P.E.R.C. NO. 99-86

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF DELRAN,

Appellant,

-and-

Docket No. IA-98-25

DELRAN TOWNSHIP SUPERIOR OFFICERS' ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission affirms an interest arbitration award issued to resolve the negotiations between the Township of Delran and the Delran Township Superior Officers' Association. The Township appeals contending that the award should be vacated as it pertains to holiday pay. It asserts that the arbitrator did not properly consider the lawful authority of the employer because the award cannot legally be implemented. The Township asserts that the Division of Pensions has advised it that holiday pay can only be included in base salary for pension purposes for the SOA if such benefit is also provided to other negotiations units whose members are in the Police and Firemen's Retirement System. The Commission agrees with the Township that the arbitrator could not order that holiday pay be included in base pay for pension purposes, but the arbitrator did have the authority to award the SOA proposal to the extent that it changed the method of payment for holiday pay and required that it be included in the base pay rate for purposes of overtime compensation. Those are mandatorily negotiable compensation issues. The Commission stresses that neither it nor the arbitrator have jurisdiction to determine what is included in base pay for pension purposes.

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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Respondent.

Appearances:

For the Appellant, Parker, McCay & Criscuolo, P.A., attorneys (Stephen J. Mushinski, of counsel)

For the Respondent, Lt. James Gilbert, President, Delran Township Superior Officers' Association

DECISION

Delran Township appeals from an interest arbitration award involving a negotiations unit of five police lieutenants. See N.J.S.A. 34:13A-16f(5)(a). It asks us to vacate the award as it pertains to holiday pay.

The Township and the Delran Township Superior Officers' Association agreed to 4% increases for 1996 through 1999, and the unsettled issues before the arbitrator were shift differential, accumulated sick leave, prescription co-pay and holiday pay. The arbitrator resolved these unsettled issues by conventional arbitration, as he was required to do absent the parties' agreement to use another terminal procedure. N.J.S.A. 34:13A-16d(2).

The arbitrator awarded a five-year contract from January 1, 1996 through December 31, 2000 and, as the parties had agreed, awarded 4% increases for 1996 through 1999 (Arbitrator's opinion, p. 26). For 2000, the arbitrator awarded a 3.5% increase (Arbitrator's opinion, p. 26). The arbitrator awarded the Township's proposal to eliminate the "early retirement" option for payment for accumulated sick leave and increased the cap on lump sum payments for accumulated sick leave to $25,000 (Arbitrator's opinion, p. 26). In addition, the arbitrator awarded the Township's shift differential proposal and, effective January 1, 1997, awarded the SOA proposal that holiday pay shall be included in base salary in the same manner as longevity, shift differential and college credit payments (Arbitrator's opinion, p. 26).

The Township appeals and contends that "the award should be vacated as it pertains to holiday pay." While the Township states that all other aspects of the award are acceptable, it argues that the arbitrator did not properly consider the "lawful authority of the employer," N.J.S.A. 34:13A-16g(5), because he issued an award that it cannot legally implement. It states that it has been advised in a letter from the State Division of Pensions that it can include holiday pay in base salary only if it does so for other negotiations units whose members are part of the Police and Firemen's Retirement System (PFRS). It notes that members of the Delran Patrolmen's Association (DPA) are also PFRS

members, that their contract provides for lump sum payments of holiday pay, and that it cannot unilaterally change that provision. The Township also argues that the award violates N.J.S.A. 2A:24-8d because it is not final and definite and cannot be implemented without negotiations with the DPA. It notes that the agreement between it and the DPA does not expire until December 31, 1999 and that the DPA might not agree to change the method of payment for holiday compensation. For all these reasons, the Township maintains that the arbitrator violated N.J.S.A. 2A:24-8a because he did not consider the ramifications of the award and mistakenly applied a legal rule of the Division of Pensions.

The SOA counters that we have held that proposals to include holiday pay in base pay are mandatorily negotiable. It argues that the Division of Pensions letter relied on by the Township is misguided, and that no pension statute prohibits the SOA from negotiating, or an interest arbitrator from awarding, a holiday pay provision that pertains to one unit. The SOA also notes that negotiations for the new DPA contract will begin in September 1999 and that the DPA would likely agree to include holiday pay in base pay. The SOA further maintains that the arbitrator properly applied 16g(5), which encompasses consideration of the Local Government Cap Law, N.J.S.A. 40A:4-45.1 et seq., which is in turn designed to control the costs of government. It notes that it proposed including holiday pay in

base pay in order to afford officers a higher salary, presumably for pension and overtime purposes, while minimizing the financial impact on the Township, which was already making lump sum holiday payments. Finally, it argues that the Fair Labor Standards Act, 29 U.S.C. §201 et seq. (FLSA), requires that holiday pay be included in base pay for the purpose of computing overtime.

The standard of review for considering interest arbitration appeals is well established. Consistent with pre-Reform Act case law, we will vacate an award if 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. Cherry Hill Tp., P.E.R.C. No. 97-119, 23 NJPER 287 (¶28131 1997); Middlesex Cty., P.E.R.C. No. 98-46, 23 NJPER 595 (¶28293 1997); Borough of Allendale, P.E.R.C. No. 98-123, 24 NJPER 216 (¶29103 1998); cf. PBA Local 207 v. Bor. of Hillsdale, 137 N.J. 71, 82 (1994); Division 540, Amalgamated Transit Union, AFL-CIO v. Mercer Cty. Improvement Auth., 76 N.J. 245, 253 (1978).

The Township's contention that the award contravenes pension requirements implicates the second component of the above-noted review standard. Under N.J.S.A. 2A:24-8, an award may be vacated where it was procured by, among other things, "undue

means," a term that, in the public sector, has been "greatly enlarged" to include conformance to statutes and regulations. Old Bridge Tp. Bd. of Ed. v. Old Bridge Ed. Ass'n, 98 N.J. 523, 527 (1985); see also Jersey City Ed. Ass'n v. Jersey City Bd. of Ed., 218 N.J. Super. 177, 188 (App. Div. 1987). Thus, we will vacate an interest arbitration award where an appellant demonstrates that the award violates statutes or regulations, including statutes and regulations that do not pertain to interest arbitration.

We begin with a discussion of the negotiations history of the SOA's holiday pay proposal. The parties' predecessor agreement expired on December 31, 1995 and, during 1996 and 1997, the parties met approximately ten times in an effort to negotiate a successor contract (Arbitrator's op., p. 2). During those sessions, the SOA took the position that the Township was in violation of the FLSA by refusing to include various non-discretionary payments in base salary for the purpose of computing overtime (Arbitrator's op., p. 9). The Township agreed, effective January 1, 1997, to include longevity, shift differential and college pay in base pay for the purpose of computing overtime (Arbitrator's op., p. 9). It did so because of a federal court decision holding that the FLSA required that an employer consider such payments in computing overtime compensation (Arbitrator's op., p. 9); see Featsent v. Youngstown, 70 F.3d 900, 906 (6th Cir. 1995). Featsent did not address holiday pay, and

therefore the Township would not agree to include this item in base pay (Arbitrator's op., p. 9).

On November 6, 1997, the SOA filed a petition for interest arbitration. It listed as one of the unresolved issues, its proposal to "include in the base salary and regular pay as per Fair Labor Standards Act the following lump sum payments beginning January 1, 1996 -- longevity, shift differential, college and holiday pays." In other words, it sought to add holiday pay to the list of payments that the Township had agreed to include in base pay and sought retroactive adjustments for the holiday and other payments to 1996.1/ On November 13, the Township filed a response to the petition listing additional unresolved issues, see N.J.A.C. 19:16-5.5(a), but did not file a scope of negotiations petition asserting that any of the issues listed by the SOA were outside the required scope of negotiations. See N.J.A.C. 19:16-5.5(c). Arbitration hearings were held on July 20 and October 20, 1998 and the arbitrator issued his award on January 20, 1999 (Arbitrator's op., p. 1).

In his final opinion and award, the arbitrator rejected the Township's argument that he lacked authority to award the holiday pay proposal. He stated:

> The Township raises a question of jurisdiction arguing that if holiday pay is included for SOA pension purposes, it must be included for all

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1/ It appears, by referring to "base pay," that the SOA proposed that holiday pay would be creditable for pension as well as overtime purposes.

> members of the retirement system who are employed by it. Hence, the township reasons that the arbitrator does not have the authority to award a benefit that will result in a change in the terms and condition of other employees. Yet it is not entirely clear why this should be so, given the fact that other items such as longevity and college credits and shift differentials have been folded into the base rate by the township. Besides, the only unit this change might impact upon is the Delran Patrolman's Association, the only other bargaining unit in the Police and Fireman's Pension System. All other township employees are members of the Public Employees Retirement system. Since PERC has ruled this is a negotiable term and condition of employment, it would follow that it is a proper subject for interest arbitration. [Arbitrator's op., pp. 22-23]

In light of this ruling, the arbitrator considered the holiday pay and other proposals in the context of all of the section 16(g) factors (Arbitrator's op., pp.10-22). We need not summarize the arbitrator's careful review and discussion of the statutory criteria, because the Township does not challenge either the arbitrator's factual findings or the analysis that led him to award the proposals that he did. We do note that the arbitrator concluded that N.J.S.A. 34:13A-16g(8) had "special relevance" to the dispute (Arbitrator's op. p. 21). While he found that there was no evidence that the "continuity and stability of employment" would be affected by the award of either party's proposal, he added that another factor encompassed by 16g(8) -- "seniority rights and such other factors ... which are ordinarily and traditionally considered in the determination of wages, hours and

conditions of employment" -- weighed in favor of awarding the holiday pay proposal (Arbitrator's op., pp. 21-22). He observed that one of the "traditional factors" referred to in g(8) is the concept that, in recognition of their greater responsibilities, high-level supervisors often receive not only higher salaries but better fringe benefits (Arbitrator's op., p. 22).

After reviewing all the criteria (Arbitrator's op., pp. 10-22), the arbitrator ordered that holiday pay be included in base pay effective January 1, 1997. He reasoned that SOA members' years of service at the top echelon entitled them to a benefit that would give them a bit more in overtime and a slightly higher pension and would be a reasonable way of bringing their salaries closer to that of their peers in other municipalities (Arbitrator's op., pp. 22, 24). Based on the Township's calculations, the arbitrator found that the additional overtime and pension contribution costs attributable to this benefit were $5,700 per year for the unit (Arbitrator's op., p. 23).

The arbitrator also awarded the Township's shift differential, prescription co-pay and accumulated sick leave proposals, although he increased the cap on payments for accumulated sick leave from the $22,500 proposed by the Township to $25,000 (Arbitrator's op., pp. 24-25). He explained that his award of these proposals would help offset the costs of including holiday pay in base pay, although he also found that the

Township's proposals warranted approval on other grounds (Arbitrator's op., p. 24). In this vein, he explained that an increase in prescription co-pay "was virtually endemic in municipalities throughout the state as well as the county" (Arbitrator's op., p. 24). He noted that the Township's shift differential proposal was reasonable, that the Township had acceded to the SOA's demand for 1999, and that in the absence of evidence that a shift differential was common among supervisory personnel, he found little justification for higher payments than the Township had offered (Arbitrator's op., p. 24). Finally, he found that very few municipalities offered as generous a sick leave buyout as provided by the "early retirement" option that the Township sought to eliminate (Arbitrator's op., p. 24). The arbitrator reasoned that in an era of fiscal constraints, reduced state and federal aid, and taxpayer resistance to increased governmental expenditures, "paying an employee half his salary while he stays home awaiting retirement seems a touch out of whack" (Arbitrator's op., p. 25).

In arguing that the arbitrator lacked authority to award the holiday proposal because of its alleged impact on another negotiations unit, the Township relies on an August 11, 1998 letter from the Division of Pensions. That letter states, in part:

> Administratively, it has been determined that holiday pay given in a lump sum is not subject to pension contributions. However, if holiday pay is included as part of the contractual base wage, paid in routine paychecks, and this is the only means by which the reporting entity

> grants holiday pay to its members of a retirement system, then holiday pay is subject to pension and should be included as part of creditable base salary subject to contributions.
>
> To determine creditable salary, N.J.A.C. 17:4-4.1(a) states, "Only a member's base salary shall be subject to pension contributions and creditable for retirement and death benefits in the system." The creditable salary must be uniformly applied on the basis of a retirement system, not on the basis of various bargaining units comprising the members of a retirement system within the reporting district.
>
> Accordingly, if your township's methods for paying holiday pay corresponds with the above requirements, then it is includable in base pay for pension purposes. If it is paid in any other manner other than through routine paychecks, or if it is paid differently based on bargaining units, then it is not includable.

This letter does not refer to a statute or regulation that requires that creditable salary be determined uniformly on the basis of a retirement system. Compare N.J.S.A. 40A:10-23 (employer that elects to pay health benefit premiums for some retirees must do so uniformly for all eligible retirees). However, we are satisfied that the Division of Pensions has so construed the statutes and regulations that it is charged with interpreting, and we will assume for the purpose of this analysis that the Township cannot include holiday pay in base pay for pension purposes for SOA members unless it does so for DPA members as well.

Before turning to the merits of the Township's appeal, we comment on the procedural context in which it arises. As noted,

the Township made the same arguments to the arbitrator that it does here. This type of threshold challenge to the arbitrator's jurisdiction and the legal arbitrability of a proposal, like a more typical scope of negotiations challenge, can affect the issues that will be considered in a proceeding and, therefore, should be made and decided before the arbitrator's final opinion and award. See N.J.A.C. 19:16-5.5(c)(where party does not file scope of negotiations petition within ten days of receiving interest arbitration petition, or within five days of receiving response to petition, it is deemed to agree to submit all unresolved issues to compulsory interest arbitration); compare Borough of Allendale, P.E.R.C. No. 98-27, 23 NJPER 508 (¶28248 1997)(arbitrator should have decided, prior to issuing his final opinion and award, whether he would consider issues not included in a timely response to a petition). Further, this type of challenge to the legal arbitrability of an interest arbitration proposal should be decided in the first instance by us, not the arbitrator. See, e.g., Verona Tp., P.E.R.C. No. 97-71, 23 NJPER 48 (¶28032 1996); Bernards Tp., P.E.R.C. No. 88-116, 14 NJPER 352 (¶19136 1988).

For these reasons, we hold that challenges to an arbitrator's jurisdiction or the legal arbitrability of a proposal should, in the future, be made in the time and manner prescribed by N.J.A.C. 19:16-5.5(c). Nevertheless, we consider the

Township's challenge at this stage. We note that the Division of Pensions letter was not received until August 11, 1998, well after the parties' initial interest arbitration filings, and that N.J.A.C. 19:16-5.5(c) may be relaxed in certain circumstances. See N.J.A.C. 19:10-3.1. In addition, the SOA does not object to our consideration of the issue.

We turn now to the Township's contention that the arbitrator did not have the authority to order that holiday pay be included in base pay. This issue implicates three principles, two of which relate to an interest arbitrator's authority.

The first principle is that an interest arbitrator may not rule on a proposal where, by operation of law, his ruling would affect employees over whom he has no jurisdiction. See Verona; Bernards Tp.; accord Borough of Oradell, P.E.R.C. No. 91-85, 17 NJPER 222 (¶22095 1991)(interest arbitrator could not consider proposal that employer pay cost of medical coverage for dependents where, by virtue of uniformity requirement in State Health Benefits Plan, an award granting the proposal would affect the rights of employees not participating in the proceeding).

The second principle is that an arbitrator may not issue any "finding, opinion or order regarding any aspect of the rights duties, obligations in or associated with ... any governmental retirement system or pension fund...." See N.J.S.A. 34:13A-18. Cf. City of Newark, P.E.R.C. No. 93-57, 19 NJPER 65 (¶24030 1992)(holding that contract provision requiring that holiday pay

be included in base pay for pension purposes was mandatorily negotiable but observing that because no modification of the provision had been proposed, we would not address whether N.J.S.A. 34:13A-18 would bar an interest arbitrator from awarding such a proposal in the first instance).

The third principle is that, while the subject of pensions is not mandatorily negotiable, see N.J.S.A. 34:13A-8.1 and State v. State Supervisory Employees' Ass'n, 78 N.J. 54, 83 (1978), pension statutes and regulations do not automatically preempt proposals relating to terminal leave, longevity or holiday pay, even though those proposals may trigger questions about how the compensation will be treated for pension purposes. For example, in Galloway Tp., P.E.R.C. No. 98-133, 24 NJPER 261 (¶29125 1998), we held that the pension statute defining base salary for pension purposes did not address, and did not preempt, negotiations over the separate issue of how base salary is defined for purposes of calculating terminal leave payments. We also found that pension statutes and regulations did not preempt negotiations over a provision requiring a 10% longevity payment, includable in base salary, for employees with 25 years of service who had announced an intent to retire. We reasoned that the employer could agree to provide that compensation but that whether it was creditable for pension purposes was within the jurisdiction of the Division of Pensions. See also Paramus Bor., P.E.R.C. No.

86-17, 11 NJPER 502, 506-507 (¶16178 1985)(pension regulation prohibiting certain pre-retirement increases in salary did not preempt negotiations over proposal to increase longevity payments during police officers' 23rd year of service; proposal did not on its face violate regulation and Division of Pensions could decide whether the payments were creditable for pension purposes); Voorhees Tp., P.E.R.C. No. 96-77, 22 NJPER 198 (¶27105 1996).2/

Applying these principles, we agree with the Township that, by virtue of N.J.S.A. 34:13A-18 and the Verona, Voorhees, and Bernards line of cases, the arbitrator could not order that holiday pay be included in base pay for pension purposes. But the arbitrator did have the authority to award the SOA proposal to the extent that it changed the method of payment for holiday pay and required that it be included in the base pay rate for purposes of overtime compensation. Those are mandatorily negotiable compensation issues that are separate and apart from the issue of how the periodic holiday payments are treated for pension purposes, a question that is within the jurisdiction of the

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2/ Newark held that a provision requiring that holiday pay be included in base pay for pension purposes was mandatorily negotiable, but did so because, in the circumstances of that case, the Division of Pensions had advised the employer that this treatment was consistent with the pension statutes and that pension contributions for other employees were already calculated with holiday pay included in base pay. Newark does not permit parties to negotiate over the pension implications of compensation payments in a manner inconsistent with pension regulations or where the Division has not determined the pension effect of a form of compensation.

Division of Pensions. Galloway; Paramus. Nothing in the Division of Pensions letter bars an employer from including holiday pay in base pay for non-pension purposes for some units while making lump sum holiday payments for other units.

The arbitrator's order does not specifically address the pension implications of the holiday pay award and states only that "effective January 1, 1997 holiday pay shall be included in the base salary in the same manner as longevity, shift differential and college credit payments." (Arbitrator's op., p. 26).3/ The award can be legally implemented, consistent with the Division of Pension's advice, by including holiday pay in base pay for overtime purposes -- one of the SOA's original objectives. Therefore, we affirm the award.

We recognize that the arbitrator's opinion reflects his view that including holiday pay in base pay would result in a "slightly higher pension," although the award itself does not direct that holiday pay be included in base pay for pension purposes (Arbitrator's op., p. 24). We stress that neither we nor the arbitrator has jurisdiction to determine what is included in base pay for pension purposes. From this record, it appears that whether the holiday pay for this unit is creditable for pension purposes will depend on whether the Township and the DPA agree that that unit shall also receive holiday pay on a periodic rather

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3/ The Township states that it includes these items in base pay only for the purpose of calculating overtime.

than lump sum basis. If they do, one effect of the arbitrator's ordering that holiday pay be included in base pay will be that the holiday pay for both units will, by virtue of the Division of Pensions letter summarized earlier, be creditable for pension purposes. But that result will flow not from an arbitrator's having impermissibly ruled on pension matters, N.J.S.A. 34:13A-18, but from the combined effect of the arbitrator's ruling on mandatorily negotiable compensation issues, an agreement between the Township and the DPA, and the Division of Pension's construction of its regulations. In view of our ruling, we need not address the SOA's contention that the FLSA requires that holiday pay be included in base pay for purposes of calculating overtime.

ORDER

The arbitrator's award is affirmed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Buchanan, Finn and Ricci voted in favor of this decision. None opposed.

DATED: March 25, 1999
Trenton, New Jersey
ISSUED: March 26, 1999