Interest Arbitration Developments – 2002
Public Employment Relations Commission

Susan E. Galante
Special Counsel to the Chair

What follows is a review of interest arbitration developments since the April 2001 Annual Conference. Also included are statistics on the number of interest arbitration appeals filed since 1996.

Interest Arbitration Appeal Decisions

In *City of Orange*, P.E.R.C. No. 2002-4, 27 *NJPER* 323 (¶32115 2001), the Commission affirmed an arbitration award involving a police superiors unit. The arbitrator had awarded across-the-board salary increases, as well as all or part of employer proposals to increase health benefits co-payments; eliminate "seniority" days off; modify one terminal leave option; and permit employees to waive health insurance in exchange for an annual $2,000 payment. In addition, the arbitrator clarified and added contract language concerning sick leave and awarded the SOA's proposal to include holiday pay in base salary for all members of the SOA negotiations unit. The expired contract included holiday pay in base salary beginning with the 23rd year of service.

The City appealed, but asked the Commission to vacate the award only as it pertained to holiday pay. It argued that that provision violated an April 2000 Police and Fire Retirement System (PFRS) regulation, *N.J.A.C.* 17:4-4.1(a)(2)xiii. That regulation states that "creditable compensation" does not include "[a]ny form of compensation which is not included in a member's base salary during some of the member's service and is included in the member's base salary upon attainment of a specified number of years of service." The City argued that the quoted language requires that holiday pay be included in an employee's base wages during all of his or her years of service with an employer in order for it to be considered in calculating pension benefits. It maintained that the arbitrator's award ran afoul of the regulation because it pertained only to the superior officers unit; the rank-and-file unit did not have a similar fold-in provision; and employees do not become

superior officers without having some years of service in the rank-and-file unit.

In affirming the award, the Commission applied the same analysis as in *Delran Tp.*, P.E.R.C. No. 99-86, 25 *NJPER* 166 (¶30076 1999). In *Delran* and *Orange*, the Commission reiterated that, under *N.J.S.A.* 34:13A-18, 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...." But it noted that while the subject of pensions is not mandatorily negotiable, *see N.J.S.A.* 34:13A-8.1, 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. As in *Delran*, the Commission held that the method of payment for holiday pay was a mandatorily negotiable compensation issue that affects overtime and other pay rates calculated on an officer's base salary. The Commission reasoned that the award could be legally implemented, regardless of whether the Division of Pensions finds the compensation to be pensionable. It stressed that the Division must resolve the pension implications, if any, of changing the method for paying holiday pay for the SOA unit.

The *Orange* decision made two final points. First, it recognized that the SOA may have proposed to fold in holiday pay without regard to years of service so as to retain or obtain pensions at a particular level, while conforming to the new regulation. (Both parties had agreed that the 23rd year fold-in was prohibited by the regulation). However, the Commission observed that an award does not become invalid because a provision on a compensation issue may, after Division of Pensions review, also affect pension benefits. Second, the Commission noted one difference between *Orange* and *Delran*. In *Delran*, the Division of Pensions had already advised the employer that holiday pay would not be included in pensionable base salary of SOA unit members unless all other PFRS members – that is, rank-and-file police officers – also received holiday pay on a regular, periodic basis instead of as a lump sum. By contrast, the record in *Orange* included no communication from the Division of Pensions, and the Commission stated that it had less basis than in *Delran* to surmise that the Division of Pensions would find that the holiday pay was not pensionable -- and less reason to

vacate an award that addressed the mandatorily negotiable issue of the method of payment for holiday pay. It noted that the current regulations, unlike the Division of Pensions communication in *Delran*, focus on whether a form of compensation is paid uniformly among certain members of the same negotiations unit, as opposed to uniformly to all employees who are members of the same retirement system.

In *City of Clifton*, P.E.R.C. No. 2002-56, 28 *NJPER* ___ (¶____ 2002), the Commission affirmed, with a modification, an arbitration award involving a unit of firefighters, firefighter/EMTs, lieutenants, captains, and deputy chiefs. The sole issue in the proceeding was the FMBA's proposal to change from a "10/14" to a "24/72" work schedule. The parties had agreed to all other terms of a January 1, 1999 through December 31, 2002 contract. The arbitrator awarded the 24/72 schedule for a one-year trial period, and established a review procedure by which, at the end of the period, the City could petition the arbitrator to eliminate the 24/72 schedule; if the FMBA objected, the appointed arbitrator would hold a hearing, after which the arbitrator would decide whether the City had shown "reasonable cause" to revert to the 10/14 schedule.

The City appealed, contending that the arbitrator did not give due weight to the relevant factors in *N.J.S.A.* 34:13A-16g; the award was not supported by substantial credible evidence in the record as a whole; and the award's post-trial period review procedure violated the Arbitration Act and the standards in *Teaneck Tp.*, P.E.R.C. No. 2000-33, 25 *NJPER* 450, (¶30199 1999), app. pending App. Div. Dkt. No. A-01850-99T1.

The Commission reiterated some of the principles that it had set out in *Teaneck*, another appeal challenging an arbitrator's award of a 24/72 work schedule. Thus, *Clifton* stated that the party proposing a work schedule change has the burden of justifying it and that, before awarding a major work schedule change, an arbitrator should carefully consider the fiscal, operational, supervision and managerial implications of such a proposal, as well as its impact on employee morale and working conditions. The Commission rejected the City's argument that an arbitrator can award a schedule change only if the proponent shows that a current schedule does not "work." An arbitrator should consider whether there is evidence of problems with an existing schedule, but interest arbitration must allow for a schedule change that an

arbitrator reasonably concludes is warranted after a full and fair consideration of the statutory criteria. Where a schedule change is awarded because of potential benefits, as opposed to problems with a current schedule, it is appropriate for an arbitrator to establish a mechanism that allows the parties to evaluate the award schedule and ensures that it will not become the new status quo unless the predicted benefits materialize. With respect to the *Clifton* award, the Commission found that the arbitrator comprehensively analyzed the evidence and arguments; gave due weight to the relevant statutory factors; and reached a reasonable determination that the FMBA had met its burden of justifying the award of the schedule change for a one-year trial period. The arbitrator reached well-supported conclusions that the 24/72 schedule would improve morale, increase recuperative time, and reduce firefighter fatigue – thereby improving firefighter safety. His award was grounded in extensive testimony in support of the schedule from fire chiefs with experience under both the 10/14 and 24/72 schedules. The Commission declined to disturb his decision to give greater weight to that evidence than to the City's predictions concerning the possible negative effects of the schedule on department operations. Because the *Clifton* negotiations unit included rank-and-file as well as superior officers, the case did not involve the same supervision issues as *Teaneck*, where the arbitrator's award of a work schedule change would have, absent the Commission's modification, resulted in supervisors and firefighters being on different schedules.

Clifton modified the award with respect to the trial period. It noted that, given the January 1, 1999 through December 31, 2002 contract term and its March 2002 decision, the contract would expire before the one-year trial period is completed, although the arbitrator could not have known that when he issued his September 2001 award. In this posture, the Commission concluded that the best and least complicated mechanism for evaluating the 24/72 schedule – absent the parties' agreement to continue or discontinue it – was the post-contract expiration interest arbitration process, where an arbitrator will be appointed in accordance with Commission regulations. The Commission did not decide whether an arbitrator who awards a schedule change on a trial basis may retain jurisdiction, during the term of an awarded contract, to consider whether the schedule should be made permanent.

The Commission also held that, consistent with *Teaneck*, the burden would be on

the FMBA to justify adoption of the schedule in a new interest arbitration. It noted that, in *Teaneck*, the arbitrator had tied continuation of the schedule after the trial period to the achievement of certain benefits and that, consistent with that objective, the Commission decision had placed the burden on the union to again justify the schedule. Those standards applied in *Clifton*, where the arbitrator also awarded the schedule primarily because it would improve morale, safety and working conditions. However, by requiring the City to establish "reasonable cause" to revert to the 10/14 schedule, the *Clifton* award instead placed the burden on the City to show that the 24/72 schedule should not be continued.

Finally, *Clifton* considered whether the City may return to the 10/14 schedule after the trial period concludes. *Teaneck* referred to the old schedule being "effectively restored," but did not mean that the employer could unilaterally revert to the old schedule after the trial period. Instead, the quoted language signified that the burden was on the union to again justify the schedule. It would be destabilizing to allow the employer to revert to an old schedule during negotiations or interest arbitration, with the possibility that it might have to change back should an interest arbitrator again award the schedule.

Interest Arbitration Regulations

The interest arbitration regulations, *N.J.A.C.* 19:16, were readopted, with minor amendments, effective June 4, 2001 (readoption) and July 2, 2001 (amendments). Most of the amendments were to regulations governing the interest arbitration process prior to an arbitrator's appointment. For example, amendments require the Director of Arbitration to send a Notice of Filing of an interest arbitration petition to the non-filing party; increase the time period for a respondent to file an answer to a petition; and adjust related deadlines (e.g., time for filing scope petitions). A procedure was added that, consistent with prior administrative practice, allows a party to file a motion to dismiss an interest arbitration petition on the grounds that the unit is not eligible for interest arbitration under *N.J.S.A.* 34:13A-15. *N.J.A.C.* 19:16-5.7(d) was amended to add that an arbitrator shall consider motions to quash subpoenas that he or she has issued.

Continuing Education for Special Panel Members

In November 2001, the Commission held its annual continuing education program for its special panel of interest arbitrators.

The program included a review of interest arbitration developments; Commission interest arbitration appeal decisions; other court and Commission decisions of note; and the readopted regulations. A "roundtable" discussion was held where all panel members were encouraged to discuss mediation techniques, approaches to opinion-writing; and issues arising with respect to particular types of interest arbitration proposals.

Biennial Report on the Police and Fire Public Interest Arbitration Act

N.J.S.A. 34:13A-16.4 requires that the Commission submit biennial reports to the Governor and Legislature on the effects of the Police and Fire Public Interest Arbitration Reform Act on "the negotiations and settlements between local governmental units and their public police departments and public fire departments." The Commission's third report was submitted in January 2002. It reviewed Commission actions in implementing and administering the statute and provided information concerning interest arbitration petitions, settlements, awards and appeals during the six years the Act has been in place. The report also included a nine-year salary analysis and identified the following trends:

- Parties are invoking the interest arbitration process less frequently than before the Reform Act
- In a very high percentage of cases, the parties have mutually agreed on the selection of an interest arbitrator instead of having an arbitrator assigned by lot by the Commission
- There is a significant trend towards interest arbitrators assisting parties in reaching voluntary settlements, rather than issuing formal awards
- When disputes do proceed to an award, interest arbitrators are overwhelmingly deciding disputes by conventional arbitration -- the terminal procedure mandated by the Reform Act unless the parties agree to one of the other optional procedures allowed by statute
- The number of awards issued in each of the last six calendar years is substantially less than the average annual number of awards issued under the predecessor statute. In addition, there have been very few interest arbitration appeals filed with the Commission.

These developments were evident in the first years the Reform Act was in place and some of the trends – those concerning mutual selections, settlements, and the low numbers of petitions,

awards, and appeals - have become more marked in the past two to three years.

The report concluded that there have been no significant problems in the implementation of the Reform Act and that the parties have completed the transition to the Act and adapted to its provisions and requirements. The report stressed that the Commission plans to continue its emphasis on encouraging mediation and maintaining a high quality special panel of interest arbitrators.

Interest Arbitration Appeal Statistics Since January 1996

Since the Reform Act went into effect, the Commission has issued 17 decisions reviewing final interest arbitration awards. It has affirmed eight awards; affirmed two with a modification; and vacated and remanded seven awards. One of the decisions affirming an award with a modification, *Teaneck Tp.*, P.E.R.C. No. 2000-33, 25 *NJPER* 450 (¶30199 1999), app. pending, Dkt. No. A-1850-99T1, has been appealed to the Appellate Division. The Commission has also denied one motion to file a late appeal and five requests to review interim procedural rulings by interest arbitrators.