
Interest Arbitration Developments -- 1999

Public Employment Relations Commission

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What follows is a review of interest arbitration developments since the April 1998 Annual Conference.

Commission Decisions

1. Interest Arbitration Appeal Decisions

In *Borough of Allendale*, P.E.R.C. No. 98-123, 24 *NJPER* 216 (¶29103 1998), the Commission affirmed an award involving the Borough's police force. The award was issued after an earlier award was remanded on procedural grounds. See *Borough of Allendale*, P.E.R.C. No. 98-27, 23 *NJPER* 508 (¶28248 1997). The Commission held that the arbitrator adequately analyzed the evidence presented on the relevant statutory factors and reached conclusions supported by substantial credible evidence in the record.

The Commission rejected the Borough's argument that, under the award, unit salaries were excessive when compared with those of several high-level state officials. The arbitrator appropriately exercised his discretion in awarding increases based on all

the statutory criteria, including comparisons with private employees in general, public employees in general, and other police officers. The Act does not mandate that a particular salary relationship be maintained between police officers and other employees.

The arbitrator's conclusion that the Borough was a financially sound community was supported by the record and it was appropriate for him to note that the savings realized by the Borough through police force attrition could be a source for funding the difference between his award and the Borough's offer.

Allendale also held that:

- The arbitrator did not err in analyzing the parties' final offers in terms of how they would affect patrol officers at the top step of the salary guide, when those officers comprised a substantial majority of the unit.
- Although the arbitrator considered the Borough's evidence concerning police salaries in urban areas, he was not compelled to award the Borough's offer in light of that evidence when he found, in

effect, that the salaries of city officers were depressed by their employers' serious financial problems.

- The arbitrator was not required to award increases equal to what he found to be the cost of living where, based on all the statutory factors, he concluded higher increases were appropriate.

Allendale also found that the arbitrator did not err in taking notice of the annual report on private sector wage increases, prepared by the New Jersey Department of Labor at the Commission's request, pursuant to *N.J.S.A. 34:13A-16.6*. In the administrative and judicial context, parties have an opportunity to be heard on the propriety of noticing a matter and the tenor of the matter noticed. While it may have been preferable for the arbitrator to give the parties an opportunity to be heard, the Borough's objections to the report were unpersuasive and the Legislature clearly intended that the survey would be used in arbitration proceedings.

In *Rutgers, the State Univ.*, P.E.R.C. No. 99-11, 24 *NJPER* 421 (¶29195 1998), the Commission affirmed awards involving Rutgers' rank-and-file and superior police officers. Rutgers had contended that they were *per se* void because they were issued

four months after the date on which the parties had agreed to extend the statutory deadline for issuing the awards. Rutgers also maintained that the arbitrator did not properly calculate the total net annual economic changes resulting from the awards, did not properly apply the comparability criterion, and issued awards unsupported by substantial credible evidence in the record.

Consistent with *Cherry Hill Tp.*, P.E.R.C. No. 97-119, 23 *NJPER* 287 (¶28131 1997), the Commission held that the statutory goal of providing an expeditious, effective and binding procedure for the resolution of disputes would not be served by vacating a late award and starting proceedings all over again. The common law rule that an arbitrator's authority expires after the deadline in the parties' agreement does not pertain to compulsory interest arbitration, where the arbitrator's authority is derived from statute and any agreement to extend the deadline is made within a statutory framework mandating interest arbitration as the method for resolving the parties' impasse. However, failure to issue a timely award or observe proper extension procedures will be viewed seriously under *N.J.S.A. 34:13A-16e(2)*.

The arbitrator complied with the requirement in *N.J.S.A. 34:13A-16d(2)* to "separately determine" whether the total "net *annual economic changes* for *each* year of the agreement are reasonable under the statutory criteria." Given the italicized language, an arbitrator satisfies *N.J.S.A. 34:13A-16d(2)* if he or she identifies what new costs will be generated in each year of the agreement and figures the change in costs from the prior year rather than from the beginning of the contract. If the Legislature had intended to require that arbitrators calculate each year's new costs, plus the repeating costs from prior years of the award, it would not have directed them to determine the "annual economic changes" for "each" year of the award. Therefore, the arbitrator did not violate *N.J.S.A. 34:13A-16d(2)* when he did not calculate the cumulative cost of the awards. Further, the arbitrator was not required to calculate the cumulative cost of the awards in order to assess their financial impact. *N.J.S.A. 34:13A-16g(6)*. Rutgers did not show how the cumulative cost of the awards undermined the arbitrator's financial analysis.

The arbitrator's unchallenged factual findings supported his conclusion that Rutgers police officers had much in common with

municipal police officers in Middlesex County. Therefore, the arbitrator appropriately compared Rutgers police to those officers. The Commission's comparability guidelines, *N.J.A.C. 19:16-5.14*, did not require that Rutgers police be compared only with those at other State colleges and universities. While comparison with other college and university police officers would also have been appropriate, the lack of specific discussion concerning those officers did not, given the record, undermine the arbitrator's award.

The Commission also rejected Rutgers' argument that the arbitrator did not adequately consider the "State settlement" and Rutgers' agreements with its other non-faculty employees. The arbitrator noted that Rutgers' agreements with its other non-faculty units conformed to the State settlement and that its agreement with its faculty unit was also modeled on the settlement. However, the arbitrator was not required to give dispositive weight to the dollar amount increases included in agreements with other non-faculty employees where he concluded that a higher award was appropriate based on the evidence concerning private-sector wage increases, the cost of living, statewide interest arbitration

awards and settlements, and the salaries of police officers in Middlesex County.

The arbitrator did not commit reversible error by not referring to the State settlement in his discussion of "public employment in general," *N.J.S.A.* 34:13A-16g(2). The arbitrator recognized that Rutgers' offer tracked that settlement; he granted the health proposal included within it; and he awarded the four-year agreement that Rutgers had sought in order to place the FOP units on the same cycle as State employees. The arbitrator therefore considered the settlement and Rutgers did not show why the arbitrator should have given it greater weight.

In *Borough of Bogota*, P.E.R.C. No. 99-20, 24 *NJPER* 453 (¶29210 1998), the Commission vacated an award involving the Borough's police force, which was issued after an earlier award had been vacated and remanded. See *Borough of Bogota*, P.E.R.C. No. 98-104, 24 *NJPER* 130 (¶29066 1998). The Commission held that the arbitrator did not fully analyze the 1996 private sector wage report that the first *Bogota* decision had directed him to review or the 1997 report that he took arbitral notice of. The arbitrator was not compelled to award different salary increases than he did in his first award.

However, he was required to provide a reasoned explanation as to how he weighed all the statutory factors in arriving at his award and, given the remand, to explain how the additional private sector employment evidence factored into his analysis. The arbitrator did not provide such an explanation because he focused on portions of the reports and did not explain why he found some information -- *e.g.*, the statewide wage increase for 1996 -- more probative than other information, -- *e.g.*, the statewide increase for 1995.

The Commission declined to modify the award -- the remedy requested by the Borough. Determining salaries requires an analysis and weighing of all the evidence submitted on all the statutory factors and should be made in the first instance by an arbitrator. The award was vacated and the matter was consolidated with another interest arbitration proceeding between the parties, which was initiated in 1998.

In *Borough of Lodi*, P.E.R.C. No. 99-28, 24 *NJPER* 466 (¶29214 1998), the Commission discussed the process for formulating an interest arbitration award and specified what an arbitrator should include in an interest arbitration opinion. Because the Reform Act sets forth general criteria rather

than a formula, the setting of wage figures necessarily involves judgment and discretion and an arbitrator will rarely be able to conclusively demonstrate that his or her award is the only "correct" one. Some of the evidence may be conflicting and an arbitrator's award is not necessarily flawed because some pieces of evidence, standing alone, might point to a different result. However, the arbitrator should state what statutory factors he or she considered most important in arriving at the award, explain why they were given significant weight, and explain how other evidence or factors were weighed and considered in arriving at a final award. Once an arbitrator has provided such a reasoned explanation for an award, *N.J.A.C.* 19:16-5.9, a party appealing an award must offer a particularized challenge to the arbitrator's analysis and conclusions.

The award in *Lodi* involved the Borough's police force. As in most arbitration proceedings, the evidence did not point ineluctably to a particular salary increase. Although the arbitrator thoroughly reviewed the evidence on all the statutory criteria, he did not explain what factors he found most important; why he gave those factors more weight than others; or how he weighed and

considered other evidence or factors in arriving at his final award. Therefore, the Commission could not assess the Borough's arguments that the wage increases were not justified given the Borough's financial condition without, for example, an explanation of how the arbitrator weighed evidence of what he found to be the Borough's severe short-term budgetary difficulties vis-a-vis evidence concerning the Borough's strong tax base and high tax collection rate. The case was remanded for further explanation. On remand, the arbitrator was also asked to separately determine whether the total net annual economic changes for each year of the agreement were reasonable under the eight statutory criteria. *See N.J.S.A.* 34:13A-16d(2).

In *Delran Tp.*, P.E.R.C. No. 99-86, 25 *NJPER* ____ (¶____ 1999), the Commission affirmed an award involving the Township's police lieutenants. The unsettled issues were shift differential, accumulated sick leave, prescription co-payments and holiday pay. The arbitrator awarded the Township's proposal on the first three items, as well as the union's proposal to include holiday pay in base pay. The Township asked the Commission to vacate the award as it pertained to holiday pay.

It argued that it could not legally implement that portion of the award because it had been advised by the Division of Pensions that it could include holiday pay in base pay for pension purposes only if it did so for other units whose members were part of the Police and Fire Retirement System (PFRS). It noted that its patrol officers were PFRS members and that it could not unilaterally change its agreement with that unit, which provided for lump sum payments of holiday pay. It also maintained that the arbitrator did not have jurisdiction to change the holiday pay provisions for the patrol officers' unit.

The Commission first addressed a threshold procedural issue. It held that, in the future, challenges to an arbitrator's jurisdiction or the legal arbitrability of a proposal should be made before the arbitrator's final opinion and award, in accordance with *N.J.A.C.* 19:16-5.5(c), which governs the filing of scope of negotiations petitions in connection with interest arbitration proceedings. However, the Commission considered the Township's appeal, noting that the Division of Pensions letter had not been received until after arbitration hearings had begun.

The Commission affirmed the award, reasoning that the arbitrator's order did not

address the pension implications of the holiday pay proposal and that the award could be legally implemented, consistent with the Division of Pension's advice, by including holiday pay in base pay for overtime purposes -- one of the union's original objectives. The Commission stressed that neither it nor the arbitrator had jurisdiction to determine what is included in base pay for pension purposes. It stated that *N.J.S.A.* 34:13A-18 prohibited an arbitrator from issuing any "finding, opinion or order" regarding any aspect of the "rights, duties, obligations in or associated with" any governmental retirement system or pension fund. In addition, an interest arbitrator may not rule on proposals that would, because of requirements that unit and non-unit employees be treated uniformly, affect employees not subject to the arbitrator's jurisdiction.

Based on the Division of Pensions letter in *Delran*, it appeared that whether the holiday pay for the lieutenants' unit is creditable for pension purposes will depend on whether the Township and the patrol officers' unit agree that that unit shall also receive holiday pay on a periodic rather than lump sum basis. If they do, one effect of the arbitrator's ordering that holiday pay be included in base pay will be that the holiday pay for both units

will be creditable for pension purposes. But that result will flow not from an impermissible ruling on pension matters, *N.J.S.A.* 34:13A-18, but from the combined effect of the arbitrator's ruling on mandatorily negotiable compensation issues, an agreement between the Township and another negotiations unit, and the Division of Pension's construction of its regulations.

2. Interest Arbitration Interlocutory Appeal Decisions

In *Edison Tp.*, P.E.R.C. No. 98-124, 24 *NJPER* 221 (¶29104 1998), the Commission denied the Township's request for special permission to appeal an arbitrator's interlocutory order directing it to produce its auditor's worksheets. There was no basis to disturb the arbitrator's ruling that the worksheets were relevant to the cross-examination of the auditor. The arbitrator also correctly ruled that the union could have a right to the worksheets even if a member of the public might not be able to obtain them under statutes and case law governing access to public records. The specific, hearing-related need for the documents outweighed the Township's interest in not disclosing the documents. In declining special permission to appeal, the Commission

did not decide whether disclosure of municipal budget worksheets would be required in all circumstances.

In *City of Trenton*, P.E.R.C. No. 98-165, 24 *NJPER* 358 (¶29172 1998), the Chair denied the City's request for special permission to appeal an interest arbitrator's interlocutory ruling limiting the arbitration proceeding to the issues listed in the PBA's petition initiating interest arbitration. The arbitrator ruled that the City had not identified additional issues to be arbitrated within the time prescribed by *N.J.A.C.* 19:16-5.5(b) and, therefore, could not submit its work schedule proposal to arbitration.

While assuming that the City's initial objection to processing the petition tolled the time for filing a response, the Chair found that the City still did not identify additional issues after it agreed to proceed to interest arbitration -- despite the Director of Arbitration's letter stating the consequence of failing to do so. Further, any agreement to submit the work schedule to mediation before an interest arbitrator would not entitle the City to have the proposal considered at a formal hearing. *See also Borough of Allendale*, P.E.R.C. No. 98-27.

In *City of Newark*, P.E.R.C. No. 98-166, 24 *NJPER* 360 (¶29173 1998), the Chair denied special permission to appeal an interest arbitrator's interlocutory ruling denying the City's request for an extension of time to respond to the union's interest arbitration petition or, in the alternative, authorization to include health benefits as part of its economic proposal. After the petition was filed, the City requested an extension of time to file a response and, in addition, asked that the proceeding be stayed pending resolution of its unit clarification petition. The Director of Arbitration declined to stay the proceeding; the City participated in mediation sessions; and, a year after the petition was filed, the City again requested permission to file a late response. Assuming that the City had initially established good cause for an extension of time to file a response, the Chair found that it did not explain why it could not or did not follow up on that request until one year after it learned that the petition would be processed.

3. Other Decisions of Note

In *City of Garfield*, I.R. No. 99-2, 24 *NJPER* 446 (¶29205 1998), PBA Local No. 46 applied for interim relief seeking an order

directing the City to implement an interest arbitration award. The Commission designee found that the PBA had established the elements required for granting interim relief. He reasoned that *N.J.S.A.* 34:13A-16f(5)(b) requires that an award that is not appealed to the Commission be implemented immediately. Although the City had filed an appeal from the award, it later withdrew the appeal. The designee reasoned that, under the most generous interpretation of the Act, the City was required to implement the award 14 days after the Commission deemed the case closed. *See N.J.S.A.* 34:13A-16f(5)(b)(an award that is appealed and that is not set aside by the Commission shall be implemented 14 days after receipt of the Commission's decision absent a stay). The designee concluded that the City's failure to implement the award undermined the Act's express language, created labor instability, and irreparably harmed the collective negotiations process. In considering the public interest and the relative hardship to the parties, he found that the balance tipped in the PBA's favor because the Act states that an interest arbitration award shall be final and binding, the City had not explained why it did not comply with the award, and the PBA membership was being

denied the right to receive benefits under the award within a reasonably prompt time frame. The City was restrained from failing to implement the award.

Private Sector Wage Survey

N.J.S.A. 34:13A-16.6 requires the Commission to make available annually, by September 1, a survey of private sector wage increases. As it did in 1996 and 1997, the New Jersey Department of Labor, Division of Labor Market and Demographic Research, compiled a report identifying changes in the average wages of private sector jobs on a county-by-county and statewide basis. The private sector jobs are those covered under the state's unemployment insurance system. The 1998 document, like the 1997 report, also shows changes in average wages for such major industry groups as construction, manufacturing, transportation, wholesale and retail trade, services and finance, insurance and real estate. Copies may be requested from the Director of Arbitration.

Continuing Education for Special Panel Members

In October 1998, the Commission held its annual continuing education program for its special panel of interest arbitrators. The program reviewed the Commission's interest arbitration appeal decisions and included panel discussions on municipal budgets and finance and on mediation, hearing and opinion-writing issues. The panel on municipal budgets and finance was composed of special panel members with expertise in those subjects. They discussed such topics as reviewing budgetary and fiscal evidence in light of the revised statute, performing trend analyses of fiscal elements, and reviewing expert testimony and reports on financial and budget issues.

The panel on mediation, hearing and opinion-writing issues was composed of two special panel members who excel in these areas. They emphasized that the Reform Act, like the predecessor statute, encourages arbitrators to assist parties in resolving disputes and they shared their approaches for helping parties reach agreement. With respect to hearing and opinion-writing issues, panel members discussed how to write opinions that show that all statutory factors were considered and weighed, reviewed approaches to analyzing the types of evidence and arguments

that parties are presenting on the statutory factors and discussed how to comply with the statutory requirement to determine "net annual economic change."

Reappointment of Special Panel of Interest Arbitrators

In February 1996, shortly after the enactment of the Police and Fire Public Interest Arbitration Reform Act, *P.L. 1995, c. 425*, the Commission appointed, for three year terms, most members of the current Special Panel of Interest Arbitrators. The Commission appointed only experienced and highly qualified labor relations neutrals to the panel, in recognition of the fact that any special panel member may be assigned by lot to the most demanding and complex interest arbitration. Overall, the Special Panel's performance has been excellent and, at its February 25, 1999 meeting, the Commission reappointed panel members for three-year terms.