

P.E.R.C. NO. 2023-13

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF BURLINGTON,

Petitioner,

-and-

Docket No. SN-2022-040

PBA LOCAL 249,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the County's request for restraint of binding arbitration of the PBA's grievance contesting the Township's alleged incorrect payment of salary and back pay to PBA officers based on the Township's implementation of the salary terms of a recent interest arbitration award. The Commission finds that the compensation dispute is mandatorily negotiable and that there is no statutory or regulatory support for the County's assertion that it should be decided by the interest arbitrator rather than through the parties' negotiated grievance procedure. As the award was not appealed, the Commission finds that, per N.J.S.A. 34:13A-16f(5), it is final and binding on the parties and to be implemented immediately. The Commission finds that the parties' grievance procedure was not modified by the award and that there is no requirement that the award be converted into a collective negotiations agreement in order for a grievance arbitrator to resolve a dispute arising under the terms of the award.

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 Petitioner, Malamut & Associates, LLC,
attorneys (Evan Crook, of counsel and on the brief)

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

DECISION

On April 20, 2022, the County of Burlington (County) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by PBA Local 249 (PBA). The grievance asserts that the County paid PBA officers incorrect salaries and incorrect amounts of back pay owed when it failed to correctly implement the salary portion of the parties' January 19, 2022 interest arbitration award issued (Docket No. IA-2021-023) for the term January 1, 2021 through December 31, 2024.

The County filed briefs, exhibits, and the certifications of its counsel, Evan Crook. The PBA filed a brief.^{1/2/} These facts appear.

The PBA represents certain County police officers including the titles of corrections officer and I.D. Officer. The County and PBA were parties to a CNA in effect from January 1, 2012 through December 31, 2020. The PBA filed for interest arbitration to settle the parties' collective negotiations impasse and establish the terms of their successor contract. On January 19, 2022, the arbitrator issued his interest arbitration award setting the parties' contract terms for the period of January 1, 2021 through December 31, 2024. Among other things, the interest arbitration award provided for a new salary guide, certain salary step movement, and pay increases. The award provided that: "All provisions of the existing agreement shall be carried forward except for those which have been modified by the terms of this Award." Crook certifies that both parties accepted the interest arbitration award and neither party appealed it. The parties' grievance procedure ends in binding arbitration as

1/ On May 9, 2022, PBA Local 249 requested oral argument. We deny the request for oral argument.

2/ The PBA did not file a certification. N.J.A.C. 19:13-3.6(f) requires that all briefs filed with the Commission recite all pertinent facts supported by a certification based upon personal knowledge.

set forth in their 2012-2020 CNA. The grievance procedure was not modified by the interest arbitration award.

Crook certifies that on March 18, 2022, the County took steps to implement the salary portion of the interest arbitration award. He certifies that the parties dispute whether the step movement on the award's new salary guide is supposed to be implemented for the 2021 contract year. Crook certifies that the County utilized the examples provided in the interest arbitration award for implementing and calculating back pay. He certifies that the PBA alleges that the award provides for automatic step movement for officers on the guide in 2021.

In March 2022, the parties exchanged letters concerning their disagreement over the correct step movement, salaries, and back pay to be paid to PBA officers for the year 2021. The PBA filed a grievance and submitted a request for binding grievance arbitration to the Commission on April 11, 2022. The request for arbitration alleges that the County incorrectly implemented the salary portion of the interest arbitration award, resulting in incorrect step movement, incorrect back pay, and incorrect salary adjustments for PBA officers. On April 20, 2022, the County filed this scope of negotiations petition seeking to restrain arbitration of the PBA's grievance.

Prior to filing this scope petition, the County, on April 12, 2022, filed a modified interest arbitration petition seeking

for the Commission to re-open the interest arbitration award to allow the interest arbitrator to issue a clarification of his salary award. The PBA objected to the County's request. On May 2, 2022, the Commission's Director of Conciliation and Arbitration issued its decision denying the County's request to re-open the interest arbitration award in order to seek a clarification from the interest arbitrator. The Director stated, in pertinent part:

I am unable to process the County's petition. The Commission rules do not provide for the re-opening of interest arbitration matters absent appeal. I note that I have communicated with the parties and was unable to obtain consent from the PBA to send the matter for clarification. The relief sought by the County is not supported by the ethical code, Commission regulations, or Commission case law. Therefore, it is outside the authority of the Division of Conciliation & Arbitration to process it.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978) states:

The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Thus, we do not consider the contractual merits of the grievance or any contractual defenses the employer may have.

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police:

First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978). If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable.

Arbitration is permitted if the subject of the grievance is mandatorily or permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd, NJPER Supp.2d 130 (¶111 App. Div. 1983). Thus, if a grievance is either mandatorily or permissively negotiable, then an arbitrator can determine whether the grievance should be sustained or dismissed. Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

The County asserts that arbitration should be restrained because the salary dispute has arisen from language in the parties' interest arbitration award and therefore should be interpreted by the interest arbitrator instead of a grievance arbitrator. It argues that the Appellate Division's unpublished decision in In re Borough of Bergenfield, 2021 N.J. Super. Unpub. LEXIS 2398 (App. Div. Dkt No. A-3495-19), which allowed a limited remand to the Commission and interest arbitrator to resolve an unfair practice dispute over reducing the salary terms of an interest arbitration award to writing in a CNA, directs a similar remand for clarification of the interest arbitration award in this case. The County contends that because the issue in this case concerns conflicting interpretations of an interest arbitration award, it is not the type of dispute that falls within the terms of the parties' grievance procedure.

The PBA asserts that arbitration should not be restrained because its grievance is a contractual dispute over appropriate salary step placement, which is a mandatorily negotiable compensation issue. It argues that because neither party appealed the interest arbitration award that sets forth the parties' salary increments for the current contract term, the award is settled and serves as the parties' contract until the parties draft and execute an updated CNA.

There is no question that the dispute here concerning whether certain employees have been placed on the correct salary guide step and have received the correct amount of salary and back pay according to the appropriate step placement is a mandatorily negotiable compensation issue. "The 'prime examples' of mandatorily negotiable terms and conditions of employment under New Jersey case law 'are rates of pay and working hours.'" Robbinsville Twp. Bd. of Educ. v. Washington Twp. Educ. Ass'n, 227 N.J. 192, 199 (2016) (quoting Local 195, IFPTE v. State, 88 N.J. 393, 403 (1982)); Atlantic Cty., 230 N.J. 237, 253 (2017) ("We find that salary step increments is a mandatorily negotiable term and condition of employment because it is part and parcel to an employee's compensation for any particular year.") The PBA's grievance is therefore legally arbitrable.

We turn to the County's claim that the PBA's grievance arbitration should be restrained and that the salary dispute

should instead be considered by the interest arbitrator who issued the parties' interest arbitration award. There is no statutory or regulatory basis for the County's requested procedural maneuver to avoid grievance arbitration over the mandatorily negotiable compensation issue disputed by the parties. Any remand to the interest arbitrator by the Commission or courts is only contemplated within the confines of the statutory appeal process. N.J.S.A. 34:13A-16f(5) (a). The interest arbitration award was issued and neither party appealed it to the Commission within the statutory 14-day period. The award therefore became " . . . final and binding upon the parties and shall be irreversible . . ." and set the terms of the parties' contract going forward. N.J.S.A. 34:13A-16f(5); see also N.J.S.A. 34:13A-16f(5) (b): "An arbitrator's award shall be implemented immediately." As the interest arbitration award is binding and to be implemented immediately, there is no requirement that the parties formally convert the award's modifications into an updated CNA in order to resolve a dispute concerning terms of employment set forth therein. Accordingly, once the 14-day statutory appeal period expired, those terms of employment set forth in the award became enforceable by either party according to their negotiated grievance procedure or via an enforcement action in Superior Court pursuant to N.J.S.A.

34:13A-19.^{3/} See City v. City of Orange Twp., 2019 N.J. Super. Unpub. LEXIS 959 (App. Div. 2019) (after 14-day statutory appeal period expired, the interest arbitration award became final, binding, and enforceable; the City had no right to substantively challenge the award when the union sought to enforce it).

For those terms and conditions of employment that the interest arbitration award did not modify, the parties' most recent CNA continues to govern. The award explicitly states that any terms not modified therein continue in effect unchanged.^{4/} The award did not modify the parties' negotiated grievance procedure that has continued from their most recent CNA. See Article XXI "Grievance Procedure and Arbitration Procedures." As this procedure ends in binding grievance arbitration and continues to be applicable for the contract term covered by the interest arbitration award, the PBA may arbitrate its compensation dispute according to the parties' negotiated grievance procedure. It is not unusual for parties to utilize

^{3/} We note that the option to seek enforcement of an interest arbitration award in court is not an exclusive enforcement mechanism. "The decision of the arbitrator may be enforced at the instance of either party in the Superior Court with venue laid in the county in which the dispute arose." N.J.S.A. 34:13A-19. The statute does not preclude parties from utilizing their negotiated grievance procedures to resolve disputes over terms and conditions of employment.

^{4/} "All provisions of the existing agreement shall be carried forward except for those which have been modified by the terms of this Award."

the grievance procedure to resolve disputes over the terms of an interest arbitration award. See, e.g., Union Cty. Sheriff, P.E.R.C. No. 2016-36, 42 NJPER 269 (¶77 2015) (work hours provision modified by interest arbitration award was arbitrable); West Windsor Tp., P.E.R.C. No. 2013-39, 39 NJPER 225 (¶76 2012) (tuition reimbursement provision modified by interest arbitration award was arbitrable); and Burlington Cty., P.E.R.C. No. 2018-41, 44 NJPER 391 (¶110 2018) (County committed unfair practice when it repudiated a grievance decision implementing shift schedules set by interest arbitration award).

Furthermore, the County's assertion that the grievance procedure does not cover this salary dispute is a contractual defense that is outside of the Commission's scope of negotiations jurisdiction and appropriate for the arbitrator to determine. Ridgefield Park, supra, 78 N.J. at 154; University Hospital (UMDNJ), P.E.R.C. No. 2017-34, 43 NJPER 236 (¶73 2016) (issues of substantive, contractual, and procedural arbitrability are outside the purview of a negotiability determination). We note as well that the Employer-Employee Relations Act (Act) favors the broadest interpretation of the scope of an arbitration clause.^{5/}

5/ N.J.S.A. 34:13A-5.3 provides: "In interpreting the meaning and extent of a provision of a collective negotiation agreement providing for grievance arbitration, a court or agency shall be bound by a presumption in favor of arbitration. Doubts as to the scope of an arbitration clause shall be resolved in favor of requiring arbitration."

The County's reliance on the Appellate Division's decision in Bergenfield, 2021 N.J. Super. Unpub. LEXIS 2398, supra, is misplaced. The instant case has arisen in a scope of negotiations context wherein the County seeks to restrain the PBA from arbitrating over the correct implementation of salary provisions set forth in the interest arbitration award. Bergenfield, by contrast, was an unfair practice case concerning the employer's alleged violation of N.J.S.A. 34:13A-5.4a(6) for refusing to sign a draft collective negotiations agreement. The Bergenfield court determined that the unfair practice dispute "over whether the PBA's proposed draft of the salary term is an accurate reflection of the salary term the interest arbitrator wrote for the parties" should be remanded to the interest arbitrator. Bergenfield at *18. The Bergenfield holding was narrowly applicable to the unique situation therein concerning whether the Borough "could only be compelled to sign a contract that accurately reflected the interest arbitration award." Ibid. As Bergenfield was an unpublished decision that did not contain a judicial pronouncement interpreting the Police and Fire Public Interest Arbitration Reform Act (Reform Act), it provides no precedential support for the County's broad assertion that it may

re-open a final, binding interest arbitration award to resolve a grievance arbitration dispute over contract language.^{6/}

Moreover, Bergenfield is distinguishable because the interest arbitration award that the parties disputed there was subject to the now expired 2% cap on average annual increases to base salary items. The Bergenfield court repeatedly emphasized the significance of the interest arbitrator's calculations of the 2% "hard cap" and how the union's interpretation of the award's salary agreement might violate that statutory cap. Bergenfield at *13-*17. The court was particularly concerned that allowing a grievance arbitrator to resolve the disputed salary language could "potentially result[] in salary increases exceeding the two percent hard cap." Id. at *19. As no such 2% cap concerns are present in this case, the grievance arbitrator's determination of the present salary step and back pay dispute would not have the potential to violate a statutory salary cap. There is thus no comparable, compelling reason to re-open a final interest arbitration award for clarification by the interest arbitrator.

Finally, we concur with the Director of Conciliation and Arbitration that the County's request to re-open the interest

^{6/} While unpublished opinions are not binding on courts, R. 1:36-3, the Commission is obliged to follow judicial pronouncements interpreting the statutes it implements. Twp. of Franklin v. Franklin Twp. PBA Local 154, 424 N.J. Super. 369, 378 (App. Div. 2012), citing, In re Byram Bd. of Educ., 152 N.J. Super. 12, 22 (App. Div. 1977).

arbitration award for clarification without the PBA's consent would violate the "Code of Professional Responsibility for Arbitrators of Labor-Management Disputes" to which the Commission's interest arbitrators must adhere.^{7/} Section 6(D)(1) of the Code provides: "No clarification or interpretation of an award is permissible without the consent of both parties." As the PBA has not consented to re-opening the award before the interest arbitrator for his interpretation of the disputed salary step provisions, the interest arbitrator may not provide such requested interpretation. We also note that Section 6(F)(1) of the Code provides that: "The arbitrator's responsibility does not extend to the enforcement of an award." The PBA's grievance seeking to enforce certain salary provisions set forth in the award is therefore properly before the grievance arbitrator and is not within the interest arbitrator's jurisdiction.

Based on all of the above, we find no support for the County's position that the PBA's compensation grievance is outside of the scope of negotiations and should be directed to the parties' former interest arbitrator rather than a grievance

^{7/} N.J.S.A. 34:13A-16(e)(3) provides: "Arbitrators serving on the commission's special [interest arbitration] panel shall be guided by and subject to the objectives and principles set forth in the 'Code of Professional Responsibility for Arbitrators of Labor Management Disputes' of the National Academy of Arbitrators, the American Arbitration Association, and the Federal Mediation and Conciliation Service." See also N.J.A.C. 19:16-5.10.

arbitrator according to their grievance procedure. The interest arbitrator no longer has jurisdiction and there is no statutory or regulatory support for the Commission invoking its interest arbitration jurisdiction in order to re-open a closed, final, and binding interest arbitration award. See N.J.S.A. 34:13A-16f(5).

ORDER

The request of the County of Burlington for a restraint of binding grievance arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: October 27, 2022

Trenton, New Jersey