

P.E.R.C. NO. 2012-35

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF ENGLEWOOD CLIFFS,

Appellant,

-and-

Docket No. IA-2010-115

PBA LOCAL No. 45,

Respondent.

SYNOPSIS

The Public Employment Relations Commission affirms an interest arbitration award establishing the terms and conditions of employment for an agreement between the Borough of Englewood Cliffs and PBA Local No. 45. The employer appealed the award arguing that the arbitrator did not properly consider or give due weight to the interest and welfare of the public, the financial impact factor and the lawful authority of the employer factor. Additionally the employer argued that the arbitrator violated the New Jersey Arbitration Act by not accepting certain evidence after the record was closed. The Commission affirms the award noting that its rules provide for the receipt of documents after the close of the record only in the discretion of the arbitrator, and that it defers to the arbitrators judgement in the application of the statutory standards.

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 & Wisler, LLP, attorneys, (Douglas F. Doyle, of counsel)

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

DECISION

On December 23, 2011, the Borough of Englewood Cliffs ("employer") appealed from an interest arbitration award to establish, beginning on January 1, 2009, the terms of a collective negotiations agreement between the Borough and PBA Local 145 for police officers ranked below Deputy Chief. 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).^{1/} A conventional award is crafted by an

^{1/} Effective January 1, 2011, P.L. 2010, c. 105 eliminated all other methods of interest arbitration and only provides for conventional arbitration.

arbitrator after considering the parties' final offers in light of nine statutory factors. We affirm the award.

One unique aspect of this dispute arose from the undisputed fact that although the PBA has represented these employees since 1978, their terms and conditions of employment had never been reduced to a written agreement prior to the agreement now under negotiations. Rather, the terms and conditions of employment had been negotiated, but were contained in various Municipal Ordinances and Resolutions, as well as practices of alleged long-standing duration within the Department. During the pre-interest arbitration negotiations, much of the effort of the parties was expended in agreeing to exactly what these understandings were, and finding appropriate contractual language which both sides could agree accurately expressed them. While the vast majority of these issues were resolved prior to the opening of formal interest arbitration proceedings, there remained a significant number of so-called "status quo open" issues for the arbitrator to resolve. For purposes of this appeal, however the resolution of those issues was not raised by appellant in its challenge to the award, and therefor are not specifically addressed herein.

The employer proposed a four-year agreement covering January 1, 2009 through December 31, 2012 with: a 0% wage increase on base pay for 2009; a 0% increase on base pay for 2010 ; a 2% increase in base pay for 2011; and a 2% increase in base pay for

2012. The Borough further proposed that the number of steps in the salary guide be increased from 9 to 11. It further proposed the elimination of longevity for all new hires and modifying the existing longevity scale as follows:

4 years- 1%
8 years- 2%
12 years- 4%
16 years- 5%
20 years- 6%
24 years- 10%
28 years- 12%

and the elimination of longevity for all new hires.

The Borough also proposed the modification of sick leave as follows :

0-5 years- 10 days
After 5 years- 15 days
After 10 years- 20 days

The Borough also proposed modification of vacation as follows:

1-5 years - 10 days
6-10 years - 20 days
11-15 years- 20 days
16-20 years- 25 days

21 years and over- 30 days.

In addition, the Borough proposed the modification of death benefits so that any officer who passes away while on the job would receive all unused earned and accumulated sick leave pay up to a maximum of 150 days, and to modify terminal leave so that active employees would receive a maximum of 2 months of terminal leave, and the terminal leave benefit would be eliminated for all new hires. Finally the Borough proposed reimbursement for meal allowances with a daily limit of \$50.00 for overnight only, contingent upon submission of receipts, and modification of the continuous payment for college credits, with credits limited to a one-time payment for classes earned during a defined period.

The PBA proposed a six year contract from its inception on January 1, 2009, to its termination on December 31, 2014, salary increases of 3.5% on January 1 of each year of the contract; and it proposed maintenance of the statu quo on all other economic issues.

On December 15, 2011, the arbitrator issued a 79-page Opinion and Award. He noted that the record contained extensive and voluminous documentary evidence, and direct testimony from several witnesses.

After summarizing the parties' offers and reviewing in detail their respective supporting arguments, the arbitrator awarded a five-year agreement covering January 1, 2009 through

December 31, 2013 with a 1% salary increase for 2009, 1.5% for 2010, 2.0% for 2011, 2.5% for 2012, and 2.5% for 2013. The arbitrator noted that retroactive payment for the awarded raises for 2009 through 2010 be made within 30 days of the issuance of his award. He left in place the longevity system for current employees, but modified longevity for new hires to:

5 to 10 years-2%

11 to 15 years-4%

16 to 20 years-6%

21 to 25 years and thereafter -8%

He also awarded a reduction in education incentive to \$10.00 per credit for new hires effective January 1, 2012. Finally, he also denied the Borough's proposed language change in the out-of-title pay, which had been agreed to in one of the earlier sessions.

The employer appeals contending that the arbitrator did not properly apply the statutory criteria listed in N.J.S.A. 34:13A-16(g) in issuing the award. Specifically, the employer argues: that the arbitrator did not properly consider or give due weight to the interest and welfare of the public in deciding the wage award; did not properly consider or give due weight to the financial impact factor; did not properly consider or give due weight to the lawful authority factor; and did not consider or give due weight to the statutory restrictions factor.

Additionally, the employer asserts that the arbitrator is guilty of misconduct in violation of N.J.S.A. 2A:24-8 by refusing to hear evidence pertinent and material to the controversy, specifically by his failure to accept the Borough's Budget for 2011. The PBA responds that the arbitrator properly considered those statutory factors, and the budget at issue was not offered in a timely manner in accordance with N.J.A.C. 19:16-5.7(k).

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.

We will first treat with the employer's allegations regarding N.J.S.A. 2A: 24-8 (The New Jersey Arbitration Act). The first of these allegations claims that because the arbitrator

failed to fully award the Borough's proposed modifications to sick leave, vacation leave, and terminal leave, he so imperfectly executed his authority under the statute as to violate N.J.S.A. 2A:24-8. Specifically, the Borough points to Kearny PBA Local No.21 v. Town of Kearny, 81 N.J. 208 (1979) for support for its premise that the award was so internally inconsistent that the arbitrator imperfectly executed his powers. In essence the employer argues that because the arbitrator allegedly disregarded the N.J.S.A. 34:13A-16g standards, the award violated N.J.S.A. 2A:24-8 as well. While this may be accurate as a legal proposition, in the absence of an analysis of the arbitrator's award on the underlying issues it is of little value in reaching a conclusion. Said differently, if the arbitrator did not properly apply the standards set forth in N.J.S.A. 34:13A-16(g), the award would also violate N.J.S.A. 2A:24-8. However, the assertion adds little to the Commission's obligation to consider appeals on the grounds "that the arbitration failed to apply the criteria specified in subsection g of this section or violated the standards set forth in N.J.S.A. 2A:24-8 or N.J.S.A. 2A:24-9." N.J.S.A. 34:13A-16(f) (5) (a).

The employer's second assertion regarding N.J.S.A. 2A:24-8 is that the arbitrator failed and refused to receive and consider evidence which was pertinent and material to the case, which constitutes "misconduct" in violation of the Arbitration Act. The

record reveals, however that the disputed evidence that the Borough contends was not received by the arbitrator consisted of the Borough's 2011 Budget, which was not offered to be produced until after its adoption on June 11, 2011. During the proceedings, after the closing of the hearings, and after the submission of briefs by both parties, the arbitrator requested that the parties submit a revised cost-out document in order to more closely reflect the actual size of the unit and the impact of a percentage change in base salary on total base compensation. At the same time, the arbitrator inquired if the parties wanted him to consider the Borough's 2011 adopted budget. Both parties agreed to his receipt of the revised cost-out materials, but because the PBA objected to the submission of the 2011 Budget, the arbitrator withdrew his request for that document.

The PBA responds that the Borough never requested that the record be held open for submission of the Budget, did not request that the record be re-opened for submission of that document, and never requested special permission to appeal the arbitrator's decision not to include that Budget pursuant to N.J.A.C. 19:16-5.17. Further, it asserts that N.J.A.C. 19:16-5.7(k) provides that "The parties shall not be permitted to introduce any new factual material in the post-hearing briefs, except upon special permission of the arbitrator" which gives the arbitrator complete discretion to either accept or reject such evidence. In the

instant matter, it was the arbitrator himself who asked for the Budget to be submitted. It was not made as a proffer of major import by the Borough. Additionally, in the context of multi-year awards, it is anticipated that not all budgets will be available to be submitted as evidence. City of Asbury Park, P.E.R.C. No. 2011- 17, 36 NJPER 323 (¶ 126 2010).

In the instant matter the arbitrator took consideration of the Borough's concerns regarding the retroactive portion of his award that would be needed to be paid during 2011 budget year, and offered considerable analysis of this issue. (Award at 48-54).

For the reasons set forth above, the Borough's appeal regarding the N.J.S.A. 2A:24-8 grounds must be rejected. The employer objects to a number of aspects of the Award, each relating to a specific standard set forth in the Act. In each case the Borough offers no evidence reflecting its position that the arbitrator did not give due consideration to its concerns. It asserts that the arbitrator did not properly apply the interest and welfare of the public, financial impact, and the lawful authority of the employer because the arbitrator ignored the evidence of the employer's precarious financial situation that includes increased labor and public safety costs, potentially requiring layoffs, and the effect of the 2011 levy cap changes reflecting a reduction to a 2% revenue cap, and a

budget deficit. Intertwined with these arguments are a disagreement with the arbitrator's conclusions to not award the Borough's proposals regarding changes in the salary schedule, the sick leave and vacation leave systems and the longevity system that the arbitrator did modify partially as requested by the Borough.

We reject these grounds for appeal. The arbitrator found that his award would not present a problem with respect to the Cap Law limitations on the Borough's's budget as the overall budget will be reduced from the fact that there have been retirements and attrition which inure to the Borough's advantage in terms of costs. As to the issues of vacation, sick leave, longevity and terminal leave, the arbitrator replicated the cost savings estimates provided by the Borough's financial witness, Mr Steven Wielkocz at pages 19-20 of the award. Thus, the arbitrator clearly considered each of these issues with regard to each of the statutory standards to which he deemed them relevant, and also related in his view why they were not relevant to other standards. As noted above, 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). Here, the parties presented volumes of documents and the Borough has not pointed to any particular evidence in the record that requires rejecting the contract terms that were awarded.

ORDER

The interest arbitration award is affirmed.

BY ORDER OF THE COMMISSION

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

ISSUED: January 20, 2011

Trenton, New Jersey