

P.E.R.C. NO. 98-27

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF ALLENDALE,

Appellant,

-and-

Docket No. IA-95-71

PBA LOCAL NO. 217,

Respondent.

SYNOPSIS

The Public Employment Relations Commission vacates an interest arbitration award issued to resolve negotiations between the Borough of Allendale and PBA Local No. 217. The Commission remands the matter to the arbitrator for reconsideration. The Borough appealed the interest arbitration award, maintaining that the arbitrator should not have excluded its vacation, eye examination, red dot days, and vacation proposals under N.J.A.C. 19:16-5.5(b). The Borough also asserts that the arbitrator's ruling on the PBA's objection to reconsideration of these proposals was untimely. The Borough also requests modification of the award consistent with the criteria in N.J.S.A. 34:13A-16g.

The Commission affirms the arbitrator's ruling limiting the arbitration proceeding to the issues raised in the PBA's petition. However, the Commission finds that the Borough was disadvantaged by the arbitrator's not ruling on the PBA's objection to the submission of these issues until after he issued his final award. The Borough's salary proposal included these issues being considered by the arbitrator and the Borough might have submitted a different proposal to the arbitrator had it known these proposals would be excluded. Accordingly, the Commission remands the matter to the arbitrator and allows the Borough to submit a new final offer. In light of the remand, the Commission does not decide the remaining issues in this appeal.

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, Murray, Murray & Corrigan, attorneys
(Robert E. Murray, of counsel; Robert E. Murray and
Valerie J. Dion, on the brief)

For the Respondent, Loccke & Correia, attorneys
(Richard D. Loccke, of counsel; Richard D. Loccke and
Leon B. Savetsky, on the brief)

DECISION AND ORDER

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 Allendale appeals from a March 11, 1997 award.

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 contract from January 1, 1995 through December 31, 1998 with 5.5% across-the-board wage increases for each year. It also sought to: (1) increase the clothing allowance by \$100 effective January 1, 1995 and (2) modify the contract bereavement clause by allowing three days off rather than one day off for the death of a grandparent.

The Borough proposed a five-year contract from January 1, 1995 through December 31, 1999 that would include, for each contract year, a new maximum step for each rank. The new step for each year would be \$1500 above the prior year's maximum. The Borough also proposed to: (1) reduce vacation time; (2) lower the starting salary for an officer in the academy; (3) eliminate an annual eye examination benefit; and (4) eliminate "red dot" days, whereby an officer may earn up to six additional days off ("red dot" days) in exchange for working a scheduled holiday. The Borough agreed to the PBA's clothing allowance and bereavement proposals.

On July 22, 1996, the first of two days of hearing, the PBA objected to the Borough's inclusion of the vacation, "red dot" day, and eye examination proposals in its final offer. It argued that, because these issues had not been listed in an answer to the PBA's petition to initiate interest arbitration, the Borough was, under N.J.A.C 19:16-5.5(b), deemed to have agreed to the request for interest arbitration as submitted by the PBA. The arbitrator directed the parties to address this issue in their post-hearing briefs.

At the outset of his opinion accompanying his final award, the arbitrator determined that the proceeding "shall be limited to the three issues the Association listed in its petition, viz. wages, clothing allowance and bereavement leave and the Borough's counter positions on each of these issues" (Arbitrator's opinion, p. 9). In evaluating the parties' proposals on these issues, the arbitrator was required to decide the dispute "based on a reasonable determination of the issues, giving due weight to those factors listed below that are judged relevant for the resolution of the specific dispute." N.J.S.A. 34:13A-16g.

The arbitrator issued an award that: (1) established a four-year agreement from January 1, 1995 through December 31, 1998; (2) awarded across-the-board wage increases of 4.25%, 4.00%, 3.75% and 3.50% for 1995, 1996, 1997 and 1998, respectively; (3) included the agreed-upon clothing allowance and bereavement leave provisions; (4) increased the clothing allowance by an additional \$100 for the fourth year of the contract and (5) modified the present academy step and created a new first step.

The Borough maintains that the arbitrator should not have excluded its vacation, eye examination and red dot day proposals under N.J.A.C. 19:16-5.5(b). It also asserts that the arbitrator did not timely rule on the PBA's objection to considering these proposals, thereby preventing it from submitting an offer consistent with the issues that would be considered in the

proceeding. The Borough also requests that we modify the award consistent with the criteria in N.J.S.A. 34:13A-16g or, in the alternative, remand the matter to a new arbitrator. It maintains that the award is fundamentally flawed because, contrary to the reform act and PBA Local 207 v. Borough of Hillsdale, 137 N.J. 71 (1994), it is not supported by findings of fact or an analysis of the criteria in N.J.S.A. 34:13A-16g. The Borough specifically alleges that the arbitrator: (1) did not consider the extensive evidence it presented on the financial impact criterion; (2) awarded excessive wage increases inconsistent with his finding that Borough officers are well paid compared to other public and private-sector employees; (3) did not make findings of fact concerning the "interest and welfare of the public" criterion or discuss that criterion in his analysis; (4) rendered an award inconsistent with his findings concerning the cost of living; and (5) erred in refusing to award a five-year contract and in adding \$100 to the clothing allowance for the fourth year of the contract.

The PBA maintains that the arbitrator properly excluded the Borough's vacation, eye examination, and red dot day proposals pursuant to the plain language of N.J.A.C. 19:16-5.5(b). The PBA also urges us to affirm the award, countering that the arbitrator analyzed all of the facts and arguments in accordance with the statutory criteria.^{1/}

^{1/} The PBA also requested oral argument. We deny that request.

We turn to the Borough's argument that the arbitrator should have considered its proposals concerning red dot days, vacation time, and the annual eye examination. The chronology is as follows.

In November 1994, one month before the parties' contract was to expire at the end of the year, the Borough submitted successor contract proposals to the PBA which included the proposals at issue here. On January 9, 1995, the PBA filed a petition to initiate interest arbitration listing the issues in dispute as wages, clothing allowance and bereavement leave. The Borough did not file a response. On February 7, 1995, an arbitrator was appointed. The parties had a series of mediation sessions with this arbitrator, who subsequently withdrew from the proceeding in November 1995. On November 22, 1995, a second arbitrator was appointed. That arbitrator scheduled a meeting on April 1, 1996 and, when the parties were unable to resolve the matter on that date, he scheduled a formal hearing for July 22, 1996. The Borough's disputed proposals were discussed during the mediation sessions with both arbitrators.

At the July 22, 1996 hearing, when the parties were placing their final offers on the record, the PBA attorney objected to consideration of the Borough's vacation, red dot day, and eye examination proposals. He also stated that he had indicated on April 1 that he would raise this objection if the matter proceeded to a formal hearing.

As noted, the arbitrator advised counsel that they could address the issue in their post-hearing briefs. A second day of hearing was held on October 25, 1996. The parties submitted post-hearing briefs addressing the PBA objection, as well as urging adoption of their respective offers.

The arbitrator concluded that the proposals could not be considered because the Borough had not complied with N.J.A.C. 19:16-5.5. He found that the rule did not provide for alternate compliance through discussion of the disputed topics in negotiations or mediation (Arbitrator's opinion, p. 9).

N.J.A.C. 19:16-5.5(a) and (b) provide:

(a) In the absence of a joint petition requesting the initiation of compulsory interest arbitration, the non-petitioning party shall file within seven days of receipt of a petition, a statement of response setting forth the following:

1. Any additional unresolved issues to be submitted to arbitration;
2. A statement as to whether it disputes the identification of any of the issues as economic or non-economic.
3. A statement as to whether it refuses to submit any of the issues listed on the notification or petition to arbitration on the ground that such issue is not within the required scope of negotiations; and
4. Any other relevant information with respect to the nature of the impasse.

(b) Proof of service on the petition of the respondent's statement shall be supplied to the Director of Arbitration. If a party has not submitted a response within the time specified, it shall be deemed to have agreed to the request for the initiation of compulsory interest

arbitration as submitted by the filing party.
The substance of this response shall not provide
the basis for any delay in effectuating the
provisions of this chapter. [Emphasis supplied]

This rule establishes the framework for an interest arbitration proceeding and is intended to provide for an expeditious, effective and binding procedure for the resolution of disputes between law enforcement officers and firefighters and their public employers. N.J.S.A. 34:13A-14. That goal could not be accomplished if a party could freely submit additional issues at any time. Middlesex Cty., P.E.R.C. No. 97-63, 23 NJPER 17 (¶28016 1996).

N.J.A.C. 19:16-5.5 also structures the interest arbitration process and ensures that the parties and the arbitrator know the nature and extent of the controversy at the outset. Within that broad framework, the parties more precisely define their positions when, at least ten days prior to the hearing, they submit their "final offers to the arbitrator on each economic and non-economic issue in dispute." N.J.A.C. 19:16-5.7(f) (Emphasis supplied). When N.J.A.C. 19:16-5.5 and N.J.A.C. 19:16-5.7(f) are read together, the quoted language in N.J.A.C. 19:16-5.7(f) plainly refers to issues identified in the petition. Of course, the parties do not have to submit final offers on all issues identified in the petition and response. They may resolve or narrow their differences with the assistance of the arbitrator acting as mediator. See N.J.S.A. 34:13A-16f(3); Newark FMBA v. Newark, 90 N.J. 44, 54-55 (1982).

In light of this framework, discussion of the Borough's proposals during mediation cannot substitute for compliance with N.J.A.C. 19:16-5.5. Mediation is distinct from the formal arbitration hearing, as evidenced by the fact that an interest arbitrator may not penalize a party for conduct during mediation or rely on information not presented at the formal hearings. Aberdeen Tp. v. PBA, 286 N.J. Super. 372, 377 (App. Div. 1996); see also N.J.A.C. 19:16-5.7(c). Given these principles, discussion of a topic in mediation would not put an adversary on notice that the matter would be addressed in the formal arbitration proceeding. Thus, absent an answer to its petition or a request for an extension of time to file such, the PBA could assume that the vacation, red dot day and eye examination proposals would not be in the Borough's formal, pre-hearing final offer. Moreover, the Borough has identified no unusual circumstances or good cause for not including its proposals in an answer to the PBA petition -- proposals which the Borough acknowledges had been a part of its negotiations strategy since November 1994. See Middlesex Cty.^{2/}

Similarly, we reject the Borough's argument that the arbitrator disregarded the statutory directive to consider the "interest and welfare of the public" when he excluded the

^{2/} We would have reached the same result in this case even if Middlesex had not been decided and need not address the Borough's argument that that case should be applied prospectively.

Borough's proposals. N.J.S.A. 34:13A-16g lists the criteria to be used by an arbitrator in resolving a dispute -- as that dispute has been framed by Commission rules. Given its statutory goal of resolving disputes expeditiously, the Legislature presumably anticipated that we would adopt rules requiring parties to identify issues in a timely manner.

The Borough suggests that the PBA misled it by discussing the proposals in mediation and then, at the start of the hearing, objecting to their inclusion in the Borough's final offer. However, as discussed above, the fact that an item is discussed in mediation does not mean that it is automatically an issue at the formal hearing. The PBA had no obligation to alert the Borough that it was relying on the rule until the Borough attempted to include the disputed proposals in its final offer.

Nor was the PBA obligated to include the disputed proposals in its own petition to initiate interest arbitration. Given the expectation that the non-filing party will submit a response, N.J.A.C. 19:16-5.4 does not require a party to identify proposals raised by its adversary during negotiations -- especially since the petitioning party cannot be certain that its adversary will want to pursue those issues through interest arbitration.

For all these reasons, we affirm the arbitrator's ruling limiting the arbitration proceeding to the issues raised in the PBA's petition. However, while the arbitrator correctly applied

N.J.A.C. 19:16-5.5, we believe that the Borough was disadvantaged by the fact that the arbitrator did not rule on the PBA's objection until he issued his final award and opinion. Because of the timing of the procedural ruling, the parties submitted post-hearing briefs without knowing the parameters of the dispute. Moreover, the arbitrator considered the Borough's salary offer without evaluating other proposals which, the Borough maintains, were an integral part of its economic package. The Borough might have changed the proposals considered by the arbitrator had it known its other proposals would be excluded.

If the arbitrator had ruled on the PBA's objection before the formal hearing, the Borough could have submitted a final offer in light of his ruling. We thus conclude that it was reversible error for the arbitrator to have deferred his ruling until he issued his award. We therefore vacate the award and remand this matter to the arbitrator for reconsideration. The Borough shall be permitted to submit a new final offer but, unless the parties agree otherwise or the arbitrator requires additional submissions on an issue, the arbitrator shall issue a new opinion and award based on the record already submitted.

In view of our decision to remand this matter and allow the Borough to submit a new final offer, we need not decide the remaining issues in this appeal. However, in fashioning an opinion and award on remand, the arbitrator may of course consider the parties' submissions in this appeal concerning whether the

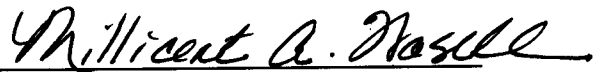
opinion provided an adequate explanation on certain issues -- for example, the twelve-step salary schedule, the "public interest and welfare" criterion, and the annual wage increases awarded.

We direct that the arbitrator complete his reconsideration of the award no later than 90 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. The Borough shall be permitted to submit a new final offer.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

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

DATED: August 28, 1997
Trenton, New Jersey
ISSUED: August 29, 1997