P.E.R.C. NO. 2005-56

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-2003-037

ESSEX COUNTY SHERIFF'S
OFFICERS, PBA LOCAL 183,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies a motion for a stay pending appeal of P.E.R.C. No. 2005-52 filed by Essex County and the Essex County Sheriff. The Commission concludes that the County has not shown that it has a substantial likelihood of prevailing in its appeal or that it will be irreparably harmed by implementing the award now. The Commission further concludes that a balancing of the equities favors immediate implementation of the award.

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Appearances:

For the Appellants, Genova, Burns & Vernoia, attorneys (Angelo J. Genova, of counsel; Brian W. Kronick and Nicholas D. Bliablias, on the brief)

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

DECISION

On February 14, 2005, the County of Essex and Essex County Sheriff (hereafter "County") moved for a stay of our decision in Essex Cty. and Essex Cty. Sheriff, P.E.R.C. No. 2005-52, ___ NJPER ___ (¶_____ 2005), and of the interest arbitration award that it affirmed, pending review of our decision by the Superior Court, Appellate Division.[1/] The County's Notice of Appeal was

1/ The documents were submitted by e-mail and received by the Commission on February 10 at 5:08 p.m., after the close of business at 5 p.m. The motions were therefore docketed as received on February 14, 2005, since Friday, February 11 was a legal holiday. The filing date is important because N.J.S.A. 34:13A-16f(5)(b) requires that an award that is

(continued...)

filed with the Appellate Division on February 10. In P.E.R.C. No. 2005-52, we held that the arbitrator had duly considered the County's financial and other arguments; reached a reasonable determination of the issues; and fashioned an overall award supported by substantial credible evidence. We declined to consider the County's arguments that the Police and Fire Public Interest Arbitration Reform Act ("Reform Act"), N.J.S.A. 34:13A-14 et seq., was unconstitutional, noting that we did not have jurisdiction to consider that question with respect to a statute that we are charged with implementing.

In support of its application for a stay, the County contends that it has demonstrated a likelihood of success on the merits because our decision assertedly disregarded the County's evidence concerning per capita income; improperly focused on the high morale of sheriff's officers rather than the public

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1/ (...continued)
appealed to the Commission and not set aside be implemented within 14 days of receipt of the Commission's decision absent a stay. Thus, a stay application must ordinarily be made within the 14-day period. City of Clifton, P.E.R.C. No. 2002-74, 28 NJPER 254, 255 (¶33097 2002). The parties' attorneys received the decision by facsimile transmission on January 27 and the decision was also sent by regular mail. If January 27 is considered the receipt date for purposes of N.J.S.A. 34:13A-16f(5)(b), then the motion should have been filed by February 10. However, the attorneys were not advised that the facsimile transmission constituted formal service and the Administrative Procedure Act, N.J.S.A. 52:14B-10, states that final agency decisions should be served in person or by mail. We need not resolve any timeliness questions, however, because we are satisfied that, on the merits, there are no grounds for a stay.

interest; and established a new comparability criterion with respect to civilian settlements that conflicts with the Reform Act and the requirements of the Administrative Procedure Act. It contends that, balancing the equities, it will suffer greater harm from implementation of the award than the sheriff's officers would incur from having the award stayed pending appeal. The County maintains that it and the taxpayers will be irreparably harmed if it is forced to pay salary increases that the Appellate Division may ultimately invalidate. In that event, it contends that it will be forced to institute separate recoupment actions against over 350 sheriff's officers, some of whom may be unable to remit payment because they will have already spent their salary increases by the time of recoupment. Finally, it maintains that the "status quo" should be preserved until the Appellate Division rules on the constitutional issues we did not address.

The PBA opposes the County's motion, maintaining that the County has not met the judicial criteria for obtaining a stay and has not submitted any new material or argument to call into question the correctness of P.E.R.C. No. 2005-52. The County has filed a reply reiterating that it meets the requirements for a stay.

We consider the County's application within the context of the traditional standards for granting a stay pending appeal, as

well as the particular policies of the interest arbitration statute.

To obtain a stay of an administrative agency's order pending appeal, the moving party must demonstrate both that it has a likelihood of prevailing in a final Appellate Division decision and that irreparable harm will result if the judgment is enforced pending appeal. Crowe v. DeGioia, 90 N.J. 126, 132-134 (1982); Avila v. Retailers & Manufacturers' Dist., 355 N.J. Super. 350, 354 (App. Div. 2002), certif. denied, 176 N.J. 74 (2003); Matter of Comm'r of Ins., 256 N.J. Super. 553, 560 (App Div. 1992); City of Clifton. Further, the legal right underlying the moving party's claim cannot be unsettled, the public interest must not be injured by a stay, and the relative hardship to the parties in granting or denying relief must be considered. Crowe.[2/]

The County has not shown a substantial likelihood of prevailing in an Appellate Division appeal. The Courts have endorsed our interest arbitration review standard, which states that the Reform Act vests the arbitrator with the responsibility to weigh the evidence and arrive at an award. Therefore, the Commission will not disturb the arbitrator's exercise of

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2/ Citing Crowe, Avila frames the second principle as "whether a meritorious issue is presented," a rephrasing of Crowe's statement that the legal right underlying a movant's claim cannot be unsettled. The County argues that its claims are meritorious. However, that alone is not a sufficient basis to grant a stay. The other elements of the Crowe test must be present as well.

discretion in weighing the evidence unless an appellant demonstrates that the arbitrator did not adhere to the Reform Act or the Arbitration Act, N.J.S.A. 2A:24-1 et seq., or shows that the award is not supported by substantial credible evidence. Teaneck Tp. v. Teaneck FMBA, Local No. 42, 353 N.J. Super. 289, 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). In addition, court review of our interest arbitration appeal decisions is circumscribed, and our decision in an appeal will stand unless it is arbitrary and capricious. Teaneck, 353 N.J. Super. at 299. Within this framework, the County has not shown a likelihood that the Appellate Division will reverse our decision and vacate the award.

For example, the County focuses on the record evidence concerning the per capita income of County residents and contends that we erred in stating that it had not shown why the arbitrator should have given this statistic "particular prominence in considering overall compensation."

Per capita income was one of the many financial statistics that the County had submitted to the arbitrator. P.E.R.C. No. 2005-52 found that the arbitrator had thoroughly considered and given due weight to that financial evidence in arriving at the increases he did. The County offers no particularized challenge to the Commission's discussion of the arbitrator's financial

analysis and has not shown that its per capita income is a per se indicator of fiscal distress. Nor has it demonstrated that this single item was one to which the arbitrator was necessarily required to give determinative weight. Given the extensive financial and demographic data that the arbitrator reviewed and that was encompassed in his overall discussion of the County's fiscal situation, P.E.R.C. No. 2005-52 reasonably declined to remand the award in order to require the arbitrator to separately discuss the County's per capita income.

Similarly, the County has not shown that the arbitrator's award, or our decision, elevated the morale of sheriff's officers over the public interest. P.E.R.C. No. 2005-52 held that arbitrators must consider the public interest, the interests of taxpayers, and the employer's financial constraints. However, it also observed that the Legislature was concerned with the morale of public safety officers, as set forth in N.J.S.A. 34:13A-14. Our opinion stated that we had previously affirmed the traditional arbitral view that the public interest encompasses the need for both fiscal responsibility and the compensation package required to maintain an effective public safety department with high morale. P.E.R.C. No. 2005-52, citing Teaneck Tp., P.E.R.C. No. 2000-33, 25 NJPER 450, 459 (¶30199 1999). Accordingly, we rejected the County's argument that the arbitrator erred in considering sheriff's officers morale as one

component of the public interest (Arbitrator's award, p. 113). That judgment is grounded in the Legislature's express linkage of the high morale of public safety officers with the efficient operation of public safety departments and, in turn, the protection of the public. N.J.S.A. 34:13A-14a and c.

The County also has not shown that the Commission established a new comparability rule or guideline. The County argues that, in affirming an award that did not follow an alleged wage pattern with nine of the County's 29 negotiations units, the Commission ruled that a settlement must be tested by interest arbitration before it must be considered. That is not the case. P.E.R.C. No. 2005-52 expressly stated that we "would not endorse an analysis that automatically disregarded internal settlements because they had not been tested in interest arbitration or did not involve public safety units." We added that an arbitrator's analysis should be free of any improper presumption that civilian settlements should never - or always - be extended to public safety units, and stressed that the Reform Act requires a careful balancing of multiple factors and establishes no rigid formula as to how to weigh internal civilian settlements, internal public safety settlements, external comparables and financial considerations. Absent the creation of any new comparability regulation or standard, there was no obligation to engage in rulemaking.

We also found that the arbitrator did not err in stating that he would have given more weight to the internal settlements if they had involved public safety units. Our holding does not signify that a pattern of civilian settlements should not be considered or given weight but reflects instead the widely held arbitral view that public safety settlements are of particular significance because they involve units that have traditionally been aligned for negotiations purposes. It is also consistent with our interest arbitration comparability regulations, which list comparisons with law enforcement officers and firefighters; non-uniformed employees in negotiations units; and non-uniformed employees not in negotiations units - along with the history of differentials between uniformed and non-uniformed units - as separate items pertaining to comparisons within the same jurisdiction that the parties may address through their presentations and which the arbitrator must then consider. N.J.A.C. 19:16-5.4(c) and N.J.A.C. 19:16-5.4(c)4iii. The statutorily-designated comparison with employees in the same jurisdiction performing the same or similar services, N.J.S.A. 34:13A-16g(2)(c), would be undercut if the arbitrator could not consider whether an alleged settlement pattern involved both civilian and uniformed units.

In addition, we found that, in analyzing the internal settlements, the arbitrator engaged in the required multi-factor

analysis. That judgment is entitled to deference. The arbitrator did not decline to award the wage increases in the settlements simply because they involved civilian units and, indeed, followed the prescription drug component of the settlements. However, he found that the settlements pertained to only eight other County units and included increases lower than those received by public safety officers statewide, and by public and private employees in general. In that context, his statement that he would have given greater weight to the settlements if they had also involved law enforcement units simply reflects that he would have more likely awarded those lower increases if another of the statutorily-designated comparisons had supported that result. Contrary to the County's reading of P.E.R.C. No. 2005-52, our decision does not require that a settlement include average increases in order for it to be given weight. However, a multi-factor analysis militates against the County's implicit argument that an arbitrator must automatically award the increases included in internal settlements, regardless of the amount of the increases or the employees encompassed in the settlements.

Nor is a stay warranted by virtue of the fact that the Commission did not rule on the County's constitutional arguments. As we noted, our Supreme Court has upheld the constitutionality of the interest arbitration section of the County Improvement

Authorities Law, N.J.S.A. 40:37A-96, against contentions that it violated the Equal Protection Clause and unduly delegated legislative authority. See Division 540, Amalgamated Transit Union v. Mercer Cty. Improvement Auth., 76 N.J. 245, 252-254 (1978). The Reform Act has more detailed criteria and review procedures than that statute, and thus the County's undue delegation challenge is unlikely to be successful. Similarly, given that the Legislature and the courts have treated law enforcement officers and firefighters differently from other public employees, the courts are unlikely to hold that the Legislature lacked a rational basis to establish a compulsory arbitration process that pertained only to those employees. See, e.g., N.J.S.A. 43:16A-1 et seq. (establishing separate pension system for police and firefighters, with different benefit formulas than in other state pension systems); Paterson Police PBA v. City of Paterson, 87 N.J. 78, 94-96 (1981)(upholding constitutionality of permissive category of negotiations for police and firefighters).

Finally, the County has not shown that it will be irreparably harmed by implementing the award now. It argues only that if the award is vacated, payments will have to be recouped. Within the context of the Reform Act, that circumstance alone does not constitute irreparable harm. N.J.S.A. 34:13A-16f(5)(a) requires immediate implementation of awards not appealed to the

Commission, and thus effectively stays an award that is appealed. City of Clifton, P.E.R.C. No. 2002-56, 28 NJPER 201, 209 n.7 (¶33071 2002). However, N.J.S.A. 34:13A-16f(5)(b) states that an award that is appealed to the Commission and is not set aside shall be implemented within 14 days of receipt of the award, absent a stay. The Legislature was presumably aware both of the stringent standards for obtaining a stay, as well as the fact that interest arbitration appeals could often involve salary and therefore recoupment issues. Yet it did not extend the automatic stay in N.J.S.A. 34:13A-16f(5)(a) to awards under appeal. Thus, absent special circumstances, the potential for recoupment does not constitute irreparable harm warranting a stay.

N.J.S.A. 34:13A-16f(5)(a) and (b) strike a balance. On the one hand, the Legislature wanted the Commission to consider contentions that an award does not conform to statutory standards before requiring it to be implemented. However, once the Commission affirms an award, the Legislature believed that public safety employees should not have their wages and benefits frozen until the end of post-agency litigation unless the strict standards for obtaining a stay were satisfied. Compare Sussex v. Merrill Lynch Pierce Fenner & Smith, Inc., 351 N.J. Super. 66, 73 (Law Div. 2001), aff'd o.b. 351 N.J. Super. 1 (App. Div. 2002) (holding that whether a judgment should be stayed pending appeal depends on the equities in each case, but commenting that "the

reality is" that large sums of money are transferred pursuant to judgments under appeal).

We conclude that a balancing of the equities favors immediate implementation of the award. The award is for 2002 through 2005 and a stay pending appeal would virtually ensure that no salary increases would be received until after the contract expires.[3/] That result would be counter to the legislative aim to establish an expeditious and binding interest arbitration process.

N.J.S.A. 34:11-4.4, cited by the County, does not direct a different result. The statute allows an employer to withhold or divert a portion of an employee's wages when "required or empowered" to do so under New Jersey or federal law, and includes a list of deductions that employees may authorize (e.g., union dues, charitable contributions). It does not appear to have been intended to prevent employers from recouping amounts eventually determined to have been erroneously paid out. In any case, in the unlikely event that the arbitrator's award is vacated, the County may argue in the remand proceeding for both lower salary increases and an adjustment of the amounts already paid. Cf. Washington Tp. v. New Jersey State PBA, 137 N.J. 88, 92-93 (1994) (consent order entitled employer, in event it was successful on

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3/ Even under the County's final offer unit members would have been entitled to salary increases and retroactive payments.

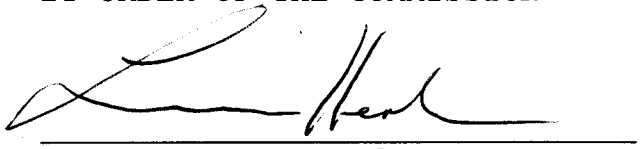
appeal, to have salary payments readjusted in accordance with subsequent arbitration proceedings). In that event, the recoupment or readjustments will be directed by a binding interest arbitration award or settlement.

For the foregoing reasons, the motion for a stay is denied.

ORDER

The motion for a stay is denied.

BY ORDER OF THE COMMISSION



Lawrence Henderson
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller, Katz and Watkins voted in favor of this decision. Commissioner Mastriani abstained from consideration. None opposed.

DATED: February 24, 2005
Trenton, New Jersey
ISSUED: February 24, 2005