

P.E.R.C. NO. 2011-92

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF ESSEX and  
ESSEX COUNTY SHERIFF,

Appellants,

-and-

Docket No. IA-2008-098

ESSEX COUNTY SHERIFF'S  
OFFICERS, PBA LOCAL 183,

Respondent.

SYNOPSIS

The Public Employment Relations Commission remands an interest arbitration award to the arbitrator to analyze the employer's entire health benefits proposal for all years of the agreement. The arbitrator must issue his supplemental decision by July 15, 2011. The parties have seven days from receipt of the supplemental award to file any 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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Respondent.

Appearances:

For the Appellants, Genova, Burns & Giantomasi,  
attorneys (Angelo J. Genova, of counsel; Brian W.  
Kronick and Joseph M. Hannon, on the brief)

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

DECISION

The County of Essex and Essex County Sheriff appeal from an interest arbitration award involving a unit of approximately 359 sheriff's officers represented by Essex County Sheriff's Officers, PBA Local 183.<sup>1/</sup> Pursuant to N.J.S.A. 40A:9-117.6, these officers are appointed by the County Sheriff subject to the County's budget. We remand the award to the arbitrator to analyze the employer's entire health benefits proposal for all

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<sup>1/</sup> We deny the County's request for oral argument. The issues have been fully briefed.

years of the agreement. The arbitrator's supplemental award is due July 15, 2011.

The arbitrator issued a conventional award as he was required to do absent the parties' agreement to use another terminal procedure. N.J.S.A. 34:13A-16d(2).<sup>2/</sup> A conventional award is crafted by an arbitrator after considering the parties' final offers in light of nine statutory factors. The parties' final offers are as follows.

The PBA proposed a four-year contract with a 4.5% across-the-board wage increase effective January 1 of each year; a four-hour minimum for court appearances paid at the overtime rate if an officer is off-duty; the same vacation schedule as the rank and file members of the Essex County Prosecutor's Office; codification into the contract of the current practice of the PBA President being assigned full-time to the PBA Office; 100 tours be provided to the PBA without loss of regular compensation to be utilized for PBA business for unit members at the control of the PBA President; codification into the contract of the current practice to provide free parking for members' personal vehicles within reasonable proximity of their work locations; a separate paycheck procedure for retroactive pay awarded; and a Maternity/Paternity provision for the contract.

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<sup>2/</sup> Effective January 1, 2011, P.L. 2010, c. 105 eliminated all other methods of interest arbitration and only provides for conventional arbitration.

The County proposed a three-year contract with a 2% increase on January 1, 2008 and 0% increases for 2009 and 2010. Regarding health benefits, it proposed an increase in prescription drug co-pays, prior authorization for certain prescription drugs, 2% of pensionable salary premium contribution for single coverage; removal of the rate cap freezing contributions at 1993 rates beginning in 2008, 25% co-pay for dependent coverage, and a 15% contribution of the difference between the County selected HMO and the full cost of the selected plan, a waiver of the 2% contribution if an employee has other health coverage, elimination of the Traditional Plan for new hires, and continuation of mandatory second surgical opinion and pre-admission review programs. The County also proposed a 24/7 work schedule for each Division; that overtime be paid only when an employee works more than 40 hours in a week; elimination of overtime for weekend assignments and the day off provided during the week after a weekend assignment; and removal of Lincoln's Birthday, Good Friday, Election Day and the Friday after Thanksgiving as paid holidays.

The arbitrator issued a 102-page Opinion and Award. He noted the record was extensive, the parties were provided with the opportunity to argue orally, present voluminous documentary evidence and present witness testimony over five hearing dates. After summarizing the parties' proposals and respective arguments

on those proposals in detail, the arbitrator analyzed them in relation to the statutory factors and awarded a three-year agreement from January 1, 2008 through December 31, 2010.

The arbitrator awarded 2.85% wage increases effective January 1, 2008; 0% for January 1, 2009 through September 1, 2009; 2.75% effective September 1, 2009 and 2.5% effective January 1, 2010. The arbitrator also awarded the PBA's proposal to have retroactive pay issued in a separate paycheck; 1.5% premium contributions in accordance with P.L. 2010, c. 2, effective May 21, 2010; no change in prescription co-pay; two hours overtime minimum for required court appearances on officer's off-duty hours; and reference in the written contract to the current practice of free parking without change or expansion to the benefit.

The County appeals arguing that: the arbitrator did not properly apply the statutory criteria; did not resolve all unsettled issues between the parties; created an improper presumption that the County's work schedule proposal should not be awarded in arbitration; premised his award on a material mistake of fact; and improperly relied upon evidence submitted by the PBA that was not credible. Finally, the County argues that the issue of wage increases and financial terms of employment are preempted by statute and the New Jersey Constitution.

The PBA responds that the arbitrator gave due weight to the statutory criteria; the arbitrator did not make any mistakes of fact; and the award was based on substantial credible evidence in the record as a whole.

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, 26 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.

#### Statutory and Constitutional Preemption

First, we will address the County's argument that the issues of wage increases and other financial terms of employment were not properly before the arbitrator as they are preempted by County Statutes and the New Jersey Constitution. Specifically,

the County asserts that N.J.S.A. 40:20-1<sup>3/</sup>, 40A:9-10<sup>4/</sup>, 40:41A-41<sup>5/</sup>, 40A:41A-36<sup>6/</sup> and N.J. Const. Art. 4, §7, par. 11, which

3/ This statute provides:

The property, finances and affairs of every county shall be managed, controlled and governed by a board elected therein, to be known as "the board of chosen freeholders of the county of ..... (specifying name of county)", and the executive and legislative powers of the county shall be vested in that board of chosen freeholders, except where by law any specific powers or duties are imposed or vested in a Constitutional officer.

The board of chosen freeholders of any county which has created the office of county administrator, pursuant to the provisions of *N.J.S. 40A:9-42*, may, by resolution, delegate to that office such executive and administrative powers, duties, functions and responsibilities as the board may deem appropriate.

4/ This statute provides:

Except as otherwise provided by law, the board of chosen freeholders of the county or the governing body of the municipality shall fix the amount of salary, wages or other compensation to be paid to county and municipal officers and employees unless they are to serve without compensation.

5/ This statute provides:

The board of freeholders:

- a. Shall advise and consent to all appointment by the executive for which board confirmation is specified under this article;

(continued...)

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5/ (...continued)

- b. Shall pass in accordance with this act whatever ordinances and resolutions it deems necessary and proper for the good governance of the county;
- c. Shall appoint a clerk to the board who shall keep the records and minutes of the board, and who shall serve at the pleasure of the board or for such term, not to exceed 3 years, as may be provided by the administrative code; provided, however, that an ordinance providing for the adoption of any such term shall not be enacted between October 1 of any year and January 1 of the succeeding year;
- d. May appoint counsel to the board, if such position is created by the administrative code, to serve at the pleasure of the board;
- e. May pass a resolution of disapproval or dismissal, subject to the provisions of section 87b. of this act;
- f. May override a veto of the county executive by a two-thirds vote of its full membership;
- g. Shall approve the annual operating and capital budgets pursuant to the Local Budget Law.

6/ This statute provides:

The executive power of the county shall be exercised by the county executive. He shall:

- a. Report annually to the board of freeholders and to the people on the state of the county, and the work of the previous year; he shall also recommend to the board whatever action or programs he deems necessary for the improvement of the county and the welfare of its residents. He may from time to time at his discretion recommend any course of action or programs he deems necessary or desirable for the county to

(continued...)

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6/ (...continued)

undertake;

- b. Prepare and submit to the board for its consideration and adoption an annual operating budget and a capital budget, establish the schedules and procedures to be followed by all county departments, offices and agencies in connection therewith, and supervise and administer all phases of the budgetary process;
- c. Enforce the county charter, the county's laws and all general laws applicable thereto;
- d. Supervise the care and custody of all county property, institutions and agencies;
- e. Supervise the collection of revenues, audit and control all disbursements and expenditures and prepare a complete account of all expenditures;
- f. Sign all contracts, bonds or other instruments requiring the consent of the county;
- g. Review, analyze and forecast trends of county services and finances and programs of all boards, commissions, agencies and other county bodies, and report and recommend thereon to the board;
- h. Develop, install and maintain centralized budgeting, personnel and purchasing procedures as may be authorized by the administrative code;
- i. Negotiate contracts for the county subject to board approval; make recommendations concerning the nature and location of county improvements and execute improvements determined by the board;
- j. Assure that all terms and conditions, imposed in favor of the county or its inhabitants in any statute, franchise or other contract, are faithfully kept and performed;

(continued...)

requires that the statutes be liberally construed, preempts arbitration to the extent it allows the Arbitrator to issue an award with respect to wages and other financial terms of employment that exceeds the County's final offer.

The PBA responds that the County's argument is the same position presented with respect to the 2004 interest arbitration award wherein the County argued that the Interest Arbitration Reform Act was unconstitutional. See County of Essex, P.E.R.C. No. 2005-52, 31 NJPER 86 (¶41 2005).

We reject the County's argument because the statutes do not specifically set the salaries of the employees. As a general rule, an otherwise negotiable topic cannot be the subject of a negotiated agreement if it is preempted by legislation. However, the mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations. Negotiation is preempted only if the regulation fixes a term and condition of employment "expressly, specifically and comprehensively." Council of New Jersey State College Locals v. State Bd. of Higher Ed., 91 N.J. 38, 30 (1982). The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." In re IFPTE

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6/ (...continued)

k. Serve as an ex-officio nonvoting member of all appointive bodies in county government.

Local 195 v. State 88 N.J. 393, 403-04, 443 A.2d 187 (1982), quoting State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80 (1978). If the legislation, which encompasses agency regulations, contemplates discretionary limits or sets a minimum or maximum term or condition, then negotiation will be confined within these limits. Id. at 80-82, 393 A.2d 233. See N.J.S.A. 34:13A-8.1. Thus, the rule established is that legislation "which expressly set[s] terms and conditions of employment...for public employees may not be contravened by negotiated agreement." State Supervisory, 78 N.J. at 80. [Id. at 44]. Here, the statutes cited by the County are a delegation of fiscal authority to manage the County's finances and do not specifically set the salaries of the employees. We also note that the Legislature could have excluded Counties from the definition of public employer in the New Jersey Employer-Employee Relations Act including the interest arbitration statute if it so intended.

#### The Wage Award

The County appeals the wage award arguing that the arbitrator failed to properly consider or give due weight to the interest and welfare of the public and failed to properly consider or give due weight to the financial impact factor. Specifically, the County asserts that although the arbitrator stated he gave the interest and welfare of the public factor the greatest weight, he put too great an emphasis on the need to

attract and retain highly qualified personnel and issued an award that the County could not fund when its affect on other negotiations units is considered. The County asserts that the arbitrator failed to consider the effect the award would have on other units and the County's overall budget.

This case was processed under the 1996 Reform Act legislation which reflected the Legislature's intent that arbitrators focus on a full range of statutory factors and not just comparability of salaries or ability to pay. PBA Local 207 v. Borough of Hillsdale, 137 N.J. 71, 85-86; Washington Tp. v. New Jersey PBA Local 206, 137 N.J. 88 (1994); Fox v. Morris Cty., 266 N.J. Super. at 516-517; Cherry Hill. An arbitrator must consider the financial evidence and explain how he or she weighed the financial impact and lawful authority criteria, along with the other factors deemed relevant. However, the Reform Act does not require an arbitrator to award the amount the employer has budgeted. Middlesex Cty., P.E.R.C. No. 98-46, 23 NJPER 595 (¶28293 1997). Further, an arbitrator does not have the statutory authority to direct the employer as to how it will fund the award. See Irvington PBA v. Town of Irvington, 80 N.J. 271, 296 (1979) (in formulating how to pay for an award, municipal officials must determine whether appropriations for non-payroll costs should be reduced or whether and to what extent, public safety or other personnel should be laid off).

The County generally states that it presented undisputed evidence on the historical impact of the award, but does not offer particularized arguments and evidence concerning the payroll costs of other units or how the arbitrator's award will affect those units.

We find that the arbitrator adequately evaluated all the statutory criteria; explained why he gave more weight to some factors and less to others; and issued a comprehensive award that reasonably determined the issues and is supported by substantial credible evidence as to the wage award. The arbitrator stated he awarded moderate wage increases based upon the public interest in fiscal responsibility even though the comparability criterion supported higher wage increases than those awarded. He further found that the evidence presented did not establish that his award conflicted with the lawful authority of the employer or the statutory CAP law. The arbitrator correctly found that he only has jurisdiction for the unit before him and cannot apply the criteria to other impasses as there is no evidentiary record with respect to the other units. We are satisfied that the arbitrator considered the County's evidence and argument. The arbitrator specifically stated that when considering a criterion such as the lawful authority of the employer, he must consider, at least subjectively, that there will be costs attributable to the new contracts in other bargaining units even though the costs are not

definitively predictable. The arbitrator acknowledged that the proportionally small costs of the increases to this unit cannot be assumed to be the only further costs resulting from new terms and conditions of employment for the employer. We do not perform a de novo review of the evidence and defer to the arbitrator's judgment, discretion and labor relations expertise where he weighed all the statutory criteria and his award is supported by evidence in the record as a whole. City of Newark, P.E.R.C. No. 99-77, 25 NJPER 242 (¶30103 1999). The arbitrator awarded what he found to be lower than average salary increases that the County could fund without any impact on its taxpayers. The County has not shown that the evidence compelled the award of its final offer or that it was not supported by substantial credible evidence in the record.

#### The Work Schedule

The County appeals the arbitrator's denial of its work schedule proposal because it alleges he did not carefully consider the fiscal, operational, supervisory and managerial implications of the proposal as well as its impact on employee morale and working conditions. Teaneck. It further asserts that the arbitrator improperly assumed that interest arbitration was not the appropriate forum in which to make a determination regarding the County's proposal.

The PBA responds that the arbitrator did not simply dismiss the County's work schedule proposal by directing the parties to resolve this issue through negotiations as the arbitrator took notice of the provision in the expired collective negotiations agreement arising from the previous interest arbitration award that called for the formation of a joint scheduling committee to meet and discuss the feasibility of any proposed change to the existing schedule.

The party proposing a work schedule change has the burden of justifying it. Clifton; Teaneck. Cf. Hillsdale. That burden is consistent with the fact that interest arbitration is an extension of the negotiations process and that, within the context of the statutory criteria, an interest arbitrator should fashion an award that the parties, as reasonable negotiators, might have agreed to. Hudson Cty. Prosecutor, P.E.R.C. No. 98-88, 24 NJPER 78 (¶29043 1997); City of Trenton, P.E.R.C. No. 2010-73, 36 NJPER 130 (¶50 2010). Over the course of a negotiations relationship between a particular employer and majority representative, department work schedules are not routinely or frequently changed and they should not be changed by an arbitrator without strong reasons.

We are satisfied the arbitrator considered the argument and evidence of the County with regard to the proposed work schedule change. The arbitrator did not ignore the evidence, he rejected

the County's proposal for lack of evidentiary support because there was no evidence in the record that the County availed itself of the joint committee procedure set in place by the previous arbitrator. Without first availing itself of that mechanism to resolve the dispute, the arbitrator did not find that the employer's arguments compelled his awarding of a new work schedule. The arbitrator did not refuse to rule on the issue as he did award a joint committee to address the work schedule issue that the employer may avail itself of. In finding that this was an appropriate result supported by the record, we are mindful that an employer has a managerial prerogative to make work schedule changes where negotiations over such changes would substantially limit governmental policy. Essex Cty.; Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106, 113 (¶28054 1997); City of North Wildwood, P.E.R.C. No. 97-83, 23 NJPER 119 (¶28057 1997) (restraining arbitration over work schedule change effected to provide a command presence on weekends). We are also mindful that if the parties are unable to reach agreement through the joint committee mechanism awarded, the parties may avail themselves of the new interest arbitration procedures to achieve a prompt resolution of the impasse as this agreement has already expired. See P.L. 2010, c. 105.

The Health Benefits Proposal

The County appeals the arbitrator's health benefits award arguing that the arbitrator failed to analyze the County's health insurance and prescription drug proposal prior to the effective date of P.L. 2010, c. 2. It also asserts that the arbitrator erroneously assumed that the legislation preempted an award on this issue.

The PBA responds that the arbitrator did deal with the issue of health benefits as he took notice of the Legislature's mandatory 1.5% contribution and found that this was more than adequate to meet the County's reasonable need for cost containment beginning in 2010.

With respect to health benefits, the arbitrator stated:

At this point it is important to discuss the issue of health benefits and the Employer's proposal to address employees' contributions toward premiums. The County has presented a complicated and comprehensive proposal with respect to contributions to health insurance premiums. However, earlier this calendar year, 2010, the State Legislature enacted a statutory approach to health insurance contributions by public employees, see Chapter 2, P.L. 2010. The record herein otherwise would have been supportive of the establishment of a system of flat dollar contributions, relating to the specific coverage provided each employee, rather than a percentage of salary. That would have provided the Employer with a significant measure of cost containment in the area of health insurance benefits. It is likely that this Arbitrator would have awarded such a plan. However, the State Legislature has, as a practical (rather than legal) matter,

pre-empted that issue with respect to the impasse at hand. The Arbitrator believes that the legislative approach, now in effect for unit employees, cannot be reasonably reconciled with the approach that was likely to have been awarded under the record herein. Further, the 1.5% of salary contribution, provided for in the statute, is more than adequate to address the reasonable need for cost containment in the contract at hand. Therefore, the Arbitrator determines that all health insurance contributions under the contract, effective upon the implementation date of the statutory contributions, shall be consistent with those provided for by Chapter 2, P.L. 2010. This will provide the Employer with a new substantial cost containment factor in 2010.

[Award at 70].

We agree that the arbitrator did not provide a reasoned explanation for his award of the statutory 1.5% contribution towards premium and remand the award for further explanation as to why the evidence did not support the other aspects of the employer's healthcare proposal. The arbitrator specifically stated that he did not find that the new legislation legally preempted the health benefits issue, but practically speaking preempted. The arbitrator was required to award at least the 1.5% contribution and was prohibited from rejecting the County's proposal outright or ordering less than the 1.5% contribution. He reasoned:

The record herein established ample evidence of the financial pressure placed upon the Employer by the cost of health insurance benefits. The issue is deemed to impact the public interest, comparability, financial

impact and continuity and stability of employment criteria. Had the State Legislature not intervened, the Arbitrator would have constructed a system of flat dollar contributions by all unit members receiving health benefits that would have produced substantial cost containment for the employer. However, the statutory imposition of contributions by all employees to their health insurance premiums has changed the negotiations landscape with respect to health insurance costs. The County has already attained substantial cost containment within this contract period and additional provisions are not now warranted. The impact of the contribution of 1.5% of base salary is quite significant. The Arbitrator determines that all health insurance contributions under the contract, effective upon the implementation date of the statutory contributions, shall be consistent with those provided for by Chapter 2, P.L. 2010. It is assumed that these contributions shall be in accordance with a Section 125 account and paid in pre-tax dollars. The Employer is provided, by operation of law, with a new substantial cost containment factor in 2010. The record otherwise would have supported the establishment of a significant level of premium contributions, albeit in a different format. The Employer has proposed certain changes in the Prescription Drug Plan. The Arbitrator finds that the record does not support the implementation of those changes at this time. The substantial savings with respect to the health insurance component are recognized as sufficiently addressing the fiscal responsibility and financial impact factors concerning health benefits. Further, the comparison evidence presented by the County (comparing with other Sheriff's Departments) establishes that the current prescription co-pay is solidly within the norm. In fact, the co-pay levels are at the upper end of the range. The evidence does not support any change in the prescription co-pay benefit in this contract. The current contract provision shall remain unchanged.

[Award at 85].

The arbitrator stated that his initial impression of the case was to award flat dollar contributions rather than a percentage of salary for health insurance cost containment. The arbitrator needs to address why he could not reconcile the County's offer with the new legislation when the County's offer included 2% premium contributions as well as the other cost containments - including the elimination of the Traditional Plan for new hires and elimination of the rate cap. The 1.5% statutory contribution is a floor and not a ceiling and the arbitrator must analyze the employer's proposal and not simply award what the legislation requires without further analysis.

#### Holiday Proposal

The County appeals the arbitrator's denial of its proposal to eliminate four holidays arguing that the arbitrator failed to consider or give due weight to the relevant statutory criteria. It asserts that the arbitrator did not analyze or consider any factors other than comparability with other jurisdictions in analyzing the holiday proposal.

With respect to the holiday proposal, the arbitrator stated:

The County has proposed the elimination of four of the current fourteen holidays provided by the collective bargaining agreement. There is simply no evidence that supports the implementation of this measure. The County's own document, Exhibit C-81

reveals that the range of holidays for Sheriff's Officers among the counties in New Jersey is from 13 to 15 days. Further, the most common level of benefit is 14 days, as in this contract. Additionally, the average of all the Sheriff's Officers' units is 13.8 days, almost exactly the 14 days received herein. The record provides no convincing basis for the reduction in benefits sought by the Employer, other than it would reduce its expenses. The proposal shall not be awarded herein.

[Award at 93].

We reject this ground for appeal. The County does not identify any economic evidence that it presented that would compel the arbitrator to award its proposal. The County objects to the arbitrator's use of comparability evidence with other Sheriff's departments to support his rejection of the proposal, but asks this Commission to credit its comparability evidence of other units that have agreed to eliminate holidays in negotiations.

#### Minimum Overtime for Off-Duty Court

The County appeals the award of the PBA's proposal for minimum overtime for court appearances arguing that the arbitrator simply compromised on the PBA's proposal of a 4-hour minimum by awarding a 2-hour minimum without any consideration of the issue in connection with the other economic issues.

The PBA responds that the evidence established that many of the Sheriff's officers who are required to attend court on their off-duty time are required to travel one to one and one-half

hours for cases that are often disposed of or adjourned or otherwise handled in less than one hour.

We reject this basis for appeal. The arbitrator reviewed the evidence and found the concept of minimum overtime for court appearances to be reasonable, especially under the public interest, comparability and continuity and stability of employment. Comparing the current practice in Essex County with Bergen and Hudson Counties where officers receive four hours of overtime for off-duty court with other counties that receive two hours overtime for off-duty court and considering the low incidence in which it occurs, the arbitrator awarded two hours finding that it did not pose a significant economic cost to the County. The arbitrator justified his award pointing to credible evidence in the record and did not simply compromise the PBA's proposal.

#### Mistake of Fact

The County also asserts that the arbitrator premised his award on a material mistake of fact in violation of the standards set forth in N.J.S.A. 2A:24-8 and N.J.S.A. 2A:24-9 thus resulting in an award procured by undue means. Specifically, the County contends that the arbitrator erred when he analyzed a chart provided by the County during his comparability discussion that showed the Essex County Sheriff's officers comparative top step salaries with other County Sheriff's department in the State.

The arbitrator concluded that based on the chart, Essex County ranked seventh of the 21 counties, but evidence from Passaic and Morris counties was not available for 2007. The arbitrator concluded that in 2007, Essex would be ranked ninth because Passaic and Morris were ranked higher in previous years.

The PBA responds that the arbitrator's statement is accurate since he did state that Passaic and Morris were ranked higher in prior years and that if it remained constant would move Essex to ninth.

N.J.S.A. 34:13A-16f(5) (a) states that an appeal may be based on an alleged violation of N.J.S.A. 2A:24-8, which in turn states that an award shall be vacated where it was procured by corruption, fraud, or undue means; where there was evidence of arbitrator partiality, corruption or misconduct; or where the arbitrator exceeded or so imperfectly executed his or her powers that a final and definite award was not made. In the public sector, "undue means" has been enlarged to include conformance to statutes and regulations. Old Bridge Tp. Bd. of Ed. v. Old Bridge Ed. Ass'n, 98 N.J. 523, 527 (1985).

We do not find that the arbitrator made a mistake of fact that would require us to find the award was procured by undue means. The County has not provided any evidence to establish the salaries for Passaic and Morris counties were not greater than Essex County in 2007. Further, the arbitrator did not give the

comparability data significant weight finding that it favored wage increases higher than what he awarded. He found the interest and welfare of the public and the financial impact to be most relevant.

#### Objection to Evidence

Next, the County asserts that the arbitrator improperly relied upon evidence submitted by the PBA despite the lack of personal knowledge of the PBA's witness and lack of foundation for the evidence. The County objects to the PBA's presentation of the testimony of the PBA President through a Power Point presentation. The arbitrator ruled that elements of the presentation that were arguments rather than fact would not be given evidentiary value. In his award, the arbitrator cited to a list introduced by the PBA of 30 Sheriff's officers who resigned since 2006 and who accepted employment at other law enforcement agencies. In fashioning the wage award, the arbitrator credited this list which the County asserts is unreliable evidence.

We are not persuaded that the arbitrator should not have relied upon the PBA's exhibit regarding unit member turnover. The Rules of Evidence are not strictly applied in arbitration proceedings. Fox, 266 N.J. Super. 1, 15, n.7; Essex Cty. The County has not pointed to any evidence in the record or provided us with an argument that the PBA exhibit contained erroneous

information. Thus, we defer to the arbitrator's weighing of the evidence.

ORDER

The interest arbitration award is remanded to the arbitrator for further analysis of the County's health benefits proposal. The arbitrator must issue a decision by July 15. The parties have seven days from receipt of the award to file any appeal.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni and Eskilson voted in favor of this decision. Commissioners Krengel and Voos voted against this decision. Commissioner Colligan recused himself. Commissioner Wall was not present.

ISSUED: June 30, 2011

Trenton, New Jersey