

P.E.R.C. NO. 2021-34

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PASSAIC COUNTY SHERIFF'S OFFICE,

Respondent,

-and-

Docket No. IA-2021-005

PBA LOCAL 197,

Appellant.

SYNOPSIS

The Public Employment Relations Commission remands an interest arbitration award to the arbitrator for a cost-out of his award that clarifies the net annual economic changes and annual costs of all base salary items. The PBA, Local 197 (PBA), which represents a non-supervisory correctional officers unit, appealed from the award setting the terms of a successor agreement with the Passaic County Sheriff's Office (County) arguing, among other things, that the arbitrator did not cost-out his award. The Commission declines to decide the PBA's other related objections to the award prior to reviewing the arbitrator's cost-out on remand. The Commission retains jurisdiction and orders the parties to file supplementary briefs following receipt of the arbitrator's cost-out and clarification.

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 Respondent, Florio Perrucci Steinhardt Cappelli
Tipton & Taylor, LLC, attorneys (Lester E. Taylor, III,
of counsel and on the brief)

For the Appellant, Crivelli & Barbati, LLC, attorneys
Frank M. Crivelli, of counsel and on the brief)

DECISION

On January 12, 2021, the Patrolmen's Benevolent Association, Local 197 (PBA or Local 197), appealed an interest arbitration award covering the PBA's negotiations unit. The PBA is the majority representative of non-supervisory correctional officers employed by the Passaic County Sheriff's Office (County). The County and PBA are parties to a collective negotiations agreement (CNA) effective from January 1, 2007 through December 31, 2014, and a Memorandum of Agreement (MOA) effective from January 1, 2015 through December 31, 2018. On September 3, 2020, the PBA filed a Petition to Initiate Compulsory Interest Arbitration pursuant to N.J.S.A. 34:13A-16(b)(2) to resolve an impasse over

the terms of a successor CNA. On September 17, 2020, the interest arbitrator was appointed. After the parties failed to resolve their impasse at arbitrator-led mediation sessions, arbitration hearings were held on October 27 and 29. After the parties submitted post-hearing briefs by December 5, the record was closed.

On December 21, 2020, the arbitrator issued a 58-page conventional award setting the terms of a successor CNA for a term of five years, from January 1, 2019 through December 31, 2023.

The PBA asserts that the interest arbitration award did not provide a cost-out to show the financial impact of the award on the governing unit and its taxpayers as required by N.J.S.A. 34:13A-16(g)(6), or to show the total net economic changes for each year of the award as required by N.J.S.A. 34:13A-16(d) and N.J.A.C. 19:16-5.9©. The PBA cites two passages in the award that, it contends, exemplify the award's failure to provide an adequate cost-out under the applicable law. Specifically, page 49 of the award states, in pertinent part:

Under this Award with step movement in each year of the agreement and the modest increase of 1% for those at the top step and off-guide for each year of the CNA, the base salary of the bargaining unit will increase from \$23,186,793 to \$27,000,483 for an average annual increase of 3.106%

The PBA contrasts the above-quoted statement with the following on page 51 of the award:

The cost of step movement plus the 1% increase for those at the top step and those off-guide for the five years of the agreement will be at \$1,677,336.73 or 6.98%.

The PBA argues that both statements attempt to set forth the cost of the award over the life of the agreement, yet neither specifies the total economic cost of each year of the award. Nor did the award provide or refer to a table or scattergram to support the statements. The PBA submits that an annual increase of 3.106% over the course of five years (the duration of the agreement), as set forth in the first statement, would produce a total percentage increase of 15.53% ($3.106\% \times 5$). The PBA argues that this is not consistent with the second statement's conclusion that the percentage increase over five years is 6.98%. The PBA further argues that the two statements provide different dollar amounts for base salary costs over five years: the first statement indicates that this will exceed \$3 million (the difference between \$23,186,793 and \$27,000,483); while the second statement notes that the base salary increases by approximately \$1.6 million. The PBA contends the disparities between the two statements indicate plain error, and that the statements cannot be logically reconciled.

The PBA links the arbitrator's conflicting statements regarding the ultimate cost of the salary award to his reliance

on certain cost-outs, which he ordered each party to calculate and produce after the record was closed. The PBA's cost-out utilized employee "breakage" (i.e., reductions in costs resulting from retirements or otherwise, as well as any increases in costs stemming from promotions or new hires after the expiration of the most recent CNA). The County's cost-out did not utilize breakage. Moreover, neither party accepted the other's calculations, and they so informed the arbitrator.

The PBA further contends that the cost of the award given in the statement quoted from page 49 of the award is derived directly from a cost-out provided by the County, while the financial calculation in the statement quoted from page 51 was derived from the PBA's cost-out. The PBA asserts that the award did not set forth the arbitrator's cost-out in detail or otherwise explain his reasoning regarding the conflicting statements. The PBA further argues that the arbitrator improperly relied on the parties' cost-outs, because neither party had an opportunity to challenge or "vet" their accuracy, and they are not part of the evidence in the record.

The PBA contends that the award should be vacated and remanded and that the parties may request the arbitrator's permission to supplement the record with additional information for costing out the award.

The PBA also asserted the following bases for appeal:

- The arbitrator's salary award was based on mistakes of fact and law; as such, it was not based on substantial, credible evidence in the record as a whole and therefore it must be rejected by the Commission in its entirety.
- The arbitrator's salary award failed to give due weight to the financial impact on the governing unit and the savings the County will realize as a result of the elimination of the traditional healthcare plan.
- The Commission properly determined "good cause" existed to accept the PBA's appeal as timely filed under the unique circumstances of this case in accordance with N.J.A.C. 19:10-3.1.

In response, the County acknowledges that the award contains two separate percentage increases, either 3.106% or 6.98%, when calculating the overall cost of the salary award. The County also acknowledges that these figures are derived from scattergram/cost-outs the arbitrator asked both parties to produce after the record was closed, and that the discrepancy between them was mostly due to the PBA's utilization of breakage. The County allows that, at most, the award could be remanded for the sole purpose of specifying the cost of the award. But it insists that any such remand must be conducted without re-opening the record, as an additional hearing is neither required nor necessary.

Notwithstanding, the County disputes the PBA's claim that the award's inconsistent figures regarding the cost of the salary award warrant a remand. The County argues that the award's

inclusion of a salary guide, on page 54, establishes its compliance with N.J.S.A. 34:13A-16.7, as construed by the Commission.

The County also asserted the following bases for denying the PBA's appeal:

- The salary award was a reasonable determination based upon substantial evidence in the record.
- The arbitrator gave proper weight to the financial impact on the governing unit as a result of the elimination of the traditional healthcare plan.
- The PBA cannot overcome the considerable deference that the Commission must give to an interest arbitration award.
- The Commission abused its discretion by deciding to hear the PBA's untimely appeal.

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 16(g) factors judged relevant to the resolution of the specific dispute; (2) the arbitrator violated the standards in N.J.S.A. 2A:24-8 and -9; or (3) the award is not supported by substantial credible evidence in the record as a whole. Teaneck Tp. v. Teaneck FMBA, Local No. 42, 353 N.J. Super. 298, 299 (App. Div. 2002), aff'd o.b., 177 N.J. 560 (2003), citing Cherry Hill Tp., P.E.R.C. No. 97-119, 23 NJPER 287 (¶28131 1997). Because the Legislature entrusted arbitrators

with weighing the evidence, we will not disturb an arbitrator's exercise of discretion unless an appellant demonstrates that the arbitrator did not adhere to these standards. Teaneck, 353 N.J. Super. at 308-309; Cherry Hill.

We first address the PBA's assertion that the arbitrator failed to provide the requisite cost-out of the award to show the net annual economic changes and enable evaluation of the financial impact of the award under the subsection 16(g)(6) factor. N.J.S.A. 34:13A-16(d) provides, in pertinent part:

The arbitrator shall determine whether the total net annual economic changes for each year of the agreement are reasonable under the nine statutory criteria set forth in subsection g. of this section and shall adhere to the limitations set forth in section 2 of P.L.2010, c.105 (C.34:13A-16.7).

We note that the limitations set forth in N.J.S.A. 34:13A-16.7, i.e., the 2% cap on average annual salary increases (P.L. 2010, c. 105; P.L. 2014, c. 11), have expired for this unit and are not applicable to this award. N.J.S.A. 34:13A-16.9. However, the determination of the "total net annual economic changes for each year of the agreement" in light of the 16(g) statutory factors remains a requirement for non-2% cap interest arbitration awards.

N.J.A.C. 19:16-5.9©, as adopted in 2018, further specifies the necessary elements required for a cost-out to comply with N.J.S.A. 34:13A-16(d):

Where applicable, the arbitrator's economic award must comply with the two percent cap on

average annual increases to base salary items pursuant to N.J.S.A. 34:13A-16.7, as amended by P.L. 2014, c. 11. In all awards, whether or not subject to the two percent cap, the arbitrator's decision shall set forth the costs of all "base salary" items for each year of the award, including the salary provided pursuant to a salary guide or table, any amount provided pursuant to a salary increment, any amount provided for longevity or length of service, and any other item agreed to by the parties or that was included as a base salary item in the prior award or as understood by the parties in the prior contract. These cost-out figures for the awarded base salary items are necessary in order for the arbitrator to determine, pursuant to N.J.S.A. 34:13A-16.d, whether the total net annual economic changes for each year of the award are reasonable under the statutory criteria.

[N.J.A.C. 19:16-5.9©; emphasis added.]

In City of Orange Township, P.E.R.C. No. 2017-13, 43 NJPER 101 (¶31 2016), the Commission remanded an interest arbitration award in a non-2% cap case because it expressed the financial costs of the award as less than half of what the union's financial expert said the employer could afford, rather than specifically showing the net annual economic changes and costs of increases to base salary items. The Commission held:

[B]ecause the arbitrator did not present calculations showing the total net economic change for each year of the award and did not set out the total dollar costs of the step movement and the 1.5% annual raises over the term of the award, we remand the award to provide for such clarification.

[City of Orange Tp., 43 NJPER 101.]

Similarly, in Cumberland County Prosecutor, P.E.R.C. No. 2012-66, 39 NJPER 32 (¶10 2012), the Commission remanded a non-2% cap interest arbitration award for failing to set forth the total dollar cost of the salary step progression for each year of the award. The Commission reasoned:

Because the terms and spirit of the 2010 amendments to the interest arbitration law are aimed at transparency and consistency, we think it is appropriate for all interest arbitration awards to cost both step movement and percentage increases for each year of the contract. This explanation should be reflected in the interest arbitration award. It is not appropriate for us to perform those calculations for the first time in considering an appeal of an award. Therefore, we remand the award to provide such clarification. We expect that in future cases, interest arbitration awards will detail the dollar cost of awards, where the same or similar issues are present.

[Cumberland Cty. Pros., 39 NJPER 32, 35.]

Even prior to the enactment of P.L. 2010, c. 105 and the 2% cap, the Commission remanded interest arbitration awards that did not provide the requisite data to exhibit compliance with the statutory requirement to determine whether the total net annual economic changes for each year of the award are reasonable under the 16(g) statutory factors. See, e.g., County of Passaic, P.E.R.C. No. 2010-42, 35 NJPER 451 (¶149 2009); Borough of Paramus, P.E.R.C. No. 2010-35, 35 NJPER 431 (¶141 2009). In County of Union, P.E.R.C. No. 2004-58, 30 NJPER 97, 102 (¶38

2004), the Commission explained: "An arbitrator satisfies N.J.S.A. 34:13A-16d(2) if he or she identifies what new costs will be generated in each year of the agreement; figures the change in costs from the prior year; and determines that the costs are reasonable."^{1/}

The arbitrator's award indicates that he considered the record evidence submitted by both the County and the PBA concerning the projected costs of their respective salary offers. (Award at 22-43). The arbitrator explained the terms of his salary award in terms of step movement and salary increases, including for those at the top step and off-guide (Award at 48-49), and set forth a salary guide for the years 2018 through 2023. (Award at 54-55).

However, the arbitrator did not explain why the award appears to provide two different percentage increases and dollar amounts for the overall cost of the award. As noted, on page 49 he expressed those figures as an average annual increase of 3.106%, based on a total base-salary increase from \$23,186,704 to \$27,00,483; while on page 51 of the award he expressed those figures as a five-year total of 6.98%, based on a total dollar cost of step movement (inclusive of top-step and off-guide

^{1/} The statute cited in Union Cty., Paramus Bor., and Passaic Cty. containing the "total annual net economic changes" language, N.J.S.A. 34:13A-16(d)(2), was the predecessor to the current N.J.S.A. 34:13A-16(d).

increases) of \$1,677,336. The award provides a salary guide, but it does not provide a cost-out of his awarded salary items as applied to a scattergram of the unit members. "Even if the Commission could marshal all the pertinent financial exhibits and perform its own cost-out calculations from the base salaries and scattergrams provided, Cumberland Cty. Pros., supra, specified that the arbitrator should express these figures in the award and that it is not appropriate for the Commission to attempt to make these calculations for the first time on appeal." City of Orange Tp., 43 NJPER 101.

We find that the arbitrator did not adequately present the total net economic change for each year of the award, including the costs of base salary, increments, and longevity as required by N.J.S.A. 34:13A-16(d) and N.J.A.C. 19:16-5.9©. Accordingly, we remand the award for the arbitrator to provide a cost-out of his award that clarifies the net annual economic changes including the annual costs of all base salary items.

We note that there is no single correct methodology for costing out once the arbitrator has satisfied the requirements of N.J.S.A. 34:13A-16(d) and N.J.A.C. 19:16-5.9© discussed above. For instance, unlike in 2% cap cases, arbitrators may use their discretion in deciding whether the record supports the consideration of savings from retirements or costs from new hires that occurred since the previous CNA expired, either as part of

the overall costing or as a separate collateral analysis.

Hopewell Tp., P.E.R.C. No. 2020-10, 46 NJPER 117 (¶26 2019); see also In re State, 443 N.J. Super. 380, 390 (App. Div. 2016), certif. den., 225 N.J. 221 (2016) (“except for failure to comply with the 2% salary cap provision, we will not set aside an interest arbitration award for failure to apply a specific methodology.”)

We are not persuaded that the PBA’s appeal should be rejected as untimely. We find that under the circumstances presented, wherein the PBA ultimately filed its appeal one day late due to confusion surrounding service of the award as well as a reasonable misunderstanding of language used in a communication from PERC, it was fully within the Commission’s discretion, pursuant to N.J.A.C. 19:10-3, to accept the appeal as timely filed so as to “effectuate the purposes of the Act.”

At this time, we decline to decide the PBA’s other objections to the award prior to seeing the full financial impact expressed as part of the arbitrator’s cost-out on remand. We leave to the arbitrator’s discretion any determination of whether to request additional evidence from the parties as he may deem necessary and material to a just determination of the issues in dispute. See N.J.A.C. 19:16-5.7(e).

ORDER

A. The interest arbitration award is remanded for the arbitrator to provide clarification as to the cost-out of the award of the net annual economic changes including the annual costs of all base salary items in compliance with N.J.S.A.

34:13A-16(d) and N.J.A.C. 19:16-5.9©.

B. The interest arbitrator shall provide the cost-out and clarification described in Section A. of this Order within 60 days of receipt of this decision.

C. We retain jurisdiction. Following receipt of the arbitrator's remand award, the PBA shall have seven days to file a supplementary brief with the Commission limited to five pages and limited to responding to the cost-out and clarification provided by the arbitrator on remand. The County shall then have seven days from receipt of the PBA's supplementary brief to file a supplementary response brief limited to five pages and limited to responding to the cost-out and clarification provided by the arbitrator on remand.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Jones and Voos voted in favor of this decision. None opposed. Commissioner Papero recused himself.

ISSUED: March 15, 2021

Trenton, New Jersey