P.E.R.C. NO. 2010-73

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF TRENTON,

Petitioner,

-and- Docket No. IA-2007-016

TRENTON FMBA LOCAL NO. 6,

Respondent.

SYNOPSIS

The Public Employment Relations Commission affirms, with modification, an interest arbitration award. The City of Trenton appealed the award of a 24/72 work schedule on a trial basis and that driver's assignments be made by seniority. The Commission modifies the award to provide that the FMBA has the burden of justifying the continuation of the 24/72 schedule in any post-trial period arbitration proceedings. The Commission also modifies the award to remove the restrictions placed on the evidence the parties may present in the event they arbitrate a work schedule dispute at the end of the trial period. The Commission holds that the arbitrator's award of driver's pay to the most senior qualified employee involves a permissively negotiable subject and there is substantial credible evidence to support that aspect of the award.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Respondent.

Appearances:

For the Petitioner, Knapp, Trimboli & Prusinowski, LLC (Stephen E. Trimboli, of counsel and on the brief; Molly S. Marmion, on the brief)

For the Respondent, Fox & Fox, LLP (David I. Fox, of counsel; Lynsey A Stehling, on the brief)

DECISION

The City of Trenton appeals from an interest arbitration award involving a negotiations unit of firefighters represented by Trenton FMBA Local No. 6. See N.J.S.A. 34:13A-16f(5)(a). The arbitrator issued a conventional award as he was required to do absent the parties' agreement to use another terminal procedure. N.J.S.A. 34:13A-16d(2). We affirm the arbitration award with modifications to the work schedule trial period. We note that the economic terms of the award were not appealed.

The FMBA proposed a seven-year agreement from January 1, 2006 through December 31, 2012 with salary increases of 5.5% effective in the first three years and 4.75% effective each

January 1 for the remaining four years. The FMBA also proposed a 24/72 hour work schedule to replace the existing 10/14 hour work schedule. In addition, it submitted 29 other proposals on a variety of economic and non-economic issues including a proposal that driver's pay be increased by 1.5% each year of the contract from its current level of 4.5% of base salary. The FMBA also sought to incorporate language into the agreement that would require the City to make all driver appointments by seniority.

The City proposed a five-year agreement from January 1, 2006 through December 31, 2010 with 3% salary increases effective April 1 of each year. The City opposed the FMBA's work schedule proposal and proposed that driver's pay be eliminated. In addition, it made ten other proposals on various economic and non-economic issues.

The arbitrator issued an award that established a seven-year contract from January 1, 2006 through December 31, 2012. He awarded 3.5% salary increases effective each January 1 in 2006 through 2009, a 3% increase effective January 1, 2010, and 3.5% increases effective January 1 of 2011 and 2012. He also awarded a 1% increase in the longevity schedule at 24 and 29 years respectively and a $250 enhancement to base pay for firefighters who perform EMS Special Work/First Responder Service; employee health and prescription premium sharing; and an increase in prescription co-pays.

The arbitrator did not award an increase in driver's pay, but did order that "Language shall be incorporated into the agreement to provide that driver position appointments be based on seniority among applicants who are qualified."

The arbitrator awarded the following work schedule:

> Within ninety (90) days of the issuance of an Interest Arbitration Award in this matter, the City shall commence, for Local No. 6, a 24/72 hour shift schedule on a two year trial basis, subject to terms of this agreement. This means that there shall be a 24 hour tour followed by 72 hours off work, for all employees except for certain agreed upon staff "day" employees. The parties may mutually agree to a different implementation date. The 24/72 hour shift schedule shall remain in effect unless it is altered or replaced by mutual agreement or by decision of an interest arbitrator (pursuant to PERC rules) pursuant to the procedures set forth herein.
>
> If either party desires to revert to the current work schedule (10/14-hour shifts) at the end of a 18-month period, begin on __ and end on __, it shall serve written notice of its intention to do so on the other party, at least 60 days prior to the end of that period. The specific reasons with statistical backup and detailed argument shall be submitted with the notice. This shall not preclude the submission of additional evidence thereafter. The other party who receives the notice shall after 30 days of receipt provide its objections to the notice and the parties shall immediately thereafter meet and confer in an effort to resolve any dispute concerning the schedule. If the parties are unable to reach agreement, either party shall have the right to submit the dispute to binding arbitration no later than 30 days after the end of the 18 month period, to an arbitrator designated by PERC

under its rules and regulations. The parties agree that the reversion to the old schedule shall only be based upon a demonstration of good cause for this and in evaluating the issues in question, such things as employee morale, productivity, staffing, training, sick leave, overtime and the like may be among the criteria addressed. The City may produce evidence as to the impact of dual work schedules on departmental operations, continuity and impairment or impediments to supervision. However, issues which are not attributable to the 24/72 hour shift such as reductions in manning, sick leave caused by on-the-job injury, or long-term illnesses or injuries, and the like, shall not be considered in support of a change to the former shift. During the period prior to the 60 day period, a committee consisting of representatives of Local 6 and the City shall meet at least every 30 days to evaluate the shift and any concerns which either party has with regard to its implementation.

The 24/72 hour shift shall remain in effect after the 18 month period. If there is objection to as set forth above, it shall continue at least until a determination of the arbitrator is made, provided that timely objection is made as aforesaid by the objecting party. The determination of the arbitrator shall be based upon the record developed without prejudice to the fact that the 24/72 hour work schedule shall be maintained during the course of review.

If neither party elects to submit the matter to arbitration in accordance with the procedures set forth above during the initial 18 month period, then the 24/72 hour work schedule shall become the permanent work schedule.

The conversion of hours shall be on the basis of one day equals 12 hours.

Operational periods shall mean 12 hours.

> Vacation time may, subject to other provisions of the agreement, be taken in operational periods of 12 hours.
>
> Prior to the implementation of the 24/72 hour shift, the parties shall meet to agree upon such things as paid leave time like vacations, holidays, personal days and sick days to maintain the equivalent level of benefit as under the current 10/14 hour shift schedule.
>
> [Arbitrator's Award at 117-119]

The City appeals from both the award of the 24/72 work schedule and the award of the driver's pay language. The City appeals on the following grounds:

> The arbitrator failed to apply the criteria set forth in N.J.S.A. 34:13A-16g(1), (3) and (8) by failing to give adequate weight and consideration of the comparison of the wages, salaries, hours and conditions of employment of the firefighters by ordering a completely different work schedule for rank-and-file firefighters from that worked by fire officers.
>
> The arbitrator failed to apply the criteria set forth in N.J.S.A. 34:13A-16g(1), (3) and (8) by failing to give adequate weight and consideration to the adverse effects of having fire officers, especially Captains work a different schedule.
>
> The arbitrator's award was procured by undue means pursuant to N.J.S.A. 2A:24-8 when he failed to apply controlling precedent regarding the conclusion of the trial period. Specifically, Township of Teaneck, P.E.R.C. No. 2000-33, 25 NJPER 450, 457 (¶30199 1999), requires that the "trial period" contain a sunset provision (i.e. the schedule goes away unless the parties agree otherwise), whereas the arbitrator's "trial period" would place

> the burden on the City to negotiate out of the "trial" schedule.
>
> The arbitrator exceeded his authority pursuant to N.J.S.A. 2A:24-8, and failed to apply the criteria set forth in N.J.S.A. 34:13A-16g(1), (3) and (8), by specifically barring consideration of days lost to on-the-job injuries in determining the effectiveness of the new schedule, regardless of the evidence presented at hearing by the City that suggests a positive correlation between longer work days and on-the-job injuries.

The FMBA responds that the arbitrator's award should be affirmed because the award satisfies our standard of review; the arbitrator gave due weight to legal precedent and the statutory criteria in awarding the 24/72-hour work schedule; and the award of driver's pay was in compliance with N.J.S.A. 2A:24-8 and the statutory criteria.

N.J.S.A. 34:13A-16(g) requires that an arbitrator shall state in the award which of the factors are deemed relevant, satisfactorily explain why the others are not relevant, and provide an analysis of the evidence on each relevant factor. The statutory factors are as follows:

> (1) The interests and welfare of the public . . .;
>
> (2) Comparison of the wages, salaries, hours, and conditions of employment of the employees with the wages, hours and conditions of employment of other employees performing the same or similar services and with other employees generally:
>
> (a) in private employment in general . . .;

> (b) in public employment in general . . . ;
>
> (c) in public employment in the same or comparable jurisdictions;
>
> (3) the overall compensation presently received by the employees, inclusive of direct wages, salary, vacations, holidays, excused leave, insurance and pensions, medical and hospitalization benefits, and all other economic benefits received;
>
> (4) Stipulations of the parties;
>
> (5) The lawful authority of the employer . . .;
>
> (6) The financial impact on the governing unit, its residents and taxpayers . . .;
>
> (7) The cost of living;
>
> (8) The continuity and stability of employment including seniority rights . . . ; and
>
> (9) Statutory restrictions imposed on the employer. . . .
>
> [N.J.S.A. 34:13A-16(g)]

The standard for reviewing interest arbitration awards is well established. We will not vacate an award unless the appellant demonstrates that: (1) the arbitrator failed to give "due weight" to the subsection 16g factors judged relevant to the resolution of the specific dispute; (2) the arbitrator violated the standards in N.J.S.A. 2A:24-8 and -9; or (3) the award is not supported by substantial credible evidence in the record as a whole. Teaneck Tp. v. Teaneck FMBA, Local No. 42, 353 N.J.

Super. 298, 299 (App. Div. 2002), aff'd o.b. 177 N.J. 560 (2003), citing Cherry Hill Tp., P.E.R.C. No. 97-119, 23 NJPER 287 (¶28131 1997). Because the Legislature entrusted arbitrators with weighing the evidence, we will not disturb an arbitrator's exercise of discretion unless an appellant demonstrates that the arbitrator did not adhere to these standards. Teaneck, 353 N.J. Super. at 308-309; Cherry Hill.

An arbitrator must provide a reasoned explanation for an award and state what statutory factors he or she considered most important, explain why they were given significant weight, and explain how other evidence or factors were weighed and considered in arriving at the final award. N.J.S.A. 34:13A-16g; N.J.A.C. 19:16-5.9; Borough of Lodi, P.E.R.C. No. 99-28, 24 NJPER 466 (¶29214 1998). An arbitrator must provide a reasoned explanation for an award, N.J.A.C. 19:16-5.9, and, once he or she has done so, an appellant must offer a particularized challenge to the arbitrator's analysis and conclusions. Lodi. As we discussed in Teaneck, additional considerations pertain in reviewing an award ordering a work schedule change.

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. That requirement derives both from the arbitrator's obligation to

consider the relevant statutory factors, N.J.S.A. 34:13A-16g, and from Court and Commission decisions recognizing a strong governmental policy interest in ensuring appropriate discipline, supervision, and efficient operations in a public safety department. City of Clifton, P.E.R.C. No. 2002-56, 28 NJPER 201 (¶33071 2002); see also Teaneck, 25 NJPER at 455 and cases cited therein.

We also reiterate that the party proposing a work schedule change has the burden of justifying it. Clifton; Teaneck; cf. PBA Local 207 v. Borough of Hillsdale, 137 N.J. 71, 82 (1994). That burden is consistent with the fact that interest arbitration is an extension of the negotiations process and that, within the context of the statutory criteria, an interest arbitrator should fashion an award that the parties, as reasonable negotiators, might have agreed to. Hudson Cty. Prosecutor, P.E.R.C. No. 98-88, 24 NJPER 78 (¶29043 1997). Over the course of a negotiations relationship between a particular employer and majority representative, department work schedules are not routinely or frequently changed and they should not be changed by an arbitrator without strong reasons.

We first consider the City's appeal of the 24/72 hour work schedule. The background of the arbitration proceedings is necessary to fully address the City's arguments. After the assignment of the initial interest arbitrator, the parties

participated in mediation and then one day of hearing. After the first hearing day, the interest arbitrator withdrew from the case. The parties agreed on the appointment of a second arbitrator and to incorporate the record from the first day of hearing into the new arbitrator's record. After the record closed before the new arbitrator, the Trenton Fire Officers Association ("TFOA") settled its contract without achieving its 24/72 work schedule proposal. The City then filed a petition for scope of negotiations determination arguing that the FMBA could not continue to submit its 24/72 work schedule proposal to the arbitrator because the superior officers settled and remained on the 10/14 schedule. We held that the proposal was mandatorily negotiable and could be submitted to the interest arbitrator for consideration in accordance with the Teaneck standards.[1/]

In Teaneck, the firefighters proposed a 24/72 work schedule and the employer opposed the proposal on the ground that the superior officers were on a 10/14 schedule. The arbitrator awarded the 24/72 schedule and, on appeal, we modified the award

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1/ The City asserts for the first time in its reply brief that it objected to the submission of certifications by the FMBA after the close of the record. It asks us to disregard the evidence. The FMBA responds that the parties agreed to submit certifications to the arbitrator after the City filed a post-hearing scope petition on the subject. The City did not list this issue in its Notice of Appeal and did not brief it until it asked for leave to file a reply brief. We will consider all of the evidence that was part of the record before the arbitrator.

to provide that the 24/72 schedule could be implemented only if and when the 24/72 schedule was adopted for the superior officers' unit. The Appellate Division reversed and remanded that portion of our ruling and the Supreme Court affirmed substantially for the reasons expressed by the Appellate Division. 353 N.J. Super. 289 (App. Div. 2002), aff'd o.b. 177 N.J. 560 (2003). The Appellate Division stated that:

> [F]rom a practical standpoint PERC's decision dooms the FMBA rank-and-file to continuation on the 10/14 shift in perpetuity so long as the Township continues to oppose the change to a 24/72 shift for the officers. . . . By its postponement of a trial period for the 24/72 schedule, PERC has sent FMBA's proposal off to a political never-never land. Such a result is both arbitrary and unreasonable.

On remand, we directed the arbitrator to consider the work schedule proposal in light of the standards arbitrators should apply in considering proposals for a major work schedule change, including proposals that would result in supervisors being on a different work schedule from the employees they supervise.

> [A]n arbitrator may award such a proposal only if 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.
>
> [Teaneck, 25 NJPER at 455]

The City argues that the arbitrator misunderstood our scope decision because he found it "significant" that the issue of dual work schedules was "thoroughly reviewed by PERC, and that the

courts have specifically rejected the claim advanced by the City in this proceeding that the dual work schedule necessarily, amongst other things, would impair supervision." The City contends that the arbitrator operated under the assumption that we had applied the Teaneck standards to the FMBA's work schedule proposal and had resolved the factual issue in favor of the FMBA.

The FMBA responds that the City has cited the award out of context and that when read as a whole, the arbitrator did not believe that PERC resolved the issue of dual work schedules. It argues that the award was based on the testimony and documentary evidence presented by the FMBA that demonstrated that the FMBA met the standards necessary to award the 24/72 work schedule.

The arbitrator stated the following with regard to the City's argument that dual work schedules would preclude the awarding of the 24/72 work schedule:

> I find it significant that this particular issue of dual work schedules has been thoroughly reviewed and considered by PERC and has also been reviewed at the highest level of New Jersey's court system. The fact that a fire department would operate with firefighters and fire officers on different work schedules has not been found to render the issue non-negotiable. The courts have specifically rejected the claim advanced by the City in this proceeding that the dual work schedule necessarily, among other things, would impair supervision. As found by the Court, to reach such a per se conclusion would doom the FMBA rank and file to a continuation of the 10/14 shift in perpetuity simply because the change would result in different work schedules within the

> department. Of course, simply because the issue has been found to be mandatorily negotiable does not require an award on the merits of the issue that favors the FMBA. I have carefully reviewed the record on the issue.
>
> [Arbitrator's Award at 102]

We find that the arbitrator was not under the assumption that we had found in favor of the FMBA's work schedule proposal. The arbitrator correctly found that under Teaneck, the resulting dual work schedule for the firefighters and officers could not be a per se bar to his awarding the proposal. He specifically stated that he carefully considered the record in concluding to award the work schedule.

Under Teaneck, an arbitrator must find that awarding different work schedules will not impair supervision, or that compelling reasons exist that override the danger of impaired supervision. The City argues that the arbitrator did not make this finding prior to awarding the 24/72 work schedule. It further argues that the FMBA did not meet its burden of proving the need for a work schedule change because the union did not produce evidence to rebut the City's supervisory concerns and only provided evidence of other non-comparable municipalities where the 24/72 work schedule was working. Specifically, the City argues that supervision would be impaired because with the dual schedules, a captain would only be working with his assigned company four times during a 28-day cycle. It also asserts that

training, discipline, and procedures would be negatively impacted.

The FMBA responds that the only evidence presented by the City on the work schedule issue in Trenton was the testimony of the fire director who did not have experience with 24/72 work schedules. The FMBA asserts that it demonstrated by a preponderance of the credible evidence that the 24/72 schedule minimizes the attendant risks of firefighting compared to the 10/14 schedule; the department currently operates well with inconsistent supervision due to gaps in the officers ranks because of injuries, illness, and military service obligations; both Newark and Teaneck had dual work schedules without problems; and in other municipalities, the 24/72 schedule reduced sick time, overtime, firefighter injuries and fatigue, and improved productivity and morale.

We find that the arbitrator's award of the work schedule on a trial basis was in accordance with the Teaneck standards. The arbitrator acknowledged that the party seeking to modify existing terms and conditions of employment has the burden to prove that there is a basis for its proposed change and he applied that principle to his analysis of the issues in dispute. Clifton; see also Union Cty., P.E.R.C. No. 2003-33, 28 NJPER 459, 460 (¶33169 2002). The arbitrator did not find that his award of the work schedule would impair supervision. He found that the City's

supervision concerns were speculative. He also found that there was no guarantee that the City would have the same success as Newark and Teaneck with the dual schedule nor the overall success of the other cities with a 24/72 work schedule. However, the FMBA produced enough detailed and unrefuted evidence regarding the success and benefits of the 24/72 schedule in other municipalities to warrant a trial schedule.

The City also argues that the arbitrator did not give due weight to the internal pattern of settlement because the fire officers did not achieve the 24/72 work schedule in negotiations. The FMBA responds that the fire officers had to abandon their 24/72 work schedule proposal because it was facing layoffs and needed to preserve jobs. The City replies that its memorandum of agreement with the fire officers does not address any layoff action.

The fact that the TFOA did not achieve a work schedule change in its negotiations does not require greater weight be applied to the internal pattern of settlement criterion. Teaneck. We find that the arbitrator did consider the internal pattern of settlement. The arbitrator stated he found his award of the trial period to be consistent with the internal pattern of settlement with the fire officers. He wrote:

> The awarding of the FMBA's work schedule proposal is not inconsistent with awarding the terms of the TFOA agreement on the issues of salary and longevity despite the exclusion

> of the TFOA work schedule proposal from the MOA. Unlike the salary and longevity issues, which involve compensation, the work schedule proposal does not and, based upon this record, will not cause additional costs to the City nor require the additional staffing of firefighters.
>
> [Arbitrator's Award at 105]

The City also argues that the arbitrator's language for the trial period was procured by undue means in violation of N.J.S.A. 2A:24-8. Specifically, it argues that it is contrary to the trial period in Teaneck because it does not include a sunset provision; the old schedule should be restored unless otherwise agreed upon; the burden does not remain on the FMBA to set forth compelling reasons for continuing conflicting schedules; and the factors to be considered regarding the schedule must not be limited.

The FMBA responds that the trial period maintains the 10/14 schedule as the status quo for successor negotiations if the City objects to maintaining the 24/72 schedule; we have previously rejected the City's argument that an employer may unilaterally revert to the old schedule during the resolution of the next contract; and the arbitrator only narrowed the evidence to that relevant to the work schedule.

In Teaneck, we stated:

> We specifically approve 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, we note that 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 we believe is a necessary part of a trial period. Accordingly, we clarify 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.
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> [Id. at 457]

In City of Clifton, P.E.R.C. No. 2002-56, 28 NJPER 201 (¶33071 2002), we clarified our decision in Teaneck:

> Finally, we consider whether the City may return to the 10/14 schedule after the trial period concludes. While Teaneck referred to the old schedule being "effectively restored" following the trial period, we did not mean that the employer could unilaterally revert to the old schedule after the trial period. Instead, the quoted language signified that the burden was on the union to again justify the schedule. We think it would be destabilizing to allow the employer to revert to an old schedule during negotiations or interest arbitration, with the possibility that it might have to change back should an interest arbitrator again award the schedule. See Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978) and N.J.S.A. 34:13A-21.
>
> [28 NJPER at 209]

The arbitrator awarded a two year trial period that requires the party seeking to revert to the 10/14 schedule to give notice at 18 months. If the parties are unable to reach an agreement, they may submit the dispute to binding interest arbitration where reversion to the old schedule will require the party seeking reversion to the old schedule to show good cause. We agree with the City that this language shifts the burden to it if it seeks a return to the 10/14 schedule. Under Teaneck and Clifton, the FMBA must maintain the burden to prove its case for the 24/72 schedule anew if the City objects to its continuation. Thus, we modify the award to provide that the FMBA has the burden of justifying the continuation of the 24/72 schedule in the post-trial period arbitration proceedings.[2/]

We disagree with the City that it can revert to the old schedule after the trial period. It is more appropriate for the 24/72 schedule to continue until a resolution of the work schedule by the parties or the arbitrator. Clifton.

We also modify the award to remove the restrictions placed on the evidence the parties may present in the event they arbitrate the work schedule dispute at the end of the trial period. The arbitrator may consider all evidence relevant to the work schedule. If the City objects to the 24/72 work schedule,

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2/ If the trial period were to expire at the end of the contract, the FMBA would have the burden of justifying adoption of the schedule in the successor agreement.

it is not precluded from presenting its evidence and argument to the arbitrator under our rules and the procedures for conventional arbitration. If the arbitrator excludes evidence relevant to the parties' dispute, the City may appeal by special permission to appeal. N.J.A.C. 19:16-5.17. The weight given to the City's arguments and evidence remains in the discretion of the arbitrator.

The City's last point of appeal is that the award's seniority language for driver's pay was procured by undue means in violation of N.J.S.A. 2A:24-8 and failed to apply the criteria set forth in N.J.S.A. 34:13A-16g(5) by failing to give adequate weight to controlling case law. Specifically, the City argues that the award bases driver's assignments solely on seniority, which interferes with its prerogative to assign the most qualified individual to the position.

The FMBA responds that the City never filed a scope of negotiations petition on the proposal and that the arbitrator properly modified the FMBA's proposal so as to not compromise management's prerogative to assign the employees it deems most qualified.

The City replies that it could not file a scope petition because the FMBA did not list the seniority issue on its Petition to Initiate Compulsory Interest Arbitration. The FMBA responds that the seniority issue was in its final offer submitted on

April 15, 2008 and that the City must be barred from arguing negotiability now since it could have included the issue in the scope petition it filed over the work schedule.

N.J.A.C. 19:16-5.5(c) provides:

> (c) Where a dispute exists with regard to whether an unresolved issue is within the required scope of negotiations, the party asserting that an issue is not within the required scope of negotiations shall file with the Commission a petition for scope of negotiations determination pursuant to N.J.A.C. 19:13. This petition must be filed within: 14 days of the filing of a joint petition; 14 days of receipt of the Director of Arbitration's notice of filing; or five days of receipt of the response to the petition requesting the initiation of compulsory interest arbitration. The failure of a party to file a petition for scope of negotiations determination shall be deemed to constitute an agreement to submit all unresolved issues to compulsory interest arbitration.

N.J.A.C. 19:16-5.5 structures the interest arbitration process and ensures that the parties and the arbitrator know the nature and extent of the controversy at the outset. Borough of Allendale, P.E.R.C. No. 98-27, 23 NJPER 508 (¶28248 1997). In setting deadlines for filing scope petitions and submitting responses to a petition, the rule furthers the statutory goal of providing for an expeditious, effective, and binding procedure for the resolution of disputes between law enforcement officers and firefighters and their public employers. N.J.S.A. 34:13A-14a.

In Borough of Roseland, P.E.R.C. No. 2000-46, 26 NJPER 56 (¶31019 1999), we held that where a scope petition contends that an item proposed for interest arbitration is not mandatorily negotiable, it is presumptively time-barred unless it is filed within the time prescribed by N.J.A.C. 19:16-5.5(c) or by the date set by the Director of Arbitration for a response to the interest arbitration petition. However, we will consider, on a case by case basis, arguments that N.J.A.C. 19:16-5.5(c) should be relaxed. Further, we will evaluate the nature of the negotiability challenge. Where a party alleges that a proposal contravenes a statute or regulation, or would significantly interfere with a clearcut and dominant government policy interest, that factor may weigh in favor of relaxing N.J.A.C. 19:16-5.5(c). Id.

We have also held that N.J.A.C. 19:16-5.5(c) does not bar an employer from arguing, even after an award, that subjects are illegal rather than permissive. That is because a public body cannot be bound by an illegal award. Roseland; see also Town of Kearny, P.E.R.C. No. 81-23, 6 NJPER 431 (¶11218 1980); Town of Kearny, P.E.R.C. No. 81-38, 6 NJPER 455 (¶11233 1980). There is no showing that this aspect of the award involves either a statute or regulation or a clearcut and dominant governmental policy interest.

Our rules on filing a scope petition may be relaxed if the City did not know what the proposal was or if a subsequent revision raised new negotiability concerns. Roseland at 59 n. 1. We do not find it appropriate to relax our rules here where the City was put on notice of the seniority for driver's assignments in the FMBA's final offer and did not file a scope petition on the issue within fourteen days or include it in the scope petition it filed on the work schedule issue.

The issue of assigning the most senior qualified driver is permissively negotiable. City of Camden, P.E.R.C. No. 93-43, 19 NJPER 15 (¶24008 1992), aff'd 20 NJPER 319 (¶25163 App. Div. 1994). By not filing a timely scope petition, the City is deemed to have agreed to submit the issue to interest arbitration. N.J.A.C. 19:16-5.5(d); N.J.S.A. 34:13A-16f(4).

The arbitrator found that it was the parties' practice to assign the most senior employee to the driver position. The City has not provided evidence or argument to challenge the arbitrator's finding. The City cites Town of Phillipsburg, P.E.R.C. No. 83-122, 9 NJPER 209 (¶01098 1983), in support of its argument that the award, as written, is illegal because it would eliminate the City's discretion to make or change shift assignments based on any other factors besides seniority. However, the City has not provided any specifics as to its need

to make driver assignments on unique qualifications.[3/] Contrast New Jersey Transit, P.E.R.C. No. 2006-36, 31 NJPER 358 (¶143 2005) (arbitration restrained where employer proved that special skills and traits were required for new unit). The arbitrator's award of driver's pay to the most senior qualified employee involves a permissively negotiable subject and there is substantial credible evidence to support that aspect of the award.

ORDER

The interest arbitration award is affirmed as modified by this decision.

BY ORDER OF THE COMMISSION

Commissioners Colligan, Eaton, Fuller, Krengel, Voos and Watkins voted in favor of this decision. None opposed.

ISSUED: April 29, 2010

Trenton, New Jersey

3/ We note that the arbitrator did not order the language in his award, but directed the parties to develop language that incorporates their practice. We encourage the parties to address any specific concerns of the City in the drafting process.