

P.E.R.C. NO. 2011-76

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF ATLANTIC,

Appellant,

-and-

Docket No. IA-2007-057

FOP LODGE #34,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the appeal of the County of Atlantic of an interest arbitration award. The Commission modifies the award by rescinding the \$1200 equity adjustment awarded by the arbitrator finding that it was not supported by substantial credible evidence in the record. The Commission affirms all other aspects 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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Appearances:

For the Appellant, Eric M. Bernstein & Associates,
L.L.C., attorneys (Deborah J. Bracaglia, of counsel)

For the Respondent, Selikoff & Cohen, PA, attorneys
(Keith Waldman, of counsel)

DECISION

On February 3, 2011, we vacated and remanded, for a second time, an interest arbitration award. P.E.R.C. No 2011-56, ___ NJPER ___ (___ 2011). The award had first been remanded in P.E.R.C. No. 2011-8, 36 NJPER 307 (¶117 2010). On March 18, the arbitrator issued a second supplemental award. On April 14, the County of Atlantic appealed the second supplemental award.^{1/} The County's appeal does not challenge the annual percentage salary increases awarded by the arbitrator for the January 1, 2007

^{1/} As the supplemental award issued after P.L. 2010, c. 105 became effective, this appeal has been processed to meet the time requirements of N.J.S.A. 34:13A-16f(5) (a).

through December 31, 2010 term of the agreement.^{2/} However, the County asserts generally that the arbitrator did not give due weight to the statutory factors and that the granting of the \$1200 equity adjustment to the top step of the salary guide and shift differentials as well as the arbitrator's refusal to grant its proposal to reduce holiday pay from time and one-half to straight time was not supported by substantial credible evidence in the record. On April 19, the FOP Lodge #34 filed a brief in opposition to the appeal.^{3/} We modify the award to eliminate the arbitrator's granting of the \$1200 equity adjustment. All other aspects of the award are affirmed.^{4/}

In P.E.R.C. No. 2011-56, we directed the arbitrator to provide additional information and analysis regarding several issues. With regard to the award of the \$1200 equity adjustment to the top step of the guide, we asked for specific reasoning as to how or why it was necessary to modify the guide and achieve better progression between the steps; the rationale behind the comparability analysis applied with regard to the \$1200 equity

2/ As reflected in our previous decisions, the parties have been working pursuant to the terms of a collective negotiations agreement that expired on December 31, 2006.

3/ Both parties' requests for oral argument are denied. The matter has been fully briefed.

4/ The County's Amended Notice of Appeal has been accepted since it conformed to its letter brief that was filed within the requisite time period.

adjustment; and the treatment of the County's argument that three central New Jersey counties should have been excluded in his comparability analysis. With regard to the arbitrator's denial of the County's proposal to reduce holiday pay from time and one-half to straight time,^{5/} we asked: for an explanation and analysis with regard to the comparables used to decide the issue; and whether his acknowledgment that the mandatory overtime proposal does not result in any cost savings to the County affects his award. Regarding the arbitrator's award of shift differentials^{6/}, we asked for explanations: as to his treatment of the County's argument that no other County employees, law enforcement or otherwise, received shift differentials; and his treatment of the comparability evidence that was submitted regarding shift differentials.^{7/} With regard to consideration of

5/ As reflected in P.E.R.C. No, 2011-56, the current holiday pay practice is that officers receive by November 15th of each year payment for ten holidays at time and one-half of their daily rate of pay. Since the officers work in a facility that operates 24 hours a day, seven days a week, officers work on holidays that fall on regularly scheduled days. When an officer's regularly scheduled work day falls on a holiday, they receive an additional full days pay. (Supp. Award at 7).

6/ As reflected in our prior decisions, the arbitrator awarded shift differentials of \$.50 per hour for 0730 - 1530 hours and \$.55 per hour for 1530 - 2330 hours.

7/ We also asked the arbitrator to explain why the retiree health benefits provision was awarded as of December 31, 2009 as opposed to the start of the agreement on January 1, 2007. As described in our prior decisions, the retiree
(continued...)

the lawful authority of the employer and the financial impact of the award, we asked the arbitrator: to identify what part of the expert witnesses' testimony he relied on in making his findings that the County could fund the award without exceeding its lawful authority; and also to reconcile his findings about the general severe state of the economy with the various economic aspects of the award. We also asked for a more thorough explanation of the relative correlation between the cost of living and the awarded increases.

On March 18, 2011, the arbitrator issued a second supplemental award. With regard to the \$1200 equity adjustment, the arbitrator stated that "the equity adjustment is for the top step of the salary guide to keep the workforce stable." (Supp Award2 at 13). As he did in his prior awards, he drew comparisons to PBA 243 and PBA 77, representatives of other law enforcement units in the County. He stated "I fail to understand why a \$1200 equity adjustment is okay for PBA 243 and PBA 77 but it is not okay or acceptable for FOP 34." (Supp Award2 at 14)^{8/}.

7/ (...continued)
health provision awarded by the arbitrator increased the qualifying years of full-time service with the County from 15 to 25 to qualify for retiree health benefits. With regard to the retiree health benefits provision, the arbitrator modified his award and found that the provision should be awarded as of January 1, 2007 instead of January 1, 2009. (Supp Award2 at 2 - 3).

8/ "Initial Award" refers to the arbitrators' initial award
(continued...)

In rejecting the County's proposal to reduce holiday pay from time and one-half to straight time, he found a pattern of bargaining existed with the three FOP superior officer units at the correctional facility, and noted that the time and one-half payment has existed since at least 2005. With regard to how the employer would save money in connection with the mandatory overtime proposal, the arbitrator noted that the holidays are not named in the contract. He then reviewed the holidays that are named in nine other law enforcement contracts and other contracts within the County and modified his award to reflect that the named holidays that have appeared in all of the other contracts shall appear in this contract. (Supp Award2 at 7 - 9). He went on to modify his mandatory overtime proposal to read as follows:

An officer shall have the option to refuse mandatory overtime two (2) times per calendar year. Overtime refusal shall apply to Thanksgiving Day, Christmas Day and New Year's Day. Overtime refusal shall not apply to the ten (10) remaining recognized holidays or Superbowl Sunday. On Superbowl Sunday, Corrections Officers assigned to work Superbowl Sunday cannot call out and utilize that day not to appear at work now. This means the stick list is not being utilized or minimally utilized because of long-term absences on that particular day and all assigned employees will be present. If an officer does call out sick at least one day

8/ (...continued)
issued on April 2, 2010, "Supp Award" refers to the first supplemental award issued on September 1, 2010 and "Supp Award2" refers to the second supplemental award issued on March 18, 2011.

prior to Superbowl Sunday, and at least one day after Superbowl Sunday, that Officer must present a physician statement. Personal days, vacation days, compensatory days and administrative days cannot be utilized on Superbowl Sunday without the prior approval of the Officer's immediate supervisor. Any verified violation of the above will result in disciplinary action against that officer(s). This provision shall not apply in emergent situations and whether a situation is deemed emergent shall be determined by the Shift Commander.

The arbitrator found that officers not being able to call off from work on the ten recognized holidays, plus the day before Superbowl Sunday, Superbowl Sunday and the day after Superbowl Sunday, saves the County money on overtime. (Supp Award2 at 9 - 12). With regard to shift differentials, the arbitrator acknowledged that no other law enforcement groups employed by the County receive shift differentials. However, he awarded the shift differentials based on comparisons he made to three other non-law enforcement units within the County who work in a facility that operate 24 hours a day, seven days a week. (Supp Award2 at 4 - 7). With regard to the lawful authority of the employer, the arbitrator stated that the County offered 16.9% over four years and that it specifically represented that if its proposal were granted it could meet the lawful authority of the employer standard, as well as not exceed CAP limitations. Based on this representation, and because his award equated to 15.75% and was less than the County's offer, he determined he did not

have to go into any in depth analysis of the CAP limitation or the lawful authority of the employer. The arbitrator stated that he relied on the County's expert testimony setting forth that the County's surplus had remained relatively static through 2009 as had the amount utilized to support the budget, and that the County does in fact replenish surplus annually. The arbitrator concluded that given these considerations, the lawful authority of the employer and the cost of living were not the major standards he utilized in arriving at his award. He stated that he placed the heaviest emphasis on the comparability with County employees including law enforcement.

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). 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 County asserts the following six grounds as the basis for its appeal:

I. The interest arbitration opinion and award fails to give due weight to the statutory factors judged relevant to the resolution of the within dispute.

II. Arbitrator Restaino's supplemental opinion and award is not in compliance with N.J.S.A. 2A:24-8 and 2A:24-9 in that the awards of shift differentials, the \$1200 equity adjustment and the refusal to award the County's holiday pay proposal are not fully supported by substantial credible evidence: therefore the award should be vacated and the within appeal granted.

III. The overwhelming weight of the evidence and the pattern of bargaining within the correctional facility does not support the award of the shift differentials for officers working the 0730 - 1530 and the 1530 - 2330 shifts.

IV. There is no support in the record for the arbitrator's assertion that the workforce at the correctional facilities is not stable and there is no pattern of bargaining between the PBA units and the FOP Lodge 34; therefore, there is no basis for the award of the \$1200 equity adjustment.

V. There is no analysis and no support for the arbitrator's refusal to award the County's proposal to reduce holiday pay from time and one-half to straight time.

VI. The supplemental award, like the initial award, fails to adequately analyze the financial impact of the overall award on the citizens, residents and taxpayers of the County.

The FOP responds that the second supplemental award "carefully and decisively addresses each of the stated reasons for the remand." The FOP also seeks post-judgment interest in the event that the County does not make payment within 14 days of confirmation of the award.

Analysis

On January 1, 2011, P.L. 2010, c. 105 became effective. Pursuant to this law, we have 30 days to process an appeal of an interest arbitration award. N.J.S.A. 34:13A-16f(5) (a). Given this time constraint, and in the interest of the parties to finalize the terms of this contract which is already expired, we are modifying the granting of the \$1200 equity adjustment as we are authorized to do pursuant to N.J.S.A. 34:13A-16f (5) (a). Our decision to modify this aspect of the award is due to these unique circumstances where the decision has already been remanded twice and a third remand would not benefit the parties.

We begin with setting forth the economic aspects of the award that have not been appealed by the County:

-For 2007, the arbitrator added a new maximum step 8 to the salary guide. All officers on steps 6 and 7 moved to step 8. He awarded 3% increases except for the maximum step which was increased by 4%. A \$1350 hazardous duty payment was rolled into base pay at each step;

- For 2008, he awarded a 3% increase to each step except step 8 which received 4%;

-For 2009, the arbitrator awarded a 3.5% increase to each step, except step 8 which received 3.75%;

-For 2010, the arbitrator awarded a 3.5% increase to each step except step 8 which received 4.0%. He also added a new maximum step 9 and all officers on steps 7 and 8 moved to step 9;

- The clothing allowance was increased from \$1,250 to \$1,350;

-All members of the Special Emergency Response Team were awarded a \$500 stipend, effective January 1, 2009; and

- With regard to unused sick leave, effective January 1, 2007, the arbitrator increased by \$1,000 at 50% of days (total \$13,000); effective January 1, 2008, increased by \$1,000 at 50% of days (total \$14,000); effective January 1, 2009, increased by \$1,000 at 50% (total \$15,000 at 50% of days) and effective January 1, 2010, changed to \$15,000 at 100% of days.

We find that the arbitrator's granting of the \$1200 equity was not supported by substantial credible evidence in the record. The arbitrator premised his award of the \$1200 equity adjustment to the top step of the salary guide "to keep the workforce stable." (Supp. Award2 at 13). However, there is no indication

in his initial award, his first supplemental award, or his second supplemental award that the workforce is unstable or is under threat of becoming unstable. The arbitrator states as follows regarding this issue:

While the County objects to me saying there is not a stable workforce, I have no problem with reopening the hearing to review documentation concerning how many correction officers represented by FOP 34 have left in 2007, 2008, 2009 and 2010, and the reasons for them leaving, whether it is for retirement or other reasons. Additionally, when somebody leaves and is replaced, the difference in salary goes to the County. This is the so-called breakage money. I addressed breakage money on pages 55/56 of my [Initial] Award. I also addressed on those pages the impact on average salaries with a high turnover. My experience as an interest arbitrator has shown me that typically corrections officers do not transfer from a municipality, County Sheriff's Office Prosecutor's Office or even the NJ State Police. They are usually hired "off the street" after being interviewed and assessed by the County. After working a specified number of years as a correctional officer, there is a turnover when some move on to a higher paying law enforcement position. Some transfer into a supervisory law enforcement position in the same facility. On the entire pyramid of salaries paid to law enforcement facilities, Corrections Officers [are] towards the bottom. Corrections Officers leave the correctional facility to work for a municipality, a Sheriff's Department, potentially the Prosecutor's Office, and potentially for the State Police. It is my understanding that no one becomes a Corrections Officer who has already served as a Municipal Police Officer or Sheriff's Officer. Therefore, to maintain a stable workforce and to keep the workforce in place

I put the \$1200 equity adjustment in the top step of the salary guide.

[Supp. Award2 at 13 - 14]

The above statement represents anecdotal observations by the arbitrator, and is not based on substantial credible evidence supporting a finding that the workforce in this unit is unstable or is in danger of becoming unstable. Moreover, the arbitrator again justified the equity adjustment with comparisons to other law enforcement employees in the County, specifically Sheriff's Officers represented by PBA Local 243 (for which voluntary settlement was reached on April 21, 2006) and Prosecutor's Officers rank and file and superior officers represented by PBA Local 77 (for which voluntary settlement was reached for both units in 2009). (Supp. Award at 1 - 2). For PBA Local 243, a \$1200 equity adjustment was added to the top step of the guide. For both superior officers and rank and file officers represented by PBA Local 77, \$2,800 was added to the top step and then a percentage of that \$2,800 was added to each individual step as an equity adjustment. (Supp. Award at 2 - 3). The arbitrator found that although it is indisputable that corrections officers are not paid at the same level as the Sheriff's officers represented by PBA Local 243, Sheriff's officers represented by PBA Local 243 received a \$1,200 equity adjustment to the top step of the salary guide and therefore a \$1,200 equity adjustment was necessary to maintain a stable work force for the members of FOP Lodge #34.

(Initial Award at 83, Supp. Award at 4). However, as the arbitrator noted, PBA Local 243 had made a substantial concession in giving up overtime opportunities resulting from performing hospital duties. The rank and file officers and the superior officers represented by PBA Local 77 agreed to make health insurance contributions of 1% of their base salary and to take three furlough days in 2009 and three furlough days in 2010. The arbitrator noted that "even though health insurance is not on the table with FOP Lodge 34, the fact remains that the salary increases were negotiated by PBA 77 because of give-backs. There are no give-backs from FOP Lodge 34." (Initial Award at 85). The arbitrator himself acknowledges that the unions in the comparisons he used made concessions that are not present in the instant matter. This difference calls into question the arbitrator's use of comparables on this issue. We also note that the arbitrator failed to address the County's argument that three central New Jersey counties should have been excluded in his comparability analysis. Borough of Paramus, P.E.R.C. No. 2010-35, 35 NJPER 431 (¶141 2009).

The arbitrator's award of shift differentials was based on comparisons he made with three County non-law enforcement units whose members are employed at a facility that operates 24 hours a day, seven days a week. The arbitrator's refusal to award the County's proposal to reduce holiday pay from time and one-half to

straight time was based on comparisons to the three FOP units of superior officers at the correctional facility. Those aspects of the award are affirmed. Accordingly, we modify the award to eliminate the granting of the \$1200 equity adjustment. All other aspects of the award are affirmed.

ORDER

The award is modified to eliminate the granting of the \$1200 equity adjustment. All other aspects of the award are affirmed.

BY ORDER OF THE COMMISSION

Commissioners Colligan, Eaton, Krengel and Voos voted in favor of this decision. Chair Hatfield and Commissioners Bonanni and Eskilson voted against this decision.

ISSUED: May 13, 2011

Trenton, New Jersey