster or within the distance of 600 miles therefrom was enforceable as to London and Westminster, but that the 600 miles could not be divided. *Roane*, p. 555.

In *Knowles-Zeswitz*, the Chancery Court opined,

.. while this Court evidently once paid lip service to what was referred to as the 'blue pencil test' and granted partial enforcement to parts of restrictive covenants not to compete on a theory of contract divisibility, thus enforcing lawful parts of a restrictive covenant rather than denying

any relief whatsoever ...the modern view, which I believe applies in Delaware, is that restrictive covenant should be enforced only to the extent that it is reasonable to do so.

No cases were cited which applied the “blue pencil test” or its progeny to collective bargaining proposals, or in the context of a binding interest arbitration proceeding. Further in the cases cited, both Courts were interpreting contractual language to which parties had agreed. That is not the case where an interest arbitrator is considering the relative merits of proposals in an interest arbitration proceeding. The interest arbitrator is charged to consider the relative merits of contractual proposals made by one party but, by definition, not accepted by the other party to the negotiations. A shared understanding of the proposals cannot be presumed.

DSTA was successful (on consideration of further evidence) in challenging that the October 2008 BIA decision misconstrued the intent of the State’s LMC proposal and any implication that four months was a reasonable period for completing the negotiation. A review of the history of these negotiations and the State’s Labor Management proposal reveals:

- The State’s first LMC proposal was made to DSTA on September 5, 2007, and was for the purpose of conducting “a feasibility study on the development and implementation of a First Sergeant position.” The Committee was required to meet at regular intervals beginning not later than 60 days after ratification, and to issue written findings and recommendations not later than June 1, 2008. This proposal allowed a maximum period of approximately nine months to complete this work, assuming the proposal resolved the negotiations, the parties immediately established the LMC and it began its work immediately.

- The State's second LMC proposal was offered on November 15, 2007, and provided for a more comprehensive "review of the recruitment, selection and promotional processes within the uniformed ranks of the Delaware State Police". The Committee was required to be constituted and to initiate its work under the same requirements, but to issue its written findings and recommendations by "no later than December 1, 2008". This allowed a maximum period of 11.5 months.
- The State's final LMC proposal was included in its last, best, final offer on January 30, 2007. The last, best final offer did not change the composition of the LMC, its purpose and scope or timeline for initiating its work, but did change the deadline for reporting its written findings of fact and recommendations to May 31, 2008. This date allowed a maximum of four months for the Committee to complete its work.

This evidence does not support the conclusion that the State intended to commit to a four month period for the Committee to meet and complete its work. Approximately two months prior to submitting its last, best, final offer, the State's offer evidenced that it could reasonably take up to 11 ½ months to complete the same work. There is no consistency in the proposed time periods for completion of the LMC's work in the three proposals made by the State.

It is undisputed the binding interest arbitration hearing did not convene for its first of three days of hearing until four days after the effective date of the State's LMC proposal. Consequently, the State could not technically have met its May 31, 2008, deadline unless the parties voluntarily resolved the impasse with a mutually accepted agreement prior to the issuance of the binding interest arbitration decision. Further, there is no ratification process following imposition of an interest arbitrator's decision. The question thus becomes what, if any, impact does the impossibility of performance of one proposal have on the entirety of

the State's last, best, final offer and the determination of which of the parties' offers should be accepted under the statute.

In *FOP Lodge 10 & DOC* (BIA 07-02-552, VI PERB 3887, 3902 (2007)), the interest arbitrator found that where a proposal exceeded a specific statutory limitation it was determined to be unenforceable. The full PERB affirmed the award and found that a severability clause included in the tentative agreements of the parties could not be used to resurrect an alternative proposal which would have been consistent with the statutory limitations. *FOP Lodge 10 & DOC, Decision of the full PERB on Review*, BIA 07-02-552, VI PERB 4023, 4025 (2008). The decisions in this case did not, however, dismiss the entire last, best, final offer of FOP Lodge 10 because a single proposal, if implemented, would have been in violation of State Merit rules; rather the arbitrator continued his analysis but concluded that proposal did not support adoption of the FOP's last, best, final offer.

The State argues that an interest arbitrator must have broad authority to interpret contractual proposals, guided by principles of contractual and statutory construction and generally accepted arbitral standards. The State cites specific contractual arbitration decisions and decisions by courts and the NLRB supporting the authority of a grievance arbitrator to construe the intent of the parties and to interpret contractual provisions with the context of the entire agreement. The cases cited primarily involve grievance arbitration, a substantively different type of arbitration wherein arbitrators are required to interpret and apply negotiated and mutually developed contractual language. An interest arbitrator must conduct a review of proposals for resolution of negotiations, where intent is only revealed by the evidence presented by the parties during the interest arbitration proceedings.

The function of an interest arbitrator is described as a “legislative” function in the seminal labor arbitration treatise, *How Arbitration Works*<sup>5</sup>, which notes that the role of the public sector interest arbitrator is not fundamentally different from that in the private sector, except to the extent that jurisdictional differences place limitations on the interest arbitrator’s authority and discretion.<sup>6</sup>

Arbitration of contract terms differs radically from arbitration of grievances. The latter calls for a judicial determination of existing contract rights; the former calls for a determination, upon consideration of policy, fairness and expediency, of what the contract rights ought to be. In submitting this case to arbitration, the parties have merely extended their negotiations – they have left it to [the arbitrator] to determine what they should, by negotiation, have agreed upon...[T]he fundamental inquiry as to each issue is: what should the parties themselves, as reasonable men, have voluntarily agreed to?...<sup>7</sup>

Section 1615 (d)(7) of the statute requires the interest arbitrator, in addition to considering other relevant factors in order to make the determination of which of the parties last, best, final offers should be accepted, to consider:

(7) Such other factors not confined to the foregoing [factors] which are normally or traditionally taken into account 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.

Under the POFERA, the interest arbitrator is required to consider the last, best and final offer of each party in its entirety. This statutory mandate can only be meaningful (when read in conjunction with §1615(d)(7)), if applied to require that individual proposals included in a last, best and final offer be considered within the context of the entire offer.

The State’s offer includes Article 38, Term of Agreement:

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<sup>5</sup> Elkouri and Elkouri, Alan Miles Ruben, Editor, 6<sup>th</sup> Ed. (Washington, D.C.: Bureau of National Affairs, Inc, 2003) p. 1358.

<sup>6</sup> Elkouri & Elkouri, p. 1360.

<sup>7</sup> Elkouri & Elkouri, p. 1358-1359, citing Twin City Rapid Transit Co., 7 LA 845, 848 (1947).

The Term of this Agreement shall become effective July 1, 2007, and shall continue in effect through June 30, 2009. This Agreement shall be binding on the successors of the parties hereto.

When considered in its entirety and based upon the testimony adduced during the interest arbitration hearing, the State's offer must be understood to include a commitment to establish the LMC as set forth in its Article 37, within sixty days after the date on which this Agreement is instituted and to complete the work of the committee with written findings of fact and recommendations expeditiously thereafter.

Whether the State could have reasonably foreseen that the Agreement would not be implemented in sufficient time prior to May 31, 2008, to allow the LMC's work to proceed in a meaningful manner and result in recommendations by that date is certainly subject to debate among reasonable people. The State did provide evidence as to why it chose to use a date certain rather than a period of time for the LMC process to conclude, specifically in order to complete the LMC's work in sufficient time prior to the July 1, 2008 date DSTA was proposing for implementation of its 1<sup>st</sup> Sergeant proposal. The State's LMC proposal had been included in the State's offers in a similar form since September, 2007, and was an important and material part of the State's offer. The record does not support the conclusion that the State did not intend to fully implement this proposal.

### **DECISION**

Based upon the record before me and consideration of the reasoned argument presented by the parties on remand<sup>8</sup>, I conclude that the "blue pencil" prohibition argued

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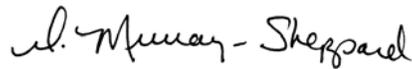
<sup>8</sup> Both parties are commended for their presentations and support for their arguments on remand. Although there was an initial objection to providing argument orally (rather than in writing) the parties were succinct, well-prepared and each made credible and compelling arguments. The decision was delayed by the volume of the pending case load currently before PERB and the agency's limited staff at this time. Under better

by DSTA is not applicable to the interpretation or evaluation of the last, best, final offers of either party in the interest arbitration process established by 19 Del.C. §1615.

The record in this case supports the conclusion that the State's LMC proposal is not contrary to law, nor is it legally defective such that the State's entire last, best, final offer must be dismissed in its entirety. The binding interest arbitrator must consider each proposal contained in each party's offer within the context of the entire offer, and balance the relative merits of the last, best, final offers based upon the factors set forth in 19 Del.C. §1615.

Pursuant to the Remand Order and consistent with the foregoing discussion and consideration, the decision reached herein is consistent with the determination that the State's last, best, final offer is determined to be the more reasonable based upon the statutory criteria set forth in 19 Del.C. §1615.

Dated: June 1, 2009



DEBORAH L. MURRAY-SHEPPARD  
Executive Director, Delaware PERB

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circumstances, oral argument would have permitted the Executive Director to issue an expedited decision, as was intended when the parties were directed to present their arguments orally.