

PUBLIC EMPLOYMENT RELATIONS COMMISSION

1997 - INTEREST ARBITRATION DEVELOPMENTS

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1996 saw the enactment of the Police and Fire Public Interest Arbitration Reform Act, *P.L. 1995, c. 425*, which was signed into law on January 10, 1996. What follows is an overview of the statute, a summary of the Commission's actions in implementing the law, and a review of case law developments under the statute. Also included is information on the number of interest arbitration petitions filed since the enactment of *P.L. 1995, c. 425*, the number of awards issued under the new statute, and other information concerning the administration of the statute.

A. INTEREST ARBITRATION STATUTE

A synopsis of *P.L. 1995, c. 425* follows, but the reader must rely on the text of the law rather than this synopsis.

Legislative Declaration of Public Purpose

Section 1 provides a name for the interest arbitration statute: the Police and Fire Public Interest Arbitration Reform Act.

Section 2 modifies the legislative declaration of public policy. The Legislature recognizes the unique and essential duties police officers and firefighters perform and the life-threatening dangers they face. The interest arbitration procedure is declared to promote the well-being and benefit of New Jersey citizens as well as the high morale of

employees and the efficient operation of police and fire departments. That procedure is meant to ensure that the arbitrators recognize and consider the interests and welfare of the taxpaying public and the impact of their decisions on the public interest and welfare.

Negotiations Procedures

Section 3a (*N.J.S.A. 34:13A-16(a)*) changes the dates for commencing negotiations. Negotiations must begin at least 120 days before a collective negotiations agreement expires and the parties must meet at least three times within that period unless they agree to postpone the second and third meetings. A violation of these deadlines constitutes an unfair practice.

Petition to Initiate Interest Arbitration

Section 3b (*N.J.S.A. 34:13A-16(b)(2)*) provides that a petition to initiate interest arbitration may be filed on or after the contract expiration date. Within 10 days of a non-petitioning party's receipt of a petition, the parties must notify the Commission as to whether they have agreed upon a terminal procedure.

Terminal Procedure

Subsection 3d (*N.J.S.A. 34:13A-16d*) establishes the terminal procedure if the parties have not agreed upon one. That procedure will now be conventional arbitration. The arbitrator must separately determine whether the total net annual economic changes for each year of the agreement are reasonable under the eight statutory criteria in subsection 3g (*N.J.S.A. 34:13A-16g*).

Selection of Arbitrator

Subsection 3e (*N.J.S.A. 34:13A-16e*) establishes the procedures for selecting an arbitrator if the parties have not timely agreed upon an arbitrator from the Commission's special panel. The Commission shall select the arbitrator by lot, without the parties' participation. This subsection also provides that the Commission may suspend, remove, or discipline an arbitrator for violating statutory provisions or for other good cause.

Final Offers

Subsection 3f(1) (*N.J.S.A. 34:13A-16f(1)*) changes the procedure for submitting final offers. Final offers must be submitted "on each economic and non-economic issue in dispute."

Arbitrator's Award

Subsection 3f(5) (*N.J.S.A. 34:13A-16f(5)*) sets deadlines for issuing an award. An award must be issued within 120 days of an arbitrator's selection by the parties or assignment by the Commission. An arbitrator may petition the Commission for an extension of not more than 60 days. The parties may also agree to an extension. Arbitrators may be disciplined for violating these deadlines.

Subsection 3g (*N.J.S.A. 34:13A-16g*) addresses the contents of an award and sets the criteria for deciding a dispute. The award must indicate which criteria are relevant, explain why other criteria are not relevant, and analyze the evidence on each relevant criterion. Specific changes have been made in the criteria for determining comparability; the employer's lawful authority in light of the cap law; and the financial

impact on the governing unit, its residents and taxpayers in light of the municipal or county purposes element of the local property tax, the impact of an award on each income sector of property taxpayers, and the impact of an award on a governing body's ability to maintain, expand, or initiate programs or services.

Appeal of Arbitrator's Award

Subsection 3f(5)(a) (*N.J.S.A. 34:13A-16f(5)(a)*) provides that awards may be appealed to the Commission on the grounds that the arbitrator did not apply the criteria set forth in subsection 3g or violated the standards set forth in *N.J.S.A. 2A:24-8* and *-9*.

Implementation and Enforcement of Arbitrator's Award

Subsection 3(f)(5)(a) (*N.J.S.A. 34:13A-16f(5)(a)*) states that an award that is not appealed to the Commission shall be implemented within 14 days. An award that is appealed to the Commission and not set aside shall be implemented within 14 days of the receipt of the Commission's decision, absent a stay. *N.J.S.A. 34:13A-16(f)(5)(b)*. The reform statute did not amend *N.J.S.A. 34:13A-19* which provides that the decision of the arbitrator may be enforced at the instance of either party in the Superior Court with venue laid in the county in which the dispute arose.

Arbitrator Training

A new section 4 (*N.J.S.A. 34:13A-16.1*) requires the Commission to conduct an annual continuing education program. Every arbitrator must attend that program. Failure to do so for one year may result in discipline; failure to do so for two consecutive years will result in an arbitrator's immediate removal from the special panel.

Comparability Guidelines

A new section 5 (*N.J.S.A.* 34:13A-16.2) requires the Commission to promulgate guidelines for determining the comparability of jurisdictions.

Private Sector Wage Survey

A new section 9 (*N.J.S.A.* 34:13A-16.6) requires the Commission to issue an annual survey of private sector wage increases.

Effective Date of Act

Section 11 states that the reform statute takes effect immediately and applies to all negotiations except those formal arbitration proceedings in which the arbitrator took testimony before January 10, 1996. If testimony was taken before that date, the parties will continue to use the terminal procedure in effect when the hearing began. If testimony was not taken by that date, conventional arbitration will be the terminal procedure absent an agreed-upon alternative. Any selection of an arbitrator or agreement upon a terminal procedure made before January 10, 1996 will continue to be effective.

B. REGULATIONS

The Commission adopted regulations to implement the new statute. *N.J.A.C.* 19:16-1.1 through 8.3. The Commission adopted amendments to the prior interest arbitration rules to reflect the above-noted statutory changes concerning: (1) commencement of negotiations; (2) filing of interest arbitration petitions; (3) the terminal procedure to be used in the absence of mutual agreement, and (4) the contents of the opinion and award.

In implementing these statutory provisions, the Commission regulations include additional details and timelines concerning the selection of an arbitrator, the submission of final offers, and the selection of a terminal procedure.

N.J.A.C. 19:16-5.6(b) provides that the parties shall, within 10 days of filing a petition, notify the Director of Arbitration of any mutual agreement to select an arbitrator from the Special Panel of Interest Arbitrators. The parties may also jointly request the appointment of a particular arbitrator who is not a member of the Special Panel, and the Director of Arbitration may approve the appointment of that arbitrator to the Special Panel for that particular arbitration.

N.J.A.C. 19:16-5.4(a) and (c) require the parties to notify the Director of Arbitration whether or not they have agreed upon a terminal procedure. This notification must be made within ten days after the filing of a joint petition or the receipt of a petition by the non-petitioning party. Within 10 days of receiving a mutually-agreed upon terminal procedure, the Director of Arbitration must advise the parties whether it has been approved. *N.J.A.C. 19:16-5.4(b)*.

N.J.A.C. 19:16-5.7(f) requires the parties to submit their final offers to the arbitrator at least 10 days before the hearing. It also provides that the arbitrator may accept a revision of a party's offer at any time before the arbitrator takes testimony or evidence or, if the parties agree to permit revisions and the arbitrator approves such an agreement, before the close of the hearing. The arbitrator must advise the parties that their offers shall be deemed final and irreversible unless the arbitrator approves an agreement to permit revisions before the close of the hearing.

In addition to modifying existing regulations to reflect statutory changes, the Commission adopted rules on subject areas that had not previously been addressed in its interest arbitration regulations. The following is a brief summary of some of these regulations, but the reader must rely on the full text of the rules:

Appeals of Interest Arbitration Awards -- *N.J.A.C. 19:16-8.1 through 8.3*

- Notice of appeal must be filed with the Commission within 14 days of receipt of award
- Notice of appeal must specify each alleged failure of the arbitrator to apply the criteria in *N.J.S.A. 34:13A-16g*, and each alleged violation of the standards set forth in *N.J.S.A. 2A:24-8* or *N.J.S.A. 2A:24-9*
- Notice of cross-appeal must be filed within seven days after service of notice of appeal
- Appellant's brief must be filed within 14 days after notice of appeal
- Where no cross-appeal is being filed, respondent must file answering brief within seven days after receipt of appellant's brief
- Respondent filing cross-appeal must file brief in response to appeal and in support of cross-appeal within 14 days after filing of notice of cross-appeal

- Commission may affirm, modify, correct or vacate the award or may, at its discretion, remand the award to the same arbitrator or to another arbitrator for reconsideration. If the parties are unable to agree upon a replacement arbitrator within ten days of the remand order, the arbitrator shall be selected by lot.

Disqualification of Arbitrators -- *N.J.A.C. 19:16-5.6(g)*

Permits parties to file a motion to disqualify an arbitrator. Motion may be decided by the Chair or a Commission designee or may be referred to the arbitrator or the full Commission.

Comparability Guidelines -- *N.J.A.C. 19:16-5.14*

N.J.S.A. 34:13A-16g(2)(c) lists, as one of the factors an arbitrator must consider in reviewing the parties' proposals, "public employment in the same or similar comparable jurisdictions" *N.J.S.A. 34:13A-16.2* requires the Commission to promulgate guidelines for determining the comparability of jurisdictions.

N.J.A.C. 19:16-5.14 includes guidelines that are intended to assist the parties in focusing on the types of evidence that may support comparability arguments. The guidelines are intended to be instructive, but not exhaustive. *N.J.A.C. 19:16-5.14(b)*.

N.J.A.C. 19:16-5.14(c) identifies "comparability considerations" within the same jurisdiction including:

- Wages, salaries, hours and conditions of employment of law enforcement officers and firefighters, non-uniformed employees in negotiations units; and employees not in negotiations units;

- History of differentials between uniformed and non-uniformed employees and
- Pattern of salary and benefit changes, and any other considerations deemed relevant by the arbitrator.

N.J.A.C. 19:16-5.14(d) lists factors which might be used to determine whether one jurisdiction is comparable to another -- including numerous geographic, socio-economic, and financial criteria. It also lists comparability factors concerning compensation and conditions of employment.

Standards for Appointment and Reappointment of Special Panel of Interest Arbitrators

On February 27, 1997, the Commission adopted *N.J.A.C. 19:16-5.15*, concerning standards for appointment and reappointment to the special panel of arbitrators. *N.J.S.A. 34:13A-16e* now provides that, unless the parties have mutually and timely agreed upon an arbitrator from the Commission's Special Panel to hear the case, the Commission shall assign an arbitrator to hear an interest arbitration case by lot. With this new assignment procedure, any special panel member may be assigned to the most difficult interest arbitration matter. For that reason, appointment is limited to those labor relations neutrals who have demonstrated the ability to mediate the most complex labor relations disputes and resolve the most demanding interest arbitration matters. Applicants must be members of the Commission's mediation, fact-finding and grievance arbitration panels, and have demonstrated experience as an interest arbitrator, mediator, or fact-finder.

Suspension, Removal or Discipline of Special Panel of Interest Arbitrators-- N.J.A.C. 19:16-5.16

On February 27, 1997, the Commission adopted *N.J.A.C.* 19:16-5.16 which specifies procedures for reprimanding, suspending or removing an arbitrator during his or her three-year term. The arbitrator must be provided with a written statement specifying the reasons the Director is considering disciplinary action, and must be given an opportunity to submit a response. The Director may designate a hearing officer to conduct a hearing when substantial and material facts are in dispute. Any decision by the Director to discipline an arbitrator may be appealed to the Commission.

Fee Schedules

N.J.S.A. 34:13A-16.3 authorizes the Commission to adopt a fee schedule to cover the costs of implementing the reform statute. *N.J.A.C.* 19:16-5.12 establishes a \$150 fee to file, or respond to, a petition to initiate interest arbitration. *N.J.A.C.* 19:16-5.13 sets a \$135 fee to file an appeal or cross-appeal of an interest arbitration award.

C. PROPOSED REGULATIONS

On January 30, 1997, the Commission proposed regulations concerning procedures for requesting special permission to file an appeal of interlocutory interest arbitration rulings. The proposal appeared in the March 17, 1997 *New Jersey Register*. The proposed rules are modeled on the Commission's regulations concerning special permission to appeal interlocutory rulings in unfair practice matters, and would require a party to file a request for special permission to appeal an interlocutory ruling within five days from the ruling or order. The Chair would have the authority to grant or deny

special permission to appeal and, if granted, the appeal would be heard by the Commission.

D. COMMISSION DECISIONS

In *Hudson Cty.*, P.E.R.C. No. 96-71, 22 *NJPER* 175 (¶27089 1996) and *City of Rahway*, P.E.R.C. NO. 96-72, 22 *NJPER* 175 (¶27090 1996), the Commission ruled that it does not have jurisdiction over appeals from awards issued after January 10, 1996, the effective date of the Reform Act, where testimony was taken before that date. The Commission noted that Section 11 of *P.L. 1995, c. 425* stated that the Act was effective immediately, but did not pertain to those formal arbitration proceedings in which the arbitrator had, prior to the effective date of the Act, taken testimony from the parties. The Commission concluded that it was logical to interpret this exception to the Act's immediate effective date to include all subsequent steps in proceedings which began before the effective date of the Act, including appeals.

The Commission ruled that it has the authority to grant leave to appeal interlocutory interest arbitration orders or rulings. *Middlesex Cty.*, P.E.R.C. No. 97-63, 23 *NJPER* 17 (¶28016 1997). The Commission concluded that *N.J.S.A. 34:13A-16(f)(5)(a)*, which gives it jurisdiction to decide appeals of interest arbitration awards, also implicitly gives it interlocutory review authority. Consistent with judicial and administration practice, the Commission held that it will grant leave to appeal an interlocutory order or decision sparingly. In *Middlesex*, the Commission denied leave to appeal an arbitrator's decision that an employer could not submit additional issues

for interest arbitration four months after the date by which, under Commission regulations, it was required to respond to the union's petition.

In *Borough of Stanhope*, P.E.R.C. No. 97-97, 23 NJPER ____ (¶____ 1997), the Commission remanded an arbitration award with the directive that the arbitrator apply *P.L. 1995, c. 425*. The case had been decided under the predecessor statute, although the arbitration hearings were not held until July 1996.

In a letter decision in *Borough of Fair Lawn*, Docket Nos. IA-96-68 and IA-96-69, the Chair denied a request for special permission to appeal from a ruling of the Director of Arbitration. He ruled that, pursuant to *N.J.A.C. 19:16-5.4(d)*, a party could not unilaterally withdraw from an agreement to use the final offer terminal procedure.

E. JUDICIAL DECISIONS

In *Middletown Tp. PBA Local No. 24 v. Middletown Tp.*, App. Div. Dkt. No. A-2688-94T5 (4/25/96), the Appellate Division affirmed a Chancery Division decision confirming an arbitration award issued before the enactment of the reform statute, but after the Supreme Court decisions in *Hillsdale PBA Local 207 v. Bor. of Hillsdale*, 137 N.J. 71 (1994) and *Washington Tp. v. New Jersey PBA Local 206*, 137 N.J. 88 (1994). The Court ruled that the arbitrator appropriately relied on the testimony of the PBA expert in awarding the PBA's economic package of an approximate 5% raise for 1993, 1994 and 1995, as opposed to the Township's offer of an approximate 4% raise for each year. The Court noted that: (1) the arbitrator did not have to deal with all factors specified in *N.J.S.A. 34:13A-16g*, only those he deemed relevant; (2) it was unnecessary to consider the Township's unfunded liabilities when it had a reserve for

police wages; and (3) the arbitrator properly took into account the fact that the Township was large and affluent and its police department had generally ranked number one in wages.

In *Aberdeen Tp. v. PBA Local 163*, 286 N.J. Super. 372 (App. Div. 1996), an Appellate Division panel vacated an interest arbitration award. The Court found that the award impermissibly cited statements made to the arbitrator in his capacity as a mediator.

F. ARBITRATOR TRAINING

The Commission held training sessions for arbitrators in June 1996 and October 1996. Commission staff provided an analysis of the reform statute's requirements. Financial experts presented an overview of statutes and regulations governing municipal and county budgets, and provided practical guidance on analyzing municipal and county budget documents.

G. EXPERIENCE UNDER THE NEW STATUTE

- Interest Arbitration Petitions Filed Since January 10, 1996: 179
- Interest Arbitrators Appointed Since January 10, 1996: 175
- Number of Arbitrators Selected by Mutual Agreement: 117
- Number of Arbitrators Appointed By Lot: 58
- Interest Arbitration Awards Issued Under the New Statute: 14
- Terminal Procedure Used in Awards Issued Under the New Statute:
 - Conventional 12

- Final Offer 2
- Number of Appeals Filed with the Commission 3

Of the three appeals filed, the parties in one are involved in settlement discussions; the second was remanded with a directive to apply *P.L. 1995, c. 425*, and the third is pending with the Commission.

H. PRIVATE SECTOR WAGE SURVEY

At the request of the Commission, the New Jersey Department of Labor compiled a report identifying changes in the average wage 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. This document implements the Commission's statutory obligation to publish annually, on September 1, a survey of private sector wage increases. *N.J.S.A. 34:13A-16.6*. Copies may be requested from the Director of Arbitration.