

P.E.R.C. NO. 2014-60

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Respondent,

-and-

Docket No. IA-2014-003

NEW JERSEY LAW ENFORCEMENT  
SUPERVISORS ASSOCIATION,

Appellant.

SYNOPSIS

The Public Employment Relations Commission affirms an interest arbitration award establishing the terms of a successor agreement between the State of New Jersey and the New Jersey Law Enforcement Supervisors Association (NJLESA). NJLESA appealed the award, asserting that the arbitrator erred in accepting the State's scattergram and methodology to calculate salary increases. NJLESA also challenged the arbitrator's award of the State's proposal to modify the disciplinary clause's 45-day rule. The Commission finds that the arbitrator's use of the State's scattergram and decision not to credit the unit with the State's actual savings in the first two fiscal years of award is consistent with N.J.S.A. 34:13A-16.7(b) and the Commission's New Milford, P.E.R.C. No. 2012-53, 38 NJPER 340 (¶116 2012) and Ramsey, P.E.R.C. No. 2013-6, 39 NJPER 96 (¶34 2012) decisions. The Commission holds that whether speculative or known, any changes in financial circumstances benefitting the employer or majority representative are not contemplated by the statute and should not be considered by the arbitrator. The Commission rejects the NJLESA's statutory preemption challenge to the arbitrator's 45-day rule modification because it was not filed according to the N.J.A.C. 19:16-5.5(c) time line for scope of negotiations challenges during the interest arbitration process.

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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Appellant.

Appearances:

For the Respondent, Jackson Lewis, PC, attorneys  
(Jeffrey J. Corradino, of counsel and on the brief;  
James J. Gillespie, on the brief)

For the Appellant, Pellettieri, Rabstein & Altman  
(Frank M. Crivelli, of counsel and on the brief; Donald  
C. Barbati, on the brief)

DECISION

The New Jersey Law Enforcement Supervisors Association (NJLESA) appeals from an interest arbitration award involving a unit of approximately 665 primary level supervisory law enforcement officers.<sup>1/</sup> The majority of the unit members (541) are sergeants employed in the Department of Corrections (DOC); the Juvenile Justice Commission (JJC); and in the title Supervising Interstate Escort Officer.<sup>2/</sup> Thirty-nine (39) unit

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1/ We deny NJLESA's request for oral argument. The issues have been fully briefed.

2/ These titles are in State of New Jersey Employee Relations Group (ERG).

members are Sergeants, Campus Police and Police Sergeant, Palisades Interstate Parkway (PIP).<sup>3/</sup> The remainder of the unit (85) are Assistant District Parole Supervisor; Assistant District Parole Supervisor, JJC; State Park Police Sergeant; Police Sergeant, Human Services; Conservation Officer II; and Special Agent I.<sup>4/</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.

NJLESA primarily appeals the salary award asserting the arbitrator erred in accepting the scattergram and methodology offered by the State to calculate the salary increases. NJLESA also challenges the arbitrator's award of the State's proposal to modify Article XI, Section L(5) [Discipline-45 Day Rule] as it asserts it is preempted by statute.<sup>5/</sup> On February 7, 2014, NJLESA withdrew its request for clarification and/or modification of Article XI, Section L(6) of the award.

The State responds that the arbitrator properly relied upon its scattergram and NJLESA's failure to file a scope of

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3/ These titles are in ERG K (Colleges and PIP).

4/ These titles are in ERG K (Centralized Payroll).

5/ N.J.S.A. 30:4-3.11a.

negotiations petition is a waiver to its objection regarding the Discipline article award.

The parties' final offers, as pertinent to this appeal, are as follows:

NJSLESA

Article XIII: Salary Compensation Plan and Program:

The NJLESA seeks the maximum monetary amount available pursuant to N.J.S.A. 34:13A-16.7(b), and the restrictions contained therein, to increase the base salary items of its members. This monetary amount will be allocated between a lump sum payment to NJLESA members and an appropriate across-the-board increase applied to each negotiation unit employee's base salary effective the first full pay periods in July 2013 and July 2014.

State

Compensation Adjustment

1. Wage Increases: Subject to the State Legislature enacting appropriations of funds for these specific purposes, the State agrees to provide the following benefits effective at the time stated herein or, if later, within a reasonable time after the enactment of the appropriation.

A) Effective the first full pay period after July 1, 2014, there shall be a one percent (1%) across the board increase applied to each negotiation unit employee's base salary in effect on June 30, 2014. The State Compensation Plan salary schedule shall be adjusted in accordance with established procedures to incorporate the above increases for each step of each salary range. Each employee shall receive the increase by remaining at the step in the range occupied prior to the adjustments.

B) Payable in the first full pay period after July 1, 2014, each negotiation unit employee who is at Step 10 of his/her

appropriate salary range on or before the start of Pay Period 14 of 2014, and employed on the date of payment, shall receive a one-time lump sum cash bonus of four hundred and seventy-five dollars (\$475), which shall not be included in the base salary.

2. Salary Increments: Normal increments shall be paid to all employees eligible for such increments within the policies of the State Compensation Plan during the term of this Agreement:

a. Where the normal increment has been denied due to an unsatisfactory performance rating, and if subsequent performance of the employee is determined by the supervisor to have improved to the point which then warrants granting a merit increment, such increment may be granted effective on any of the three (3) quarterly action dates which follow the anniversary date of the employee and subsequent to the improved performance and rating which justifies such action. The normal anniversary date of such employee shall not be affected by this action.

b. Employees who have been at the eighth step of the same range for 18 months or longer shall be eligible for movement to the ninth step providing their performance warrants the salary adjustment.

c. Employees who have been at the ninth step of the same range for 24 months or longer shall be eligible for movement to the tenth step providing their performance warrants the salary adjustment.

3. Salary Upon Promotion: Pursuant to the 2011 amendment to N.J.A.C. 4A:3-4.9 by the Civil Service Commission, which applies to every employee promoted in this unit, any employee who is promoted to any job title represented by NJLESA shall receive a salary increase by receiving the amount necessary to place them on the appropriate salary guide (Employee Relations Group "2" or "K") on the lowest Step that provides them with an increase in salary from the salary that they were receiving at the time of

promotion. No employee shall receive any salary increase greater than the increase provided for above, upon promotion to any job title represented by NJLESA. By way of illustration, a Senior Correction Officer ("SCO") is currently in Employee Relations Group "L" Range 18. If such SCO is at Step 9 as of the date of his/her promotion and therefore earning a salary of \$77,667.00 as shown on the salary guide effective 7/13/13, such employee, upon promotion to Correction Sergeant (Employee Relations Group "2", range 21) would move to Step 6 at \$80,254.10, as this is the lowest salary on the Group "2", Range 21 salary scale effective 1/01/11 that is above the promoted employee's salary as of the date of promotion. [It is understood that the foregoing example is for illustration purposes only and is based upon the salary guide effective as of 1/01/11 and that the salary at each step of the guide is subject to change as per the across the board salary increases that are awarded in the interest arbitration proceeding.]

12. **Article XI, Section L(5) [Discipline - 45 Day Rule]**

**Proposed Change:** Modify as follows:

~~5. All disciplinary charges shall be brought within 45 days of the appointing authority reasonably becoming aware of the offense, except for EEO charges which must be brought within sixty (60) days of the appointing authority reasonably becoming aware of the offense, or in the absence of the institution of the charge within 45 day time period, the charge shall be considered dismissed. The employee's whole record of employment, however, may be considered with respect to the appropriateness of the penalty to be imposed.~~

5.a All disciplinary charges shall be brought within forty-five (45) days of the appointing authority reasonably becoming aware of the offense, except, effective after ratification of this agreement, where the employee is charged with conduct related to the following, in which case a 120 day rule will apply:

- 1) Removal charges related to any criminal matter of the third degree or higher, or any criminal matter of the fourth degree or higher where the matter touches upon or concerns the individual's employment, or where the facts underlying the proposed discipline could support a criminal charge.
- 2) Removal charges related to positive test result for Controlled Dangerous Substances.
- 3) Removal charges related to the introduction of contraband into a State Correctional Facility, or Juvenile Justice Commission-operated facility or program, which jeopardizes safety or security, including but not limited to cell phones and cell phone accessories.
- 4) Removal charges related to undue familiarity pursuant to the State's policy thereto.
- 5) Removal charges related to misconduct/inappropriate contact involving a student of a State College or University in which the employee is employed.
- 6) Removal charges related to uses of excessive force.
- 7) Removal charges related to incidents of workplace violence, violations of the New Jersey State Policy Prohibiting Discrimination in the Workplace ("State Policy"), or findings of violations of State or Agency Codes of Ethics by the State Ethics Commission.
- 8) Removal charges related to matter where the employee becomes unfit to perform the duties of their title, including but not limited to

physical unfitness, mental unfitness or being prohibited from carrying a firearm.

- 9) Removal charges related to matters where the employee is participating in a county, state or federal government investigation. The 120 day time limit in this instance shall not commence until the conclusion of the employee's participation in the investigation.

Charges related to the above conduct constitute cause for major discipline and only will be brought under N.J.S.A. 4A:2-2.3 or, if applicable, investigated as criminal matters.

All EEO charges not meeting the description above must be brought within sixty (60) days of the appointing authority reasonably becoming aware of the offense.

In the aforementioned cases, the forty-five (45) day rule shall not apply. Where the forty-five (45) day or sixty (60) day rule applies, any charges issued after the applicable time frame will be dismissed. The employee's whole record of employment, however, may be considered with respect to the appropriateness of the penalty imposed.

5.b. For the purpose of this sub-section, the following individuals, or their respective designees, shall be the appointing authority for their respective Department or Agency: Administrator (Corrections); Vice-Chairman (Parole); Superintendent (Juvenile Justice); Director of Administration (Treasury); Human Resources Director (Human Services); Superintendent (Palisades Interstate Park Commission); Director of Human Resources (Environmental Protection); Superintendent (Law and Public Safety); Assistant Vice President of Labor Relations (Rowan University); and Vice President or Director of Human Resources (all other State Colleges).

5.c. The exceptions to the 45 day rule (Paragraph 4(A)), set forth in Paragraphs 4(A)(1)-(9)),



will not be available to an appointing authority (as defined in Paragraph (4) (B)), for a period of one year, if that appointing authority issues removal charges under Paragraphs 4(A) (1) - (9) arising out of two (2) disciplinary events within a one year period (measured backwards from the date of issuance of discipline in the second event) and the removal charges are subsequently reduced by a final agency determination. The dismissal of charges is not considered "reduced" charges for purposes of the section.

The arbitrator issued an 165-page Opinion and Award. After summarizing the parties' arguments on their respective proposals, the arbitrator awarded, in material regard to this appeal, a four year agreement from July 1, 2011 through June 30, 2015. The salary award is as follows:

#### Compensation Adjustment

It is agreed that during the term of this agreement for the period July 1, 2011-June 30, 2015, the following salary and fringe benefit improvements shall be provided to eligible employees in the unit within the applicable policies and practices of the State and in keeping with the conditions set forth herein.

1. Wage Increases: Subject to the State Legislature enacting appropriations of funds for these specific purposes, the State agrees to provide the following benefits effective at the time stated herein or, if later, within a reasonable time after the enactment of the appropriation.

a. Effective the first full pay period after July 1, 2013, there shall be a one and one quarter percent (1.25%) increase applied to each negotiation unit employee who is at Step 10 of his/her appropriate salary range on or before the start of Pay Period 14 of 2013, and employed on the date of payment.

b. Effective the first full pay period after July 1, 2014, there shall be a one and one quarter percent (1.25%) increase applied to each negotiation unit employee who is at Step 10 of his/her appropriate salary range on or before the start of Pay Period 14 of 2014, and employed on the date of payment.

2. Salary Increments: Normal increments shall be paid to all employees eligible for such increments within the policies of the State Compensation Plan during the term of this Agreement:

a. Where the normal increment has been denied due to an unsatisfactory performance rating, and if subsequent performance of the employee is determined by the supervisor to have improved to the point which then warrants granting merit increments, such increment may be granted effective on any of the three (3) quarterly action dates which follow the anniversary date of the employee, and subsequent to the improved performance and rating which justifies such action. The normal anniversary date of such employee shall not be affected by this action.

b. Employees who have been at the eighth step of the same range for 18 months or longer shall be eligible for movement to the ninth step providing their performance warrants the salary adjustment.

c. Employees who have been at the ninth step of the same range for 24 months or longer shall be eligible for movement to the tenth step providing their performance warrants the salary adjustment.

The Arbitrator also awarded the State's proposal to delete Article XI, Section L(5) Discipline - and replace it with the 45-Day Rule and modify Section L(6).

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). 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. 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).

In cases where the 2% salary cap imposed by P.L. 2010, c. 105 applies, we must also 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.

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.

Borough of New Milford P.E.R.C. No. 2012-53, 38 NJPER 340  
(¶116 2012) was the first interest arbitration award that we reviewed under the new 2% limitation on adjustments to base salary. We held:

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 crux of NJLESA's argument is that the arbitrator erred in utilizing the scattergram and methodology provided by the State to calculate the salary award. It asserts that NJLESA's scattergram and methodology provides a more accurate cost out of the award. The parties stipulated the baseline salary amount expended by the State in Fiscal Year 2011 ("FY 11" - the last year of the parties' prior agreement) is \$56,945,856.70. The State's scattergram moves all unit members through the salary guide irrespective as to whether officers retired after FY 11 or new officers joined the unit. Accordingly, based on the prior guide, the State argued the NJLESA members would receive 6.56% base salary increases through step movement and increments.

According to NJLESA, its scattergram differs in that it reflects the actual salaries and/or monies paid to unit members for FY 12 and FY 13 reflecting actual expenditures of \$55,807,399.79 for FY 12 and \$56,208,517.37 for FY 13. For FY 14, NJLESA moves its members through the guide establishing that members would realize a 5.07% base salary increase throughout the contract. NJLESA relies on our decision in Atlantic City,

P.E.R.C. No. 2013-82, 39 NJPER 505 (¶161 2013), where we stated:

We further clarify that the above information<sup>6/</sup> must be included for officers

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6/ 1) A list of all unit members, their base salary step in the last year of the expired agreement and their anniversary date of hire; 2) costs of increments and specific date on which they are paid; 3) costs of any other base salary items  
(continued...)

who retire in the last year of the expired agreement. For such officers, the information should be prorated for what was actually paid for base salary items. Our guidance in New Milford for avoiding speculation for retirements was applicable to future retirements only.

To support its position that since FY 12 and FY 13 have passed, its scattergram should have been used because it provides actual dollars verses speculation.

To illustrate its point, NJLESA refers to Borough of Tenafly, P.E.R.C. No. 2013-87, 40 NJPER 90 (¶34 2013), app. pending. In that case, we affirmed an interest arbitration award that rejected the PBA's proposal of 2% across-the-board increases for five years and the Borough's proposal of 0% increases. Finding that the PBA's offer would increase base salary by 17.35% and the Borough's offer by 15.59% based on step movement alone, the arbitrator restructured the guides and instituted longevity and salary freezes to comply with the 2% cap. If the Tenafly compensation scheme can be eviscerated by the 2% cap, NJLESA argues that it should be able to benefit from the reduction in the base salary expenditures the State realized in FY12 and FY13.

NJLESA seeks a modification of the salary award to its proposal of a lump sum payment of \$5,315,327 or \$5,292,548 payable proportionally and evenly to its members based on the

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6/ (...continued)  
and the specific date on which they are paid; and 4) the total cost of all base salary items for the last year of the expired agreement.



time they were in the unit for FY 12 and 13 as well as 4.77% and 4.65% across-the-board increases in FY 14 and 15. This proposal, according to NJLESA's expert economist, will provide a full 2% salary increase.

If the Commission does not modify the award, NJLESA seeks a vacation and a remand for re-calculation of the award asserting the arbitrator did not provide an adequate analysis to support his determination to utilize the State's numbers since the State did not introduce expert testimony to support its proposal.

The State responds that the arbitrator fully complied with his obligation under N.J.S.A. 34:13A-16g; N.J.A.C. 19:16-5.9(b); and correctly determined that the award will not exceed the 2% salary cap imposed by P.L. 2010, c. 105. The State cites Borough of Ramsey, P.E.R.C. No. 2012-60, 39 NJPER 17 (¶3 2012), where we stated:

The statute does not provide for a majority representative to be credited with savings that a public employer receives from any reduction in costs, not does it provide for the majority representative to be debited for any increased costs the public employer assumes for promotions or other costs associated with maintaining the workforce.

The State requests we affirm the salary award as NJLESA's approach would result in 24.67% salary increases over a four-year period. The State asserts that its scattergram and salary analysis complies with the interest arbitration statute and Commission case law as it is calculated based on the unit

composition at the end of the expired agreement; provides for step movement of the members as they progress through the guide in FY 11 and FY 12; and then provides for salary increases within the cap for FY 13 and 14.

The State asserts the arbitrator properly rejected NJLESA's scattergram because it incorporates post base year savings. In response to NJLESA's argument that its economic expert's testimony should have been accepted, the State argues the expert's reasoning was based on a flawed interpretation of the 2% cap law. The State points to testimony in the record wherein the expert testified the statute requires that unit employees receive 2% salary raises; took account of savings realized by the employer in FY 12 and FY 13 as "back salary not paid"; and concluded that to achieve a full 2% increase for each year of the award, NJLESA must be awarded \$5,315,327 to account for the short fall in the unit's base salary in FY 12 and 13 plus 4.77% across-the-board increases on June 30 of 2014 and 2015. The State asserts that the expert's reasoning assumes the reduction in salary realized in FY 12 and FY 13 will continue and did not account for increment payments in FY 14 and 15.

As to the arbitrator's rejection of NJLESA's proposal, the State argues it was the correct decision under the interest and welfare of the public and the lawful authority of the employer criteria. The State asserts the intent of the 2% salary cap would be frustrated if unions or employers were able to engage in

gamesmanship with the timing of interest arbitration filings. If NJLESA's method is accepted, unions could time their filings based on unit member decreases thereby deflating actual salary expenditures or employers could time a filing at a point where a group of new hires, promoted employees or cadets were added to the unit.

This case is unique because it requires us to examine our guidance in New Milford as it relates to an interest arbitration hearing proceeding two fiscal years after the expiration of the prior agreement. As the arbitrator indicated in his analysis, the State followed the dynamic status quo doctrine and paid salary increments to the unit members for Fiscal Years 12 and 13. Thus, the actual dollar amounts expended by the State were available to the parties and the evidence establishes that the State paid less monies in FY 12 and 13 than it did in the base salary year of the prior agreement being FY 11. The arbitrator complied with his calculation requirements and determined the monies available within the cap. [Award at 133-142] In determining which approach to use, and justifying his salary award, the arbitrator reasoned:

After thorough review and consideration of the parties' vigorous arguments as to how to apply the cap and base salary amounts that can be awarded, I am persuaded that the State's methodology must be selected as the one that is consistent with the PERC case law. Notwithstanding NJLESA's disagreement with that case law as applied herein by the State, I am bound by that methodology and

will apply it to the salary award. While doing so, neither the statute nor the case law requires that the apportionment of the maximum aggregate amount of funds that can be awarded be identical to the specific terms that the State has proposed. As previously indicated, the statute states that "the arbitrator may decide to distribute the aggregate monetary value of the award over the term of the collective negotiations agreement in unequal annual percentages."

Based upon the above analysis of the amount of funds available to be awarded beyond the step movements costs that the State projected would occur over the four year period, that sum is \$821,373. That amount, in addition to the \$3,734,295 projected expenditures for the cost step movements over the four year period equals the cap amount of \$4,555,668. Given the conventional arbitration authority granted to me under law, and the latitude to distribute the funds consistent with the cap amount over the four year period, I have decided not to award the 1% across the board amount in FY 2015 for all unit employees nor the \$475 one-time non-base payment during the 14<sup>th</sup> pay period of FY 2014 for those employees at the maximum step of the salary schedule. This 1.44% is calculated at \$821,373. Instead, and for the purpose of achieving reasonable consistency with collective negotiations agreements reached between the State and its other law enforcement and civilian bargaining units over the 2011-2015 contract years, I have awarded a 1.25% increase in FY 2015 (contract year #4) only for those employees who were projected to be placed at the top step of the salary schedules for unit employees during these years based upon A. Ex. #6.

The calculations of cost for this portion of the award is \$334,125 for FY 2014 as a result of a 1.25% increase only for employees at the top step and an additional

\$423,708 for FY 2015 as a result of a 1,25% increase only for employees at top step. These increases would be effective the first pay period after each July 1 effective date. The distribution for both of the two years total \$757,833 (\$334,125 in FY 2014 and \$423,408 in FY 2015) and is based off of an approximate top step salary average of \$90,000 for all of the salary guides as of the base salary year that ended on June 30, 2011 and the State's projections of the number of employees in all ERGs at Step 10 of 297 in FY 2014 and 372 in FY 2015. The amounts awarded are somewhat less than the \$821,373 that would equal the maximum allowable but there is no basis for the expenditure of that requires any additional amounts.

The terms of the award are within the costs of the cap on base salary that are lawfully allowable and are reasonably consistent with the across the board wage increases that the State achieved with PBA Local 105, NJSOLEA and FOP Local 174.

[Award at 143-145]

We affirm the arbitrator's salary award and find that his selection of the State's scattergram is consistent with our direction in New Milford. We reject NJLESA's argument that the savings realized by the State in FY 12 and 13 are to be credited to the unit. As we indicated in New Milford, the base salary calculation may not increase by more than 2% per year, or 6% in the aggregate for a three year contract award, the amount expended by the employer in the last year of the prior agreement. N.J.S.A. 34:13A-16.7(b). Whether speculative or known, we again hold that any changes in financial circumstances benefitting the employer or majority representative are not contemplated by the

statute or to be considered by the arbitrator. See Borough of Ramsey (Holding that the interest arbitration statute does not provide for a majority representative to be credited with savings that a public employer receives from any reduction in costs in the new contract years). We also note that we have recently reversed the dynamic status quo doctrine as a matter of Commission policy and no longer require employer's to pay salary increments upon contract expiration. See Atlantic County, P.E.R.C. No. 2014-40, \_\_ NJPER \_\_ (¶\_\_ 2013), app. pending; and State-Operated School Dist. of the City of Paterson, P.E.R.C. No. 2014-46, \_\_ NJPER \_\_ (¶\_\_ 2014).

The second basis for NJLESA's appeal is its opposition to the awarding of the State's proposal to modify Article XI, Section L(5), commonly referred to as the 45-Day Rule. NJLESA asserts this Article is preempted by N.J.S.A. 30:4-3.11a that provides:

A person shall not be removed from employment or a position as a State corrections officer, or suspended, fined or reduced in rank for a violation of the internal rules and regulations established for the conduct of employees of the Department of Corrections, unless a complaint charging a violation of those rules and regulations is filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based. A failure to comply with this section shall require a dismissal of the complaint. The 45-day time limit shall not apply if an investigation of a State corrections officer for a violation

of the internal rules and regulations of the Department of Corrections is included directly or indirectly within a concurrent investigation of that officer for a violation of the criminal laws of this State; the 45-day limit shall begin on the day after the disposition of the criminal investigation. The 45-day requirement in this section for the filing of a complaint against a State corrections officer shall not apply to a filing of a complaint by a private individual.

The State responds that by failing to file a petition for a scope of negotiations determination or raise its objection earlier, NJLESA has waived its objection to the awarding of the 45-day Rule modification under N.J.A.C. 19:15-5.5. This regulation requires scope petitions be filed within 5 days of the filing of an interest arbitration petition or a response to the petition. The regulation further specifies that the failure to do so will constitute an agreement to arbitrate all unresolved issues.

In the alternative, the State asserts the language is not preempted as N.J.S.A. 30:4-3.11a addresses a 45-day time limit on the issuance of major discipline issued "for a violation of the internal rules and regulations established for the conduct of employees of the Department of Corrections." The State cites McElwee v. Borough of Fieldsboro, 400 N.J. Super. 388 (App. Div. 2008), a case applying a similarly worded statute to municipal police officers, where the Court held that the statutory 45-day

time limit imposed by N.J.S.A. 40A:14-147<sup>2/</sup> did not apply to



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7/ N.J.S.A. 40A:14-147 provides:

Except as otherwise provided by law, no permanent member or officer of the police department or force shall be removed from his office, employment or position for political reasons or for any cause other than incapacity, misconduct, or disobedience of rules and regulations established for the government of the police department and force, nor shall such member or officer be suspended, removed, fined or reduced in rank from or in office, employment, or position therein, except for just cause as hereinbefore provided and then only upon a written complaint setting forth the charge or charges against such member or officer. The complaint shall be filed in the office of the body, officer or officers having charge of the department or force wherein the complaint is made and a copy shall be served upon the member or officer so charged, with notice of a designated hearing thereon by the proper authorities, which shall be not less than 10 nor more than 30 days from date of service of the complaint. A complaint charging a violation of the internal rules and regulations established for the conduct of a law enforcement unit shall be filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based. The 45-day time limit shall not apply if an investigation of a law enforcement officer for a violation of the internal rules or regulations of the law enforcement unit is included directly or indirectly within a concurrent investigation of that officer for a violation of the criminal laws of this State. The 45-day limit shall begin on the day after the disposition of the criminal investigation. The 45-day requirement of this paragraph for the filing of a complaint against an officer shall not apply to a filing of a complaint by a private individual. A failure to comply with said provisions as to the service of the complaint and the time within which a complaint is to be filed shall require a dismissal of the complaint.

(continued...)

discipline grounded in violations of Title 4A of the New Jersey Administrative Code or to violations that are criminal in nature. The State asserts the award complies with the statute because the modification that extends to 120 days the period for filing removal charges "brought under N.J.A.C. 4A:2-2.3 or, if applicable investigated as criminal matters does not apply to disciplinary charges brought for violations of the internal rules and regulations established for the conduct of employees of the Department of Corrections."

In awarding the change to the 45-day Rule, the Arbitrator relied on comparability:

The record does reflect that the 45 day rule has been the subject of interpretation and dispute. The fact that PBA Local 105 and NJSOLEA have agreed to some modification of the 45 day rule tends to support the State's argument that the rule is in need of some clarification and modification in order to minimize disputes over its application. NJLSEA shares a greater community of interest with NJSOLEA than with PBA Local 105 based upon the fact that the two units represent superior officers. Moreover, the PBA 105 agreement provides the State with the Broad authority to extend the 45 day period for an undetermined period of time by changing the trigger date from "45 days of the appointing authority reasonably becoming aware of the offense" to when "the

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7/ (...continued)

The law enforcement officer may waive the right to a hearing and may appeal the charges directly to any available authority specified by law or regulation, or follow any other procedure recognized by a contract, as permitted by law.

appointing authority reasonably becomes aware of the offense" without reference to days. The NJSOLEA agreement provides for dates of certainty by maintaining the 45 day rule except for when the 120 day rule would apply to nine specific types of removal charges that are contained in the State's proposal to NJLESA. It is reasonable for Sergeants and Lieutenants operating in the same departments and agencies to have similar investigatory procedures that provide due process for unit members. An award of the State's proposal accomplishes that goal and it is awarded. I also award the State's proposal for specific individuals to serve as the appointing authority for their respective departments or agencies consistent with the terms agreed to by the other law enforcement units. Such designation will avoid any ambiguity as to who may bring disciplinary charges against a unit member. NJLESA contends that case law supercedes the State's proposal. This cannot be determined on this record but this award is intended to be consistent with case law.

We affirm the arbitrator's award of the 45-day rule modification and reject NJLESA's appeal of same. A review of the record indicates that NJLESA is raising its negotiability argument for the first time in this appeal. The time line set forth in N.J.A.C. 19:16-5.5(c) structures the interest arbitration process; ensures that the parties and the arbitrator know the nature and extent of the controversy at the outset; and fosters the statutory goal of providing for an expeditious, effective and binding procedure for resolution of disputes between employers and police and fire employees. See Borough of Ft. Lee, P.E.R.C. No. 2008-70, 34 NJPER 261 (¶92 2008) and the

cases cited therein. This rule has become more important since the passing of P.L. 2010, c. 105 and the quick time frames set forth therein.

We find no extraordinary circumstances to relax this rule. The parties engaged in extended mediation sessions and NJLESA has not offered any evidence that it was unaware of the State's proposal or otherwise prevented from filing a scope of negotiations petition. Indeed, the State filed a scope of negotiations petition in this case that was decided on an expedited basis prior to the arbitration proceedings pursuant to a pilot program of the Commission. See State of New Jersey and NJLESA, P.E.R.C. No. 2014-21, \_\_ NJPER \_\_ (¶\_\_ 2014). Thus, we affirm the award. NJLESA is not precluded from seeking relief in Superior Court if a particularized circumstance arises that it deems violates N.J.S.A. 30:4-3.11a.

ORDER

The interest arbitration award is affirmed.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau and Eskilson voted in favor of this decision. Commissioners Voos and Wall voted against this decision. Commissioner Jones was not present.

ISSUED: March 10, 2014

Trenton, New Jersey