

SOLOMON'S WISDOM: AN EARLY ANALYSIS OF
THE EFFECTS OF THE POLICE AND FIRE INTEREST
ARBITRATION REFORM ACT IN NEW JERSEY

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ABSTRACT

From 1977 until 1996, final offer arbitration was the default form of arbitration required to resolve intractable collective bargaining contract disputes between police and fire officers and their public employers. In 1996, the state changed the default form of arbitration to conventional arbitration. This article reviews the history of the New Jersey legislation on interest arbitration and evaluates the impact of the 1996 change.

Around 1015 B.C., King Solomon of Israel ruled on a now-familiar case that involved the suffocation of a child [1]. Two harlots came to the king with a young child, each claiming to be the babe's mother. Each of the mothers had given birth to a child, and each claimed the other had rolled over on her own baby and killed it during the night. One mother claimed the living child was hers, and the other claimed the first mother had switched her child for the dead one in the night. Solomon called for his guards to bring a sword and told the women he would solve their dispute by splitting the child into two pieces and giving each of the women half. One of the women agreed, and the other rejected this proposal. These reactions indicated to Solomon who the real mother of the child was and from this information, he settled the case. Solomon's wisdom was trumpeted far and wide [2].

The tactic used by Solomon in the tale of the two harlots is still used today in final-offer arbitration (FOA). In FOA, the parties present the arbitrator with their last best offers, and the arbitrator decides between them. The arbitrator may not make a compromise between the two offers, but must choose one or the other

offer [3]. This process is supposed to lead the parties to settlement once they see how close they actually are [3]. As with Solomon, the hope is that each party will give as much as possible in its final offer so it is viewed as the more reasonable [4].

Until January 10, 1996, FOA was the default form of arbitration required in interest arbitration between police and fire officers and their public employers in resolving impasses in collective bargaining disputes in New Jersey [5]. The statute offered the parties a choice among several forms of arbitration. Unless they were able to agree on another form, the default choice would be FOA.

Proponents of this form of arbitration claim it takes the posturing and artifice out of negotiations and forces the parties to be as realistic as possible in their demands and offers. Just as Solomon's offer to split the baby down the middle led the real mother to cease negotiations and settle, FOA cuts to the heart of the matter. FOA forces the union to focus on what the bargaining unit really needs, and it encourages the community to look closely at what it can afford to pay for safety services.

In late 1996, the state changed its default form of arbitration to conventional arbitration, where the arbitrator is permitted to split the difference between the last offers of the parties. This paper reviews the developments that led to this change and provides an early evaluation of the effectiveness of that change.

BACKGROUND

Interest arbitration refers to the final form of dispute resolution mandated by the New Jersey Code for police and firefighting collective bargaining units when they are unable to resolve their differences with the governing agencies over a new collective bargaining agreement [6]. This differs from grievance arbitration, which involves an interpretation or application of an existing contract [3, at 284]. Interest arbitration allows for a new employment agreement to be formed, under which each party is bound, when the parties cannot come to a settlement on their own, or during mediation and factfinding [3, at 284]. Its purpose is to settle a contract dispute in public safety when an impasse is declared by either of the parties. The awards are binding, but appealable to the courts [3, at 284].

Interest arbitration is mandated by the New Jersey statute for police officers and firefighters because of the importance of these vocations to the safety of the community. The safety of the community is a primary concern of state government. Presumably, if the police or firefighters were to have a work stoppage, members of the community would be at a much higher risk than if the garbage collectors or teachers stopped working. Since it is unlawful for public employees to strike in New Jersey, interest arbitration provides a way for public safety employees to bring their disputes to a terminal point.

The idea of an outside "judge" deciding the fate of the impasse is supposed to help negotiations along to the point where a settlement can be reached by the two

parties. If no settlement is reached, the arbitrator is empowered to grant an award deemed as most reasonable under statutory criteria [7]. This provides continuous service by police and fire departments, while also giving them some bargaining power regarding their economic and noneconomic benefits and packages.

HISTORICAL PERSPECTIVE

From the time the interest arbitration statute was passed, the law laid out how arbitrators should analyze and decide these disputes [7]. At first, this act required arbitrators to decide the dispute reasonably, based on any of eight factors found to be relevant for resolving a particular dispute (later referred to as the 16g factors). The eight factors listed in the statute included public interest and welfare, salary and working condition comparisons with other employees, current compensation packages, party stipulations, employer authority, financial impact of offers on taxpayers and the government unit, cost of living, and employment stability [7, prior to 1996].

According to the act:

The arbitrator or panel of arbitrators shall decide the dispute based on a reasonable determination of the issues, giving due weight to those factors listed below that are judged relevant for the resolution of the specific dispute:

1. The interests and welfare of the public.
2. Comparison of the wages, salaries, hours, and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours, and conditions of employment of other employees performing the same or similar services and with other employees generally:
 - a. In public employment in the same or similar comparable jurisdictions.
 - b. In comparable private employment.
 - c. In public and private employment in general.
3. The overall compensation presently received by the employees, inclusive of direct wages, salary, vacation, holidays, excused leaves, insurance and pensions, medical and hospitalization benefits, and all other economic benefits received.
4. Stipulations of the parties.
5. The lawful authority of the employer.
6. The financial impact on the governing unit, its residents and taxpayers.
7. The cost of living.
8. The continuity and stability of employment including seniority rights and such other factors not confined to the foregoing which are ordinarily or traditionally considered in the determination of wages, hours, and conditions of employment through collective negotiations and collective bargaining between the parties in the public service and in private employment [7, before 1996].

The Public Employment Relations Commission (PERC) maintained an arbitration panel and formally appointed the arbitrators who had been chosen, usually

from panel lists supplied to the parties. By the early 1990s, the arbitrators were being criticized roundly for giving awards that were deemed far too generous. The attitude of many was that police officers and firefighters were prospering greatly in New Jersey while taxpayers and common citizens were losing their jobs due to recession-like economic conditions [4, p. 89]. Eventually, the government became dissatisfied with the money being awarded, and the legislature became involved in rectifying the situation.

By 1992, three bills were introduced in the New Jersey Legislature to amend the act and change the arbitration procedure [8]. These bills focused on requiring the arbitrators to look more closely at the ability of public employers and taxpayers to pay the awards. “The New Jersey State League of Municipalities passed a resolution on February 25, 1992, calling for reform of [this Act] and endorsing A836 and A336” [9, cited in 4, p. 93]. Ultimately, a combination of these three bills was signed into law.

THE 1996 AMENDMENTS

On January 10, 1996, New Jersey Governor Christine Whitman signed the Police and Fire Public Interest Arbitration Reform Act, P.L. 1995, c. 425 (the act), passed to revise the original interest arbitration statute [10]. According to the Sponsor’s Statement of Representative Paul DiGaetano, the revisions reflected “recent decisions by the New Jersey Supreme Court and the Appellate Division of the Superior court [10, p. 11, quoted in 4, p. 93], and the key revisions were:

- At least three required meetings between the two parties beginning 120 days before the termination of their contract.
- Allowance of either party to petition for arbitration upon the expiration of their contract.
- Requirement of arbitrators to explain which factors were relevant and irrelevant with respect to their award.
- Directives to arbitrators to consider local cap laws as well as their award’s impact on local taxes, taxpayers, and the maintenance of the local government’s current programs and services.
- Authorization of the Public Employment Relations Commission (PERC) to develop comparability of jurisdiction guidelines.
- Requirement of an issue award within 120 days of the beginning of arbitration.
- Establishment of the right to appeal an award to PERC, which can in turn affirm, modify, correct, vacate, or remand it. PERC decisions are directly appealable to the Appellate Division of the State Superior Court.
- Directives for PERC to prepare and provide annual salary increase surveys of the private sector for use in public sector wage negotiations.

- Selection of arbitrators by lot, unless the parties can select one by mutual agreement.
- Directs a continuing education program for all arbitrators to be implemented by PERC.
- Granting of greater oversight and disciplinary powers concerning arbitrators.
- Allowance of assessment of charges by PERC to the parties to cover costs incurred by PERC in providing its services.
- And the issue that becomes the point of this paper: establishment of conventional arbitration as the terminal procedure between the two parties when at an impasse [11, p. 9].

While many changes were made to interest arbitration by the act, surely the most controversial was changing the default form of arbitration from FOA to conventional. Conventional arbitration allows the arbitrator to evaluate the final offers of the two parties and come up with a compromise between the two if that is indicated. Indeed, while most of the 1996 amendments seemed to take away much of the arbitrator's freedom, the change from FOA to conventional arbitration seems to return some of that freedom. This paper focuses on this change, exploring whether the revisions have produced the hoped-for results.

JUDICIAL ACTIONS

Representative DiGaetano said that “[t]he revisions reflect recent decisions by the New Jersey Supreme Court and the Appellate Division of the Superior Court” [11, p. 9]. The lead cases in public sector interest arbitration in New Jersey are *PBA Local 207 v. Borough of Hillsdale* [12]; *Washington Township v. New Jersey PBA, Local 206* [13]; and *New Jersey State PBA, Local 29, v. Town of Irvington* [3]. *Irvington* is an earlier case that involves local cap laws as they relate to compulsory interest arbitration awards. (Cap laws limit the amount by which a unit of government may increase its budget without voter approval.) The case is useful because it lays out many definitions and explanations of interest arbitration and FOA. In *Hillsdale* and *Washington Township*, New Jersey's supreme court clarified and evaluated the arbitrators' function in assessing, analyzing, and awarding under existing statutory guidelines. However, the court *never* suggested that final-offer arbitration be replaced by conventional arbitration.

Hillsdale

In this case, the parties disputed the salary increase awarded by an arbitrator through the final-offer process. In support of its final offer, PBA Local 207 suggested salary and nonwage benefit packages of *all* Bergen County police officers be compared to that of the Hillsdale officers to determine its reasonableness. Local 207 also argued that Hillsdale's final offer was contrary to trends in similar

municipalities; that it “would result in a diminution in salary increases [12, at 78]., and that the borough was able to pay [12, at 78].

The borough contended that the appropriate comparable communities did not consist of the entire Bergen County population, but rather were the other nine “Pascack Ten” municipalities [12, at 98].¹ The borough argued that this comparison would show Hillsdale Police were well-compensated because the borough’s final offer would have made its police officers the second highest paid among the Pascack Ten, and first if fringes were added into the calculation [12, at 78]. The borough also supported its position by arguing it had a high tax rate and a low assessed valuation per capita; that it was heavily dependent on real estate taxation; and that it had granted 66 percent in salary increases over the preceding nine years, compared to a 46 percent increase in the Consumer Price Index [12, at 78].

The arbitrator selected Local 207’s as the more reasonable offer, because of comparability considerations and because the borough did not prove that meeting the PBA’s final offer would wreak or do serious harm [12, at 78]. The arbitrator expressed his reasoning in the following language:

Analyzing the numerous exhibits, particularly those relating to comparability . . . leads me to the inevitable conclusion that the increases sought by the PBA are reasonable. The only issue remaining is whether it is the *more* reasonable of the two. The Association has met that burden also—i.e., proving that its offer is more reasonable. A review of the comparables shows that the Association’s request is modest. Although one can certainly question the level of increase in light of the current economic times, nevertheless, this is the neighborhood out there. Clearly the PBA’s offer is midstream . . . [12, at 79].

The borough appealed. The chancery division, the primary appellate level, upheld the award [12, at 79], but the appellate division reversed [12, at 80]. The court concluded the arbitrator’s reasoning was faulty because he:

1. should have assumed that all factors from N.J.S.A. 34:13-16g (1) are relevant in the analysis of the two final offers [12, at 80];
2. should have compelled the parties to produce evidence relating to each of the 16g factors regarding their final offer;
3. and should have completed a factor-by-factor analysis of the final offers [12, at 79].

The appellate court further reasoned that “this would afford a proper basis for public interest arbitrators to make an informed decision as to relevance [12, at 79]. The case was appealed to the New Jersey Supreme Court. Quoting *Irvington*, the

¹ Pascack Ten municipalities are Hillsdale, Emerson, Montvale, Old Tappan, Oradell, Park Ridge, River Vale, Washington Township, Westwood, and Woodcliff Lake.

court posited that “the standard that governs judicial review of interest arbitration is whether the award is supported by substantial credible evidence in the record as a whole [3, at 294]. The court also found in *Irvington* that a reviewing court may vacate an arbitration award if the decision “fails to give due weight to the section 16g factors” [3, at 295]. While the supreme court found Section 16g expressly requires the arbitrator to consider an award’s effect on the public in general, it also determined that 16g does not require the arbitrator to rely on all its factors, only those he finds relevant [12, at 83].

The Supreme Court’s finding was contrary to the Appellate Division’s in that it did not require the arbitrator to demand the production of evidence on all 16g factors from the parties, but merely allows this step, if the arbitrator feels it is necessary [12, at 84]. In spite of the Supreme Court’s difference in analysis, it agreed that the arbitrator’s reasoning was not in accord with the statute. At the root, the Supreme Court found that the arbitration award “unduly emphasized the comparison with police salaries in other communities and inappropriately relied on the Borough’s perceived `ability to pay” [12, at 86]. The Court also found that the arbitrator did not include the reasoned explanation required by the act of why other 16 (g) factors were not relevant to the award and that his comment “this is the neighborhood out there” is insufficient reasoning for determining that the PBA’s offer was the more reasonable of the two [12, at 86].

Washington Township

Washington Township stems from a disagreement between the New Jersey State Policemen’s Benevolent Association, Inc., (PBA) Local 206 and the township on salary increases for 1991, 1992, and 1993 [13, at 89]. Table 1 presents the two final salary increase offers in question.

The arbitrator chose the PBA’s offer as the more reasonable. She quoted all the 16g factors and noted that “[t]he difference between the parties’ economic positions is very small” [13, at 90]. She also concluded there was no proof showing that the employer could not afford to pay the increases [13, at 91]. This decision

Table 1. The Positions of Washington Township and the PBA, Local 206

The Offers of the Township		The Demands of the PBA	
July 1, 1991	9%	July 1, 1991	9%
July 1, 1992	6%	Jan. 1, 1992	4%
Jan. 1, 1993	6%	July 1, 1992	4%
		Jan. 1, 1993	3%
		July 1, 1993	4%

Source: [13, at 90].

placed the burden of proving it could *not* afford to pay the PBA's final offer upon the employer. The township appealed to the chancery division, which affirmed the arbitration decision [13, at 90]. However, the appellate division reversed and remanded the decision to a new arbitrator [13], and the PBA filed a successful petition for certification with the New Jersey Supreme Court [13, at 90].

As in *Hillsdale*, the court found that the *Washington Township* arbitrator had failed to provide a sufficiently detailed analysis of the relevant factors from 16g and failed to explain why some factors were not considered [13, at 92]. The arbitrator's analysis focused on two factors: the township's ability to pay and comparability with salaries in similar communities [13, at 91]. The court felt the Washington Township arbitrator "neither identifies and weighs the relevant factors nor explains why other factors are irrelevant. Indeed, the award implies that a comparative analysis of salary increases in similar communities is dispositive [13, at 91]. The court affirmed the appellate decision to reverse, but it modified the decision to remand to a new arbitrator and returned the case to the original arbitrator [13, at 92].

Many of the 1996 amendments directly reflect the concerns of the New Jersey courts, as expressed in *Hillsdale* and *Washington Township*. In words drawn from those decisions, the legislation required: "In the award, the arbitrator or panel of arbitrators shall indicate which of the factors are deemed relevant, satisfactorily explain why the others are not relevant, and provide an analysis of the evidence on each relevant factor" [7]. But the courts never pointed a judgmental finger at the process of FOA. While the courts indicated their displeasure with the results of the arbitration process in two cases, they did not recommend that the legislature change the method of dispute resolution to conventional arbitration. We now turn to the results of that change.

THE AMENDMENTS' EFFECT ON AWARDS

According to the *Biennial Report of the Public Employment Relations Commission on the Police and Fire Public Interest Arbitration Reform Act*, (Biennial Report), filed by PERC in January of 1998, there has been a decline in the average salary increases awarded by arbitrators or voluntarily agreed to by the parties since the implementation of the act in January of 1996 [14]. In all of the cases reviewed, a main interest of the courts seems to be the arbitrator's ability to take into account the effect of the awards on local taxpayers. An easy inference to draw is that the courts want lower taxes—which means lower salaries for public employees. Therefore, it appears the amendments are effectively achieving that purpose.

Further findings reported to the governor concern the decrease in filings. The average number of annual disputes filed with the commission over the eighteen years previous to 1996 was about 200. In 1996, 133 filings were made, and in 1997, 131 filings were reported by PERC [14]. This is a 34 percent decrease in

the number of unresolved disputes, implying that more parties are settling without the intervention of a third party. To further support this implication, the report states that between 1988 and 1992 the average number of awards per year was seventy-six, while the voluntary settlements averaged forty per year [14]. Table 2, adapted from the Biennial Report, shows the more recent results.

These data corroborate PERC's claim. Average salary increases, awarded and negotiated, have declined since the amendments were passed. These data show a 36 percent drop in percentage increase of salaries awarded by arbitrators to police and firefighters between 1993 and 1997. They also show a 29 percent decrease in the amount that negotiated salaries increased over the same period as a result of settlement. But the simple statistics may be misleading.

PRE-AMENDMENTS TREND

While these data would lead one to believe the 1996 amendments are serving their purpose, a closer look at this table indicates the trend for lower salary increases started *before* the amendments were implemented. In fact, the lessening of salary increase awards did not change from the 1993-1995 period (before the amendments) and 1995-1997. The average arbitrated award declined by 20 percent in each period. The average negotiated settlement dropped in each of the two periods, but the post-amendment drop was slightly less than the pre-amendment decline. The reduction in the average settlement was 17 percent between 1993 and 1995 and 14 percent the following two years, but this change is not significant statistically.

Additionally, the win rate of the unions also fell prior to the amendments. Between 1988 and 1991, 131 final-offer arbitration awards were granted. The employees' final offer was awarded eighty-six times, giving the unions a 65 percent win rate [4, pp. 90-91]. However, as early as 1992, the trend started to turn. That year, of thirty-six final offer awards, the union's final offer was

Table 2. Salaries Through Arbitration and Negotiation (1993-1997)

Year	Average Salary Increase		Average Salary Increase	
	Awards	Through Arbitrations	Vol. Settle.	Through Negotiations
1993	46	5.65%	66	5.56%
1994	35	5.01%	56	4.98%
1995	37	4.52%	44	4.59%
1996	21	4.34%	35	4.19%
1997	37	3.63%	62	3.95%

Source: [15].

chosen only sixteen times, for forty-four percent [4, at 90-91]. From 1992 to 1995, only fifty-four of 109 awards went to the unions, a union win rate of 49.5 percent [15].

Although the data are not extensive, they suggest the trend toward fewer filings for arbitration and more municipality wins began before the implementation of the amendments. These findings may mean that arbitrators began implementing the message sent by the courts before the legislation came into being. More importantly, they may indicate a greater focus on attempting to seek out compromises in bargaining *prior* to reaching the arbitration stage of the process.

Another area to examine with regard to the effect of conventional arbitration in these matters is the difference in final offers between parties before and after the amendments, as illustrated in Figure 1. In 1995, the local PBA or fire department won fifteen of thirty-one final-offer arbitration awards [15, 1995]. The average difference or spread between final offers for all thirty-one FOA cases was 29 percent [16, 1995], and the average spread in the cases won by the unions was almost 35 percent [16, 1995; statistics by author]. In 1996, the first year the amendments were in effect, only six conventional awards were made, and the average spread was 26.5 percent [16, 1996; statistics by author]. Nineteen ninety-seven gives us a first full year with conventional arbitration as the default form. In this year, the average spread between the final positions was 44 percent, and, at the time of writing, in 1998 it was 55 percent [17, 1997, 1998; statistics by author]. While these data are scanty, they suggest the parties may be impeding serious negotiations earlier in the process, thereby giving more authority to the arbitrators.

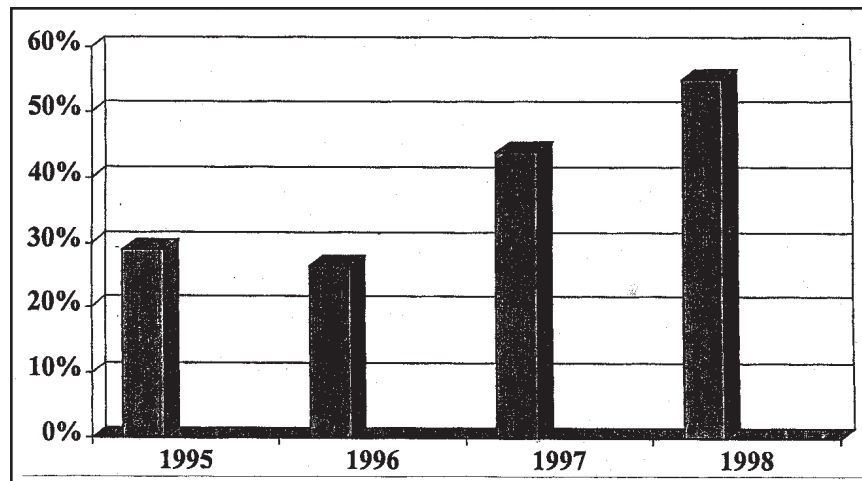


Figure 1. Average spread in final offers (1998 figures through August 1998).

SUMMARY AND CONCLUSIONS

This research focuses on the difference between the results produced by FOA and conventional arbitration in public safety labor disputes in New Jersey as a result of the recent amendments to the New Jersey interest arbitration statute. We must remember that many factors influence the awards granted by arbitrators in these cases. An understanding of the impact of the changes in the law requires more than the salary figures the negotiation/arbitration processes have produced. One must consider all of the exogenous factors that may influence these results, what interest arbitration entails, and all of the changes mandated by the act and the court decisions. However, the data indicate that

1. the number of awards rendered under the act has not changed very much since the amendments were passed;
2. focusing on salaries alone, it appears economic awards among New Jersey police and firefighters are still rising, but the rate of increase is declining. However, this decline in the rate of increase began before the amendments were enacted;
3. the union win rate in arbitration is also declining, but this too began before the amendments.

In short, these initial data suggest that conventional arbitration has not produced results much different from those that might have been obtained under FOA. The early data, therefore, suggest the amendments might have been unnecessary. Perhaps the courts had accomplished the purpose of reducing arbitration awards by previously signaling the importance of ability to pay and in asking for more detailed opinions.

Perhaps our most important finding is that the parties' final offers were generally much closer to one another under FOA. Although the data are thin, this finding suggests conventional arbitration may be causing the parties to negotiate less strenuously and to devote more energies to preparing positions for arbitration. Thus, the new default system may be forcing the parties further apart and may be discouraging each side from compromising. The data support these observations made by a highly experienced management negotiator:

. . . [T]he conventional arbitration procedure does nothing but keep the parties apart. . . . that the fair and final aspect of the prior Act at least made the parties craft reasonable offers. The current procedure allows both parties to be totally unreasonable, and still end up with a reasonable award. This "rewards" bad faith negotiation, which clearly is not the purpose of the Act [18, p. 16].

In addition, the change to conventional arbitration may have shifted the responsibility for the results of the process. FOA tended to give the parties much of the burden for coming together by forcing them to develop realistic positions

that would stand up to arbitral scrutiny. Under conventional arbitration, however, the negotiating parties may take whatever position they wish, shifting the burden of protecting the interests of management, labor, and the community to the arbitrator.

In short, because the amendments are new, the data presented in this research are hardly conclusive. However, this research raises questions about the reasoning of the state legislature when it changed the default method of mandatory dispute resolution for New Jersey police and firefighters. The early indications are that conventional arbitration does not produce results much different from what would have been obtained under FOA, but it has produced these results at a cost. Conventional arbitration allows and may even encourage the parties to adopt less-reasonable positions and may even discourage serious negotiations completely because the parties anticipate from the outset that they will go to arbitration. Conventional arbitration, as it seems to be developing in New Jersey, is like giving King Solomon the responsibility of deciding *where* to divide the baby and denying him access to a process that might save the baby.

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