

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF BERGENFIELD,

Respondent,

-and-

Docket No. IA-2021-016

PBA LOCAL 309,

Appellant.

SYNOPSIS

The Public Employment Relations Commission vacates and remands an interest arbitration award to the arbitrator for submission of additional evidence on the issues of healthcare contributions and revised final offers. The PBA appealed from the award asserting, among other things, that the arbitrator improperly considered the issue of healthcare contributions that the PBA did not identify in its petition as an issue in dispute, but that the Borough submitted in its final offer. The Commission finds that the issue of healthcare contributions (deducted from employee wages) is sufficiently connected to the issue of "wages" listed in the PBA's petition and therefore the arbitrator did not abuse his discretion by considering it. However, the Commission finds that the arbitrator improperly waited until his award to decide on the PBA's objection to the Borough's healthcare contributions proposal. The Commission declines to decide on the PBA's other objections to the award prior to reviewing the arbitrator's remand award following submission of additional evidence on the issue of healthcare contributions and revised final offers.

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, Loccke Correia & Bukosky, LLC,
attorneys (Michael A. Bukosky, of counsel)

For the Respondent, McCusker Anselmi Rosen Carvelli,
P.C., attorneys (John L. Shahdanian II, of counsel)

DECISION

On September 29, 2021, PBA Local 309 (PBA) appealed an interest arbitration award covering a negotiations unit of police officers employed by the Borough of Bergenfield (Borough).^{1/} The Borough and PBA are parties to a collective negotiations agreement (CNA) effective from January 1, 2018 through December 31, 2020.^{2/} On February 9, 2021, the PBA filed a Petition to

1/ The Borough's October 13, 2021 response opposing the appeal included a request for oral argument. The Borough's request for oral argument is denied given that the parties have fully briefed the issues raised.

2/ The parties' prior contract remains unsettled. The Superior Court, Appellate Division, recently directed the parties to return to the prior interest arbitrator to clarify the interest arbitration award, specifically regarding whether
(continued...)

Initiate Compulsory Interest Arbitration (IA Petition) pursuant to N.J.S.A. 34:13A-16(b) (2) to resolve an impasse over the terms of a successor CNA. The PBA's IA Petition listed "Wages" as the only issue in dispute. By letter of February 11, 2021, the Commission's Director of Conciliation and Arbitration notified the Borough of the PBA's IA Petition and attached a copy of the IA Petition. The Director's letter stated that, pursuant to N.J.S.A. 34:13A-16(d), the Borough was required to file a written response within five days to notify the Commission of all issues in dispute and, pursuant to N.J.A.C. 19:16-5.5, failure to file a timely response would be deemed as agreeing to the IA Petition as submitted by the filing party. The Borough did not file a response to the Director's letter.

On February 17, the interest arbitrator was appointed. After the parties failed to resolve their impasse at an April 1, 2021 arbitrator-led mediation session, an arbitration hearing was held on May 6, 2021. Pursuant to N.J.A.C. 19:16-5.7(g) (2), both parties submitted their final offers to the arbitrator and each other at least 10 days prior to the hearing. (Award at 12). The PBA's final offer was a proposal for a three-year contract from

2/ (...continued)
the PBA's proposed draft of the salary term is an accurate reflection of the salary term the interest arbitrator wrote for the parties. Bergenfield Bor., P.E.R.C. No. 2020-50, 46 NJPER 516 (¶114 2020), rev'd and rem'd, 2021 N.J. Super. Unpub. LEXIS 2398 (App. Div. 2021).

January 1, 2021 through December 31, 2023 with only the following change (Award at 7):

- A 3.0% wage increase applied across-the-board to the Salary Schedule

The Borough's final offer was a proposal for a five-year contract from January 1, 2021 through December 31, 2025 with the following changes (Award at 7-8):

- Eliminate longevity for new hires
- Maximum of 250 hours of compensatory time, which shall be paid out at the rate of the year in which it was earned
- Healthcare coverage contributions shall increase from 15% to levels consistent with P.L. 2011, c. 78
- Salary guide for new hires shall include 10 steps
- Add language stating that step movement shall be automatic during the term of "this contract only"
- Remove Article III, Section 2 of 2017 agreement stating that "Increments shall be paid in accordance with past practice."
- 2% average annual salary increases for officers who reach top step, contingent upon health contributions being increased from 15% to Chapter 78 levels; 0% salary increases for officers at top step if health contributions stay at 15%
- Include language that the PBA will present its first offer for a successor contract 18 months before contract expiration; if successor contract not settled by contract expiration, the Borough will make the appropriate step payment due at the time, with no salary increases, pending a mutual agreement or arbitration award. Further, no step increases will be awarded after the last step payment is made pursuant to this contract until a successor contract is mutually agreed on or awarded by an arbitrator.

Prior to the interest arbitration hearing, the PBA filed an objection to the Borough's final offer proposals. The PBA

asserted that the Borough violated N.J.A.C. 19:16-5.5 by failing to respond to the IA Petition and failing to identify issues in dispute, thereby waiving its right to raise additional issues in dispute at the final offer stage of interest arbitration. The arbitrator did not rule on the PBA's objection prior to or during the hearing. After the parties submitted post-hearing briefs by June 18, 2021, the record was closed. The PBA's post-hearing brief reiterated its objection to the Borough's raising of issues that it did not identify as being in dispute due to its failure to file a response to the IA Petition. The Borough's post-hearing brief responded that its final offer proposals are not barred from consideration by the arbitrator because it complied with N.J.A.C. 19:16-5.7(g) (2) by submitting them at least 10 days prior to the interest arbitration hearing.

On September 14, 2021, the arbitrator issued an 81-page conventional award, which the parties received on September 16.^{3/} The award included the arbitrator's ruling on the PBA's objection to the Borough's submission of proposals that were not included in the IA Petitions's disputed issues and had not been identified

^{3/} The award was originally due on May 18, 2021 based on the arbitrator's date of appointment. However, due to delays in the interest arbitration process related to the COVID-19 public health emergency, on April 8, 2021, the Commission Chair granted the arbitrator an extension of the 90-day statutory deadline for issuance of the award.

as disputed issues in a response to the IA Petition. (Award at 11-12). The arbitrator made the following ruling:

As both final proposals/offers were made at least 10 days prior to the Hearing, this Arbitrator finds that under the New Jersey Statutes listed above, the Borough is not barred from submitting all their issues listed in their final proposal offer from being heard and decided by this Arbitrator. And by this Arbitrator's ruling, now in this decision, PBA 309 has not been prejudiced or harmed in these proceedings.

[Award at 12.]

The arbitrator awarded the Borough's proposed 5-year contract term from January 1, 2021 through December 31, 2025. (Award at 16, 79). The "Wages/Salaries" portion of the award included the Borough's proposal of 2% annual salary increases for officers who reach top step. (Award at 69-71, 79). The award also included the Borough's proposal for a new 10 step salary guide for new hires, effective January 1, 2022. (Award at 70-71, 79). The arbitrator awarded the Borough's proposed removal of the Article III, Section 2 language from the 2017 agreement which states that "Increments shall be paid in accordance with past practice." (Award at 70, 79). The "Healthcare Contribution" section of the award partially awarded the Borough's proposal to increase health benefits contributions from 15% to the Tier 4 levels contained in Chapter 78 (P.L. 2011, c. 78). The arbitrator changed health benefits contributions levels to Tier 4 Chapter 78 levels, but capped them at 25%. (Award at 77-79).

The PBA appeals the interest arbitration award for the following reasons:

1. When the employer failed to file an answer it waived any ability to present health benefit contributions as an item to be addressed by the arbitrator.
2. The PBA has been severely prejudiced by the arbitrator's consideration of the health benefit contribution proposal of the borough.
3. The arbitrator should not have considered changes to step movement language or a salary guide for new hires.
4. The arbitrator improperly conflated health benefit premium contributions with wages.
5. The arbitrator's award should be vacated as violative of N.J.S.A. 34:13A-16(g) and controlling case law.
6. The arbitrator's decision concerning health benefits is nonsensical.
7. The arbitrator considered evidence outside of the record in a prejudicial manner.
8. The arbitrator mistakenly believed that Chapter 78 is still in existence.
9. The failure to calculate the costs of any of his award and apply the statutory criteria mandates that the award be vacated.
10. Modification of the award is not appropriate and remand to a new arbitrator is the only suitable outcome in this case.

The Borough responds with the following points:

1. Bergenfield was not barred from submitting and having the arbitrator determine all of the issues listed within its final proposal/offer, including the health benefit contribution issue.
 - A. In assuming arguendo, the term "wages" as listed in the PBA's petition encompasses more than just the base salary of PBA members, and accordingly, healthcare contribution was required to be considered by the arbitrator.

2. There is no legal basis for the award to be vacated.
 - A. The award should not be vacated because it is not violative of N.J.S.A. 34:13A-16(g).
 - B. The award should not be vacated because the arbitrator did not violate the standards in N.J.S.A. 2A:24-8 and 9 and the award is supported by substantial credible evidence in the record as a whole.
3. Although Chapter 78 is no longer in effect, controlling case law concludes that its levels represent the status quo in negotiations.

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, pursuant to N.J.A.C. 19:16-5.5, the Borough waived any ability to present health benefit contributions in its final offer when it failed to

file an answer to the IA Petition and the PBA's list of disputed issues.^{4/} The Borough responds that N.J.A.C. 19:16-5.5 only provides that failure to respond to the IA Petition means that the non-petitioning party is deemed to have agreed to the initiation of interest arbitration. It argues that it is through N.J.A.C. 19:16-5.7(g) (2) and N.J.S.A. 34:13A-16(f) (1) that the parties are to submit their final offers to the arbitrator.

N.J.A.C. 19:16-5.3(a) (9) provides that the interest arbitration petition shall contain, among other things, "A statement indicating which issues are in dispute . . ." N.J.A.C. 19:16-5.3(c) provides that, in the absence of a joint interest arbitration petition, the Director shall "send a notice of filing to the non-petitioning party advising it that it must, within five days, respond to the petition in accordance with N.J.A.C. 19:16-5.5." N.J.S.A. 34:13A-16(d) and N.J.A.C. 19:16-5.5(a) provide that the non-petitioning party "within five days of receipt of the petition, shall separately notify the Commission in writing of all issues in dispute." N.J.A.C. 19:16-5.5(b) provides, in pertinent part: "If a party has not submitted a response within the time specified, it shall be deemed to have agreed to the request for the initiation of compulsory interest arbitration as submitted by the filing party." Following the

^{4/} The PBA primarily made this argument in points 1 and 2, and also referenced and attached the supporting motion brief that it submitted to the interest arbitrator on this issue.

identification of issues in dispute in the petition and in the response, if any, the statute and regulations provide for the appointment of an arbitrator and require that the parties submit their "final offers on each economic and non-economic issue in dispute" to the arbitrator at least 10 days before the hearing.

See N.J.S.A. 34:13A-16(f)(1); N.J.A.C. 19:16-5.7(g)(2).

In Allendale Bor., P.E.R.C. No. 98-27, 23 NJPER 508 (¶28248 1997), the Commission affirmed the interest arbitrator's decision to bar the employer's final offers on three issues that had not been included in the union's interest arbitration petition. The Commission held that N.J.A.C. 19:16-5.5 requires the timely identification of issues in dispute at the outset of the interest arbitration process through the petition and the response to the petition. The Commission also noted in Allendale that strict compliance with N.J.A.C. 19:16-5.5 could be relaxed by the Commission or an arbitrator for unusual circumstances or good cause and where strict compliance would work an injustice or unfairness. 23 NJPER at 510. The Commission "will defer to an arbitrator's decision to admit or exclude additional issues unless we find an abuse of discretion." Middlesex Cty., P.E.R.C. No. 98-46, 23 NJPER 595 (¶28293 1997).

Here, the IA Petition identified the only issue in dispute as "Wages." The Borough did not respond to the IA Petition and thereby did not identify additional issues in dispute. N.J.S.A.

34:13A-16(d); N.J.A.C. 19:16-5.5(a). Having not filed a response that identified additional issues of dispute within the time specified, the Borough was deemed to have agreed to the request for interest arbitration as submitted by the PBA. N.J.A.C. 19:16-5.5(b). The Borough's final offer to the interest arbitrator was therefore required to be limited to the issues in dispute as identified in the IA Petition. N.J.S.A. 34:13A-16(f)(1); N.J.A.C. 19:16-5.7(g)(2). The Borough's final offer included a salary proposal as well as proposals on other salary-related issues such as longevity, compensatory time, a 10-step salary guide for new hires, and changes to step and increment language. The Borough's final offer also included a proposal that healthcare premium contributions be increased from 15% to levels consistent with those found in P.L. 2011, c. 78.

The Borough asserts that even if the Commission finds that it is limited to the issues in dispute as set forth in the PBA's IA Petition, then the issue of "wages" should be found to encompass health benefit contributions. The PBA asserts that healthcare contributions are distinct from wages. The Borough directly tied its salary increase proposals to its healthcare contribution proposal, offering 2% average annual salary increases contingent upon adopting its proposed increase in healthcare contributions or, alternatively, 0% salary increases if the PBA's healthcare contributions remain at 15%. The PBA's

counter-argument likewise underscored the connection between wages and contributions, as it proposed larger salary increases if healthcare contributions are increased. (Award at 76-77). We find it significant that the Borough's proposal does not concern any substantive aspect of healthcare benefits or insurance coverage, but only the apportionment of the health insurance premium costs between the Borough and the employees. As these costs are direct contributions deducted from PBA members' wages, the issues are inextricably linked. In practical terms, net wages decrease as healthcare contributions increase. This relationship between wages and healthcare contributions has only been more pronounced since the passage of P.L. 2011, c. 78, which had required healthcare contributions of up to 35% depending on salary. Although the mandates of Chapter 78 have been fully implemented for these parties and they have since negotiated reductions in healthcare contributions to 15%, the impact of Chapter 78 remains as the PBA's contribution level is significantly higher than it was prior to Chapter 78. See Ridgefield Park Bd. of Ed., 244 N.J. 1, 20 (2020) (during negotiations for the first CNA following full implementation of Chapter 78, healthcare contributions are negotiable again, but the Chapter 78 contribution level is the status quo); see also Ridgefield Park Bd. of Ed., P.E.R.C. No. 2022-10, 48 NJPER 141 (¶36 2021); Fairfield Tp., P.E.R.C. No. 2019-31, 45 NJPER 309

(¶80 2019). For all of these reasons, we find that the issue of healthcare contributions in this case is sufficiently interconnected with the broad compensation-related issues contemplated by the term “wages” proposed in the IA Petition. Accordingly, we decline to find that the arbitrator abused his discretion by considering the issue of healthcare contributions as an issue in dispute in this interest arbitration.

Furthermore, we note that, since the passage of P.L. 2010, c. 105, as amended by P.L. 2014, c. 11, the traditional interest arbitration process has been accelerated due to statutory deadlines for issuance of the final arbitration award. N.J.S.A. 34:13A-16(d) and N.J.A.C. 19:16-5.5(a), requiring a response and identification of any other disputed issues within five days of receiving the IA Petition, were enacted and promulgated as part of that new interest arbitration “rocket docket.” In contrast, prior to the “rocket docket,” N.J.A.C. 19:16-5.5 allowed 14 days to respond to an interest arbitration petition.^{5/}

However, we find that the arbitrator improperly waited to decide on the PBA’s objection to the Borough’s healthcare contribution proposal until the issuance of his award. The PBA asserts that it relied on the regulations and Allendale in believing that the issues in dispute would be strictly limited to

^{5/} In 2001, the Commission amended N.J.A.C. 19:16-5.5 to extend the period for responding to an interest arbitration to 14 days from seven days. See 33 N.J.R. 2282(a).

"wages" and would not include the Borough's healthcare contribution proposal. It argues that it was severely prejudiced by the arbitrator's failure to decide on its objection until the award. It contends that, had it known the arbitrator would allow the issue of healthcare contributions to be included, it would have altered its final proposals on the overall compensation package and substantially altered its evidentiary submissions. The Borough responds that the PBA was not prejudiced because it had the Borough's final offer including the healthcare contribution proposal in plenty of time prior to the hearing.

In Allendale, the arbitrator also waited until the arbitration award to rule on the PBA's objection to the Borough's attempt to belatedly add disputed issues. Although the arbitrator and Commission ruled in favor of the PBA and excluded the Borough's additional proposals, the Commission vacated and remanded the award, reasoning:

However, while the arbitrator correctly applied N.J.A.C. 19:16-5.5, we believe that the Borough was disadvantaged by the fact that the arbitrator did not rule on the PBA's objection until he issued his final award and opinion. Because of the timing of the procedural ruling, the parties submitted post-hearing briefs without knowing the parameters of the dispute. Moreover, the arbitrator considered the Borough's salary offer without evaluating other proposals which, the Borough maintains, were an integral part of its economic package. The Borough might have changed the proposals considered by the arbitrator had it known its other proposals would be excluded.

If the arbitrator had ruled on the PBA's objection before the formal hearing, the Borough could have submitted a final offer in light of his ruling. We thus conclude that it was reversible error for the arbitrator to have deferred his ruling until he issued his award. We therefore vacate the award and remand this matter to the arbitrator for reconsideration. The Borough shall be permitted to submit a new final offer but, unless the parties agree otherwise or the arbitrator requires additional submissions on an issue, the arbitrator shall issue a new opinion and award based on the record already submitted.

[Allendale, 23 NJPER at 510; emphasis added.]

Here, although by the time of the hearing both parties were aware of the final offers of the other party and of the PBA's objection, neither party knew what the "issues in dispute" to be analyzed and decided upon would ultimately be until the issuance of the award. The arbitrator should have decided the PBA's objection prior to proceeding to hearing, thus enabling the parties to amend their proposals and hearing submissions accordingly and/or seek the Commission's review of the arbitrator's interlocutory ruling pursuant to N.J.A.C. 19:16-5.17.^{6/} Consistent with Allendale, we conclude that it was

^{6/} The Commission has issued interlocutory decisions on objections to an arbitrator's identification of the issues in dispute. See, e.g., Paramus Bor., P.E.R.C. No. 2009-28, 34 NJPER 384 (¶125 2008) (exclusion of health benefits contribution proposal upheld); City of Newark, P.E.R.C. No. 98-166, 24 NJPER 360 (¶29173 1998) (exclusion of health benefits proposal upheld); City of Trenton, P.E.R.C. No. 98-165, 24 NJPER 358 (¶29172 1998); and Middlesex Cty., (continued...)

reversible error for the arbitrator to have deferred his ruling on the PBA's objection until he issued the award. By delaying his ruling on the scope of issues in dispute and the PBA's N.J.A.C. 19-16-5.5 objection, the arbitrator so imperfectly executed his powers that a mutual, final and definite award upon the subject matter submitted was not made. N.J.S.A. 2A:24-8(d). The arbitrator was within proper exercise of his discretion in denying the PBA's objection. However, the timing of that ruling requires that we vacate the award and remand this matter to the arbitrator for reconsideration.

On remand, the arbitrator shall allow the parties to submit additional evidence on the issue of healthcare contributions and a revised final offer. In view of our decision to vacate and remand this matter, we need not decide the remaining issues in this appeal. As the arbitrator's remand award to reconsider the issue of healthcare contributions could also impact other issues in the award, we defer ruling on any other disputed issues until issuance of the arbitrator's remand award.

As noted in footnote 2, the parties' prior contract remains unsettled. In light of the possibility that the terms of the prior contract are modified as part of that arbitrator's court-ordered remand for clarification, we direct that the arbitrator

6/ (...continued)
P.E.R.C. No. 97-63, 23 NJPER 17 (¶28016 1996).

in this case issue his remand award within 90 days from the date of issuance of the remand award in the parties' prior interest arbitration (Docket No. IA-2019-007).

Finally, we reject the PBA's assertion that remand to a new arbitrator is required. In remanding this matter, we are confident that the appointed arbitrator may reconsider the award in accordance with this opinion. See Fox v. Morris Cty., 266 N.J. Super. at 521-522 (court would presume, until shown to the contrary, that the original arbitrator would be able to take a fresh look at the case and reach a fair and impartial decision).

ORDER

A. The arbitration award is vacated and the matter remanded to the arbitrator for reconsideration in accordance with this opinion. The parties shall be permitted to submit additional evidence on the issue of healthcare contributions and a revised final offer.

B. The arbitrator shall issue the remand decision described in Section A of this Order within 90 days of being notified by the Director of Conciliation and Arbitration of the remand award in the parties' prior interest arbitration (Docket No. IA-2019-007). If the remand award in the parties' prior interest arbitration is appealed, then the arbitrator shall issue a remand decision described within Section A of this Order within 90 days of any Commission decision on appeal.

C. We retain jurisdiction. Following receipt of the arbitrator's remand award, the parties shall file briefs with the Commission on the remand award within 14 days of issuance.

BY ORDER OF THE COMMISSION

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

ISSUED: November 23, 2021

Trenton, New Jersey