STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 1590, Appellant,	:	INTEREST ARBITRATOR'S DECISION ON REMAND FROM CHANCERY COURT **C.A. NO. 2020-0765-PAF**
v.	:	
	:	**BIA 19-11-1213**
CITY OF WILMINGTON, DELAWARE, Appellee.	:	

INTEREST ARBITRATOR'S DECISION ON REMAND

Appearances

Aaron M. Shapiro, Esq., Connolly Gallagher, LLP for IAFF Local 1590

Lauren E.M. Russell, Esq., Young Conaway Stargatt & Taylor, LLP for the City of Wilmington

PROCEDURAL BACKGROUND

The City of Wilmington ("City") and the International Association of Firefighters, Local 1590 ("IAFF") entered into negotiations in January 2019 for a successor to their July 1, 2012 through June 30, 2016 collective bargaining agreement. Unable to resolve the terms through direct negotiation and mediation to their mutual satisfaction, the on-going dispute was submitted to binding interest arbitration. The Binding Interest Arbitrator issued a decision on May 27, 2020[1] ("BIA Decision"), finding the last, best, final offer of the City to be the more reasonable offer under 19 Del. C. §1615. The IAFF appealed that decision to the Public Employment Relations Board ("PERB") which affirmed the

[1] *City of Wilmington and International Association of Firefighters, Local 1590*, Decision of the Binding Interest Arbitrator, BIA 19-11-1213, IX PERB 8195 (5/27/20).

Arbitrator by decision issued on September 1, 2020.[2]

Thereafter, the IAFF appealed the PERB's decision to the Court of Chancery, pursuant to 19 Del. C. §1608. The Court issued its Order on June 28, 2021 ("Chancery Court Order")[3] finding:

> 19 Del. C. §1615(d) required the Executive Director to apply the statutory factors of the POFERA and to analyze the City's LBFO[4] in accordance with its express terms. The City's LBFO provided for a "platoon system" and "any shift schedule" that could be freely established and changed at the Chief of Fire's sole discretion. The Executive Director instead performed the statutory analysis on a three-platoon, 24/48 schedule in contravention of the terms of the POFERA. The PERB's affirmance of the BIA Decision therefore constitutes an error as a matter of law.
>
> For the foregoing reasons, the PERB's decision affirming the BIA Decision is hereby reversed. The parties' dispute is remanded to the PERB for further proceedings consistent with this Order.[5]

The PERB convened a public hearing on July 21, 2021, at which time it considered the Court's Order and received argument from the parties. The PERB issued its decision on August 4, 2021 ("PERB Remand Decision")[6] wherein it remanded the dispute back to the Executive Director, in her capacity of the Arbitrator, to reconsider the last, best, final

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[2] *International Association of Firefighters, Local 1590 and City of Wilmington*, PERB Decision on Review, BIA 19-11-1213, IX PERB 8283 (9/1/20).

[3] *IAFF Local 1590 v. City of Wilmington*, Chancery Court Order on Appeal, C.A. No. 2020-0765-PAF, IX PERB 8411 (6/28/21).

[4] Last, Best Final Offer

[5] The Court's decision included footnotes 47 and 48:

> [47] Having concluded that the PERB's affirmance must be reversed, I need not reach IAFF's argument that the Executive Director erred in selecting the City's LBFO because the proposed definition of "Hourly Rate" was unreasonable. *Citing the IAFF's Opening Brief.*
>
> [48] For the avoidance of doubt, this Order shall not be construed to limit the ability of the parties, the binding interest arbitrator, of the PERB on remand to engage in further proceedings in conformity with the POFERA and Delaware law.

[6] *IAFF Local 1590 v. City of Wilmington, Delaware*, PERB Decision on Remand from Chancery Court, BIA 19-11-1213 (C.A. 2020-0765-PAF), IX PERB 8435 (8-4-2021).

offers of the parties and to render a decision consistent with the Court's direction for reconsideration.

In its remand order, the PERB reminded the parties the POFERA specifically encourages parties to continue to bargain in good faith during impasse resolution proceedings.[7] Following the issuance of PERB's decision, the parties again attempted to resolve this dispute through direct negotiations. By letter dated November 8, 2021, counsel for the IAFF advised that the parties' discussion and exchange of proposals had not produced a resolution or a perspective path toward resolution.

This decision results from a review of the record created by the parties which was reviewed consistent with the Court's direction.

DISCUSSION

The Court's remand order states:

> The Executive Director erred by performing her statutory analysis only on the unwritten "essence" of the City's LBFO. The POFERA makes clear that the plain language of a collective bargaining agreement is meaningful. The purpose of the POFERA is "to promote harmonious and cooperative relationships between public employers and their employees, employed as police officers and firefighters, and to protect the public by assuring the orderly and uninterrupted operations and functions of public safety services." 19 *Del. C.* §1601. To achieve this objective, the POFERA "[o]bligat[es] public employers and organizations of police officers and firefighters … to enter into collective bargaining negotiations with the willingness to resolve disputes relating to terms and conditions of employment and *to reduce to writing* any agreements reached through such negotiations." *Id.* (emphasis added). Similarly, the POFERA's definition of "collective bargaining" includes the performance of the parties' obligation "to execute a written contract incorporating any agreements reached." *Id.* §1602(e). These provisions of the POFERA emphasize the importance of the express, written terms of the collective bargaining agreement.[8]

[7] 19 Del. C. §1615(g).

[8] Chancery Court Order ¶9 @ p. 8427

The Court found the Executive Director did not consider the "actual terms of the [*City's*] LBFO", concluding:

> … the Executive Director was not permitted to modify the City's LBFO or add terms based on the work schedule that the City's consultants researched or that the City represented that it would implement, because that was not the work schedule reduced to writing in the City's LBFO. Nor could the Executive Director comply with the POFERA by assessing the costs and benefits of the City's LBFO based on a non-binding illustrative application.[9]

The Public Employment Relations Board, after hearing and considering the arguments of the parties on remand, concluded:

> The Vice Chancellor's Order is straightforward and clear. There is nothing in the Court's Order which as a matter of law requires this Board, or the Binding Interest Arbitrator, to reverse the decision implementing the City's last, best, final offer. Nor does the Order direct the Board to implement the IAFF's last, best, final offer without further consideration.[10]

The City's last best and final offer at Article 17.1 explicitly states:

> (1) **Effective 7/1/20, a**ll 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.**
>
> **Effective upon 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 (7th) 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. [11]**

Excluding the example of the 24/48 schedule in the middle of the second paragraph,

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[9] Chancery Court Order ¶10,@ p. 8248.

[10] PERB Remand Decision @ p. 8437.

[11] BIA Decision @ p. 8202.

the City's offer is clear and unequivocal. The City proposed to redeploy the Suppression Division from a four platoon system to a three platoon system effective July 1, 2020. It further states that firefighters in the Suppression Division shall be limited to 2496 regularly scheduled hours annually, which would be accomplished by including Kelly Days[12] in the schedule. Its proposal did not provide for unlimited discretion in the number of hours to be scheduled annually but did provide a maximum of 2496 regularly scheduled hours per year.

The City provided extensive evidence to support its proposal to move to three platoons. The number of platoons is critical to the City's ability to meet the minimum manning requirements established in Article 11.6[13] of the collective bargaining agreement (which neither party sought to modify in the binding interest arbitration proceeding). The shift schedule flows from the platoon structure – three platoons cannot work a four-day rotation. The 24/72 schedule the firefighters were working required four platoons, in order to have one platoon working each 24-hour tour in the four-day cycle.

The IAFF proposed no changes to either the existing shift or platoon structure. It argued that although a large amount of overtime had been used for many years, the City had not effectively proven this was a problem. It concluded the amount of overtime was

[12] Kelly Days are scheduled days off built into firefighter schedules in order to maintain regularly scheduled hours below the Fair Labor Standards Act threshold beyond which public safety employees are required to be paid overtime. Testimony established the Wilmington Fire Department used Kelly Days in the past for this purpose prior to 2006.

[13] Section 11.6 MINIMUM MANNING. No on-duty piece of apparatus will be manned at the start of the 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 as 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.

could not, therefore, be considered "unsustainable". The IAFF provided no evidence to support its claim that the current level of overtime was sustainable for the duration of the proposed collective bargaining agreement, either financially or from the perspective of the health and well-being of firefighters.

The IAFF argued that the City did not establish that it is unable to maintain a full complement of apparatus in service daily using overtime under the four platoon, 24/72 shift structure. It further asserted that the City could immediately discontinue its use of rolling bypass if it chose to do so. The IAFF did not provide any support for this conclusion except to argue that overtime could be used to cover all the leaves and vacancies.

The City, on the other hand, provided concrete evidence of the continuing problem in using of overtime and rolling bypass to meet the requirements of the negotiated minimum manning provisions under a four platoon structure with 142 firefighters in the suppression division:

		Four Platoons, 24-72 Shift Structure			
	Total Tours Required[14]	**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**
Jan	1054	922	133	124	9
Feb	952	812	141	112	29
March	1054	910	144	124	20
April	1020	835	185	120	65
May	1054	881	174	124	50
June	1020	824	196	120	76
July	1054	859	196	124	72
August	1054	835	219	124	95
Sept	1020	843	178	120	58
Oct	1054	859	195	124	71
Nov	1020	833	188	120	68
Dec	1054	860	194	124	70
Total	***12,410***	***10,270***	***2,140***	***1,460***	***680***

Note: Units shown reflect 24-hour tours; maximum bypass is one apparatus out of service each day of the month. The Chart assumes a suppression division head count of 142. The leave estimates are based on 2018 average daily

[14] Total Tour required = # days in the month *times* the minimum manning requirement of 34 firefighters/24-hour tour.

usage by month. [City Exhibit 5-4].

The relevance of the information included in City Exhibit 5-4 was addressed in the initial binding interest arbitration decision:

> 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.[15]

There is a compelling public interest in fully staffing all eight pieces of apparatus and in also providing a regular schedule, without excessive unscheduled overtime, for firefighters in the suppression division. City Exhibit 5-4 demonstrates that without using rolling bypass, the City needed to cover a total of 2,140 24-hour tours with overtime (5.86 firefighters/day or an additional 17 days/year for each of the 142 firefighters in the suppression division) under the IAFF's proposal to continue the existing four platoon, 24-72 schedule. If one apparatus were placed out of service every day (i.e., placed on bypass), 680 24-hour tours still needed to be covered annually with overtime (1.86 firefighters/day or an additional 4.8 days/year for each of the 142 firefighters in the suppression division).

The IAFF's proposal to maintain the status quo did not address either the high levels of overtime and/or rolling by-pass required to meet the minimum staffing requirements employing a four platoon system.

The IAFF repeatedly argued that to adopt the City's last, best, final offer would

[15] BIA Decision at p. 8229.

preempt its statutory right to bargain for hours of work and schedules on behalf of the bargaining unit going forward because the Chief retains the right to make changes during the term of the collective bargaining agreement. Its argument misses the distinction between binding interest arbitration and the prohibition on making unilateral changes to terms and conditions of employment. The purpose of binding interest arbitration is to resolve the terms of a collective bargaining agreement where the parties have been unable to do so through their good faith negotiations and mediation. Binding interest arbitration is a choice the parties make to resolve their negotiations in lieu of direct bargaining. The interest arbitrator is required to choose, in totality, one of the parties' offers. Those offers are independently created by each party following extended negotiations and are offered as the best alternative considering the statutory criteria to resolve the terms of the collective bargaining agreement. The choice of one offer over the other is not a "unilateral imposition" but is the culmination of the negotiation process under the POFERA.

The City's last, best, final offer required implementation of the three platoon system effective July 1, 2020. The IAFF's witnesses made clear that they also clearly understood that the Chief would implement the three platoon system effective July 1, 2020, if the City prevailed in the binding interest arbitration.

On appeal, the IAFF argued that the retention of authority to modify the platoon and shift structure during the term of the agreement, at the Chief's discretion, disenfranchised firefighters of their statutory bargaining rights. This argument is without merit. While the Chief retains discretion to make a change to the shift structure and/or platoon structure during the term of this collective bargaining agreement, the IAFF is not without recourse to challenge any unilateral change which substantially affects a mandatory subject of bargaining (i.e., a change in "matters concerning or related to wages,

salaries, hours, grievance procedures and working conditions; provided, however, that such term shall not include those matters determined by this chapter or any other law of the State to be within the exclusive prerogative of the public employer." 19 Del. C. §1602 (n)).

The IAFF is correct that matters concerning or related to hours and/or conditions of employment are mandatory subjects of bargaining under the POFERA. The Delaware PERB has a long history of enforcing the duty to bargain in good faith through the unfair labor practice process as it relates to mandatory subjects of bargaining:

> Parties are required to confer and negotiate in good faith with respect to "… matters concerning or related to wages, salaries, hours, grievance procedures and working conditions…", i.e., mandatory subjects of bargaining. An alleged unilateral change does not violate the employer's obligations under the POFERA unless it involves a mandatory subject of bargaining. 19 Del. C. §1602(n).
>
> Should the matter at issue be determined to be a mandatory subject of bargaining, the analysis then turns to consideration of what constitutes the status quo for that issue under the circumstances presented.
>
> The POFERA also reserves certain rights to the public employer's inherent managerial policy. While the employer may choose to negotiate concerning these permissive subjects of bargaining, it is not required to bargain concerning, "… 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 personnel." The terms and conditions of employment defined in §1602(n), i.e., mandatory subjects of bargaining, are explicitly limited to exclude matters of inherent managerial policy reserved to the employer's discretion by §1605. *FOP Lodge No. 1 v. City of Wilmington*, ULP 21-06-1274, IX PERB 8465 8468 (Probable Cause Determination, Sept. 2021)

The prohibition on making unilateral changes to mandatory subjects of bargaining has been enforced by PERB even when alleged during the term of a collective bargaining agreement. In a case involving a unilateral change to compensation during the term of a collective bargaining agreement, the Executive Director found:

> With respect to the alleged violation of [*the duty to bargain in good faith*], it is well established that a unilateral change in a mandatory subject of bargaining constitutes a per se violation of the statutory duty to bargain in good faith. One of PERB's first decisions, held:
>
> > While a prior collective bargaining agreement is in existence, its terms serve to preserve the relationship between the parties and govern the operations and functions of the school system. Thereafter, to permit one party to unilaterally impose a change in the existing terms and conditions of employment without prior negotiation and, at least, prior to impasse, would be to permit that party to acquire an unfair tactical advantage effectively prohibiting the establishment of terms and conditions of public employment through bilateral negotiation. *Appoquinimink Education Assn. v. Bd. of Education,* ULP 1-2-84A, I PERB 23, 29 (1984).
>
> Unilateral disruptions of the status quo have been held to violate the duty to bargain in good faith because such changes frustrate the statutory objective of establishing terms and conditions of employment through the collective bargaining process. The status quo of a mandatory subject of bargaining is subject to change only through the collective bargaining process. *New Castle County Vo-Tech Education Assn. v. Bd. of Education,* ULP 88-05-025, I PERB 257, 259 (1988); *Christina Education Assn., Inc. v. Bd. of Education, ULP 88-09-026, I PERB 359, 366* (1988).[16]

In a subsequent case involving an alleged unilateral change in a mandatory subject of bargaining during the term of a collective bargaining agreement, PERB set forth the test to be employed:

> The issue raised by this charge is not whether the change in the policy violated the parties' collective bargaining agreement, but whether it constituted a unilateral change in the status quo [*during the term of the collective bargaining agreement*][17] of a mandatory subject of bargaining, sufficient to constitute a violation of the POFERA. This Board has employed a sequential analysis to determine whether an employer has unilaterally violated its duty to bargain in good faith:

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[16] *AFSCME Local 962 v. Red Clay Consolidated School District,* ULP 09-11-715, VII PERB 5171, 5185 (2011).

[17] FOP Lodge 7 and the University of Delaware were parties to a 2016 – 2019 collective bargaining agreement. The FOP alleged the University had implemented a unilateral change in a mandatory subject of bargaining, without negotiation, in July 2017, i.e., during the term of the agreement.

- Does the alleged change concern a mandatory subject of bargaining?
- Was there, in fact, a change made from the status quo?
- Was the duty to negotiate the issue superseded by an intervening event or circumstance?
- Was the union provided with a reasonable opportunity to negotiate the proposed change prior to implementation; was the change, in fact, negotiated; or did the union waive its right to negotiate? *[citation omitted]*.

Because this is a sequential analysis, a "no" answer to any of the questions renders consideration of any subsequent questions unnecessary. In order to sustain its charge, the FOP must establish that the alleged change involved a mandatory subject of bargaining and then that a change occurred in the status quo. *FOP Lodge No. 7 v. University of Delaware*, ULP 17-08-1117, IX PERB 7063, 7072 (August 2018).

Consequently, the IAFF is neither disenfranchised nor otherwise prospectively denied its rights to seek redress through the unfair labor practice proceeding under the POFERA by the retention of discretion by the Chief of Fire during the term of the collective bargaining agreement.

Finally, the IAFF provided a copy of the 2016-2020 collective bargaining[18] agreement between the City and FOP Lodge 1 which represents rank and file police officers of the Wilmington Police Department. Section 19.1 of that Agreement states:

> **Work Schedule.** The Chief of Police will be authorized to change the permanent work schedule of the divisions of the Police Department, including the Uniform Services Division, upon seventy-five (75) calendar days written notice, for the efficient utilization of manpower. However, no regular shift will: (1) violate any term of the Fair Labor Standards Act; (b) the regular shift hours will not exceed 2,080 hours per year; (c) nor 195 hour per thirty (30) day period.
>
> There will be no regular shift providing for any more than five (5) consecutive days of assigned regular duty (to be followed by at least 48 hours off), exclusive of overtime.

[18] IAFF Exhibit 3.

> The Department will not create additional prohibitions to vacation utilization during summer months than as applies to the entire year.
>
> There will be no altering of permanent shift times for some but not all shifts or portions of shifts assigned to the Uniform Services Division other than for operational needs as determined by the Chief. *IAFF Exhibit 3.*

This provision has been included in the collective bargaining agreement between the City and FOP Lodge 1 since at least the 2010-2011 agreement. *IAFF Exhibit 5.* The IAFF's assertion that there are no collective bargaining agreements in Delaware in which discretion is left to management to alter work schedules is without basis in fact. Its argument that the Chief retains "unfettered" authority is also without basis in the City's last, best, final offer which specifically provides that a three platoon system will be implemented on July 1, 2020 and that the annual hours of scheduled work will not exceed 2496.

The IAFF will have the opportunity to renegotiate the provisions with which it is unhappy during bargaining for a successor collective bargaining agreement. Obviously, the City is familiar with these types of negotiated provisions, as evidenced by its collective bargaining agreements with its FOP represented police officers.

The Court's decision did not disturb the findings concerning the comparative analysis of the other terms of each party's last, best, final offer. For the reasons set forth herein, the City's offer is determined to be the more reasonable under the statutory criteria of the Police Officers' and Firefighters' Employment Relations Act.

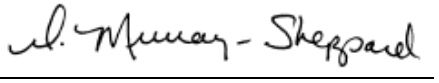
DECISION

Pursuant to the remands of the Delaware Court of Chancery and the full Public Employment Relations Board, I have reviewed the last, best, final offers of the City and the IAFF consistent with the requirements of 19 Del. C. §1615.

Having specifically reconsidered the express terms of the City's last, best, final offer related to its platoon and shift provisions, for the reasons discussed above and based on the record created by the parties in this proceeding, the parties are directed to adopt the City of Wilmington's last, best, final offer, along with the tentative agreements they reached and the unchanged terms of their 2012-2016 agreement as their successor collective bargaining agreement for the period of July 1, 2019 through June 30, 2023.

IT IS SO ORDERED.

DATE: November 17, 2021



DEBORAH L. MURRAY-SHEPPARD
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