

P.E.R.C. NO. 2012-53

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF NEW MILFORD,

Appellant,

-and-

Docket No. IA-2012-008

PBA LOCAL 83,

Respondent.

SYNOPSIS

The Public Employment Relations Commission vacates and remands an interest arbitration award to the arbitrator for issuance of a new award. The Borough of New Milford appealed the award that set the terms and conditions of employment for members of PBA Local 83 alleging that it violated the 2% cap on base salary set forth in the interest arbitration statute. The Commission amends its review standard to include that it must determine whether the arbitrator established that the award will not increase base salary by more than 2%. The Commission remands the award to the arbitrator with instructions on how to make the calculations and to consider additional arguments of the parties.

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, DeCotiis, Fitzpatrick & Cole,  
attorneys (Douglas F. Doyle, of counsel; Avis Bishop-  
Thompson, on the brief)

For the Respondent, Loccke, Correia, Linsky & Bukosky,  
attorneys (Michael A. Bukosky, of counsel)

DECISION

The Borough of New Milford appeals from an interest arbitration award involving a unit of approximately 32 police officers in the ranks of patrol officer, sergeant and lieutenant who are represented by PBA Local 83.<sup>1/</sup>

The arbitrator issued a conventional award as he was required to do pursuant to P.L. 2010, c. 105 effective January 1, 2011. A conventional award is crafted by an arbitrator after considering the parties' final offers in light of statutory factors. The parties' final offers are as follows.

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

The PBA proposed:

1. A four-year contract with 2.75% across-the-board wage increases effective February 1 of each year;
2. Elimination of the 25% offset on the holiday fold-in provision to have the full value of holidays used in computation.
3. Modify Work in Higher rank to provide that whenever a member shall be paid at the higher rank position then said member shall be at the highest rank rate of compensation for all time so worked.

The Borough proposed:

Economic Proposals

1. A three-year contract with the following wage increases:

January 1, 2012:	0%
January 1, 2013:	0%
January 1, 2014:	2%

2. Effective January 1, 2012, all new hires will be hired pursuant to a new salary guide which will contain 2 additional steps. These steps shall be one (1) year step and will be between Step 1 and the maximum Step 9. The Probation Step will be changed to Pre-Academy Certification Rate.
3. Revise Article 9, Work Day, Work Week and Overtime/Comp Time:

Overtime Compensation: Insertion of par. E to read:

In the event the Borough Hall is closed due to inclement weather, hurricane, or power outages, only those employees scheduled to work shall receive the regular salary. No additional compensation or overtime will be granted unless authorized by the Chief of Police or his designee.

Inclement Weather: Limit pay during inclement weather as follows:

In the event the Borough Hall is closed due to inclement weather, hurricane, or power outages, only those employees scheduled to work shall receive the regular salary at straight pay. No additional compensation or overtime will be granted unless authorized by the Chief of Police or his designee.

4. Modify Article 14, Longevity as follows:

Current employees: Effective January 1, 2012, all longevity payments currently paid per the following schedule in an amount not to exceed an annual payment of \$10,000 until retirement or separation from employment:

- 3% of base pay after 4 years of service
- 4% of base pay after 8 years of service
- 5% of base pay after 12 years of service
- 6% of base pay after 16 years of service
- 7% of base pay after 20 years of service
- 8% of base pay after 24 years of service

New employees: Employees hired after December 31, 2011 will adhere to the following schedule for annual payments until retirement or separation from employment:

- Completion of 10 years - \$1,500
- Completion of 15 years - \$3,000
- Completion of 20 years - \$4,500
- Completion of 25 years - \$6,000

5. Modify Article 17, vacation for new hires as follows:

- 0-5 years - 5 days
- 5-15 years - 10 days
- 15+ years - 15 days

Employees will be permitted to carry up to six weeks unused vacation days from one year to the next (non-cumulative)

6. Modify Article 18, Personal Leave as follows:

Each employee will have 3 days of personal leave. The personal leave shall not accumulate and must be used in the year it is used.

7. Modify Article 19, Holiday as follows:

Holidays shall be eliminated and the 13 holidays will be converted into base pay effective January 1, 2011.; the amount shall be calculated based on the base salary divided by 1946 hours. The 2011 base with holiday rolled in will be effective for all employees of the bargaining unit as set forth in the revised Appendix A3.

8. Modify Article 20 Sick Leave as follows:

Current employees: Employees hired before January 1, 2012 will adhere to the following. Employees shall be eligible to receive 5 sick days for each calendar year. Upon retirement or death, the employee or his/her estate or designated beneficiary will receive full payment for any unused accumulated sick leave computed on the basis of final wages in an amount not to exceed \$15,000. Current employees with more than \$15,000 shall be capped at the level that is "in the bank" as of December 31, 2011.

New employees: Employees hired after January 1, 2012 shall be eligible to receive 5 sick days for each calendar year worked with benefits when he is unable to work due to a verifiable sickness, injury or illness ... Employees will not be permitted to bank any sick days.

9. Article 23, Medical Contract:

Current employees: All employees shall contribute a percentage of the employee's total annual salary or a percentage of the annual premium as per State law. Also, the employee may opt out and receive a cash payment from the Borough, to be included in the paycheck spread out over the course of the year in the amount of 25% of the premium or \$5,000 whichever is greater.

Retirees: Payment for retiree health benefits subject to State law.

10. Article 50, Terminal Leave:

Modify paragraph B: All accumulated and unused holidays earned prior to January 1, 2011 shall be frozen at the then current rate to date of retirement.

Modify paragraph C: All unused vacation days as well as those personal days earned prior to December 31, 2011 shall be frozen at the then current rate.

Eliminate paragraph E.

Modify paragraph F to read:

The employee shall submit his/her retirement requests at least 6 months prior to the date of retirement. Upon calculation of the accumulated leave banks, the Borough reserves the right to pay for all time due over a 5 year period rather than a lump sum payment in lieu of a protracted terminal leave. The failure to provide at least 6 months notice shall result in a forfeiture of the additional 20 days. No payment under this section shall count toward nor affect, either by increasing or decreasing, any pension or retirement benefit due the employee.

Eliminate paragraph G.

The arbitrator issued a 37-page Opinion and Award. After summarizing the parties' arguments on their respective proposals, the arbitrator awarded a three-year agreement effective January 1, 2012 through December 31, 2014 with a 1% salary increase effective July 1, 2012; 2% effective January 1,

2013; and 2.5% effective January 1, 2014.<sup>2/</sup> The arbitrator also awarded the following regarding terminal leave:

Paragraph E is deleted.

Paragraph F is re-designated Paragraph E, and modified to state:

- E. If the employee submits his/her retirement request prior to October 1st of any given year, in lieu of terminal leave, the employee can receive a lump sum payment payable by April 15th of the following year (year of retirement) for all time due in lieu of protracted terminal leave.

Alternatively, the employee may within two months prior to his/her planned retirement request periodic payments, as follows:

1/3 of the total payable within 60 days of the effective retirement date;

An equal amount of 1/3 payable 365 days thereafter; and

A final amount of 1/3 payable 365 days thereafter.

The choice between a lump sum, and a 1/3 payment schedule shall remain solely with the employee.

Former paragraph G is re-designated as paragraph F

Former paragraph H is re-designated as paragraph G

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<sup>2/</sup> The arbitrator stated that all items not specifically awarded as proposed by the Borough and PBA are denied and that except as the parties may mutually agree, the provisions of the prior agreement shall continue in the new agreement.

The Borough appeals arguing that:

THE COMMISSION SHOULD VACATE THE ARBITRATION AWARD AS THE ARBITRATOR FAILED TO COMPLY WITH THE STATUTORY CRITERIA ESTABLISHED BY THE ARBITRATION REFORM ACT

THE ARBITRATOR EXCEEDED OR SO IMPERFECTLY EXECUTED HIS POWERS THAT A MUTUAL, FINAL AND DEFINITE AWARD UPON THE SUBJECT MATTER WAS NOT MADE AS REQUIRED BY N.J.S.A. 2A:24-8

THERE WAS AN EVIDENT MISCALCULATION OF FIGURES AND AN EVIDENT MISTAKE IN THE DESCRIPTION OF A PERSON, THING OR PROPERTY REFERRED TO THEREIN, PERMITTING MODIFICATION UNDER N.J.S.A. 2A:24-9

THE ARBITRATOR'S AWARD FAILED TO CORRECTLY APPLY THE CRITERIA SPECIFIED IN N.J.S.A. 34:13A-16G(1), WHICH ADDRESSES THE INTEREST AND WELFARE OF THE PUBLIC

THE ARBITRATOR FAILED TO APPLY THE CRITERIA SET FORTH IN N.J.S.A. 34:13A-16G(3), WHICH ADDRESSES THE OVERALL COMPENSATION PRESENTLY RECEIVED BY THE EMPLOYEES

THE ARBITRATOR FAILED TO REASONABLY APPLY THE CRITERIA SET FORTH IN N.J.S.A. 34:13A-16G(6), RELATING TO THE FINANCIAL IMPACT OF THE AWARD ON THE GOOVERNING UNIT

THE ARBITRATOR FAILED TO PROPERLY CONSIDER THE CRITERIA SET FORTH IN N.J.S.A. 34:13A-16G(9), THE STATUTORY RESTRICTIONS IMPOSED ON THE EMPLOYER

THE ARBITRATOR HAS VIOLATED THE CLEAR PUBLIC POLICY AGAINST PROTECTING THE PUBLIC INTEREST BY MAINTAINING THE WELFARE OF THE BOROUGH'S RESOURCES AND ITS CITIZENS, THEREBY, IN ACCORDANCE WITH NEW JERSEY SUPREME COURT PRECEDENT, THE COMMISSION SHOULD VACATE HIS AWARD

THE ARBITRATOR INCORRECTLY APPLIED THE STATUTORY CRITERIA SPECIFIED IN N.J.S.A. 34:13A-16g(2)

The PBA responds that the arbitrator complied with and considered all of the relevant statutory criteria; provided a well reasoned and comprehensive award; did not increase salaries

in excess of the 2% cap; properly considered each of the items submitted by the Borough; and correctly considered the economic interests and welfare of the public.

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. 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.).

(2) Comparison of the wages, salaries, hours, and conditions of employment of the employees involved in the arbitration proceedings 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; provided, however, each party shall have the right to submit additional evidence for the arbitrator's consideration.

(b) In public employment in general; provided, however, each party shall have the right to submit additional evidence for the arbitrator's consideration.

(c) In public employment in the same or similar comparable jurisdictions, as determined in accordance with section 5 of P.L.

1995, c. 425 (C.34:13A-16.2); provided, however, that each party shall have the right to submit additional evidence concerning the comparability of jurisdictions for the arbitrator's consideration.

(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. 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.).

(6) 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 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.

(7) The cost of living.

(8) The continuity and stability of employment including seniority rights and such other factors not confined to the foregoing which are ordinarily or traditionally considered in the determination of wages, hours, and conditions of employment through collective negotiations and collective bargaining between the parties in the public service and in private employment.

(9) 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).

[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, except as set forth below by P.L. 2010 c. 105 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.

P.L. 2010, c. 105 amended the interest arbitration law  
N.J.S.A. 34:13a-16.7 provides:

a. As used in this section:

"Base salary" means the salary provided pursuant to a salary guide or table and any amount provided pursuant to a salary increment, including any amount provided for longevity or length of service. It also shall include any other item agreed to by the parties, or any other item that was included in the base salary as understood by the parties in the prior contract. Base salary shall not include non-salary economic issues, pension and health and medical insurance costs.

"Non-salary economic issues" means any economic issue that is not included in the definition of base salary.

b. An arbitrator shall not render any award pursuant to section 3 of P.L. 1977, c. 85 (C.34:13A-16) which, on an annual basis, increases base salary items by more than 2.0 percent of the aggregate amount expended by the public employer on base salary items for the members of the affected employee organization in the twelve months immediately preceding the expiration of the collective negotiation agreement subject to arbitration; provided, however, the parties may agree, or the arbitrator may decide, to distribute the aggregate monetary value of the award over the term of the collective negotiation agreement in unequal annual percentages. An award of an arbitrator shall not include base salary items and non-salary economic issues which were not included in the prior collective negotiations agreement.

This is the first interest arbitration award that we review under the new 2% limitation on adjustments to base salary.

Accordingly, we modify our review standard to include that we

must determine whether the arbitrator established that the award will not increase base salary by more than 2% per contract year or 6% in the aggregate for a three-year contract award. In order for us to make that determination, the arbitrator must state what the total base salary was for the last year of the expired contract and show the methodology as to how base salary was calculated. We understand that the parties may dispute the actual base salary amount and the arbitrator must make the determination and explain what was included based on the evidence submitted by the parties. Next, the arbitrator must calculate the costs of the award to establish that the award will not increase the employer's base salary costs in excess of 6% in the aggregate. The statutory definition of base salary includes the costs of the salary increments of unit members as they move through the steps of the salary guide. Accordingly, the arbitrator must review the scattergram of the employees' placement on the guide to determine the incremental costs in addition to the across-the-board raises awarded. The arbitrator must then determine the costs of any other economic benefit to the employees that was included in base salary, but at a minimum this calculation must include a determination of the employer's cost of longevity. Once these calculations are made, the arbitrator must make a final calculation that the total economic

award does not increase the employer's costs for base salary by more than 2% per contract year or 6% in the aggregate.

The Base Salary Increase

The Borough argues that the award exceeds the 2% arbitration award cap when all economic factors are included. Specifically, the Borough states that while the arbitrator included wages, step increments and longevity costs, he did not include all of the additional costs comprising base salary including college credits, detective stipend and uniform allowance. It alleges the actual costs of the award are 2.56% for 2012, 3.44% for 2013, and 3.18% for 2014.

The PBA responds that the Borough's calculations ignore the savings it has realized from the retirement of two officers, adds holiday pay to its calculations which is already a part of the base salary costs, and erroneously adds in college credits, detective squad and uniform allowance that it asserts are not part of the parties' base salary. The PBA requests that we find that the arbitrator only needs to establish that the award does not exceed the caps when the savings of retirements are factored in. As the Arbitrator noted at page 34 of the award, "Emergencies, health conditions, family issues, opportunities, or simply being "worn out" may all influence when someone decides to end employment. Officers may not know until late in the game when retirement is prudent, or for that matter essential."

Indeed eligibility for retirement is not the equivalent of retirement, nor is retirement mandatory at the time of eligibility. Since an arbitrator, under the new law, is required to project costs for the entirety of the duration of the award, calculation of purported savings resulting from anticipated retirements, and for that matter added costs due to replacement by hiring new staff or promoting existing staff are all too speculative to be calculated at the time of the award. The Commission believes that the better model to achieve compliance with P.L. 2010 c. 105 is to utilize the scattergram demonstrating the placement on the guide of all of the employees in the bargaining unit as of the end of the year preceding the initiation of the new contract, and to simply move those employees forward through the newly awarded salary scales and longevity entitlements. Thus, both reductions in costs resulting from retirements or otherwise, as well as any increases in costs stemming from promotions or additional new hires would not effect the costing out of the award required by the new amendments to the Interest Arbitration Reform Act.

The arbitrator calculated base salary as wages including step increases plus longevity. However, the arbitrator has not provided the calculations he made to reach his total base salary or explain why other economic figures presented by the Borough were not included in base salary. Further, the arbitrator does

not provide a cost analysis of each year of the award that includes at a minimum step increments and longevity. These calculations are a mandatory requirement under the new law. We therefore vacate and remand the award to the arbitrator to provide a new award that explains which figures were taken into his accounting of base salary and the costs of each year of the award. Then, the arbitrator must calculate and determine that the annual costs of the award do not increase the employer's 2011 base salary costs by more than 2% per year or 6% in the aggregate. We note that the cap on salary awards in the new legislation does not provide for the PBA to be credited with savings that the Borough receives from retirements or any other legislation that may reduce the employer's costs. It is an affirmative calculation based on the total 2011 base salary costs regardless of any changes in 2012. Likewise, the PBA will not be debited for any increased costs the employer assumes for promotions or other costs associated with maintaining its workforce.

#### Internal Settlement Pattern

The Borough also appeals the award arguing that the arbitrator failed to properly consider or give due weight to the 16g(2) comparison of the wages, salaries, hours, and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours, and conditions of employment of

other employees. Specifically, the Borough asserts that although the arbitrator gave weight to this factor, he did not analyze the evidence presented of the Borough's internal pattern of settlement with other units that included wage freezes.

Similar to how an arbitrator may not only focus on external comparisons under the 16g(2) criteria, it is also improper for an arbitrator to only focus on the internal settlement pattern of the Borough with other units. 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. While an arbitrator must be careful to avoid whipsawing when analyzing the wages of other employer units, interest arbitrators have traditionally found that internal settlements are a significant factor. See Somerset Cty. Sheriff's Office and Somerset Cty. Sheriff FOP, Lodge No. 39, P.E.R.C. No. 2007-33, 32 NJPER 372 (¶156 2006), aff'd 34 NJPER 21(¶8 App. Div. 2008). While the arbitrator made findings of fact regarding the settlements the Borough has reached with other units, he did not analyze the evidence of internal comparability in his 16g2 analysis. Thus, on remand, the arbitrator must evaluate the 16g2 factor; explain the weight he gave this factor; and make a determination based on the evidence.

Other Proposals of the Parties

Having vacated the award, we do not need to reach every argument the Borough has made on appeal. As to the other proposals of the parties that were not awarded, the arbitrator stated:

Conventional arbitration takes place in the "disputed issue" context. Indeed, the statutory framework lists factors that arbitrators are to consider when resolving differences over the parties' proposals. A reasoned interest arbitration analysis must be preceded by proposals having been: identified; examined; debated examined; and ultimately recognized as in dispute. Those obligations, as shown by the record, were clearly met so far as contract term, wage increments and terminal leave.

The same cannot be said for other proposals for which the record is insufficient to allow a determination on these other issues.

(Award at 36).

The record indicates that the Borough did not abandon its proposals regarding inclement weather, longevity, sick and vacation leave, personal leave and the holiday pay roll-in calculation. Indeed, the Borough presented documentary evidence and testimony to support its proposals. We find that the arbitrator did not adequately evaluate the parties' proposals in light of the statutory criteria; explain why he gave more weight to some factors and less to others; and issue a comprehensive award that reasonably determined the issues and is supported by substantial credible evidence as to all of the parties'

proposals. This does not require the arbitrator to adopt the parties' proposals, but where there has been evidence presented in support of a proposal, the reason for its adoption, modification or rejection must be analyzed. Essex Cty., P.E.R.C. No. 2011-92, 38 NJPER 76 (¶17 2011). On remand, the arbitrator must analyze why he rejects any proposal of the parties' made in their final offers for which adequate evidence was entered into the record for analysis.

The interest arbitration award is vacated and remanded to the arbitrator for issuance of a new award within 45 days from this decision. We do not agree with the Borough that remanding this case to a new arbitrator is required particularly in light of the fact that this was the first award we have reviewed under the new statutory award cap imposed by P.L. 2010, c. 105.

ORDER

The interest arbitration award is vacated and remanded to the arbitrator for a new award within 45 days consistent with this decision. Any additional appeal by the parties must be filed within seven calendar days of service of the new award.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Eskilson, Krengel and Voos voted in favor of this decision. None opposed. Commissioners Bonanni, Jones and Wall recused themselves.

ISSUED: April 9, 2012

Trenton, New Jersey