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RE: Request for PERB Review – City of Wilmington & IAFF 1590
BIA 19-11-1213 (Review of Remand Decision)

Dear Counsel:

I have considered your arguments both in favor of and in opposition to the IAFF's request to supplement the record on remand[1] with the March 9, 2021 transcript of oral argument made before Vice Chancellor Fioravanti on appeal of the binding interest arbitration decision. I have also read and considered the decisions submitted by the City in support of its argument.[2]

The IAFF argued the transcript of the hearing before Vice Chancellor Fioravanti is relevant to its appeal of the remand decision because 1) the Court referred to a "Trojan horse", which the IAFF interprets to be "an indication of [the Court's] skepticism over the nature of the terms and how they are supposed to work" in the City's reservation of discretion to change the hours of work and work schedule during the term of the collective bargaining agreement; and 2) that the Court's comments during the course of oral argument indicates the Court did not agree with the City that the FOP Lodge 1 collective bargaining agreement was an "apt comparator to the structure, the nature and the scope of the City's proposal" to retain discretion to change the hours of work and work schedule during the term of the agreement.

The binding interest arbitration decision was remanded to PERB by the Court with very specific instructions:

[1] Oral argument was heard on this issue on February 24, 2022.

[2] *Del. Transit Corp. v. Amalgamated Transit Union, Local 842*, No. 12360-VCS, 2017 WL 2721820, at *2 n.25 (Del. Ch. June 23, 2017); ULP 13-03-889, IX PERB 6961 (2017); *Day v. Diligence, Inc.*, No. 2020-0076-SG, 2020 WL 2214377 (Del. Ch. May 7, 2020)

> The POFERA requires a binding interest arbitrator's determination to be grounded in the actual terms of an LBFO. When a binding interest arbitrator decides a resolution of the parties' collective bargaining dispute, "the decision shall be limited to a determination of which of the parties' last, best, final offers shall be accepted in its entirety." 19 *Del. C.* §1615(d). This provision does not allow the arbitrator to "pick and choose between provisions of the two LBFOs, or create terms of her own." *City of Wilmington v. Fraternal Order of Police Lodge 1*, 2015 WL 4035616, at *3 (Del. Ch. June 30, 2015). 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 LFBO. 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.
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> In sum, 19 *Del. C.* § 1615(d) required the Executive Director to apply the statutory factors of the POFERA and to analyze the City's LBFO 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 constituted an error as a matter of law.
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> 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.[3]

The Court referenced the transcript of the oral argument the parties made on appeal only once in its decision. It is clear that the Court understood the nature of the dispute and summarized the IAFF's contentions in ¶7 of the decision:

> … The City's LBFO struck the language from the 2016 CBA that outlined a 24/72 schedule, but did not replace it with analogous language providing a 24/48 schedule. Tab 4 at 1, 10. Instead, the City's LBFO provided that firefighters would work a shift of an unspecified length "as determined and established by the Chief of Fire," followed by an undetermined amount of time off "under a work schedule as established by the Chief of Fire." *Id.* To be sure, the City's LBFO stated, "[a]s an example," that the Chief of Fire could "implement a three[-]platoon system with a Complete Tour of Duty of [24] hours on, followed by [48] hours off." *Id.* at 10. But that schedule is expressly identified only as "an example," and the City's LBFO does not bind the Chief of Fire to any particular work schedule, even from the outset of the new

[3] *IAFF Local 1590 v. City of Wilmington*, CA 2020-0765-PAF, IX PERB 8411, 8428 (Del. Ch. June 28, 2021) ¶10 - ¶12.

system's implementation. *Id.* The City's proposal intentionally did not limit the Chief to implementing a 24/48 schedule. As the City's counsel explained at oral argument:

> [T]he language of the LBFO was not drafted to limit the City to a 24/48 three-platoon structure because there is discretion given to the chief of fire. And drafting definitions for tour of duty and complete tour of duty that reflect the 24/48 schedule would make it functionally difficult, if not impossible, to make a change to platoon structure that then did not, you know, place us in violation of the language that was in the contract, because it would bind us to a 24/48 structure without that. *Oral Arg. Tr. 47-48* [4]

The Court further clarified where it found error in the binding interest arbitration decision:

> To address the IAFF's concerns that the city's proposal would allow the Chief of Fire to unilaterally modify the firefighters' hours of work, the Executive Director stated:
>
> > 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 structures 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.
>
> The Executive Director thus recognized the inherent problem arising from the City's choice to delete the terms establishing the firefighters' hours and work schedules from the 2016 CBA and replace them with fully discretionary language in its LBFO. For the reasons discussed in this Order, however, the Executive Director's attempt to craft a solution, though commendable, cannot serve as a lawful substitute for the analysis mandated by 19 *Del. C.* §1615(d).[5]

The Court does not use the term "Trojan horse" in its remand order. Further, there is no statement or reference in the Court's remand decision to indicate the Court found the FOP Lodge 1 collective bargaining agreement with the City was not an "apt comparator to the structure, the nature and the scope of the City's proposal" as the IAFF asserts. [6]

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[4] *Supra.*, ¶7, p. 8425.

[5] *Ibid,* FN 45, p. 8427

[6] The decision on remand addressed the IAFF's argument to the Public Employment Relations Board that there is no precedent for the City's proposal to provide the Chief of Fire with discretion to change the working schedule. It was included in the Executive Director's decision on remand only for to make clear that the terms with which the IAFF disagrees will be subject to renegotiation in early 2023.

The Court did include a single excerpt of the hearing transcript in its June 28, 2021 decision, in the final paragraph of ¶7. It is clear that the Vice Chancellor reviewed the arguments of the parties and the record before rendering his decision. In *Day v. Diligence, Inc.*, Vice Chancellor Glasscock discussed the role of transcript rulings:

> … Rulings from the bench most often "reflect that the court intended to decide a particular dispute," not to advance the common law.[7] They tend to be informal, and often fail to be cabined in the way a jurist typically limits her rationale in a written decision. They are made in light of the fact that they will have no precedential value ….[8] *(emphasis in original).*

The transcript the IAFF requests the Public Employment Relations Board to consider on appeal of the remand decision is part of the initial oral argument made to the Court following written argument on appeal submitted by the parties. The Vice Chancellor's comments during the March 9, 2021 argument are not "transcript rulings" as a complete, comprehensive and clear written decision was issued by the Court, thereafter.

For these reasons, the IAFF's request that the transcript be entered into the remand record is denied. The Court's directive was clear and direct. Reviewing the argument made to the Court for its consideration will serve no useful purpose, as there is no ambiguity in the Court's written decision.

**WHEREFORE**, the full Public Employment Relations Board will hear IAFF Local 1590's request for review of the Executive Director's November 17, 2021 decision on remand at its next scheduled meeting on **Tuesday, April 26, 2022** commencing at **10:00 a.m.** This letter decision will be provided to the Board for its review to supplement the record previously provided to the Board.

Sincerely,

D. Murray-Sheppard

Deborah L. Murray-Sheppard
Executive Director, PERB

[7] *High River LTD. P'ship v. Occidental Petroleum Corp.*, 2019 WL 6060285, at *7 n. 77 (Del. Ch. Nov.14, 2019)

[8] *Day v. Diligence, Inc.*