

P.E.R.C. NO. 2012-54

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WEST CALDWELL,

Appellant,

-and-

Docket Nos. IA-2012-012

SN-2012-052

WEST ESSEX PBA LOCAL 81 (WEST  
CALDWELL UNIT),

Respondent.

SYNOPSIS

The Township of West Caldwell appeals an interest arbitration award, specifically a denial of its proposal to modify a contract clause addressing eligibility for out-of-title pay. The Township also filed a scope of negotiations petition with regard to the disputed language. The essence of the Township's claim on appeal is that the disputed language infringes upon its managerial prerogative to set appropriate staffing levels and to assign the number and types of officers to a particular shift. The Public Employment Relations Commission determines that the Township's appeal should be processed pursuant to the legal standards for evaluating a scope of negotiations petition rather than the legal standards for reviewing interest arbitration appeals and directs the parties to file briefs regarding the merits of the Township's scope petition.

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, Riker, Danzig, Scherer, Hyland &  
Perretti, attorneys (James Lott, Jr., of counsel)

For the Respondent, Loccke, Correia, Limsky & Bukosky,  
attorneys (Richard D. Loccke, of counsel)

DECISION

The Township of West Caldwell appeals from an interest arbitration award involving a unit of approximately 21 police officers, including 4 Lieutenants, 5 Sergeants and 12 non-supervisory officers, represented by the West Essex PBA, Local 81.<sup>1/</sup> The Township is only appealing the arbitrator's denial of its proposal to modify Article II, Section H of the collective negotiations agreement between the Township and the PBA. With regard to the language contained in that provision which addresses eligibility for out-of-title pay, the Township also filed a scope of negotiations petition with its appeal.

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<sup>1/</sup> The Township's request for oral argument is denied.

Article II, Section H reads as follows:

1. In the event a vacancy shall exist for any reason except as a result of a Department-assigned training or schooling and, as a result, an Officer or Superior is directed to assume, in an acting capacity, a higher rank and perform the duties and responsibilities of such higher rank for a period of at least ten (10) working days, then such officer or Superior shall receive the salary or pay for the higher rank for any period so worked beginning with the first hour of the eleventh (11th) day.

2. Whenever an Employee is assigned to work at a higher rank in a particular position and performs in that position for ten (10) working days either at one time or cumulatively during several assignments during a calendar year that Officer will be entitled to pay at the higher rank beginning on the eleventh (11<sup>th</sup>) day of such assignments. . . .

3. This Section shall be interpreted and applied consistent with the Grievance Arbitration and Award of grievance Arbitrator Joel Douglas (PERC Docket No. AR-99-122/issued December 30, 1999 and affirmed by the New Jersey Superior Court, Chancery Division on July 11, 2000 (Docket No.: C 110 00)).

The Township proposed that Article II, Section H be modified to delete sections 1 and 3. Its proposal also included modifying section 2 to provide for out-of-title pay for officers assuming the position of Acting Sergeant only and upon assignment to that position by the Chief only.

The arbitrator issued a 73 page Opinion and Award.

Regarding his denial of the Township's proposal to modify Article II, Section H, he found as follows:

I can reasonably conclude that there is a monetary cost to the Township if and when an officer receives acting pay. On this record, however, I cannot state with any certainty that the cost associated with providing acting pay would prohibit the Township from meeting its statutory obligations or cause it to exceed its lawful authority.

As to the Township's claim that there has been an infringement upon its managerial authority, it is an issue the Township must address through a scope of negotiations proceeding before PERC. Accordingly, I conclude that the evidence does not require me to modify Section H or to change the manner in which the parties have addressed Section H in the past.

On appeal, the Township argues that the arbitrator failed to consider the lawful authority of the employer and give due weight to the evidence presented of comparable jurisdictions. Alternatively, the Township requests a scope of negotiations determination.

The gravamen of the Township's argument on appeal is that the language of Article II, Section H infringes upon its managerial prerogative to set appropriate supervisory staffing levels and to assign the number and types of officers to a particular shift. Accordingly, the Township's claim should be evaluated pursuant to the legal standards for a scope of

negotiations determination rather than the legal standards for appealing interest arbitration awards. The PBA asserts that the Township should be estopped from seeking a scope of negotiations determination since the negotiability of the language in Article II, Section H was not raised at the time that the Township filed its Petition to Initiate Compulsory Interest Arbitration, as required by N.J.A.C. 19:16-5.5 (c).

We recently amended our interest arbitration rules in response to changes to the interest arbitration law, N.J.S.A. 34:13A-14a et seq.<sup>2/</sup> While N.J.A.C. 19:16-5.5(c) remains unchanged by the amendments, there are other rules relating to the filing of scope of negotiations petitions in interest arbitration appeals that were affected by the amendments. We created Frequently Asked Questions to help parties conform to the amended interest arbitration law and interest arbitration rules.

FAQ 1 reads:

Q. Do all of the Commission's current rules reflect the December 2010 changes to the interest arbitration statute?

A. No. However the Commission will engage in rulemaking to conform its rules to the recent statutory changes. In the meantime, parties should refer to the statute and these frequently asked questions.

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<sup>2/</sup> Those rule amendments are currently pending in the public comment period, which concludes on May 18, 2012.

FAQ 14 reads:

Q. What about a scope of negotiations dispute that arises during an interest arbitration proceeding?

A. In addition to the rules that are superceded by the recent statutory changes, the Commission has suspended application of N.J.A.C. 19:16-5.7(h), which prohibits an arbitrator from rendering a decision on any issue which is the subject of a petition for scope of negotiations determination filed with the Commission. The requirement that an arbitrator issue a decision within 45 days of assignment precludes application of this rule. Any scope of negotiations dispute can be decided by the Commission as part of any appeal of an arbitration award.

[emphasis supplied]

This case is the first time, since the recent interest arbitration rule amendments, that we will address the new requirements for the processing of a scope of negotiations petition related to interest arbitration proceedings.<sup>3/</sup> FAQ 1 sets out that parties should refer to the statute and the FAQs for guidance on the changes to the interest arbitration statute, but does not refer to the rules. FAQ 14 provides that a scope of

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<sup>3/</sup> Prior to the rule amendments implemented in response to the amendment of the interest arbitration law, a scope of negotiations petition would halt interest arbitration proceedings until we rendered a scope of negotiations determination. The current practice enumerated in the proposed rules provides that a scope of negotiations petition is processed as part of an appeal of the interest arbitration award. This change is due to the compressed time period within which interest arbitration proceedings must now be completed.

negotiations dispute can be decided by the Commission as part of any appeal of an arbitration award, however, it also does not refer to the requirement set forth in N.J.A.C. 19:16-5.5(c) that a scope of negotiations petition be filed within 14 days of the filing of an interest arbitration petition.<sup>4/</sup>

N.J.A.C. 19:10-3.1(b) provides us with the ability to construe our rules liberally to effectuate the purposes of the New Jersey Employer Employee Relations Act, N.J.S.A. 34:13A-1 et seq., and when strict compliance would result in an injustice. We find that under these circumstances, where the language of FAQs 1 and 14 could have been more precise with regard to the new procedures for the filing of a scope petition as part of an interest arbitration appeal, we are compelled to consider the Township's scope of negotiations petition. The Township is directed to file a brief regarding the merits of its petition within 14 days of this decision. The PBA shall respond within 14 days of service of the Township's brief. The Township may file a reply brief within seven days after service of the PBA's brief. Since we will be evaluating the Township's claim on appeal as a scope of negotiations matter, the Township's appeal of the interest arbitration award is denied.

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<sup>4/</sup> In response to the issues raised by this case, we will be clarifying the text of FAQs 1 and 14.

ORDER

The Township of West Caldwell's appeal of the interest arbitration award is denied. The Township is directed to file a brief regarding the merits of its scope of negotiations petition within 14 days of this decision. The PBA shall respond within 14 days of service of the Township's brief. The Township may file a reply brief within seven days after service of the PBA's brief.

BY ORDER OF THE COMMISSION

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

ISSUED: April 20, 2012

Trenton, New Jersey