

P.E.R.C. NO. 99-20

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF BOGOTA,

Appellant,

-and-

Docket No. IA-97-8

PBA LOCAL NO. 86,

Respondent.

SYNOPSIS

The Public Employment Relations Commission vacates an interest arbitration award issued to resolve negotiations between the Borough of Bogota and PBA Local No. 86. The Commission remands the matter to a new arbitrator to be consolidated with Docket No. IA-98-59, an interest arbitration petition which has been filed to resolve the 1998 negotiations.

The Commission had vacated and remanded a previous award holding that the arbitrator's consideration of the Borough of Bogota's evidence concerning private-sector wage increases did not comport with the Interest Arbitration Reform Act. The Commission also found that the arbitrator should not have stressed the small cost differential between the award and an "alternate" wage proposal that the Borough had intended to be considered only if it could arbitrate its civilian dispatcher proposal -- a proposal that the arbitrator had excluded from the proceeding.

The Commission concludes that the arbitrator, on remand, did not analyze all the information in the Commission's 1996 and 1997 wage reports and the Commission is not satisfied that he fully considered those reports in concluding that the evidence on private-sector wage increases supported the PBA's position "appreciably more" than the Borough's position.

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)

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

DECISION

The Police and Fire Public Interest Arbitration Reform Act, P.L. 1995, c. 425, N.J.S.A. 34:13A-14 to -21, authorizes the Commission to decide appeals from interest arbitration awards. N.J.S.A. 34:13A-16f(5)(a). We exercise that authority in this case, where the Borough of Bogota appeals from an April 29, 1998 interest arbitration award involving its police officers. The award was issued after a September 10, 1997 award was vacated. Borough of Bogota, P.E.R.C. No. 98-104, 24 NJPER 130 (¶29066 1998). Bogota held that the arbitrator's consideration of the Borough's evidence concerning private sector wage increases did not comport with the Reform Act. It also found that the arbitrator should not have stressed the small cost differential between the award and an "alternate" wage proposal that the

Borough had intended to be considered only if it could arbitrate its civilian dispatcher proposal -- a proposal that the arbitrator had excluded from the proceeding. While the Borough had also contended that the arbitrator had not properly considered the cost of living, N.J.S.A. 34:13A-16g(7), or analyzed its vacation and medical insurance proposals, we found no fundamental deficiencies in these aspects of the arbitrator's analysis. We remanded the matter to the arbitrator for reconsideration in accordance with our opinion.

The parties' final offers, submitted prior to the September 1997 award, were as follows.

The PBA proposed a four-year agreement from January 1, 1996 through December 31, 1999, with 5% across-the-board salary increases in each year. It also sought contract provisions: (1) permitting officers to accrue compensation time in lieu of overtime payments and (2) confirming the parties' "overlap" vacation practice. On remand, the PBA asked that "the original decision be confirmed and reissued."

The Borough proposed a two-year contract from January 1, 1996 through December 31, 1997, with 3% increases in both years. The Borough also sought to change the unit's medical plan and benefits; to freeze the starting salary for the term of the agreement and, effective July 1, 1997, to institute modified salary and vacation guides for new hires. The Borough did not object to the PBA's compensation time proposal, provided the

Borough retained the right to approve use of compensation time. On remand, the Borough did not press its medical, vacation and salary schedule proposals but urged that the arbitrator award lower across-the-board wage increases than before.

The arbitrator resolved the unsettled issues 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 stated that, upon reconsideration, he saw no reason to modify the terms of the original award (Arbitrator's opinion (II), p. 19).^{1/} He therefore awarded a two-year contract from January 1, 1996 through December 31, 1997, with 4.5% increases in each year. He denied the Borough's proposals for modified vacation and salary schedules for new hires, as well as its proposal to change the unit's medical plan and medical plan benefits (Arbitrator's opinion (II), p. 18). He granted the PBA's compensatory time proposal and denied its proposal concerning overlapping vacation (Arbitrator's opinion (I), pp. 35-36; Arbitrator's opinion (II), pp. 18-19).

The Borough asks us to modify the award. It contends that the wage increases awarded are excessive and that, contrary to our direction in Bogota, the arbitrator did not properly consider its evidence concerning private sector wage increases.

^{1/} "Arbitrator's opinion (I)" refers to the opinion issued on September 10, 1997. "Arbitrator's opinion (II)" refers to the opinion issued on April 29, 1998.

It also maintains that Bogota required the arbitrator to take a "fresh look" at the entire case and challenges the arbitrator's analysis of several of the statutory criteria. While the PBA counters that Bogota directed a limited remand, it maintains that the arbitrator fully assessed the evidence presented on "private employment in general," N.J.S.A. 34:13A-16g(2)(a), and the other statutory criteria.

In requiring that disputes be resolved by conventional arbitration unless the parties agree to another terminal procedure, the Reform Act entrusts the arbitrator with weighing the evidence and fashioning an award. An arbitrator must assess the evidence on individual statutory factors and then weigh and balance the relevant, sometimes competing, factors. In reviewing a challenge to an award, we will determine whether the arbitrator considered the criteria in N.J.S.A. 34:13A-16g and rendered a reasonable determination on the issues. Cherry Hill Tp., P.E.R.C. No. 97-119, 23 NJPER 287 (¶28131 1997); N.J.A.C. 19:16-5.9. Consistent with pre-Reform Act case law, we will vacate an award if the appellant demonstrates that: (1) the arbitrator failed to give "due weight" to the subsection 16g factors judged relevant to the resolution of the specific dispute; (2) the arbitrator violated the standards in N.J.S.A. 2A:24-8 and -9; or (3) the award is not supported by substantial credible evidence in the record as a whole. Cherry Hill Tp.; cf. PBA Local 207 v. Bor. of Hillsdale, 137 N.J. 71, 82 (1994); Div. 540, Amalgamated Transit

Union, AFL-CIO v. Mercer Cty. Improvement Auth., 76 N.J. 245, 253 (1978). In applying these standards to this appeal, we turn first to the nature and scope of the remand in Bogota.

Bogota held that the arbitrator should not have "seriously doubted" whether he should give "any real consideration" to the Commission's statutorily-mandated report showing private sector wage increases. 24 NJPER 132; see also Allendale Bor., P.E.R.C. No. 98-123, 24 NJPER 216 (¶29103 1998); N.J.S.A. 34:13A-16.6. Bogota explained that N.J.S.A. 34:13A-16g(2)(a) requires arbitrators to compare the employees involved in the proceeding with "employees generally" in "private employment in general." Bogota directed the arbitrator to consider the Borough's evidence on private sector wage increases "in conjunction with the parties' other evidence." 24 NJPER at 132. The quoted language recognized that the private sector evidence could not be considered in a vacuum: in formulating a new award, the arbitrator would have to evaluate it together with the evidence on the other statutory criteria. See Allendale Bor. (arbitrator must assess the evidence on individual statutory factors and then weigh and balance the relevant, sometimes competing, factors).^{2/} However, Bogota did not mandate that the arbitrator hold a hearing or admit new evidence, although he had

^{2/} In arriving at a second award, the arbitrator also had to adhere to Bogota's direction that the Borough's alternate wage proposal not be considered.

the discretion to do either of these things. See N.J.A.C. 19:16-5.7(a) (conduct of the arbitration proceeding is under the exclusive control of the arbitrator).^{3/}

Given these parameters, the PBA is correct that Bogota did not contemplate an entirely new proceeding. But we did anticipate that, in considering the Borough's private sector evidence, the arbitrator would again weigh and balance all of the other statutory factors in fashioning his second award. That re-weighing was necessary because the arbitrator could not consider the private sector evidence in isolation but had to consider how it related to the evidence on the other statutory factors. Therefore, the Borough may challenge whether, in arriving at his second award, the arbitrator analyzed the evidence on all the relevant statutory factors and set forth the reasons for the result reached. N.J.S.A. 34:13A-16g; N.J.A.C. 19:16-5.9; Allendale Bor.; Cherry Hill Tp.^{4/}

Against this backdrop, we turn to the Borough's contention that the arbitrator did not comply with our directions in Bogota and did not properly analyze the statutory criteria.

^{3/} The arbitrator did hold a hearing and, over the PBA's objection, admitted additional evidence concerning economic trends and private and public-sector wage increases and salaries.

^{4/} We need not decide whether the Borough could challenge factual findings that the arbitrator made in his first opinion that were not challenged in the first appeal. The Borough does not dispute any of those findings. In deciding this appeal, we have considered each of the arbitrator's opinions. The arbitrator's second opinion incorporates much of the analysis in his first opinion (Arbitrator's opinion (II), pp. 16-17).

The focus of the remand was the amount of across-the-board increases to be awarded for 1996 and 1997. In awarding 4.5% increases instead of the 3% increases proposed by the Borough or the 5% increases for 1996 through 1999 initially sought by the PBA, the arbitrator gave "considerable weight" and "heavy weight" to the comparability criterion, N.J.S.A. 34:13A-16g(2) (Arbitrator's opinion (I), p. 31; Arbitrator's opinion (II), p. 17). The arbitrator found that the evidence on police salaries in comparable jurisdictions, and the Commission's 1997 private sector wage report, supported the wage increases he awarded (Arbitrator's opinion (I), p. 31; Arbitrator's opinion (II), pp. 16, 17). The arbitrator concluded that evidence on public and private sector salaries, submitted by the Borough on remand, was entitled to "very little weight" (Arbitrator's opinion (II), p. 13).

The arbitrator also discussed, primarily in his first opinion, the lawful authority, financial impact, public interest and cost of living criteria. In discussing the lawful authority criterion, N.J.S.A. 34:13A-16g(5), the arbitrator noted that the Borough had not asserted that the Cap law, N.J.S.A. 40A:4-45.1 et seq., would prevent it from funding either the 5% increases originally sought by the PBA or the 4.5% increases awarded (Arbitrator's opinion (II), p. 16). He added that the Borough had budgeted under the Cap limit for 1995 and 1996 and that it had a Cap bank for 1997 and 1998 and "substantial flexibility" in its

budget (Arbitrator's opinion (I), p. 24; Arbitrator's opinion (II), p. 16).

In addressing the financial impact criterion, the arbitrator recognized that the Borough had the third highest equalized tax rate in the County; that the police force comprised 17% of its work force but accounted for 66.6% of its salary budget; and that, in January 1996, the Borough had been faced with financial difficulties caused by overexpenditures by prior administrations and reduced State aid (Arbitrator's opinion (I), p. 18, 32). However, the arbitrator found that the Borough's December 31, 1996 audited financial statement showed a healthy community with increasing tax collections and expenditures under control (Arbitrator's opinion, pp. 32-33). He therefore concluded that the award would not adversely affect the public interest or the Borough's financial status (Arbitrator's opinion (I), p. 33; Arbitrator's opinion (II), p. 16).

Finally, the arbitrator discussed the cost of living criterion, N.J.S.A. 34:13A-16g(7). In his first opinion the arbitrator stated that the fact that the cost of living had been "under control" for the past few years was "a strong argument on behalf of adoption of a more reasonable increase" (Arbitrator's opinion (I), p. 33). In his second opinion, the arbitrator stated that the "reasonably stable" cost of living should not have a major impact on wage increase deliberations (Arbitrator's opinion (II), p. 18).

We turn first to the Borough's contention that the arbitrator did not comply with Bogota's direction to give "real consideration" to the Borough's "Exhibit 14," the Commission's 1996 private sector wage report (Arbitrator's opinion (II), pp. 10-11). The arbitrator discussed the report and noted that it showed that, in Bergen County, average private sector wages increased by 3.6% between December 31, 1994 and December 31, 1995 (Arbitrator's opinion (II), p. 10). He also noted that the statewide increase in average private sector wages was 3.4% (Arbitrator's opinion (II), p. 10). He then wrote:

It is interesting to note that 11 of the 21 counties surveyed had wage changes in private sector jobs which exceeded 3.0 percent. (That, of course was the Boro's wage proposal for 1996).... The average increase of private sector wages in these 11 counties was 4.17 percent.

The inescapable conclusion is that the Boro's three (3%) proposal compares unfavorably with the results of the N.J.D.O.L. report. Bergen County private sector wage increases (3.6%) exceeded it by 20 percent. The state-wide private sector average increase (3.4%) exceeded it by 13.3 percent. And the average increase of the 11 counties which had increases of over 3.0 (4.17%) exceeded it by 39 percent.

Thus, it is apparent that a detailed analysis of the evidence submitted in the original proceeding simply did not lend real support to the Boro's position on this criterion. I am compelled to observe, then, that even if Boro Exhibit No. 14 had been given "real consideration" it would not have outweighed the other criteria on which I relied to make my award.
[Arbitrator's opinion (II), pp. 10-11]

The arbitrator also analyzed the Commission's 1997 private sector wage report.^{5/} The arbitrator stated that the 1997 report showed a 4.3% statewide increase in average private sector wages between 1995 and 1996 and he stated that that increase was significantly closer to the PBA's proposal than to the Borough's (Arbitrator's opinion (II), p. 16). The arbitrator also found that the 4.3% figure closely approximated the increases he had earlier awarded and commented that nine out of 21 counties had wage increases of more than 4% (Arbitrator's opinion (II), p. 15-16). The arbitrator reasoned that the report was entitled to considerable weight because it was specific to New Jersey and was prepared pursuant to legislative mandate (Arbitrator's opinion (II), p. 15).

We conclude that the arbitrator did not fully analyze either the 1996 private sector wage report that Bogota directed him to review or the 1997 report that he took notice of. With respect to the 1996 report, the arbitrator stated that the 3.6% Bergen County figure "does not support" the Borough's proposal. However, he did not explain how it or the statewide 3.4% figure supported the PBA's 5% proposal or the 4.5% increases awarded.

^{5/} The Borough did not submit this report and it objects to the arbitrator taking notice of it without giving the parties an opportunity to comment on it. While that course might have been preferable, the arbitrator did not err in taking notice of a document that the Legislature intended to be used in interest arbitration proceedings. Allendale Bor. This is particularly so where the report was the most recent version of the exhibit the Borough had submitted.

Similarly, by averaging the increases in the 11 out of 21 counties where average private sector wages had increased by between 3% and 6.6% (Arbitrator's opinion (II), p. 10), the arbitrator isolated a portion of the report and derived a percentage figure that was closer to the 4.5% increases awarded than either the statewide or Bergen County figures. But the arbitrator did not explain why Bergen County is appropriately compared just to the 11 counties where average private sector wages increased by more than 3%.

A similarly selective analysis is evident in the arbitrator's discussion of the 1997 report. The arbitrator accurately noted that average statewide private sector wages increased 4.3% during 1996. But he did not mention that average private sector wages in Bergen County increased 3.6% -- even though he had focused on the Bergen County figure in analyzing the earlier report and cited some county figures in the 1997 report when he noted that private sector wages increased by more than 4% in nine out of 21 counties.^{6/} Similarly, while the arbitrator accorded significant weight to the 1997 report, he did not explain why he did not give significant weight to the 1996 report, which was also prepared pursuant to N.J.S.A. 34:13A-16.6.

For these reasons, we conclude that the arbitrator did not analyze all the information in the Commission's 1996 and 1997

^{6/} The report also showed 3% increases for local government workers, 3.3% increases for federal government workers in New Jersey and 2.1% increases for State workers.

wage reports and, therefore, we are not satisfied that he fully considered those reports in concluding that the evidence on private sector wage increases supported the PBA's position "appreciably more" than the Borough's (Arbitrator's opinion (II), p. 17). Cf. Cherry Hill Tp. (Commission vacated and remanded award where it was not satisfied that arbitrator fully considered Borough proposal and where he expressed improper presumption that it should not be awarded in interest arbitration).^{7/}

We do not hold that the arbitrator was compelled to award different salary increases than he did. However, he was required to provide a reasoned explanation as to how he weighed all the statutory factors in arriving at his award and, given our remand in Bogota, to explain how the additional private sector employment evidence factored into his analysis. The arbitrator did not provide such an explanation because he focused on isolated portions of the reports and did not explain why he found some information --e.g., the statewide wage increase for 1996 versus that for 1995 -- more probative than other information. We therefore vacate the award.

In view of our decision to vacate the award on this ground, we do not reach the Borough's arguments that the

^{7/} While the Borough challenges the arbitrator's analysis of the 1996 and 1997 reports, it does not challenge his decision to give greater weight to the 1997 report than to national data concerning private sector wage increases and contract settlements (Arbitrator's opinion (II), pp. 13-15).

arbitrator did not properly consider the public interest, the continuity and stability of employment, the cost of living, the financial impact of the award, or the Borough's evidence, submitted on remand, concerning public and private sector salaries in New Jersey. As discussed later, we are consolidating this matter with an interest arbitration petition initiated in 1998. The arbitrator appointed in that matter will have to consider and weigh all the statutory factors in arriving at his or her award.

We will, however, comment on the Borough's argument that the arbitrator erred when, in his second opinion, he stated that the "reasonably stable" cost of living "should not have a major impact on wage increase deliberations" (Arbitrator's opinion (II), p. 18). The comment appears to be inconsistent with the Legislature's direction that an arbitrator must consider cost of living evidence unless he or she explains why the factor was irrelevant to a proceeding. N.J.S.A. 34:13A-16g. But it may be that the arbitrator's comment instead reflects an assessment that the stable cost of living did not warrant significant increases, not a judgment that the factor was irrelevant. We need not resolve this point since we have already decided to vacate this award.

We turn now to the appropriate remedy. The Borough argues that we should modify the award "consistent with the record before the arbitrator." It emphasizes that the contract awarded has already expired and argues that another remand would be a waste of time.

While N.J.S.A. 34:13A-16f(5) (a) provides that the Commission "may" modify or correct an award, we decline to exercise that authority to change this award on the only disputed issue: the salary increases to be awarded. Determining salaries requires an analysis and weighing of all the evidence submitted on all the statutory factors and should be made in the first instance by an arbitrator.^{8/}

We recognize that the parties do not have a contract for 1998 and that post-1997 contract terms cannot be resolved until those for 1996 and 1997 are settled.^{9/} In this posture, and given the previous remand, the appropriate remedy is to vacate the award and consolidate this matter before the new arbitrator who will be appointed in IA-98-59. That arbitrator will have exclusive jurisdiction over the consolidated proceeding, N.J.A.C. 19:16-5.7(a), and shall resolve the unsettled issues for 1996,

^{8/} We need not decide whether the scope of our authority to modify awards under the Reform Act is the same as a court's authority under the Arbitration Act, N.J.S.A. 2A:24-1 et seq. Under N.J.S.A. 2A:24-9, a court may modify an award only where there is an arithmetical error or obvious mistake in identification, the arbitrator decided a matter not submitted, or the award is imperfect as to form. Tretina Printing, Inc. v. Fitzpatrick & Associates, Inc., 135 N.J. 349, 355, 359 (1994); see also City of Atlantic City v. Atlantic City Firefighters, Local 198, IAFF, 234 N.J. Super. 596, 602 (Ch. Div. 1989) (under N.J.S.A. 2A:24-9, court had no authority to modify interest arbitration award to state that language concerning staffing levels was a non-binding statement of purpose).

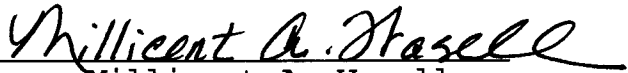
^{9/} The PBA filed a petition for interest arbitration on February 2, 1998, IA-98-59, and noted that the parties' contract expired on December 31, 1997.

1997, 1998 and any other years he or she deems appropriate, consistent with the parties' final offers.

ORDER

The arbitrator's award is vacated and this matter is consolidated with IA-98-59. The Director of Arbitration shall appoint a new arbitrator with exclusive jurisdiction over the consolidated proceeding.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

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

DATED: August 20, 1998
Trenton, New Jersey
ISSUED: August 20, 1998