
Interest Arbitration Developments –2000

Public Employment Relations Commission

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What follows is a review of interest arbitration developments since the April 1999 Annual Conference.

Interest Arbitration Appeal Decisions
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In *City of Newark*, P.E.R.C. No. 99-97, 25 *NJPER* 242 (¶30103 1999), the Commission affirmed an award involving the City's deputy fire chiefs. The unsettled issues were across-the-board salary increases for "grandfathered" and "non-grandfathered" deputy chiefs; whether to retain a two-tiered salary guide for non-grandfathered deputy chiefs; senior pay for non-grandfathered deputy chiefs; hazardous duty pay; and crediting of compensatory time. The arbitrator awarded hazardous duty pay; granted different across-the-board increases for the different categories of deputy chiefs; and retained the two-tiered guide for the term of the agreement. The award also provided that non-grandfathered deputy chiefs would be eligible for senior pay at the beginning of their

fifth year of service. It included a senior pay step for those deputy chiefs even though, based on their years of service, none of the non-grandfathered deputy chiefs would be entitled to senior pay until two years after the expiration of the agreement.

The City appealed, contending that, in including a senior pay step for non-grandfathered deputy chiefs, the arbitrator did not take into account the City's severe and chronic economic problems; did not calculate the cost of the senior pay step; and exceeded his powers by including in his award a senior pay salary that would not take effect until after the expiration of the agreement.

The Commission rejected these arguments. It noted that since the City had proposed to eliminate senior pay and the Association had sought to have deputy chiefs become eligible for it at the beginning of their fourth, instead of their sixth, year of service, the arbitrator stayed within the parameters of the parties' offers in changing the eligibility guidepost for senior pay. It also held that the arbitrator did not exceed his authority by

awarding a senior pay salary that would not affect any unit member until after the expiration of the agreement. An arbitrator has statutory authority to award a compensation and benefits package, and salary structure, for a negotiations unit. Negotiated settlements and interest arbitrations frequently include provisions that may not apply to any individual employee during the term of the agreement. There is no prohibition against such provisions, which are part of the compensation and benefits structure that will govern the parties' future relationship absent subsequent agreements or awards.

The Commission also rejected the contention that the award was deficient because the arbitrator did not calculate the cost to the City of some employees receiving senior pay after the contract expired. Because *N.J.S.A.* 34:13A-16d(2) requires arbitrators to calculate the costs for each year of the agreement, it does not automatically require the arbitrator to calculate the costs (or savings) that may flow from the existing salary structure after the agreement expires. Those costs can be taken into account by the parties in future negotiations and must be taken into account by an interest arbitrator in future interest arbitration proceedings. While

the future costs of an existing salary system may sometimes be relevant to assessing the financial impact of an award, the City did not show that this arbitrator's financial impact analysis was flawed.

The City also contended that, given the statutory criteria, its offer was more reasonable than the Association's and should have been awarded. The Commission rejected that argument, noting that the arbitrator fully complied with the requirement to state what statutory factors he considered most important, explain why they were given significant weight, and explain how other evidence or factors were weighed and considered in arriving at a final award. The City raised no particularized objections to the arbitrator's thorough findings and careful analysis. The Commission affirmed the award, finding that the arbitrator's conclusions were supported by substantial credible evidence in the record.

In *Teaneck Tp.*, P.E.R.C. No. 2000-33, 25 *NJPER* 450 (¶30199 1999), app. pending, Dkt. No. A-1850-99T1, the Township appealed an award involving its rank-and-file firefighters, contending first that the "removal" of the originally appointed arbitrator violated Commission rules and was

contrary to the Reform Act's policy of encouraging mediation efforts by arbitrators. It also contended that the arbitrator erred in awarding a 24/72 hour work schedule; that the 2% stipend for unit members with EMT/EMS certification was not supported by substantial credible evidence in the record; and that the arbitrator did not properly analyze the statutory factors, *N.J.S.A.* 34:13A-16g, in awarding salary increases. The Commission affirmed the award with the modification that the trial period for the 24/72 work schedule shall not be implemented unless the 24/72 schedule is agreed to or awarded with respect to the fire officers' unit.

The Commission first concluded that the Director of Arbitration had the authority to approve the original arbitrator's request to withdraw from the proceeding after he had issued two written "mediator's recommendations" that did not result in a settlement. The arbitrator had requested that he be relieved of his assignment in order to allow for expeditious resolution of the impasse and to avoid litigation over whether he had an obligation to withdraw. The Director accepted an experienced arbitrator's judgment that, given the circumstances of the case, he should withdraw from the

assignment. The Commission held that the Director's decision was a reasonable exercise of discretion.

With respect to the arbitrator's award of the 24/72 work schedule, the Township contended in part that the award would cause "chaos" in the department because the award would result in firefighters and fire officers being on a different work schedules. It also asserted that the 24/72 work schedule proposal was not mandatorily negotiable and that the arbitrator did not consider the cost of hiring additional staff to implement the schedule.

The Commission rejected the Township's argument that *Borough of Atlantic Highlands and Atlantic Highlands PBA Local 242*, 192 *N.J. Super.* 71 (App. Div. 1983), certif. denied, 96 *N.J.* 293 (1983) bars all negotiations over police or firefighter work schedules. The Commission noted that it had declined to read the case so broadly, and that another Appellate Division panel had commented, in *In re Mt. Laurel Tp.*, 215 *N.J. Super.* 108, 113 (App. Div. 1987), that such a per se exclusion would be inconsistent with *Local 195, IFPTE v. State*, 88 *N.J.* 393 (1982).

The Commission also addressed the FMBA's claim that the Township was required to raise any claim that there was a particularized need to preserve the existing work schedule in a pre-arbitration scope petition. Procedurally, the Township was required to file a pre-arbitration scope petition if it sought to prevent an interest arbitrator from considering the proposal. *N.J.A.C. 19:16-5.5(c)*. But the Township could still argue in its appeal that the arbitrator did not give enough weight to, or consider evidence concerning, such issues as the proposed work schedule's cost or its impact on department operations, discipline or supervision.

The Commission noted that where an appeal does challenge an arbitrator's ruling on a non-salary proposal to change an employment condition, it will consider whether the arbitrator applied the traditional arbitration principle that the party proposing a change must justify it. Further, before awarding a major work schedule change, an arbitrator should carefully consider the fiscal, operational, supervision and managerial implications of such a proposal, as well as its impact on employee morale and working conditions. Finally, an arbitrator cannot award a proposal that would result in superior

and rank-and-file employees working different schedules, unless he or she finds that the different work schedules will not impair supervision or that, based on all the circumstances, there are compelling reasons to grant the proposal that outweigh any supervision concerns.

With respect to the award in *Teaneck*, the Commission concluded that the arbitrator's award of a proposal that would result in different work schedules for fire officers and firefighters raised serious supervision and operational concerns and should not have been awarded on the record before him. At the same time, the record supported the arbitrator's conclusion that the FMBA offered undisputed evidence as to the potential benefits of the 24/72 schedule. The arbitrator reasonably gave greater weight to the FMBA's evidence as to these potential benefits, which was based on data from other jurisdictions, than to the Township's contrary evidence, which was not similarly grounded. Further, based on its review of the record, the Commission found that there was no basis for concluding that additional staff would be required to implement the 24/72 schedule. The Commission therefore approved the arbitrator's decision to award the 24/72

schedule on a trial basis, with the modification that the schedule shall not be implemented unless and until a 24/72 schedule is agreed to or awarded with respect to the fire officers' unit.

The Commission specifically approved the arbitrator's establishment of a trial period. Where, as here, a work schedule change was awarded because of potential benefits, as opposed to problems with an existing schedule, it was appropriate for the arbitrator to establish a mechanism to ensure that the awarded schedule will not become the new status quo unless the predicted benefits materialize. A trial period accomplishes that. However, the arbitrator's "trial period" did not clearly provide that the new work schedule would not become part of the status quo for successor contract negotiations, a concept which is a necessary part of a trial period. The Commission clarified that the 24/72 schedule will not be continued into the agreement that follows the completion of the trial period unless there is a mutual agreement to do so, or an interest arbitrator awards the schedule anew. If there is no mutual agreement, the old work schedule will effectively be restored and the burden will be

on the FMBA to again justify adoption of a new work schedule proposal.

Finally, the Commission held that the arbitrator's award of salary increases and a 2% stipend for EMT/EMS certification was supported by substantial credible evidence in the record as a whole. In awarding salary increases, the arbitrator stated what statutory factors he considered most important, explained why they were given significant weight, and explained how he weighed other evidence or factors. The decision to place significant weight on the increases received by other public safety employees in the Township is consistent with the Reform Act, which requires the arbitrator to compare the salaries of employees performing the same or similar services in the same jurisdiction. *N.J.S.A. 34:13A-16g(2)(c); N.J.A.C. 19:16-5.14(c)*. In any particular proceeding, an arbitrator may determine that that subfactor is important, especially where a strong internal pattern exists.

With respect to the award of the EMT/EMS stipend, the arbitrator reasonably concluded that it was appropriate, as part of an overall economic package, to compensate those unit members who obtained training that their employer believed was useful, although

not required, for their position. The Commission recognized that the stipend could prompt more firefighters to obtain EMT training and that this could have an economic impact on the Township that it believes outweighs the benefits of firefighters having the certification. If a large number of firefighters obtain the certification, the Township may emphasize this additional salary obligation in future negotiations and interest arbitration. It may also seek to remove the stipend from the agreement. But the possible future effects of the arbitrator's awarding the stipend did not provide a basis for disturbing the award.

The Township has appealed the Commission's decision and the FMBA has cross-appealed from that part of the Commission's decision modifying the arbitrator's award.

Continuing Education for Special Panel Members

In October 1999, the Commission held its annual continuing education program for its special panel of interest arbitrators.

The program included a review of interest arbitration developments.

Commission interest arbitration appeal decisions, and other court and Commission decisions of note. In addition, four distinguished advocates – two management and two labor representatives – addressed the panel about their experiences thus far under the Act. All four advocates supported strong mediation efforts by interest arbitrators.

Biennial Report on the Police and Fire Public Interest Arbitration Act

N.J.S.A. 34:13A-16.4 requires that the Commission submit biennial reports to the Governor and Legislature on the effects of the Police and Fire Public Interest Arbitration Reform Act on "the negotiations and settlements between local governmental units and their public police departments and public fire departments." The Commission's second report was submitted in January 2000. It reviewed Commission actions in implementing and administering the statute and provided information concerning interest arbitration petitions, settlements, awards and appeals during the first four years of the Act. The report identified the following trends during the first four years of the Act:

- Parties are invoking the interest arbitration process less frequently than before the Act.
- In most cases, the parties have mutually agreed on the selection of an interest arbitrator instead of having an arbitrator assigned by lot by the Commission.
- There is a significant trend towards interest arbitrators assisting parties in reaching voluntary settlements, rather than issuing formal awards.
- When disputes do proceed to an award, interest arbitrators are overwhelmingly deciding disputes by conventional arbitration -- the terminal procedure mandated by the Act unless the parties agree to one of the other optional procedures allowed by statute.
- The number of awards issued in each of the last four calendar years is substantially less than the average annual number of awards issued under the predecessor statute.
- During the past several years, including the four years in which the Reform Act has been in place, there has been an overall decline in the average salary increases awarded by arbitrators or agreed to by the parties in voluntary reported settlements.

The report concluded that there have been no significant problems in the

implementation and administration of the Act and that the Commission plans to continue its emphasis on encouraging mediation and maintaining a high quality special panel of interest arbitrators.