

PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF DELAWARE

FRATERNAL ORDER OF POLICE, LODGE NO. 5,	:	BOARD DECISION ON
	:	REQUEST FOR REVIEW OF
	:	THE DECISION OF THE
Appellant,	:	INTEREST ARBITRATOR
	:	
v.	:	
	:	
NEW CASTLE COUNTY, DELAWARE,	:	<u>BIA 11-10-826</u>
	:	
Appellee.	:	

Appearances

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

BACKGROUND

Fraternal Order of Police, Lodge No. 5 (“FOP”) is an employee organization within the meaning of §1602(g) of the Police Officers and Firefighters Employment Relations Act (“POFERA”), 19 Del.C. Chapter 16 (1986). The FOP is the exclusive bargaining representative of a unit of all sworn police officers at and below the rank of Senior Lieutenant employed by the New Castle County Police Department.

New Castle County, Delaware (the “County”) is a public employer within the meaning of 19 Del.C. §1602(l).

FOP Lodge 5 and the County were engaged in unsuccessful negotiations for a successor collective bargaining agreement to their most recent agreement which had a

term of April 1, 2008 through June 30, 2011. Following an unsuccessful mediation effort, binding interest arbitration procedures were initiated and hearings were held on January 4 and January 9, 2012, before the Executive Director of the Public Employment Relations Board.

The interest arbitrator issued her decision on or about March 5, 2012, in which she determined the last, best final offer of New Castle County to be the more reasonable based upon the statutory criteria set forth in 19 Del.C. §1615. The parties were directed to implement the County's offer within sixty (60) days and to advise PERB of compliance with the Order.

On or about March 8, 2012, the FOP filed a Request for Review of Arbitrator's Decision. At the Board's request, the FOP submitted written argument (with supporting case law) in support of its appeal on or about March 23, 2012. The County filed responsive argument (and supporting case law) on or about April 5, 2012.

A copy of the complete record in this matter was provided to each member of the Public Employment Relations Board. A public hearing was convened on April 25, 2011, at which time the full Board met in public session to consider the merits of the FOP's Request for Review. The parties were provided the opportunity to present oral argument and the decision reached herein is based upon consideration of the record and the arguments presented to the Board.

DISCUSSION

The scope of the Board's review of an interest arbitration decision is whether the decision and award of the arbitrator is arbitrary, capricious, otherwise contrary to law, or

unsupported by the record. Following its deliberations, the Board must vote to either uphold or overturn the decision, or it may choose to remand a decision for further action by the Executive Director. Upon review of the record and consideration of the arguments of the parties, the Board unanimously affirms the Executive Director's decision for the reasons that follow.

The FOP argues its last, best, final offer is more reasonable, *per se*, under the statutory considerations set forth in 19 Del.C. §1615 because the FOP only seeks to maintain the status quo established by the predecessor collective bargaining agreement. The FOP asserts it seeks nothing more than what it had negotiated for in 2007, whereas the County's last, best, final offer requires the bargaining unit to give back specific compensatory concessions which equal 2.5% of their previously negotiated annual wages. It argues the record supports the conclusion that the County failed to meet its burden to establish the concessions were necessary, independent of its obligation to support an inability to pay argument.

The FOP creates a false premise in asserting that the terms of the 2007 collective bargaining agreement constitute the status quo. In fact, the County and the FOP entered into a Memorandum of Agreement ("MOA") for Fiscal Years 2010 and 2011 which reduced bargaining unit compensation by an amount equal to 5% of wages in each of those years. Under the terms of that MOA, the concessions expired on the last day of the collective bargaining agreement, June 30, 2011. Consequently, the bargaining unit did experience an increase approximating 5% of compensation on the last day of the predecessor agreement. The FOP's last, best, final offer sought to maintain the full 5% reversion, whereas the County's last, best, final offer attempted to limit it to 2.5% in light

of continuing economic difficulties.

The FOP's argument is predicated on the premise that a negotiated economic benefit cannot be rescinded or decreased in subsequent negotiations, i.e., the prior agreement is the "base" and all subsequent negotiations are only for the purpose of increasing that base. All collective bargaining is contextual (as is binding interest arbitration) and is influenced by the fiscal and economic conditions in which the employer operates. It requires give and take. Difficult economic times affect both employers and employees and certainly lead to more circumscribed negotiations. The binding interest arbitration process is designed to bring finality to negotiations when parties are unable to resolve their differences through negotiations. The statute places a burden on the arbitrator to understand the prevailing economic situation for the employer and bargaining unit, the surrounding community and comparator units in reaching a decision on which last, best, final offer to accept in its entirety.

The FOP argues the arbitrator should have engaged in a sequential analysis, first determining which offer was more reasonable, and if the FOP's offer is chosen, to then assess the viability of the County's inability to pay argument. The plain language of the statute, however, does not support the FOP's argument:

... 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 [the financial ability of the public employer, based on existing revenues, to meet the costs of any proposed settlements . . .], no single factor in this subsection, shall be dispositive. *19 Del.C. §1615(d)*

In reaching a determination as to which of the last, best, final offers should be accepted in

its entirety, the arbitrator is required to “take into consideration” the statutory factors. It is not necessary for the arbitrator to provide written findings of fact for each statutory factor. *FOP Lodge 4 v Newark and PERB*, CA 20126, BIA 02-01-338, 2003 Westlaw 22256098, IV PERB 2959, 2963 (2003).

Section 1615(d) states no single factor set forth therein shall be dispositive, *except* for the “financial ability of the public employer, based on existing revenues, to meet the costs of the proposed settlement.” The FOP argues the arbitrator erred in applying the analysis of “existing revenues” from the binding interest arbitration decision in *City of Seaford v. FOP Lodge 9*¹, asserting arbitrators are not bound by the prior decisions of other arbitrators. This argument rings true in the context of grievance arbitration where arbitrators are interpreting and applying the contractual provisions negotiated by parties in order to give them the intended force and effect. Delaware public sector binding interest arbitration is, however, a statutory process. The interest arbitrator is required to apply the statutory criteria and to follow the mandates of the statute.

It is the responsibility of this Board to administer the statute and to provide for the fair and consistent application of its provisions. The Executive Director (acting as the interest arbitrator in *Seaford*) was directed by the Board to “specifically address what constitutes ‘existing revenues’ within the meaning of 19 Del.C. §1615(d)” in its remand order.² The Board finds the analysis undertaken therein is well-reasoned and should be applied in subsequent cases under the POFERA, unless and until it is successfully challenged and overturn. The Board further finds the Executive Director correctly applied the *Seaford* analysis of existing revenues in this case.

¹ Decision of the Binding Interest Arbitrator on Remand, IV PERB 2659 (2002).

² FOP Lodge 9 v. City of Seaford, Board Remand to Executive Director, IV PERB 2659, 2660 (2002).

The FOP argues this interest arbitration was substantially different from any prior proceedings because the issue before the arbitrator was not which of two wage increases was more reasonable under the statute, but concerned a choice between the status quo and a 2.5% decrease in compensation. The FOP expressed its fundamental belief that the status quo is presumptively reasonable under the statute, but did not provide statutory or legal support for this position. It is clear that the statutory procedure requires the arbitrator to do a comparative analysis based on the specific facts presented in the interest arbitration proceeding. A review of the extensive record in this case makes it clear that the arbitrator did undertake this analysis. She considered internal and external comparators as presented by the parties. She considered the fiscal data presented by the County, which was unrefuted by the FOP.

She also considered the County's ability to pay, again based on the information presented. The FOP argues that it cast substantial doubt on the County's argument by providing information as to the salary savings in the Police Department which resulted from extended vacancies. The arbitrator reviewed this information and credited the County's unrefuted response that those salary savings are used to meet severance costs for retiring officers and also to cover overtime and other expenses necessitated by a reduced police force. Additionally, the County provided evidence that it annually budgets for 98% of its police salary costs because it is usual and customary to have officer attrition during the course of the fiscal year. Because the majority of replacement officers must go through an extensive training period (which is initiated once a sufficient number of vacancies justify the creation of a class of recruits) the County annually makes a reasonable projection that it will not expend 100% of salary costs. Whether the

projected monthly savings was \$83,040 or \$110,720 is not dispositive. The County provided evidence that the severance pay-outs for the first half of Fiscal Year 2012 and for the Fiscal Year 2011, significantly exceeded the salary savings projected by the FOP. The Board finds there is sufficient evidence in the record to support the arbitrator's conclusion.

The crux of the FOP's appeal concerns its perception that the deck was stacked against the union coming into negotiations. It notes that prior to the first negotiating session between FOP 5 and New Castle County, the County hired a financial consultant to work on a compensation analysis. The County Council passed its Fiscal Year 2012 budget before negotiations began, which was balanced, in part, on an *anticipated* \$2.1 million in compensation savings from County employees. This budget was passed prior to the County meeting with any of the unions representing County employees. According to the testimony of its President, these actions were not typical in the FOP's experience.

The County provided evidence that it is and has been facing a very difficult economic situation which necessitated new decisions and approaches. The County has faced disproportionately diminishing revenues and uncontrolled increases in employee costs. It is the responsibility of elected officials to act in a fiscally responsible manner in order to provide for the public interest. The Board finds the record supports the Executive Director's decision that the County does not have the financial ability to meet the costs of the FOP's last, best, final offer, based on its existing revenues for the term of this agreement.

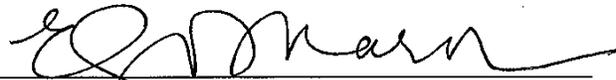
The Board notes its appreciation to counsel for presenting a comprehensive and well-documented record. The simple fact of binding interest arbitration is that it is a

winner-take-all system, designed to encourage parties to reach their own settlements prior to the need for an award. Interest arbitration places a burden on each party to fashion a reasonable and supportable offer based upon the statutory criteria, and to present compelling evidence and argument to the arbitrator. It is clear from the record, that the arbitrator executed her responsibilities in conformance with the statutory requirements.

DECISION

After reviewing the record and considering the arguments of the parties, the Board unanimously affirms the decision of the Interest Arbitrator awarding the County's proposal over that of FOP Lodge 5.

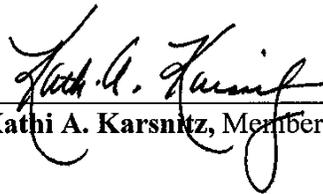
IT IS SO ORDERED.



Elizabeth D. Maron, Chairperson



R. Robert Currie, Jr., Member



Kathi A. Karsnitz, Member

DATE: June 22, 2012