

**PUBLIC EMPLOYMENT RELATIONS COMMISSION**

In the Matter of Interest Arbitration between	)	<b>Before: J. J. PIERSON, Esq.</b>
	)	<b>Arbitrator</b>
<b>CITY OF PATERSON (“City” or “Employer”),</b>	)	
<b>a municipality in the COUNTY OF PASSAIC,</b>	)	
<b>STATE OF NEW JERSEY</b>	)	
	)	<b><u>INTEREST ARBITRATION</u></b>
and	)	<b><u>OPINION and AWARD</u></b>
	)	
<b>PATERSON FIRE OFFICERS’ ASSOCIATION))</b>	)	<b>Docket No. IA-2008-057</b>
<b>(“Captains”);</b>	)	
<b>PATERSON DEPUTY FIRE CHIEFS’</b>	)	<b>Docket No. IA-2009-007</b>
<b>ASSOCIATION (“Deputy Chiefs”); and</b>	)	
<b>PATERSON BATTALION CHIEFS’</b>	)	<b>Docket No. IA-2009-006</b>
<b>ASSOCIATION (“Battalion Chiefs”)</b>	)	
	)	

The undersigned derives jurisdiction as Arbitrator of this matter from appointment by the Public Employment Relations Commission (“PERC”) and consent of the parties pursuant to their respective Collective Bargaining Agreements (collectively, hereinafter, the “Agreements”), described specifically below). The designation directs the Arbitrator to accept evidence and render a written Opinion and Award on the Issue submitted below. An administrative session was conducted on December 19, 2008 and, subsequently, an evidentiary hearing was conducted on January 12, 2009 at City Hall, Paterson, New Jersey. Due notice of hearing was given to the parties, and full opportunity was provided the parties to present evidence, together with post hearing briefs, in support of their respective positions.

<u>Appearing for the City:</u>	<u>Appearing for the Captains:</u>	<u>Appearing for Deputy Fire Chiefs &amp; Battalion Chiefs:</u>
Gerald Dorf, Esq.	Nestor Guzman, Esq	Elise Dinardo, Esq.
Richard Postorino, Fire Chief	Brian Burns, President	Edward McLaughlin, President
		Thomas Hirz, President

**Issue** What shall be the terms and conditions of the successor Collective Bargaining Agreement, based on consideration and application of all of the relevant statutory of N.J.S.A. 4:13A-16(g)(1) through (9)?

## **BACKGROUND**

The City of Paterson, located in Passaic County, maintains a population of approximately 150,000 residents within 8½ square miles. The Paterson Fire Department is the third largest fire department in the State of New Jersey and consists of approximately 330 uniformed and 60 Civilian personnel.

The matter herein arises from contract negotiations between the City and the Fire Officers' Association ("Captains", with sixty members), the Deputy Fire Chiefs' Association ("Deputy Chiefs", with seven members) and the Battalion Chiefs' Association ("Battalion Chiefs", with sixteen members) employed by the City and collectively referred to as "Superior Officers." The three "Associations" represent approximately 80 superior officers employed by the City under the three Collective Bargaining "Agreements". (see Joint Exhibits J-1, J-2A and J-2B<sup>1</sup>). The three Associations have a similar bargaining experience with the City in seeking successor Agreements.

The record revealed that, in late 2007, the three Associations individually negotiated the terms for successor Agreements with the City's Mayor, Jose Torres, with effective durations of August 1, 2005 through July 31, 2010. Terms of the Agreements, including a drug and alcohol policy ("Policy") based on the "reasonable suspicion" standard, were reduced to writing, ratified and executed by the parties.<sup>2</sup> Notwithstanding the executed Agreements and Policy, when presented to the Paterson City Council ("Council") for approval, both documents were rejected by the Council.

Thus, despite participating in extended negotiations and reaching agreement on specific terms for successor contracts, an impasse resulted and the Associations respectively petitioned PERC to initiate Interest Arbitration. Upon agreement of Counsel, the three cases were consolidated for purposes of one proceeding before this Arbitrator.

---

1. Reference to Exhibits in the record are (J- ) for Joint; (C- ) for City; and (PBA- ) for PBA.

2. Mayor Jose Torres, on behalf of the City; Brian Burns, on behalf of the Captains; Thomas Hirz, on behalf of the Battalion Chiefs; and Edward McLaughlin, on behalf of the Deputy Chiefs

To place the matter in perspective and discuss the outstanding issues, a mediation session was conducted on December 19, 2008 between the Arbitrator and Counsel. In addition to the recognized issue of wages, the parties also discussed the economic issues of longevity and night differential. The manner in which Captains were paid when scheduled to work on any of the twelve scheduled was also discussed. Finally, Counsel for the City also raised the Council's demand for the imposition of a "random drug and alcohol test" policy. At the conclusion of the mediation session, the parties agreed this Arbitrator would maintain jurisdiction to enter a conventional arbitration award covering the period August 1, 2005 through July 31, 2010.

An evidentiary hearing was conducted on January 12, 2009, with a transcript being taken. Counsel for the City confirmed the length of the Agreement and that the wages previously negotiated were not being challenged by the City. Thus, there are only four issues in dispute, relating to longevity, night differential, drug testing and holiday pay (Captains only). At the conclusion of the hearing, and after continuing discussion between Counsel and refinement of the City's proposal regarding drug and alcohol testing, the parties agreed to waive analysis of the statutory criteria which were not raised at hearing and to limit argument on the remaining issues.

**FINAL OFFERS OF THE PARTIES**

**CITY OF PATERSON FINAL OFFER**

**for**

**FIRE OFFICERS' ASSOCIATION (CAPTAINS)**

1. Contract Term - Agrees to five year contract (August 1, 2005 through July 30, 2010).
2. Wage Increase (Article 5) - Agrees to the Captains' wage proposal:

<u>8/1/2005</u>	<u>8/1/2006</u>	<u>8/1/2007</u>	<u>8/1/2008</u>	<u>8/1/2009</u>
3.75%	4.5%	4.5%	3.5%	3.5%

3. Longevity (Article 6.1) - Agrees to the revised longevity payments proposed by the Captains:

<u>Years of Service</u>	<u>2003-2005 Agreement</u>	<u>2005-2010 Agreement</u>
5	2%	2%
10	4%	4%
15	6%	6%
18		8% (See Footnote #7)
20	12%	12%
21		14%
22		16%
23		18%
24	20%	20%

However, the City requested the revisions to become effective on January 1, 2010.

4. Holiday Pay (Article 11.4) - Modifies its initial position that the Captains' proposal to increase the pay for employees scheduled to work on any of the twelve scheduled holidays by 50% be deleted in its entirety, provided that it does not go into effect until January 1, 2010.

5. Alcohol and Drug Free Workplace (Article 29.1) and Attachment A. Proposes that the new Alcohol and Drug Testing Policy include random alcohol and drug testing. The City will draft a random alcohol and drug policy based on the Alcohol and Drug Policy attached (as Attachment A) to the Tentative Agreements negotiated with the Mayor, but not ratified by the City Council, with additional language to include random alcohol and drug testing. The draft will be submitted to the Fire Officer Association for its review and, if necessary, negotiations. Interest Arbitrator Pierson will maintain jurisdiction in the event that an agreement cannot be reached.

**FINAL OFFER of the FIRE OFFICERS' ASSOCIATION (CAPTAINS)**

The Captains sought to amend or maintain the "Contract between The City of Paterson and Uniformed Fire Officers Association", which commenced on August 1, 2003 and expired on July 31, 2005, with the following considerations to provisions addressing night differential, holiday pay and random drug testing.<sup>3</sup>

---

3. The Captains recalled negotiations and noted that steps were taken as early as May 17, 2005 to negotiate in good faith with the City and directly with Mayor Torres. As the Captains asserted, various economic and

1. Article 9.5 - Night Differential. Recognizing that the City proposed the removal of the present provision from the Agreement, the Captains sought to maintain the contract clause, which states, in its present language:

9.5 Night differential of three (3%) percent shall be paid to all employees covered under this Agreement whether working or on leave.

The Captains urged the Arbitrator to consider N.J.S.A. 34:13A-16g (2) (b) and © as well as N.J.S.A. 31:13A-16g (8), which compares the wages, salaries, hours, and conditions of employment of the employees involved in the arbitration proceedings with the wages, hours, and conditions of employment of other public employees, in general, or employees in the same or similar employment in the same or similarly comparable jurisdictions.

The Captains submitted three public sector contracts for review and comparison of Night Differential payments. According to the Captains, the City of Newark Firefighters maintain a shift differential paid in quarterly installments; the Superior Officers Association of Paterson Police Department contract also contains a Night Differential<sup>4</sup>; and Paterson's DPW Supervisors also receive a Night Differential.<sup>5</sup>

---

non-economic issues were resolved and a new Agreement was reached, signed by the Mayor and Association President Brian Burns. The Association acknowledged that a significant portion of the successor Agreement concerned implementation of a new alcohol and drug policy. (See Captains Exhibit 1 and 2). In August, 2007, the proposed Agreement was approved by a vote of members at a special meeting; in September 2007, the Agreement was signed by the Association President Brian Burns and Mayor Jose Torres. The Agreement was to be applied retroactively on August 1, 2005 and in full force and effect through July 31, 2010. The successor Agreement was

The record revealed that, in the early months of 2008, a lawsuit was filed against the City to compel a vote by Council (and prescribed damages). When the suit was dismissed, the Association continued its efforts through PERC.

4. See Section 29.7, which provides for a five (5%) percent differential applicable to all employees for all work actually performed between the hours of 1500 and 0800 on tours of duty that start on or about 1500 and on or prior to 2400 as well as all employees assigned to certain schedules, squads and platoons.

5. See Exhibit 11, Article XI D (page 25) of said contract provides for a three (3%) percent differential for all employees working the second shift.

The Captains further contended that N.J.S.A. 34:13A-16g-(8) is relevant to the issue of night differential issue, asserting that the “continuity and stability of employment ... should be considered” in the Arbitrator’s determination. The Captains argued that the removal of this benefit would have a serious impact on the continuity and stability of employment which the stature seeks to protect.

Moreover, the Captains asserted that, after twenty-two (22) years of being in the Agreement (and surviving several negotiations), the City had never attempted to remove the night differential clause. As the Captains submitted, the City waived its right to remove the Night Differential clause from the Agreement. contract.

2. Article 11. 4 - Holidays. Recognizing that the City proposed the removal of the present provision from the Agreement, the Captains sought to maintain the contract clause, which states, in its present language:

11.4. Employees scheduled to work on any of the following holidays shall receive one-half (½) times their regular hourly rate for all hours worked on said holiday, in addition to their regular day’s pay...

The Captains advanced the position that the holiday pay provision was negotiated into the 2003-2005 Agreement and simultaneously agreed to an increase in the co-pay of their health insurance coverage. The Captains opposed the City’s attempt to remove the holiday pay provision despite the “give back” given by the Association membership. It was the Captains’ position that, by requesting the removal of the holiday provision, the City has breached the implied covenant of good faith and fair dealing.

In addition, the Captains cited N.J.S.A. 34:13A-16g (2) (b) and ©, several contracts which provide benefits for holidays.<sup>6</sup> Likewise, two comparable contracts for employees within the City

---

6. See Exhibit 3 - City of Newark Fire Officers Agreement, Article 7.01 through 7.03, citing the Holiday pay provision. The contract establishes thirteen (13) holidays and the member is paid for one hundred fifty-six (156) hours regardless of whether they work the holiday. Holiday pay is put into the base pay and paid out

of Paterson allow for enhanced holiday benefits. According to the Captains, the Paterson Superior Officers Association contract directs ninety-six (96) hours of holiday pay incorporated in base salary, regardless of whether the holiday is worked. (See Exhibit 9, Article 25, page 9). The second Agreement with the City Public Safety Fire and Police Communications Operators (Dispatchers) provides for payment equal to two and one-half times the regular rate of pay if any one of fourteen holidays are worked. (See Exhibit 12, Article X, page 21).

The Captains contended that each of the referenced Paterson agreements exceeds the demand made in the Captains' present contract benefit. As the Captains maintained, it is merely seeking time and a half pay for each holiday worked.

3. Drug and Alcohol Policy. The Captains maintained that the drug and alcohol policy (see Exhibit 2 and Article XXIII of the successor Agreement) was a product of extensive negotiations between the numerous Fire Fighters' bargaining units and the City of Paterson and based on an appropriate "reasonable suspicion standard" and contains an Employee Assistance Program ("EAP").

---

on a bi-weekly basis.

See Exhibit 4 - The Newark Firefighters also receive Holiday pay for thirteen (13) holidays. Article X page 16 of the contract.

See Exhibit 5 - The Clifton FMBA Local 21 also receive enhanced Holiday benefits. Article X, page 16. The contract recognizes thirteen (13) holidays. Two and one-half days of compensatory time are granted for each of five specified holidays. For the remaining eight (8) holidays, the member receives time and one half.

See Exhibit 6 - Jersey City Uniformed Fire Officers Association, IAFF Local 1064 and Exhibit 7 - North Plainfield Professional Fire Officers Association, IAFF Local 2983. Both bargaining units receive fourteen (14) holidays. See Exhibit 6 at Article 20, page 18. Eight of the holidays entitle the officer to eight compensatory days off in addition to their regular wages. The remaining six shall be paid to the officers in cash at straight time rates in addition to the regular wages. See Exhibit 7 at Article VI, page 5. Officers receive payment for a minimum of fourteen (14) days per year in addition to their regular wages. Payment is included in, and is paid with, regular compensation.

See Exhibit 8 - City of Elizabeth FMBA Local 9 Interest Arbitration Award, which provides holiday benefits and allows firefighters time off to cash in up to eighty-eight hours of holiday time. (See Award, page forty-eight (48)).

See Exhibit 10 - Township of Union FMBA Local 246 Agreement provides for payment of thirteen (13) holidays regardless of whether they are worked and is included in base salary. See Article IX, page 9.

The Captains opposed the City's rejection of the policy and attempts to initiate a "random testing policy." The Captains urged rejection of the random testing based, in part, on the cost of testing.

4. Retroactivity. The Captains requested the Arbitrator to direct all benefits and salaries be applied retroactively, "eliminating the need to pursue and/or seek additional remedies from either the Superior Court of the State of New Jersey or PERC."

[Also: see Footnote<sup>7</sup>]

**CITY OF PATERSON FINAL OFFER**  
**for the**  
**DEPUTY FIRE CHIEFS ASSOCIATION**  
**and**  
**UNIFORMED BATTALION CHIEFS ASSOCIATION**

1. Contract Term - Agrees to five year contract (August 1, 2005 through July 30, 2010).

2. Wage Increase (Article 5) - Agrees to the Captains' wage proposal:

<u>8/1/2005</u>	<u>8/1/2006</u>	<u>8/1/2007</u>	<u>8/1/2008</u>	<u>8/1/2009</u>
3.75%	4.5%	4.5%	3.5%	3.5%

3. Longevity (Article 6.1) - Agrees to the revised longevity payments proposed by the Captains:

<u>Years of Service</u>	<u>2003-2005 Agreement</u>	<u>2005-2010 Agreement</u>
5	2%	2%
10	4%	4%
15	6%	6%
18		8% (See Footnote #7)
20	12%	12%
21		14%
22		16%
23		18%
24	20%	20%

However, the City requested the revisions to become effective on January 1, 2010.

---

7. By letter dated June 3, 2009, Counsel for the Associations corrected the City's formulation of the longevity table and noted their position to include an increase of longevity payment from year 19 of service to year 20 of service from 8% to 10%. The City did not agree to the increase.



4. Holiday Pay (Article 11.4) - Modifies its initial position that the Captains' proposal to increase the pay for employees scheduled to work on any of the twelve scheduled holidays by 50% be deleted in its entirety, provided that it does not go into effect until January 1, 2010.

5. Alcohol and Drug Free Workplace (Article 29.1) and Attachment A. Proposes that the new Alcohol and Drug Testing Policy include random alcohol and drug testing. The City will draft a random alcohol and drug policy based on the Alcohol and Drug Policy attached (as Attachment A) to the Tentative Agreements negotiated with the Mayor, but not ratified by the City Council, with additional language to include random alcohol and drug testing. The draft will be submitted to the Fire Officer Association for its review and, if necessary, negotiations. Interest Arbitrator Pierson will maintain jurisdiction in the event that an agreement cannot be reached.

**FINAL OFFER**  
**of the**  
**DEPUTY FIRE CHIEFS' ASSOCIATION ("Deputy Chiefs")**  
**and**  
**PATERSON BATTALION CHIEFS' ASSOCIATION ("Battalion Chiefs")**

In addition to the proposed salary increases, the Deputy Chiefs and Battalion Chiefs' (together, the "Chiefs") sought improvements to the Longevity and Night Differential provisions of their respective Agreement.

With respect to the Longevity, the Chiefs proposed a realignment of the steps, effective with the issuance of the Award, to reflect:

<u>Years of Service</u>	<u>2003-2005 Agreement</u>	<u>2005-2010 Agreement</u>
5	2%	2%
10	4%	4%
15	6%	6%
18		8%
19		10%
20	12%	12%
21		14%
22		16%
23		18%
24	20%	20%

According to the Chiefs, its position, in relevant part, was based on the New Jersey Division of Pensions' review of the longevity schedule under the current Agreements with respect to proper funding of the benefit during the career of the firefighter. As the Chiefs represented, the Division determined that for "pension purposes, it is noted that the longevity schedule to 12% commencing in the 20<sup>th</sup> year and 20% commencing in the 24<sup>th</sup> year is problematic and must be corrected in future contracts commencing July 1, 2005, and thereafter."<sup>8</sup> The Chiefs further referred to the Division's position that any longevity schedule would only be pensionable if the increments were given in equal amounts throughout the years. According to the Chiefs, its proposed longevity schedule meets the advice of the Division of Pensions and allows the employee and the City to properly fund the pension.<sup>9</sup>

The Chiefs maintained that the longevity schedule, as proposed, reflects the negotiation between the bargaining units and the May and are in conformity with respect to the recommendations of the Division of Pensions as to "creditable compensation."

With respect to Night Differential, the Chiefs opposed the City's attempt to alleviate the night differential compensation, a benefit in place since the 1980's. According to the Chiefs, the night differential is a benefit consistent with the terms and conditions of employees performing similar services in the same or comparable jurisdictions. As the Chiefs submitted, the City's other unions enjoy longevity pay<sup>10</sup>, including the Police who receive five per cent (5%) night differential payments.

---

8. See Exhibit 28, NJDP letter dated November 7, 2008.

9. The Chiefs argued that the Division was seeking to preclude the longevity payments to retired Chiefs, but merely advising that it may not recognize the payments as credible compensation for pension and death benefits. According to the Chiefs, retirees who have retired through November 3, 2008 are grandfathered from this determination, although member who retire after November 4, 2008 may be subject to a retroactive salary adjustment made to their retirement allowance should any longevity payments be deemed non-creditable.

10. PBA Local #1, the (Police) Superior Officers Association, AFSCME and UPSEU.

Moreover, the Chiefs argued that the City could not meet its burden of proof, as required for modifying existing contract language, to support its request for this Arbitrator to eliminate night differential compensation. According to the Chiefs, the City failed to meet its burden of proof to support the elimination of longevity payments, a benefit in the Chiefs' Agreements since 1983.<sup>11</sup>

The Chiefs requested the Arbitrator to sustain the previously negotiated increase of .3% (3/10 of 1%) increase to the existing 1.7% payment to reflect a result in a two percent (2%) of full salary for night differential.

Finally, the Chiefs opposed the City's attempt to modify the Drug and Alcohol Policy to reflect a "random standard of testing" and maintained that changing the Policy would unfairly impede on the Constitutional Rights of the members of the two bargaining units.<sup>12</sup> It was the Chiefs' position that the City had the burden of producing evidence to document support for the Policy change. As the Chiefs advanced, there is no compelling reason for the City's approach to seek a policy which simply to deter and detect alcohol and drug use among firefighters<sup>13</sup> and requested the Arbitrator to maintain the Policy agreed to by the parties on September 14, 2007.<sup>14</sup> As the Chiefs argued, a policy providing for "reasonable suspicion" is constitutional, fair and fiscally sound.<sup>15</sup>

---

11. The result of an interest arbitration award of Arbitrator Robert Mitrani.

12. The Chief's arguments was based on the right against unreasonable searches and seizures guaranteed under the Fourth Amendment of the United States Constitution and Article 1, Section 7 of the New Jersey Constitution.

13. The Chiefs contended that the City produced no evidence of widespread drug or alcohol use among firefighters nor a history of accidents, fatalities, injuries or property damage attributed to use of drugs or alcohol.

14. See Exhibit N.

15. The Chiefs also argued that implementation of a "random test" policy would also carry an increased cost to the City and have a financial impact on the City, its residents and taxpayers.

In response to the arguments advanced by the Chiefs, the City maintained that “random testing” was the appropriate standard for alcohol and drug testing and essential for public safety considerations. According to the City, Firefighting personnel have a vital, dangerous and sensitive job, balancing the protection of the public and risk to their own safety. As such, the City contended that the public interest is best served by insuring that Firefighters are not impaired when protecting the public in a fire emergency. The City maintained that “a public employer may impose random drug testing with respect to employees who works in a safety sensitive position.”<sup>16</sup>

The City contended that “random testing” is reasonable under the concern for public safety and a safety measure that protects citizens from the ill effects of drug and alcohol when providing safety to citizens and fell firefighters. It was the request of the City that this Arbitrator award the City the right to subject all its firefighter personnel to “random drug and alcohol testing.”

### **STATUTORY CRITERIA**

Pursuant to N.J.S.A. 34:13A-(d)(2), wherein the dispute is resolved through conventional arbitration, the resolution is reached through application of all of the relevant statutory of N.J.S.A. 4:13A-16(g)(1) through (9), with due weight given to each of the follow criteria:

g. 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. In the award, the arbitrator or panel of arbitrators shall indicate which of the factors are deemed relevant, satisfactorily explain why others are not relevant, and provide an analysis of the evidence on each relevant factor:

---

16. See *Kreig v. Seybold*, 481 F.3d 512 (7<sup>th</sup> Cir.2007); *Wilcher v. City of Wilmington*, 891 F.Supp. 993 (D.Del,1995); *City of Cleveland*, 125 LA(BNA)431 (Skulinka, Arbitrator). The City further represented that Arbitrator Martin Scheinman, in a related interest arbitration with the Paterson Firefighters Association, would be awarding the City of Paterson “the right to impose random alcohol and drug testing with respect to Firefighters.”

(1) The interests and welfare of the public. Among the items the arbitrator or panel of arbitrators shall assess when considering this factor are the limitations imposed upon the employer by P.L. 1976, c. 68 (C.40A:4045.1 et seq.).

(2) Comparison of wages, salaries, hours, and conditions of employment of the employees involved in the arbitration proceedings with the wages, hours, and conditions of employment of other employees performing the same or similar services and with other employees generally:

a) In private employment in general; provided, however, each party shall have the right to submit additional evidence for the arbitrator's consideration.

b) In public employment in general; provided, however, each party shall have the right to submit additional evidence for the arbitrator's consideration.

c) In public employment in the same or similar comparable jurisdictions, as determined in accordance with section 5 of P.L. 1995, c. 425 (C:34:13A-16.2); provided, however, that each party shall have the right to submit additional evidence concerning the comparability of jurisdictions for the arbitrator's consideration.

(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. Among the items the arbitrator or panel of arbitrators shall assess when considering this factor are the limitations imposed upon the employer by P.L. 1976, c. 68(C.40A:4-45.1 et seq.).

(6) The financial impact on the governing unit, its residents and taxpayers. When considering this factor in a dispute in which the public employer is a county or a municipality, the arbitrator or panel of arbitrators shall take into account, to the extent that evidence is introduced, how the award will affect the municipal or county purposes element, as the case may be, of the local property tax; a comparison of the percentage of the municipal purposes element or, in the case of a county, the county purposes element, required to fund the employees' contract in the preceding local budget year with that required under the award for the current local budget year; the impact of the award for each income sector of the property taxpayers of the local unit; the impact of the award on the ability of the governing body to (a) maintain existing local programs and services, (b) expand existing local programs and services for

which public moneys have been designated by the governing body in a proposed local budget, or ( c) initiate any new programs and services for which public moneys have been designated by the governing body in a proposed local budget.

(7) The cost of living.

(8) The continuity and stability of employment including seniority rights and other such factors not confined to the foregoing which are ordinarily or traditionally considered in the determinations of wages, hours, and conditions of employment through collective negotiations and collective bargaining between the parties in the public service and in private employment.

(9) Statutory restrictions imposed on the employer. Among the items the arbitrator or panel of arbitrators shall assess when considering this factor are the limitations imposed upon the employer by section 10 of P.L. 2007, c.62 (C.40A:4-45.45).

#### **DISCUSSION OF THE RECORD and REVIEW OF THE STATUTORY CRITERIA**

Of particular note to this interest arbitration is the recognition that the parties negotiated for an extended period of time in “good faith” and reached agreement for the City’s Fire Department employees. At the time of negotiation, the three Agreements resulted in balance of interests and were acceptable to all parties. Nevertheless, the record demonstrated that the tentative agreements, while finalized for execution, failed to meet approved by the City Council. To the credit and discretion of the parties, during the interest arbitration process, the claim of “politics” in the Council’s decision was merely noted but not emphasized.

To the further credit of the parties, in referring to the specific criteria of N.J.S.A. 4:13A-16(g)(4) (“Stipulations of the Parties”), it was stipulated that this Arbitrator need only address those factors (criteria) specifically addressed by the parties in their respective arguments. In fact, the parties agreed to waive reference to many factors not considered relevant to this Arbitrator’s decision. In large part, the parties recognized a limited number of economic issues in question.

From the outset, the City did not oppose the wage increases sought by the three Associations. In fact, the City recognized that wages were previously negotiated by the Mayor, with “tentative” agreements reached with the three Associations.

Likewise, the City did not oppose the longevity revisions, recognizing the input of the Division of Pension and direction for proper funding. However, while accepting the retroactive payment of wages, the City requested the longevity modifications be delayed until January 1, 2010. According to the City, waiting to implement the longevity revisions would lessen the financial impact on the City.

Similarly, the City did not oppose the Chief’s request for an increase to the night differential, with the repeated request that the increase be delayed until January 1, 2010. Again, delaying the increase to night differential lessens the financial impact on the City.

Moreover, while not opposing the Captain’s proposal for a modification of holiday pay for employees scheduled to work on any of the twelve scheduled holidays, the City proposed two adjustments: first, that the implementation of the Fire Captains’ proposal to increase holiday pay be delayed until January 1, 2010 (again, reducing the immediate financial impact) and, second, that the Fire Chief be given discretion to decide whether to compensate holiday pay in cash or compensatory time.

With no material disagreements on the economic issues with the three Associations, the City’s documentary evidence related to comparable collective bargaining agreements and regular budgetary reports.

The Chiefs presented evidence, both testimonial and evidentiary, which clearly set forth support for their positions on the economic issues.

Deputy Chief McLaughlin described the issues in negotiations and confirmed a previous accord on the terms of a successor agreement. He noted the City did not object to the increase in night differential.<sup>17</sup> The witness added that the drug and alcohol policy was not raised during negotiations with the Mayor, but discussed in 2007 after contract negotiations concluded.<sup>18</sup> According to his testimony, the parties accepted a policy which was “finalized” in 2007 with a “reasonable suspicion” standard.

Battalion Chief Thomas Hirz also testified on behalf of the Chiefs and recalled his involvement in the prior negotiations and resulting “five-year agreement ... through July 2010.” He related how the terms of the agreements were reduced to writing and subject to a proposed drug policy. As he recalled, the drug policy was a “collaboration” of the units, based on a “reasonable suspicion” standard.

The Chiefs argued that the “tentative” agreements were appropriate, when considering ratification. According to the Chiefs, the interest and welfare of the public are best served by a fire department that is stable, sufficiently funded and adequately staffed. Recognizing the City’s obligation to protect the financial interest of the public, the Chiefs also asserted that providing the essential service of fire protection to the community was is equally important. As the Chiefs advanced, the economic package sought by the Chiefs was comparable compensation to the other public sectors unions in the City.

---

17. Deputy Chief McLaughlin testified that he received a contractual night differential payment since the “mid-80’s”. Battalion Chief Hirz confirmed that the night differential was in effect since the early 1980’s.

18. As the Deputy Chief described, in 2007, a policy was developed through a joint effort of Counsel to the City and the three Associations.



In referring to “night differential”, the Chiefs pointed to the pattern of settlements with police unions as supporting the increase in benefit. The Chiefs cited budget grants and State aid in further support of its position that the City has the financial ability to meet its obligations under the proposed increase of .3% added to the present 1.7% of salary (resulting in a total night differential of 2% of full salary).

In testimony, Captain Brian Burns (President of the FOA) recalled the negotiations with the Mayor, beginning in March 2005 and concluding in July 2006 with a meeting of the minds on the financial issues. As he related, the drug policy was also raised, but with agreement on a “reasonable suspicion” standard.

In support of its economic position, the Captains introduced contracts of other fire departments. As the Captains maintained, other fire contracts provide benefits which “exceed” the Captain’s request, including the “holiday demand” for a 50% increase in holiday pay when a Captain works on one of the contractually listed holidays. The Captains argued that the contracts submitted for review derive from municipalities similar to Paterson.

Captain Burns also testified that the Paterson is the third largest city in New Jersey and it firefighters are deserving of benefits granted in larger cities like Newark and Jersey City, but also enjoyed in smaller municipalities (Clifton, North Plainfield and Elizabeth). According to the Captains, since all the municipalities deal with diverse urban settings similar to that found in Paterson, the City should grant benefits similar to other municipalities.

The Captains pointed to the drug and alcohol policy (Exhibit 2) proposed by the P.F.O.A. According to the Captains, the policy is the product of hours of negotiations between the various Paterson firefighters unions and the City of Paterson. Moreover, the Captains argued that the detailed discussions resulted in the creation of the policy, which was agreed to by the City and provided for “reasonable suspicion” testing and an Employee Assistance Program.

The Captains asserted that the City of Paterson is now rejecting the policy that was originally negotiated and approved; seeking instead a "random testing" policy. According to the Captains, its membership is opposed to the City's revised proposal.

In the opinion of this Arbitrator, the increases to both wages and longevity increments were generous when negotiated, responsive to conditions existing at the time of negotiation and, now, an anomaly in the face of awards being presently issued. As the City noted, whether compared to wage increases in larger, financially-strapped cities or affluent suburban communities, the negotiated salary increases exceeded the average of salary increases through "awards" or reported "voluntary settlements" submitted in present reports.<sup>19</sup> This Arbitrator cannot disagree. The negotiated wage increases "are not a realistic benchmark" in this award nor in interest arbitration awards presently being issued throughout the State. The financial condition of this City (and other communities throughout the State) were not (and, could not have been) forecasted at the time of the negotiations between the parties. Indeed, there are economic limitations on the City.

At the same time, this Arbitrator recognizes that the three bargaining units have been held to 2005 salary levels for more than four years and been in limbo of economic increases during that same period of time. During that time, firefighters have worked 91 shifts per year and 2,184 total hours, without economic increases. Thus, if wage increases appear greater in comparison to other municipal employers, there is a consideration of 'lost wages' during the five year period the three bargaining units remained without a salary increase.

As a result, this Arbitrator shall confirm a five (5) year contract duration period, effective August 1, 2005 through July 31, 2010, with initial modifications to reflect wage increases for each rank and step on the respective salary guides. The increases shall be:

---

19. See "Public Employment Relations Commission Salary Increase Analysis - Interest Arbitration 1/1/93-12/31/2008".

Effective: August 1, 2005: 3.75% across-the-board  
Effective: August 1, 2006: 4.5% across-the-board  
Effective: August 1, 2007: 4.5% across-the-board  
Effective: August 1, 2008: 3.5% across-the-board  
Effective: August 1, 2009: 3.5% across-the-board

Moreover, wage increases shall be implemented immediately and paid retroactively to August 1, 2005. Retroactive payments shall be made within a reasonable period of time not to exceed two (2) months from the issuance of this Award.

With respect to Night Differential, the record revealed a benefit in existence since the mid-1980's. Herein, the Chiefs are attempting modify the provision in both contracts by increasing the amount of salary paid to Chiefs.<sup>20</sup>

The Associations submitted a comparison with other Paterson employee unions ( PBA Local 1 and the Superior Officers Associations and the Fire Captains, the Department of Public Works employees represented by the American Federation of State, County, and Municipal Employees and the United Public Service Employees Union), stressing that all contracts contained compensation for night differential. Evidence demonstrated that the Police Department received a five per cent (5%) night differential. (Awarded through an Interest Arbitration Award, see Exhibit D, dated May 2006).

In the opinion of this Arbitrator, the Chiefs have provided sufficient evidence to grant the increase (of .3%) to be added to the present night differential (1.7%) and to modify the night differential to "two per cent (2%) of salary", effective July 1, 2009.

---

20. The Chiefs hree Associations introduced evidence in response to the City's original position to eliminate Night Differential from the Agreements. However, in its Final Offer, the City did not seek elimination of Night Differential, but agreed to the "increased to two per cent (2%) of salary," with the condition that the increase take effect on January 1, 2010.

With respect to Longevity, this Arbitrator is convinced there is justification for realigning the longevity benefit, in that the evidence clearly revealed increments are too high in later years of employment and require adjustment in order to insure proper funding of pension benefits. Language contained in the November 7, 2008 letter from the NJ Division of Pensions pointed to the potential problem in that any longevity schedule would only be pensionable if the increments are given in equal amounts throughout the years. The longevity schedule submitted by the Chiefs addresses the issue by providing for increments in equal amounts throughout the years of service, thus allowing firefighters and the City to properly fund pensions. The Longevity provision of the Agreements shall be modified according to the submissions.

Finally, in response to the arguments advanced by the Captains and the Chiefs regarding “drug and alcohol testing,” the City maintained that “random testing” was the appropriate standard for alcohol and drug testing and essential for public safety considerations. According to the City, Firefighting personnel have a vital, dangerous and sensitive job, balancing the protection of the public and risks to their own safety. As such, the City contended that the public interest is best served by insuring that Firefighters are not impaired when protecting the public in a fire emergencies. The City maintained that “a public employer may impose random drug testing with respect to employees who works in a safety sensitive position.”

The City contended that “random testing” is reasonable under the concern for public safety and a safety measure that protects citizens from the ill effects of drug and alcohol when providing safety to citizens and fell firefighters.

This Arbitrator finds agreement with the City’s request that the Alcohol and Drug Policy (Article 29.1 and Attachment A) be modified to include random alcohol and drug testing

procedures. As supported by prior court decisions, firefighters have a “vital, dangerous and safety sensitive job.” *Brown v Winkle*, 715 F.Supp.195 (N.D. Ohio 1989). In the opinion of this Arbitrator, while there is a self-imposed sense of job responsibility maintained by firefighters, the public’s expectation of an on-duty officer justifies a standard of conduct, clearly stated and highly held.<sup>21</sup>

Although there may be no evidence of an existing drug or alcohol problem in the department nor an awareness of individual drug and alcohol abuse within the ranks, the City has responsibility to protect the public and provide safety response on a twenty-four hour, seven-day per week basis and to insure the public that fire emergencies are being addressed with a fire-fighting force conditioned to perform their duties and provide protection to person and property. When considering the territorial size of the City and its vast population, the City can meet its responsibility by pursuing adherence to a strict drug and alcohol policy.<sup>22</sup>

The City shall draft the additional language of a random alcohol and drug testing policy to be incorporated into the previously proposed written policy (“Schedule A”) and, upon review and agreement by the three bargaining units\*, shall implemented through Article 29.1 and Attachment A of the respective Agreements.<sup>23</sup>

An analysis of the N.J.S.A. 34::13A-16g(1) to (9) criteria follows:

---

21. While Chief Postorino found the existing policy sufficient and questioned the random testing standard, he acknowledged that the City’s demand for “random testing” was to provide a safer environment for both City residents and Department employees.

22. See City Exhibit 34, News Article, “Unions Wrong About Drug Testing, Drug Free Workplace, at page 2, “Random alcohol and drug testing is more common in major urban fire departments around the country, including Baltimore, Chicago, New York City, Philadelphia, and San Francisco.”

23. This Arbitrator’s decision relates only to the contract justification and does not address the individual privacy issues attached to the implementation and administration of a “random testing” procedure. (See City Exhibit 30).

### **Interests and Welfare of the Public**

Without question, the interest and welfare of the public is best served by a stable fire department, sufficiently funded to perform its duties, adequately staffed by qualified firefighters and effectively lead by experienced fire officers. In recognizing the City's obligation to protect the interests of the public, the Associations asserted that providing the community with professional staff of firefighters is equally important. According to the Association, the economic package sought by fire officers is reasonable and comparable to compensation to the City's other public sector (police) unions.

The record demonstrated that the City of Paterson is the third largest city in New Jersey and, by its own acknowledgment, is required to provide fire protection in a diverse urban setting. Firefighters employed by the City, with wages held at 2005 levels, perform their duties in a professional and skillful manner. It follows that the same firefighters are deserving of compensation similar to those received by firefighters in larger cities (such as Newark and Jersey City) and municipalities such as Clifton, North Plainfield and Elizabeth. All cited municipalities face a diverse and "distressed" urban settings, similar to Paterson, where providing emergency services to its residents are a critical element of the government operation.

This Arbitrator is convinced that the welfare of the public is best served by a Fire Department with professional firefighters adequately compensated. The award of wage increases is an attempt to place the City's superior fire officers in a position of adequate compensation and reasonably responsive to the duties they perform for the City.

### **Overall Compensation**

Evidence established that overall compensation of the Captains and Chiefs include wages, vacations, holidays, excused leaves, insurance and pensions, medical and hospitalization benefits. The two economic improvements sought by the Chiefs, specifically to increase "Night Differential" and realign "Longevity," place bargaining unit members in a favorable position as compared to other firefighting bargaining units in the same or similar employment. In the opinion of this Arbitrator, Firefighters in the City of Paterson receive a "solid", although not frivolous, compensation package. The City's characterization of "generous" salary increases is not lost on this Arbitrator.

### **Stipulations**

The parties entered a stipulation to waive arguments on the specific criteria which were not raised in argument nor deemed relevant to the issues presented for this Arbitrator's decision. The parties further agreed to waive the requirement for the Arbitrator to address the criteria of N.J.S.A. 34:13A-16(g) in detail.

### **Lawful Authority of the Employer**

Notwithstanding the waiver of the parties to submit argument on this criteria, evidence was produced at hearing which guided this Arbitrator to conclude that the City has the ability to pay for the proposed economic increases while staying within its budgetary constraints and the restrictions of the New Jersey Cap Law.

### **Financial Impact**

Based on the evidence presented, wage increases will have a financial impact on the City. Notwithstanding, the Fire Chief acknowledged the City's receipt of a \$6.4 million Federal grant for the purposes of firefighter salaries and State aid intended to apply to the City budget.

**Cost of Living**

Waived by the parties.

**Continuity and Stability of Employment**

Waived by the parties.

**Statutory Restriction Imposed on the Employer**

Waived by the parties.

\*\*\*\*\*



In consonance with the proof, and upon all the foregoing, the undersigned Arbitrator hereby renders, decides, determines, and issues the following.

**INTEREST AWARD**  
**Public Employment Relations Commission**  
**Docket Nos. IA-2008-057; IA-2009-007; IA-2009-006**

**I. Common Contract Modifications**

1. **Term of Agreement**: Modify the three Collective Bargaining Agreements to reflect a five (5) year duration period, effective August 1, 2005 through July 31, 2010.

2. **Wages** - Increase each rank and step on the respective salary guides, as follows:

Effective: August 1, 2005: 3.75% across-the-board

Effective: August 1, 2006: 4.5% across-the-board

Effective: August 1, 2007: 4.5% across-the-board

Effective: August 1, 2008: 3.5% across-the-board

Effective: August 1, 2009: 3.5% across-the-board

**Retroactive Pay**: Wage increases shall be implemented immediately, inclusive of retroactive amounts from August 1, 2005, and paid within a reasonable period of time not to exceed two (2) months from the execution of this Agreement.

3. **Alcohol and Drug Free Workplace - Article 29.1 and Attachment A**. Modify the three Collective Bargaining Agreement to include a "random alcohol and drug testing" policy. The City shall draft the additional language of a random alcohol and drug testing policy to be incorporated into the previously proposed written policy ("Schedule A") and, upon review and agreement by the three bargaining units\*, shall implemented through Article 29.1 and Attachment A of the respective Collective Bargaining Agreements.

\*This Arbitrator shall retain jurisdiction of this matter as it relates to the language of the random alcohol and drug testing policy, should an agreement not be reached.

## II. Individual Contract Modifications

### 4. Fire Officers' Association (Captains):

A. **Article 5.:** [In addition to the Wage increases set forth above] add:

**Retroactive pay:** Wage increases shall be implemented immediately, inclusive of retroactive amounts from August 1, 2005, and paid within a reasonable period of time not to exceed two (2) months from the execution of this Agreement..

B. **Article 6.1 - Longevity.** Effective August 1, 2009, Article 6.1 shall be amended to reflect the following longevity payment schedule:

<u>Years of Service</u>	<u>2003-2005 Agreement</u>	<u>2005-2010 Agreement</u>
5	2%	2%
10	4%	4%
15	6%	6%
18		8%
19		10%
20	12%	12%
21		14%
22		16%
23		18%
24	14%	20%

C. **Article 11.4 - Holiday Pay.** Effective January 1, 2010, Article 11.4 shall be amended to reflect that Captains scheduled to work on any of the twelve scheduled holidays receive one-half time their regular hourly rate for all hours worked on the holiday, in addition to their regular pay for the day's work. The aforementioned compensation shall be in either cash or compensatory time, at the discretion of the Fire Chief.

### 5. Deputy Fire Chiefs' Association and Uniformed Battalion Chiefs' Association

A. **Article 4.4 - Night Differential.** Effective August 1, 2009, Article 4.4 shall be increased to reflect a night differential of two (2.0%) percent of the full salary compensation.

**B. Article 6.1 - Longevity** (Deputy Fire Chiefs') and **Article 4.5 - Longevity** (Uniformed Battalion Chiefs') Agreements. Effective August 1, 2009, the respective contract provisions shall be amended to reflect the following longevity payment schedule:

<u>Years of Service</u>	<u>2003-2005 Agreement</u>	<u>2005-2010 Agreement</u>
5	2%	2%
10	4%	4%
15	6%	6%
18		8%
19		10%
20	12%	12%
21		14%
22		16%
23		18%
24	14%	20%

**C. Article 20 - Retroactive pay:** (Deputy Fire Chiefs\*) shall be amended and **Article 4.12 - Retroactive pay** (Uniform Battalion Chiefs\*) shall be added, which states:

"The parties agree that all monetary items owed to members of the   \*   Association Bargaining Unit pursuant to this Agreement shall be paid to them as soon as reasonably possible, but not to exceed two (2) months from the execution of this Agreement..

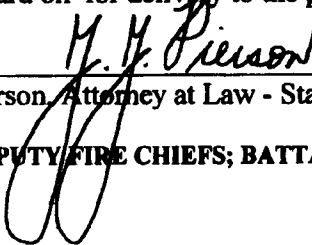
6. All remaining provisions of the existing three (3) Collective Bargaining Agreements shall be carried forward except those modified above.

Dated: June 21, 2009  
New Vernon, New Jersey

  
\_\_\_\_\_  
J. J. PIERSON, Esq., Arbitrator

STATE OF NEW JERSEY )  
                                  :SS  
COUNTY OF MORRIS    )

I, J. J. PIERSON, Esq., on my oath, do attest to being the person who has executed the foregoing instrument and issued the above Award on for delivery to the parties on June 22, 2009.

  
\_\_\_\_\_  
J. J. Pierson, Attorney at Law - State of New Jersey

CITY OF PATERSON -and- FIRE CAPTAINS; DEPUTY FIRE CHIEFS; BATTALION CHIEFS