

P.E.R.C. NO. 2011-37

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF KEARNY,

Appellant,

-and-

Docket No. IA-2008-021

KEARNY FIREMEN'S MUTUAL BENEVOLENT  
ASSOCIATION, LOCAL NO. 18,

Respondent.

SYNOPSIS

The Public Employment Relations Commission affirms an interest arbitration award involving the Town of Kearny and Kearny Firemen's Mutual Benevolent Association, Local No. 18. The Town appealed the award arguing that the arbitrator failed to apply and give due weight to the statutory factors and that the arbitrator should not have ordered a fifth year on the record presented. The Commission holds that the arbitrator's award is supported by substantial credible evidence, the arbitrator properly addressed the statutory factors, and the Town has not shown how the evidence requires rejecting the arbitrator's award of increases similar to its own settlement pattern.

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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Appearances:

For the Appellant, Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys (Frederick T. Danser, of counsel and on the brief; Robert J. Merryman, on the brief)

For the Respondent, Fox and Fox, LLP, attorneys (David I. Fox, Nora R. Locke and Jessica S. Swanson, of counsel and on the brief)

DECISION

On June 7, 2010, the Town of Kearny appealed from an interest arbitration award involving a unit of firefighters employed by the Town and represented by Kearny Firemen's Mutual Benevolent Association, Local No. 18 (FMBA). 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). A conventional award is crafted by an arbitrator after considering

the parties' final offers in light of nine statutory factors. We affirm the award.<sup>1/</sup>

The Town proposed a four-year contract with wage increases of 3.25% on July 1 of 2007, 2008, 2009 and 2010. Among other things, the Town also proposed a change in salary progression for new employees, a change in health benefits including an employee contribution of 1.5% of salary, changes in leaves of absence, vacations and sick leave, and resolution of pending grievances.

The FMBA proposed a five-year agreement with wage increases of 4.5% plus a 2% parity payment on July 1 of 2007, 2008, 2009, 2010 and 2011. The FMBA also sought a senior duty differential for those members who have completed a specific number of years as a firefighter, a 0.6% night differential (the FMBA claims that the PBA enjoys both a night differential and 0.6% added to base pay for muster pay), a clothing allowance to replace the direct exchange program under which clothing orders and repairs are done through the mail, widows' benefits similar to those enjoyed by the PBA, an increase in holiday pay, a differential for employees assigned to the day shift, a 2% payment for First Responder duties, a \$1500 payment for the performance of HAZMAT and Technical Rescue duties, and numerous non-economic items.

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<sup>1/</sup> We deny the Town's request for oral argument. The matter has been fully briefed.

On May 20, 2010, the arbitrator issued a 74-page Opinion and Award. He noted that the record was extensive, containing hundreds of exhibits and including data concerning the entire financial profile of the Town including budget documents and comprehensive financial analyses, interest arbitration awards and labor agreements from many municipalities with emphasis on paid fire departments, and internal labor agreements between the Town and its six unions with accompanying arguments as to the relevance of the specific terms of those agreements. The arbitrator also stated that the parties submitted voluminous evidence touching upon the statutory factors with extensive argument as to the relevance and weight to be given to those factors.

After summarizing the parties' proposals and respective arguments on those proposals in detail, the arbitrator awarded a five-year agreement. The arbitrator accepted the FMBA's argument that a shorter period would result in additional protracted negotiations almost immediately after the implementation of the award. The arbitrator noted that no persuasive arguments to the contrary had been offered. He further observed that the Town's agreements with the Association of Department Heads and Assistant Departments Heads, Kearny PBA Local 21, and the Kearny Superior Officers Association expire on December 31, 2012, six months

after the June 30, 2012 expiration date awarded by the arbitrator.

By way of introduction to his award on salary and benefit issues, the arbitrator explained that those issues could not be properly analyzed and decided separately. He noted that there is substantial cost to the Town and impact on employees associated with each issue.

The arbitrator began with salary, the most substantial cost item. He stated that any analysis of that issue must start with the internal relationships between the FMBA and the other employee organizations that have negotiated with the Town. In particular, the arbitrator stated that a proper analysis must start by addressing whether there is a pattern of settlement that applies to the negotiations unit, and if so, whether adherence to its terms represents a reasonable determination of the issue. He noted that evidence of a pattern of settlement can implicate several of the statutory factors including the interests and welfare of the public, internal comparisons between an employer's negotiations units, and the continuity and stability of employment.

The arbitrator then reviewed the Town's other labor agreements. The Town has agreed to 3.25% increases on January 1 of each year with Civil Service Council No. 11 for 2008-2011, the Association for Department Heads and Assistant Department Heads

for 2009-2012, Kearny PBA Local 21 for 2009-2012, and the Kearny Superior Officers Association (SOA) for 2009-2012. For 2007 and 2008, the PBA and SOA received 3.95% increases in base pay. The arbitrator noted, however, that the Town's law enforcement units receive 0.6% on top of base salary each year for muster pay, thus turning the 3.95% increases into 4.5% and the 3.25% increases into 3.85%. He concluded that there is an internal pattern of settlement with respect to base wage increases and that adherence to that pattern with respect to base wages and health insurance represents a reasonable determination of those issues.

As for health benefits, the arbitrator awarded the Town's proposal that sets the New Jersey Direct 15 plan as the basic plan with an employee option to pay the difference between Direct 10 and Direct 15. He did not award the Town's proposal for a 1.5% contribution given the fact that the Town's agreements with both of its law enforcement units expire on December 31, 2012 and those units do not make a contribution. We note that on May 22, 2010, the Town began health benefit deductions of 1.5% of base salary pursuant to P.L. 2010, c. 2.

As for salary, the arbitrator awarded the Town's internal pattern of 3.25% increases to base pay for each of the five years. He rejected the FMBA's proposals for 4.5% increases plus 2% parity payments, finding that they would so encroach upon the Town's budget responsibilities in all areas of its budget that

the result would have an adverse financial impact on the governing body, residents and taxpayers.

The arbitrator noted that the FMBA's financial expert had submitted an extensive report putting the Town's financial position in its most favorable light. He further noted, however, that the report would be more persuasive in the absence of a declining economy, declining surplus, declining State aid, and the budgetary pressures placed upon the Town due to the tax cap levy. The arbitrator concluded that an award to base pay beyond 3.25% per year would be inconsistent with the relevant statutory criteria.

The Town's law enforcement units have received additional payments beyond the levels of the across-the-board increases. The arbitrator rejected the FMBA's argument for dollar for dollar parity. He found, however, that the FMBA had shown that there was a basis for some additional compensation for specialized duties, although the financial circumstances of the Town prevent such payments from being anywhere near as substantial as the FMBA had proposed. Thus, the arbitrator rejected the FMBA's proposal for HAZMAT and Technical Rescue payments. However, he awarded a 1% payment for the performance of First Responder Duties as part of base pay beginning July 1, 2011. He found that the data submitted concerning the extensive nature of these payments

through fire departments in New Jersey allowed for consideration of the proposal.

The arbitrator also awarded the FMBA's proposals to modify the leaves of absence provision to be consistent with the Kearny Fire Superior Officers Association and PBA benefits. He added the widow's benefit and military leave time provision contained in the PBA agreement. He restored a retiree dental benefit if it was inadvertently omitted from the current agreement, modified the holiday provision to incorporate a practice, included current differentials for the Mechanic and Chief Inspector of Combustibles, ordered the generation of overtime lists in each firehouse, and allowed vacation time carryover at the sole discretion of the Chief. He declined to award any of the other economic or non-economic proposals.

The arbitrator concluded that the annual economic change of the award is 16.25% over five years for base wages with an additional 1% in 2011 due to the First Responder payment. He found the costs of the award to be generally consistent with internal comparability for wage increases that have been granted by the Town during these years in the law enforcement units. He further found the costs to be consistent with the cost of living data submitted for 2007 and 2008 but lower than the data in 2009 and 2010. He concluded that the terms of the award fall above

the cost of the Town's proposal but far lower than the costs associated with the FMBA's proposal.

N.J.S.A. 34:13A-16g 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 leaves, 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-16g]

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.

Arriving at an economic award is not a precise mathematical process. Given that the statute sets forth general criteria

rather than a formula, the treatment of the parties' proposals involves judgment and discretion and an arbitrator will rarely be able to demonstrate that an award is the only "correct" one. See Borough of Lodi, P.E.R.C. No. 99-28, 24 NJPER 466 (¶29214 1998). Some of the evidence may be conflicting and an arbitrator's award is not necessarily flawed because some pieces of evidence, standing alone, might point to a different result. Lodi. Therefore, within the parameters of our review standard, we will defer to the arbitrator's judgment, discretion and labor relations expertise. City of Newark, P.E.R.C. No. 99-97, 25 NJPER 242 (¶30103 1999). However, 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; Lodi.

The Town argues that proper resolution of this matter is a modification of the award or a decision to vacate and remand the award for reconsideration of the economic award for 2010 and 2011. The FMBA responds that since the Town's proposal for a 3.25% increase for 2010 was granted, the Town's appeal should be limited to the 3.25% for 2011, the 1% First Responder pay for 2011, and the vacation and widows' benefits provisions.

More specifically, the Town argues that the arbitrator did not appropriately consider and apply the interest and welfare of the public factor when he awarded a five-year contract. See N.J.S.A. 34:13A-16g(1). The Town states that while there were no economic data for 2010 and 2011 in the record, there is a considerable amount of economic information that demonstrated the trends with respect to loss of State aid, increases in taxes and tax rates, increasing reliance on property taxes as part of the municipal budget, and loss of property value for homeowners. The Town asserts that there is no sound reason to expect that these trends will not continue into both 2010 and 2011. The Town argues that while the arbitrator made reference to the FMBA's financial expert, he made no reference to the report of the Town's Chief Financial Officer. The Town contends that the arbitrator did not discuss the award's impact on the Town's tax rate, and did not analyze the Town's budget situation or its ability to fund the award in the fourth and fifth years in light of its cap obligations.<sup>2/</sup>

The FMBA responds that the arbitrator discussed what considerations were made in reaching his determination. It states that the arbitrator indicated that pursuant to established case law, evidence of pattern of settlement can implicate several

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<sup>2/</sup> The Town has both tax levy and spending cap restrictions that must be considered under N.J.S.A. 34:13A-16g(5) and 16g(9). See N.J.S.A. 40A:4-45.1 and 40A:4-45.45.

of the statutory criteria, including the interest and welfare of the public, internal comparisons between the employer's negotiations units, and the continuity and stability of employment. The FMBA notes that the contract expiration date is consistent with the termination dates of the agreements between the Town and the Association of Department Heads and Assistant Department Heads, Kearny PBA Local 21, and the Kearny SOA. The FMBA further responds that the fact that the arbitrator could not have certain information in his possession for calendar years 2011 and 2012 is irrelevant to his ability to award a contract term beyond 2009. The FMBA states that interest arbitration awards typically extend beyond the date in which the award was rendered.

N.J.S.A. 34:13A-16g(1) addresses the interest and welfare of the public. The arbitrator found a pattern of internal settlement that included the:

Association of Department Head and Assistant Department Heads,  
1/1/09 through 12/31/12 with wage increases of 3.25% per year;

Kearny Civil Service Council No. 11,  
1/1/08 through 12/31/11 with wage increases of 3.25% per year;

Kearny PBA Local 21,  
1/1/07 through 12/31/08 with wage increases of 3.95% per year and  
1/1/09 through 12/31/12 with wage increases of 3.25% per year; and

Kearny Police Superior Officers Association,

1/1/09 through 12/31/12 with maintenance of existing rank differential which translates to the same wage increases of 3.25% per year.

The arbitrator noted that the police units also receive an additional 0.6% per year which turns the 3.95% increases into 4.5% and the 3.25% increases into 3.85%. The arbitrator stated that internal pattern of settlements are also relevant under the comparability factor, N.J.S.A. 34:13A-16g(2)(c), and the continuity and stability of employment factor, 16g(8). The arbitrator applied this internal pattern to base wages and health benefits and that application is supported by substantial credible evidence.

We conclude that the arbitrator adequately addressed the interest and welfare of the public when he awarded the Town's proposal for 3.25% increases for each year of the agreement. We recognize that there can only be limited hard economic data for 2010 through 2012. We recently addressed that fact in the context of a similar dispute over the duration of an agreement. City of Asbury Park, P.E.R.C. No. 2011-17, 36 NJPER 323 (¶126 2010). We stated:

The collective negotiations process contemplates labor and management sitting down and negotiating terms and conditions of employment for one, two, three or more future years. Parties enter into collective negotiations agreements even though no one can predict with any assurance the exact budget circumstances a public employer will face in future years. For police and fire departments, when the parties cannot reach a

voluntary agreement, either party may invoke the interest arbitration process by which a neutral third party sets terms and conditions of employment based on the evidence presented and in light of the nine statutory factors. N.J.S.A. 34:13A-16b(2). As an extension of the collective negotiations process, an arbitrator will also award multi-year contracts. And because of the delays in the interest arbitration process, arbitration awards will often also set terms and conditions of employment retroactively thereby requiring adjustments to the public employer's budgets. Retroactive salary adjustments and future salary increases are inherent in both the collective negotiations process and interest arbitration.

Here, the arbitrator awarded a fifth year, but awarded an increase for that year consistent with the Town's settlements with its department heads and assistant department heads, police officers and police superior officers. The additional 0.6% annual muster pay for the police officers is addressed by the award of a 1% First Responder stipend in the last year of the agreement. Although the arbitrator did not order employee contributions to health insurance premiums, 1.5% contributions for health benefit premiums under P.L. 2010, c. 2 commenced on May 21, 2010. The Town's other negotiations units will not begin to make health benefit contributions until the expiration of their current agreements.

The Town also argues that the arbitrator failed to consider and give due weight to the lawful authority of the Town. See N.J.S.A. 34:13A-16g(5) and (9). The Town asserts that the

arbitrator completely ignored both the tax levy cap and the appropriations cap. The Town further asserts that the award will make it extremely difficult, if not impossible, for the Town to meet those legally imposed obligations.

The PBA responds that the arbitrator referred to the cap laws in explaining that "an award to base salary beyond 3.25% would be inconsistent with the relevant statutory criteria. These include financial impact, the impact of the costs of the FMBA's proposal on the Town's appropriation and revenue caps, internal comparability and cost of living." Arbitrator's Award at 67. It further responds that the Town and PBA agreed to a four-year agreement with a 3.25% increase in addition to the 0.6% muster pay, totaling 3.85% for each of the years 2009 through 2012. The FMBA contends that the FMBA Financial Expert Report demonstrated that the Town is in good financial health and could easily have afforded to pay the FMBA's proposal and that the salary increases and other benefits are well within cap calculations.

N.J.S.A. 34:13A-16g(5) and (9) require consideration of the employer's lawful authority, in particular consideration of its cap restrictions. In its brief to the arbitrator, the Town acknowledged that the tax levy cap is applied to the budget as a whole and not to each of its individual components. Appellant's Appendix at 137. In its brief on appeal, the Town argues that

the award will make it extremely difficult, if not impossible, for the Town to meet its cap obligations. The Town asserts that it will have to reduce its labor costs through reductions in personnel in order to remain within the cap limitations. We reject this ground for appeal. An interest arbitration award is not unreasonable even though an employer may be forced to make economies in order to implement the award. Irvington PBA v. Town of Irvington, 80 N.J. 271, 296 (1979). That is true even where municipal officials must determine whether, and to what extent, police personnel or other employees should be laid off, or whether budgetary appropriations for non-payroll costs should be reduced. Id. at 296-297. We recognize that any salary increase places pressure on a public employer's cap limitations. However, an interest arbitration award that is similar to the employer's own internal pattern of settlements should not create unexpected pressure.

The Town also argues that the arbitrator failed to assess the financial impact of the last two years of the award. N.J.S.A. 34:13A-16g(6). The Town contends that the failure to have a record to assess the financial impact of the last two years is fatal to its approval, particularly given the unprecedented economic situation facing municipalities in New Jersey.

The FMBA responds that the employer's offer does not automatically equate with the public or taxpayers' interest. It states that arbitrators have viewed the public interest as encompassing the need for both fiscal responsibility and a compensation package required to maintain an effective public safety department with high morale.

Our discussion of Asbury Park above is relevant here. There is no per se bar to awarding terms and conditions of employment for future years based on the record evidence and the current economic trends. The Town presented hundreds of pages of documentation to the arbitrator. It has not pointed to any particular evidence in the record that requires rejecting the arbitrator's award of increases similar to the Town's own internal pattern of settlement.

The Town also argues that the arbitrator failed to appropriately assess the continuity and stability of employment. N.J.S.A. 34:13A-16g(8). It contends that the arbitrator rejected the Town's reasonable request for a 1.5% contribution towards health insurance, a contribution now imposed by law on most public employees in New Jersey. The Town argues that the arbitrator placed too great an emphasis on comparability with the Town's police officers. It asserts that the focus should not be on whether the employees will be satisfied with the compensation package they receive, but instead on whether the public employer

can maintain its current staffing levels while at the same time pay for the rising cost of employee salaries and benefits.

The FMBA responds that the arbitrator addressed this factor in general and in addressing the duration of the award. It suggests that the Town wants to reopen the record to challenge the fourth year of the agreement that it had proposed. The FMBA states that the Town continuously relies upon economic conditions of the State and not the economic conditions that are specific and relevant to the Town of Kearny. The FMBA adds that pursuant to P.L. 2010, c. 2, the Town instituted a 1.5% salary deduction of base salary from Kearny firefighters towards health care and that this issue is moot.

We conclude that the arbitrator adequately considered this statutory factor and that his award is supported by substantial credible evidence. The Town has not pointed to any evidence showing that the award in the final two years will impact its ability to continue staffing levels in the Fire Department or other Town departments.

Finally, the Town argues that the award must be vacated or modified because the arbitrator violated the standards set forth in N.J.S.A. 2A:24-8(d). The award states:

Language shall be added to the Agreement stating that "At the sole discretion of the Chief, FMBA members may receive payment for all carried over vacation time at straight time or, in the alternative, the ability to

carry over all unused vacation days at the end of the calendar year.”

The Town asserts that the award makes no mention of the basis for the carryover or the length of time of such carryover, all of which are circumscribed by N.J.S.A. 11A:6-3. That statute permits vacation time not taken because of business demands to accumulate and be granted during the next succeeding year only. The Town contends that the arbitrator so imperfectly executed his powers in issuing this portion of the award that no definite award on this subject was made.

The FMBA responds that the provision is clear and provides for the restriction of vacation carryover “at the sole discretion of the Chief.”

We conclude that the language does not compel the Town to violate N.J.S.A. 11A:6-3 because the Chief retains the discretion to deny the right to carry over unused vacation days. Any dispute that arises over the meaning of this contract language can be addressed through the parties’ negotiated grievance procedure.

The second alleged violation involves widows’ benefits.

The arbitrator stated:

Effective with the date of this Award, this Agreement shall provide a surviving spouse benefits provision that conforms with the benefits provided by the PBA agreement.

The Town asserts that the award leaves open the question of whether this provision applies prospectively or retroactively. The Town argues that this uncertainty rises to the level of an imperfect execution which in turn requires remand for clarification.

The FMBA responds that the Town did not address the FMBA's proposal in its original submission and that there is no ambiguity, it shall be applied in the same manner as it is applied in the PBA contract.

We similarly hold that any dispute over the meaning of this provision can be addressed through the grievance procedure.

ORDER

The arbitrator's award is affirmed.

BY ORDER OF THE COMMISSION

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

ISSUED: October 28, 2010

Trenton, New Jersey