

P.E.R.C. NO. 2017-69

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT,

Appellant,

-and-

Docket No. IA-2017-004

PATROLMEN'S BENEVOLENT ASSOCIATION  
LOCAL 304,

Respondent.

SYNOPSIS

The Public Employment Relations Commission affirms an interest arbitration award establishing the terms of a successor agreement between the Association and New Jersey Transit. New Jersey Transit appealed, arguing that an ex parte communication to the arbitrator after the record closed tainted the award. The Commission holds that the arbitrator addressed all of the N.J.S.A. 34:13A-16g statutory factors, adequately explained the relative weight given, analyzed the evidence on each relevant factor, and did not violate N.J.S.A. 2A:24-8 and -9.

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, McElroy, Deutsch, Mulvaney &  
Carpenter, attorneys (John J. Peirano, of counsel and  
on the brief, David M. Alberts on the brief)

For the Respondent, D. John McAusland, of counsel and  
on the brief

DECISION

New Jersey Transit (NJT) appeals from an interest arbitration award involving a unit of approximately 173 NJT police officers and detectives in ranks below sergeant represented by Patrolmen's Benevolent Association Local 304 (PBA).

On January 13, 2017, the PBA filed a Petition to Initiate Compulsory Interest Arbitration. Following three days of hearings and the submission of post-hearing briefs, on April 18, the arbitrator issued a conventional award as she 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.

NJT appeals the award asserting that it was tainted by an ex parte (and initially anonymous) e-mail sent by the PBA's counsel to the arbitrator after the record closed on April 7, 2017. The e-mail attached an April 12, 2017 announcement purportedly issued by NJT's Executive Director advising that, effective retroactively to January 1, 2017, non-agreement employees, with some exceptions, would receive a salary increase of 1.9 percent. NJT asserts the purpose of the e-mail was to influence the arbitrator's analysis of salaries and pay raises applicable to other NJT employees.

The same day the e-mail was received, the arbitrator sent the following e-mail to the parties:

I wanted you both to know that today I received an anonymous email from the address below. No subject line; no text. Just the image attached. While I have no idea whether the image is real or fake, it does not matter. I consider the direct communication to the arbitrator is highly inappropriate and unethical. Further the document cannot be treated as "evidence" in any way as the hearing record closed in this matter on March 31. Please be advised that I will not consider this emailed "image" in any way in deciding an award in this matter.

The next day the PBA's counsel sent another ex parte e-mail to the arbitrator apologizing for sending the first message and taking full responsibility for his actions. He admitted that he

did not use appropriate and professional judgment. The arbitrator sent a copy of both e-mails to NJT's counsel and directed that there be no further ex parte communications with her.

In its appeal, NJT states that the e-mail may have had a "subliminal" effect on the arbitrator, asserting, "Of the . . . issues in dispute, the arbitrator awarded in the PBA's favor on all of them."

The PBA denies that the award adopted its position on all the issues in dispute. It further asserts that based on Commission, state, and federal case law, the facts and circumstances of the ex parte communications do not constitute grounds to overturn the award.

For the reasons discussed below we find that the ex parte e-mails, while inappropriate, did not taint the proceedings or the award. We further hold, applying the applicable criteria and standard of review, that the award should be affirmed.

The arbitrator issued a 95-page Decision and Award. After summarizing the proceedings, quoting from the parties' arguments and proposals from their post-hearing briefs, and addressing the required statutory factors, the arbitrator awarded an eight-year contract effective January 1, 2010 through December 31, 2017. The Award addressed several issues that were raised by the parties during the proceedings. Our decision focuses on the ex

parte issue raised in NJT's appeal and substantive challenges to the issues raised in its appeal: salaries, premium contributions, paid injury leave, vision care, and free ridership on NJT vehicles.

I. Standard of Review

N.J.S.A. 34:13A-16g requires that an arbitrator state in the award which of the following factors are deemed relevant, satisfactorily explain why the others are not relevant, and provide an analysis of the evidence on each relevant factor:

- (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. 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)]. 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, 25 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;

Borough of Lodi, P.E.R.C. No. 99-28, 24 NJPER 466 (¶29214 1998).

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, in the first year of the collective negotiation agreement awarded by the arbitrator, 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. In each subsequent year of the agreement awarded by the arbitrator, base salary items shall not be increased 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 immediately preceding year of the agreement awarded by the arbitrator.

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 percentage increases, which shall not be greater than the compounded value of a 2.0 percent increase per year over the corresponding length of the collective negotiation agreement. 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.<sup>1/</sup>

### Salaries

NJT proposed 1% increases effective July 1, 2014, 2015, 2016, and 2017. The PBA proposed 1.9% increases effective July 1 for all eight years of the new CNA.

The arbitrator extensively analyzed salary data for the 25 largest New Jersey municipal police departments as well as the police department of New York's Metropolitan Transportation

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<sup>1/</sup> Because the prior agreement expired on June 30, 2010 the contract awarded by the arbitrator is not subject to the 2% "Hard Cap" on annual base salary increases for arbitration awards imposed, effective January 1, 2011, by P.L. 2010, c. 105 and continued by P.L. 2014, c. 11, until December 31, 2017. According to a letter written by the then-Attorney General to the United States Department of Labor, NJT is not subject to the P.L. 2011, c. 78 health insurance premium contribution requirements. (Award at 76). In addition as NJT is not a municipal body, statutory limits on tax levy and spending increases do not apply to it.



Authority.<sup>2/</sup> Finding that the starting salary and the lower steps of the guide for NJT officers were higher than normal, no increases were awarded in the first six years of the agreement. In contrast, the arbitrator determined that more experienced NJT officers were underpaid. Effective July 1 of each of the first six years, percentage increases in salary were awarded on Steps 5 to 10 only.<sup>3/</sup> For the seventh and eighth years of the agreement, all steps were increased by 1.9%, again effective July 1 of both years. The raises were made retroactive to July 1, 2013.

#### Paid Injury Leave

The parties' most recent CNA provided 18 months of such leave. NJT argued that the benefit should be eliminated. The PBA proposed the limit be cut to 12 months which would be consistent with the benefit enjoyed by large New Jersey municipal police departments. The arbitrator capped the benefit at nine months.

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2/ NJT maintains that the arbitrator should have given more weight to salary data for police employed in State-wide units. The award (at 49 to 52) responds to this argument.

3/ In years one through three, the affected steps were increased by 1.5%. These increases to Steps 5 to 10 were awarded in the succeeding years: Year four, 1.6%; Year five, 1.7%; Year six, 1.8%; Years seven and eight 1.9% to all steps.

Health Insurance Premiums

NJT proposed that unit employees pay premiums in accordance with Chapter 78.<sup>4/</sup> It sought 30% of premium cost contributions for all types of coverage except family coverage, which would be 29%. The expired CNA had PBA unit members paying, regardless of the type of coverage, a monthly fee of \$40.00. The PBA sought to maintain a uniform dollar amount except that the monthly contribution would be increased to \$169.00 effective July 1, 2017. Noting that virtually every public employee is required to contribute toward the cost of health insurance coverage, the arbitrator awarded a 15% contribution toward the cost of health insurance premiums, effective July 1, 2017, (a figure matching the percentages paid by the NJT superior officers unit and the bus operations unit).

Vision Care

NJT asserts that the arbitrator should have granted its proposal to eliminate vision care coverage because that benefit had been eliminated for the superior officers' unit. In rejecting the proposal the arbitrator noted that no other negotiations unit had been asked to give up the benefit, the cost of which to NJT is \$1,350 per year. However, we note that the 2016 interest arbitration award establishing a CNA between NJT

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<sup>4/</sup> NJT is self-insured.

and the superior officers unit for July 1, 2010 through June 30, 2017 ended the vision care benefit as of June 30, 2016.

Free Ridership on NJT Vehicles

NJT asserts that the arbitrator rejected its proposal to eliminate this benefit "out of hand." The arbitrator said this:

I find that the presence of police officers on trains and buses, especially in uniform, furthers one of the stated goals of NJ Transit police department; that is, to have as much police presence as possible in its facilities and on its carriers. For the very reasons that led NJT's Director to "temporarily" return free ridership to police management employees after the Paris bombings - to be the additional "eyes and ears" - provides a good rationale for maintaining this benefit for patrolmen. A police officer on a train or bus commuting to work acts as an additional resource to deter crime on the train or bus, and enhances public safety - all in the public interest. On the other hand, savings to the Company has not been established by the record and therefore, the Employer has not provided sufficient justification for the elimination of this benefit.

[Award at 92]

We concur that the award articulates a sufficient rationale to maintain this benefit.<sup>5/</sup>

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<sup>5/</sup> A 2016 interest arbitration award covering the superior officers declined to eliminate the same benefit for that unit.

Law Governing Ex Parte Communications

Given NJT's assertion that the award was tainted by an ex parte communication, we will consider the pertinent sections of N.J.S.A. 2A:24-8 providing:

The court shall vacate the award in any of the following cases:

- a. Where the award was procured by corruption, fraud or undue means;
- b. Where there was either evident partiality or corruption in the arbitrators, or any thereof;
- c. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause being shown therefor, or in refusing to hear evidence, pertinent and material to the controversy, or of any other misbehaviors prejudicial to the rights of any party;
- d. Where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made.

After reviewing the cases cited and discussed by the parties, we discern the following principles governing the impact of ex parte communications on the validity of an arbitration award:

- An ex parte communication initiated by a party, rather than the arbitrator, does not, in and of itself, provide grounds to invalidate an arbitration award;
- The party seeking to vacate the award has the burden of demonstrating misconduct by the arbitrator that prejudices its rights;

- An in-depth analysis of the evidence and an award which grants in part and denies in part the proposals of each party tends to show that the arbitrator was not partial to the party making the ex parte communication.

See Risco, Inc. v. N.J. Natural Gas Co., 2015 N.J. Super. Unpub. LEXIS 1785; Mutual Fire, Marine & Inland Ins. Co. v. Norad Reinsurance Co., 868 F.2d 52, 57 (3rd Cir 1989).<sup>6/</sup>

For the following reasons we determine that the ex parte communication to the arbitrator has not been shown to have influenced her award and her rulings do not show evident partiality towards the PBA. The rulings challenged on appeal did not adopt the PBA proposals in almost all respects.

NJT suggests that because the arbitrator awarded 1.9% increases in the last two years of the agreement, the same percentage raise contained in the Executive Director's announcement, she may have been "subliminally" influenced to award that percentage increase.

The PBA responds, and the record shows, that it proposed a 1.9% increase to all steps for each of the eight years of the agreement.

Thus, the PBA proposal, filed well before the submission of the Executive Director's notice, had already identified 1.9% as a

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<sup>6/</sup> Despite citing these cases, NJT argues, contrary to their holdings, that it should not be required to demonstrate prejudice. Its point is not supported with legal authority.

desired annual salary increase. And, as discussed in her award at 65 to 69, the arbitrator, finding that the starting and low step salaries for NJT police were above average when compared with comparable departments, froze salaries for steps one through four in the first six years of the agreement and awarded percentage increases lower than 1.9 for the higher steps for that same period of time.<sup>7/</sup> The percentage increases show a yearly progression in increments of 0.1% from 1.5% in year 3 to 1.8% in year 6 and then 1.9% in years seven and eight. In addition, the arbitrator declined to award full retroactivity for the raises as had been proposed by the PBA. The salary award was preceded by a 22-page discussion (Award at 43 to 64) of the factors bearing on salary issues set forth in N.J.S.A. 34:13A-16g.

We conclude that there is no evidence that the 1.9% increase for non-unionized employees persuaded the arbitrator to award that same raise in the final two years of the NJT-PBA agreement. While the salary award may be viewed as more favorable to the PBA than to NJT, the salary award is not the product of evident partiality, improper conduct by the arbitrator, or the ex parte

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<sup>7/</sup> In years one through three, higher steps were increased by 1.5%. These increases to Steps 5 to 10 were awarded in the next years: Year four, 1.6%; Year five, 1.7%; Year six, 1.8%; Years seven and eight 1.9% to all.

communication received six days prior to the release of her comprehensively analyzed and lengthy award.<sup>8/</sup>

Additionally, we find that the other challenged aspects of her award were the product of reasoned and well-documented application of the required statutory criteria and have not been demonstrated to be the result of evident partiality. The maximum amount of paid injury leave, which had been 18 months, was reduced by the arbitrator to nine months. The arbitrator ended the nominal payments of \$40.00 per month toward health insurance premiums and awarded a contribution rate of 15%, which matched the percentage paid by the superior officers and members of the bus operations unit. The arbitrator provided reasonable justifications for her resolution of the vision care and ridership on NJT vehicles issues.

ORDER

The interest arbitration award is affirmed.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Jones and Voos voted in favor of this decision. None opposed.

ISSUED: June 29, 2017

Trenton, New Jersey

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<sup>8/</sup> We note that the standard set by N.J.S.A. 2A:24-8.b. for vacating an award is "evident partiality" by the arbitrator. Synonyms for "evident" include "observable," "detectable," "perceptible," and "noticeable." NJT's assertion that the ex parte communication "subliminally" influenced the arbitrator to be partial toward the PBA does not equate to evident partiality.