

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF JERSEY CITY,

Petitioner,

Docket No. SN-80-106

-and-

JERSEY CITY POLICE SUPERIOR  
OFFICERS ASSOCIATION,

Respondent.

SYNOPSIS

In a scope of negotiations proceeding, the Chairman of the Commission concludes that although a public employer, upon demand, must negotiate with an employee organization representing police officers or fire fighters regarding the terminal step of the impasse resolution process, absent mutual agreement, the parties must utilize the final offer interest arbitration procedure set forth in N.J.S.A. 34:13A-16(d)(2). In consideration of pertinent sections of the Police and Fire Arbitration Act, Chapter 85, Laws of 1977, the Chairman concludes that a party may agree but cannot be required to submit a dispute regarding the form of interest arbitration to an arbitrator for a determination.

The Chairman further states that it appears that the Police Superior Officers Association is seeking to enforce in this scope of negotiations proceeding a contract provision within its present contract which it believes entitles the Association to conventional arbitration with regard to a successor agreement. The Chairman concludes that the Commission has not been granted the authority in the scope of negotiations context to resolve contractual interpretation disputes.

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Appearances:

For the Petitioner, Francis X. Hayes, Director  
of Labor Relations

For the Respondent, Osterweil, Wind & Loccke, Esqs.  
(Mr. Alfred G. Osterweil, of Counsel)

DECISION AND ORDER

A Petition for Scope of Negotiations Determination was filed by the City of Jersey City ("City") with the Public Employment Relations Commission on February 8, 1980 seeking a determination as to whether a matter in dispute between the City and the Jersey City Police Superior Officers Association ("Association") is within the scope of collective negotiations. The City submitted a letter brief dated April 3, 1980 and the Association filed a letter brief dated April 18, 1980. A relevant portion of the expired contract between these parties was supplied subsequently.

At its meeting of May 20, 1980, the Commission discussed this matter and, at the same time, delegated to the undersigned

the authority to render a decision in this matter on behalf of the Commission in accordance with N.J.S.A. 34:13A-6(f).

The issue in dispute concerns the form of interest arbitration to be used by parties who are subject to the Police and Fire Arbitration Act, Chapter 85, Laws of 1977. This issue is complicated by the background to this dispute and there appears to be no disagreement between the parties regarding this factual background.

The most recent agreement between these parties covered the period from January 1, 1978 through December 31, 1979. The terms of that agreement were set by an interest arbitrator who rendered a so-called "conventional" arbitration award as opposed to any type of "final offer" award, i.e. the arbitrator's award reflected the arbitrator's judgment regarding the merits of each disputed issue and the arbitrator was not restricted in his award to selecting the position of either party on disputed issues. That procedure, i.e. conventional arbitration, came about because the parties had agreed to such a procedure as Article XXXVII of the 1976-1977 contract between them.<sup>1/</sup> Although the City objected at that time to conventional arbitration and went to court to avoid conventional arbitration, it was determined that the parties' 1976-1977 contract did provide for conventional arbitration and that the contractual provision was

<sup>1/</sup> A similar provision also had appeared in prior contracts between these parties.

lawful and did not constitute an unlawful delegation of legislative authority.<sup>2/</sup> Furthermore, the Commission's Director of Conciliation and Arbitration, acting in accordance with N.J.A.C. 19:16-5.2(a)(2), held that conventional arbitration is an acceptable and approvable form of interest arbitration under Chapter 85.<sup>3/</sup> Thus, the terms of the 1978-1979 agreement were established through conventional arbitration as a result of the parties' agreement contained in their 1976-1977 contract to utilize conventional arbitration if necessary in seeking a successor agreement.

As the 1978-1979 contract came to a close, the Association, on October 15, 1979, filed a Petition to Initiate Compulsory Interest Arbitration with the Commission. The Association asserts that the form of arbitration again is to be conventional arbitration because the 1978-1979 contract so provides and because the City did not object to the Association's submission. The Association cites N.J.A.C. 19:16-5.4(b) as support.<sup>4/</sup>

<sup>2/</sup> See Judge Robert E. Tarleton's letter opinion dated June 14, 1978.

<sup>3/</sup> See James W. Mastriani's letter dated June 29, 1978.

<sup>4/</sup> That section provides:

In the event that the above 60-day notification indicates that the parties have failed to agree upon a terminal procedure, the parties, no later than 10 days thereafter, shall separately file a statement with the director of arbitration indicating the reasons for their inability to agree on a procedure. The failure of a party to submit such a statement or the substance of the statement shall not provide a basis for any delay in effectuating the provisions of this subchapter.

The Association argues that the disputed clause has already been interpreted by the courts, and has been held to provide for conventional arbitration. Furthermore, the Commission has found conventional arbitration to be an acceptable form of interest arbitration under N.J.S.A. 34:13A-16(c).

However, as the Association acknowledges, the matter is not that simple. The parties are not in the same position they were in going into the 1978-1979 negotiations. Rather, Article XXXVII of that agreement not only contains the provision contained in the 1976-1977 agreement but also provides that:

This section is subject to litigation.  
The parties have agreed that the City may raise legal arguments before PERC concerning their issue. The arbitrator is to retain jurisdiction concerning this section pending a ruling from PERC.

The Association objects that the City did not file a scope petition until January 9, 1980 when it sent a letter to the Commission's Director of Conciliation and Arbitration who forwarded the proper forms to the City. The Association argues that the City's delay in filing this petition constitutes a waiver of any right it may have had under the previous interest arbitration award and Article XXXVII of the 1978-1979 contract and also under the Commission's rules.<sup>5/</sup>

The City, while not disputing the procedural history of this dispute as outlined, simply asserts that it now seeks a determination from the Commission on the negotiability of the disputed issue. It says the petition was not filed earlier

<sup>5/</sup> N.J.A.C. 19:16-5.4(b), quoted in note 4 supra.

due to inadvertance. Its legal argument rests upon N.J.S.A. 34:13A-16(b) which, in part, provides that, "Any procedure mutually agreed upon by the parties shall be reduced to writing, provide finality in resolving the issues in dispute, and shall be submitted to the commission for approval." The City argues that the language in Article XXXVII of the 1978-1979 agreement indicates an absence of the requisite mutual agreement required for the utilization of any form of arbitration other than final offer arbitration.<sup>6/</sup>

While it appears that the Association may be seeking in this proceeding the enforcement of a contractual provision which it believes entitles it to conventional arbitration, as occurred regarding the meaning of Article XXXVII in the 1976-1977 contract, it must be borne in mind that what is before the Commission is a petition for scope of negotiations determination. Such petitions permit the Commission to "...make a determination as to whether a matter in dispute is within the scope of collective negotiations." N.J.S.A. 34:13A-5.4(d). We will not, in this proceeding, attempt to enforce contractual rights. See Ridgefield Park Board of Education v. Ridgefield Park Education Assn, 78 N.J. 144 (1978) at 153-156, for a discussion of the Commission's role and that of the courts in matters such as this.

The scope of negotiations issue involves the form of interest arbitration. The Police and Fire Arbitration Act encourages

<sup>6/</sup> See N.J.S.A. 34:13A-16(d) (2).

the parties to agree upon a terminal procedure. N.J.S.A. 34:13A-16(b) calls upon the parties to "...notify the commission 60 days prior to the required budget submission date of the public employer as to whether or not they have agreed upon a terminal procedure for resolving the issues in dispute." The next paragraph, N.J.S.A. 34:13A-16(c), lists six approvable types of terminal procedures.<sup>7/</sup> The following paragraph, N.J.S.A. 34:13A-16(d) (1), requires that "In the event of a failure of the parties to agree upon an acceptable terminal procedure 50 days prior to the public employer's budget submission date, no later than the aforesaid time the parties shall separately so notify the commission in writing indicating all issues in dispute and the reasons for their inability to agree on the procedure." <sup>8/</sup> See also "Public Employer-Employee Relations Study Commission Report to the Governor and the Legislature", at page 7 (February 2, 1976).

However, the Act, while encouraging the parties to voluntarily agree upon a terminal procedure, also requires that any such procedure must be "mutually agreed", N.J.S.A. 34:13A-16 (b), and goes on to specify a procedure to be utilized "...if parties fail to agree on a terminal procedure for the settlement of an impasse dispute." N.J.S.A. 34:13A-16(d). The first subsection of that paragraph begins with the statement, "In the

<sup>7/</sup> Including conventional arbitration.

<sup>8/</sup> The next sentence provides that "The substance of a written notification shall not provide the basis for any delay in effectuating the provisions of this subsection."

event of a failure of the parties to agree upon an acceptable procedure..."

Therefore, based upon the above statutory language as well as the Study Commission Report which recommended the procedure ultimately adopted by the Legislature, the undersigned determines that the parties must negotiate regarding a terminal procedure but that, absent mutual agreement, they must utilize the final offer procedure set forth at N.J.S.A. 34:13A-16(d)(2). A party may agree but cannot be required to submit a dispute regarding the form of interest arbitration to an arbitrator for a determination. The parties are free to agree on the form of interest arbitration to be used in their next round of negotiations and to embody that agreement in their current contract as the parties here did in their 1976-1977 contract for the 1978-1979 negotiations. But any such agreement must be voluntary and mutual and may not be compelled by an arbitrator.<sup>9/</sup> Only in this way can the words of the law be given effect. Furthermore, although the statute provides that the parties must notify the Commission 60 days before the employer's budget submission date as to whether they have agreed upon a terminal procedure and 50 days before that date why they have failed to agree upon a terminal procedure, neither the statute nor the rules precludes a subsequent mutual agreement between the parties on an approvable

<sup>9/</sup> It is noted that the arbitrator retained jurisdiction over this matter pending this scope of negotiations determination. Thus, the arbitrator's behavior has been fully consistent with this decision.

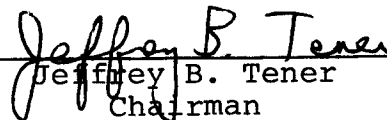


terminal procedure any time up to the issuance of an arbitration award.<sup>10/</sup>

ORDER

Based upon the above, the City of Jersey City is ordered to negotiate in good faith with the Jersey City Police Superior Officers Association regarding the form of interest arbitration prior to the 60 days prior to the City's required budget submission date.<sup>11/</sup> The Police Superior Officers Association is ordered not to insist upon negotiating the form of interest arbitration with the City within the 60 days prior to the City's required budget submission date. Both parties are free, however, throughout formal arbitration proceedings, to agree mutually upon an approvable terminal procedure.

BY ORDER OF THE COMMISSION

  
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Jeffrey B. Tener  
Chairman

DATED: Trenton, New Jersey  
June 5, 1980

<sup>10/</sup> N.J.S.A. 34:13A-16(f)(3) authorizes the arbitrator to "mediate or assist the parties in reaching a mutually agreeable settlement" throughout formal arbitration proceedings and N.J.A.C. 19:16-5.7(f) specifically provides that, "The parties may also at any time prior to the close of the hearing mutually agree to adopt a different terminal procedure, providing such procedure is approved by the director of arbitration."

<sup>11/</sup> The parties are well past the 60 day period this year. This portion of the order is intended to have prospective application only.