

P.E.R.C. NO. 98-104

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF BOGOTA,

Appellant,

-and-

Docket No. IA-97-8

PBA LOCAL NO. 86,

Respondent.

SYNOPSIS

The Public Employment Relations Commission vacates an interest arbitration award issued to resolve negotiations between the Borough of Bogota and PBA Local No. 86. The Commission remands the matter to the arbitrator in accordance with its opinion. The Borough had appealed the interest arbitration award.

The Commission finds that the arbitrator's consideration of evidence concerning private sector wage increases did not comport with N.J.S.A. 34:13A-16(g). The Commission remands and directs the arbitrator to consider the Borough's evidence on private sector wage increases. The Commission also remands because of the arbitrator's discussion of the Borough's alternate 4% wage increase proposal. Because the arbitrator did not consider a civilian dispatcher proposal, it was inappropriate for him to stress the small cost differential between his award and a 4% wage increase proposal or suggest that the Borough had agreed to a 4% increase that was contingent upon acceptance of the dispatcher proposal. The Commission orders that he may not do so.

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, Dorf & Dorf, attorneys,
(Gerald L. Dorf and Perry L. Lattiboudere, on the brief)

For the Respondent, Loccke & Correia, attorneys (Leon B.
Savetsky, of counsel)

DECISION

The Police and Fire Public Interest Arbitration Reform Act, P.L. 1995, c. 425, N.J.S.A. 34:13A-14 to -21, authorizes the Commission to decide appeals from interest arbitration awards. N.J.S.A. 34:13A-16f(5)(a). We exercise that authority in this case, where the Borough of Bogota appeals from a September 10, 1997 award involving its police officers.

The arbitrator resolved the unsettled issues in dispute by conventional arbitration, as he was required to do absent the parties' agreement to use another terminal procedure. N.J.S.A. 34:13A-16d(2). He fashioned a conventional award after analyzing the parties' final offers. Those offers were as follows. The PBA proposed a four-year agreement from January 1, 1996 through December 31, 1999, with 5% across-the-board salary increases in

each year. It also sought contract provisions: (1) permitting officers to accrue compensation time in lieu of overtime payments and (2) confirming the parties' "overlap" vacation practice.

The Borough proposed a two-year contract from January 1, 1996 through December 31, 1997. It proposed 4% across-the-board increases in each year if the arbitrator awarded a proposal concerning civilian dispatchers (discussed below) and 3% increases if he did not. It sought to freeze the starting salary for the term of the agreement and, effective July 1, 1997, to institute modified salary and vacation guides for new hires. The Borough did not object to the PBA's compensation time proposal, provided the Borough retained the right to approve use of compensation time.

The Borough also sought to arbitrate two issues not listed in the PBA's July 1996 petition to initiate interest arbitration. It proposed to change medical insurance plans and sought a contract provision authorizing it to use civilian employees to perform dispatch duties. The PBA objected to the submission of these issues. On May 13, 1997, the date of the formal hearing, the arbitrator ruled that he would consider the medical insurance proposal but not the civilian dispatcher proposal. The arbitrator therefore deemed the Borough's final offer to include 3% across-the-board wage increases for 1996 and 1997 (Arbitrator's opinion, p. 14).

The arbitrator awarded a two-year contract from January 1, 1996 through December 31, 1997, with 4.5% across-the-board

increases in each year (Arbitrator's opinion, pp. 33-34). He denied the Borough's medical insurance proposal, as well as its proposals for modified salary and vacation schedules for new hires (Arbitrator's opinion, pp. 34-35). He awarded the PBA's proposal concerning compensation time and denied its proposal relating to overlapping vacation (Arbitrator's opinion, pp. 35-36).

The Borough requests that we vacate the award and remand it to a new arbitrator. It contends that the arbitrator erred in excluding its civilian dispatcher proposal; it was prejudiced by the timing of the arbitrator's ruling on the issues to be included in the proceeding; and the arbitrator erred in finding that the PBA had submitted a final offer that satisfied N.J.A.C. 19:16-5.7(f). The Borough also maintains that the arbitrator did not properly apply the relevant statutory criteria, see N.J.S.A. 34:13A-16g, and did not consider all of its evidence.^{1/}

We turn first to the Borough's procedural arguments.

The Borough first contends that the award should be vacated because it was prejudiced by the arbitrator's alleged failure to determine the issues to be included in the proceeding prior to the start of the formal hearing. We disagree. The arbitrator ruled expeditiously, within three weeks of the PBA's objecting to consideration of the civilian dispatcher proposal and before any evidence was presented or testimony taken. Therefore,

^{1/} The Borough also requests oral argument. We deny that request.

the Borough could have modified its final offer after the rulings. See N.J.A.C. 19:16-5.7(f) (arbitrator may accept a revision of a final offer at any time before the arbitrator takes testimony or evidence); cf. Allendale Bor., P.E.R.C. NO. 98-27, 23 NJPER 508 (¶28248 1997) (arbitrator committed reversible error by not ruling on objection to submission of additional issues until he issued his final opinion and award). Thus, we consider that the ruling was made before the start of the formal hearing, albeit on the same day of that hearing and the timing of the ruling did not prejudice the Borough.

We also reject the Borough's argument that the award should be vacated because in submitting its final offer, the PBA referenced its positions in mediation and did not restate those positions in a separate written document. The Borough cites Aberdeen Tp. v. PBA, 286 N.J. Super. 372 (App. Div. 1996), which stressed the importance of protecting the confidentiality of mediation and settlement discussions. That concern does not arise where a party adopts as its final offer a proposal put forward in mediation. Further, because the Borough does not dispute that the interest arbitration award addressed the unresolved issues between the parties, it was not prejudiced by the PBA's submission. Nevertheless, N.J.A.C. 19:16-5.7(f) is intended to identify the proposals to be considered by the arbitrator and that objective is best achieved if each party puts the specific terms of its final offer in writing.

We also conclude that the arbitrator did not abuse his discretion in excluding, as untimely, the civilian dispatcher proposal raised ten months after the interest arbitration petition was filed. We agree with the arbitrator's analysis of this issue. We add that no injustice resulted from excluding the proposal. The Borough is maintaining in a pending unfair practice proceeding that it has a prerogative to implement its dispatching proposal without negotiations. If it is successful in that proceeding, it will be able to implement its ordinance unilaterally. If it is not, it may press its concerns in negotiations, consider the employees' concerns in response, and maintain its position if it sees fit. We note that the arbitrator awarded a contract from January 1, 1996 through December 31, 1997. The Borough thus will have the opportunity, if it chooses, to raise this issue in the current round of negotiations.

We turn now to the Borough's contention that in awarding 4.5% wage increases and denying its vacation guide and medical insurance proposals, the arbitrator did not consider all of its evidence and did not properly apply the criteria in N.J.S.A. 34:13A-16g.

In requiring that disputes be resolved by conventional arbitration unless the parties agree to another terminal procedure, the Reform Act entrusts the arbitrator with weighing the evidence and fashioning an award. An arbitrator must assess the evidence on individual statutory factors and then weigh and

balance the relevant, sometimes competing, factors. In reviewing a challenge to an award, we will determine whether the arbitrator considered the criteria in N.J.S.A. 34:13A-16g and rendered a reasonable determination on the issues. Cherry Hill Tp., P.E.R.C. No. 97-119, 23 NJPER 287 (¶28131 1997); N.J.A.C. 19:16-5.9.

Consistent with pre-Reform Act case law, we will vacate an award if 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. Cherry Hill Tp.; cf. PBA Local 207 v. Bor. of Hillsdale, 137 N.J. 71, 82 (1994); Div. 540, Amalgamated Transit Union, AFL-CIO v. Mercer Cty. Improvement Auth., 76 N.J. 245, 253 (1978).

In awarding 4.5% across-the-board increases for 1996 and 1997, as opposed to the 3% increases proposed by the Borough and the 5% increases sought by the PBA, the arbitrator gave "considerable weight" to the "comparability" and "overall compensation" criteria, N.J.S.A. 34:13A-16g(2) and (3) (Arbitrator's opinion, p. 31). He also reviewed the evidence submitted on the lawful authority, financial impact, cost of living and other criteria, see N.J.S.A. 34:13A-16g(5), (6) and (7), in arriving at his award (Arbitrator's opinion, pp. 31-33).

The Borough does not dispute the arbitrator's findings concerning the financial condition of the Borough, the impact of the CAP law, the salaries received by police officers in comparable communities, or his finding that the police force had provided a high level of service despite a reduction in the number of officers (Arbitrator's opinion, pp. 29, 31-34). However, it contends that the award should be vacated because the arbitrator summarily dismissed its evidence on private sector wage increases, contrary to the Reform Act's intent to make comparison with private employment an important factor in interest arbitration awards. It also maintains that the arbitrator erroneously deemed its wage increase proposal to be 4%, awarded a wage increase inconsistent with his finding on the cost of living, and did not consider the evidence submitted on its medical insurance and vacation proposals.

The arbitrator's consideration of the Borough's evidence concerning private-sector wage increases did not comport with N.J.S.A. 34:13A-16g(2). The arbitrator wrote:

The Borough also looks to the level of increase in the private employment sector in support of its position. It bases its argument on a single document -- a report of private sector wage increases in Bergen County between 1994 and 1995. It showed a 3.6 percent increase. That hardly supports the Borough's 3 percent position. There is serious doubt in my mind that such general "shot gun" approach should be given any real consideration in making a determination. There was no evidence regarding "comparative private employment." There was no attempt to equate the work performed by the police officers with any other public or private employment. [Arbitrator's opinion, p. 31]

N.J.S.A. 34:13A-16g(2) calls for, among other things, a comparison of the wages, hours, and working conditions of the employees involved in the proceeding with employees "in private employment in general." See N.J.S.A. 34:13A-16g(2) (a); Town of Newton, P.E.R.C. No. 98-47, 23 NJPER 599 (128294 1997). By directing a comparison with private-sector employees "in general," N.J.S.A. 34:13A-16g(2) (a) deems that information concerning private-sector employees should be considered even though their work may not be similar to that of police or fire officers. Cf. Town of Newton (arbitrator did not err in considering Department of Labor statistics on average private-sector wage increases). N.J.S.A. 34:13A-16.6 also indicates a legislative intent for interest arbitrators to consider general information on private-sector wage increases: it requires the Commission to perform or cause to be performed a survey of private sector wage increases for use by all interested parties in public sector wage negotiations. In light of these provisions, an arbitrator must consider evidence pertaining to "private employment in general" regardless of whether the work of private sector employees is similar to that of police or fire officers. It was thus inappropriate for the arbitrator to seriously doubt that the survey of general private sector wage increases, prepared pursuant to N.J.S.A. 34:13A-16.6 and submitted by the Borough, should be given any "real consideration." A remand is therefore required.

On remand, we direct the arbitrator to consider the Borough's evidence on private-sector wage increases in conjunction with the parties' other evidence. The arbitrator may give that evidence the weight he deems appropriate, but may not decline to give it any real consideration because it reports wage increases received by employees whose work is not necessarily similar to that of police officers.

A remand is also required because of the arbitrator's discussion of the Borough's alternate 4% wage increase proposal. The arbitrator adverted to this proposal on several occasions. He calculated the difference between the PBA's proposal and both 3% and 4% across-the-board increases, stated that the Borough did not dispute that a 4% increase was within its budgetary limits and, in summarizing the rationale for his award, stressed that there was only a \$10,500 difference between his award and the 4% proposal (Arbitrator's opinion, pp. 27-28, 31, 34).

The Borough's offer of a 4% wage increase was contingent upon the arbitrator's awarding its civilian dispatcher proposal, thus permitting the Borough to achieve some cost savings and assign more officers to patrol duty. If, however, the arbitrator did not consider or award the Borough's dispatching proposal, the Borough's proposal was for a 3% wage increase for each year. Because the arbitrator did not consider the civilian dispatcher proposal, it was inappropriate for him to stress the small cost differential between his award and the 4% wage increase proposal.

or suggest that the Borough had agreed to a 4% increase. On remand he may not do so.

We perceive no fundamental deficiencies in the arbitrator's analysis of the Borough's cost of living evidence or its medical insurance and vacation proposals. It appears to us that the arbitrator considered the evidence submitted.

In remanding this matter, we are confident that the appointed arbitrator will reconsider the award in accordance with this opinion. See Fox v. Morris Cty., 266 N.J. Super. 501, 521-522 (App. Div. 1993), certif. denied, 137 N.J. 311 (1994) (court would presume, until shown to the contrary, that the original arbitrator would be able to take a fresh look at the case and reach a fair and impartial decision). We direct that the arbitrator complete his reconsideration of the award no later than 60 days from the date of this decision.

ORDER

The arbitration award is vacated and the matter remanded to the arbitrator for reconsideration in accordance with this opinion.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Buchanan, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioners Finn and Klagholz were not present.

DATED: January 29, 1998
Trenton, New Jersey
ISSUED: January 30, 1998