

P.E.R.C. NO. 2012-66

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PBA LOCAL NO. 396 AND
PBA LOCAL NO. 396A,
Petitioners,

-and-

Docket No. SN-2012-055

COUNTY OF CUMBERLAND AND
CUMBERLAND COUNTY PROSECUTOR,
Respondents.

COUNTY OF CUMBERLAND AND
CUMBERLAND COUNTY PROSECUTOR,
Petitioners,

-and-

Docket No. SN-2012-061

PBA LOCAL NO. 396 AND
PBA LOCAL NO. 396A,
Respondents.

COUNTY OF CUMBERLAND AND
CUMBERLAND COUNTY PROSECUTOR,
Appellants,

-and-

Docket No. IA-2012-028

PBA LOCAL NO. 396 AND
PBA LOCAL NO. 396A,
Respondents.

Docket No. IA-2012-029

SYNOPSIS

The Public Employment Relations Commission considers appeals filed by the Cumberland County Prosecutor and Cumberland County from interest arbitration awards setting the terms of collective negotiations agreements for superior officers represented by PBA Local 396A and detectives and investigators represented by PBA Local 396. The Commission also issues negotiability rulings on contract proposals and contract language identified in scope of negotiations petitions filed by both parties as to those issues

that were not rendered moot because the arbitrator declined to award the proposals or language in dispute.

The Commission affirms the interest arbitration award covering the Superior Officers represented by PBA Local 396A. It remands the award covering officers represented by PBA Local 396 to have the arbitrator explain and clarify the financial impact of the salary award, taking into account both the percentage increases awarded for the term of the successor agreement and the raises resulting from advancement on the salary guide. The Commission affirms the award covering PBA Local 396 in all other respects.

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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Appellants,

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Docket No. IA-2012-028
Docket No. IA-2012-029

PBA LOCAL NO. 396 AND
PBA LOCAL NO. 396A,

Respondents.

Appearances:

For the Petitioners in SN-2012-061, the Respondents in SN-2012-051, and Appellants in IA-2012-028 and IA-2012-029, Genova, Burns, Giantomasi & Webster, attorneys (Brian W. Kronick, of counsel; Brian W. Kronick and Phillip M. Rofsky, on the briefs)

For the Petitioners in SN-2012-055, the Respondents in SN-2012-061, IA-2012-028 and IA-2012-029 SN-2012-061, Alterman & Associates, LLC, attorneys (Christopher A. Gray, of counsel)

DECISION

In this decision we rule upon an appeal from an interest arbitration award covering two collective negotiations units of law enforcement officers employed by the Cumberland County Prosecutor and represented for purposes of collective negotiations by PBA Local 396 (Detectives/Investigators) and PBA Local 396A (Superior Officers).^{1/} We also determine if proposals submitted to interest arbitration, raised in related scope of negotiations petitions, are mandatorily negotiable, but only as to issues that did not become moot after the award issued.

On March 15, 2012, petitions to initiate compulsory interest arbitration were filed with the Public Employment Relations

^{1/} The Prosecutor is the public employer of both units of employees. See Mercer Cty. and Mercer Cty. Pros'r, 172 N.J. Super. 411 (App. Div. 1980). However, as Cumberland County funds the Prosecutor's office, it is also listed as an employer in the captions of the cases. See In re Application of Bigley, 55 N.J. 53 (1969). References to the "County" will mean both the County and the Prosecutor unless otherwise indicated. References to the "PBA" will signify both law enforcement units unless otherwise indicated.

Commission by PBA Local 396 (IA-2012-028) and PBA Local 396A (IA-2012-029).

On May 17, 2012, the arbitrator issued a conventional interest arbitration award setting the terms of successor collective negotiations agreements for both units. N.J.S.A. 34:13A-16d, as amended by P.L. 2010, c. 105, requires that the impasse be resolved by the issuance of a conventional award, crafted by an arbitrator after considering the parties' final offers in light of statutory factors.

On May 25, 2012 the County filed a Notice of Appeal with the Commission, together with a supporting brief. On June 1, the PBA filed a brief urging that the award be affirmed.

In addition, on March 23 and April 16, 2012, respectively, the PBA (SN-2012-055) and the County (SN-2012-061) filed scope of negotiations petitions seeking rulings on contract proposals and language listed as issues in the interest arbitration. We rule only upon the negotiability of those issues that remain in dispute after the interest arbitration award.^{2/}

2/ N.J.A.C. 19:13-3.2 provides in pertinent part:

(a) When a petition to initiate compulsory interest arbitration . . . has been filed, the Commission will suspend the processing of any scope of negotiations petition involving issue(s) in dispute in the interest arbitration proceeding.

* * *

(continued...)

Scope of negotiations issues

In its Notice of Appeal, the County asserts that, given the Commission's exclusive jurisdiction, the arbitrator lacked authority to make rulings on the following issues identified in the scope petitions that the County contends are not negotiable: Minor Discipline; Vehicle specifications; and Health Insurance Opt-out.^{3/}

Initially, we note that before considering the merits of an issue where a negotiability objection had been raised, the arbitrator declared:

I do not address the negotiability of this proposal. That statutory authority rests with PERC who has not delegated that authority to interest arbitrators to render such decisions. However, PERC has suspended its rule that had prohibited arbitrators from

2/ (...continued)
(c) The Commission will resume processing of a scope of negotiations petition:

1. As part of an appeal from an interest arbitration award, provided that the award includes issue(s) that were asserted to be non-negotiable in the scope of negotiations petition;

* * *

(d) Unless the conditions described in (c)1 . . . are present, after the issuance of an interest arbitration award . . . the Commission will not, . . .determine the negotiability of any issue.

3/ The parties disputed the negotiability of proposals concerning "layoffs by seniority" and "sick time buy back." The arbitrator did not award those proposals. Accordingly, these negotiability disputes are moot.

issuing an award on an issue that is subject to a scope of negotiations petition. Following this suspension, no new rule has yet been adopted. Accordingly, I will decide this issue on its merits and not as a substitute for an agency scope of negotiations determination.

The arbitrator is correct that, as of the date of his award, we had not adopted a rule expressly allowing arbitrators to issue scope rulings as part of an interest arbitration award. However, that may soon change as we have proposed to readopt, with amendments, our rules governing interest arbitration proceedings.^{4/} A proposed amendment would alter N.J.A.C. 19:16-5.7(i) to read:

If a party objects to an issue as being outside the scope of mandatorily negotiable subjects, the parties may state their positions to the arbitrator on the record. The arbitrator shall be permitted to take evidence and render a decision on the issue. Any further negotiability argument may be made to the Commission post-award if appealed and provided the negotiability objection has not been waived by a party's failure to file a timely petition for scope of negotiations determination.

In accordance with the intent of the rule proposal, the arbitrator analyzed the negotiability of the disputed language,

^{4/} This proposal appeared in the New Jersey Register (NJR) at 44 N.J.R. 562(a). And, the Commission has received comments from interested parties and the public in accordance with the mandates of the Administrative Procedure Act. The Commission has the authority to vote on the proposed re Adoption with amendments at an upcoming regular meeting. If the rule proposal is approved, the amendments would take effect when an adoption notice is published in NJR.

clarified the issues, discussed and applied precedent. His opinion provides context to decide the negotiability issues.

The standard for determining the negotiability of proposals involving police officers and fire fighters is set forth in City of Paterson and Paterson Police PBA, 87 N.J. 78, 87 (1981).

Because the negotiability dispute arose during collective negotiations and interest arbitration, only mandatorily negotiable subjects can be part of the interest arbitration award. Where a proposal is alleged to be non-negotiable because it is "expressly, specifically and comprehensively" preempted by a state statute or regulation, the test set forth in Bethlehem Tp. Bd. of Ed. and Bethlehem Tp. Ed. Ass'n, 91 N.J. 38 (1982) is applied. We now review the negotiability rulings that are challenged in this appeal.

Minor Discipline

The arbitrator awarded a modified version of the PBA's minor discipline proposal by directing that the successor agreements provide for binding arbitration to review suspensions of one day or more up to five days. We adopt the arbitrator's analysis that the minor discipline proposal concerned a mandatorily negotiable term and condition of employment. It is well settled that allowing law enforcement personnel to contest minor disciplinary sanctions (suspensions or fines of five days or less) through binding grievance arbitration is mandatorily negotiable and is

not preempted by any statute or regulation. See N.J.S.A. 34:13A-5.3; County of Monmouth v. Communications Workers of America, 300 N.J. Super. 272 (App. Div. 1997).^{5/}

Vehicle Specifications

The interest arbitration award recognizes that, in general, a public employer has the authority to unilaterally decide what vehicles to purchase, and how they shall be equipped, except as to particular specifications or vehicle features that may directly relate to the safety of law enforcement personnel as well as proper maintenance of vehicles. The latter issues are

^{5/} N.J.S.A. 2A:157-10 et. seq. does not preempt a contract provision allowing an investigator to contest suspensions of one to five days through binding arbitration. N.J.S.A. 2A:157-10.1 provides that a county investigator shall not be suspended, removed, fined or reduced in rank except for just cause and then only upon a written complaint setting forth the charge or charges. While N.J.S.A. 2A:157-10.7 permits judicial review of any sanction imposed, an investigator may use an alternative method of review as N.J.S.A. 2A:157-10.1 also provides:

The investigator may waive the right to a hearing and may appeal the charges directly to any available authority specified by law or regulation, or follow any other procedure recognized by a contract, as permitted by law.

[emphasis supplied]

As review of minor discipline imposed on a police officer through a contractual grievance procedure is a legally negotiable issue, the arbitrator's award is "permitted by law."

mandatorily negotiable. Middlesex Cty. and PBA Local 152 Correction Officers of Middlesex Cty. Workhouse, 6 NJPER 338, 339 (¶11169 App. Div. 1980).

The County sought removal of Article XXIII "Vehicles" from the most recent agreements covering these units. The PBA noted that the contractual vehicle requirements were, in part, the product of a report issued by an expert hired by the Board of Freeholders.

The arbitrator directed that Article XXIII be partially modified.^{6/} His award states:

6/ The article specifies that:

1. Vehicles be 4-door, mid to full size with AM/FM radios and air conditioning;
2. Vehicles for investigators have adequate emergency lighting and audible devices to conform with the minimum standards of the Attorney General Guidelines on Motor Vehicle Pursuits;
3. Vehicles will be kept on a routine maintenance schedule;
- 4, Any vehicle that exceeds 100,000 miles by December 31st of a calendar year will be replaced;
5. Vehicles deemed unsafe to operate will be removed from service and immediately repaired, or, if necessary, replaced;
6. The assigned operator of a vehicle will maintain it in accordance with maintenance guidelines and policies;
7. All damage or other issues will be immediately reported to the investigator' s supervisor;
8. Each assigned vehicle will be maintained by that officer 24 hours per day, can be used in Cumberland and adjacent

(continued...)

To the extent that Article XXIII requires vehicles to conform to specific standards, I award a modification that would remove vehicle specifications from the existing provision. I do not redraft or rephrase Article XXIII because the PBAs have indicated a willingness to cooperate with the Prosecutor concerning vehicle replacement and other such issues. It is appropriate to require such discussion to ensue through a joint committee whose function shall be to modify Article XXIII solely with respect to issues such as vehicle specification and replacement.

The County asserts that the arbitrator's award allows the committee to determine issues involving vehicles that are not mandatorily negotiable.

We find that the County's concern is premature. We adopt the arbitrator's negotiability determination and agree with his opinion that portions of Article XXIII involving vehicle features unrelated to the comfort and safety of law enforcement officers are not mandatorily negotiable.^{7/}

Health Insurance Opt-Out

The PBA proposed to modify Article XXIV of the prior agreement allowing an employee to waive health insurance in

6/ (...continued)
counties while on-duty or on-call, except for authorized out of area law enforcement duties.

7/ In the event the PBA files a grievance alleging a violation of Article XXIII, that seeks adherence to specifications unrelated to comfort and safety, the County may seek to restrain binding grievance arbitration at that time by filing a scope of negotiations petition.

exchange for a stipend. The proposal would cap opt-out payments at 25% of the applicable premium up to a maximum of \$5,000.

The County argued that the opt-out proposal was preempted by N.J.S.A. 40A:10-17.1.

The arbitrator concurred that the statute precluded negotiations over the program and, in the event a public employer decided to implement a program, vested the employer with sole discretion as to the amount of the payments for a waiver of coverage, subject to the statute's terms which caps compensation at the lower of 25% of the applicable premium or \$5,000.00

The arbitrator made the following ruling:

However, there is nothing that precludes the County from setting the amount of consideration in the form of notice to the PBA within the context of the collective negotiations agreement. Accordingly, I award the language of the PBAs' proposal in the form of a recommendation to the Prosecutor to be considered for adoption and, if adopted, to include an opt out provision in the form of a notice to the unit employees as follows:

The Prosecutor has exercised the authority of that office to allow employees to opt out of the County's sponsored health benefits plan in the amounts allowable by N.J.S.A. 40A:10-17.1 , namely, in an amount equivalent to 25% of the premium for the type of coverage waived not to exceed \$5,000. Any change to this program can be made with thirty (30) days written notice. The Prosecutor shall notify the PBA, within thirty (30) days of the Award as to whether the recommendation is accepted.

Following receipt of the award, the Prosecutor, on May 29, 2012, advised the presidents of Local 396 and Local 396A that an

opt-out program would not be implemented. In its response to the County's appeal, the PBA says that the Prosecutor's decision moots the scope of negotiations dispute over this proposal.

The PBA is correct and we will dismiss the negotiability challenge to this proposal as moot.

The Appeal from the Interest Arbitration Award

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's award is not necessarily flawed because some pieces of evidence, standing alone, might point to a different result. Borough of Lodi, P.E.R.C. No. 99-28, 24 NJPER 466

(¶29214 1998). Therefore, within the parameters of our review standard, we will defer to the arbitrator's judgment, discretion and labor relations expertise. City of Newark. However, an arbitrator must provide a reasoned explanation for an award and state what statutory factors were 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.

On May 17, 2012, the arbitrator issued a 70-page Opinion and Award. The record contains the testimony of seven witnesses and more than 300 exhibits. After summarizing the parties' proposals and respective arguments on those proposals in detail, the arbitrator awarded a four-year agreement with a term of January 1, 2011 through December 31, 2014.

Salary increases for PBA Local 396

The award provides for these increases:

- 0% effective January 1, 2011
- 1.0% effective on January 1, 2012,
- 1.25% on July 1, 2012,
- 1.0% on January 1, 2013,
- 1.25% on July 1, 2013
- 1.5% effective January 1, 2014.^{8/}

^{8/} The award contains a new salary schedule for both collective negotiations units that reflect these percentage increases.

In addition, the arbitrator rejected the County's proposal that there be no step movement during 2012 and 2013.^{9/}

The County argues that (1) the arbitrator should not have awarded both step movement and percentage increases;^{10/} and (2) the arbitration award is deficient because it does not discuss and analyze the total cost of both the percentage increases and step increases.^{11/}

The PBA responds that the interest arbitrator "was under no obligation to fully cost out wage increases with step movements." It contends that the testimony of two witnesses, Dr. Raphael Caprio, and County Administrator Ken Mecouch, deal directly with the financial issues raised by the County's appeal and support the arbitrator's award.

The arbitrator did construct a new salary guide that reflects the salary increases that he awarded. However, the award does not set out the total dollar cost of the step

^{9/} The County's appeal does not challenge the salary increases awarded for PBA Local 396A as there is no salary guide with step increases for superior officers. A scattergram submitted by the County (Exhibit E4) shows that 10 of the 28 officers represented by Local 396 were already at the top step of the salary guide for that unit.

^{10/} The County had proposed percentage increases of 1.75% effective July 1, 2012 and 2.00% effective July 1, 2013. However, those percentage increases would only be received by officers on the top step of the salary guide.

^{11/} The County asserts that the cost out totals 4.4% in 2011; 4.8% in 2012; 5.9% in 2013 and 4.8% in 2014.

movements over the term of the agreement. Interest arbitration awards filed with this agency must now include this information in a standard summary format to facilitate comparisons.

Moreover, the Police and Fire Public Interest Arbitration Task Force is charged with studying the relative growth in total compensation rates for all interest arbitration awards. N.J.S.A. 34:13A-16.8e(2). Because the terms and spirit of the 2010 amendments to the interest arbitration law are aimed at transparency and consistency, we think it is appropriate for all interest arbitration awards to cost both step movement and percentage increases for each year of the contract. This explanation should be reflected in the interest arbitration award. It is not appropriate for us to perform those calculations for the first time in considering an appeal of an award. Therefore, we remand the award to provide such clarification.^{12/} We expect that in future cases, interest arbitration awards will detail the dollar cost of awards, where the same or similar issues are present.

The County also appeals the arbitrator's decision not to add contract language it proposed that would provide that step movement would be frozen upon the expiration of the agreement

^{12/} The hard cap on salary increases in P.L. 2010, c. 105 does not apply to this arbitration proceeding as the prior contract expired on December 31, 2010. See Borough of Bloomingdale, P.E.R.C. No. 2011-70, 37 NJPER 143 (¶43 2011).

until a successor agreement is reached through collective negotiations or interest arbitration. In rejecting the County's proposal, the arbitrator observed:

The failure to award this proposal is not intended to serve as a waiver of any arguments the County may raise in the future with regard to the automatic payment of future increments upon contract expiration which, as the parties have referenced, has been the subject of recent case law. In the event that any such dispute arises in the future on this issue, they may be resolved through the grievance procedure and/or unfair labor practice proceedings.

We deny this aspect of the County's appeal as the award does not affect the ability of the County to maintain that it is not obligated to pay step increases on contract expiration.

Duration of Agreement

The County also appeals the award of a four-year agreement, rather than a three year contract as it had proposed. Other than to refer to its poor financial condition, the County provides no grounds to set aside the arbitrator's award concerning contract term. The County argues that the uncertainty of fiscal forecasting made its proposed three-year agreement more reliable.^{13/} Uncertainty is not evidence and, by definition, cannot be determined. See City of Asbury Park, P.E.R.C. No.

^{13/} We note that, as the award issued in mid-May, 2012, the first 17 months of the new contract have already passed.

2011-17, 36 NJPER 323 (¶126 2010). We affirm the awarding of a four year term.

ORDER

A. The "Minor Discipline" proposal awarded by the arbitrator is mandatorily negotiable and shall be incorporated into the successor agreements between the County and PBA Local 396 and PBA Local 396A, respectively.

B. The arbitrator's directive that a joint committee be formed to recommend changes in Article XXIII "Vehicles" is adopted as the award appropriately notes that vehicle specifications and features that are unrelated to employee safety are not mandatorily negotiable. The portion of SN-2012-061 is dismissed without prejudice to the County's right to refile its scope of negotiations petition, after receipt of the report of the joint committee.

C. The challenges to the negotiability of proposals on "layoffs by seniority," "sick time buy back," and "health insurance opt-out" are dismissed as moot.

D. The interest arbitration award issued in IA-2012-029 establishing the terms of a successor agreement between the County and Local 396A is affirmed.

E. The interest arbitration award issued in IA-2012-028 is remanded for an explanation and clarification of the financial impact of the salary award. Such clarification shall take into

account both the percentage increases awarded for the term of the successor agreement and the raises resulting from advancement on the salary guide. The award is otherwise affirmed.

F. The interest arbitrator shall provide the explanation and clarification described in Section E. of this order within 45 days of receipt of this decision. The arbitrator has the discretion to issue his explanation and clarification based upon the record created during interest arbitration, or, in his sole discretion, may solicit additional comment or argument from the parties based on matters already in the record.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Eskilson, Jones, Krengel and Voos voted in favor of this decision. None opposed. Commissioner Wall recused himself. Commissioner Bonanni was not present.

ISSUED: June 25, 2012

Trenton, New Jersey