

**STATE OF DELAWARE**

**PUBLIC EMPLOYMENT RELATIONS BOARD**

FRATERNAL ORDER OF POLICE, LODGE 15,	:	Decision of the
	:	Binding Interest
and	:	Arbitrator
	:	
CITY OF DOVER, DELAWARE.	:	<b><u>BIA 11-07-820</u></b>

**Apearances**

*Gary W. McLhinney, Schlachman Belsky & Weiner, PA., for FOP Lodge 15  
Glenn C. Mandala, Baird Mandala LLC, for City of Dover*

**Background**

The City of Dover, Delaware (“City”) is a municipal corporation, municipality, city or town located within Kent County in the State of Delaware, and is a public employer within the meaning §1602(l) of the Police Officers and Firefighters Employment Relations Act (“POFERA”), 19 Del.C. Chapter 16 (1986).

Fraternal Order of Police (“FOP”) is an employee organization within the meaning of §1602(g) of the POFERA. The FOP, by and through its affiliated Lodge 15 is the exclusive bargaining representative of the bargaining unit of sworn officers of the City of Dover Police Department at and below the rank of Captain, within the meaning of 19 Del.C. §1602(h).

The City and FOP Lodge 15 are parties to a current collective bargaining agreement which has a term of July 1, 2009 through June 30, 2012. Article II, Salaries, of that Agreement states:

- A. Effective July 1, 20008 the regular salaries of all employees shall be in accordance with the schedule set forth in Exhibit A attached hereto. This schedule contains a 3.5% increase. Effective July 1, 2010, Exhibit A shall be increased a minimum of 1.5% to a maximum of 3.0%. The percentage change in the

Consumer Price Index for Urban Consumers (CPI-U) for the Philadelphia/Wilmington area for all items from December, 2008 to December, 2009 will determine the exact percentage change. Negotiations for wages only will begin the first week of January 2011 for the period of July 1, 2011 – June 30, 2012. Parties will also attempt to develop a new wage scale.

During fiscal year 2011 (July 1, 2010 – June 30, 2011) and fiscal year 2012 (July 1, 2011 – June 30, 2012) only represented members of the bargaining unit would not be subject to any furloughs or unpaid leave that would result in a wage reduction.

The parties entered into negotiations pursuant to the negotiated wage reopeners in February, 2011. Unable to reach a successful conclusion to the negotiations, on or about April 19, 2011, the FOP requested mediation. A mediator was appointed by the Public Employment Relations Board (“PERB”) and three mediation sessions were conducted. Mediation concluded on July 21, 2011, without settlement.

By letter dated July 21, 2011, the mediator recommended the impasse be submitted to binding interest arbitration. Upon request from PERB, each party submitted its last, best, final offer for consideration

By letter dated August 11, 2011, the parties jointly requested the matter be held in abeyance pending an attempt to reach a resolution at or before the City Council’s meeting on August 21, 2011. By letter dated August 23, 2011, the City advised PERB that settlement efforts had again been unsuccessful and requested the binding interest arbitration proceedings be reinstated.

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”, without objection by either party. *19 Del.C. §1315(a)*. A prehearing conference was conducted on September 26, 2011.

A binding interest arbitration hearing was held before the Executive Director on

November 8, 2011, at which time the parties presented testimony and documentary evidence in support of their respective positions. Closing argument was provided in written post-hearing submissions. The record closed upon receipt of written argument. The following discussion and decision result from the record thus created.

### **LAST, BEST, FINAL OFFERS OF THE PARTIES**

#### **Fraternal Order of Police Lodge 15:**

The FOP's last, best and final offer to the City (as modified on September 27, 2011) is a 2% pay increase across all pay lines, effective January 1, 2012.

#### **City of Dover's last, best, final offer:**

The City's last, best and final offer to the FOP was a one percent (1%) general wage increase for active employees effective July 1, 2011, conditioned upon the FOP's acceptance of a mandatory soft body armor policy.

On or about November 2, 2011, the City also provided the following Body Armor proposal:

#### Body Armor Use Procedural Notice 22C

##### **I. PURPOSE**

The purpose of this policy is to provide law enforcement officers with guidelines for the proper use and care of body armor.

##### **II. POLICY**

It is the policy of the Dover Police Department to maximize officer safety through the use of body armor in combination with prescribed safety procedures. While body armor provides a significant level of protection, it is not a substitute for the observance of officer safety standards.

##### **III. DEFINITIONS**

*Field Activities:* Duty assignments and/or tasks that place or could reasonably be expected to place officers in situations where they would be required to act in enforcement rather than administrative or support capacities.

#### IV. **PROCEDURES**

##### A. Issuance of Body Armor

1. All body armor issued must comply with protective and related requirements prescribed under current standards of the National Institute of Justice.
2. All officers shall be issued agency-approved body armor.
3. Body armor that is worn or damaged shall be replaced by the agency. Body armor that must be replaced due to misuse or abuse by the officer shall be paid for by the officer.

##### B. Use of Body Armor

1. Officers shall wear only agency- approved body armor.
2. All officers are required to wear body armor while engaged in field activities both on duty and during extra duty employment unless exempt as follows:
  - a. When an agency-approved physician determines that an officer had a medical condition that would preclude wearing body armor.
  - b. When the officer is involved in undercover or plain clothes work that his/her supervisor determines could be compromised by wearing body armor; or
  - c. When the department determines that circumstances make it inappropriate to mandate wearing body armor.

##### C. Inspections of Body Armor

1. Supervisors shall be responsible for ensuring that body armor is worn and maintained as required by this policy through routine observation and periodic documented inspections.
2. Annual inspections of body armor shall be conducted for fit, cleanliness, signs of damage, abuse and wear.

##### D. Care, Maintenance and Replacement of Body Armor

1. Officers shall routinely inspect personal body armor for signs of damage and for general cleanliness.
2. As dirt and perspiration may erode ballistic panels, each officer shall be responsible for cleaning personal body armor in accordance with the manufacturer's instructions.

3. Officers are responsible for the proper storage, maintenance and care of body armor in accordance with manufacturer's instructions.
4. Officers are responsible for reporting damage or excessive wear to the ballistic panel or cover to their supervisor and the Special Services Coordinator.
5. Body armor will be replaced in accordance with the guidelines and protocols established by the National Institute of Justice.

E. Training

1. The Firearms training officer shall be responsible for:
  - a. Monitoring technological advances in the body armor industry that may necessitate a change in body armor.
  - b. Assessing weapons and ammunition currently in use and the suitability of approved body armor to protect against those threats.

**V. SUPERSEDES**

This order supersedes all provisions of all directives previously published, orally or in writing, which are not in total conformity herewith.

**VI. EFFECTIVE DATE**

This order shall become effective immediately upon execution and issuance.

ORDER EXECUTED and ISSUED this \_\_\_\_ day of \_\_\_\_ 2011.

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Major Paul M. Bernat  
Deputy Chief of Police

The parties did not submit nor establish that any mutual agreements were reached during the course of negotiations or mediation. Because these parties are currently covered by a collective bargaining agreement concerning all other terms and conditions of employment and their negotiations were initiated pursuant to a limited wage reopeners in that agreement, the issue before this Arbitrator is limited thereto.

## **STATUTORY PROVISIONS**

### **19 Del.C. §1315. 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**

### **FOP Lodge 15:**

The FOP argues the City's last, best, final offer should be rejected in its entirety because it violates the scope of the parties' contractual reopeners. Article II of the parties' current collective bargaining agreement limits the parties' negotiations "for wages only." The arbitrator is limited to choosing one of the last, best, final offers, in its entirety. This mandate is meaningful only "if applied to require that individual proposals included in a last, best, final offer be considered within the context of the entire offer."<sup>1</sup> Consequently, the City's soft body armor policy cannot be severed from its last, best, final offer. Because negotiations are limited "for wages only" under the terms of the collective bargaining agreement and a soft body armor policy cannot reasonably be considered negotiating for wages, the City's offer should be rejected.

The current collective bargaining agreement between these parties does not provide the City with the authority to require the FOP to accept a mandatory soft body armor policy as a condition to a proposed wage increase. A new soft body armor policy would require modification of terms of the current agreement, other than the wage provisions, without the opportunity for the membership to ratify this operational change.

The FOP argues each party had the opportunity to modify its last, best, final offer up until the point that hearing exhibits were submitted to the arbitrator ten days prior to the binding, interest arbitration hearing. The City was free to amend its offer to delete its mandatory soft body armor policy at any point between August 8 (when it submitted its offer to PERB) and October 31, 2011 (when exhibits were submitted to the arbitrator). It chose not to modify its offer and should be precluded from modifying its offer after

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<sup>1</sup> *Delaware State Troopers Association and State of Delaware*, BIA 08-02-612, VI PERB 4245, 4252 (2009).

October 31.

The City's attempt to withdraw its soft body armor policy just prior to hearing should be denied because it is untimely and because it significantly prejudices the FOP. The City's claim that it sought to remove the policy from its last, best, final offer so as not to complicate "a relatively straightforward arbitration" is disingenuous. The FOP made a strategic, tactical decision to bring a single wage proposal to interest arbitration and limited its offer in an timely manner, which allowed the City to adequately prepare for hearing. To allow the City to modify its offer on the eve of the hearing is unfair and unwarranted by any circumstances presented in this case.

The FOP asserts the City violated the spirit and purpose of the law when it included in its last, best, final offer a lengthy description of the soft body armor policy during mediation, relying on Delaware Chancery Court Rule 95<sup>2</sup> for support. The FOP notes that although it originally proposed a soft body armor policy during mediation, it also withdrew that proposal during mediation. Had the City accepted the FOP's soft body armor proposal at that time, it would have been subject to ratification by the FOP membership. It was not submitted to the membership for ratification, however, because it was rejected during the mediation process.

In applying the statutory factors set forth in 19 Del.C. §1615(d), the FOP argues its proposal is the more reasonable. The interests and welfare of the citizens of the City of Dover are best served by "having a quality police department comprised of highly professional and dedicated police officers." Witnesses from both parties testified that the

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<sup>2</sup> DEL. CH. Ct. R. 95: Any communication made in or in connection with the mediation that relates to the controversy being mediated, whether made to the Mediator or to a party, or to any person if made at a mediation conference, is confidential... [except] (1) [w]here all parties to the mediation agree in writing to waive the confidentiality, or (2) where the confidential materials and communications consist of statements, memoranda, materials, and other tangible evidence otherwise subject to discovery, which were not prepared specifically for use in the mediation conference.

Dover Police Department is second to none in the state and the region in terms of quality of work, clearance rate of criminal investigations, and removing violent criminals from the streets. The police department received an overall performance rating of 88% good to excellent in a citizen survey conducted by the City, recognizing the officers' professionalism and excellent service.

The City admitted in its opening statement that, "as a matter of fact, the City has the ability to pay the two percent wage increase demanded by the FOP. They can pay it in this current fiscal year and probably in the next few years." It is undisputed that the FOP's wage proposal has an identical cost to the City's proposal in Fiscal Year 2012 ("FY 2012").<sup>3</sup> The FOP asserts the City's analysis of future years is flawed by the City's inclusion of items not affected by the wage increase in an attempt to prove that a 1% difference will cost the City \$900,000 in further years. The FOP argues:

[The City's Finance Director] provided conflicting testimony regarding OPEB<sup>4</sup> and was mistaken when she testified that OPEB included pension cost. The City offered no proof that a pay increase harms the public interest. The City did not dare offer any evidence that fees or taxes would need to be raised to cover the minimal future cost of the FOP proposal. Ms. Mitchell also testified no city services would need to be eliminated if the FOP's proposal was accepted. [The FOP's economist]'s analysis of the City's finances proved that the City can afford the FOP's package in future years and that no other City services would be adversely affected by the FOP wage proposal. In addition, both sides will be back at the table in one month to address any concerns the City might have.

The City of Newark, Delaware was shown to be the closest comparable to the City of Dover in terms of size and working conditions. Evidence and testimony established that the police departments are very close in terms of wages, benefits and hours worked. The difference between the last, best, final offers in this arbitration are so small that acceptance of either proposal would not have a significant impact on

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<sup>3</sup> Fiscal Year 2012: July 1, 2011 through June 30, 2012.

<sup>4</sup> OPEB: Other Post Employment Benefits

comparability to Newark.<sup>5</sup> The FOP rejects the City's assertion that Hagerstown, Maryland should also be considered as a comparable because the City's witness was unable to competently testify as to the basis for comparability or to answer basic questions about compensation and the terms of employment for police officers in that municipality.

The FOP asserts the overall compensation currently received by Dover Police Officers is also similar to the compensation received by other City of Dover employees. The City participates in both the State Police Pension Plan and the State Healthcare Plan (for all other City employees). City Exhibit 23 establishes that the benefits of all unionized Dover employees are virtually identical and that the pay increases for all three Dover bargaining units were virtually identical from July, 2007 through June, 2011. The two other unionized bargaining units of City employees received 2% wage increases effective July 1, 2011, a wage increase which is more than the last best final offer of the FOP or the City in this proceeding. The fact that the FOP's offer forgoes for six months a wage increase equal to that the City agreed to for its other two groups of unionized employees is evidence of the FOP's reasonableness and its willingness to work with the City.

The FOP argues the City's reason for rejecting the FOP's reasonable offer was not based on finances or whether its police officers deserve of a wage increase or on a comparability analysis with other police officers or other City employees. The City negotiating team during the course of these negotiations, presented the FOP's offer and recommended its acceptance to the City Council. Testimony during this hearing established the Council's rejection was based on political considerations, rather than the

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<sup>5</sup> The FOP notes that the City of Newark is currently in negotiations with its police officers for successor collective bargaining agreement.

criteria listed in 19 Del.C. §1615. The FOP concludes, “For the Dover City Council to place the management team of the City in the position of now arguing against something they thought was fair and reasonable is irrational and constitutes bad faith on the part of the City leadership.”

**City of Dover:**

The City argues including a soft body armor policy in its last, best, final offer does not warrant outright rejection of its offer. It asserts the FOP originally proposed the policy during mediation as a means to generate additional federal funds to help offset the additional cost of a 2% across the board wage increase. Based on the FOP’s proposal, the City understood the soft body armor policy to be “fair game” and reasonably part of the wage negotiations. For the FOP to now argue the policy is outside the scope of bargaining raises a serious question about the FOP’s good faith during the course of negotiations.

The FOP was on notice that the City included a soft body armor policy in its last, best, final offer since August 8, 2011. In a letter to the arbitrator the following day, the FOP complained about the background information and argument included in the City’s submission, but did not object to the scope of the City’s offer. The parties met with the arbitrator in a prehearing conference on September 26, 2011, at which the parties’ offers were discussed; again the FOP did not object to the scope of the City’s offer. To allow the FOP to prevail on what it alleges is a dispositive procedural issue that was not raised until the morning of the hearing is fundamentally unfair, and should be rejected.

Alternatively, the City argues that if the arbitrator determines the soft body armor policy is outside the scope of the parties’ negotiated reopeners and the arbitrator

determines the City's pure wage proposal is the more reasonable (but for the soft body armor policy), the City would simply not implement the policy. The City asserts PERB has previously determined that it is inappropriate to dismiss an entire offer even when one of its terms is unenforceable. *DSTA and DSP*, Supra., p. 4250 -4252.

In support of its position on the merits, the City argues the FOP asks this arbitrator to substitute the FOP's interests for the public interest. The City asserts the current impasse is in interest arbitration because the citizens of Dover, "elected a new slate of public officials to curb runaway spending and wage increases," and the FOP does not like that message. Consideration of the evidence and economic information presented during this proceeding, however, supports the conclusion that the City's offer is in the best interest of the welfare of the public.

In summary, the City argues its proposal is the more reasonable under the statutory criteria because:

- The City is currently facing future economic uncertainty. It is in the public's best interest and welfare to allow the City to constrain its salary expenses as much as practical in light of the public's clear message. It is not in the public's interest to ignore the future effect of a general wage increase and hope instead to address these real concerns at some future date.
- Under the City's proposal, FOP employee performance will not suffer or detrimentally affect their ability to protect the public.
- Dover's police force will remain favorably compensated in comparison to other similarly-situated police forces under the City's proposal, and the FOP has failed to provide any evidence showing that the City's proposal will adversely affect recruiting or cause officers to leave the Dover Police Department.
- FOP employees will remain generously compensated under the City's proposal.
- The true cost of the FOP's proposal is substantially more onerous this year and in all future years than the City's proposal. The FOP's only justification is that (1) the City has enough money to cover the increase this fiscal year; and (2) that prices have increased 3.4% since the last wage increase, ignoring the fact that prices have been rising

and falling at different increments over the course of the three-year collective bargaining agreement. *City Closing Argument*, p. 15.

## **DISCUSSION**

The authority of the binding interest arbitrator under the PERA is narrow in scope. The arbitrator is limited to choosing between the last, best, final offers of the parties, in their entirety. *FOP Lodge 4 v. City of Newark*, Del.Ch., Civ.A. 20136, 2003 WL 22256098, IV PERB 2959 (2003). In making that determination, the arbitrator must consider the statutory criteria and must specify the basis for the findings, giving appropriate weight to each relevant factor. 19 Del.C. §1315(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)

Once an impasse proceeds to the binding interest arbitration hearing, it is no longer a continuation of negotiation or mediation. Interest arbitration is the final stage of the impasse resolution procedure and is implemented only when the negotiation and mediation processes have failed and the parties have abdicated their statutory responsibility to collectively bargain to the arbitrator to determine the terms of the labor/management relationship for the period in issue.

The arbitrator does not stand in the place of either negotiation team or act on behalf of either party. Positions which may foster or support movement toward resolution in negotiations and/or mediation (and are reasonable negotiating positions)

may not stand up when evaluated under the statutory criteria for interest arbitration set forth in 19 Del.C. §1615(d). The statute requires the arbitrator to evaluate the two positions based on internal and external comparability and costs, within the specific workplace and with comparable employers, in the same and similar communities, and to economic conditions and the labor market, generally. The arbitrator must base his or her determination upon consideration of these objective standards.

This case presents the first instances in which parties have resorted to interest arbitration to resolve an impasse resulting from a contractual wage reopeners. The scope of these negotiations was circumscribed by the terms of the negotiated reopeners, which stated:

... Negotiations for wages only will begin the first week of January 2011 for the period of July 1, 2011 – June 30, 2012. Parties will also attempt to develop a new wage scale.

The parties were unsuccessful in their efforts to “develop a new wage scale” and at some point there was agreement to simply focus their efforts on negotiating a wage increase for the third and final year of their collective bargaining agreement.

The FOP has argued that the City’s offer should be rejected because it exceeds the scope of the limited, negotiated contractual reopeners by including a soft body armor policy. While this argument has merit in theory, the FOP was aware the City’s offer included the policy since the last, best, final offers were submitted in early August. At no time prior to the hearing, did the FOP assert the position that the City’s proposal was fatally flawed, nor did the City move to modify its offer to limit it to wages. The record evidences there was a fundamental, if unspoken, understanding between these parties that if the inclusion of a proposal which extended beyond a traditional wage consideration would assist in resolving the impasse, it would be considered during the negotiations. To

exclude consideration of the City's offer at this point because it includes a soft body armor policy which the parties had previously considered at length would be fundamentally unfair and is not required by the POFERA.

It would be equally unfair to allow the City to modify its last, best, final offer just prior to the hearing. The parties were placed on notice during a prehearing conference on September 26, 2011, and reminded in an October 24, 2011 letter confirming the scheduling of this arbitration hearing that, "...the Arbitrator has permitted parties to modify their last, best and final offers up to the point that hearing exhibits are exchanged, which in this case would be up until October 28<sup>6</sup>, by mutual agreement." The City chose not to modify its offer in a timely manner.

For these reasons, the City's last, best, final offer will be considered as it stood at the time of submission of the parties' exhibits on October 31, 2011, including both the 1% wage increase to be effective July 1, 2011, and the soft body armor policy.

Turning to a consideration of the statutory criteria set forth in 19 Del.C. §1615(d), there were no stipulations from the parties nor argument that either last, best, final offer exceeded the lawful authority of the public employer. Each statutory factor was presumed to be relevant and given due weight in my analysis.

Review of internal comparables pursuant to 19 Del.C. §1615 (d)(2) and (d)(3), reveals a high level of relative equity between all City of Dover employees in wages and benefits. City Exhibit 23 establishes wage increases for all City employees since July 1, 2007 (FY 2008) were:

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<sup>6</sup> The Arbitrator extended the deadline to October 31, 2011, for submission of exhibits at the mutual request of the parties.

<b>Contract Year</b>	<b>Non-bargaining</b>	<b>FOP</b>	<b>IUE</b>	<b>IBEW</b>
7/1/07 – 6/30/08 (FY 08)	PFP scale 2.0% – 6.5%	3.5%	3.5%	3.0%
7/1/08 – 6/30/09 (FY 09)	3.5%; 3.66% or 4.0%	4.0%	3.5%	3.5%
7/1/09 – 6/30/10 (FY 10) <sup>7</sup>	3.5%	3.5%	3.5%	4.0%
7/1/10 – 6/30/11 (FY 11)	PFP scale 0% – 4%	3.0%	3.0% eff. 8/15/10	3.0% + \$500 eff. 1/25/11
7/1/011 – 6/30/12 (FY 12)	0% proposed	1.0% <sup>8</sup> proposed	2.0%	2.0%

City Exhibit 23 also evidences a consistency and equity in benefits across all employee groups. Benefits for police officers represented by the FOP are not markedly different from those provided to all other City employees. The subtle differences in benefits between employee groups appear to be related to the type of work performed by those groups of employees ( e.g., Court Pay and rank progression for police officers; more personal days in lieu of holidays for Electric Department employees represented by the IBEW, etc.)

The City's Human Resources Director testified she found Newark, Delaware and Hagerstown, Maryland to be the closest comparables to Dover for police forces.<sup>9</sup> City Exhibit 36 includes the following data:

	Dover, DE	Newark, DE	Hagerstown, MD
# Sworn Personnel	90	64	98
Population Served	36,047	31,454	39,662
Area Served (sq. miles)	23.15	9.19	11.79
Police Budget (\$ millions)	13.5	9.7	10.4
2010 Reported "Violent" Crimes	239	139	177
2010 Reported "Property" Crimes	2,122	947	1,436

<sup>7</sup> It is undisputed that all City of Dover employees had nine (9) furlough days in FY 2010, which essentially saved the City the approximate cost of the wage increases noted for that fiscal year.

<sup>8</sup> City Exhibit 23 erroneously states the City's proposed wage increase is 0% in FY 12; the error has been corrected herein to reflect the City's last, best, final offer.

<sup>9</sup> The municipalities of Milford, Smyrna and Wilmington, Delaware, and New Castle County, Delaware were rejected as comparables due to significant differences in the relative size of police forces, budget, population, and crime rates.

Through cross-examination, it was established that Hagerstown differed in several material respects from both Dover and Newark. The FOP argued that along with Newark, State Police Troop 3 (whose 90 troopers serve the rest of Kent County, Delaware) and the New Castle County Police should also be considered comparables, based on similarity of work and similarity of working conditions. The FOP argues the statute does not define “similar communities” exclusively in terms of demographics. Providing only a comparison of relative wages and salaries by rank, and arguing that a force is a comparable simply because it is contiguous does not provide the arbitrator with a sound basis to conclude jurisdictions are “similar”. I find that Newark is the closest comparable to Dover, as was previously held by both PERB and the Chancery Court.<sup>10</sup>

19 Del.C. §1615(d)(2).

Upon review of the collective bargaining agreements, differences in healthcare for current and retired police officers, and the opportunity of Dover Police officers to use “terminal leave”<sup>11</sup> when they retire were identified. The City’s conclusion that the benefits plan for Dover Police Officers is “at least as good as or better than the police benefit plans in Newark” is supported by the record. A direct comparison of wages for Dover and Newark Police Officers established they are very similar and close over the course of an officer’s career, with Dover slightly outpacing Newark in years one to four, and ten through twenty two, and Newark doing slightly better in years five through nine.

*City Exhibit 39.*<sup>12</sup> The higher salaries of upper ranks in the Dover Police Department are

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<sup>10</sup> *FOP Lodge 4 v. City of Newark*, BIA 02-01-338, IV PERB 2789 (PERB Decision on Remand, 2003); *Fraternal Order of Police, Lodge No. 4 v. City of Newark and Public Employment Relations Board*, C.A. No. 20136, IV PERB 2959, VC Lamb (Chan. Ct, 2003).

<sup>11</sup> “Terminal leave” is the pay out of accumulated sick leave when an officer retires. She testified terminal leave is capped at \$12,000 in Hagerstown, but is not similarly capped in Dover.

<sup>12</sup> The data the City relied upon in composing Exhibit 39 are substantially similar to those relied upon by the FOP in preparing its exhibits and the testimony of its economic expert.

offset to some extent by the earlier eligibility of Newark Police Officers to attain these ranks. The record also establishes a very low turn-over rate for Dover Police Officers (excluding officers who retire) over the last sixteen years.

No direct comparison of police bargaining unit wage increases between Newark and Dover for Fiscal Year 2012 is possible at this time, however, as both bargaining units are in negotiations concerning the current year. In fact, both groups are in interest arbitration proceedings as of the date of this decision.

It is undisputed the wage increases proposed by both parties (the City proposes 1% effective July 1, 2011; the FOP proposed 2% effective January 1, 2011) have essentially the same net cost in Fiscal Year 2012. The City conceded it can afford either wage offer in Fiscal Year 2012, but that it is concerned as to whether a 2% increase is sustainable three to ten years into the future, or over the life of a Dover Police Officer's career. Perhaps the most important factor in considering these proposals is the fact that these parties are only negotiating for a single year wage increase for Fiscal Year 2012, and they will initiate negotiations for a successor agreement this month.<sup>13</sup> It is the nature of collective bargaining that parties have the opportunity to review their prior agreements and to negotiate changes as necessitated by changing economic and workplace conditions, every two to three years.

The City presented ample evidence to establish that if revenues and expenditures continue to diverge into the future (with expenditures exceeding revenues), a structural deficit is created which must be addressed. In the recent past, Dover (like many municipalities) relied heavily on a tax base that was dependent upon real estate transfers and property values. The national recession has significantly decreased earlier levels of

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<sup>13</sup> Article 1.2 of the parties' collective bargaining agreement requires "negotiations for a successive agreement shall begin the first week of January 2012."

these revenues. As with most governmental entities, the recovery of these revenue streams will undoubtedly lag behind a general economic recovery by a few years. The City argues it must also consider competitors (both public and private) in setting its fees for services such as electricity, recycling and waste removal.

There are many means available to a municipality to address economic downturns. The City's recently retired City Manager proposed three alternatives in May, 2011, which revealed typical approaches. Proposed Plan A called for marked reductions in expenditures and services (including the lay-off of 33 municipal employees and extensive cuts to capital expenditures); Proposed Plan B called for marked increases in revenues (including increases to both taxes and fees); and Proposed Plan C was a hybrid which included a combination of decreased expenditures and increased revenues. None of these plans were accepted as proposed by the City Manager, but it is important to note that to the extent than any proposed plan impacts terms and conditions of employment for represented employees, the law requires the City to collectively bargain those changes.

These parties have a very recent history of successfully negotiating a wage compromise to address an economic deficit. The first year of the current agreement reflects a 3.5% across the board increase, but the FOP agreed to the City's request for nine (9) unpaid furlough days, resulting in no real wage increase for police officers in the first year of the agreement. Furloughs were also served by all other City employees. The collective bargaining agreement also reserves to the City the discretion to determine if reductions in rank or force are necessary due to lack of funds.

The City's Finance Director testified that OPEB costs are required by GASB (the Government Accounting Standards Board) since 2009 to be recognized on the municipal balance sheets, but are not required to be funded. To the extent these future costs are not

funded, however, they appear as unfunded liabilities (like an underfunded pension) on the City's Comprehensive Annual Financial Report ("CAFR"). The CAFR is open to review by rating agencies, bondholders and creditors and unfunded liabilities can affect the City's ability to borrow money or to receive credit at favorable rates. The City chose to initiate a plan to fund its OPEB's over ten years in FY 2010. The recommended annual contribution to the OPEB fund is based on an accelerating rate of total annual salary each year. The City's Finance Director also testified that in the past, the City has only funded the annual expenditure for retiree benefits and that in FY 2010, the City did not make the full recommended contribution to the OPEB fund because of its projected deficit. The City's recently modified Financial Policies, however, do require that when the final Budget Balances from the General Fund, the Water/Wastewater Fund, and/or the Electric Revenue Fund "exceeds the amount as approved in the budget ordinance, such funds shall be used to provide for unfunded retirement liabilities or as otherwise designated by the City Council." *City Exhibit 13*. Although the City emphasized the OPEB liabilities as a major impediment to agreeing to the FOP proposal, the record does not establish that the City has been or will be unable to meet its obligations this year or in the near future.

Concerning the soft body armor policy, the City did not establish why this policy is necessary or reasonable at this point in time. It is undisputed that the majority of Dover police officers currently wear soft body armor, and that the situation has not changed substantially since this issue was first addressed in an unfair labor practice proceeding before PERB in 1998. *Fraternal Order of Police, Lodge No. 15 v. City of Dover , Delaware*, U.L.P. No. 98-08-241, III PERB 1855 (1999). The evidence did not establish that this policy would generate significant new moneys for the City which would help to offset any costs nor did it establish whether soft body armor policies exist

in comparable police forces. The record does not support the conclusion that the soft body armor policy is reasonable under the statutory criteria.

Based on the record before me and consideration of internal and external comparables as well as the existing revenues of the City, I conclude the FOP's proposal is the more reasonable. The FOP made a major concession in proposing to forego any wage increase for the first six months of the Fiscal Year 2012, despite the fact that other represented employees received 2% increases for the entire fiscal year. The City's concerns about the impact of the increase in three to five years will be the subject for future negotiations between these parties.

### **DECISION**

For the reasons discussed above, based on the record created by the parties in this proceeding, the last, best, final offer of FOP Lodge 15 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 considered in their entirety in reaching this decision.

WHEREFORE, the parties are directed to implement the 2% wage increase (effective January 1, 2012) as set forth in FOP Lodge 15's last, best, final offer. The parties are to notify the Public Employment Relations Board of compliance with this Order within sixty (60) days of the date below.

**IT IS SO ORDERED.**

Date: January 16, 2012

*D.L. Murray-Sheppard*

DEBORAH L. MURRAY-SHEPPARD  
Executive Director, Delaware PERB