
Interest Arbitration Developments – 2003 Public Employment Relations Commission

**Susan E. Galante
Special Counsel to the Chair**

What follows is a review of interest arbitration developments since the April 2002 Annual Conference. Also included are statistics on the number of interest arbitration appeal decisions issued since 1996.

Interest Arbitration Appeal Decisions
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Court Decisions

Teaneck Tp. and Teaneck FMBA Local No. 42, P.E.R.C. No. 2000-33, 25 NJPER 450 (¶30199 1999, aff'd in part, rev'd and remanded in part, 353 N.J. Super. 289 (App. Div.), certif. granted, 175 N.J. 76 (2002)

Teaneck Tp. is the first Commission interest arbitration appeal decision to be reviewed by the Appellate Division. The Appellate Division affirmed in part and reversed and remanded in part a Commission decision that had affirmed, with a modification, an interest arbitration award granting an EMT stipend; across-the-board salary increases; and a 24/72 work schedule on a trial basis. The award involved a

firefighters' unit and the arbitrator who issued the award was the second arbitrator appointed in the proceeding.

As noted in the General Counsel's Report, the Court agreed with the Commission that the Director properly accepted the withdrawal of the first arbitrator appointed to the case. The Court also agreed that the record supported the award of the EMT stipend and that the Township was barred from contesting the negotiability of that issue since it had not filed a pre-arbitration scope of negotiations petition or raised the issue before the Commission. Further, the Court held that the 24/72 work schedule was mandatorily negotiable and that the record supported the award of the schedule on a trial basis. The Court considered the negotiability of the schedule, even though the Township had not filed a pre-arbitration scope petition, because it found that the Commission itself had considered the negotiability question in the course of considering whether the evidence supported the award. The Court held that Commission regulations "need not preclude a

challenge to negotiability made after the arbitration when PERC decides to consider the issue.” 353 *N.J. Super.* at 302.

The Court also accepted the Commission’s newly articulated standard for when an arbitrator may award a proposal that results in different work schedules for employees and their supervisors. That is, the arbitrator may do so only if he or she determines that the award would not impair supervision or that, based on all the circumstances, there are compelling reasons to grant the proposal that outweigh any supervision concerns. *Id.* at 307; 25 *NJPER* at 455. The Court also held that it was appropriate for the Commission to provide this type of direction in an interest arbitration appeal decision.

However, while *Teaneck* noted the Commission’s authority to modify awards, *see N.J.S.A. 34:13A-16f(5)(a)*, the Court disagreed with the Commission’s modification of the award to delay implementation of the 24/72 schedule for the firefighters until the schedule was agreed to or awarded for their superior officers. It held that the arbitrator should have first been given the opportunity to apply the Commission’s new standard, disagreeing with the Commission that the arbitrator had in

effect found that different schedules would impair supervision. The Court also concluded that the modification unreasonably entwined the negotiations of the two units, with the firefighters “held captive” to the results of future negotiations between the Township and the much smaller fire officers’ unit. The Court remanded the case to the Commission to “succinctly articulate its new guideline regarding impairment of supervision and to remand to the same arbitrator for evaluation of proofs and factual findings in light of PERC’s standard.” *Id.* at 310; *see also Teaneck Tp.*, P.E.R.C. No. 2003-11, 28 *NJPER* 347 (¶33122 2002), discussed on page 3.

The salary portion of the arbitrator’s award was not an issue in the Appellate Division appeal and the salary increases were implemented by the Township after the Commission decision.

In reaching its conclusions, the Appellate Division also:

- Held that judicial review of Commission decisions reviewing interest arbitration awards is “sensitive, circumspect and circumscribed” – the standard that applies to review of Commission decisions in other areas. 353 *N.J. Super.* at 300.

- Quoted and endorsed the standard set out in *Cherry Hill*, P.E.R.C. No. 97-119, 23 *NJPER* 28 (¶28131 1997) in describing the proper Commission role in reviewing awards. *Cherry Hill* stressed that the Reform Act vests the arbitrator with the responsibility to weigh the evidence and fashion an award. Accordingly, *Cherry Hill* held that the Commission will not disturb the arbitrator's exercise of discretion in weighing the evidence unless an appellant demonstrates that the arbitrator did not adhere to the standards in the reform statute or the Arbitration Act or shows that the award is not supported by substantial credible evidence in the record as a whole.
- Cited and appeared to approve *Maplewood Tp.*, P.E.R.C. No. 97-80, 23 *NJPER* 106 (¶28054 1997), which held that a work schedule proposal may be submitted to interest arbitration unless a particular proposal so involves and impedes governmental policy that it must not be addressed through the negotiations process at all, despite the legislative intent that work hours be negotiated.
- Affirmed the Commission decision holding that, but for the supervision issue, the award of the work schedule on a trial basis was supported by substantial credible evidence in the record. The Court summarized the evidence before the arbitrator; the arbitrator's ruling; and his description of the conditions for continuing the schedule after the trial period. The Commission opinion had also clarified that, after the trial period, the burden

would be on the union to again justify the schedule. 25 *NJPER* at 457. The FMBA did not challenge that aspect of the Commission's decision in its cross-appeal, and it is not discussed in the Court's opinion.

The Supreme Court has granted certification to consider the negotiability of the FMBA's proposal for a 24/72 work schedule and has stayed the further arbitration ordered by the Appellate Division pending its review.

Commission Decisions

***Teaneck Tp.*, P.E.R.C. No. 2003-11, 28 *NJPER* 347 (¶33122 2002)**

Teaneck Tp., P.E.R.C. No. 2003-11, is the Commission's decision on remand from the Appellate Division. The Commission "succinctly articulated" its guideline concerning what arbitrators should consider before awarding a proposal that results in different work schedules for rank-and-file employees and their supervisors. The Commission reiterated the standard that had been quoted by the Appellate Division and, pursuant to the Court's order, the Commission remanded the case to the arbitrator. The Commission directed him to determine whether award of the 24/72 schedule to the firefighters' unit would impair supervision

and, if so, whether, based on all the circumstances, there are compelling reasons to award the proposal. In granting certification, the Supreme Court stayed this arbitration.

Union Cty., P.E.R.C. No. 2003-33, 28 NJPER 459 (¶33169 2002)

In *Union Cty.*, the Commission vacated and remanded an award involving a County corrections officers unit. The arbitrator had awarded a three-year contract with across-the-board increases in between the parties' final offers, along with the County's proposal to increase the clothing allowance. The arbitrator denied County proposals for health benefits changes for new and current employees, as well as a number of other proposals that the County had described as "operational". The arbitrator also denied several PBA proposals on such issues as the senior officer differential; stipends for Special Operations Unit officers; a compensatory time off bank; and orthodontic coverage.

The County appealed, contending that the arbitrator did not provide a reasoned analysis; individually analyze the County's operational proposals; consider the pattern of settlement in the County with respect to salary and health benefits; or calculate the net annual economic changes for each year of the

agreement. The County also maintained that the arbitrator made a mistake of fact in awarding the contract term and improperly presumed that interest arbitration was an inappropriate forum for considering the County's health benefits and operational proposals. It asked that the award be vacated and the case be remanded to a new arbitrator.

The Commission vacated the award but remanded it to the same arbitrator. The Commission held that the arbitrator did not resolve the unsettled issues with respect to the County's operational proposals; explain his salary award; or fully discuss, or explain how he weighed and analyzed, the parties' arguments and evidence concerning internal settlements. In addition, the arbitrator appeared to have expressed an improper presumption that health benefits proposals should not be awarded in interest arbitration.

In addressing the County's health benefits proposals, the arbitrator went beyond stating the principle, recognized in Commission decisions, that a party has the burden of justifying its proposals. Because the arbitrator emphasized that the proposals were best achieved in negotiations, he appeared to have required the County to surmount an additional hurdle of showing why

the proposals should be granted in interest arbitration rather than obtained through negotiations. The Commission found that the arbitrator's discussion was reminiscent of the analysis it disapproved in *Cherry Hill*, where it also vacated and remanded the arbitration award.

The Commission also found that a remand was required so that the arbitrator could more fully discuss the internal settlements in connection with the County's health benefits proposals. Pattern is an important labor relations concept that is relied on by both labor and management. The comparability criterion, *N.J.S.A. 34:13A-16g(2)*, requires the arbitrator to consider evidence of settlements between the employer and other of its negotiations units, as well as evidence that those settlements constitute a pattern. Further, a settlement pattern is encompassed in *N.J.S.A. 34:13A-16g(8)* as a factor bearing on the continuity and stability of employment. Interest arbitrators have traditionally recognized that deviation from a settlement pattern can affect the continuity and stability of employment by discouraging future settlements and undermining employee morale in other units.

The Reform Act does not specify the weight that must be given to internal settlements. But it does require that an arbitrator carefully consider evidence of internal settlements and settlement patterns, together with the evidence on all of the other statutory factors, and articulate the reasons for adhering or not adhering to any proven settlement pattern.

While this arbitrator stated that other units' acceptance of the health benefits proposals was "supportive but not persuasive," he did not make findings as to whether the settlements differed from the offer to this unit; the significance of any differences; and whether in fact there was a settlement pattern among the County's negotiations units. On remand, the arbitrator was directed to make those determinations; discuss and apply the principles that the Commission had set out concerning pattern and internal comparability; and explain how he weighed the County's arguments and evidence concerning the settlements vis-a-vis the PBA's.

With respect to salary, the arbitrator set out his award after he summarized the parties' arguments and evidence; stated his view of the evidence on each statutory factor;

and noted whether a factor favored either party's offer. The Commission held that this approach made it difficult to assess what factors the arbitrator weighed most heavily and how he weighed and balanced the other factors. A remand was therefore required for the arbitrator to explain his award -- as opposed to the parties' evidence -- in the context of the statutory criteria. The Commission added that the discussion should also be informed by the analysis and findings concerning the internal settlements that the Commission had directed the arbitrator to undertake.

In addressing the County's operational proposals, the arbitrator stated that it was inappropriate for an interest arbitrator to rewrite a contract and that the long list of County proposals was properly dealt with in negotiations. The Commission held that this discussion did not resolve the unsettled issues. If the County offered evidence and reasons in support of a proposal, the arbitrator was required on remand to discuss that evidence and make a reasoned determination whether or not to award the proposal. On remand, the arbitrator could take into account the principle that benefits and provisions agreed upon through years of collective negotiations should

not ordinarily be undone in a single contract. However, the arbitrator must fully discuss the evidence on all of the County's operational proposals and explain his basis for accepting or rejecting them.

Finally, the arbitrator was required on remand to calculate the net annual economic changes for each year of the agreement and determine that those changes are reasonable. *N.J.S.A. 34:13A-16d(2)*. Fulfilling that obligation requires the arbitrator to state the new dollar costs for each year of the agreement. The Commission held that the arbitrator could reconsider the contract term on remand, although the County had not shown that he had made a mistake of fact in awarding a three-year contract. In addition, because the arbitrator's award was vacated and remanded, the arbitrator could reconsider the PBA's economic and non-economic proposals.

In remanding the award to the same arbitrator, the Commission noted that it and the courts have presumed, unless shown to the contrary, that an original arbitrator would be able to take a "fresh look" at the case and reach a fair and impartial decision in accordance with Court or Commission guidance. It found no reason to doubt that the

arbitrator could reconsider the matter in accordance with its decision.

On remand, the arbitrator issued a supplemental opinion and award that reached the same determinations on all but one issue. The arbitrator awarded a four-year rather than three-year contract, and granted the same salary increase for the fourth year as he did for the other three years. The County has appealed the second award.

City of East Orange, P.E.R.C. No. 2003-39, 28 NJPER 581 (¶33181 2002)

In *City of East Orange*, the Commission affirmed in part and remanded in part an award involving a firefighters' unit. The remand was for the limited purpose of allowing the arbitrator to address an issue concerning holiday pay.

The arbitrator awarded a five-year contract with across-the-board increases in between the parties' offers for four of the five years. The awarded increases were closer to the City's proposal for the first two years, and closer to the FMBA's proposal for the fourth and fifth years. In the third contract year, beginning July 1, 2001, the arbitrator did not award an across-the-board increase but granted the FMBA's proposal to include holiday pay in base salary. She also increased

the number of salary guide steps; awarded the City's proposal to establish a \$25,000 probationary salary; and awarded the FMBA's proposal for prescription and HMO doctor visit co-pays. She directed the City to negotiate with the FMBA over the impact of the department's alternate duty policy and, at the FMBA's request, the proposal to assign acting captains on a rotating basis in order of seniority. She denied FMBA proposals concerning vacation, tuition reimbursement, and clothing allowance, as well as City proposals concerning disability; change in longevity for new hires and current employees; HMO co-pays; and premium co-pays for employees and retirees with traditional coverage.

Three days after the arbitrator issued the award, she corrected arithmetical and typographical errors on two of its pages. Also after the award, the FMBA requested that the arbitrator clarify the amount of holiday pay included in base salary.

The FMBA appealed, contending that the awarded increases were too low and were inconsistent with the arbitrator's analysis of the comparability, financial impact, lawful authority, and public interest criteria. It also maintained that the arbitrator did not give due

weight to some of the statutory factors and abused her discretion in allowing the late submission of the City's final offer. Finally, the FMBA contended that the arbitrator lacked authority to change the award without the parties' mutual consent and that its own clarification request demonstrated that the award was not final and definite, as required by *N.J.S.A. 2A:24-8*.

Preliminarily, the Commission upheld the arbitrator's discretionary decision to allow the late submission of the City's final offer, which was submitted without objection by the FMBA. The award resolved the unsettled issues and the FMBA did not show that it was prejudiced by the arbitrator's decision. Further, the minor typographical and arithmetical errors did not affect the award's finality or definiteness and the arbitrator's correction of them did not provide a basis to vacate the award. While there is no express authority for an arbitrator to correct an award, no purpose would be served by vacating and remanding the award on that ground, particularly since the Commission would have had the authority to make the corrections on appeal if the arbitrator had not done so.

In affirming the award, the Commission concluded that the arbitrator

gave due weight to the statutory factors; reached a reasonable determination of the issues; and provided a reasoned explanation for the award, which was supported by substantial credible evidence. Read as whole, there was no inconsistency between the awarded increases and the arbitrator's findings on, and discussion of, the statutory factors.

The thrust of the arbitrator's discussion of the public interest and financial impact criteria was that while the City had suffered devastating economic reversals, it was emerging from that crisis and could afford an award above its offer so that firefighter salaries could begin to be brought in line with those in comparable communities. The arbitrator noted that, by the end of the contract she awarded, the base salaries of unit members should be above the average 2002 salary for Essex County firefighters and at the level of the anticipated 2003 salary for firefighters in a community that both parties recognized as comparable. The Commission declined to disturb the arbitrator's decision to focus on the actual salary to be achieved by the end of the contract rather than, as the FMBA had urged, the percentage increases received by public safety employees in other jurisdictions.

The Commission also declined to disturb the arbitrator's discretionary decision to award only the holiday pay fold-in for the contract year beginning July 1, 2001, where that decision was linked to her objective of raising maximum base salaries by the end of the contract. The arbitrator had noted that the fold-in proposal entailed additional costs to the City but that it was a relatively inexpensive way to improve firefighter compensation. Finally, the Commission rejected the FMBA's objections to the arbitrator's analysis of internal comparability evidence, the cost of living, and private sector wage increases.

With respect to the arbitrator's award of the FMBA's proposal concerning holiday pay, the FMBA maintained that the lump sum holiday payments received by unit members prior to July 1, 2001, the effective date of the fold-in, should have been enhanced by the percentage increases the arbitrator granted on July 1, 1999 and July 1, 2000, before being included in base salary. The arbitrator's opinion did not address that point, and the Commission remanded the case for the limited purpose of allowing the arbitrator to do so. The award was stayed pending issuance of the arbitrator's supplemental opinion and award.

On remand, the arbitrator issued a supplemental opinion and award that, as had been urged by the FMBA, increased the amount of holiday pay included in base salary as of July 1, 2001. (The supplemental award was not appealed).

Continuing Education for Special Panel Members

In October 2002, the Commission held its annual continuing education program for its special panel of interest arbitrators.

The program included a review of interest arbitration developments; Court and Commission interest arbitration appeal decisions; and other Court and Commission decisions of note. A "roundtable" discussion was held where all panel members were encouraged to discuss mediation techniques; approaches to opinion-writing; and issues arising with respect to particular types of interest arbitration proposals.

Interest Arbitration Appeal Statistics Since January 1996

Since the Reform Act went into effect, the Commission has issued 19 decisions reviewing final interest arbitration awards. It has affirmed eight awards; affirmed two with

a modification; and vacated and remanded nine awards, including the limited remand in *East Orange*. The Commission has also denied one motion to file a late appeal and five requests to review interim procedural rulings by interest arbitrators. One decision, *Teaneck*, has been reviewed by the Appellate Division and will be considered by the Supreme Court.