IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 1589,	)	
Appellant-Below, Appellant,	)	
v.	)	C.A. No. 2020-0765-PAF
CITY OF WILMINGTON, a Delaware Municipal Corporation,	)	
Appellee-Below Appellee.	)	

ORDER ADDRESSING INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 1590'S APPEAL FROM THE DECISION OF THE PUBLIC EMPLOYMENT RELATIONS BOARD ON REMAND AND CITY OF WILMINGTON'S MOTION TO DISMISS UNPERFECTED APPEAL

WHEREAS:[1]

A. 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.* Ch. 16.

B. The City's Department of Fire (the "Department") employs approximately 156 unionized firefighters.[2] These employees are split between the

[1] Citations to the docket will be in the form of "Dkt. [#]". Exhibits contained in the appendix to the City of Wilmington's opening brief (Dkt. 39) are cited as "A" followed by the relevant page number.

[2] A173.

Suppression Division, which responds to emergencies, and the Fire Prevention Division, which conducts investigations and enforces the City's fire code.[3] The International Association of Firefighters, Local ("IAFF" and together with the City the "Parties") is an employee organization within the meaning of 19 *Del. C.* § 1602(g). The IAFF is the exclusive bargaining representative for a unit of firefighters, lieutenants, captains, and battalion chiefs employed by the Department. *Id.* § 1602(h).

C. Firefighters in the Department's Suppression Division have traditionally worked 24-hour shifts. Under the Parties' prior collective bargaining agreement, which covered the period of July 1, 2012, to June 30, 2016 (the "2016 CBA"), these firefighters were scheduled to work every fourth day, *i.e.*, one full day working followed by three full days off (a "24/72 schedule").[4] In conjunction with the 24/72 schedule's four-day cycle, the Department maintained four platoons of firefighters, with each platoon comprising 35 firefighters.[5] The 2016 CBA required each platoon to have a minimum of 34 firefighters.[6]

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[3] A173–74.

[4] A39 § 17.1; A174.

[5] A174.

[6] *Id*. Pursuant to the Parties' 2016 CBA, each on-duty piece of apparatus was to be staffed by four firefighters. A30 § 11.6. The Department maintains six engines and two ladder trucks. A174. With four firefighters per apparatus, plus two battalion chiefs at the command center, the minimum staffing per shift is 34 firefighters. A175.

D. Due to training, sick leave, vacation, or other absences, platoons frequently fell below the minimum-staffing requirement.[7] If there were five or fewer vacancies at the start of a 24-hour shift, the Department would fill the vacancies by having a firefighter work overtime.[8] If there were more than five vacancies, the Department would take an engine out of service for the shift, a practice known as "rolling bypass."[9] Rolling bypass has been the subject of much public scrutiny, due to its effect, or potential effect, on the health and safety of firefighters and residents.[10]

E. After being appointed Chief of the Department in 2017, Michael Donohue investigated alternatives to reduce or eliminate rolling bypass.[11] The City hired consultants to analyze alternative platoon and shift structures that would better meet the minimum-staffing requirements.[12] After considering various options, Chief Donahue concluded that the Department should move from a four-platoon system to a three-platoon system.[13] To implement a three-platoon system, Chief Donahue proposed replacing the 24/72 schedule with a 24/48 schedule, whereby firefighters

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[7] A202.

[8] A175.

[9] *Id*.

[10] *Id*.

[11] A138; A148–49; A202.

[12] A202.

[13] A154.

would work one full day followed by two full days off.[14] The plan also contemplated the addition of 17 non-work days, or "Kelly Days," to reduce annual compensable hours to approximately 2,500.[15] Chief Donahue selected the 24/48 schedule in part because it "would be the easiest shift to transition into," due to the firefighters already working 24-hour shifts.[16]

F. In January 2019, the City and the IAFF began negotiating a successor agreement to the 2016 CBA.[17] The IAFF opposed the City's proposal to implement a new 24/48 schedule with Kelly Days and, instead, favored maintaining the 24/72 schedule from the 2016 CBA. In May 2019, the Parties reached an impasse and pursued mediation.[18] Three days of mediation failed to resolve the Parties' disagreements, and the mediator recommended to the Public Employee Relations Board ("PERB") that the Parties undergo binding interest arbitration.[19]

G. Section 1615 of the POFERA establishes rules and procedures for binding interest arbitration over a collective bargaining agreement. Within seven days of receiving a recommendation to initiate binding interest arbitration, the PERB

[14] A156; A204.

[15] A196.

[16] A204.

[17] A171.

[18] *See* 19 *Del. C.* § 1614(b).

[19] *See id.* § 1615.

must determine (i) whether the parties have made a good faith effort to resolve their labor dispute and (ii) whether arbitration would be appropriate. *Id.* § 1615(a). The PERB then appoints its Executive Director to act as the binding interest arbitrator, who must hold hearings to determine facts and render a written decision resolving the dispute. *Id.* § 1615(b)–(d). The arbitrator's decision "shall be limited to a determination of which of the parties' last, best, final offers shall be accepted in its entirety." *Id.* § 1615(d). The binding interest arbitrator must take into consideration seven specific factors when determining which offer to accept, in addition to "any other relevant factors." *Id.* § 1615(d)(1)–(7).

H. The PERB determined that binding interest arbitration between the City and the IAFF would be appropriate, and the PERB appointed its Executive Director as the arbitrator.[20] On December 11, 2019, the IAFF and the City each submitted a last, best, final offer (an "LBFO") to the Executive Director.[21] Although the Parties' LBFOs identify several points of disagreement,[22] the central area of dispute pertained to the platoon structure and work schedule.[23] The IAFF's LBFO sought to preserve unchanged the 2016 CBA's language pertaining to the four-platoon

[20] *See id.* § 1615(b) ("[The PERB] shall appoint the Executive Director or his/her designee to act as binding interest arbitrator.").

[21] A172.

[22] A175–183.

[23] A202.

system and the 24/72 schedule. The City's LBFO included the following pertinent changes to the 2016 CBA:

> 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., 8-10-2 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).
>
> . . .
> Amend Article [17 (Hours of Work)] to read as follows:
>
> . . .
> 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 (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.[24]

I. On May 27, 2020, following a two-day evidentiary hearing, the Executive Director issued her decision (the "Original BIA Decision").[25] Among other things, the Original BIA Decision outlined the alternative work schedules and analyzed each alternative's anticipated effect on the Department's ability to meet the minimum-staffing requirements in order to avoid overtime or rolling bypass.[26] Based on this analysis, the Original BIA Decision found that "[t]he 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."[27] By contrast, the IAFF "did not establish that its proposal to maintain the [24/72], four platoon system reasonably addresses the [Parties'] shared goal of essentially eliminating rolling bypass."[28] The Executive Director concluded that the City's

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[24] A107; A116.

[25] The record consisted of 75 exhibits submitted by the parties and testimony from nine witnesses. A173.

[26] A202.

[27] A207.

[28] A206.

LBFO was more reasonable than the IAFF's LBFO.[29] The Executive Director ordered the Parties to implement the City's final offer into their new collective bargaining agreement.[30]

J. The IAFF appealed the Original BIA Decision to the PERB, filing a notice of appeal on September 8, 2020 (the "2020 Notice of Appeal"). On appeal, the IAFF argued that the Original BIA Decision "does not meet the requirements of 19 *Del. C.* § 1615(d)" because it "add[s] terms to the City's final offer that are not part of the offer."[31] The IAFF objected on the basis that the City's proposal gave the Chief of Fire extensive discretion to set platoon and shift structures.

K. On September 1, 2020, the PERB issued its decision affirming the Original BIA Decision.[32] The PERB reviewed the Executive Director's determination for whether it was "arbitrary, capricious, unsupported by the facts in the record, or contrary to law."[33] The PERB noted that "[t]he arbitrator's decision references and reviews extensive evidence proffered by the City to support its choice of the 24/48 schedule from among many options."[34] The PERB agreed with the

[29] A221.

[30] A222.

[31] A226.

[32] A237–244.

[33] A239.

[34] A241.

Executive Director that the City had the authority to establish a platoon and shift structure and that a 24/48 schedule was more effective than a 24/72 schedule at reducing overtime and rolling bypass.[35] Like the Executive Director, the PERB concluded that the City's LBFO was the more reasonable proposal, and the PERB ordered the City's LBFO to be implemented into the Parties' new collective bargaining agreement.[36]

L. On September 8, 2020, the IAFF filed a notice of appeal in this court pursuant to 19 *Del. C.* § 1609(a), appealing the PERB's affirmance of the Original BIA Decision.[37]

M. Following briefing and argument, the court issued an order on June 28, 2021, reversing the PERB's decision affirming the Original BIA Decision and remanding the matter to the PERB for further proceedings (the "Court's Remand Order").[38]

N. On remand from this court, the PERB issued a decision on August 4, 2021 (the "PERB's August 4 Decision"), remanding the matter to the Executive

[35] A242.

[36] A243.

[37] Dkt. 1; *see* 19 *Del. C.* § 1609(a).

[38] Dkt. 17.

Director to "reconsider the last best, final offers of the Parties and to render a decision consistent with the Court's direction for reconsideration."[39]

O. On November 17, 2021, the Executive Director issued a decision on remand, finding the City's LBFO to be the more reasonable offer under the criteria set forth in 19 *Del. C.* § 1615 (the "BIA Remand Decision").[40]

P. The IAFF requested the PERB review the BIA Remand Decision.[41] Following the resolution of an intervening motion by the IAFF to include the transcript of this court's March 9, 2021, oral argument, a three-member panel of the PERB heard argument and issued a decision on May 25, 2022, unanimously affirming the BIA Remand Decision (the "PERB's Remand Decision").[42]

Q. POFERA provides a right to appeal a binding interest arbitration decision to the Delaware Court of Chancery. 19 *Del. C.* § 1609(a). "Such an appeal must be filed within 15 days upon which the decision was rendered and shall not automatically act as a stay." *Id.*

R. On June 3, 2022, the IAFF filed a letter with this court in the same action as the previous appeal informing the court of the IAFF's "intent to appeal"

[39] A245–249.

[40] A250–262.

[41] A263

[42] A326.

the BIA Remand Decision (the "June 3 Letter").[43] The June 3 Letter requested "instruction for the appeal process."[44] The June 3 Letter attached as exhibits the PERB's August 4 Decision, the BIA Remand Decision, and the PERB's Remand Decision.

S. The next activity on the docket occurred on July 6, 2022, when the IAFF filed another letter requesting that this court confirm the status of the IAFF's appeal.[45] On August 17, 2022, the IAFF filed a "Motion to Confirm Appeal of Decision by the Public Employee Relations Board on Remand."[46] On September 23, 2022, the City filed a motion to dismiss IAFF's appeal. The City asserted that the June 3 Letter was not a notice of appeal and, consequently, the IAFF failed to file a timely appeal.[47]

T. After briefing, the court heard argument on November 28, 2022 on the City's motion to dismiss the appeal and the IAFF's appeal on the merits.[48] This order adjudicates those motions.[49]

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[43] Dkt. 19.

[44] *Id.*

[45] Dkt. 20.

[46] Dkt. 25.

[47] Dkt. 29.

[48] Dkt. 46 & 47.

[49] Dkt. 36.

U. Because POFERA provides that an appeal does not automatically act as a stay, while this case has been making its way through the administrative and judicial system, the Department has been operating under the terms of the City's LBFO. The contract expires on June 30, 2023.

NOW, THEREFORE, the court having carefully considered the City's motion to dismiss the appeal and the IAFF's appeal from the PERB's Remand Decision, IT IS HEREBY ORDERED, this 28th day of February 2023, as follows:

1. IAFF's right to appeal binding interest arbitration decisions originates from 19 *Del. C.* § 1609. The right to appeal "is not an inherent or inalienable right; and the general rule is that an appellate court is without jurisdiction to hear an appeal unless the proceeding therefor is filed within the time allowed by the governing law or rule of court." *Casey v. S. Corp.*, 29 A.2d 174, 176–77 (Del. 1942). Section 1609 requires that appeals be filed within 15 days of the date upon which the BIA renders its decision. 19 *Del. C.* § 1609. Appeals to the Court of Chancery are governed by Court of Chancery Rule 72(a) which provides "[t]he procedure in cases appealed to the Court of Chancery shall be as heretofore."[50]

[50] This language is admittedly unhelpful, and the parties did not join issue on this rule. Nevertheless, the lack of an express set of appellate rules does not mean a letter of counsel is sufficient to perfect an appeal.

2. The IAFF contends that its June 3 Letter constituted a notice of appeal sufficient to perfect its appeal within the 15-day period required by Section 1609. This court holds that it did not.

3. Delaware has adopted a view that "de-emphasizes the technical procedural aspects of appeals and stresses the importance of reaching and deciding the substantive merits of appeals whenever possible." *State Personnel Comm'n v. Howard*, 420 A.2d 135, 137 (Del. 1980). "[T]he proper purpose of a notice of appeal . . . is to provide notice of the appeal to all litigants who may be directly affected thereby, and to afford them an opportunity to take action to adequately protect their interests. [T]his standard should be applied uniformly to every Delaware court when functioning in an appellate capacity." *Silvious v. Conley*, 775 A.2d 1041, 1024 (Del. 2001).

4. The IAFF's argues that *Howard* and *Silvious* compel the acceptance of the June 3 Letter as having perfected an appeal. The IAFF's reliance on those cases is misplaced. In *Howard*, the appellant timely filed a notice of appeal. The notice was technically defective because it did not name two of the three plaintiffs below. *Howard*, 420 A.2d at 138. The Delaware Supreme Court held the notice sufficiently put all of the plaintiffs on notice, as they were all represented by the same counsel, and there was no substantial prejudice created by adding them as appellees. *Id*. at 138. Similarly, in *Silvious*, the appellant filed a notice of appeal, but it did not

provide the "grounds" for the appeal as required by Superior Court Rule 72(c). *Silvious*, 775 A.2d at 1042. The Delaware Supreme Court held the Superior Court abused its discretion in dismissing the appeal because the notice of appeal provided sufficient notice to the opposing party. *Id*. *Howard* and *Silvious* do not carry the day for the IAFF because the union did not file a notice of appeal within the statutory deadline. *Cf. Howard*, 420 A.2d at 138 ("This is not a case in which this Court lacks jurisdiction because the appellant failed to file any notice of appeal within the 30 day statutory period. On the contrary, the appellant here has met the jurisdictional requirement imposed by [statute] by filing a notice of appeal within the prescribed period."). Thus, *Howard* and *Silvious* involved a technical defect to a timely filed notice of appeal.

5. The June 3 Letter was not a notice of appeal. It was a letter from counsel to the court. The letter stated: "Following guidance from your chambers, the IAFF is providing this letter to advise you of its *intent to appeal* the Decision on Remand and *to request instruction for the appeal process*."[51] The June 3 Letter stands in stark contrast with the IAFF's 2020 Notice of Appeal of the Original BIA Decision. The 2020 Notice of Appeal stated: "PLEASE TAKE NOTICE that the International Association of Firefighters, Local 1590, Appellant-Below, Appellant,

[51] Dkt. 19, at 2 (emphasis added).

pursuant to 19 *Del. C.* § 1609(a), gives notice of this appeal to the Court of Chancery of the State of Delaware from the decision of the Public Employment Relations Board of the State of Delaware . . . ."[52]

6. The June 3 Letter merely stated that the IAFF had an "intent to appeal" the BIA Remand Decision. Stating that one intends to do something is not the same as carrying out the intended action. *See* Alida Liberman, *Reconsidering Resolutions*, 10 J. Ethics & Soc. Phil. 2, 1 (2016) (describing the familiar process of intending to do one thing and then finding oneself not having done what one set out to do). Further, the June 3 Letter's request for "instruction for the appeal process" further indicates that the letter itself was not a notice of appeal. Rather, it was a step in preparation of IAFF's appeal. Unlike IAFF's initial notice of appeal which made it clear that it was appealing the Original BIA Decision, the June 3 Letter only evidences a future intent to appeal and requests information about how to go about effectuating that intended, future appeal.

7. The court is cognizant of the policy in favor of deciding cases on the merits, but a litigant must first perfect an appeal. The June 3 Letter was not a notice of appeal, and the IAFF cites no authority in which a Delaware court accepted a letter of counsel as a notice of appeal. In *In re Smith v. First State Exxon*, 1997 WL

[52] Dkt. 1, at 1.

528235 (Del. Super. July 16, 1997), a case cited by neither party, Justice Quillen, then serving on the Superior Court, faced a similar circumstance. There the court had previously reversed an administrative decision on appeal and remanded for new findings of fact and conclusions of law. After the administrative body rendered a decision on remand, the *pro se* plaintiff sent a letter to the court, which the court "did not interpret . . . as a filing to commence . . . a new action of judicial review of the Board's new decision after remand." *Id*. at *1. The plaintiff sent two later letters, which made clear that the plaintiff had intended his first letter to be the filing of an appeal. The first letter was received within the time for taking an appeal, the other two were not. Judge Quillen held the plaintiff had not perfected an appeal. In a statement reflecting his generosity, Judge Quillen indicated that had he realized the plaintiff intended the first letter to be a notice of appeal, the judge "would have had it docketed as a new appeal." *Id*. at *2. But Judge Quillen was clear that taking that action would have been a matter of grace to assist a *pro se* litigant. He wrote: "Hopefully, Judges, including this one, will try to assist *pro se* litigants with non-frivolous grievances, such as the one in this case. But the expectation of such help cannot become a legal right." *Id*.

8. *Smith* does not persuade me that the June 3 Letter was intended to be a notice of appeal. It was a letter to the court in the prior proceeding by a litigant represented by counsel, not a *pro se* party. It expressed an intent to appeal in the

prior proceeding but was not a notice of appeal opening a new action. Under the circumstances here, the court cannot accept the June 3 Letter as perfecting an appeal. Requests for substantive judicial action by this court are not to be made by letter. "Parties may use letters to provide updates to the court or to address logistical and scheduling issues. Letters should not be used to request substantive relief." Ct. Ch. 171 (f)(1)(C); *see also In re Xura, Inc. S'holder Litig.*, 2019 WL 3063599, at *4 n.13 (Del. Ch. July 12, 2019) ("[A] letter is not a proper means by which to amend or supplement a pleading . . . ."); *Cowan v. Furlow*, 2022 WL 3269982, at * 2 (Del. Ch. Aug. 11, 2022) ("[A]ny request for relief must be made by motion, not letter, under Court of Chancery Rule 7(b)."); *In re Lordstown Motors Corp*., 2023 WL 1974708, at *1 (Del. Ch. Feb. 13, 2023) ("Requests for judicial action are to be made by motion." (internal quotation and citation omitted)); *cf.* Ct. Ch. R. 184(a) (stating that an appeal from an order of the Register of Wills shall be commenced by serving a notice of appeal).

9. In addition, the IAFF never paid the court fees required to make an appeal to this court, further undercutting the notion that the June 3 Letter was a notice of appeal. Nor was the June 3 Letter accompanied by a Supplemental Information Form or a Verification, as required by Court of Chancery Rule 3. Ct. Ch. R. 3. The letter's infirmities made it ineffective as a notice of appeal because it did not "set the judicial machinery in motion." *Casey*, 29 A.2d at 174.

10. It has been held that a court will not dismiss an appeal as untimely if the default is occasioned by court-related personnel. *See Bey v. State*, 402 A.2d 362, 363 (Del. 1979) (observing that appellant was prevented from properly perfecting appeal by action and inaction of State agencies); *Wilson v. Thomas*, 1997 WL 33471240, at *1–2 (Ct. Com. Pl. Mar. 10, 1997) (refusing to dismiss the appeal as untimely where clerk prevented pro se litigant from filing a timely appeal). Those cases are generally limited to circumstances where court personnel have prevented the filing of appeal papers or where court personnel have provided inaccurate information to a *pro se* litigant. *Id*. at *2 ("In cases where pro se appellants have been given an incorrect appeal date, the Courts have refused to dismiss an appeal."). The basis of this rule is that "the party seeking review has done all that is required of him." *Casey*, 26 A.2d at 177.

11. The IAFF is not a *pro se* litigant, and it offers no evidence that court personnel prevented IAFF from perfecting its appeal. The IAFF's assertion that this court's chambers provided advice as to filing cannot be heard to excuse a represented party from filing a proper and timely notice of appeal. It is not the court's function to dispense legal advice to represented parties. *See Johnson v. P & F Cycles*, 1992 WL 1364290, at *1 (Del. Super. Ct. July 6, 1992) ("The Prothonotary may not give legal advice."); *Casey*, 29 A.2d at 178 ("Speaking generally, we know of no duty imposed on Clerks of courts to advise litigants, and the dangers and embarrassments

inherent in such practice are readily foreseeable."); *Trala v. Melmar Indus., Inc.*, 254 A.2d 249, 250 (Del. Super. 1969) ("[T]he appellants must accept the consequences of their willingness to rely on the gratuitous advice of the clerk."). *But see Ebert v. Kent Cnty Dep't of Planning Servs*., 2019 WL 994578, at *4 (Del. Super. Feb. 22, 2019) ("There are times, when appropriate, that the Court will provide a *pro se* litigant some degree of latitude in preparing and presenting a case or appeal.").

12. "Appellate jurisdiction rests wholly on the 'perfecting' of an appeal within the period of limitations fixed by law." *Dixon v. Delaware Olds, Inc*., 396 A.2d 963, 966 (Del. 1978). The June 3 Letter did not perfect an appeal from the BIA Remand Decision. As the IAFF did not make any other filing within the 15-day time period prescribed by Section 1609, IAFF did not perfect its appeal.[53] "To the extent the [June 3 Letter] is relied upon to perfect a new appeal from the decision

[53] The City argues that the June 3 Letter was also defective because the IAFF did not serve the PERB as required by Section 10145 the Administrative Procedures Act. 29 *Del. C.* Ch. 101 (the "APA"). This argument is without merit. Section 10145 states: "No . . . appeal or other application for relief of the Court shall be considered as having been taken . . . until it has been filed with the Prothonotary and served upon the agency in accordance with the rules of the Court." 29 *Del. C.* § 10145. Section 10145 is inapplicable here. The term "Court" in the APA is defined as the Superior Court, with one exception for certain matters involving Family Court. *See id*. § 10102(4). Furthermore, the Prothonotary is the clerk of the Superior Court, not the Court of Chancery. The City cites no case applying this provision to administrative appeals to this court. To the contrary, the "APA does not govern appeals from the [PERB] to this Court because this Court is not within the APA's definition of 'court' . . . , and the [PERB] is not listed in 29 *Del. C.* § 10161, which identifies those state agencies to which the APA is fully applicable." *Del. Correctional Officers Ass'n v. State*, 2003 WL 23021927, at *5 n.18 (Del. Ch. Dec. 18, 2003). Had the legislature intended Section 10145 to apply to administrative appeals to this court, it would have so provided.

on remand, the appeal is dismissed." *Smith*, 1997 WL 528235, at *2 (emphasis omitted). Admittedly, this decision may be harsh, but "all statutory appeal requirements are, by their very nature, 'harsh' in that they arbitrarily establish jurisdictional prerequisites for initiating or maintaining a suit." *Riggs v. Riggs*, 539 A.2d 163, 164 (Del. 1988).

13. Even if the court were to conclude that the IAFF had perfected its appeal from the PERB's Remand Decision, the court would deny the appeal on the merits.

14. Binding interest arbitration under the POFERA is done "baseball style." *City of Wilmington v. Fraternal Order of Police Lodge 1*, 2015 WL 4035616, at *3 (Del. Ch. June 30, 2015) ("*FOP*"). Each side submits its LBFO to the arbitrator, who must then evaluate the offers by applying the factors articulated in Section 1615(d). After applying the factors, the arbitrator must select one of the two offers in its entirety; "the arbitrator may not pick and choose between provisions of the two LBFOs, or create terms of her own." *FOP*, 2015 WL 4035616, at *3. "In making determinations, the binding interest arbitrator shall give due weight to each relevant factor . . . . With the exception of [the factor concerning the public employer's ability to meet the costs of any proposed settlement] no single factor . . . shall be dispositive." 19 *Del. C.* § 1615(d).

15. The IAFF contends that the Court's Remand Order established that the City's LBFO did not require fixed terms or limitations for a work schedule or platoon system.[54] Therefore, the IAFF argues that the Court's Remand Order established as law of the case that the City's LBFO "eliminated all fixed and defined terms for a platoon structure, work schedule, and hours of work."[55] From this, the IAFF maintains that the Executive Director and the PERB on remand analyzed the City's LBFO as providing for fixed terms, in derogation of the Court's Remand Order. Essentially, the IAFF takes the position that the Court's Remand Order established that the discretion afforded the Chief of Fire in the City's LBFO was fatal because the Executive Director effectively could not apply the statutory criteria and, therefore, she was constrained to accept the IAFF's LBFO. In a somewhat related argument, the IAFF contends the Executive Director and the PERB could not conduct a proper comparability analysis under Section 1615(d) because there is no other collective bargaining agreement or case cited for such broad discretion for management to alter work schedules.[56]

16. The Court's Remand Order did not hold as a matter of law that the City's LBFO was so fatally flawed that the Executive Director could not conduct a

[54] IAFF Ans. Br. 5.

[55] IAFF Opening Br. 24.

[56] IAFF Opening Br. 28–29.

meaningful application of the Section 1615(d) factors to the City's offer. The court expressed its view that the language in the City's LBFO was problematic and that the Executive Director erred in evaluating a shift schedule that was included only as an example in the City's LBFO. The court did not, however, indicate that a Section 1615(d) analysis was impossible to perform.

17. On remand, the Executive Director followed the court's directive and applied the criteria of Section 1615(d) to the City's LBFO. The Executive Director expressly excluded use of the example of a 24/48 schedule as referenced in Article 17.1 of the City's LBFO.[57] The Executive Director observed that "shift schedule flows from the platoon structure – three platoons cannot work a four-day rotation."[58] Thus, the IAFF's insistence on a 24/72 shift structure "required four platoons, in order to have one platoon working each 24-hour tour in the four-day cycle."[59]

18. The Executive Director also observed that, notwithstanding the language in the City's LBFO giving the Chief of Fire "discretion" to change the platoon system and any shift schedule, that discretion is not unbounded.[60] The Executive Director made clear, and agreed with the IAFF, that "matters concerning or related to hours and/or conditions of employment are mandatory subjects of

[57] A252–253.

[58] A254.

[59] *Id*.

[60] A257–261.

bargaining under the POFERA."[61] The PERB reached the same conclusion.[62] "In undertaking [its] review [on appeal] the Court accords due weight to PERB's expertise and specialized competence in labor law." *Fraternal Order of Police, Lodge 5 v. New Castle Cnty*, 2014 WL 351009, at *4 (Del. Ch. Jan. 29, 2014) (internal quotations omitted).

19. At oral argument, the City expressly acknowledged and agreed that, notwithstanding the "discretion" language in Article 17.1 of the City's LBFO, if the City were to attempt to change the current platoon structure, shift schedule, or work hours, the City would be required to negotiate any such change with the IAFF.[63] Thus, the City accepts that it must bargain for any change to the current three-platoon system, 24/48 shift schedule, or increasing the maximum number of regularly scheduled hours per year beyond 2496. With that concession, and the conclusions of the Executive Director and the PERB on remand, the IAFF's concern about unfettered discretion to modify these provisions has been alleviated. For the avoidance of doubt, had the court rested this decision on the merits of the appeal, the City's acknowledgment that it must engage in collective bargaining over any proposed change to the current three-platoon system, 24/28 shift schedule, or

[61] A258.

[62] A331–332.

[63] Dkt. 47 (Tr. at 27).

maximum number of work hours per year above 2496 is a position upon which this court would have accepted as a basis for affirming the PERB's remand decision. *See In re Rural/Metro Corp. S'holders Litig.*, 102 A.3d 205, 246–47 (Del. Ch. 2014) ("Judicial estoppel applies in Delaware when (i) "a litigant advances a position inconsistent with a position taken in the same or earlier legal proceeding" and (ii) "the court was persuaded to accept the previous argument as a basis for its earlier ruling.'" (quoting *VIII–Hotel II P Loan Portfolio Hldgs., LLC v. Zimmerman*, 2013 WL 5785290, at *3 (Del. Super. Sept. 19, 2013)).[64]

20. The IAFF argues that the Executive Director and PERB were required to accept the IAFF's LBFO because, in the Original BIA Decision, the Executive Director determined that the City's term for calculating the firefighters' effective hourly rate was not supported by sufficient evidence.[65] The IAFF cites no case to support this argument, and it appears contrary to the statutory framework, which provides that "no single factor . . . shall be dispositive" except for the financial ability

[64] The IAFF's related argument that the Executive Director and the PERB had no comparable collective bargaining agreement or case decision to support the discretion bestowed upon the Chief of Fire is therefore of no moment. The Executive Director cited the current CBA between the City and the Fraternal Order of Police, which authorizes the Chief of Police to change permanent work schedules, within certain express limitations. A260–61. While not identical to the language in the City's LBFO, the City's contract with the FOP reflects a certain level of discretion in setting work schedules. Again, it is important to note that no one factor (other than the factor concerning the public employer's ability to meet the costs of the contract) controls. The Executive Director is entitled to give due consideration to all of the factors, and I conclude she did so here.

[65] IAFF Opening Br. 30.

of the public employer to meet the costs of any proposed settlement. 19 *Del. C.* § 1615(d). Indeed, the Executive Director also found that several of the IAFF's proposals were not supported by the record.[66] Binding interest arbitration is winner take all. Section 1615(d) required the Executive Director to give "due weight" to each relevant factor. *Id*. "[W]ritten findings of fact are not required for each of the factors [in Section 1615(d)] so long as each factor is considered*." Fraternal Order of Police Lodge No. 4 v. City of Newark*, 2003 WL 22256098, at *2 (Del. Ch. Sept. 29, 2003). The court is satisfied that the Executive Director met her statutory duties to consider all relevant factors and complied with the Court's Remand Order.

21. The City's motion to dismiss IAFF's unperfected appeal is GRANTED. IAFF's request to confirm perfection of its appeal is DENIED.

/s/ Paul A. Fioravanti, Jr.
Vice Chancellor

[66] A200; A216; A220.