

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

LAUREL EDUCATION ASSOCIATION, DSEA/NEA,	:	Decision of the
	:	Binding Interest
and	:	Arbitrator
	:	
	:	<u>BIA 13-12-934</u>
LAUREL SCHOOL DISTRICT.	:	

Appearances

Patricia P. McGonigle, DSEA General Counsel, for Laurel Education Assn.

David H. Williams, Esq., Morris James LLP, for Laurel School District

Background

The Laurel School District (“District”) is located in the southwestern corner of the State of Delaware, and is a public school employer within the meaning of §4002(q) of the Public School Employment Relations Act (“PSERA”), 14 Del.C. Chapter 40 (1982).

The Laurel Education Association, DSEA/NEA (“LEA” or “Association”) is an employee organization within the meaning of §4002(h) of the PSERA. The LEA is the exclusive bargaining representative of the bargaining unit of certified employees of the District within the meaning of 14 Del.C. §4002(i). The bargaining unit includes all elementary and secondary classroom teachers, speech and hearing specialists, visiting teachers, psychologists, guidance counselors and librarians, and excludes administrative personnel, substitutes and supportive services personnel employed by the District.

The District and LEA were and are parties to a collective bargaining agreement which has a term of July 1, 2006 through June 30, 2010. Addendum #1 to that

agreement, Ground Rules for Negotiations, states:

III. General Rules

- (a) Either party may initiate negotiations by notifying the other party in writing by November 1 of the negotiation year. Negotiation year is the year preceding the expiration date of this negotiated agreement. Failure to notify by November 1 of the negotiating year will automatically renew the Agreement for another two-year period.

The parties entered into negotiations for a successor agreement in April, 2013. Unable to reach a successful conclusion to the negotiations, on or about May 10, 2013, the District requested mediation. A mediator was appointed by the Public Employment Relations Board (“PERB”) and three mediation sessions were conducted. Mediation concluded on December 4, 2013, without settlement.

By letter dated December 9, 2013, 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.

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 January 23, 2014.

A three day binding interest arbitration hearing was conducted by the Executive Director on March 12, 13 and 14, 2014, at which time the parties presented testimony and documentary evidence in support of their respective positions. The record created by the parties was extensive and included the submission of fifty-two exhibits by the District and thirty-four by the Association, as well as the testimony of five witnesses.

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

Laurel School District: ¹

All tentative agreements are identified in the Board proposal (updated on March 4, 2014) with the designation of “TA” in the margins.

The permissive subjects of bargaining identified in District Exhibit 46² are withdrawn from further bargaining and the binding interest arbitration process. Thus, the subjects of bargaining listed in Exhibit 46 will be eliminated from the successor collective bargaining agreement implemented as a result of the arbitration determination.

Article 3, Grievance Procedure

3.2 Definitions

Grievance – A grievance is a claim by ~~an teacher~~ **employee**, a group of ~~teachers~~ **employees**, or the Association that the provision of this Agreement has been misapplied, misinterpreted, or otherwise violation, ~~or that Board policy has been misapplied or misinterpreted by administrative decisions.~~ **An allegation an employee is adversely affected by a violation, misinterpretation or misapplication of Board policy, administrative regulation, State or federal law, or regulation is a complaint which must be pursued through the Complaint Procedure attached as Addendum #4.**

Article 8, Teaching Hours and Teaching Conditions

8.2 The ~~Teacher~~ **Employee** Work Day:

The ~~teacher~~ **employee** work day shall be a minimum of seven and one-half (7 ½) hours, inclusive of a duty-free one-half (1/2) hour lunch period. The reporting time shall be as established for each building by the Board or its representative. ~~On Fridays and/or days preceding holidays or vacations, the teacher~~ **employee** ~~work day shall end at the close of the pupil's day.~~ **When employees are required to attend evening parent conferences, the workday shall be adjusted to compensate employees for time scheduled for conferences.**

¹ The District’s proposal renumbered and reorganized the format of the predecessor agreement; consequently the numbering of related proposals of the parties’ last, best, final offers do not coincide. No reason was offered for this change of format and organization of the proposed collective bargaining agreement.

² The issues the District identified as “permissive” subjects of bargaining are enumerated and evaluated herein, in the Discussion section of this award, under the heading of “Scope of Bargaining” at p. 35.

Time compensation will be offered on the same day as the conferences, unless the Association and the District agree upon an alternative arrangement. Employees are required to attend up to 3 evening events as designated by their administrator. Employees are also encouraged to attend those evening activities that are vital to the mission of the District. The Association recognizes and supports the importance of such involvement. An ~~teacher~~ **employee** who is required to work beyond the regular in-school work year, ~~or beyond the total in-school workday (excepting those defined in Paragraph 51, Meetings)~~ shall be compensated at the same rate as the ~~teacher~~ **employee's** regularly scheduled salary.

8.3 Daily Teaching Load

Daily classroom instruction shall not exceed ~~five (5)~~ **six (6)** hours of actual instruction time. Assignment to any activity other than the regular classroom which requires ~~teacher~~ **employee** supervision shall be construed as instructional time. Before and after school duties that exceed ten (10) minutes shall be counted toward the daily teaching load.

8.4 Planning ~~Preparation~~ and Conference Time

Each ~~teacher~~ **employee** in the District shall **receive 45 consecutive minutes of planning and preparation time each school day within the regular student day** ~~be entitled to at least one preparation and conference time per day, exclusive of recess time. The District recognizes the importance of uninterrupted preparation time and shall make every effort to keep interruptions to a minimum. A preparation shall consist of a minimum of fifty (50) consecutive minutes. In the event state and/or national testing prohibits the above, the administrator shall confer with the employee to reach mutual agreement on how the time can be compensated. Mutual planning periods will be scheduled for co-teaching TAM teachers~~ **employees** whenever possible. ~~No teacher~~ **Employees** shall **not involuntarily lose their planning** ~~his/her preparation time, except in an emergency as a result of another teacher's absence.~~ In cases of emergency, **an teacher employee** may be asked to substitute ~~with compensatory time being awarded on a minute-for-minute basis equal to that spent as a substitute. The amount of time shall be mutually agreed upon by the teacher and the building administrator.~~ **In the event of an abbreviated student day, or state and/or national testing, less than 45 minutes of planning time may be provided, but every effort will be made to equitably distribute planning time within that day.**

8.6 Subject Area and ~~Teacher~~ **Employee** Preparation:

When a departmentalize schedule is used the Principal

shall make a reasonable effort to limit the number of preparations so as to avoid an undue burden to an employee. “In all events, an employee shall have no more than a total of 4 teaching preparations in any given semester.” ~~Departmentalized teachers shall not be required to teach more than two (2) subject areas nor more than a total of three (3) teaching preps unless agreed upon by the teacher involved and the Administrator.~~

- 8.8 Continuous Teaching Time **DELETE IN ITS ENTIRETY**
- 8.9 Waiver of Provision **DELETE IN ITS ENTIRETY**
- 8.23 Compensatory Time **DELETE IN ITS ENTIRETY**
- 8.25 Reserved Inservice Days **DELETE IN ITS ENTIRETY**
- 8.26 Banking Time **DELETE IN ITS ENTIRETY**

Article 12, Salaries and Fringe Benefits

12.1 Salaries (*Tentative Agreement reached on first ¶*)

~~The local supplement salary shall be as provided in Appendix A.~~ The local salary schedule set forth in Appendix A is based upon 188 work days. If the State reduces or increases the number of working days, the local salary schedule shall be adjusted to reflect the number of work days by calculating a per diem rate for 188 work days, and decreasing, or increasing, the local salary schedule. For example, if the local salary for a cell in the salary schedule is \$10,000, \$10,000 will be divided by 188 to calculate a per diem. If the number of work days is reduced to 187, the local salary of \$10,000 shall be reduced by an amount equal to the per diem rate derived by dividing \$10,000 by 188. If the State implements a furlough thereby reducing the number of work days funded by the State, and the furlough applies to all District employees (including employees who are not in the teachers’ bargaining unit), the reduction in the local salary of bargaining unit employees will occur only if the District applies the same approach (i.e., a per diem reduction) to all employees who are not in the bargaining unit. (T/A).

The local salary schedule shall reflect:

- A. 2013 - 2014 0%
- B. 2014- 2015 0%
- C. 2015 - 2016 0%
- D. 2016 - 2017 0%

- 13.1 Teacher Assignment, Definitions **DELETE IN ITS ENTIRETY**

- 13.2 Teacher Assignment, Posting & Timelines **DELETE IN ITS ENTIRETY**
- 13.3 Teacher Assignment, Notice of Assignment **DELETE IN ITS ENTIRETY**
- 13.4 Teacher Assignment, Re-assignments **DELETE IN ITS ENTIRETY**
- 13.5 Teacher Assignment, Areas of Competence **DELETE IN ITS ENTIRETY**

Article 14, Selection, Assignment and Transfer

- 14.1 Overview (new)

April 15 to April 30	Preference Form Accepted
May 1 to August 1	Right to Return Period
May 1 to July 1	Voluntary Transfer Process Period

- 14.2 Purpose (new)

This Article outlines the procedures used to determine the selection, assignment, reassignment, and transfer of employees. To provide a stable school environment for students, the movement of employees during the school year will normally not occur except under unique circumstances deemed critical by the District.

- 14.3 Assignment (new)

Assignment of an employee within a school or program is based upon certification, highly qualified status, interest of the employee, and needs of the students. Assignments are classified as: (1) Regular – assigned to a specific school(s) or program(s) based on certification, and (2) Limited duration – assigned to a school(s) or program(s) for a limited period of time based upon certification and/or other specific experience or skills of the individual.

- 14.4 Reassignment (new)

The District has the discretion to change an employee’s subject area, course assignments, grade or room assignments. Such a change shall take place at the beginning of the school year and the affected employee shall receive notice of the change by the end of the school year which precedes the effective date of the change. The parties recognize that at the secondary level there may continue to be changes in the composition of courses assigned to an employee due to changes in the course selections of students. An employee will not be assigned outside the employee’s area(s) of certification.

- 14.7 Posting Vacancies (new)

The District shall post all vacancies. A vacancy does not exist if there is an unassigned employee who is certificated for the open position; or there is an employee on the recall list who is certificated for the position. “Post” means delivering a copy to the Association, posting notices in all buildings, and sending notice to employees via the District email system. The notice of vacancy will contain:

- A. Type of vacancy;**
- B. Position description;**
- C. Location;**
- D. Start date;**
- E. Closing date of posting;**
- F. Required certification; and**
- G. Other qualifications.**

The Notice shall be posted for at least 10 work days prior to the closing date except that postings between August 1 and first teacher workday, and emergencies (situations suddenly arriving over which the employee and the District have no control or advance knowledge), shall be for 5 work days.

14.8 Voluntary Transfers (new)

Voluntary transfers are initiated by the employee based upon a desire to change school, grade level, program, or certification area. Individuals returning from leave of longer than 12 weeks of duration, and returning after June 1, will be placed for the following school year by using the voluntary transfer process.

14.9 Criteria For Applying For Voluntary Transfer (new)

An employee may only apply for a voluntary transfer if the employee has not voluntarily transferred during the prior 2 years, and the employee is:

- A. Certified for the position;**
- B. Highly qualified for the position, or has the credentials to be deemed highly qualified for the position if applicable;**
- C. Not on an improvement plan;**
- D. Without any documented disciplinary actions in the employee’s personnel file (for insubordination or inappropriate behavior with a student) for a period of 2 years prior to the voluntary transfer request; and**
- E. In at least the employee’s second year of employment**

with the District except for those employees who are unassigned.

14.10 Temporary Assignments (new)

Temporary assignments are given to employees hired after October 10 for the remainder of their initial year of hire. Employees with temporary assignments shall use the voluntary transfer process to determine assignment for the following school year. Right of Return does not apply to a temporary assignment.

14.11 Unassigned Employees (new)

Unassigned employees shall be the least senior certificated employee in a school/program unless the school/program such an employee is currently assigned to requires the employee's certification.

14.12 Preference Form (new)

A preference form shall be completed by employees involuntarily transferred and employees who desire a voluntary transfer. This form shall require employees to identify by preference schools, programs, grade levels, or areas of certification to which they are requesting assignment. Involuntarily transferred employees with right of return must also identify such right of return on the same form. The form must be completed and returned to Human Resources by April 30. A request for movement to a different area of certification shall not be considered if the employee is not eligible for such certification, or until all employees in the desired certification area have received assignments. The preference form is only valid from the May 1 to July 1 transfer period immediately following the submission of the form.

14.13 Right of Return (new)

An employee's right of return to a school or program is not a transfer and shall only take place if an opening in that school or program occurs prior to August 1. Right of return applies to employees who have been involuntarily transferred. Such an employee may waive the right of return by notifying Human Resources in writing any time prior to notification of a right of return opening.

14.14 Selection Criteria (new)

Voluntary transfers shall be filled in accordance with the following criteria which are listed in order of priority:

A. Certification;

B. Highly qualified for the position or has the credentials to be deemed highly qualified for the position if

applicable;

C. Qualifications, based upon the State mandated appraisal system; and

D. Seniority.

14.15 Notice To Employees Of Granting Right Of Return Or Voluntary Transfer (new)

Notice that a right of return or transfer request has been granted shall be by telephone. If notification by telephone is successful (there is a conversation with the employee), the employee must respond to the offer within 2 administrative work days of the telephone conversation (excluding the day of the telephone conversation). If notification by telephone is not successful, an email will be sent advising the request has been granted. The employee must respond to the offer within 2 administrative work days of the day the email was sent (excluding the day the email was sent). Failure to respond to the offer in a timely manner will be deemed a rejection of the right of return or transfer, and the employee will remain in the employee's current assignment.

14.16 Request for Written Notice (new)

At the end of the voluntary transfer process, an employee who was not selected for a voluntary transfer may request written notice from Human Resources regarding the final outcome of the request, including the reasons for the decision.

Article XV, Involuntary Transfers and Reassignments **DELETE IN ITS ENTIRETY**

Article XVI, Reduction in Force **DELETE IN ITS ENTIRETY**

Article 15, Seniority, Layoff, and Recall

15.1 Seniority

B. An administrator who is assigned to bargaining unit positions shall be afforded seniority as an employee commensurate with the time of his/her previous employment as either an employee and/or administrator by the District. Such service must be continuous and a resignation is considered a break in service. (Moving from an employee to an administrator position is not considered a resignation).

C. The Human Resources Office shall annually publish a list of all employees by field of current major teaching assignment listed in seniority order. This list shall be published and posted in each school by February 15 of each year. Employees who wish to appeal their placement on this list must do so in writing to the

Human Resources Office before March 1 of the year the list is published. A final list shall be published by March 31 each year. An employee's failure to question prior to March 1 his/her seniority date and classification on the first published list will preclude the assertion of incorrect seniority date and classification in challenging a subsequent layoff.

G. Board-approved leaves of absence shall not constitute a break in service, but will not be counted toward seniority as applied in this Article with the following exceptions:

- (1) sabbatical leaves**
- (2) military leaves**
- (3) leave for officer of the Association**

15.2 Layoff

A. The Superintendent shall determine the number of positions to be reduced, taking into consideration known attrition, and shall apprise the President of the Association of this information and also share with the Association how this information was developed.

B. To accomplish the necessary reduction in force, employees will be laid off from the field of their current major assignment on the basis of seniority.

C. Employees who work in programs of limited duration and are scheduled to be laid off from such a program shall be permitted to return to a regular position in their former major teaching field when the limited duration program is reduced or terminated provided the employees have sufficient seniority. When a decline in enrollment, a decrease in program, or a reduction in funding is anticipated for the following year, any necessary reduction will be made in that field consistent with seniority to permit such reassignment.

D. Employees who have been involuntarily transferred or involuntarily reassigned to an assignment that places them in a different seniority classification and are scheduled to be laid off from such classification shall, at the employee's option, be permitted to return to their previous seniority classification provided they have sufficient seniority.

E. Employees who are laid off shall be placed on the recall list in the subject field from which they were laid off and in a field in which they are fully certificated. Placement on the recall list(s) shall be for 2 years. An

employee may request that his/her name be removed from a seniority classification on the recall list. *(Fully certificated means – holds a regular certificate or only needs six refresher hours to renew a regular certificate.)

Article 17, Fair Dismissal Procedure

17.1 Termination

In all cases of termination during the school year, termination at the end of the school year, and the non-renewal of non-tenured employees at the end of the school year, the rights of affected employees are set forth in Chapter 14, Title 14 of the Delaware Code.

Fair Dismissal Procedure, Notification **DELETE IN ITS ENTIRETY**

Fair Dismissal Procedure, Re-employment or Dismissal **DELETE IN ITS ENTIRETY**

Fair Dismissal Procedure, Hearing **DELETE IN ITS ENTIRETY**

Article 20, Sick Leave

20.3 Sick Leave, Accumulation Bonus **DELETE IN ITS ENTIRETY**

20.4 Sick Leave, Occupational Injury and Illness **DELETE IN ITS ENTIRETY**

Article 22, Leaves of Absence

22.4 Leaves of Absence, Family Illness Leave **DELETE IN ITS ENTIRETY**

22.5 Benefits:

All benefits to which ~~an teacher~~ **employee** was entitled at the time his leave of absence commenced, including unused accumulated sick leave and credits toward sabbatical eligibility, shall be restored to him upon his return. When employees take leaves of absence, upon their reemployment they are entitled to the identical assignment only when new temporary contracted personnel are employed to fill the temporary vacancy. ~~Leaves of absence continue a contract in force.~~—However, leave time does not count in years of experience.

Article 25, Maintenance of Classroom Control and Discipline

25.6 Maintenance of Classroom Control and Discipline, Building Coverage **DELETE IN ITS ENTIRETY**

Article 29, Professional Development & Educational Improvement

29.5 Staff Development

The Board and Association agree that staff development is important to the maintenance of a strong public education and jointly agree to promote staff development which supports systemic change. The Board recognizes that it shares, with the staff, in the responsibility of upgrading and updating ~~teacher~~ **employee** performance and attitudes.

The Board agrees to work in conjunction with the Association for the purpose of planning meaningful professional development activities such as workshops, conferences, and programs on in-service days designed to improve the quality of instruction. ~~Such activities shall be coordinated through a committee of representatives from each building who will plan professional development activities with the building administrator.~~

29.6 Staff Development Compensation

Where curriculum improvement projects or in-service workshops (i.e. science kit training) occur beyond the normal school day, employees who attend the activity shall be compensated at the state rate, ~~per ¶ 70-65 of this Agreement, for that activity or shall receive cluster credit, if available. The form of compensation will be the employee's choice.~~

Addendum #1, Ground Rules for Negotiations **DELETE IN ITS ENTIRETY**

Addendum #4, Complaint Procedure

In order that teachers (certificated non-administrative employees not including substitutes, supervisory, or staff personnel) of the District may feel free to express their concerns, a complaint procedure is provided for the resolution of complaints.

Definition: A “complaint” shall be an allegation by a teacher (or group of teachers) that the teacher was adversely affected by a violation, misapplication or misinterpretation of Board policy, administrative regulation, state or federal law, or DOE regulation.

A “complaint” is not to be confused with a “grievance.” A “grievance” is an alleged violation of the terms of the Collective Bargaining Agreement between the Board and the Association. All “grievances” shall be processed pursuant to the terms of the Collective Bargaining Agreement.

The complaint procedure is open to all District teachers. The decision to file a complaint is an individual one and the use of this procedure is viewed as a teacher “right” and teachers are free of “pressure” if they use this procedure.

Steps for the Resolution of Complaints

Step One: The teacher shall first discuss the issue with the immediate supervisor and inform the immediate supervisor of the complaint.

At the first meeting, the teacher shall identify the nature of the complaint and the desired remedy.

The teacher will receive a written response within 8 working days of the discussion of the complaint. The issue will be considered resolved unless the teacher appeals to the Principal within 8 working days of receiving the immediate supervisor's decision.

Step Two: If the employee is not satisfied with the immediate supervisor's decision, the teacher may appeal to the Principal.

The appeal shall be in writing and shall include the policy, regulation, law or common practice the employee feels has been violated, misinterpreted or inequitably applied, and a suggested remedy.

The teacher will receive a written response within 8 working days of the review unless the teacher and Principal agree to an extended time.

Step Three: The issue will be considered resolved unless the teacher appeals to the Assistant Superintendent within 8 working days of receiving the Principal's decision. The consideration of a complaint at Step Three is the final step in the Complaint Procedure, except that the teacher may seek judicial review should the teacher be of the opinion the District's denial violates the teacher's legal rights.

Understandings and Stipulations

1. It is desirable that complaints be resolved at the earliest possible time and at the most immediate level of supervision. The complainant may select a representative to attend any of the meetings after the complainant reaches Step Two.
2. A teacher who wishes to lodge a complaint must do so within 10 working days from the time when the employee knew, or reasonably should have known, of its occurrence.
3. The teacher who lodges a complaint shall, during and notwithstanding the pending complaint, continue to observe all assignments and applicable rules and regulations pending review of the complaint.
4. Meetings at which the teacher's presence is required shall be arranged at a time and place so as not to interfere with the teacher's regular duties.

5. **Failure by the teacher's District, at any step of this procedure, to provide a timely decision shall automatically move the complaint to the next step. Failure by the teacher to appeal a complaint to the next step within the specified time limits is deemed an acceptance of the resolution proposed at that step.**
6. **Any matter for which a method of review is prescribed by law, or by any rule or regulation of the State Board of Education, or any matter according to law is beyond the scope of Board of Education authority, shall be excluded from this complaint procedure.**

Laurel Education Association:

¶20. Selection of Grade Coordinators and Subject Chairpersons

Any teacher having taught for three (3) or more years in the State of Delaware, two (2) of which have been in the employ of the Laurel School District shall be eligible to hold the position of Grade Coordinator or Subject Chairperson. The selection of such personnel shall be made by an election to be held prior to June 1, during odd numbered years. If any interim vacancy should occur, it shall be filled by this process for the unexpired period of the vacant position. The following personnel shall be eligible to vote: the teachers of each grade or specialist areas and the Principal of that building. The duties and responsibilities of each position shall be posted in each building and will be included in the Personnel Manual. In the event there are no candidates for any such positions, the building principal shall make an appointment, from the personnel within the grade or subject area, regardless of years teaching experience. Teacher membership shall be based on their major subject area or department assignment, except as selected in grades K-4.

In the event that issues occur which impede the group's progress and/or a complaint(s) regarding the leadership of the Coordinator or Chairperson is registered by the employees or building principal, the principal may replace the Coordinator or Chairperson. Removal from the position will only occur after the completion of a mutually agreed to plan of intervention between the administration and the staff member(s) involved. The employee(s) shall have the right to association representation.

¶26. Access to Buildings

- A. **Recognizing a need for professional employees to have access to their teaching stations beyond the normal school day for job related professional business, the district will provide an entry system for each school. Access, as defined in this**

provision, may only occur during the custodian's normal work time. Access shall not be unreasonably denied to professional employees. Abuse/misuse of the provisions of this article could result in disciplinary action.

B. Professional employees who access a building while custodial employees are present shall not interfere with custodial duties. There will be no custodial overtime costs as a result of building access as defined in this section. During weekends, summer and holidays, professional employees enter the building at their own risk, unless participating in a district-approved program not covered under "a building use agreement."

¶ 39 The School Calendar:

The School calendar shall be as prescribed by the ~~Laurel~~ Board of Education and **with input from** the ~~Laurel Education~~ Association.

Guidance counselors shall each be allocated ten (10) working days in the summer and shall be compensated at their per diem rate.

The Board shall determine the number of working days, if any, allocated to nurses in the summer. The compensation for any such days worked in the Summer shall be their per diem rate.

¶ 42. The Teacher Work Day:

The employee work day shall be ~~a minimum of~~ seven and one-half (7 ½) hours, inclusive of duty-free one half (1/2) hour lunch period **within the hours of 7:30 a.m. and 4:00 p.m.** The reporting time shall be as established for each building by the Board or its representative. On Fridays and/or days preceding holidays or vacations, the teacher work day shall end at the close of the pupil's day. Any employee who is required to work beyond the regular in-school work year, ~~or beyond the total in-school workday (excepting those days defined in Paragraph 51, Meetings)~~ shall be compensated at the same rate as the employee's regularly scheduled salary.

¶ 43. Daily Teaching Load:

Daily classroom instruction shall **not exceed five (5) five and one-half (5.5)** hours of actual instruction time. Assignment to any activity other than the regular classroom which requires employee supervision shall be construed as instructional time. Before and after school duties that exceed ten (10) minutes shall be counted toward the daily teaching load.

¶ 53. Meetings

A. Faculty or Professional Meetings

Teachers may be required to remain after the end of the regular work day, without additional compensation, for the purpose of attending building faculty or other professional meetings, one (1) day each month, ~~except for September and March when a second meeting may be required.~~ Such meetings shall begin no later than ten (10) minutes after the student dismissal time and shall ordinarily run no longer than one (1) hour after student dismissal. If a planned meeting will require more time than is available, students shall be dismissed early. In case of emergency, involving the health and safety of students and employees, meetings may be extended beyond the deadline.

B. Evening Meetings and Assignments

Employees may be required to attend no more than one (1) evening assignment or meeting each school year. In the event employees are asked to attend additional evening assignments, they shall be compensated, at the employee's option, in time by a shortened workday(s), or shall receive additional compensation. Any shared employee who is asked to attend more than one (1) evening meeting per year shall be awarded, at the district's option, compensatory time or shall be paid per the state hourly rate.

C. Committee Meetings

Additional meetings (school or district committees) held after regular work hours that benefit district programs, excluding those compensated through EPER pay, shall, **at the District's option, be compensated receive compensatory time or shall be paid at the state hourly rate, per ¶70 of this agreement.** Such meetings must be pre-approved by a district administrator.

¶61. Compensatory Time

~~Compensatory time shall be given to any teacher or employee who is assigned or has been given prior authorization by their supervisor to work on days or hours not a part of the regular work schedule and for which he is not paid. Compensatory time shall be on a minute per minute basis and must be taken during the fiscal year in which the time was earned, or the time shall be lost. The employee shall provide three (3) days advanced notice for use of compensatory time. Every effort will be made by the administrator to schedule an employee's use of compensatory time for the time requested. However, under extenuating circumstances, the administrator may request that the employee reschedule the use of compensatory time.~~

Compensatory time shall be given to any teacher or employee

who serves in a role that requires work on days or hours beyond the regular work schedule and for which the employee is currently paid. Prior authorization must be obtained from their supervisor. If the employee agrees to stay per administrator's request, compensatory time shall also be granted. Compensatory time shall be on a minute per minute basis and must be taken within a mutually agreed upon time limit within the fiscal year it was earned, or the time will be lost. Another employee cannot be required to provide coverage for an employee using compensatory time. Under no circumstances can compensatory time be used when a substitute is required.

63. Reserved Inservice Days:

Employees will be guaranteed at least one (1) full inservice day at the end of the second and third marking periods to be used for grade averaging, report cards, data collection/analysis, and paperwork. Such days shall be unencumbered by building meetings, district meetings, and/or parent conferences. **These inservice days may be used for other purposes only upon joint agreement by the Association and the District.**

68. Salaries (*Tentative Agreement reached on first ¶*)

The local supplement salary shall be as provided in Appendix A. The local salary schedule set forth in Appendix A is based upon 188 work days. If the State reduces or increases the number of working days, the local salary schedule shall be adjusted to reflect the number of work days by calculating a per diem rate for 188 work days, and decreasing, or increasing, the local salary schedule. For example, if the local salary scheduled for a cell in the salary schedule is \$10,000, \$10,000 will be divided by 188 to calculate a per diem. If the number of work days is reduced to 187, the local salary of \$10,000 shall be reduced by an amount equal to the per diem rate derived from dividing \$10,000 by 188. If the State implements a furlough thereby reducing the number of work days funded by the State, and the furlough applies to all District employees (including employees who are not in the teachers' bargaining unit), the reduction in the local salary of bargaining unit employees will occur only if the District applies the same approach (i.e., a per diem reduction) to all employees who are not in the bargaining unit. (T/A).

The local salary schedule shall reflect:

- A. **2013 - 2014** **additional 0% each cell**
- B. **2014 - 2015** **additional 0% each cell**
- C. **2015 - 2016** **additional 0% each cell**
- D. **2016 - 2017** **The parties will reopen negotiations on salary no later than January, 2016.**

¶97(E) (RIF) Criteria

- 1) To determine which teacher(s) would be terminated, the following order would be applied to the teachers in the affected area of certification.
- 2) Seniority is determined from date of most recent continuous contract. Times pre-dating most recent continuous contract is considered only in breaking ties. **The District shall insure that more senior employees are provided with the opportunity to fill positions for which they are certificated and which are being filled by less senior employees. Laid off employees shall have the right to bump into another bargaining unit position for which they are fully certificated.** When district seniority is equal, the following will apply:
 - Overall instructional proficiency as documented by Lesson Analysis and Performance Appraisals, teaching assignments, educational preparation and training including the number of areas of certification within which the teacher(s) are working.
 - Years of service in the District (based upon last continuous contractual effective date).
 - Number of years teaching experience in current area of certification(s).
 - Length of service in current assignment.
 - Total number of years teaching experience.

¶99. Placement on the Recall List:

Any teacher released under such a reduction in force shall be automatically placed upon a recall list for one year, and upon request for a second year. **Teachers who are laid off shall be placed on the recall list in the seniority classification from which they were laid off. Such employees may request to be placed on the recall list of any other seniority classification in which they are fully certified.** When positions again become available in the District, they shall be offered first to those faculty members **who are currently employed and who have expressed an interest in said positions and then to those RIF'd employees who are certified for the positions and who have the most district seniority will be recalled first. The recall process will continue down the district seniority lists until all positions are filled.** ~~who are certified for the position whose contracts were cancelled last and running in inverse chronology through the list of those whose contracts were cancelled first.~~

¶115 Accumulation Bonus

The following guidelines shall be followed for the use of all personal days beyond the allotted three (3) personal days given

by the State. Personal days not used by June 30th of any given fiscal year shall be relinquished. Personal days provided by the State which are not used shall transfer as the employee's accrued sick leave for the next fiscal year.

~~Personal Day #4: Employees who have accumulated thirty (30) sick days or more at the beginning of the school year.~~

Personal Day #4: Employees who have accumulated seventy-five (75) sick days or more at the beginning of a school year.

¶137 Building Coverage

~~The District will make every effort to provide administrative building coverage by administration at all times during student hours.~~

No member of the bargaining unit shall be required to provide coverage in any building due to the absence of an administrator in said building.

Addendum #1 Ground Rules for Negotiations

III. General Rules

b. Meetings shall be held ~~at two week intervals except when~~ **on** mutually agreeable **dates** ~~between the two parties~~, and shall be held during regular work hours, when feasible. The Board of Education agrees to release ~~five (5)~~ **seven (7)** Association members for participation as mentioned above. The District agrees to provide substitute funds for this purpose.

d. **DELETE IN ITS ENTIRETY**

e. **DELETE IN ITS ENTIRETY**

h. **DELETE IN ITS ENTIRETY**

STATUTORY PROVISIONS

14 Del.C. §4015. 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.
- (b) Pursuant to § 4006(f) of this title, the Board shall appoint the Executive Director or the Executive Director's 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 arbitrators' own behalf.

- (d) The binding interest arbitrator shall make written findings of facts 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 school employer.
 - (6) The financial ability of the public school 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 school 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 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 (d)(6) of this section, no single factor in 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 school 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 school 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.

PRINCIPAL POSITIONS OF THE PARTIES

Laurel School District:

The District asserts it has an inability to pay for its last, best, final offer based on existing revenues and, therefore, is also unable to pay for the Association's "more costly" offer. It asserts that while the Board may choose to allocate reserves or to further cut expenses in order to meet the costs of its offer, the arbitrator may not force the Board to do so. The District's inability to afford its own offer is dispositive.

The District asserts the nine contractual provisions it has identified in its Exhibit 46 are permissive subjects of bargaining on which it cannot be compelled to negotiate. Consequently, these provisions must be removed from the collective bargaining agreement regardless of which last, best, final offer is accepted in its entirety.

It asserts its last, best, final offer must be accepted based on a consideration of the interests and welfare of the public; comparison of salaries, benefits, hours and conditions of employment with other Sussex County school districts and with other District employees; the

overall compensation presently received by the bargaining unit employees; and the lawful authority of the District.

The District argues the current collective bargaining agreement (which it argues the Association's last, best, final offer seeks essentially to preserve) is not focused on the interests of the District's students, but on the interests of the teachers. It alleges this problem is "particularly acute ... with regard to the critical issue of limitations on instructional time." It concludes the provisions of the existing collective bargaining agreement are "out of sync with the collective bargaining agreements in other Sussex County school districts".

Laurel Education Association, DSEA/NEA

The Association argues its last, best, final offer is the more reasonable under the statutory criteria.

It asserts PERB has established the duty to bargain in good faith that continues into the binding interest arbitration process. A determination as to whether a party has met its good faith obligations cannot only be made based upon a review of the totality of the party's conduct. By asserting that it does not have the resources to afford its own proposal, the Association charges the District has failed to meet its good faith obligations and has acted with a "dishonest purpose and furtive design" in putting forth a proposal (which the Association considered in making meaningful concessions to arrive at its last, best, final offer) that it then argued it could not afford. The Association concludes the District's proposal should, therefore, be rejected *in toto*.

The District's evidence does not support the conclusion that because it assertedly cannot afford its own proposal, it therefore, cannot afford the Association's "more costly" proposal. The District's Chief Financial Officer testified the two offers were financially similar and failed to provide any documentary evidence that the Association's offer was, in fact, more costly. Consequently, the "financial ability to pay" factor is a wash, tipping the scales in neither party's

favor.

The Association also contests the District's assertion that the nine issues it concludes are "permissive subjects of bargaining" which it may properly remove from the scope of bargaining do, in fact, constitute matters of inherent managerial policy. Applying the well-established analysis for determining the bargaining status of proposals under the PSERA, the Association concludes each of the nine issues more directly impacts bargaining unit employees and not the overall function and operation of the school district as a whole. Consequently, those nine provisions are mandatory rather than permissive subjects of bargaining.

The Association argues the District's last, best, final offer should be rejected in its entirety because the District has not presented a final offer, but rather presented its proposals in the alternative. The District has argued the nine proposals it asserts are permissive subjects of bargaining should be excluded from the collective bargaining agreement, but in the event that they are found to be mandatory subjects, the arbitrator should consider alternative proposals the District has included in its last, best, final offer. By this design, the Association contends the District has not, in fact, properly withdrawn these matters from negotiations.

The statutory binding interest arbitration process requires the arbitrator to reach her decision based on the criteria set forth in 14 Del.C. §4015. Although the District contends that only Woodbridge, Seaford and Delmar are appropriate comparables, it has included Indian River and Cape Henlopen districts (which the Association contends are also appropriate comparables) in its consideration of the relative offers. The Association argues that application of the statutory criteria supports a finding that its last, best, final offer is the more reasonable proposal.

DISCUSSION

PRELIMINARY ISSUES:

I. Addendum #2

At the opening of the hearing, the Association represented there had been some confusion within its team concerning whether tentative agreement had been reached on Addendum 2, Increments. In reviewing the last, best, final offers submitted on March 4, 2014, it is apparent that the parties did not have the same recollection concerning agreement on this provision.

The Association stated it was willing to accept the District's offer on Addendum 2. The District, however, objected arguing that the acceptance constituted a change in the Association's last, best, final offer which thwarted the purpose and intent of the statutory binding interest arbitration process.

The District's understanding of the purpose of the law, generally, and the binding interest arbitration process specifically is misplaced. The purpose of the PSERA is to promote and support harmonious and productive relationships between management and labor in order to insure the orderly and uninterrupted function and operation of Delaware's public schools. The law specifically obligates public school employers and unions certified to represent their employees to enter into collective negotiations in order to resolve disputes and to thereafter reduce any such agreements to writing. 14 Del.C. §4001.

In this case, the District made a proposal concerning Addendum 2 which the Association has accepted. Consequently, tentative agreement has been reached and there is no need for further consideration of this provision in this proceeding. The collective bargaining agreement which results from this decision will include Addendum 2 as set forth in the District's last, best, final offer.

II. District's Permissive Subjects of Bargaining

The District included in its last, best, final offer a list of contractual provisions which it concluded are permissive subjects of bargaining and which it was withdrawing from the binding interest arbitration process. The list was included in District Exhibit 46:

Permissive Subjects of Bargaining Withdrawn From Binding Interest Arbitration

1. Section of Grade Coordinators and Subject Chairpersons (District 4.10, pp. 18-19; LEA Par. 20, p. 10 -11).
2. Access to Buildings (LEA Par. 26, p. 12).
3. The School Calendar (shall allocate guidance counselors 10 work days in summer) (District 7.1, p. 24; LEA Par. 39, p. 14).
4. Employment of Substitutes (District 8.12, p. 26; LEA Par. 52, p. 16).
5. Meetings (District 8.13, p. 27; LEA Par. 53, p. 15).
6. Extra-Duty Consideration (District 10.1, p. 31; LEA Par. 66, pp. 18-19).
7. Employee Credentials (District 11.1, p. 32; LEA Par. 67, p. 19).
8. Duties and Responsibilities (District 25.1, p. 59; LEA Par. 132, p. 36).
9. Books and Other Instructional Materials and Supplies and Access to Technology (District p. 61; LEA Par. 143, p. 38).

The District also, however, presented an alternative position:

[T]o the extent the items listed above are determined to be permissive subjects of bargaining, they should be eliminated from the agreement implemented by the BIA irrespective of which LBFO is implemented. To the extent, if at all, the items listed above are determined to be mandatory subjects of bargaining, and the BIA decision is that the Board's LBFO shall be implemented, the District's alternative position is that the revision to the current CBA reflected in the District's LBFO should be implemented. *District's Post-Hearing Brief, p. 5.*

The District further explained its position in footnote 2 of its brief:

In the absence of such an approach, if the arbitrator decides that one or more of the items listed in Exhibit 46 is a mandatory subject of bargaining, the Board's LBFO will be missing a proposal on the mandatory item(s). This could lead the arbitrator to determine the LEA LBFO is more reasonable, or lead to the implementation of the Board's LBFO which fails to address one or more mandatory subjects of bargaining.

The District asserts it engaged in good faith bargaining with the Association on several permissive subjects during the course of these negotiations and mediation, but that by doing so, it did not forfeit its right to withdraw its proposals and remove those matters from the issues to be

resolved in binding interest arbitration. In so doing, the District relied upon PERB's decision in *Capital Educators Association v. Bd. of Education*³, which states:

It is determined that a party desiring to withdraw a permissive subject of bargaining from the fact-finding process, and which does so in a timely manner, effectively removes that subject from the list of unresolved contract issues being submitted for review and recommendation.

Application of similar logic compels a like determination as to the Association's argument of the District's waiver of its §4005 rights by its conduct during the negotiations. Either party may undertake good-faith bargaining concerning a permissive subject of bargaining without forfeiting its right to, at least at a later point, refuse to bargain further or, in fact, to withdraw its proposal and remove the subject from the negotiations entirely. To rule otherwise and sustain a claim of waiver based on a course of collective bargaining would penalize the moving party for endeavoring to reach agreement by consenting to bargain upon such issues as to which the statute does not require him to bargain.

PERB further clarified this holding in *City of Wilmington v. FOP Lodge 1, et al.*⁴:

A party's willingness to engage in good faith negotiations concerning a permissive subject of bargaining does not prevent that party from later withdrawing that matter from the scope of negotiations prior to or during impasse resolution procedures. Inclusion of a permissive subject of bargaining in an agreement does not convert that issue to a mandatory subject of bargaining in successive negotiations.

The District misses the critical point of these decisions. A party may withdraw a proposal from negotiations or choose to negotiate to a final position on a particular topic, based on its belief that the matter is a permissive subject of bargaining, or for any other reason. To the extent that parties are able to successfully resolve their disputes through negotiations, why a party has chosen a particular position is irrelevant. The parties' agreement simply reflects their mutual agreement as to terms which will govern their shared work for the term of that agreement.

³ *Capital Educators Association v. Bd. of Education*, DS 1-11-84-3CAP, I PERB 105 (1984).

⁴ *City of Wilmington, Delaware v. Fraternal Order of Police, Lodge 1, IAFF, Local 1590, AFSCME Local 1102, and AFSCME Local 320*, DS 02-10-369, IV PERB 2859 2875 (2003)

The binding interest arbitration process is implemented when negotiation efforts fail. The statute requires each party to submit a comprehensive last, best, final offer for consideration by the interest arbitrator. There is no option afforded to the parties to create and submit “alternative” offers under the law. Unlike the predecessor fact-finding process (which resulted only in a recommendation and did not require the parties to lock into a final positions), binding interest arbitration results in a contract which is imposed on the parties when the arbitration decision is rendered. In order to be effective, the binding interest arbitration process requires each party to clearly set forth its final offer, on which it will ultimately either win or lose.

For purposes of this proceeding, the District has clearly stated in its various communications, Exhibit 46 and argument that it intended to withdraw from the negotiations the nine items it has identified as permissive. Consequently, the District’s last, best, final offer will be considered with those provisions excluded.

CONSIDERATION OF THE MERITS:

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 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. 14 Del.C. §4015(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).

The instant case is the first binding interest arbitration to go to hearing and to require a

decision under the PSERA, which was amended in 2008 to replace advisory fact-finding with binding interest arbitration as the final step in the statutory impasse resolution procedure.

There are a number of clear differences between the finances of public school districts in Delaware when compared to those of other public employers. The record establishes that the Laurel School District is primarily funded with state funds that are allocated annually (by fiscal year) based on very specific criteria, including, *inter alia*, the number of students enrolled in the District's schools in specific categories as of September 30 of each year when a "unit count" is conducted and based on the programs and services provided to its students. These monies earmarked for specific purposes and expire at the end of the fiscal year.

The State has established by statute a salary scale for all district positions which contributes approximately 67-69% of the total salary received by bargaining unit employees. The State salary scale is not subject to modification through collective bargaining. The remaining 31%-33% of the District's teachers' salaries is funded through locally controlled funds (referred to by the parties in these proceedings as "current expense funds") which are derived from discretionary State funds (e.g., Division II and Division III funding, Sustainment funds; etc.) and local revenues from property taxes and a capitation tax, the rates of which are set by District residents through referendum. The District also receives some federal funds, primarily through grants, which expire if not used for specific purposes and within a fixed time frame (usually between 12 and 24 months).

All District revenues must be deposited with the State and all disbursements are made through the State fiscal system. Because the District's funding is heavily controlled by the State, reserves and/or contingency funds can only be accumulated from an excess of locally generated funds, i.e., from the property and capitation taxes. There is no opportunity, for example, for the District to accumulate salary savings from the State allocation of salary dollars for a position for which the District qualifies under its unit count, if an employee leaves in the middle of the fiscal

year who is not replaced. Any such savings would only be in the 31% - 33% of budgeted local salary expenditures.

In addition to controlling funding, the State also imposes numerous conditions and sets educational and programmatic standards which the District must meet as a condition of continued funding. The State dictates the required number of working days in a school year; the required length of a school day; the allocation of sick days and annual leave it will fund for district staff as well as limitations on the accumulation and pay out for leave if it is not used; grants tenure to certificated professional employees who have completed at least three years of service in the State and provides due process rights and a process for tenured employees to challenge a termination, among other requirements. The State also requires that public school districts provide three quarterly financial position reports in a format prescribed by the State Department of Education which “project a school district’s current fiscal year ending balance in its local current expense revenue accounts after taking into consideration all remaining local operating obligations that can be reasonably estimated.” The financial position reports require each district to maintain a surplus of at least “the amount required to satisfy 1 month’s full local payroll and other operating obligations for the ensuing fiscal year.” If the District’s projected surplus is less than this amount (or there is a projected deficit), the District must also provide its plan for meeting this shortfall and may be subject to imposition of financial oversight by the State. *District Exhibits 29 – 35 (excerpts from Title 14, Education, of the Delaware Code).*

This binding interest arbitration proceeding is also unique in the number and scope of the issues which are presented for resolution. Although this is the first binding interest arbitration proceeding involving a public school district, there have been many interest arbitrations over the past fourteen years under identical statutory processes in the Public Employment Relations Act (19 Del.C. Chapter 13) and the Police Officers and Firefighters Employment Relations Act (19 Del.C. Chapter 16). It is well established that 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 issues... The arbitrator does not stand in the place of either negotiating team or act on behalf of either party. Positions which may foster or support movement toward resolution of 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 [the statute]. *FOP Lodge 15 and City of Dover*, BIA 11-07-820, VII PERB 5345, 5388 (2012).

The fact that these parties have chosen to allow so many issues to remain in dispute is both disappointing and troubling. Mediation was afforded to these parties as was the offer made by PERB to facilitate further discussions before the arbitration hearing in an effort to narrow the number and scope of the issues presented for resolution through binding interest arbitration. The parties were either unable or unwilling to engage in a successful process to resolve their differences. It was apparent from the testimony of the witnesses that any changes which were made to the last, best, final offers prior to hearing did not result from mutual efforts to resolve these negotiations but instead resulted from tactical and/or strategic choices in an effort to “win” in this process.

I. District’s Ability to Pay

The statute provides that the proven inability of the public school employer to “meet the costs of any proposed settlements”, based on existing revenues is dispositive in an interest arbitration proceeding. It is noted that reserves are not in issue in this proceeding.

It is undisputed the District is and has been in a difficult financial situation caused by a stagnant revenue stream. The District asserted (and the Association did not dispute) its difficult financial situation has been caused, in part, by recent economic downturns and conditions beyond its control. The record supports the District’s assertions that over the last five to six years it has experienced cost shifting from State and federal sources back to the District. Federal

funding has decreased and although the State has increased some of its funding, it has not fully replaced the lost federal dollars. The State has shifted costs to the District which it is now required to fund locally (e.g., 10% of all transportation costs) and has increased mandates and imposed instructional and other standards on the District without sufficient funding.

The District has also not increased its locally generated current expense revenues by raising either its capitation or current expense property tax for more than twenty years. Its Chief Financial Officer testified the District does not believe it can (and so has no plans at this time) successfully pass a referendum to increase its current expense revenue because it recently passed a referendum for debt service which raised the local tax rates for citizens residing in the district. The District asserts that it is further limited by the property assessment and the capitation numbers generated by Sussex County which have limited the base on which these taxes are assessed. The District has experienced declining growth in both its tax base over the last ten years, and has had marginal changes in its capitation count over the same period. *District Exhibit 5*. It has the lowest property assessment value of any traditional public school district in Delaware. *District Exhibit 52*.

These factors have contributed to the District's structural revenue situation which led the State Department of Education to appoint a Financial Recovery Team (RFT) to assist the District in Fiscal Year 2012. The FRT was appointed pursuant to 14 Del.C. §1802⁵ based on the Secretary of Education's recommendation that the District was in financial distress in the spring of 2012. The FRT issued its first status letter on April 20, 2012, which stated:

The FRT has been working with the Laurel School District to review all contracts, staffing, enrollment projections, revenue and tax structure, and its major capital program. The FRT is reviewing all potential obligations of funds prior to Laurel School District making any new financial commitments and is approving all expenditures before they are processed into the State's accounting system.

⁵ *District Exhibit 34*.

At this time it appears that the Laurel School District will end this fiscal year with a balance of approximately \$200,000 which is short of the statutory requirement, per Title 14, Section 1802(1)a., to have one month's carryover, which is approximately \$351,000. At this time we are projecting a deficit of approximately \$650,000 for Fiscal Year 13. The FRT will continue to work with the Laurel School District, the Laurel Board of Education, and the Laurel Education Association, the Office of Management and Budget and the Department of Education to come up with a plan to address the structural deficit of the district. *District Exhibit 26.*

The FRT completed its work in October, 2012, when it issued its final report, which stated:

A Financial Recovery Team (FRT) was established for Laurel School District in February, 2012 to address the projected shortfall of \$105,937.36 at the end of June 2012. The FRT went in to Laurel and reviewed all financial transactions, collective bargaining agreements, staffing levels, revenue estimates and potential opportunities for additional revenues and contracts to determine where costs could be cut. The FRT made recommendations to the Laurel School Board and Administration for ways to cut expenses to end the year with a positive balance. The Laurel Education Association was also helpful in supporting the work of the FRT to have Laurel return to a sound financial position.

Based on the recommendations of the FRT and the actions of the Laurel School Board, the district ended FY 12 with a carryover balance of \$450,000. This carryover met the requirement to *[sic]* a balance greater than one month's payroll on hand at the end of the fiscal year. For Laurel this payroll amount would have equaled approximately \$380,000. The FRT also worked with the district to set its tax rate and plan its budget for FY 13. At the June 2012 Board meeting the Laurel School Board approved their tax rate for the coming year and at the July Board meeting the Board voted to approve the preliminary budget for FY 13. The preliminary Budget was supported by current revenue estimates, had a contingency of \$35,405 and has a surplus of \$457,898.

At the September 19, 2012 Board meeting, the Laurel Board voted to hire Mr. John Ewald as the new Superintendent for the district and Mr. Ewald started in that position on October 1, 2012. The Financial Recovery Team met with Mr. Ewald to discuss the financial issues that had impacted the district and also provided an overview of the current budget situation and made recommendations to continue the path to improve the finances of Laurel.

At this time it is my recommendation that the Laurel Financial

Recovery Team be discontinued. Laurel School district has a new superintendent to lead the district, a budget that is within the available resources and the assistance of Jan Steele, Business Manager of the Delmar School District to assist with the finances of Laurel until a permanent solution can be determined for management of the finances for Laurel. *District Exhibit 27.*

The record establishes that during the course of the FRT's review of District's collective bargaining agreements with its employees, tuition reimbursement for additional education for this bargaining unit was identified as an uncontrolled and excessive expense. The Association partnered with the District early in the FRT process (May 9, 2012) and entered into a Memorandum of Understanding which modified the collective bargaining agreement:

The Laurel School District Board of Education ("the Board") and the Laurel Education Association, Inc. ("LEA") agree as follows:

1. Article XXV, Paragraph 124 of the Collective Bargaining Agreement (LEA) and Article XIX, Paragraph C (Support Staff) currently in place provide for tuition reimbursement. For the 2012-2013 school year (July 1, 2012 – June 30, 2013), LEA waives the right of all employees for reimbursement for graduate and undergraduate coursework. *Association Exhibit 13.*

This agreement resulted in significant savings as prior expenditures for tuition reimbursement had annual totals of \$105,346.50 (FY 09), \$80,057.00 (FY 10), \$70,244.00 (FY 11), and \$72,140.25 (FY 12). Consistent with that agreement, there were no tuition reimbursement expenditures in FY 13. *Association Exhibit 13.* It was undisputed that there were no discussions to extend the MOU into Fiscal Year 14 and/or until a successor collective bargaining agreement was reached.⁶

The importance of the FRT's work to this proceeding is that, as part of the scope of its review, the FRT reviewed the District's agreement with this bargaining unit. It is undisputed that tuition reimbursement was the only provision of the collective bargaining agreement which

⁶ The last, best, final offers of the parties each include tentative agreement which was reached on or about December 4, 2013 which caps annual aggregate available funds for tuition reimbursement at \$20,000.

was identified as area for cost-cutting. It is noted that the Association willingly participated in the financial review process and agreed to make interim concessions on the tuition reimbursement issue which had financial consequences for its members. The FRT specifically noted the Association's participation and commitment to helping the District return to a sound financial position.

After reviewing the exhibits, testimony, and prehearing submissions of the parties, I note this record is devoid of anything which clearly sets forth the relative costs of the parties' last, best, final offers. The District's Chief Financial Officer testified the Association's proposal might include an additional cost for substitutes for a personal day under ¶115, Accumulation Bonus. Under the existing collective bargaining agreement, bargaining unit employees who accumulate thirty or more unused sick days are eligible to use an additional personal day (beyond the three allotted by the State), and if they accumulate seventy-five or more unused sick days, are eligible for a second additional personal day. The District's last, best, final offer eliminates both personal days, and the Association's reduces the benefit to only one additional personal day after the accumulation of 75 unused sick days.

The record raises a question as to the validity of this testimony. Both proposals would provide cost savings. The District's witness testified that the total cost of the Accumulation Bonus in the first three quarters of FY 2014 was \$11,806.42, but did not have any projections on the actual cost or the number of bargaining unit members who would be eligible for the personal day over the course of the contractual period when the qualifying number of unused sick days was raised to 75. Association Exhibit 11 was admittedly prepared by the Chief Financial Officer's staff, but indicates on \$3,740.39 had been expended to date for personal day related expenses in the current fiscal year for employees who were still eligible for two personal days under the existing accumulation bonus. On cross examination the Chief Financial Officer stated she was not comfortable answering questions about the differences between her projections for

the costs of a decreased benefit and the current year's expenditures for the existing more generous benefit.

The record supports the conclusion that the financial problems the District has faced in the past and those it anticipates facing in the future are not attributable to the collective bargaining agreement between these parties. This is evidenced by the fact that the District did not point to a single proposal in its last, best, final offer which would result in cost savings. Its offer does not include wage or benefit decreases. The District's witnesses testified that without additional revenue, it could face lay-offs and other drastic measures. There is nothing in this record which suggests that either last, best, final offer will remedy or significantly affect the District's revenue problems. It's obvious that potential solutions will have to address the District's funding sources.

It must be presumed that the employer has the ability to afford its own offer; otherwise it has failed to bargain in good faith and has abused the collective bargaining and binding interest arbitration processes. Binding interest arbitration is the final step in the collective bargaining and negotiation process; not an alternative for resolution of unfair labor practice charges. *Delaware State Troopers Association v. Delaware DSHS/DSP*, BIA 08-01-612, VI PERB 4083, 4098 (PERB, 2008).

Considering all of the information and evidence on this record, the District has not met its burden to establish that it does not have the financial ability based on existing resources to afford the costs of the last, best, final offers.

II. Scope of Bargaining

One of the earliest decisions of the Delaware Public Employment Relations Board concerned the scope of bargaining under the Public School Employment Relations Act. *Appoquinimink Education Association v. Bd. of Ed.*, ULP 1-3-84-3-2A, 1 PERB 35 (1984).

PERB case law clearly establishes mandatory subjects of bargaining are statutorily defined as “terms and conditions of employment” which include “matters concerning or related to wages, salaries, hours, grievance procedure and working conditions.” (emphasis added). The General Assembly intentionally created a "broad and encompassing scope of negotiability." *Smyrna Educators Assn. v. Bd. of Education*, DS 89-10-046, I PERB 475, 486 (1990).

The function of local school districts, as governed by their local boards of education and subject to the provisions of Title 14, Education, and the rules and regulations of the State Board of Education, are enumerated at 14 Del.C. §1049. Ultimate control of the educational process, rests with the State Board of Education. *Woodbridge Education Assn. v. Bd. of Education*, ULP 90-02-048, I PERB Binder 537 (PERB, 1990), citing *Morris v. Bd of Education*, 401 F.Supp 188 (D.Del, 1975). The PERB has established that the general grant of authority to the local district board of education by 14 Del.C. §1049 is not sufficient to remove an issue from the legal scope of bargaining. *Woodbridge (Supra., p. 551)*.

Section 4005 of the PSERA enumerates matters of inherent managerial policy which are reserved to the discretion of the public school employer. Those matters include areas of discretion or policy which include but are not limited to “the functions and programs of the public school employer, its standards of services, overall budget, utilization of technology, the organizational structure, curriculum, discipline and the selection and direction of personnel.” 14 Del.C. §4005. This section provides only that an employer shall not be required to bargain policy matters, thereby allowing the employer the freedom to choose those policy items it may choose to negotiate and legally refusing to negotiate others.

There are many reasons an employer may choose to negotiate permissive subjects of bargaining and to include them in a negotiated agreement, e.g., finding it is in the best interest of an effective workplace and a positive and productive relationship with its employees to do so. Most collective bargaining agreements (including the one at issue in this case) include many

terms that are permissive in nature. A permissive subject which is negotiated and included in a collective bargaining agreement binds the employer and the union for the term of that agreement and is enforceable through the negotiated grievance process. Inclusion does not, however, convert that permissive provision into a mandatory subject for purposes of future negotiations.

Where a scope of negotiability issue is presented, the *Appoquinimink* decision established the test for determining whether a specific proposal must or may be negotiated:

Once established that given proposal touches a term and condition of employment, it must also be determined whether or not the proposal also touches upon inherent managerial policy. If so, in order to reduce the level of negotiability from mandatory to permissive, the impact on the school system as a whole must clearly outweigh its direct impact on the individual teacher. Generally, where the subject matter of given proposal relates to substance or to the establishment of criteria for the ultimate decision, it tends toward permissive, as infringing upon the decision-making authority of the employer. Where the subject matter of the proposal relates to matters of procedure or communication, it tends toward being mandatory. However, in determining what constitutes inherent managerial policy, impact is an equally important factor. *Appoquinimink (Supra., p. 52)*.

The test was further explained and summarized in a sequential four part analysis in *Woodbridge*:

- 1) Is the subject matter of the proposal expressly reserved to the exclusive prerogative of the public school employer by the PSERA or other law (i.e., is it an illegal subject of bargaining)?
- 2) Does the subject matter fall within the statutory definition of “terms and conditions of employment” (i.e., does it involve a mandatory subject of bargaining)?
- 3) Does the subject matter fall within the statutory definition of “inherent managerial policy” (i.e., does it involve a permissive subject of bargaining)?
- 4) Does the impact of the matter on the school system as a whole clearly outweigh the direct impact on individual teachers?

The analysis begins with the understanding that the purpose of the statute is to promote negotiations concerning a broad and encompassing scope of bargaining. Consequently, there is a rebuttal presumption that issues should be negotiated and should only be excluded where it is

clear that it is either not a term and condition of employment, unequivocally falls within the definition of inherent managerial discretion, or where the impact of the proposal on the school system as a whole “clearly outweighs” the “direct impact” on employees.

This determination is fact-specific and requires careful consideration of the language of the specific provision in issue. It is possible that a given proposal may include both mandatory and permissive provisions. Only those provisions which are determined to be permissive may be excluded under the law.

The PSERA is, again, intended to promote and support collective bargaining and the development of meaningful negotiable proposals over which the parties have the opportunity to bargain. Finding a matter to be negotiable, however, does not require either party to agree to a specific proposal. 14 Del.C. §4002(s). It is unfortunate where, as here, parties choose to expend more time, effort and resources arguing over whether they can be required to bargain rather than actually bargaining.

The District has alleged the following issues are permissive subjects of bargaining over which it cannot be compelled to negotiate. The *Woodbridge* analysis has been applied to each proposal in order to reach the following determinations:

1) **SELECTION OF GRADE COORDINATORS AND SUBJECT CHAIRPERSONS**
(District 4.10, pp. 18-19; LEA Par. 20, p. 10 -11).

Provision in 2006-2010 Agreement:

¶20. Section of Grade Coordinators and Subject Chairpersons

Any teacher having taught for three (3) or more years in the State of Delaware, two (2) of which have been in the employ of the Laurel School District shall be eligible to hold the position of Grade Coordinator or Subject Chairperson. The selection of such personnel shall be made by an election held prior to June 1, during odd numbered years. If any interim vacancy shall occur, it shall be filled by this process for the unexpired term period of the vacant position. The following personnel shall be eligible to vote: the teachers of each grade or specialist area and the Principal of that building. The duties and responsibilities of each position shall be posted in each building and will be included in the Personnel Manual. In the event

there are no candidates for any such position, the building principal shall make an appointment, for the personnel within the grade or subject area, regardless of years teaching experience. Teacher membership shall be based on the major subject area or department assignment, except as selected in grades K-4.

LEA Proposal – Add:

In the event that issues which impede the group’s progress and/or a complaint regarding the leadership of the Coordinator or Chairperson is registered by the employees or building principal, the principal may replace the Coordinator or Chairperson. Removal from the position will only be after the completion of a mutually agreed to plan of intervention between the administration and staff member(s) involved. The employee(s) shall have the right to association representation.

District Proposal: Delete as permissive subject of bargaining

PERMISSIVE – This provision clearly addresses the selection of personnel for specific duties and thus falls within the inherent managerial rights of the public school employer. While the employer may choose to negotiate concerning this issue, inclusion of this provision in a collective bargaining agreement does not convert the matter into a mandatory subject of bargaining.

Consistent with the *Appoquinimink* decision, the fact that the method or process by which Grade Coordinators and Subject Chairpersons are selected is not a mandatory subject of bargaining does not mean that the impact of that decision, i.e., the stipend those employees receive for performing these duties, is not a mandatory subject of bargaining. Consequently, the District may not unilaterally alter the compensation of persons holding these positions without providing the opportunity for collective bargaining.

2) **ACCESS TO BUILDINGS** (LEA Par. 26, p. 12).

No Provision in 2006-2010 Agreement

LEA Proposal: Add:

¶26. Access to Buildings

A. Recognizing a need for professional employees to have access to their teaching stations beyond the normal school day for job related professional business, the district will provide an

entry system for each school. Access, as defined in this provision, may only occur during the custodian's normal work time. Access shall not be unreasonably denied to professional employees. Abuse/misuse of the provisions of this article could result in disciplinary action.

- B. Professional employees who access a building while custodial employees are present shall not interfere with custodial duties. There will be no custodial overtime costs as a result of building access as defined in this section. During weekends, summer and holidays, professional employees enter the building at their own risk, unless participating in a district-approved program not covered under "a building use agreement."

District Proposal: Delete as permissive subject of bargaining

MANDATORY

The District argues the Association's proposal to allow teachers access to their work sites beyond the hours of the normal school day is permissive simply based on PERB's determination in *Appoquinimink* that contractual provisions requiring storage space for supplies and materials and accessible faculty lounges to be used during the school day were permissive. It does not argue the Association's proposal is specifically linked to any of the matters of inherent managerial policy enumerated in 14 Del.C. §4005.

The record evidences the Association's proposal is based on the teachers' need for more time when there are no students present to prepare for class and to meet their professional responsibilities. Access to materials in the work place that are necessary to effectively prepare for and perform assigned job duties falls squarely within the definition of a working condition.

- 3) **THE SCHOOL CALENDAR** (shall allocate guidance counselors 10 work days in summer) (District 7.1, p. 24; LEA Par. 39, p. 14).

Provision in 2006-2010 Agreement:

- * The School Calendar shall be as prescribed by the Laurel Board of Education and the Laurel Education Association.
- * Guidance counselors shall each be allocated ten (10) working days in the summer and shall be compensated at their per diem rate.

LEA Proposal: Retain existing language and add:

The Board shall determine the number of working days, if any allocated to nurses in the summer. The compensation for any such days worked in the summer shall be their per diem rate.

District Proposal: Delete as permissive subject of bargaining

PERMISSIVE as to limitation on the number of days Guidance Counselors may be required to work over the summer;

MANDATORY as to the rate of compensation to be paid to Guidance Counselors and Nurses for work performed during the summer.

The Association's proposal to limit the number of days Guidance Counselors may be required to work during the summer clearly impacts the functions, organizational structure and overall budget of the District. It goes to the essence of the District's assignment of work and direction of the workforce over the summer, and limits the District's ability to accomplish work it determines to be necessary because it limits the number of days an identified class of employee may be employed.

The proposal also, however, affects the wages paid to Guidance Counselors and Nurses who are required and directed to work over the summer months. Wages and compensation are mandatory subjects of bargaining.

To the extent this proposal mandates the District either must employ Guidance Counselors for ten days each summer or is limited to only employing Guidance Counselors a maximum of ten days, it is a permissive subject of bargaining. The portion of the provision that addresses the wage rate to be paid for time so worked, is a mandatory subject of bargaining.

Consequently, the portion of the proposal that mandates the number of days to be allocated for Guidance Counselors over the summer is stricken. The compensation rate for these bargaining unit employees who perform services to the District over the summer must be negotiated.

4) **EMPLOYMENT OF SUBSTITUTES** (District 8.12, p. 26; LEA Par. 52, p. 16).

Provision in 2006-2010 Agreement:

The District will employ a substitute when any teacher is absent. No teacher shall involuntarily lose his/her preparation time or released time as a result of another teacher's absence. In case of emergency, a teacher may be asked to substitute with compensatory time being awarded on a minute-for-minute basis equal to that spent as a substitute. The amount of time shall be mutually agreed upon by the teacher and building administrator.

LEA proposal: Retain existing language

District Proposal: Delete as permissive subject of bargaining

MANDATORY

While the employment of substitutes may impact the District's standards of service as it asserts, it clearly has a greater impact on the hours and working conditions of teachers. If teachers are required to cover for absent colleagues as a regular course of business and therefore to relinquish preparatory periods to do so, it directly impacts hours of work. The preparatory work required for a teacher's assigned classes (not those for which the teacher is serving as a substitute) would still need to be done. It would necessarily have to be accomplished outside of the normal work day, if the time contractually dedicated for this purpose can be redirected at the district's discretion. For these reasons, the employment of substitutes is determined to be a mandatory subject of bargaining.

5) **MEETINGS** (District 8.13, p. 27; LEA Par. 53, p. 15)

Provision in 2006-2010 Agreement:

A. Faculty or Professional Meetings

Teachers may be required to remain after the end of the regular work day, without additional compensation, for the purpose of attending building faculty or other professional meetings, one (1) day each month, except September and March when a second meeting may be required. Such meetings shall begin no later than ten (10) minutes after the student dismissal time and shall ordinarily run no longer than one (1) hour after student dismissal. If a planned meeting will require more time than is available, students shall be dismissed early. In case of emergency,

involving the health and safety of students and teachers, meetings may be extended beyond the deadline....

B. Evening Meetings and Assignments

Teachers may be required to attend no more than one (1) evening assignment or meeting each school year. In the event teachers are asked to attend additional evening assignments, they shall be compensated, at the employee's option, in time by a shortened workday(s), or shall receive additional compensation. Any shared employee who is asked to attend more than one (1) evening meeting per year shall be awarded, at the teachers option, compensatory time or shall be paid per the state hourly rate.

C. Committee Meetings

Additional meetings (school or district committees) held after regular work hours that benefit district programs, excluding those compensated through EPER pay, shall, be compensated at the state hourly rate per ¶70 of this agreement. Such meetings must be pre-approved by a district administrator.

LEA Proposal: Modify prior language to read:

A. Faculty or Professional Meetings

Teachers may be required to remain after the end of the regular work day, without additional compensation, for the purpose of attending building faculty or other professional meetings, one (1) day each month, ~~except September and March when a second meeting may be required.~~ Such meetings shall begin no later than ten (10) minutes after the student dismissal time and shall ordinarily run no longer than one (1) hour after student dismissal. If a planned meeting will require more time than is available, students shall be dismissed early. In case of emergency, involving the health and safety of students and employees, meetings may be extended beyond the deadline....

B. Evening Meetings and Assignments

Employees may be required to attend no more than one (1) evening assignment or meeting each school year. In the event employees are asked to attend additional evening assignments, they shall be compensated, at the employee's option, in time by a shortened workday(s), or shall receive additional compensation. Any shared employee who is asked to attend more than one (1) evening meeting per year shall be awarded, at the ~~teachers~~ **district's** option, compensatory time or shall be paid per the state hourly rate.

C. Committee Meetings

Additional meetings (school or district committees) held after regular work hours that benefit district programs, excluding those

compensated through EPER pay, shall, **at the District's option, be compensated receive compensatory time or shall be paid the state hourly rate, per ¶70 of this agreement.** Such meetings must be pre-approved by a district administrator.

District Proposal: Delete as permissive subject of bargaining

Mandatory

The District argues this issue was also settled in the *Appoquinimink* decision, which found the following provision to be a permissive subject of bargaining:

For purposes of this item, faculty meetings shall mean that a majority of professional teaching staff of a building meets with an administrator or designee to discuss educational programs or policies. There shall not be more than an average of one faculty meeting per month. The required duration shall not exceed an average of fifty (50) minutes.

The specific provisions in issue in this case are clearly more specific and detailed than those considered in *Appoquinimink*.

The Association argues mandatory attendance at an unspecified number of meetings (of unlimited duration) after regular work hours clearly and more directly impacts employee hours, working conditions and wages, and is therefore a mandatory subject of bargaining. While it concedes the District does have a legitimate need to convene faculty and other professional meetings, it does not have the right to do so without negotiating reasonable limits on such meetings.

This issue touches both conditions of employment and the inherent managerial discretion of the District. However, by application of the balancing test, as applied to the specific proposals of the parties, it is determined that the matter is mandatorily negotiable because the impact on the individual teachers clearly outweighs the impact on the operation of the District. The District retains the right to call meetings and require bargaining unit employees to attend and therefore has a more limited impact on District operations.

6) **EXTRA-DUTY CONSIDERATION** (District 10.1, p. 31; LEA Par. 66, pp.

18-19).

Provision in 2006-2010 Agreement:

- A. The Board and Association acknowledge that a teacher's primary responsibility is to teach and that his/her energies should, to the extent possible be utilized to this end. Consideration of items relating to extra-curricular duties which influence the employment of an individual shall be subject to the grievance procedure, fair dismissal procedures, just cause provision, and any other sections of this contract.
- B. Extra-Duty Evaluation Procedures:
 - (1) Academic: Performance of extra-duty assignment will be evaluated at the conclusion of the assigned period. The evaluation will be completed by the Principal.
 - (2) Athletic: Performance of extra-duty assignments will be evaluated at the conclusion of the assignment (or the end of the activity/coaching season). The evaluation will be completed by the Principal(s) and the Athletic Director when appropriate. Written input will be solicited from the head coach of a sport when a coaching position is being evaluated. The Principal(s) completing the evaluation will consider such input when writing the evaluation.
- C. Dismissal Procedures
 - (1) A negative evaluation which may result in non-renewal of extra-duty assignment will be given to the assignee twenty-four (24) hours before he/she is called in for a conference with the Principal(s), and Athletic Director when evaluating the head coach of a sport.
 - (2) The Assignee will have the opportunity to rebut the evaluation in conference with the Principal and Athletic Director when appropriate. Written comments may be submitted at the assignee's discretion.
 - (3) An appeal of the Principal's recommendation for dismissal may be made, within ten (10) school days of the conference with the Principal, to the Superintendent of Schools, who will make the final recommendation to the Board.
 - (4) The regular teaching position of the person so involved is not placed in jeopardy as a result of removal from the extra curricular duty.
 - (5) Upon request, the assignee may be represented by the Association.

LEA Proposal: Retain existing language

District Proposal: Delete as permissive subject of bargaining

PERMISSIVE

This provision concerns the evaluation and dismissal procedures from extra-duty positions. In *Cape Henlopen Education Assn. v. Board of Education* (ULP 91-01-058, I PERB 689, 695 (PERB, 1991), PERB held:

The procedures adopted by the District require School Board approval of all extra duty positions, annual contracts and the formal reapplication annually by all incumbents in extra duty positions. The Association contends that the "selection" of personnel reserved to the exclusive prerogative of the employer (14 Del.C. §4005) is limited to the initial hire of a teacher. This position is unsubstantiated by either history or case law. When read in the context of "selection and direction of personnel", it is clear that the statutory language is broad enough to cover multiple personnel decisions including the assignment of employees to extra duty positions. Further, when "functions and programs of the public school employer, its standards of service....[and] organizational structure" are considered in conjunction with the selection and direction of personnel, it is illogical to conclude that the District does not have the right to control the selection process for extra duty positions within the District. Reapplication procedures, annual contracts and Board approval are central components to the selection process. As such, they are matters of inherent managerial policy. Where, as here, the issue is clearly one of inherent managerial policy, it is unnecessary to apply the balancing test established in *Appoquinimink*.

This issue has previously been determined to be a permissive subject of bargaining.

7) **EMPLOYEE CREDENTIALS** (District 11.1, p. 32; LEA Par. 67, p. 19).

Provision in 2006-2010 Agreement:

Teacher Credentials: The Board agrees to make a reasonable attempt to hire only certified teachers holding standard certificates issued by the Department of Education for every teaching assignment, including summer school.

A. Summer School Employment: Summer school employment will be offered as early as possible. Initial assignments for summer school positions will be made by June 1. Employees who are properly certified applicants for summer school positions shall be given preference over outside applicants in filling such vacancies. Such vacancies shall be filled by employees on the basis of seniority. Compensation for employees filling summer school positions shall be at the state hourly rate.

- B. Homebound: At the beginning of each school year, the district shall generate a list of teachers interested in possible homebound teaching positions. Principals will first notify staff members in the respective student's building of any imminent homebound teaching position(s) to solicit interest. The position will be offered first to the affected student's classroom teachers and then to any teacher within the building. If there is no interest within the building, the position will be filled with an employee from the list. Compensation shall be based on the regular state hourly rate.
- C. Salary Schedules: Salary schedules for teachers shall be based on the regular state salary schedule and local supplement as per the nature of the assignment established for the fiscal year in which the assignment takes place.

A professional Employee newly hired after the first required working day of the school year, and whose employment begins during the school year, shall receive a temporary contract. Such Professional Employee shall be placed on the seniority list upon securing a regular contract through the normal procedures for new hires and provided there has been no break in employment

LEA Proposal: Retain existing language

District Proposal: Delete as permissive subject of bargaining

PERMISSIVE as to the selection of Summer School and Homebound Instructors

MANDATORY as to the compensation for performance of these assigned duties.

This provision clearly addresses the selection of personnel for specific duties and falls with the inherent managerial rights of the public school employer. While the employer may choose to negotiate concerning this issue, inclusion of this provision in previous collective bargaining agreements does not convert the issue to a mandatory subject of bargaining.

Consistent with the *Appoquinimink* decision, the fact that the method or process by which Summer School and Homebound Instructors are selected is not a mandatory subject of bargaining does not mean that the impact of that decision, i.e., the compensation those employees receive for performing these duties, is not a mandatory subject of bargaining. Consequently, the last sentence of (A) and subsection (C) Salary Schedules, is a mandatory subject of bargaining.

8) **DUTIES AND RESPONSIBILITIES** (District 25.1, p. 59; LEA Par. 132, p. 36).

Provision in 2006-2010 Agreement:

An appropriate student disciplinary procedure shall be developed and/or approved for each school building by a committee of administration and of faculty members appointed by the LEA Executive Council. Said procedures shall be submitted to the building administrator and/or Superintendent/Board for approval each year.

LEA Proposal: Retain existing language

District Proposal: Delete as permissive subject of bargaining

PERMISSIVE

The Association acknowledges in its Opening Brief that student discipline is a matter of inherent managerial policy. It asserts, however, that the District's practice of requiring a teacher or guidance counselor to serve as an administrator in responding to student disciplinary issues when there is no administrator in the building impacts working conditions.

The District has asserted that only Section 25.1 (LEA ¶132), as cited above, is a permissive subject of bargaining. The Association's concerns are addressed in its proposed ¶137 and will be addressed within the context of the consideration of the relative reasonableness of the parties' last, best, final offers below.

9) BOOKS AND OTHER INSTRUCTIONAL MATERIALS AND SUPPLIES AND ACCESS TO TECHNOLOGY (District p. 61; LEA Par. 143, p. 38).

Provision in 2006-2010 Agreement:

¶139. Purchase of Textbooks
The Board shall allocate sufficient funds to provide for the purchase of textbooks, library books, instructional materials, supplies and equipment of sufficient quality and quantity to enable teachers to properly fulfill their teaching responsibilities, inasmuch as is possible.

LEA Proposal: Retain existing language

District Proposal: Delete as permissive subject of bargaining

PERMISSIVE – PERB previously determined the following language to be a permissive subject of bargaining in *Appoquinimink* (Supra., p. 59, 75):

The Board shall allocate sufficient funds to provide for purchase or replacement of textbooks, library books, instructional materials, supplies

and equipment of sufficient quality and quantity to enable teachers to properly fulfill their teaching responsibilities.

The language in the prior collective bargaining agreement which the Association proposes to retain is identical to the provision considered in *Appoquinimink*. Consequently, this provision is a permissive subject of bargaining and Article XXIXVIII is deleted from the contract.

III. Consideration of the merits of the last, best, final offers

Turning to a consideration of the statutory criteria set forth in 19 Del.C. §1615(d), each statutory factor was presumed to be relevant and given due weight in my analysis. There was no argument from the parties that either last, best, final offer exceeded the lawful authority of the public employer. Consequently, §4015(d)(5) is irrelevant to this determination.

Each party attached to its last, best, final offer a copy of the complete agreement which included tentative agreements reached during the course of negotiations (including contractual provisions for which neither party was proposing changes). Those tentative agreements are considered to be stipulations of agreement by the parties and are included as part of the final agreement which will be implemented by this award, pursuant to §4015(d)(4).

The Laurel School District has an enrollment of 2,080 students who attend the District's five schools (2 elementary, 1 intermediate, 1 middle and 1 high school). The bargaining unit consists of 152 faculty and other professional staff, of which 51.9% have Bachelor's degrees, 48.1% have Masters degrees, and none held doctorates. The District's profile (prepared and published by the State Department of Education) for the 2012-2013 school year indicates the District's revenue is received from state (73%), federal (12%) and local sources (15%).
Association Exhibit 14.

The parties agreed that the Woodbridge, Delmar and Seaford School Districts are comparable to the Laurel School District, based on size, similarity in percentage of eligible

students attending the district's schools, economic demographics of the student population, geographical proximity and the percentage of total budget allocated to instructional services. Because there are no economic issues in dispute in the parties' last, best, final offers, the Association also included the Cape Henlopen, Indian River and Milford districts in its comparables. It is undisputed that these are larger districts and that Cape Henlopen has a much higher tax base and local revenues. Neither party included Sussex Vo-Tech as a comparable.

I accept the parties' agreement that Woodbridge, Delmar and Seaford school districts are comparables to the Laurel School District. Because both parties submitted documentation which compared terms and conditions provisions included in the collective bargaining agreements of Woodbridge, Delmar, Seaford, Indian River, Cape Henlopen and Milford school districts, I also accept that the parties have considered all of the traditional public school districts in Sussex County in reaching their offers with respect to working conditions.

The Association provided comparative data on salaries (by level of education and years of experience) for Laurel and the six other Sussex County school districts (Woodbridge, Delmar, Seaford, Woodbridge, Indian River and Cape Henlopen). *Association Exhibit 10*. This data establishes that while Laurel teachers have relatively higher salaries for lower levels of education, that salary advantage diminishes and Laurel falls behinds the other Sussex County districts at higher levels of education. This type of salary distribution is consistent with an employer who has difficulty attracting more educated staff but who is in direct competition with surrounding districts for new teachers. The previously mentioned tuition reimbursement policy would seem to encourage teachers to pursue additional education that would ultimately make them more attractive to other districts who were paying more to more highly educated teachers.

Neither party provided comparatory information concerning "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 with

other employees in the same community and in comparable communities.” The evidence and argument was limited to explaining the specific components of the proposed changes in working conditions contained in each last, best, final offers relative to similar provisions in the collective bargaining agreements between Seaford, Woodbridge and Delmar Boards of Education and their professional bargaining units (and Cape Henlopen by the Association) as either justification for or derogation of the proposal. Consequently, full application and consideration of the criteria of §4015(d)(2) was limited by the scope of the record.

Similarly, neither party presented evidence which addressed the criteria of §4015(d)(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 other benefits received.

The District did address the relative ranking of the “average” salary of Laurel teachers at or slightly above the State median and also argued that its “average” administrative salary is the lowest in Sussex County and in the State. Whether Laurel administrators are well or poorly compensated is not material to consideration of the parties’ last, best, final offers, because those salaries are not negotiated. Further, the simple comparison of averages is limiting. Both the District’s Chief Financial Officer and its expert witness testified the averages used were derived from DOE data, but neither could explain how the averages were reached. They each speculated that the averages were computed by dividing the total salary expenditures (by group) by the number of individuals holding positions in that group, but neither could testify to that with any certainty. Simple averages mask important differentiations between comparable groups of employees, such as the distribution of advanced degrees, the longevity of the work force (which is also an indicator of the “continuity and stability of employment”, one of the §4015(d)(3) criteria and the competitive position of the employer to hire in new talent. As such, I find the information provided to be of limited usefulness.

The lack of record evidence neither proves nor disproves a conclusion argued by the parties. *AFSCME Local 1670-001 & Town of Smyrna*, BIA No. 11-07-815, VII PERB 5279, 5293 (PERB, 2011) Conclusions based upon the testimony of a witness who admitted under oath that he was not familiar with the methodology used is less than credible. When, as here, analysis is provided that is based on information that is either not presented into evidence or which is drawn from other documents (i.e., the individual explaining the conclusions reached cannot explain the method(s) used to derive the underlying information), it is of limited value to the arbitrator's understanding.

The statute does not provide a formula for weighing the statutory criteria, other than to state that the financial inability of the public school employer to meet the costs of a proposed settlement based on existing revenues is dispositive. The ultimate decision 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 has been considered and evaluated against the criteria of 19 Del.C. §4015, with following results:

III. Grievance Procedure (3.2 Grievance Definition)

The District proposes to change the existing definition of a grievance to limit it to "alleged violations, misinterpretations or misapplications of the collective bargaining agreement" and to establish a separate procedure for violations of Board policy (which is currently included in the definition of a grievance). The District argues there are no other negotiated grievance procedures in any of the other Sussex County public school districts which include alleged violations of Board policy and only Woodbridge has a separate complaint procedure for Board policy violations. The Association asserts the Indian River collective bargaining agreement also defines a grievance broadly to mean, "a written claim by an employee that the terms of this Agreement, official written policy of the Board of Education, or written administrative rules and

regulations relating to salaries, employee benefits, and/or working conditions have been violated, misinterpreted, or misapplied resulting in the abridgement of rights granted to the employee by such documents.” *Association Exhibit 23*.

As stated earlier, it is well established in PERB case law that 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. Binding interest arbitration decisions are based on documented need, not simply the wants or purported convenience of one of the parties.

There is no dispute that there have not been any grievances filed contesting a violation of Board policy in at least the last five years. Neither was there any evidence presented that this provision has been a source of contention between these parties. The District’s proposed modification of the grievance definition is not justified or supported by the record.

Article IV. Teacher Rights (Access to Buildings)

The Association’s proposes to include a new provision (§26) in the collective bargaining agreement which is narrowly crafted to limit access to a teacher’s specific work site for purposes of “job-related professional business” and provides that abuse or misuse of such access is subject to disciplinary action. It further places limits on the access by including a “no-cost” clause; i.e., “There will be no custodial overtime costs as a result of building access as defined in this section.”

It is undisputed that administrators and secretaries (as well as custodians) currently have access to school district facilities beyond the normal school day. The District did not provide a credible justification for refusing to allow teachers this same access. This issue goes to the heart of the District’s concern for support the best interests of the students in the collective bargaining agreement.

As this has been determined to be a mandatory subject of bargaining, the Association’s

position is determined to be the more reasonable under the statutory criteria.

Article VII. Teachers Work Year (§39. The School Calendar)

The compensation to be paid to Guidance Counselors and Nurses who are directed to work during the summer is a mandatory subject of bargaining. The predecessor collective bargaining agreement requires Guidance Counselors be compensated for this work at their per diem rate. The Association's offer provides that Nurses who are required to work during the summer months also be compensated at their per diem rate.

The District proposed to delete this section in its entirety, asserting it is a permissive subject of bargaining. This position was denied as set forth above. The specific language for inclusion in the collective bargaining agreement is:

Guidance counselors and nurses shall be compensated at their per diem rate for any days they are required to work in the summer.

Article VIII. Teaching Hours and Teaching Conditions

The District's last, best, final offer maintains the current daily minimum 7 ½ hour work day but modifies the contractual agreements concerning hours in many ways, including:

- Deleting language in §8.2 which allows employees to end their work days on Fridays and/or on days preceding a holiday or vacation period at the end of the students' day.
- Adjusts the work day to compensate employees for required attendance at evening parent conferences on the same day as the conference unless the parties agree otherwise.
- Requires employees to attend up to three evening "events" at their administrators direction and also encourages employees "to attend those evening events that are vital to the mission of the District."
- Deletes the requirement that employees who are required to work beyond the regular work day be compensated at their regular rate of pay.
- Increases the maximum daily instructional time requirement from five to six hours.
- Reduces employees' daily planning and preparation time from 50 to 45 consecutive minutes. Deletes the requirement that administrators discuss

compensating loss of planning time which results from state/national testing requirements.

- Protects the employee's planning time except in cases of emergency. When teachers are required to substitute for an absent colleague, the provisions requiring that lost planning time be replaced with compensatory time are deleted.
- Adds a provision which does not require the District to replace any planning time which is lost due to state/national testing or an abbreviated school day, but does commit the District to "make every effort... to equitably distribute planning time within that day."
- Increases the number of different classes (referred to as "preps") which an individual employee may be required to teach to four, from the current three and removes the limitation that an employee may not be required to teach more than two subject areas.
- Deletes the limitation that teachers not be required to teach more than four contiguous periods or three continuous hours without a break.
- Deletes the requirement that the Administrator and employee enter into a waiver agreement when the employee is required to deviate from any of the contractual time provisions.
- Eliminates the requirement that the District hire substitutes for absent employees and compensate employees who are required to cover for an absent colleague with compensatory time for lost planning and preparation time.
- Eliminates all restrictions on scheduling and requirements for meetings above and beyond the normal work day.
- Eliminates the requirement that compensatory time be provided for any days or hours employees are required to work as a result of an assignment. Also eliminates the procedural requirements for requesting and use of compensatory time.
- Eliminates the guarantee that an in-service day be provided at the end of the second and third marking period for grade writing on which no other meetings may be scheduled.
- Eliminates the option for employees to bank compensatory time to be used to offset days lost as a result of inclement weather.

The Association's last, best, final offer modifies the existing contractual requirements concerning teaching hours and conditions as follows:

- Defines the work day as 7 ½ hours within the hours of 7:30 a.m. and 4:00 p.m.
- Eliminates the requirement that employees be compensated for hours worked beyond the normal workday (except for meetings as otherwise addressed in the collective bargaining agreement).
- Increases the daily limit on instructional time from five hours to five and a half hours per day.

- Increases the number of “preps” a teacher can be required to teach from three to four. Maintains the limitation that a teacher cannot be required to teach more than two subject areas unless agreed upon by the teacher and the Administrator.

The District asserts the existing contractual limitations on teaching are “contrary to the best interests of students and therefore contrary to the public interest.” It argues that because the “interest and welfare of the public” is one of the factors which the arbitrator must consider, this factor “tilts” decisively in the District’s favor. The District’s Assistant Superintendent for Instruction, Curriculum and Achievement testified that any contractual limits on instructional time impacts the District’s ability to effectively schedule classes. She also testified the guarantee of 50 consecutive minutes of planning time causes difficulties at the high school which uses longer class periods of 93-96 minutes. The District also argues that requiring employees to sign waivers for any schedule that does not comply with the contractual provisions is a potential hardship because “the District is at the mercy of the continuing willingness of teachers to sign” the waiver. The record confirms that employees have fully cooperated and there has not been a problem with securing signed waivers.

The District also argues that any compensatory time and banking of inservice days provisions reduce its ability to schedule professional development.

The Association asserts that its offer includes concessions in the key areas of increasing instructional time, increasing the number of preps that can be required from three to four, and providing greater flexibility to the District in scheduling meetings.

The comparability information provided by both parties establishes that all of the proposals have a similarity to at least one other Sussex County district. The comprehensive changes proposed by the District, however, would not put Laurel in the mainstream of negotiated provisions for the use of teacher time. Although current contractual provisions are slightly more restrictive than the comparable districts, the evidence does not support the District’s argument that it has been unreasonably constrained in its efforts to provide a positive educational

experience for its students.

It would unquestionably be easier for the District not to have to consider contractual limitations in developing schedules, distributing class assignments and planning meetings. But it is also reasonable to consider the employees' interest in their working conditions. Were these parties in negotiations (rather than interest arbitration) there are many compromises that might be reached. When the entire record is considered, the changes proposed by the District are sweeping and are not supported by evidence of a persistent or pervasive problem which must be resolved in the manner the District has proposed. The Association's offer makes concessions in the areas of most impact and is determined to be more reasonable based upon the statutory criteria.

Article XII. Salaries and Fringe Benefits

The parties have each proposed a 0% across the board increase to the local salary schedule which was appended to the prior agreement as Addendum A in each of the first three years of the agreed upon term of this collective bargaining agreement of July 1, 2013 through June 30, 2017. Addendum A to the predecessor agreement was entitled "Laurel School District Teachers Local Salary Table, 2006- 2007." Per the unambiguous terms of that agreement, that table reflected a 3% across the board wage increase effective July 1, 2006. Across the board local salary increases of 3% were also negotiated to be implemented on July 1, 2007, July 1, 2008, and July 1, 2009. It is important to note that these across the board increases were only applied to the 31% -33% of bargaining unit total salaries which are funded by the District.

It is undisputed that the employees did not receive any local salary increases on either July 1, 2010, July 1, 2011, July 1, 2012. The parties have agreed to 0% local salary increases effective July 1, 2013, July 1, 2014 and July 1, 2015.

The District proposes a 0% across the board wage increase for the fiscal year beginning

July 1, 2016 as well, while the Association's offer includes a limited reopener for purposes of negotiating an increase to the local salary scale, should economic conditions improve.

By July 1, 2016, the bargaining unit employees will have continued faithful service to the District without any wage increases for six years. Under these conditions, it is more reasonable based upon the statutory criteria to permit a wage reopener for the last year of this agreement on the chance that the District's financial position and revenues may have improved.

Article XIV. Selection, Assignment, Transfer and Recall

The District asserts the current contractual provisions addressing selection, assignment, transfer, and recall "deprives principals of the discretion to reassign teachers within a school; fails to establish meaningful qualifications for transferring; places no limitations on the frequency of transfers; permits transfers immediately prior to the school year making it difficult to get staff in place; and requires posting of a vacancy even if there is an unassigned employee certified for the vacancy." *Employers Post Hearing Brief, p. 25.* The District has proposed extensive changes to the previous contractual provisions, including:

- Deleting existing definitions of assignment, reassignment, vacancy, and transfer.
- Including a new timeline and process for voluntary transfers.
- Reducing the information which is provided on postings for vacancies and limiting the definition of a vacancy (does not include situations where there are either unassigned employees or employees on the recall list who are certified for the position).
- Deletes existing definition and procedures for reassigning teachers and provides the District retains sole "discretion to change an employee's subject area, course assignment, grade or room assignment."
- Redefines "assignment" and dictates the criteria for assignment within a school or program. Defines new terms for "regular", "limited duration" and "temporary" assignments.
- Modifies the criteria (and the order of importance) for voluntary transfer.
- Restricts employees from applying for a voluntary transfer if they had been voluntarily transferred within the prior two years.
- Creates a new definition for an "unassigned employee."

- Requires a “preference” for transfer form be completed by “employees involuntarily transferred and employees who desire a voluntary transfer.” Restricts the time frame in which such transfers may be requested.
- Modifies the procedure for “right to return” transfers.
- Deletes existing language and replaces seniority provisions.
- Provides seniority to administrators who are returning to bargaining unit positions.

The Districts offer permits principals to reassign teachers within a school to any position within the teacher’s area(s) of certification. Its revised transfer criteria is designed to screen out applicants who are not certified for the position; not highly qualified under No Child Left Behind; on an improvement plan; have a recent disciplinary history; or are in their first year of employment. The record does not support the conclusion that any of these issues have been a significant or recurring problem in the past or that they pose an imminent threat to the District’s ability to provide an effective educational experience for its students.

The current contract language is consistent with the provisions in the collective bargaining agreements of other Sussex County districts in the comparator group. When the entire record is considered, the changes proposed by the District are again sweeping and not supported by evidence of a persistent or pervasive problem which must be resolved in the manner the District proposes. While many of these changes could have been properly considered and modified through negotiations with the Association (or may be in future negotiations), there is a very different standard for effectuating changes through binding interest arbitration. In binding interest arbitration, the party proposing the change must persuasively demonstrate the changes are necessary and justifiable under a reasonable application of the statutory criteria of 14 Del.C. §4015 (d). Simply asserting the change is in the public interest because it advances what the District perceives to be the best interest of students is not dispositive.

Article XX. Sick Leave (Accumulation Bonus)

The District proposed to eliminate the current accumulation bonus which provides an additional personal day to employees at the point at which they have accumulated 30 days and again when they have accumulated 75 days of unused sick leave. The Association's offer eliminates the personal day provided after an employee accumulates 30 days of unused sick leave and retains a single personal day for employees who reach an accumulation of 75 days.

It is intuitively obvious that an incentive which results in more regular attendance and decreases the need to hire substitutes or otherwise provide coverage for employees who are absent results in significant cost savings. What was not apparent (as previously discussed) was exactly what the impact of the elimination or reduction in the use of personal days would be.

The District's witness made an assertion that it was not clear whether the granting of additional personal days was legal, but no further argument was offered on this point. The statute states at §4013, Collective Bargaining Agreements:

- (e) No collective bargaining agreement shall be valid or enforceable if its implementation would be inconsistent with any statutory limitation on the public school employer's funds, spending or budget, or would otherwise be contrary to law.

Should this matter be determined in some other forum to be inconsistent with limitations imposed on the District's spending of funds, it would be unenforceable.

Article XXII. Leaves of Absence (Family Illness Leave and Leaves of Absence)

No evidence, comparables or argument was offered in support of this provision of the District's proposal.

Article XXVII. Maintenance of Classroom Control & Discipline (Building Coverage)

The Association proposes to modify the current provision which requires the District to make every effort to provide administrative building coverage by an administrator in order to

prohibit the District assigning a bargaining unit member to provide coverage in the absence of an administrator. No comparable information was offered on this issue. The District convincingly argued that it does not have sufficient resources or administrative staff to comply with the Association's proposal. The Association did not provide evidence, other than the anecdotal testimony of its President, that a significant or pervasive problem exists which necessitates the proposed change.

Article XXIX. Professional Development and Educational Improvement
(¶29.5 Staff Development)

The District proposes to delete from the Staff Development provisions a requirement that the planning of meaningful professional development activities will be coordinated through a committee of building representatives who plan such activities with the building's Administrator. No evidence or justification was offered as to why this provision should be deleted or the impact of the proposed deletion.

Addendum #1: Ground Rules for Negotiations

No evidence was offered as to why this contractual provision should be modified (as proposed by the Association) or completely eliminated from the agreement (as proposed by the District). PERB has previously determined that parties may not lawfully decline to engage in negotiations because there is not agreement on ground rules. Including ground rules as an addendum to the agreement may make it easier to move directly to substantive discussions in subsequent negotiations. The variance in these proposals favor neither party and consequently has limited impact on the decision reached herein.

Addendum #4. Complaints Procedure

Consistent with its proposal to remove from the grievance definition any claims that "Board policy has been misapplied or misinterpreted by administrative decisions", the District's

offer included this proposed Complaint Procedure as an addendum to the agreement. Having previously determined the District's proposal for modification to the grievance procedure is not supported by the record, it is unnecessary to consider the impact of this proposal.

The statute requires the interest arbitrator to consider the last, best, final offers of the parties in their totality and does not provide the opportunity for creation of a more reasonable hybrid to resolve the dispute. I have reviewed the statutory criteria set forth in 14 Del.C. §4015 and have considered the last, best, final offers of the parties, separately and collectively, based on the record before me.

The District's offer simply seeks to make too many changes which affect the working conditions of the bargaining unit employees for which reasonable justification and documented support were insufficient to meet the statutory criteria set under 14 Del.C. §4015.

In conclusion, this record clearly establishes that the Laurel School District is faced with limited financial resources and more critically a less than optimistic projection for increasing its discretionary revenues. The scope and depth of those projected challenges are beyond the scope and consideration of this binding interest arbitration process.

The current funding system for this district is insufficient in the long-term. Economic downturns which result in loss of property value ultimately and directly impact school funding in Delaware. Similarly, the loss of jobs and economic opportunity impact the ability of the district to increase revenues and to successfully elicit local financial support through referendum. While it is widely accepted that the key to long term economic recovery is an educated and well trained work force, it is exceedingly difficult to provide more and better educational opportunities where financial resources are so limited. The answer to the financial conundrum, however, is not to be found in draconian revisions to the collective bargaining agreement of these parties.

Addressing these challenges will require the collaborative efforts of District

administrators and employees, parents, union, community and business leaders, and the citizens of the Laurel community who understand and appreciate how critical educated and engaged citizens are to its economic future and continued viability. It will also require this community to engage educational and political leaders at the State, county and federal level to understand the limitations of the current funding system as they impact the legitimate needs of a small public school district with a depressed economic base, stagnant property values and declining population.

A collective bargaining agreement imposed through the binding interest arbitration process is not a panacea. In all probability, the decision reached herein will not resolve the relational difficulties that have impeded these parties from reaching a negotiated agreement. There is no substitute for a respectful, collaborative and productive working relationship which depends directly upon the willingness, desire and commitment of both parties.

It is important to note that this decision does not represent the imposition of an agreement designed and created by a disinterested third party, an “outsider”. In reaching this decision, I am constrained by the last, best, final offers generated by these parties⁷, based upon their intimate knowledge and understanding of this school district and the manner in which operates. The arbitrator cannot fashion a contract or impose alternatives which might appear to be more reasonable or workable.

Consequently, the contract imposed by this decision is one which was designed by the District administrators and the Association as the representative of the faculty, not collectively and collaboratively, but in direct and active opposition. It will establish a period of stability through June 30, 2017 in which these parties are encouraged to repair and rebuild their relationships in the best interests of the students they obviously care about and the community they have dedicated their careers to serving.

⁷ *FOP Lodge 4 v. City of Newark, et al*, CA 20136, IV PERB 2959, 2963 (Chan. Ct., 2003).

DECISION

For the reasons discussed above, based on the record created by the parties in this proceeding, the last, best, final offer of the Association is determined to be the more reasonable based upon the statutory criteria set forth in 19 Del.C. §1315.

The following provisions are determined to be permissive subjects and are consequently removed from the resultant collective bargaining agreement, as discussed herein:

- Section of Grade Coordinators and Subject Chairpersons (District 4.10, pp. 18-19; LEA Par. 20, p. 10 -11)
- The School Calendar (permissive only as to decision whether to hire guidance counselors and nurses during the summer; mandatory as to compensation for those employees so hired.) (District 7.1, p. 24; LEA Par. 39, p. 14).
- Extra-Duty Consideration (permissive only as to decision to hire and retain employees in extra-duty positions; mandatory as to compensation) (District 10.1, p. 31; LEA Par. 66, pp. 18-19).
- Employee Credentials (District 11.1, p. 32; LEA Par. 67, p. 19).
- Duties and Responsibilities (District 25.1, p. 59; LEA Par. 132, p. 36).
- Books and Other Instructional Materials and Supplies and Access to Technology (District p. 61; LEA Par. 143, p. 38).

The record establishes the Laurel School District is in a very difficult financial situation as a result of its inability to increase its local and/or other revenues. The record does not, however, establish that the cost of the Association's last, best, final offer exceeds the cost of the District's offer, in its totality. Nor does it support the conclusion that the District's structural financial challenges result from the negotiated terms of these parties' collective bargaining agreement.

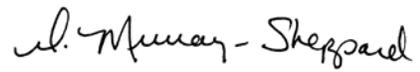
The relative merits of the last, best, final offers were considered in their totality and balanced according to the statutory criteria. *FOP Lodge 4 v. Newark*, PERB Review of Arbitrator's Decision on Remand, IV PERB 2789, 2793 (2003). All of the exhibits, testimony, arguments and cases cited by the parties were considered in their entirety in reaching this

decision.

WHEREFORE, the parties are directed to implement the tentative agreements and proposals set forth in the Association's last, best, final offer, with the exclusion of the matters determined herein to be permissive subjects of bargaining. 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: July 11, 2014



DEBORAH L. MURRAY-SHEPPARD
Executive Director, Delaware PERB