

**STATE OF DELAWARE**

**PUBLIC EMPLOYMENT RELATIONS BOARD**

<b>CITY OF WILMINGTON, DELAWARE,</b>	:	DECISION OF THE
	:	BINDING INTEREST
AND	:	ARBITRATOR
	:	
<b>INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 1590.</b>	:	<b><u>BIA 19-11-1213</u></b>
	:	

**Appearances**

*William W. Bowser, Esq. and Scott A. Holt, Esq., Young Conaway Stargatt & Taylor,  
LLP for the City of Wilmington  
Aaron M. Shapiro, Esq., Connolly Gallagher, for IAFF Local 1590*

**BACKGROUND**

The City of Wilmington (“City”) is a public employer within the meaning of 19 Del.C. §1602(l) of the Police Officers and Firefighters Employment Relations Act (“POFERA”). 19 Del.C. Chapter 16 (1986).

The International Association of Firefighters, Local 1590 (“IAFF”) is an employee organization within the meaning of 19 Del.C. §1602(g). The IAFF is the exclusive bargaining representative of a bargaining unit of Firefighters, Lieutenants, Captains, and Battalion Chiefs of the Wilmington Fire Department (“WFD”). 19 Del.C. §1602(h).

The City and the IAFF were parties to a collective bargaining agreement which has a term of July 1, 2012 through June 30, 2016. The terms of this agreement have continued to govern the parties’ relationship since its nominal expiration date.

The parties entered into negotiations for a successor agreement in January 2019. Unable to reach a successful conclusion to their negotiations, the City requested mediation on May 14, 2019. A mediator was appointed by the Public Employment Relations Board,

who met with the parties on June 26, July 9, and November 18, 2019. At the conclusion of the final mediation session, the mediator advised PERB:

I held a third mediation session with the parties in this matter today. Based upon the proposals and responses of the parties made throughout the day of negotiations, I am of the view that further mediation sessions will not be productive. I recommend that no further mediation sessions be scheduled and that the parties be directed to submit their final offers for purposes of arbitration.

By letter dated November 19, 2019, the parties were directed to submit their last, best, final offers on or before December 4, 2019. At the IAFF's request, an extension was granted until December 11 to file last, best, final offers.

On December 6, 2019, the IAFF requested the binding interest arbitration proceedings be held in abeyance while an unfair labor practice (filed on December 4, 2019)<sup>1</sup> was processed. By letter dated December 6, 2019, the PERB Executive Director denied the IAFF request to holding this binding interest arbitration proceeding in abeyance, stating "... the establishment of terms of the successor agreement is not dependent upon the resolution of the unfair labor practice charge, which raises a question arising under the status quo established by the 2012-2016 agreement."

Each party submitted a last, best, final offer on December 11, 2019. 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. §1615(a). A prehearing conference was conducted on January 9, 2020.

At the conclusion of the prehearing conference, the parties agreed to enter into an effort to facilitate the resolution of the contract terms. After an intensive good faith

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<sup>1</sup> *International Association of Firefighters, Local 1590 v. City of Wilmington*, ULP 19-12-1215

engagement by both parties in the facilitation, a tentative agreement was reached which was signed off on February 3, 2020. The IAFF presented the terms of the agreement to its membership on February 13, 2020, where it was rejected.

Thereafter, a binding interest arbitration hearing was convened by the PERB Executive Director on February 24 and 25, 2020. During the two days of hearing, the parties presented testimony and documentary evidence in support of their respective positions. The record created by the parties consisted of thirty-three (33) exhibits submitted by the City and forty-two (42) exhibits submitted by the IAFF. The parties also submitted all of the tentative agreements reached during the course of their negotiations as a joint exhibit.

Testimony was received from Wilmington Fire Department (“WFD”) Chief of Fire, Michael Donohue; Michael Nadol, Partner with PFM Group Consulting; City Assistant Budget Director, Robert Winkeler; City Director of Human Resources, Charlotte B. Barnes; WFD Captain Kevin O. Turner, immediate past-president of IAFF Local 1590; WFD Lieutenant Kevin Weems; WFD Lieutenant Paul Merrill; WFD Lieutenant Bruce Schweiger; and WFD Lieutenant Joseph Leonetti, Jr., President of IAFF Local 1590.

Closing argument was provided in written post-hearing submissions. The record closed on April 13, 2020. The following discussion and decision result from the record thus created by the parties.

### **FACTS**

The Wilmington Fire Department (“WFD”) is the only paid, full time, fire department in Delaware. WFD is staffed by approximately 156 sworn firefighters and 5 civilian positions. It is functionally divided into two divisions: the Fire Prevention Division (14 firefighters) which conducts investigations, enforces fire codes and ordinances, and

oversees licensing and inspection of buildings in the City for compliance with the fire code; and the Suppression Division which is primarily responsible for fighting fires and providing emergency services.

The Suppression Division has an allocated staffing of 142 positions, including eight Battalion Chiefs, nine Captains, 26 Lieutenants, and 99 Fire Fighters and Senior Fire Fighters. On July 1, 2017, the City eliminated 16 fire suppression positions, reducing the suppression staff from 156 to 142.

Currently and consistent with the terms of §17.1 of the 2012-2016 collective bargaining agreement, firefighters assigned to the Suppression Division are organized into a four platoon system which provides 24-hour, 7 days per week fire and emergency services to the approximately 71,000 residents of the City. Each platoon is comprised of 35 members. Each platoon works a 24-hour tour, followed by 72 hours off. This is referred to by these parties as the 24-72 Shift. Each tour of duty begins at 8:00 a.m. and concludes at 8:00 a.m. the following morning. Under the 24-72 shift, firefighters are scheduled to work 2,184 hours annually.

From 1952 until 2006, the City operated its Suppression Division using a three platoon system, working a 3-3-3 shift. *TR p. 52.* The 3-3-3 shift was comprised of three 10-hour days, followed by 24 hours off, followed by three 14-hour nights, concluding with three complete 24-hour periods (72 hours) off. *TR p. 102.* The 3-3-3 shift also included Kelly Days which were designed to keep the firefighters hours below the Fair Labor Standards Act threshold for the payment of premium overtime rates for public safety employees.

The City operates six fire stations which house a total of six engines and two ladder trucks. The parties have negotiated a minimum manning requirement of one officer and

three firefighters for each apparatus. Article 11.6. As a result of the minimum manning requirement, WFD needs at least 34 firefighters available at the start of each tour in order to operate all 6 engines and 2 ladder trucks. When 34 firefighters are not available at the start of a tour due to planned or unplanned absences (e.g., annual leave, sick leave, bereavement, union leave, workers compensation, disability, training, etc. ), WFD fills the first five vacancies by calling overtime. Overtime is filled in twelve hour increments, referred to as units. Overtime hours may be filled by volunteers who are not working, by calling in a firefighter who is scheduled to be off, or by holding a firefighter over from the prior tour. *TR p. 39-40.*

If more than five vacancies exist at the start of a tour, the City, by policy, implements “rolling bypass”. Rolling bypass is the process of closing a single engine company, removing that engine from service for the day and reassigning the firefighters on the idled engine to other engine companies for the day. *TR p. 41.* The designated engine company to be bypassed is rotated among the City’s fire districts and no individual engine company is idled on consecutive days.

Rolling bypass has been used by the WFD for a number of years. It has been the subject of much public scrutiny and has been an on-going concern of both the City and the IAFF. Those concerns focus on the impact on the health and safety of firefighters and residents when an engine company is removed from active service due to the lack of available manpower to meet minimum manning standards.

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

#### **I. Last, Best, Final Offer of City of Wilmington:**

##### **1. Amend Article 3 (Definitions) as follows:**

Unit – is defined as **the number of hours in a shift scheduled for or worked by employees assigned to the Suppression Division of the Fire Department (i.e., 8-10-12 hours).** ~~twelve (12) hours: 0800–2000 or 2000–0800~~

Tour – is defined as **consecutive Units immediately before scheduled hours or days off under a work schedule as established by the Chief of Fire.** ~~twenty-four (24) hours: 0800–0800~~

Complete Tour of Duty – is defined as **consecutive Units immediately followed by scheduled hours or days off under a work schedule as established by the Chief of Fire.** ~~twenty-four (24) hours on duty immediately followed by seventy-two (72) hours off~~

Hourly Rate – is defined as the hourly compensation calculated on an annual base salary divided by ~~2080~~ **2496** hours per year (Annual Base Salary ÷ ~~2080~~ **2496**).

Apparatus (Minimum Manning) – is defined as an **Engine, Ladder, or Squad utilized by employees assigned to the Suppression Division of the Fire Department.**

2. **Amend Sections 10.1 and 10.2 to read as follows:**

Section 10.1

(a) ~~Employees~~ **Through June 30, 2020, employees** covered by this Agreement shall be offered three medical plans: Point of Service 100/80 (“POS”); Point of Service 90/70 (“POS (2)”); and Simply Blue EPO Plan 100 (“EPO”). ~~These plans shall be provided to bargaining unit Employees plus eligible dependents during the term of this Agreement.~~

~~Benefits and required employee contributions and co-pays provided under these plans shall be attached to and made part of this Agreement as Appendix “A\_\_\_.”~~

(b) **Effective July 1, 2020, employees covered by this Agreement, who were hired before July 1, 2020, shall be offered three medical plans: PPO 100/80 (“PPO1”), PPO 90/70 (“PPO2”), and Simply Blue EPO Plan 100 (“EPO”). These plans shall be provided to employees covered by this Agreement plus eligible dependents during the term of this Agreement. Effective July 1, 2020, employees covered by this Agreement who were hired after July 1, 2020, shall be offered two plans: PPO2 and EPO.**

**Benefits and required employee contributions and co-pays provided under these plans shall be attached to and made part**

of this Agreement as Appendix “A”.

(c) **Healthcare (Effective 7/1/20)**

**Employee Share**

- **12% of total premium, or**
- **10% of total premium if employee meets with HCP and gets blood screening**
- **PPO1 Plan closed to new hires effective 7/1/2020**
- **\$150 co-pay for emergency room visits, effective 7/1/2020 (up from \$50)**
- **Mandatory generic drug prescriptions, effective 7/1/2020**
- **Mandatory annual physical and age/gender specific lab screenings for 2% premium discount.**

(bd) Upon retirement, Employees shall have the right to choose, in writing, to continue coverage with the City of Wilmington’s health insurance plans, at the Employee’s expense, with a deduction from pension payments where applicable, unless the Employee qualifies under the stipulations outlined in subsection 10.1 (e e).

(e e) **Retiree Medical Program**

...

Section 10.2 The Employer will **provide** ~~continue its current~~ Dental (“~~Current Dental Plan~~”) and Long-Term Disability Plans during the life of this Agreement. ~~Within sixty days after execution of this Agreement, the Employer shall also offer an alternative dental benefit (“Traditional Dental Plan”).~~ The benefits and required contributions and co-pays under these plans shall be attached to and made part of this Agreement as Appendix “A-1”. **The Employer will provide two Vision Plans. Vision Base Plan will be provided at no cost to all employees with the option of purchasing enhanced vision benefits (“Buy-up Plan”) as outlined in Appendix “A-2”.**

3. **Amend Sections 16.1 and 16.2 to read as follows:**

Section 16.1 The following salary rates will be in effect in the Fire Department for the duration of this Agreement.

*Salary Matrices included for FY 2020 (effective 7/1/19); FY 2021 (effective 7/1/20); FY 2022 (effective 7/1/21) and FY 2023 (effective 7/1/22)*

Section 16.2 The salaries outlined above reflect the following percentage increases:

**Effective upon the 7/1/20 implementation of a three (3) platoon system for Fire Suppression, salaries shall reflect a 16% increase.**

Salaries effective July 1, ~~2012~~ **2019** reflect a general increase of ~~2~~ **2.0%**

Salaries effective July 1, ~~2013~~ **2020** reflect a general increase of ~~0~~ **2.0%**

Salaries effective July 1, ~~2014~~ **2021** reflect a general increase of ~~1~~ **2.0%**

**Salaries effective July 1, 2022 reflect a general increase of 2.0%**

**Additionally, each Employee shall receive a one-time bonus payment of \$1,250 payable on 7/1/20.**

~~Salaries effective 6/30/2016 reflect a general increase of 1%. Such increase shall be paid in lieu of shift differential. Shift differential, as provided in Section 11.13, is eliminated effective June 30, 2016.~~

~~The salary increase for FY 13 shall be retroactive to July 1, 2012. The salary increase for FY 15 shall be retroactive to July 1, 2014. The salary increases for FY 13 and FY 15 will be used to calculate retroactivity pay for salary and any other salary related compensation such as overtime, out of class pay, shift differential, etc.~~

#### **4. Amend Article 17.1 to read as follows:**

##### Section 17.1

- (1) **Effective 7/1/20, all Fire Suppression members of the Fire Department shall work a three (3) ~~four (4)~~ platoon system and a shift as determined and established by the Chief of Fire.—as follows:**

~~One twenty four (24) hour period 0800—0800 hours followed by seventy two (72) hours off (24-72 Work Schedule)~~

~~The term “A Complete Tour of Duty” in this subsection is defined as twenty four (24) hours on, followed by seventy two (72) hours off.~~

**Effective upon the implementation of a three (3) platoon system, additional hours off (“Kelly Days”) shall be scheduled to reduce the annual hours to 2496. As an example, if the Chief of Fire were to implement a three platoon system with a Complete Tour of Duty of twenty-four (24) hours on, followed by forty-eight (48) hours off, then each employee would be scheduled for an additional twenty four (24) hours off as a Kelly Day every seventh (7<sup>th</sup>) shift.**

**The platoon system for fire suppression members described above and any shift schedule may be changed at the discretion of the Chief of Fire.**

- (2) Forty (40) hours shall constitute a week's work for all members of the Fire Department assigned or detailed to the **Fire Prevention Division (Fire Marshal's Office and Fire Prevention Unit)**, Office of the Chief of Fire, Office of the Deputy Chief of Operational Services, Training Unit, Internal Affairs Unit, Planning and Research Unit, and the Data and Statistics Unit. Daily hours of work for members assigned or detailed to the above mentioned offices and units shall be assigned by the Chief of Fire or his representative as required to meet the operational requirements of such offices and/or units.
- ~~(3) Forty (40) hours shall constitute a week's work for all members of the Fire Department assigned to the Fire Prevention Division (Fire Marshal's Office and Fire Prevention Unit). Work hours will consist of either four (4) ten hour days or five (5) eight hour (1600-2400) nights as assigned by the Chief of Fire or his representative as required to meet the operational requirement of such office.~~
- (3) ~~(4)~~ The salary schedule contained in this Agreement is to be the total compensation for the schedule of hours worked listed in Section 16.1 and 16.2.

**5. Amend Article 18.3 to read as follows:**

Section 18.3 Members of the Fire Department shall be permitted to work as replacements for other members, providing that:

(1) At least twenty-four (24) hours' notice is given to the commanding officer of the member for whom another member is substituting and the officer approves the substitution.

(2) That such substitution shall not require the payment of overtime compensation by the City under the provisions of the Fair Labor Standards Act of 1938, as amended.

(3) Exchange of days/unit(s) will be completed within six (6) months, provided that any Firefighter who retires owing exchange days/unit(s) must pay those back to the City.

(4) If, on the second part of the exchange, the member being replaced is on sick or off-duty injury, the member scheduled to work will still work but the member being replaced will not be charge a sick day/unit for the duration of the exchange period.

(5) If either member is unable to work the agreed date due to sickness or off-duty injury, that member will not be permitted to exchange for a period of three (3) months from the day/unit they reported off and will be required to work a "day/unit owed" which must be repaid within sixty (60) calendar days. The day/unit repaid will be at the member's choice from three (3) options proposed by the department.

**(6) A member will not be permitted to exchange until he or she has worked or "repaid" all shifts required under any prior**

exchanges.

(7) Other than for Educational Exchange Days, a member may not exchange more than twelve (12) units per calendar year.

(8) Both members involved in an exchange must be qualified to perform the job functions required by the exchanged shifts.

6. Amend Article 32.1 to read as follows:

Section 32.1 This Agreement shall be effective as of July 1, 2019, and shall remain in full force and effect until June 30, 2023.

7. Rename and replace the information contained in Appendix A, A-1, A-2 with the Tables to be supplied when final plan summaries received.

**II. Last, Best, Final Offer of IAFF Local 1590:**

1. **Article 2 – EMPLOYEES REPRESENTATIVE, DEDUCTION OF FEES AND UNION SECURITY**

Section 2.2 mutually resolved by the parties as memorialized at ¶1 of the Tentative Agreement. Joint Exhibit 1.

Section 2.3 mutually resolved by the parties as memorialized at ¶10 of their Tentative Agreement. Joint Exhibit 1.

Amend Section 2.5(b) as follows:

(b) All new employees of the Fire Department may become members of Wilmington Firefighters Local 1590. **The City agrees that it shall not interfere with or restrain employees in any manner from exercising their right to join the Union, including probationary employees.** ~~upon successful completion of their probationary period.~~ [The remainder of this section was mutually resolved by the parties as memorialized at ¶11 of their Tentative Agreement. Joint Exhibit 1]

2. **Article 3 – DEFINITIONS**

A. Preserve all definitions provided in the parties' current agreement.

3. **Article 5 – HOLIDAYS**

Amend section 5.1 to include the following term:

**All employees whose normal work schedule falls on a City designated holiday shall be compensated at their straight-time rate in addition to their regular compensation, for up to 16 hours. This term shall not affect the premium compensation rates for employees who volunteer to work a holiday, or the compensation rates provided in Section 11.4 of this Agreement.**

4. **Article 6 – VACATION**

*Mutually resolved by the parties as memorialized at ¶12 their Tentative Agreement. Joint Exhibit 1.*

## **5. Article 7 – SICK LEAVE**

*Mutually resolved by the parties as memorialized at ¶13 their Tentative Agreement. Joint Exhibit 1.*

## **6. Article 9 – BEREAVEMENT LEAVE**

A. Section 9.2(a) *mutually resolved by the parties as memorialized at ¶14 their Tentative Agreement. Joint Exhibit 1.*

B. Section 9.2(b) *mutually resolved by the parties as memorialized at ¶14 their Tentative Agreement. Joint Exhibit 1. as follows:*

C. New Section, Paid Parental Leave, *mutually resolved by the parties as memorialized at ¶3 of their Tentative Agreement. Joint Exhibit 1.*

## **7. Article 11 – WORKING CONDITIONS**

A. Section 11.6 – Preserve Minimum Manning as defined in the parties' current agreement.

B. Amend Section 11.9 (Friday after Thanksgiving) as follows:

An employee who works on the Friday after Thanksgiving from 0800 – 0800 hours the following day will receive ~~cash payments,~~ **in addition to his/her normal compensation for those hours, payment** for the hours worked **at his/her regular rate of pay.** ~~Any member working under Article 11.4 will be excluded from this section.~~

## **8. Article 13 – ACTING OUT OF RANK**

Amend Section 13.1, as follows:

Any Firefighter designated by appropriate authority ~~to~~ acting out of rank will be paid at the rank in which they are serving, **unless the designate rank is lower than the Firefighter's normal rank, in which case the Firefighters shall not be paid at any rate less than his/her regular hourly rate, including any applicable premiums.** All personnel substituting in a higher rank will be entitled to payment at the higher rank **for all hours served, including overtime and any other duty, service or applicable premiums.**

## **9. Article 16 – CLASSIFICATION AND SALARIES**

A. Amend Sections 16.1 and 16.2 including the wage scales provided in Section 16.1, to reflect the following general increases which shall be describe in Section 16.2:

**Salaries effective July 1, 2016 shall reflect a general increase of 0%**

**Salaries effective July 1, 2017 shall reflect a general increase of 2%**

**Salaries effective July 1, 2018 shall reflect a general increase of 2%**

**Salaries effective July 1, 2019 shall reflect a general increase of 2.5%**

**Salaries effective July 1, 2020 shall reflect a general increase of 2.5%**

**Salaries effective July 1, 2021 shall reflect a general increase of 3.0%**

~~Salaries effective June 30, 2016 reflect a general increase of 1%. Such increase shall be paid in lieu of shift differential. Shift differential, as provided in Section 11.13, is eliminated effective June 30, 2016.~~

~~The salary increase for FY 13 shall be retroactive to July 1, 2012. The salary increase for FY 15 shall be retroactive to July 1, 2014. The salary increase for FY 13 and 15 will be used to calculate retroactivity pay for salary and any other salary-related compensation such as overtime, out of class pay, shift differential, etc.~~

## **10. Article 17 – HOURS OF WORK**

A. Preserve all terms in this Article as provided in the parties' current agreement.

## **11. Article 18 – COMPANY OFFICER LEAVE AND SUBSTITUTION**

Preserve all terms as currently defined in the parties' agreement, except as modified by the parties' tentative agreements on Sections 18.1 and 18.2.

## **12. Article 30 – NO LAY-OFFS**

Amend the article as follows:

### **NO DEMOTIONS AND LAY-OFFS**

**Section 30.1 The City will not demote employees during the term of this Agreement, or during any subsequent period before the effective date of a successor agreement, for any reason other than individual disciplinary action, if the parties agree that demotion is available as a disciplinary measure. exercise its managerial right to lay-off employees during Fiscal Year 2012, ending on June 30, 2012. In the event that the City determines layoffs are necessary, the City shall negotiate the procedures for layoff and reinstatement with the Union. In addition to those procedures, the parties agree that layoffs shall be based on the employee's dates of appointment as a Fire Fighter. No new appointments shall be made until all laid-off employees who wish to return have been recalled. Employees who have been laid off shall have recall rights in the inverse order of layoff according to seniority.**

## **13. Article 10 – HEALTH AND WELFARE**

Amend Section 10.1(a) as necessary to reflect the following:

The firefighters will agree to increase their health care premium share rates, but the increase shall be limited to 10% of the premium rates in recognition of the firefighters' required annual medical screenings. The premium share increase shall be effective 60 days following resolution of a new collective bargaining agreement through binding interest arbitration, or other procedures. The City shall pay each firefighter a one-time payment of \$1,250 in the same pay period that the new premium rates become effective.

#### **14. Maintenance of Terms**

Maintain all terms in the current agreement that are not otherwise modified by a provision of the IAFF's last, best, final offer, or a tentative agreement reached by the parties

#### **STIPULATED AGREEMENTS OF THE PARTIES<sup>2</sup>**

1. Amend Section 2.2 to read as follows:

Section 2.2 Upon the written authorization of any employee covered by this contract, the City shall deduct from their wages the monthly amount of dues or **voluntary** agency fee as certified by the Secretary of the Union and shall deliver the same to the Treasurer of the Union.

2. Amend Section 4.14 to read as follows:

Section 4.14. The Union shall be presumed to be the authorized representative of all members of the bargaining unit in grievance proceedings, unless an individually aggrieved employee, in writing (**with a contemporaneous copy given to the Union President**), rejects its representation.

3. Add new Section 9.5 (Paid Parental Leave) to read as follows:

**Section 9.5 Employees shall be granted paid parental leave as defined under Section 40-341 of the City Code, on terms at least as favorable as those provided to employees of the City not covered by this Agreement.**

4. Amend Section 11.2(c) to read as follows:

(c) **TURN-OUT GEAR.** The City shall be totally responsible for supplying to all Firefighters turn-out gear and equipment required by the Rules and Regulations at its sole cost and expense, including two (2) protective hoods, **two (2) helmet liners**, and gloves. If a Firefighter does not complete their probationary period, they are required to pay the City for the cost of this equipment; such cost to be deducted from their final pay.

5. Amend Section 18.1 to read as follows:

Section 18.1 A suppression company officer is authorized to give

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<sup>2</sup> Submitted at the commencement of the binding interest arbitration hearing on February 24, 2020 as Joint Exhibit 1, entitled "Tentative/Mutual Agreements".

any member of his or her company up to two (2) hours leave, so long as another **qualified** member will cover or holdover for this member. In the absence of the company officer, the request will be directed to the Battalion Chief.

6. Amend Section 18.2 to read as follows:

Section 18.2 A Battalion Chief is authorized to give any member of the Fire Department up to four (4) hours leave, so long as another **qualified** member will cover or hold-over for this member. In the absence of the Battalion Chief, the request will be directed to the Deputy Chief in Charge of Operations.

7. Amend Section 26.8 to read as follows:

Section 26.8 **REASONABLE SUSPICION TESTING.** The department may also initiate drug and/or alcohol screening for any incident in which there is “reasonable suspicion” that the employee is under the influence of, or impaired to any degree, by drugs and/or alcohol while on duty.

When a member is arrested off duty for an alleged criminal act involving the possession of or use of a controlled substance, the employee may be ordered to report to the department for drug testing. They shall be permitted to consult with a Union official.

“Reasonable Suspicion” means – “an articulable belief based on specific facts and reasonable inferences drawn from those facts that a member is under the influence of, or impaired to any degree, by drugs and/or alcohol.”

Circumstances which constitute a basis for determining “reasonable suspicion” may include, but are not limited to:

- (1) Direct observation of drug and/or alcohol use.
- (2) The member’s body shows evidence of drug use (e.g. “track marks”, etc.).
- (3) The member is found to be in possession of alcohol and/or drugs while on duty.
- (4) Spontaneous unusual, abnormal, erratic, or unacceptable behavior.
- (5) A documented pattern of unusual, abnormal, erratic, or unacceptable behavior.
- (6) An unusual pattern of sick leave usage.
- (7) A serious on duty injury ~~under suspicious circumstances.~~ **Serious shall mean any injury that requires the filing of a Department Injury Report.**
- (8) An accident on duty ~~under suspicious circumstances~~, including motor vehicle accidents, which results in any property damage or bodily injury to any person.
- (9) Reporting to work unfit for duty.

- (10) The presence of physical symptoms of drug and/or alcohol use (i.e., glassy or bloodshot eyes, the odor of alcohol on breath, slurred speech, poor coordination, and/or reflexes, etc.)

A credible report of alcohol or drug abuse from a member or non-member may result in an investigation, which shall first consist of an interview with the member under suspicion. The interview shall be conducted by a superior officer and an Employee Assistance Program (“EAP”) officer. If the interview establishes reasonable suspicion, a test may be ordered. If the interview does not establish reasonable suspicion, no test shall be ordered unless the department can independently establish “reasonable suspicion” by other means, such as those listed in subparagraphs 1 through 10 above. In no event shall an anonymous report of alcohol or drug abuse result in a test unless the department is able to independently establish reasonable suspicion through an investigation as set forth above.

All departmental supervisors initiating disciplinary action on the basis of “reasonable suspicion” will be required to detail in writing the specific facts, symptoms, or observations which formed the basis for their determination that “reasonable suspicion” existed to warrant the testing of the member.

A refusal of an employee to submit an adequate sample will be found in violation of this policy. The employee will be suspended without pay and subject to discipline up to and including discharge.

8. Amend Section 11.13 to read as follows:

(a) ~~Effective July 1, 2011, all Fire Suppression members or those in support of Fire Suppression activities (as required by Fire Department Management) who work the night unit (2000 – 0800) and Fire Administration Personnel who work the night shift (1600 – 2400) shall be paid a 5% shift differential. Shift differential will only be paid to Firefighters who work these hours. This shift differential will be paid on the basis of straight time for actual hours worked up to a maximum eight (8) hours. Overtime will apply as stipulated in Article 17, Section 17.3.~~

(b) Effective June 30, 2016, shift differential shall be eliminated.

9. Delete Article 31 in its entirety:

~~Section 31.1 — In the event that the City and FOP Lodge #1 Rank and File enter into a collective bargaining agreement for the period of July 1, 2011 through June 30, 2012, which includes a general wage increase for that period, the implementation of that agreement shall automatically require a reopening of wage negotiations between the City and IAFF Local 1590 on April 1, 2012. A general wage increase required by a binding interest award shall not trigger such negotiations.~~

10. Amend Section 2.3 to read as follows:

Section 2.3 The Union shall deliver to the City, ~~at least ten (10) days before the end of the current pay period,~~ additional “check-off dues

forms” under which membership dues or voluntary agency fees ~~for the current pay period~~ are to be deducted. Dues or fees withheld shall be transmitted by the City, with a list of those for whom such deductions have been made, to the duly elected Treasurer of the Union not later than the tenth (10<sup>th</sup>) working day of the following month. Upon request, the City shall transfer all of the withheld dues and fees by direct deposit to an account designated by the Union.

11. Amend Section 2.5(b) to read as follows:

~~(b)...If a new employee does not become a member of Local 1590, or if an existing member drops their membership, they shall pay an agency fee to the Union. The agency fee shall be paid in recognition of the employee’s obligation and responsibility for their proportionate share of the services provided by Local 1590 and the International Association of Firefighters for collective bargaining, contract administration, grievance adjustment, and other duties and services related to being the exclusive bargaining representative of the uniformed employees of City of Wilmington Fire Department. The City recognizes Local 1590’s right to collect such agency fee from bargaining unit members. Local 1590 recognizes that legal or other action to collect such agency fee from an employee who does not elect voluntary payroll deduction is an action of Local 1590 and not that of the City. The agency fee shall be set by the Union, which will notify the City of the amount of the agency fee.~~

12. **Article 6 – Vacation**

Preserve all terms in this Article as provided in the parties’ current agreement.

13. **Article 7 – Sick Leave**

Preserve all terms in this Article as provided in the parties’ current agreement.

14. Amend Article 9 to read as follows:

Section 9.2 Bereavement Leave

(a) Administrative Personnel

(1) All firefighters will be granted four (4) consecutive working days off for a death of one of the following members of the firefighter’s immediate family: spouse, children, **brother, sister, and** parents, **grandparents, mother-in-law, father-in-law, any person who stands in loco parentis to the employee, and any person or relative with whom the employee is making his or her home.** These days shall be consecutive. The bereavement period ends five (5) calendar days after the interment. **If an employee would be granted additional leave under Section 40-336 of the City Code, such leave shall be granted.**

(2) All firefighters will be granted up to four (4) working days off for a death of one of the following members of the firefighter’s immediate family: ~~brother, sister, grandparents,~~ spouse’s grandparents,

~~mother-in-law, father-in-law, son-in-law, daughter-in-law, grandchildren, brother-in-law, and sister-in-law, or any person who stands in loco parentis to the Employee or any person or relative with whom the employee is making his or her home.~~ The bereavement period ends three (3) calendar days after the interment. **If an employee would be granted additional leave under Section 40-336 of the City Code, such leave shall be granted.**

(3) The time off allowed in the case of death in the firefighter's immediate family shall not be chargeable to either sick leave or vacation time. In the event of a death of a near relative not listed above, up to two (2) days' vacation time may be taken.

(4) Additional time off may be granted for extenuating circumstances as determined by the Chief of Fire or Designee.

(b) Suppression Personnel

(1) All firefighters will be granted two (2) consecutive tours off for a death of one of the following members of the firefighter's immediate family: spouse, children, **brother, sister, and** parents, **grandparents, mother-in-law, father-in-law, any person who stands in loco parentis to the employee, and any person or relative with whom the employee is making his or her home.** The bereavement period ends five (5) calendar days after the interment. **If an employee would be granted additional leave under Section 40-336 of the City Code, such leave shall be granted.**

(2) All firefighters will be granted one (1) tour off for a death of one of the following members of the firefighter's immediate family: ~~brother, sister, grandparents, spouse's grandparents, mother-in-law, father-in-law,~~ son-in-law, daughter-in-law, grandchildren, brother-in-law, **and** sister-in-law, ~~or any person who stands in loco parentis to the Employee or any person or relative with whom the employee is making his or her home.~~ The bereavement period ends three (3) **calendar** days after the interment. **If an employee would be granted additional leave under Section 40-336 of the City Code, such leave shall be granted.**

(3) The time off allowed in the case of death in the firefighter's immediate family shall not be chargeable to either sick leave or vacation time. In the event of a death of a near relative not listed above, up to one (1) tour of vacation time may be taken.

(4) Additional time off may be granted for extenuating circumstances as determined by the Chief of Fire or Designee.

## STATUTORY PROVISIONS

19 Del.C. §1615. Binding interest arbitration.

- a. Within 7 working days of receipt of a petition or recommendation to initiate binding interest arbitration, the Board shall make a determination, with or without a formal hearing, as to whether a good faith effort has been made by both parties to resolve their labor dispute through negotiations and mediation and as to whether the initiation of binding interest arbitration would be appropriate and in the public interest.
- 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 contractual issues. The hearings shall be held at times, dates and places established by the binding interest arbitrator in accordance with rules promulgated by the Board. The binding interest arbitrator shall be empowered to administer oaths and issue subpoenas on behalf of the parties to the dispute or on the binding interest arbitrator's own behalf.
- d. The binding interest arbitrator shall make written findings of facts for the resolution of the dispute; provided, however, that the decision shall be limited to a determination of which 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.

## PRINCIPLE POSITIONS OF THE PARTIES

### City of Wilmington

The City argues that its last, best, final offer is more reasonable based upon consideration of the statutory criteria. The public welfare is best served by adjusting the distribution of resources to ensure adequate staffing of the Fire Suppression Division. By modifying the platoon and shift structure, the need for rolling bypass and excessive overtime expenditures will be controlled. Recognizing that the proposed schedule change from the current 24-72 to a 24-48 schedule (with 17 Kelly Days annually) will increase the regularly scheduled work hours of firefighters by 14.2%, the City will increase base wages by 16% upon implementation of the new schedule on July 1, 2020. Its wage proposal also includes across the board wage increases similar to those of other City employees (both unionized and unrepresented). The City's healthcare offer would bring the firefighters in line with the plan and premium structure recommended by the Healthcare Task Force and which has been accepted by all other City employees<sup>3</sup>. It seeks to protect firefighters' health by incentivizing engagement in preventative and diagnostic care with each employee's primary care physician. The City's offer also places reasonable limits on the use of Exchange Days (for non-educational purposes) within the Fire Suppression Division.

The City argues the IAFF's proposals are unreasonable, are not supported by the evidence of record in this proceeding, and seek to bind the City on permissive subjects of bargaining, about which it cannot be compelled to negotiate.

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<sup>3</sup> The City's police force (two bargaining units represented by FOP Lodge 1), its paraprofessional employees (represented by AFSCME Local 1102), and its non-union employees are currently covered by the healthcare plan in the City's offer. The City's Director of Human Resources testified, without refutation, that the plan has also been accepted in principle by the remaining bargaining unit which was also negotiating at the time of this proceeding, i.e., AFSCME Local 320, which represents the City's blue collar employees.

IAFF Local 1590

The IAFF argues the primary issues in dispute are the current work schedule and the City's use of rolling bypass to maintain adequate staffing in the suppression division. It asserts the use of rolling bypass was necessitated by the City's decrease in the manpower from 156 to 142 firefighters in the suppression division in July 2017. The IAFF argues the City has failed to establish that the current level of overtime spending is unsustainable. It calculates that the average annual expense for WFD overtime over the last thirteen years<sup>4</sup> has been \$1,279,316. It notes that the number of days on which the City uses rolling bypass doubled from FY 2016 and FY 2017 when it was 142-145 days to 286-289 days in FY 18 and FY 19.<sup>5</sup> It argues, "The City now seeks to presumptively impose and unilaterally control an extraordinary increase of working hours on the firefighters as a preferred – not required – means of achieving its stated goal of reducing – with no general commitment to eliminating - rolling bypass."<sup>6</sup>

The IAFF also argues the City is seeking unfettered discretion in creating a new schedule. It asserts, "... there is no basis to conclude that the City intends to or is committed to implementing a 24-48 schedule with 17 Kelly Days, or that it believes it is obligated to define a specific schedule or maintain any specific schedule."<sup>7</sup> The IAFF concludes the City did not consider and was not guided by concern for the impact of changes to the platoon and shift structure in developing its proposal.

The IAFF asserts its proposals are more reasonable and tempered under the statutory criteria. It proposes to maintain the current platoon and shift structure, to increase

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<sup>4</sup> This average presumably covers the period since the WFD changed to four platoons working 24-hour shifts on the 24-72 schedule in 2006.

<sup>5</sup> City Exhibit 20.

<sup>6</sup> IAFF Opening Brief, p. 21

<sup>7</sup> IAFF Opening Brief, p. 19, FN 33.

compensation across the existing salary structure retroactive to July 1, 2018 through June 30, 2022. It would increase the wage premium for the firefighters in the Suppression Division who are required to work on City holidays (including the Friday after Thanksgiving) and when firefighters are assigned to work out of rank. The IAFF also argues a prohibition on demotions and lay-offs is necessary to protect the rank structure of bargaining unit members.

## DISCUSSION

### **I. City's Preliminary Motion to Exclude IAFF Proposals and Evidence**

On February 20, 2020, just four days prior to the commencement of the public hearing in this matter, the City filed a Motion to Exclude Proposals and Evidence Related to Permissive Subjects of Bargaining. The City relied on 19 Del.C. §1615(a) to assert that provisions of the IAFF's last, best, final offer which related to permissive subjects of bargaining were excluded from consideration by the arbitrator. It requested that all "proposals that contain permissive subjects of bargaining" be preliminarily struck from the IAFF's offer and that evidence supporting those proposals be excluded from consideration.

The City specifically identified the following IAFF's proposals:

- The scope of the bargaining unit (Section 2.5(b))
- The shift and platoon structure of the Fire Suppression Division (by retaining the current definitions of "Unit", "Tour" and "Complete Tour of Duty" in Article 3, and maintaining the current 24-72 shift schedule in Section 17.1 of the 2013-2016 agreement).
- The number and mix of firefighters employed by the City by adding restrictions on lay-offs and demotions (Article 30).

The IAFF opposed the City's petition arguing the City sought the "... disqualification and forfeiture of any right or opportunity to factually and legally challenge [the City's] efforts to unilaterally modify the most fundamental terms and conditions of the

firefighters' employment, to shelter its efforts from meaningful scrutiny, and to effectively "win" by default."

The parties were notified at the beginning of the binding interest arbitration hearing that the arbitrator would proceed to accept the evidence and arguments of the parties and thereby create the record in this matter. The parties were advised the arbitrator would accept argument from the parties on the City's motion, which would be addressed as a preliminary matter in this decision before consideration of the merits of the parties' last, best, final offers.

Section 1615(a) of the POFERA requires PERB, upon receipt of a request from one or both parties or the referral of the mediator to initiate binding interest arbitration, to determine whether a good faith effort has been made by the parties to resolve their labor dispute through negotiations and mediation. PERB is also required to determine whether the initiation of binding interest arbitration would be appropriate and in the public interest. Section 1615(a) includes an explicit limitation that "any discretionary subject shall not be subject to binding interest arbitration".

The term "discretionary subject" is not defined nor is it used in the POFERA other than as quoted in §1615(a). The term discretionary subject is, however, both defined and used in the corollary Public Employment Relations Act<sup>8</sup> which applies to all public sector employees in Delaware except for public school employees, police and firefighters. In the PERA, "discretionary subject" is defined to mean, "... for the State as an employer only, any subject covered by the merit rules which apply pursuant to §5938(c) of Title 29, and which merit rules have been waived by statute." 19 Del.C. §1302(h), formerly §1302(g).

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<sup>8</sup> Public Employment Relations Act, 19 Del.C. Chapter 13.

The PERA, since its passage in 1994, has limited the good faith bargaining obligation of public employers (covered by that law) to exclude discretionary subjects. 19 Del.C. §1307(a)(5)<sup>9</sup> The Court of Chancery applied this definition to circumscribe the limits of PERB’s jurisdiction under the PERA:

... [T]he PERB’s jurisdiction does not embrace all matters that may affect the public sector employment relationship. By statute, matters that are covered by the Merit Rules System pursuant to 29 Del.C. §5938(c), are “discretionary”. Where there is uncertainty as to areas where the General Assembly intended to deny collective bargaining and instead provide coverage under the merit system, the Court will resolve any doubt in favor of the Merit System and, as a necessary consequence, the conclusion that the subject matter at issue is discretionary.<sup>10</sup> *AFSCME Council 81, Local 2004 v. Delaware DSCYF & PERB*, CA 14869, II PERB 1425, 1433 (Del. Chan, 1996).

The City argues that the term “discretionary subject” is synonymous with “inherent managerial policy” about which a public employer may not be required to negotiate under the POFERA. 19 Del.C. §1605.<sup>11</sup> The employer’s inherent managerial policy has been the basis for PERB’s long case line establishing permissive subjects of bargaining about which an employer may decline to negotiate.

Under accepted canons of statutory construction, words chosen by the General Assembly should be read, in context, to give meaning to each and every word, and “none

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<sup>9</sup> §1307. Unfair labor practices – Enumerated.

- (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
  - (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.

<sup>10</sup> Citing *Laborers’ Local 1029 v. State*, Del.Ch., 310 A. 2d 664, 667 (1973), aff’d, Del.Supr., 314 A.2d 919 (1974).

<sup>11</sup> §1605. Employer rights.

The public employer is not required to engage in collective bargaining on matters of inherent managerial policy which include, but are not limited to, such areas of discretion or policy as the functions and programs of the public employer, its standards of service, overall budget, utilization of technology, the organizational structure and the staffing levels, selection and direction of person.

should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.”<sup>12</sup> Had the General Assembly intended to exclude all matters of the employer’s inherent managerial policy from consideration in binding interest arbitration proceedings when it amended the POFERA in 2000, it could have done so. It did not, but chose instead to use the term “discretionary subject”. It is reasonable to presume the General Assembly did not mean for these terms to be synonymous or interchangeable.

The legislative history of §1615(a) was reviewed in *Delaware State Troopers Assn. and Delaware Dept. of Safety and Homeland Security, Division of State Police* (BIA 08-01-612, VI PERB 4083, 4094 (2008):

The impasse resolution procedures in the PERA and the Police Officers and Firefighters’ Act were simultaneously amended on March 28, 2000, at which time binding interest arbitration replaced advisory fact-finding as the final step in the impasse resolution procedure under each of these statutes.<sup>13</sup> The bills which modified these laws were identical, specifically with respect to the use of the term “discretionary subject” in section (a) of Section 4 of each bill. Both bills were introduced by the same primary sponsor. It is logical to conclude under generally accepted standards of statutory construction that inclusion of the final clause of subsection (a), “except that any discretionary subject shall not be subject to binding interest arbitration” was intended to have the same effect under both laws.

The City’s motion to exclude the proposals and evidence of the IAFF is denied.

## **II. Impact of the Declaratory Statement issued concerning the negotiability of Platoon and Shift Structures<sup>14</sup> in binding interest arbitration**

The underlying premise of the Delaware public employment collective bargaining

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<sup>12</sup> *Young v. UPS*, 135 S. Ct. 1338, 1352 (2015) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)).

<sup>13</sup> 140<sup>th</sup> General Assembly, HB 373 (amending the POFERA) and HB 375 (amending the PERA).

<sup>14</sup> *In RE: City of Wilmington & IAFF Local 1590*, D.S. 19-10-1191, IX PERB 8147 (2019).

laws is to promote negotiations concerning a broad and encompassing scope of bargaining.

There is a rebuttable presumption that issues should be negotiated and should only be excluded where it is clear that a matter 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 [employer’s operation] as a whole ‘clearly outweighs’ the ‘direct impact’ on employees.”<sup>15</sup>

PERB has declined to find that a matter of inherent managerial policy (i.e., a permissive subject of bargaining) cannot be submitted to interest arbitration. The issue of submission of permissive subjects of bargaining to the binding interest arbitration process was addressed in the *Laurel* decision (Supra.)

... 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.

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 position), 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.

In this case, the City submitted proposals in its last, best, final offer which specifically provide the existing four platoon, 24-72 schedule will be replaced with three platoons which will work a 24-48 schedule and includes 17.3 Kelly days annually. Because

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<sup>15</sup> *Laurel Education Association v. Laurel School District*, BIA 13-12-934, VII PERB 6131, 6167 (2014)

the City has chosen to submit this proposal (although the decision in declaratory statement<sup>16</sup> issued at the City's request during the mediation process found this matter to be a permissive subject of bargaining), it will be considered on its comparable merits under the statutory framework of 19 Del.C. §1615(d), as will the IAFF's corollary proposal to maintain the current shift and platoon structure.

The IAFF argues that the platoon and shift structures are mandatory subjects of bargaining because they impact terms and conditions of employment, specifically hours and conditions of employment. It is absolutely true that a change in the manner in which the employer organizes its workforce (i.e., defines and deploys a platoon structure) and schedules the work to be performed impacts the working conditions of employees. When a matter of inherent managerial policy impacts upon terms and conditions of employment, the employer is required by law to negotiate concerning that impact. The Connecticut State Board of Labor Relations expressed this requirement well:

If an employer's exercise of managerial prerogative has substantial secondary impacts 'which encroach deeply and substantially' on the working conditions of employees the employer will be required to bargain the impacts of the decision.<sup>17</sup>

The parties were afforded full opportunity since January 2019 to negotiate the terms of a successor agreement. Unfortunately, they were unable to mutually resolve their negotiations and have submitted their independently determined last, best, final offers for consideration under §1615 to finally resolve these negotiations. The decision reached does not constitute the unilateral imposition of new terms by this arbitrator or by the prevailing party. It reflects a choice by these parties to finally resolve the terms of the successor

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<sup>16</sup> *In RE: City of Wilmington and IAFF Local 1590*, D.S. 19-06-1191, IX PERB 8147 (2019).

<sup>17</sup> *City of Bridgeport v. Bridgeport Police Union Local 1159*, Decision 4651 (Conn. State Bd. of Labor Relations, 2013) citing *Area Cooperative Educational Services*, Decision 3159 (1997) and *City of Bridgeport*, Decision 3119 (1993).

agreement through the binding interest arbitration process, rather than through bilateral negotiations.

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

Turning to a consideration of the criteria set forth in 19 Del.C. §1615, each statutory factor was initially considered to be relevant. These statutory restrictions,

... present significant challenges to an arbitrator. Parties in collective bargaining often become so entwined in their adversarial embrace that they cannot see beyond their struggle. Instead of being allowed the advantage of a neutral perspective that might yield a more equitable solution, an interest arbitrator under the statute must choose a winner from among two unsuccessful negotiators ... *In Re: State of Delaware & AFSCME Council 81 (Unit 11)*, BIA 08-05-625, VII PERB 5193, 5198 (R. Colflesh, 2011).

It is well established in Delaware that binding interest arbitration

... is the final stage of the impasse resolution procedure and is implemented only when the negotiation and mediation processes have failed and the parties have abdicated their statutory responsibility to collectively bargain to the arbitrator to determine the terms of the labor/management relationship for the period in issue... The arbitrator does not stand in the place of either 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).

At the opening of the hearing, the parties presented a Joint Exhibit 1, which memorialized the resolution of the issues identified therein by the parties. The “Tentative/Mutual Agreements” are considered for purposes of this binding interest arbitration proceeding to be stipulations of agreement which will be included in the final collective bargaining agreement, pursuant to §1615(d)(4). Any provision of the predecessor collective bargaining agreement which is not modified by the agreement of the

parties or by this binding interest arbitration decision, shall remain unchanged from the provisions of the July 1, 2012 – June 30, 2016 agreement.

The lawful authority of the public employer has been resolved above and there are no other challenges under §1615(d)(5).

The City does not assert a lack of financial ability to meet the cost of either proposed settlement. Consequently, §1615(d)(6) is not a factor in this proceeding. The City projects the additional total cost of its last, best, final offer<sup>18</sup> for the term of July 1, 2020 through June 30, 2023 to be \$4,412,983. *City Exhibit 6*. It projected the additional cost of the IAFF's offer<sup>19</sup> for the term of July 1, 2017 through June 30, 2022 to be \$4,840,647. *City Exhibit 7*. The IAFF costed only the base increase in wages (without including wage associated other employment costs) over the proposed terms of the agreements. It estimated the additional cost of the base wage increases proposed by the City to be \$3,113,894 and the increase in the cost of its base wage proposal to be \$1,586,287. *IAFF Exhibit 25*. The IAFF also did not provide estimated costs for its other proposals which included increased holiday premiums, changes to wage rates while acting out of rank, and associated retroactivity costs (e.g., overtime, out of class pay, etc.) for its wage proposals for Fiscal Years 2018, 2019, and 2020.

Section 1615(d)(2) requires this arbitrator to consider the offers of the parties concerning wages, salaries, benefits, hours, and conditions of employment to those of

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<sup>18</sup> The City has proposed a 2% base wage increase for four years, effective on July 1 of 2019, 2020, 2021, and 2022. Its wage proposal also includes a 16% general wage increase effective July 1, 2020 when the 3 platoon, 24-48 shift is implemented. Additionally, its proposal includes a one-time bonus of \$1,250 payable on July 1, 2020.

<sup>19</sup> The IAFF proposes general wage increases of 0% effective July 1, 2016; 2% effective July 1, 2017; 2% effective July 1, 2018; 2.5% effective July 1, 2019; 2.5% effective July 1, 2020; and 3% effective July 1, 2021. Its offer also includes a one-time bonus of \$1,250 to be payable in the pay period that the new rates become effective.

comparable groups of similar employees in the same community, in comparable communities, and with employees generally in the same and comparable communities. The City provided documentary and testimonial evidence through its consultant concerning various jurisdictions, including those covered by the six collective bargaining agreements submitted by the IAFF in its Exhibits 8 - 13.<sup>20</sup> He concluded that of the six comparators submitted by the IAFF, none were in the Reading-Camden-Wilmington metropolitan statistical area (MSA) which is typically examined for purposes of economic analysis.<sup>21</sup> These jurisdictions did not share similar size or cost of living bases. He found that the compensation and benefits of the WFD compared favorably to those of both Reading, Pennsylvania and Vineland, New Jersey, both of which are within the MSA and are of similar size. *City Exhibit 30.*

The IAFF's support for its last, best, final offer was cursory. The only information it provided from other City public safety employees and from other jurisdictions were copies of collective bargaining agreements, on which it offered no testimony. It did not explain the basis on which it chose the other jurisdictions in terms of size, budget, revenue, similarity of services, duties and shifts, or other traditional bases for comparison. Section 1615(d) is very clear on the criteria which the arbitrator must consider in reaching a

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<sup>20</sup> The IAFF submitted the following collective bargaining agreements from other jurisdictions: CBA between the City of Allentown, PA and IAFF Local 302 (2016-2020); Memorandum of Agreement between Anne Arundel County, MD and IAFF Local 1563 Anne Arundel County Professional Fire Fighters (2018-2020); CBA between the City of Atlantic City, NJ and the Atlantic City Professional Fire Fighters, IAFF Local 198 (2015-2017); Memorandum of Understanding between The Mayor and City Council of Baltimore (MD) and IAFF Baltimore Fire Fighters Local 734 (2018-2020); Compensation and Working Conditions Collective Bargaining Agreement between the District of Columbia and IAFF Local 36 (effective through Sept. 30, 2020); and the Collective Bargaining Agreement between the City of Trenton (NJ) and the Fireman's Mutual Benevolent Association, Local 6 (2013-2020). The IAFF also submitted the prior collective bargaining agreement between itself and the City (2010-2012) and copies of collective bargaining agreements between the City and rank and file City police officers for the terms of 2010- 2011; 2011- 2016; and 2016 – 2020; as well as copies of the agreements between the City and the bargaining unit of Police Captains and Inspectors for the terms of 2014-2017 and 2017-2020.

<sup>21</sup> City Exhibit 30.

decision. 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. *AFSCME Local 1670-001 and Town of Smyrna*, BIA 11-07-815, VII PERB 5279, 5294 (2011).

Considering the record created during this proceeding, I conclude that the City of Wilmington compares favorably in terms of overall compensation to the cities of Reading, PA and Vineland, NJ. I am unable to determine that any of the jurisdictions for which the IAFF submitted collective bargaining agreements are comparable due to a lack of evidence.

The essence of the IAFF's support for its offer was primarily offered through the testimony of its President who testified that the firefighters "wanted to be treated fairly". He testified concerning the change from the 3-3-3 shift in 2006 to working 24-hour shifts, at which time, "... every other bargaining unit got 12 percent and the firefighters received six percent." *TR p. 510*. This was a wage increase that was negotiated by the IAFF in exchange for a significant change in shifts wherein each of the four platoons of firefighters would work on 24-hour tour and then have 3 days off. The City did not unilaterally impose this wage increase on the firefighters, any more than it now seeks to "impose" a shift change. The City's proposal to change the platoon and shift structures have been the subject of the parties' on-going negotiations for more than a year. The IAFF has had the opportunity to negotiate concerning the impact of the proposed change in platoon structure and shifts on wages, hours and terms and conditions. Its last, best, final offer reflects that the IAFF chose to put all its eggs in the basket of maintaining the status quo, with the addition of limited increases in wage rates, attempting to limit the City's ability to lay-off or demote firefighters, and limiting the increase in health care premiums to 10%.

The analysis now turns to consideration of the relative merits of the proposals in

the last, best, final offers.

Article 17: Hours of Work

As a starting point, the parties share an interest and goal of decreasing the use of rolling bypass. The Chief testified he was charged upon taking office with eliminating rolling bypass. *TR p. 102.* IAFF President Leonetti “absolutely” affirmed that Local 1590 supports the elimination, or at least the reduction of the current practice of using rolling bypass. *TR p.522.*

The central issue in the on-going dispute between the City and IAFF concerns the City’s proposal to change the platoon structure from four to three platoons and to change the current work schedule from 24-hours of work followed by 72 hours off (the 24-72 schedule) to a 24-hour tour followed by 48 hours off (the 24-48 schedule). The WFD Chief testified extensively on his concerns that the current platoon and shift structures did not provide adequate manpower to fully staff the City’s firefighting apparatus without incurring large amounts of overtime expense and/or using rolling bypass. Rolling bypass results in one of the City’s six engines (on a rotating or “rolling” basis) being sidelined most days in order to reassign firefighters so that the other seven apparatus may be safely and effectively staffed according to the negotiated minimum manning standards found in §11.6.

The City hired consultants to analyze its staffing, available daily staff, and options to meet the negotiated minimum manning requirements. The consultants prepared a comprehensive comparison of the relative benefits of various alternatives. *City Exhibit 5, Subsection 1.*

	<b>24-72</b>	<b>3-3-3</b>	<b>24-48</b>	<b>48-96</b>
Description of Shift	24 hours on 72 hours off	3 10-hr days 24 hrs off 3 14-hr nights	24 hours on 48 hours off	48 hours on 96 hours off

		72 hrs off (After 6 rounds, additional 72 hrs off to reduce average weekly hours of work from 56 to 48)	Commonly includes a Kelly day (24 hrs off) every 3 weeks (17.4/.yr.) to reduce weekly hrs below FLSA threshold (53 hrs), otherwise structured OT would be paid (3 hrs per 21-day period)	Commonly includes 2 Kelly Days (24 hrs off each) per 28 day period to reduce weekly hrs below FLSA threshold (53 hrs), otherwise structured OT would be paid (28 hours per 28 day period)
Annual hours	2,184	2,496	2,496	2,496
Average weekly hours	42	48	48	48
Annual Appearances	91.3	183.7	104.3	95.6 Each 48 hr tour counted as 2 appearances
Weekends Off/Year	26	12	17	30
Partial Weekends Off/Year	26	21	35	16
Staffing Impact Assumes: - Continued staffing of 3 FF, 1 Officer/apparatus - 6 engines and 2 ladders (8 companies) - Required staffing per platoon: 34 2 Battalion Chiefs 8 Officers (Captain on 1 platoon, Lt on rest) 24 Firefighters	<b>Suppression Staff 4 Platoons (142)</b> Battalion Chiefs: 8 Captains: 9 Lieutenants: 26 Senior FF/FF: 99  <b>Average staffing per platoon before paid leave: 35.5</b>	<b>Suppression Staff 3 Platoons (142)</b> Battalion Chiefs: 8 Captains: 9 Lieutenants: 26 Senior FF/FF: 109  <b>Average staffing per platoon before paid leave: 47</b> During transition, would reassign 2 Battalion Chiefs and 8 Lts. as “floaters” until attrition; frontline FF staff maintained to cover vacations, training, etc., with less overtime	<b>Suppression Staff 3 Platoons (142)</b> Battalion Chiefs: 8 Captains: 9 Lieutenants: 26 Senior FF/FF: 99  <b>Average staffing per platoon before paid leave: 47</b> During transition, would reassign 2 Battalion Chiefs and 8 Lts. as “floaters” until attrition; frontline FF staff maintained to cover vacations, training, etc., with less overtime	<b>Suppression Staff 3 Platoons (142)</b> Battalion Chiefs: 8 Captains: 9 Lieutenants: 26 Senior FF/FF: 99  <b>Average staffing per platoon before paid leave: 47</b> During transition, would reassign 2 Battalion Chiefs and 8 Lts. as “floaters” until attrition; frontline FF staff maintained to cover vacations, training, etc., with less overtime
Other Jurisdictions with Shift	Anne Arundel Co., MD East Orange, NJ Erie, PA Jersey City, NJ Newark, NJ Prince George’s Co., MD Trenton, NJ Washington, DC	Multiple regional departments use 10-14 hour tours under a four platoon schedule	Vineland, NJ Montgomery Co, MD Chicago, IL Columbus, OH Indianapolis, IN Milwaukee, WI	Numerous Fire Depts. In West (CA, NM, CO, OR, WA)

City Exhibit 5, p. 5.

The Chief testified he requested this analysis “...to help me to come up with a solution to rolling bypass”. *TR p. 48*. He also testified the City provided this information to the IAFF in response to an information request during the course of the negotiations. He testified that he evaluated different options to address the goal of reducing or ideally eliminating rolling bypass:

I had several options. The first option was at the time I made Chief there was a recirculation of the Berkshire report. The Berkshire report indicated that the city could shut two engines, completely shut

down engines and get rid of people.

The second option was to close an engine, just shut an engine down, which wouldn't take any negotiations. It's just a stroke of the pen.

The third option was to negotiate three men on an engine, to reduce the amount of people on a fire truck.

All those three options I felt were not good options. So I wanted to come up with a better way to keep all six engines in service. I didn't want to lose any engines. I didn't want to lose any more manpower...

... I thought the 24-48 hour shift would be the best solution and ... go from a four-platoon system to a three-platoon system.

... I just felt like the 24-48 would be the easiest shift to transition into. We were already working the 24's. *TR p. 49-52.*

The City also provided evidence to illustrate the quantitative impact of moving from the four platoon 24-72 shift to the three platoon 24-48 shift.

		Current 24-72 shift				24-48 Shift	
	Total Tours Required <sup>22</sup>	Total Tours Available (after leave)	Coverage Needed, without use of Bypass	Shifts Covered with Max use of Bypass	Coverage needed at OT with Max use of Bypass	Total Tours Available (after leave)*	Coverage Needed at OT, NO Bypass
Jan	1054	922	133	124	9	1095	0
Feb	952	812	141	112	29	966	0
March	1054	910	144	124	20	1086	0
April	1020	835	185	120	65	1002	19
May	1054	881	174	124	50	1055	0
June	1020	824	196	120	76	992	28
July	1054	859	196	124	72	1032	23
August	1054	835	219	124	95	1007	47
Sept.	1020	843	178	120	58	1011	10
Oct	1054	859	195	124	71	1027	28
Nov	1020	833	188	120	68	997	23
Dec	1054	860	194	124	70	1034	20

<sup>22</sup> Total Tour required = # days in the month X minimum manning requirement of 34 firefighters/24-hour tour.

<b>Total</b>	<b>12,410</b>	<b>10,270</b>	<b>2,140<sup>23</sup></b>	<b>1,460</b>	<b>680</b>	<b>12,301<sup>24</sup></b>	<b>196</b>
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*Note: Units shown reflect 24 hour tours; maximum bypass is one apparatus out of service per day of the month. Assumes suppression headcount of 142.*

*\* After Leave (based on 2018 usage rates) and Kelly Days (under 24-48 schedule only)*

*Source: FY 2018 Leave Usage Data, Wilmington Fire Department City Exhibit 5, p. 274*

This chart establishes that under the current 24-72, four platoon system, there are, on average only 28 firefighters per platoon available to staff the City’s eight suppression units, based on the leave usage rates from 2018. Minimum manning requires 34 firefighters to staff the six engine and 2 ladder companies daily. If the City were to use rolling bypass every day (closing down one engine daily in order to free up 4 firefighters to be reassigned to other apparatus), it would still leave 680 tours of 24 hours each of which would have to be covered by overtime (for a total of an additional 16,320 hours of overtime). Although rolling bypass was only used 80% of the 365 days in Fiscal Years 2018 and 2019, it is clear the City cannot staff all of 6 engine and 2 ladder companies most days under the current system.

The Chief also provided unrefuted testimony that under the current four platoon, 24-72 shift system he does not have enough bodies on any given day to effectively run the WFD. He credibly testified that the need to reassign staff daily in order to provide adequate manpower on suppression equipment results in an inability to assign necessary training, results in less building inspections and causes supervisory challenges. *TR p. 38-39.*

The IAFF’s argument that the City created the current staffing challenges when it

<sup>23</sup> Under the current 24-72 schedule, the 2,140 hour difference between the required tours (12,410) and the Total Tours Available after applying the 2018 Leave Usage data was covered by 1,460 tours eliminated by using bypass (max bypass usage of 1,460 = 4 x 365 days) plus the additional need for 680 tours covered by overtime (680 x 24 = 16,320 hours of overtime). On average, there are only 28 firefighters available after typical absences are factored in each day, despite the minimum manning requirement of 34 firefighters per platoon to operate all engines.

<sup>24</sup> Because of the change to three platoons and the 14.3% increase in hours worked by each firefighter (2,184 hours/year to 2,496 hours/year worked), under the proposed 24-48 schedule, there are 34 firefighters available daily, on average. Consequently, the

reduced the suppression staff by 16 firefighters in July 2017 is simply not relevant to these negotiations or to the binding interest arbitration analysis. Nor is its argument that the current level of overtime spending for the WFD has remained constant on average over the past thirteen years<sup>25</sup>; consequently, the IAFF concludes, the current level of overtime spending is sustainable. Both the complement of employees and controlling overtime expense are financial constraints which are subject to control by the City Council. They are constraints placed upon negotiations for both parties. Adopting the IAFF's proposal to cover the 4 tours on each of the 289 days on which the City implemented rolling bypass in 2019 would require an additional 27,744<sup>26</sup> hours of mandated overtime. On average, this equates to an additional 195 hours/year (essentially eight additional tours) for each of the 142 employees in the suppression division. The IAFF did not establish that its proposal to maintain the 24-48, four platoon system reasonably addresses the parties shared goal of essentially eliminating rolling bypass.

The IAFF raises valid concerns that the move to a three platoon system with one less day between tours will have an impact on firefighters. All change is hard and this change will require IAFF bargaining unit members to adjust their normal routines and personal arrangements during the transition period. The three platoon system does maintain the 24-hour tours and will have the same predictability in scheduling as the current system, including the identification of Kelly Days and options for exchanging shifts under §18.3. The IAFF provided general information in its Exhibits 19 through 23, based on research by the National Fire Protection Association, the National Safety Council, and the National Institute for Safety and Health on the role fatigue plays in reported injuries to

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<sup>25</sup> IAFF Exhibit 17.

<sup>26</sup> 289 days x 4 firefighters per day x 24 hours/tour =

firefighters. It did not, however, provide testimony to relate this research to the circumstances in Wilmington, nor did it provide any information concerning the experience of other fire departments in terms of relative injury rates under 24-72 compared to 24-48 schedules. It also did not provide evidence from the WFD concerning changes to injury rates following the 2006 transition to new schedule and platoon structure. An arbitrator cannot draw a conclusion based on evidence which is either not explained and/or only implied.

The information contained in City Exhibit 5 supports the City's conclusion that the current 24-72 schedule and four platoon system is not effective in meeting the goals of maximizing use of the City's firefighting equipment to provide for the safety of City residents and visitors at the current complement of 142 firefighters in the Fire Suppression division. The need for rolling bypass is essentially eliminated and the need for overtime greatly reduced by redeploying the available 142 firefighters to a 3 platoon, 24-48 schedule. The increase in hours under this City's proposed schedule has the added benefit of redistributing the overtime hours currently worked among all firefighters in the suppression division, to include the wages earned by working additional hours in the pensionable base for the firefighters (overtime hours are not pensionable).

The number of hours required to fully staff all 8 engines and ladder trucks at the negotiated 4 firefighters per apparatus minimum manning standard does not change whether four platoons or three platoons are used. Currently under the 24-72 four platoon system, the WFD must fill 34 tours per platoon per day; under the City's proposed change, it would still have to fill those same 34 tours every day. Under the proposed 24-48 schedule, it would be able to routinely cover the 34 required tours daily, even assuming a daily absence rate modeled on the 2018 leave usage records. City Exhibit 5, p. 274.

The IAFF has not provided an alternative to the City's proposal to move to the 24-48 three platoon schedule, which would effectively meet the requirement of staffing 34 tours each and every day. It proposes simply to continue the current platoon and shift structures. It did not effectively challenge the City's analysis. The City, as the party seeking to change the existing structure, has met its burden to establish that there is a compelling need for change to the current deployment system for its fire suppression resources.

The IAFF has a legitimate concern, however, that the language of the City's proposal appears to provide broad discretion to the Chief to change "... the platoon system for fire suppression members ... and any shift schedule" at his discretion during the term of the agreement. There is no question, based on this record, the City proposes to move to a three platoon system and implement a 24-48 schedule on July 1, 2020. This change is the essence of City's last, best, final offer. The City should be mindful, however, that it has a continuing obligation to negotiate concerning terms and conditions of employment, which includes hours and working conditions. To the extent the Chief should decide to exercise his discretion to unilaterally change the platoon or shift structure during the term of this agreement, the City may find itself in violation of its statutory obligations if it does not negotiate the impact of such change on the terms and conditions of employment of bargaining unit members with the IAFF.

#### Article 2: Union Security Clause

The IAFF proposes to modify §2.5(b) by striking the word "new" and eliminating the restriction that employees may become members of Local 1590 "upon successful completion of their probationary period". The proposal also includes language which mirrors the statutory prohibition on the City in 19 Del.C. §1607(a)(5) not to interfere with

or restrain bargaining unit employees in the exercise of their rights, limiting it to the employees' right to join the union.

The parties agreed to strike the remainder of §2.5(b) which set forth agency fee provisions. These provisions were effectively determined to be unconstitutional as a result of United States Supreme Court's June 2018 decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, No. 16-1466, 585 U.S. \_\_\_\_ (2018).

The City argues the IAFF seeks to expand the bargaining unit definition to include probationary employees through the proposed changes. On its face, the clear language of the proposal is much more limited. It is a union security clause which dictates who may become members of the union; it is not a bargaining unit definition. IAFF President Leonetti explained:

There are some benefits along with being an IAFF member. If one of our members is killed in the line of duty, there are very big – I don't know how to explain – I don't want to say pluses, but if you are killed in the line of duty, your family receives many benefits. Your kids will get free tuition to in-state colleges.

These probationary members we're not trying to stop the process of them being hired or fulfilling their obligation to the City the first year. We are simply just allowing them the same exact benefits we get, they are riding the same trucks and doing the same job we are when they graduate. So it's just a benefit thing for them. *TR p. 501-502.*

He then clarified on cross-examination that probationary employees are not part of the bargaining unit and stated:

I want them to be a member of the International Association of Firefighters. Currently they are not covered under our collective bargaining agreement and just because they are a member if we had that we could put language in that says they still have to follow their one-year probationary... This is simply because they ride the trucks next to us and if they die in the line of duty, I want them to be able to reap the benefits. *TR p. 520*

This testimony is consistent with the conclusion that the line of duty death benefits accrue from membership in the IAFF, and are not benefits which arise under the collective

bargaining agreement. It is curious to this arbitrator why the union would want to include a provision in the collective bargaining agreement which relates to eligibility to join the union. That would seem to be something within the exclusive control of the IAFF. Further, the language protecting the rights of employees to join the union without interference or restraint by the employer is statutorily protected under the POFERA and can be enforced through an unfair labor practice charge filed with PERB.

The provision as a whole is a redundant and unnecessary statement of the rights of bargaining unit employees to join the IAFF, but, ultimately, it does no harm to the reasonableness of the totality of the IAFF's last, best, final offer.

### Article 3: Definitions

The City seeks to modify the definitions of "Unit", "Tour", "Complete Tour", and "Hourly Rate" consistent with its overall proposal to modify the deployment of resources in the Suppression Division through changes to platoons and shift structure. The City also seeks to add a definition of "Apparatus" as that term is used in §11.6 of the current agreement. Neither party has proposed to change the terms of §11.6.<sup>27</sup>

The IAFF objects to the City's proposed changes to the definitions for "unit", "tour" and "complete tour of duty" because it would remove the specificity of the existing definitions (which specifically identify the 24-72 shift by hours and time of day). The City's proposal to move to a 24-48 shift schedule does not alter the start and ending times

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<sup>27</sup> Neither party seeks to modify the existing §11.6, which states:

Section 11.6 Minimum Manning. No on-duty piece of apparatus will be manned at the start of a shift by less than one (1) Officer and three (3) Firefighters. This level of manpower shall be maintained for the duration of the shift unless affected by (a) sickness or injury of personnel assigned to Suppression; (b) notification of death in the immediate family of personnel assigned to Suppression; (c) personnel assigned to Suppression being immediately relieved from duty for violation(s) of rules and regulations set forth in the Fire Department Rules and Regulations; or (d) any occasion of a temporary nature, which has been a past practice in the Fire Department.

(8:00 a.m. to 8:00 a.m. the following day) or the length of an individual tour (24 hours).

Clearly the length and start time of a tour directly impacts hours of work, which constitutes a term and condition of employment which is a mandatory subject of bargaining. The City's proposed changes are consistent with its demonstrated need to move to a three platoon system in order to meet minimum manning requirements.

The IAFF opposes the City's proposal to change the divisor for determining "Hourly Rate". The hourly rate is used to calculate the overtime rate paid to firefighters. The City argues that the current division of 2080 hours was a "mistake" because firefighters currently work 2,184 hours annually. *TR p. 386*, The City's argument rings hollow as this is a negotiated provision which has been included in the collective bargaining agreements of these parties since at least 2010.<sup>28</sup> The City may wish to change the divisor to more accurately reflect the actual numbers of annual scheduled hours, and has made this proposal to do just that. The City has not, however, provided any costing or support for the economic necessity of changing this definition.

Applying the statutory criteria to the proposed modification of the hourly rate definition, the City has not provided sufficient evidence to concluded it is reasonable and necessary.

#### Holiday Compensation

The IAFF seeks to amend §5.1 by adding:

All employees whose normal work schedule falls on a City designated holiday shall be compensated at their straight-time rate in addition to their regular compensation, for up to 16 hours. This term shall not affect the premium compensation rates for employees who volunteer to work a holiday, or the compensation rates provided in Section 11.4 of this Agreement.

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<sup>28</sup> IAFF Exhibits 1 and 2.

President Leonetti explained the purpose of the proposal:

We're looking to get holiday pay for the days we work that are approved City holidays. We are doing this because all members of our Union aren't awarded the same opportunity as some of our Union members where they are paid off on a holiday where the suppression division has to work on holidays. Administration workers, fire prevention, so if the holiday falls on their working day they receive the day off and they're paid for it<sup>29</sup> where our suppression members have to show up no matter what day it is... Just for the suppression unit ... [W]e are just looking to be compensated – instead of having the day off just being compensated because we have to be there. *TR p. 502 – 503.*

Section 5.1 is not limited exclusively to the suppression division. The record establishes that holiday pay was actually rolled into the base pay of bargaining unit members in 1998, through the collective bargaining process. The IAFF is attempting to renegotiate holiday pay (limited to 16 hours) for suppression division employees who work a holiday.

The IAFF also seeks to amend §11.9 to provide additional compensation to firefighters who work on the Friday after Thanksgiving, referred to by these parties as “Fat Day”. *TR p. 503.* Currently §11.9 states:

**FRIDAY AFTER THANKSGIVING.** Any employee who works on the Friday after Thanksgiving from 0800 – 0800 hours the following day will receive cash payments for the number of hours worked. Any member working under Article 11.4 [*Holiday Manning Procedures*] will be excluded from this section.

The IAFF proposes to amend this provision to provide payment “in addition to his/her normal compensation for those hours, payment for the hours worked at his/her regular rate of pay.” President Leonetti explained the IAFF’s rationale for this proposal:

[*Fat Day is*] currently the only day firefighters receive additional pay for working on a holiday. So, if I was to work an overtime shift on the Friday after Thanksgiving, I’m paid hour for hour meaning if

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<sup>29</sup> Testimony established that bargaining unit employees working in administration do receive a paid day off on each of the City designated holidays. *TR p. 528.*

I work a 12-hour shift, I get 12 hours of pay. The working shift members only receive eight hours for each 12-hour shift, so, in a 24-hour period they're paid for 16 hours. We are just trying to be treated as fair as everyone else. *TR p. 504.*

The IAFF did not provide any costing for this proposal and did not include it in its calculation of the total cost of its proposal. The City estimated the additional cost of the IAFF holiday proposals to be \$707,561 over the period of July 1, 2017 through June 30, 2022, accounting for approximately 14.5% of the City's costing of the IAFF's proposal.<sup>30</sup> *City Exhibit 7.*

The IAFF's proposed change to §5.1 is based on a perceived inequity between the manner in which holidays are compensated for administrative and suppression divisions. The proposed change to §11.9 is based on a perceived inequity between the numbers of hours compensated for firefighters working their regularly scheduled shifts and those who are working overtime.

The existing differences in holiday premiums have been negotiated by these parties over the course of their previous negotiations. The burden is on the party seeking to make a change to establish the substantive reason for the change; the IAFF has not met that burden with respect to its proposed changes to holiday compensation.

#### Article 10: Health and Welfare

The IAFF asserts that it did not have any issue with the City's health care proposal except for the 12% premium share. President Leonetti explained:

We are looking to take the same health care that everybody in the City – almost everybody in the City right now is following health care-wise minus the 12 percent. I feel like firefighters, you know, do a lot for their health and we are screened. I believe it's just us and the police officers who are doing fit for duty testing every year,

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<sup>30</sup> The City estimated the total cost of IAFF's last, best, final offer to be \$4,840,647. *City Exhibit 6.* The IAFF did not provide a comprehensive costing of its offer, nor did it effectively refute the City's calculations.

which if they need to add more I wouldn't object to it, but, I don't think that we should be punished if we can't get to our doctor when it could be handled with our fit for duty testing... [We object] simply just to the 12 percent. We agreed to everything else within the health care benefits. TR p. 517

On its face, the IAFF proposed to simply "amend §10.1(a) as necessary to reflect...":

The firefighters will agree to increase their health care premium share rates, but the increase shall be limited to 10% of the premium rates in recognition of the firefighters' required annual medical screenings. The premium share increase shall be effective 60 days following resolution of a new collective bargaining agreement through binding interest arbitration, or other procedures. The City shall pay each firefighter a one-time payment of \$1,250 in the same pay period that the new premium rates become effective.

The IAFF proposal does not address the changes required to move to the health care benefit plan under which the majority of City employees are currently covered. It does not address the phasing out of the PPO1 plan for new hires, the increase in emergency room co-pay, the mandatory use of generic drug prescriptions, or the mandatory annual physical with a primary care physician.

The City's Director of Human Resources provided credible and comprehensive testimony, supported by documentary evidence, that the City engaged in a comprehensive process to evaluate its health care benefits. That process included extensive work by a task force which include representative of each of the unions representing City employees, including the IAFF. The City established there is substantive difference between the annual screenings done by the City physician to certify that firefighters meet the minimum physical standards to perform their job duties and that their equipment is fitted appropriately to provide adequate protection, and an annual physical, including screening for chronic conditions, by a primary care physician. The 2% reduction in employee contribution to annual premiums for employees who have their annual physicals is

certainly an incentive and not punitive. It is possible that a firefighter may pass his annual fitness for duty exam and choose not to have annual physical with his family physician; that individual would be choosing to pay a higher portion of the health care premium for the plan. The benefit to an individual to establish an on-going relationship with a primary care physician is well-documented. The fact that it may also benefit the City financially (which is self-insured for health care benefits) is secondary and clearly not the motivating factor for the City's proposed changes.

The record supports the conclusion that the City has met its burden to establish that its proposed changes to Article 10, Health and Welfare, are supported by the record and more reasonable under the statutory criteria.

#### Article 13: Acting out of Rank

The IAFF proposes to change the current language of §13.1 to require that when a firefighter acts out of rank, the firefighter will be paid at the rank in which they are serving, unless the firefighter is acting in place of a lower ranking position. In that case, the firefighter will be paid at his/her earned rank. It also seeks to extend payment at the higher rank "... for all hours served, including overtime and any other duty, service or applicable premiums." President Leonetti provided the only testimony explaining the proposed changes:

...[C]urrently we do act out of rank meaning that if a captain is off, a lieutenant can fill that spot; or, if a lieutenant is off, a firefighter can fill the spot. When we fill the spot it's for the entire shift, their entire tour of duty, meaning I'm going to be an acting captain or a firefighter will be an acting lieutenant for 12 or 24 hours.

When we do act in that capacity, we are only paid as an acting captain or lieutenant or battalion chief for eight hours of each 12-hour shift. So if we're doing the job for 12 hours, we are looking to be compensated for the 12 hours. *TR p. 504-505.*

The IAFF did not cost this proposal nor did it identify where the limitation on the

payment for acting at a higher rank is found. It did not establish that there is a practice whereby firefighters are directed to work at a lower rank and suffer a reduction in their normal wage rate as a result. It has provided no support for this proposal based on any comparative factors.

The IAFF has not provided convincing evidence that this proposal is necessary or reasonable under the criteria of 19 Del.C. §1615(d).

#### Article 16: Classification and Salaries

The IAFF proposes general wage increases of 0% effective July 1, 2016; 2% effective July 1, 2017; 2% effective July 1, 2018; 2.5% effective July 1, 2019; 2.5% effective July 1, 2020; and 3% effective July 1, 2021. It did not provide a rationale for the proposed annual rates of increase in its offer, nor did it explain its calculation of the cost of its proposal in IAFF Exhibit 25. It also did not provide an explanation or calculation of the impact of the retroactive wage increases for Fiscal Years 2018, 2019, and 2020 on total salary and benefit costs.

The City has proposed a 2% base wage increase for four years, effective on July 1 of 2019, 2020, 2021, and 2022. Its wage proposal also includes a 16% general wage increase effective July 1, 2020 when the 3 platoon, 24-48 shift is implemented.

Both offers include a one-time bonus of \$1,250, which is consistent with one-time payment agreed to by AFSCME Local 1102 (representing the City's paraprofessional employees) and which was offered to AFSCME Local 320 (representing the City's blue collar employees).

The IAFF argues its wage proposal tracks wage increases provided to other City employees except for what it asserts are "significant increases provided to Police

Officers.”<sup>31</sup> The IAFF argues that if its general percentage wage increases have been significantly less than to those of the City’s police officers over the last ten years. The negotiated increases in base salaries of City police officers resulted in part from rolling holidays, shift differential and shooting days into their base wage. Police Captains and Inspectors also negotiated increases in their base wages by rolling in overtime and shift differential.<sup>32</sup> The IAFF also negotiated a roll-in of holiday pay in or around 1998. *TR p. 521.*

When premiums like holidays, shift differential, shooting days, and overtime are rolled into base wages, it is a reallocation of moneys such that the base wage rate is increased. It is not necessarily new money or a true increase in overall compensation. In many cases, is simply a redistribution of dollars in a manner with allows those previous “premium” dollars to become a part of pensionable wages. Just comparing percentage increases in base wages between police and firefighters is an overly simplistic and deceiving metric. This is why the §1615(d)(3) requires the binding interest arbitrator to consider “overall compensation ... 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.”

The City’s offer includes a 16% increase in base wages on implementation of the 24-48 shift on July 1, 2020, in addition to a 2% general increase in base wags for Fiscal Year 2021. The 16% wage increase is more than the 14.2% increase in hours which the firefighters will be required to work under the new platoon and shift structure. It also represents an effective reallocation of moneys which are currently being expended for

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<sup>31</sup> IAFF Responsive Brief at p. 14

<sup>32</sup> City Exhibit 12.

overtime costs.

The City's calculations of the relative costs of the wage offers are much more rigorous and come closest to the analysis required by the statute. Careful review of these projections does not lead to the conclusion that either offer is unreasonable.

#### Article 18: Company Officer Leave and Substitution

The City's offer would modify §18.3 to limit "exchange days".<sup>33</sup> The existing contractual provision requires notice of a shift exchange be provided to the commanding officer of the firefighter who will be replaced, that the exchange does not require payment of overtime compensation under the federal Fair Labor Standards Act, that all exchanges must be completed (i.e., "paid back") within 6 months, and also establishes procedures if one of the parties to the exchange is unable to work due to illness or an off-duty injury.

The City's offer includes new, additional restrictions:

- A member will not be able to exchange until he or she has worked or "repaid" all shifts required under any prior exchanges.
- Other than Educational Exchange Days, a member cannot exchange more than twelve (12) units per calendar year.
- Both members involved in an exchange must be qualified to perform the job functions required by the exchanged shifts.

The parties agreed there are only a handful of firefighters who exceed the twelve units of Exchange Days used in a calendar year which the City has proposed. No evidence was presented which established that this proposal was unreasonable or that it would have any significant impact on the current use of Exchange Days.

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<sup>33</sup> The parties have historically negotiated to allow firefighters assigned to the Suppression Division to exchange a scheduled tour (24 hours) or a unit (12 hours during a tour) with another firefighter.

Article 30: No Demotions or Lay-offs

The IAFF proposes to modify Article 30 by prohibiting demotions of employees (except for disciplinary purposes) during the term of this Agreement and during any subsequent period prior to the effective date of the next successor agreement. It also requires the City to negotiate with the IAFF for lay-off and reinstatement procedures. It sets forth the criteria for lay-offs and recalls and prohibits the City from making new appointments until laid-off employees have been recalled.

The IAFF provided no basis for this far reaching provision, except the testimony of its President, who explained the reason for prohibiting demotions:

We just want the guys who worked hard for these positions to be promoted, preserved to hold their rank until the spot – until they either retire or get promoted. *TR p. 516*

The City opposes the IAFF's proposal asserting it concerns a permissive subject of bargaining on which it cannot be compelled to negotiate, and which it has specifically declined to negotiate over the course of these negotiations. It asserts the IAFF's proposal directly restricts its ability to control the number and mix of firefighters it employs.

Staffing levels have defined as "... the number and mix of positions necessary to accomplish the [employer's] mission."<sup>34</sup>

... Staffing constitutes a fundamental and far-reaching right of management which touches not only the employer's financial and budgetary considerations but also the efficient utilization of its employees. In the absence of any reference to staffing in [*the definition of 'terms and conditions of employment'*], staffing decisions do not constitute a term and condition of employment about which the University was required to bargain but rather remained a matter of inherent managerial policy to be bargained at the University's discretion.<sup>35</sup>

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<sup>34</sup> *AFSCME Council 81, Local 218 v. Brandywine School District*, ULP 07-05-570, VI PERB 3857 (Del.PERB, 2007).

<sup>35</sup> *AFSCME 1007 v. Delaware State University*, ULP 01-06-320, IV PERB 2559, 2567 (Del.PERB, 2002)

The scope of “staffing level” was clarified and limited in the *Brandywine* decision (Supra.) to exclude the method or procedure (whether voluntary or involuntary) by which employees are assigned to or transferred between positions, once the employer determines the composition and complement of positions to be employed. PERB has determined that the process and/or mechanism for adjusting the workforce is a mandatory subject of bargaining.<sup>36</sup>

To the extent that the IAFF proposes to extend the reach of this proposal beyond the boundaries of the negotiated term of the successor agreement, it interferes with the statutory obligations of the parties to enter into good faith negotiations for a successor agreement.

Considering the proposal as a whole, the record does not establish that it is reasonable, necessary or supported under the criteria of §1615 (d).

#### Article 32: Duration of Agreement

The City seeks a four year term for this agreement through June 30, 2023, while the IAFF seeks a six year term (retroactive to the expiration of the prior agreement on June 30, 2016) through June 30, 2022. The City argues that both PERB and the Delaware Chancery Court have recognized the mutual benefit of a period of labor stability following the resolution of the terms of a new collective bargaining agreement. It asserts an agreement which expires three years into the future is better than a contract which expires in two years.

The POFERA requires that any contract or agreement reached between the parties must be for a minimum period of two years from the effective date, unless otherwise agreed

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<sup>36</sup> *Appoquinimink Education Assn., DSEA/NEA v. Appoquinimink Board of Education*, ULP 1-3-84-3-2A, I PERB 35, 56 (1984).

to by the parties. Both proposals meet this minimum. PERB has considered the impact of a one year difference in contract duration in negotiations which have extended well beyond the expiration of the prior agreement. It opined, “The lengthy period of time in which these parties mutually chose not to negotiate to a successor agreement is a fair consideration in evaluating the impact of a one year difference in the offers of the parties.”<sup>37</sup> That decision was based on nearly identical circumstances to the present case.

The IAFF provided documents and supporting testimony in which it alleged the City had delayed the initiation of negotiations for a successor to the 2012-2016 collective bargaining agreement. The POFERA provides either party with the ability to unilaterally invoke mediation at any point after thirty (30) days prior to expiration where an agreement has not been reached. 19 Del.C. §1614(b). Neither party engaged in the self-help available under the statute. The result was that, through their actions (or perhaps more pointedly, their inaction) these parties tacitly agreed to delay negotiations for a successor agreement for 2 ½ years.

Consequently, the City’s proposal to extend the contract through June 30, 2023 is consistent with the statutory purpose of stabilizing the relationship between these parties given the difficulties in their negotiation history.

### **DECISION**

For the reasons discussed above, based on the record created by the parties in this proceeding, the last, best, final offer of the City of Wilmington is determined to be the more reasonable based upon the statutory criteria set forth in 19 Del.C. §1615.

The relative merits of the last, best, final offers were considered in their entirety

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<sup>37</sup> FOP Lodge 1 v. City of Wilmington, BIA 14-11-985, PERB 6635, 6638, PERB Decision on Review (2015).

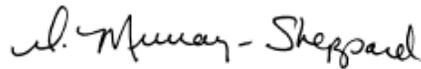
and balanced according to the statutory criteria. All of the exhibits, testimony, arguments, and cited cases submitted by the parties were carefully reviewed and considered in reaching this decision.

Ultimately, the City established a compelling need to adjust the deployment of fire suppression resources in Wilmington to end the WFD's reliance on rolling bypass and high levels of overtime expenditures. The transition to a new platoon and shift structure will require adjustments by firefighters. That adjustment is necessitated and supported by public interest in the health and safety of firefighters and residents and visitors to the City of Wilmington.

WHEREFORE, the parties are directed to implement their stipulated mutual agreements and the final offer of the City of Wilmington. All references to the term of the Agreement should be updated. All other terms of the predecessor agreement shall remain unchanged. The parties are directed 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: May 27, 2020



DEBORAH L. MURRAY-SHEPPARD  
Executive Director  
Del. Public Employment Relations Bd.