

MINUTES OF SPECIAL MEETING
NEW JERSEY PUBLIC EMPLOYMENT RELATIONS COMMISSION
April 9, 2012
11:00 a.m.
495 West State Street
Trenton, New Jersey

The meeting was called to order by Chair P. Kelly Hatfield.

Present by telephone were:

Commissioners:

John Eskilson
Sharon Krengel
Paula B. Voos

Also present were:

David Gambert, Deputy General Counsel
Mary E. Hennessy-Shotter, Deputy General Counsel
Don Horowitz, Deputy General Counsel
Christine Lucarelli-Carneiro, Deputy General Counsel
Martin R. Pachman, General Counsel
Annette Thompson, who acted as Stenographer

At the commencement of the meeting, Chair Hatfield, pursuant to section 5 of the Open Public Meetings Act, entered this announcement into the minutes of the meeting:

Adequate notice has been provided by the dissemination of a written "Notice of Special Meeting."

On April 4, 2012 a copy of such notice was:

(a) prominently posted in a public place at the offices of the Public Employment Relations Commission;

(b) sent to the business offices of the Trenton Times, the Bergen Record, and the Camden Courier Post, as well as to the State House press room addresses of 25 media outlets;

(c) mailed to the Secretary of State for filing; and

(d) posted on the agency's web site.

A roll call was initiated to confirm the Commissioners that were present on the telephone. Commissioners Jones and Wall were not present because they were recused from voting. Commissioner Bonanni was not present due to a pending recusal issue.

The first item for consideration was Borough of Milltown and Policemen's Benevolent Association Local No. 338, Docket No. IA-2010-051. Commissioner Eskilson moved the draft decision and Chair Hatfield seconded the motion. Commissioner Krengel stated that she disagrees with the decision. She stated that she felt the arbitrator addressed the statutory points as requested and he also addressed the effect on taxpayers. Commissioner Voos stated the fundamental purpose of the new interest arbitration law, with its emphasis on speedy decisions, requiring more and more elaborate write-ups, just seems unfair. Commissioner Eskilson stated the arbitrator was asked for additional discussion. The arbitrator does not provide a comprehensive discussion of the 1.5% cap on premium contributions. Commissioner Eskilson continued that the decision should be remanded for another arbitrator to be assigned. It does not meet the challenge that was put forth by the Commission in its original remand. Mr. Pachman stated the basic problem that led to this draft being produced was frankly we did not believe that the arbitrator applied any additional thinking or analysis to the award that had been remanded back to him. This was the second remand, we are

now dealing with the third one. There was no analysis, with reference to the record, that demonstrated why he reached the conclusions he reached. Unfortunately it was not there. The process he was asked to go through was not done in a sufficiently analytical way so that the decision can stand up on its own. Commissioner Eskilson stated although he was asked for additional analysis the arbitrator just spent time diving back into the record trying to prove that he did the analysis we felt he did not accomplish in the first go round. Chair Hatfield stated that even though this predates the new interest arbitration law, under the old statutory criteria, we are just trying to make sure there is a fair analysis and evaluation by the arbitrator. Looking at the second award we did not feel he met that requirement. Commissioner Krengel stated there is a greater issue here. If we have to continue to remand these decisions then there is an issue of how we can better understand the statute, increase training for arbitrators, etc. In this case we are perhaps confusing analysis and elucidation. She did not feel the analysis was so terribly weak in the arbitrator's first effort. It was remanded, not to redo the analysis, but requiring elucidation, especially under the statute. I feel we got what we asked him for. There is a question now about whether arbitrators are equipped now to do their work, which is a separate question, but a real one. Chair Hatfield responded there have been several trainings for

the interest arbitrators. One was held last October which outlined the changes in the new law. There was another meeting in January where we invited fact-finders and arbitrators. Marc Pfeiffer did an excellent job discussing local government finances, which is extremely complicated. It is challenging for everyone. When these awards are appealed or remanded, it is not taken lightly. Mr. Pachman responded that we need to remember that under 16G of the statute an arbitrator is required to elucidate which of the factors are relevant and satisfactorily explain why the other factors are not relevant. That was one of the basis for which the original award was remanded.

Commissioner Eskilson states this decision does not meet the challenge of the original remand. It was directed that the arbitrator shall indicate which of the factors seems relevant, satisfactorily explain why the others are not relevant, and provide an analysis of all of the relevant evidence of each relevant factor. The arbitrator must also address the arguments of the parties and explain why he accepts or rejects each specific argument, and the arbitrator shall specifically, and with the appropriate detail, analyze and consider all of the factors as set forth in the statute. This would seem to require a lot more thought and explanation than that which was provided in the second decision. It is totally inadequate. The motion to adopt the draft decision resulted in a tie vote, two in favor

(Chair Hatfield and Commissioner Eskilson) and two opposed (Commissioners Krengel and Voos).

The next case for consideration was Borough of New Milford and PBA Local 83, Docket No. IA-2012-008. Commissioner Eskilson moved the draft decision and Chair Hatfield seconded the motion. Commissioner Voos stated that she is not comfortable with stating that the law requires that the arbitrator use this scattergram method. The problem with reviewing a scattergram is that the increments will have a different amount depending on where the existing employees are placed on the grid. On the other hand employees may leave, quit, new employees may be hired, etc. Somehow asking arbitrators to put the employees in a spreadsheet may or may not be necessary. Mr. Pachman explained the purpose of a scattergram. The scattergram in negotiations traditionally is a snapshot of the employee compliment before the old contract expires. Employees who may retire, who may be hired, who may be promoted, etc. these are imponderable future occurrences that can not be calculated in any way. Therefore, when the Legislature spoke about 2% of last year's base, they are speaking about 2% based upon the same compliment of employees including the increment and longevity and any of the other statutory inclusions in base pay that has been set forth in the statute. Otherwise you could never calculate the 2% because your base would always be changing. You must establish a base number from which

increases and decreases in cost can be calculated. It has become universally accepted that the scattergram becomes the base of which your salary calculations are made for the assuming years of the contract. The scattergram is "frozen picture" of the compliment of employees, as of whatever date the parties agree to, and under our law it has to be as closely as possible to reflect the cost for the previous year. It becomes critical in determining whether or not an arbitrator, under the new law, has met his or her burden. Commissioner Eskilson agrees there is no other practical or reasonable way to do the calculations. Commissioner Voos states it is very different when you are talking about a statute that arbitrators are applying. The ignoring of breakage always means that the costs are overestimated and applying a hard cap to a number that is an overestimate is systematically something that should not be recommended. Mr. Pachman responded that there is absolutely no way to effectively apply the 2% cap unless the breakage is not calculated, nor is the cost for additional employees or the overtime costs that may result from replacement of any employees leaving. The actual cost is a much more fluid thing than what the scattergram shows, and therefore as Commissioner Eskilson just said there is no way to calculate that. The notion of breakage does not necessarily mean that it works to the employer's advantage. The breakage itself does, but the

replacement costs are completely outside of the scattergram and that comes out of the employer's side of the ledger. Ultimately it turns out to be a balance. When the Legislature imposed this 2% cap it had to be imposing it on a 2% cap based on the preceding years aggregate salaries. The only way to generate those numbers prospectively is by the methodology that we have suggested in this decision in terms of using the scattergram to determine a finite number now and then relying on that determination to drive future calculations. Commissioner Eskilson stated that the law indicates that the 2% is calculated based on the amount of money expended in the previous year. This is the kind of thing that happens when you look at breakage in individual positions. Chair Hatfield commented that we are trying to articulate what the arbitrators' assignment is under the new law. We are trying to make it clear. This is a precedent setting case because it is the first award before us that addresses the 2% cap. We are modifying our review standards so that we can be clear on what is expected of the arbitrator. Commissioner Voos asked if college credits, detective stipend and uniform allowance are part of base salary. Ms. Hennessy-Shotter stated that if the parties are proposing that it be included in base salary, it is not mandated by the statute. However the arbitrator has to consider it and then make a determination. Commissioner Eskilson states that in this case it was not

addressed. The inclusion of these items actually helps the PBA's position with respect to calculation of the cap. Chair Hatfield states that the law specifically states that the parties can agree as to whether or not it is part of base salary in the prior contract. Commissioner Voos stated that these are economic as opposed to non-economic issues and they should be included. Mr. Pachman responded whether an item is generally economic or not is not the standard. The standard on which 2% is based is the base salary calculation, and that calculation statutorily is mandated to include salary, longevity and incremental movement. Commissioner Eskilson stated the arbitrator did not do the math on the 2% calculation. The municipality provided detailed information regarding how they came to the conclusion of why certain positions exceeded the statutory cap limit. It seems the arbitrator, at minimum needs to address that scattergram, which was not done or addressed. It is in the record, but not disputed in any detailed way, no analysis provided. That issue alone is enough to remand this case. Chair Hatfield stated that this is a new arbitrator and this is clearly new ground. With this draft and instructions it will help the arbitrators understand our new review standards. Commissioner Krengel stated that it is important to inform the arbitrators what is expected in their awards going forward. Mr. Pachman stated that the statute requires them to do that calculation and if it requires us to

review the number to determine whether the calculation that was done was accurate, I do not think it is too much to ask them to show their work. It is a complex set of calculations, there are multiple aspects to it. There are two ways, if the Commission agrees this is the appropriate approach to take. 1) We can write new rules or 2) ask for what we are requested in this decision on a decisional basis, and if at some point a particular set of facts come to us that show that those calculations or that methodology is inappropriate or results in an unacceptable result we can then modify it through a change in what we require in the decision. Commissioner Kregel agrees that the facts and figures have always had to be in awards, but the level of detail, in terms of the figures and in terms of abiding by the new statute that we are looking for, perhaps it is not so clear. She continued that she understood how cumbersome it is to rewrite rules, but perhaps in our language in these decisions, with the new statute, we should be making it clearer that we are not remanding because the arbitrators are not doing their job appropriately, but we are finding that the arbitrators are not providing us with the level of detail about their analysis that we feel is now required. Chair Hatfield responded that she agrees and that was part of our goal to make this clear. She referred to the language on page 12 for clarification. Commissioner Eskilson stated the decision should be amended to

reflect the methodology as to how base salary was calculated. It was amended to state "and the methodology as to show how base salary was calculated." Commission Voos seconded the amended motion. The motion to adopt the draft decision was unanimously approved (Chair Hatfield, Commissioners Eskilson, Krengel and Voos).

The meeting was then adjourned.

The next meeting is scheduled to be held on Thursday, April 26, 2012.