

P.E.R.C. NO. 2012-33

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF MILLTOWN,

Appellant,

-and-

Docket No. IA-2010-051

POLICEMEN'S BENEVOLENT ASSOCIATION
LOCAL NO. 338,

Respondent.

SYNOPSIS

The Public Employment Relations Commission vacates and remands an interest arbitration award to the arbitrator for reconsideration and issuance of a new award. The arbitrator has 45 days to issue a new award that must explain which of the statutory factors were deemed relevant, satisfactorily explain why the others are not relevant, and provide an analysis of the evidence on each relevant factor.

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 (Arthur R. Thibault, Jr., of counsel; Jonathan F. Cohen, on the brief)

For the Respondent, Loccke, Correia, Limsky & Bukosky, attorneys (Leon B. Savetsky, of counsel and on the brief)

DECISION

On November 29, 2011, the Borough of Milltown ("Borough") appealed from an interest arbitration award involving a unit of police officers represented by the Policemen's Benevolent Association ("PBA"), Local No. 338.^{1/} The arbitrator issued a conventional award, as he was required to do. 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 the nine

^{1/} This appeal has been processed to meet the time requirements of N.J.S.A. 34:13A-16f(5) (a).

statutory factors. We vacate the award and remand it back to the arbitrator to issue a new decision within 45 days.

Procedural and Factual History

The parties collective negotiations agreement expired on December 31, 2009; the PBA filed for interest arbitration on January 19, 2010 and the arbitrator was appointed by mutual request of the parties on March 10, 2010. The arbitrator first conducted a number of mediation sessions with the parties wherein a settlement was reached but failed to be ratified. The arbitrator next convened a formal interest arbitration hearing on May 13, 2011. The parties submitted extensive post-hearing arguments on behalf of their final positions and the arbitrator's Award was issued on November 21, 2011.

The Parties Final Proposals

The PBA's Proposals

1. A four (4) year contract to commence January 1, 2010 and to provide a 3.5% across the board increase at each rank, step and position effective each January 1.

2. A modification of Longevity (J-1, Article VII) by adding a twenty four (24) year step at an additional 2%, for a total of 10% at that level.

The Borough's Proposals

A three (3) year contract - January 1, 2010 - December 31, 2012

1. Article IV-Wages

- a. Wage increases as follows for each year of the contract for all employees. 2010-0%, 2011-0%, 2012-1.5%
- b. Add one new step for new hires between step 4 and step 5 in the current salary guide.

2. Article X- Medical Benefits

Add to Section A:

Effective May 21, 2010 all unit employees shall contribute 1.5% of their base salary toward the cost of health insurance.

The Arbitrator's Award

The terms of the Award are as follows:

1. Duration of the contract shall be three years. January 1, 2010 through December 31, 2012.
2. A three percent (3%) across the board retroactive wage increase as of June 1, 2010. A three (3%) across the board retroactive wage increase as of April 1, 2011 and a three (3%) across the board wage increase as of April 1, 2012.
3. Add a twenty fourth (24) top step of longevity with an additional 2% for a total of 10% effective December 21, 2012.
4. An additional step on the existing salary guide between step 5 and step 6 of the guide eliminating the bubble step for newly hired employees.
5. Health care premium cost contribution of 1.5% of base salary by all members of the Bargaining Unit as of June, 30, 2010.

(Additionally, the previously agreed upon PBA contract proposals, agreed upon before and during the mediation process as contained in PBA proposal (P1) #s 2, 4A and B, 5B and 8 shall be incorporated in the new agreement.)

The Borough's Arguments on Appeal and PBA's Response

On November 28, 2011, the Borough appealed the award. The Borough asserts that the Arbitrator failed to apply the criteria specified in N.J.S.A. 34:13A-16(g) and/or to comply with N.J.S.A. 2A:24-8(d) and 2A:24-9(b). Specifically, the Borough alleges that: the arbitrator did not appropriately consider and apply the interest and welfare of the public criterion when he awarded a contract that exceeds the 2% tax levy cap; the award failed to consider and give due weight to the Borough's ability to pay the Award and its lawful authority to do so given the 2% cap and the Borough's appropriation limits; the Award was issued under undue means because a material mistake in fact appeared on the face of the Award regarding the arbitrator's analysis of N.J.S.A. 34:13a-16(g) (2); the arbitrator's analysis of the overall compensation of the unit demonstrated a misunderstanding of the pertinent criterion; the Award's application of a "set off" for the state mandated 1.5% base salary contravenes legislative intent and demonstrates a misunderstanding of the relevant criteria by the arbitrator; the arbitrator never considered the annual or overall cost increase of the award; the arbitrator failed to give due weight to the criterion requiring that Borough police officer salary increases be measured against cost of living increases; inadequate consideration was paid to the criterion of continuity and stability of employment of Borough police officers; and that the arbitrator's Award be either

modified pursuant to N.J.A.C. 19:16-.8.3 to eliminate the unaffordable wage increases, or, in the alternative, that the Award be vacated and remanded for reconsideration and issuance of a new award that addresses the evidential record and provides analysis of the statutory criteria that support the arbitrator's award.

The PBA responds that: the arbitrator considered and gave due weight to each of the statutory criteria set forth in N.J.S.A. 34:13a-16(g) (1) through (9); the arbitrator did not violate the standards set forth in N.J.S.A. 2A:24-8 and 2A:24-9; and that the arbitrator's Award should be affirmed.

The Statutory Requirements and Legal Standards for Reviewing Interest Arbitration Awards

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.

Analysis

Within this framework, we conclude that the Award must be vacated and the matter remanded back to the arbitrator. In his Opinion, the arbitrator provided the procedural history of the instant interest arbitration, the proposals of the parties, reproduced N.J.S.A. 34:13A-16g as the statutory criteria and reproduced verbatim the positions of the PBA and the Borough from their respective post hearing briefs. The arbitrator, however, did not provide an independent analysis of all of the relevant factors and how he weighed each of them against the evidence presented to reach his Award.

First, the arbitrator failed to sufficiently consider the limitations imposed on the Borough's property tax levy pursuant to N.J.S.A. 40A:4-45.45 and the other factors as required by N.J.S.A. 34:13A-16g(6)^{2/}. The arbitrator's analysis does not

^{2/} N.J.S.A. 34:13A-16g(6) provides:

The financial impact on the governing unit, its residents, the limitations imposed upon the local unit's property tax levy pursuant to section 10 of P.L.2007, c.62 (C.40A:4-45.45), and taxpayers. When considering this factor in a dispute in which the public employer is a county or a municipality, the arbitrator or panel of arbitrators shall take into account, to the extent that evidence is introduced, how the award will affect the municipal or county purposes element, as the case may be, of the local property tax; a comparison of the percentage of the municipal purposes element or, in the case of a county, the

(continued...)

satisfactorily discuss the required factors. This is especially problematic since N.J.S.A. 34:13A-16g^{3/} specifically requires that the arbitrator address these factors. It should be noted that the parties introduced a total of 128 exhibits into evidence, many of which were relevant to this paragraph, and the arbitrator stated that he gave this paragraph "significant weight." The arbitrator's analysis under paragraph 6 (with the statutory language omitted) is as follows:

Criteria g6. The Financial Impact on the Governing Unit, its Residents and Taxpayers, would not be immediately devastated even if the entire PBA proposal were to be awarded. However, as stated above, given the negative economic prospects being able to afford the increase in a given year is not necessarily the controlling factor in determining its reasonableness. When all the statutory factors are taken into consideration the 3%

2/ (...continued)
county purposes element, required to fund the employees' contract in the preceding local budget year with that required under the award for the current local budget year; the impact of the award for each income sector of the property taxpayers of the local unit; the impact of the award on the ability of the governing body to (a) maintain existing local programs and services, (b) expand existing local programs and services for which public moneys have been designated by the governing body in a proposed local budget, or (c) initiate any new programs and services for which public moneys have been designated by the governing body in a proposed local budget.

3/ N.J.S.A. 34:13A-16g provides in pertinent part:

...in every interest arbitration proceeding, the parties shall introduce evidence regarding the factor set forth in paragraph (6) of this subsection and the arbitrator *shall* analyze and consider the factors set forth in paragraph (6) of this subsection in any award. (Emphasis added).

delayed-start wage increase each year in a three-year contract, appears in this case, to be more reasonable than the 0% proposed by the Borough.

For the above stated reasons and being aware of the general obvious budget difficulties in all the municipalities in the State of New Jersey, I gave this Criterion and the arguments of the Borough significant weight. As a result of the continued existence of negative economic circumstances, I have more confidence that the late-start base wage increases herein are appropriate.

Second, the arbitrator's analysis under paragraphs (5) and (9)^{4/} includes:

Criteria g5 and g9, require the Arbitrator's consideration of the limitations imposed upon the Employer by PL 1976, c. 68 (C. 40A:4-45.1 et seq.) In the case of g5 and Section 10 of PL 2007, c. 62 C. 40A:4-45.45) for Criteria g9.

In this regard the PBA presented the Annual Financial Statement for 2010 in evidence indicating in part in Sheet 19 an amount of budget flexibility supported by the 2009 Report of Audit indicating that the tax rate has remained essentially flat. The PBA

4/ N.J.S.A. 34:13A-16g(5) provides:

The lawful authority of the employer. Among the items the arbitrator or panel of arbitrators *shall* assess when considering this factor are the limitations imposed upon the employer by P.L. 1976, c.68 (C.40A:4-45.1 et seq.);

N.J.S.A. 34:13A-16g(9) provides:

Statutory restrictions imposed on the employer. Among the items the arbitrator or panel of arbitrators *shall* assess when considering this factor are the limitations imposed upon the employer by section 10 of P.L. 2007, c. 62 (C.40A:4-45.45). (Emphasis added).

argued that as demonstrated by (AFS Sheet 9), the Borough has "an excellent cash position" and is below CAP Levy.

Third, the arbitrator also indicated in his analysis that another unit, the Office Professional Employees International Union Local 32 ("OPEIU"), which represents civilian employees of the Borough, received a 2.75% wage increase in 2010. The arbitrator, however, neglected to mention in his analysis that all Borough employees, except police sworn personnel, police dispatchers and crossing guards, were required to take nine furlough days without pay during 2010 which effectively reduced OPEIU members annual salaries by approximately 3.65%.

Fourth, the arbitrator failed to mention and address the relevance of the new schedule of employee health care contributions set forth in P.L. 2011, c. 78. That law became effective on June 28, 2011 and increases employees' share of health benefit premiums and pension contributions. Employees working from an expired agreement as of the effective date of the law are subject to the phase in of the new schedule of employee health care contributions. P.L. 2011, c. 78, § 42. Additionally, the arbitrator erroneously indicated in his Award at paragraph 5 that the prior 1.5% base salary health care premium cost contribution would begin on June 30, 2010, whereas the statute requires implementation of the contribution on May 21, 2010.

On remand, the arbitrator shall comply with N.J.S.A. 34:13A-16g and indicate which of the factors are deemed relevant, satisfactorily explain why the others are not relevant, and provide an analysis of all of the relevant evidence on each relevant factor; the arbitrator must also address the arguments of the parties and explain why he accepts or rejects each specific argument; and the arbitrator shall specifically, and with the appropriate detail, analyze and consider all the factors set forth in N.J.S.A. 34:13A-16g(6) and then explain how all of the relevant evidence and each relevant factor was considered in arriving at his award.

Finally, given the remand on the ground that the arbitrator failed to satisfactorily comply with the criteria specified in N.J.S.A. 34:13A-16g, we need not reach the question of whether those same reasons would also violate N.J.S.A. 2A:24-8 and 2A:24-9.

ORDER

The interest arbitration award is vacated and remanded to the arbitrator for reconsideration and issuance of a new award in

accordance with the directives set forth in this decision. The new award is due within 45 days of the date of this decision.

BY ORDER OF THE COMMISSION

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

ISSUED: December 28, 2011

Trenton, New Jersey