NEW JERSEY PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of Arbitration Between:

TOWNSHIP OF WEST ORANGE

"Public Employer,"

- and -

FMBA LOCAL 28

"Union."

Docket No. IA-2007-001

INTEREST ARBITRATION DECISION AND AWARD

Before
James W. Mastriani
Arbitrator

Appearances:

For the City:
Kenneth A. Rosenberg, Esq.
Brett D. Halloran, Esq., on the brief
Fox Rothschild, LLP

For the FMBA:
Brian J. Aloia, Esq.
Weiner Lesniak LLP

This interest arbitration proceeding concerns a negotiations impasse between the Township of West Orange [the "Township"] and FMBA Local 28 [the "Union" or the "Firefighters"]. Local 28 is the majority representative of paid uniform firefighters. There are 55 firefighters in the bargaining unit who average slightly more than nine years of seniority. Overall, the fire department is comprised of the fifty-five (55) uniformed firefighters, and beyond the bargaining unit, twenty-seven (27) captains, six (6) deputy chiefs, and one (1) fire chief. The firefighters perform firefighting duties but also operate the Township's ambulance and perform the duties of emergency medical technicians ["EMTs"]. The Township and the Union are parties to a collective bargaining agreement [the "Agreement"] effective January 1, 2002 through December 31, 2005.

After a lengthy direct negotiations process, a petition for interest arbitration was filed with the New Jersey Public Employment Relations Commission [PERC]. I was designated to serve as interest arbitrator by the parties. Pursuant to that designation, I conducted several pre-interest arbitration mediation sessions. Despite a substantial narrowing of issues and positions, the parties were unable to reach final resolution. Thereafter, a formal interest arbitration hearing was scheduled on April 7, 2008. At the hearing, the parties mutually agreed to employ an alternative terminal procedure as is set forth in N.J.S.A. 34:13A-16.C(2). This subsection provides for:

> Arbitration under which the award by an arbitrator or panel of arbitrators is confined to a choice between (a) the last offer of the employer and (b) the last offer of the employees' representative, as a single package. [underline added]

The parties' agreement to utilize this terminal procedure was approved by PERC.

An interest arbitration hearing was held in West Orange, New Jersey on April 7, 2008. At the hearing, the parties argued orally and submitted substantial documentary evidence into the record. Certifications were received from John Sayers, the Township's Business Administrator, Edward J. Coleman, the Township's Comptroller, Treasurer, and Chief Financial Officer, Vincent J. Foti, FMBA Financial Consultant and Angelo Tedesco, President of Local 28. A schedule for the submission of post-hearing and response briefs was provided. In accordance with that schedule, as amended by the parties, response briefs were filed and exchanged on or about November 17, 2008.

The statute requires each party to submit a last or final offer. I have set forth below the last or final offer of each party.

FINAL OFFERS OF THE PARTIES

The FMBA

1. Four (4) year contract covering years January 1, 2006 through December 31, 2009, with contractual salary increases of four (4%) percent for each of the four (4) years. All increases effective January 1st of each year and fully retroactive to January 1, 2006.

2. Amend Article 24 – Uniform Allowance of the contract to provide that the uniform allowance shall be increased $25 per year for each year of the contract for a total increase of $100 over the life of the Agreement. Thus, the article shall be amended to indicate that the uniform allowance as follows: 2006 = $725; 2007 = $750; 2008 = $775; and, 2009 =$800.

3. Article 18 – Insurance: Effective January 1, 2008, amend prescription co-pays to $10 for generic drugs, $20 for brand name prescription drugs and increase mail order prescriptions to $2 per order.

4. Article 12 – Overtime: Amend to provide that "any member called in for duty on a scheduled day off shall be paid a minimum of 4 hours' pay at the overtime rate."

5. Article 28 – Uniform Allowance: Add the following language: "By December 31, 2008 all employees hired prior to September 26, 2005 shall be paid a one time stipend of $25 for the purpose of uniform shirt upgrades as per Order Number 2005-0147, Uniform Specifications. Employees in the unit eligible for the $25 stipend shall complete the uniform shirt upgrade within 3 months after payment by the Township. This one time stipend shall not be added to base salary."

6. All other economic and non-economic terms and conditions of employment contained in this Agreement shall remain unchanged.

The Township

A. Term of the Agreement: Four (4) year contract covering years January 1, 2006 through December 31, 2009.

B. Salaries:

1. Effective and retroactive to January 1, 2006, 3.9% wage increase.
2. Effective and retroactive to January 1, 2007, 3.8% wage increase.
3. Effective and retroactive to January 1, 2008, 3.9% wage increase.
4. Effective to January 1, 2009, 3.8% wage increase.

C. Holidays: Effective January 1, 2008, modify the contract to provide that the existing Martin Luther King Day holiday shall be recognized and paid out under the current Township's pay practice.

D. Uniform Allowance: Amend Article 24 – Uniform Allowance of the contract to provide that the uniform allowance shall be increased $25 per year for 2006, 2007, 2008 and 2009 for a total increase of $100 over the life of the Agreement. To effectuate this change Article 24 shall be amended to state that the uniform allowance for 2006 will be $725, for 2007 $750, for 2008 $775 and for 2009 $800.

Add the following language: "By December 31, 2008 all employees hired prior to September 26, 2005 shall be paid a one time stipend of $25 for the purpose of uniform shirt upgrades as per Order Number 2005-0147, Uniform Specifications. Employees in the unit eligible for the $25 stipend shall complete the uniform shirt upgrade within 3 months after payment by the Township. This one time stipend shall not be added to base salary."

E. Health Insurance: Article 18 – Insurance – Amend the prescription copays to $10 for generic drugs, $20 for brand name prescription drugs and increase mail order prescriptions to $2 per order. All changes to become effective no later than January 1, 2009.

F. Overtime: Article 12 – Overtime – Amend to provide that effective January 1, 2009 Article 12 shall include the following language: "Any member called in for duty on a scheduled day off shall be paid at a minimum of 4 hours' pay at the overtime rate."

G. Vacation: Article 28, Section B – Amend Section B to provide that employees hired after December 31, 2009 will receive vacation as follows: 1-3 years/5 24-hour shifts per year; 4-5 years/6 24-hour shifts per year; 6-10 years/7 24-hour shifts per year; and 11 or more years/8 24-hour shifts per year. Additionally the following sentence shall be deleted: "New probationary firefighters shall earn ½ of a 24-hour shift every month during their first calendar year of employment."

BACKGROUND

The Township is located in Essex County, some six miles west of downtown Newark. It has a population of 45,000 within a 12.154 square mile

area. It is mostly a residential community of owner-occupied single-family housing units that number approximately 17,000. It maintains a paid fire department consisting of eighty-eight (88) full-time employees, fifty-five (55) who are in the bargaining unit represented by FMBA Local 28. The fire department operates out of four (4) Township-owned fire houses. The department is productive as can be seen by an FMBA exhibit showing calls for service in 2006:

2006 Total Fire Department Calls

Municipality	# of Calls
Paterson	8,990
Union	5,894
East Orange	5,374
Clifton	5,166
West Orange	**4,309**
Linden	4,082
Cranford	3,999
Teaneck	3,785
Maplewood	3,562
Belleville	3,492
Irvington	3,008
Montclair	2,738
Bloomfield	2,114
Millburn	2,063
South Orange Village	1,510
Nutley	1,139

As this is a single package final offer proceeding, each party contends that its last or final offer in its totality is more reasonable than the other's and more in

line with the statutory criteria. As stated above, my authority is limited to a selection of one of the parties' final offer without deviation. It is commonly understood and accepted that when parties select this terminal procedure it motivates them to move closer to the other party's position. As is evident from their respective final offers, this objective was accomplished because the difference between the two positions in terms of overall dollar impact is not substantial. Nevertheless, a final voluntary resolution was not achievable despite the narrowness of the gap between the two final offers.

I will concisely summarize the reasons and the support that each party has offered in support of its final offer.

As a general overview in support of its position, the FMBA argues:

> The FMBA's final offer should be awarded because the Township's final offer cannot be granted as it attempts to impermissibly alter the vacation allotment received by FMBA members in contravention of long-standing Civil Service rules. The FMBA's final offer should also be awarded because of the financial impact of the offer is reasonable, fiscally responsible, and comparable to the raises received by firefighters in surrounding municipalities. The FMBA's final offer should also be awarded because, as more fully described in Point IV, the Township's final offer proposes to eliminate the Martin Luther King holiday without providing the firefighters proper compensation for this change. Finally, the FMBA's final offer should be granted because a comparison of the wages, salaries, hours and conditions of employment of the firefighters compared to other similarly situated employees requires the FMBA's position to be awarded.

The FMBA provides lengthy argument in support of its contention that the Township's final offer must be rejected because it contends that one element of the Township's final offer concerning a vacation schedule for new hires is illegal. Its position on this issue was fully set forth in its post-hearing brief:

> The Township's final offer attempts to impermissibly alter the vacation allotment received by FMBA members in contravention of long-standing Civil Service rules and therefore, cannot be awarded. As a civil service jurisdiction, the Township is obligated to adhere to the regulations promulgated by the Department of Personnel and set forth in Title 11A of the New Jersey Statutes and Title 4A of the Administrative Code. Simply put, although the Agreement negotiated between the FMBA and the Township govern the terms and conditions of the uniformed firefighters' employment, it still must adhere to the framework set forth in civil service regulations and may not include terms inconsistent with those regulations. State v. State Supervisory Employees Association, 78 N.J. 54, 81 (1978). In this case, the Township's final offer includes an impermissible alternation of the firefighters' entitlement to vacation benefits. The subject of vacation benefits is addressed in *N.J.S.A.* 11A:6-3 and *N.J.A.C.* 4A:6-12(b). Both *N.J.S.A.* 11A:6-3 and *N.J.A.C.* 4A:6-12(b) provide that vacation benefits for employees shall be <u>at least</u>:
>
> a. Up to one year of service, one working day for each month of service;
> b. After one year and up to 10 years of continuous service, 12 working days;
> c. After 10 years and up to 20 years of continuous service, 15 working days;
> d. After 20 years of continuous service, 20 working days.
>
> The aforementioned statute and supporting regulation expressly apply to municipal employees and are unambiguous in their *minimum* provisions for vacation entitlement. *I/M/O City of Newark and FMBA Local 4*, 14 NJPER ¶19126 (1988). Under *State Supervisory, supra*, negotiated terms and conditions of employment that are inconsistent with express statutes and/or regulations are preempted. *I/M/O City of Newark and FMBA Local 4*, 14 NJPER ¶19126 (1988) (noting that because a contractual clause provided benefits over the minimally required vacation allotment set forth in *N.J.A.C.* 4:1-17.3(b), predecessor of *N.J.A.C.* 4A:6-1.2(b), the clause was not preempted). Consequently, since vacation leave for the firefighters is specifically governed by statute and regulation, *N.J.S.A.* 11A:6-3 and *N.J.A.C.* 4A:6-1.2, the Township may not include terms inconsistent with those provisions in the collective negotiations agreement. Moreover, all negotiations relative to terms and conditions of employment specifically governed by statutes and regulations must begin

at the minimum required benefit set by those statutes and regulations, and are not permitted to fall below that minimum required benefit.

In the matter of City of Newark & FMBA Local 4, 14 NJPER ¶19126 (1988) is instructive on the issue (Exhibit U61). In that case, the Public Employment Relations Commission held that a union's grievance seeking to establish a different 'seniority' date for purposes of a firefighter's longevity and vacation rights under collective agreement was arbitrable. In so finding, the Commission held:

> The subject of vacation benefits is expressly addressed in N.J.S.A. 4:1-17.3(b) [now 4A:6-1.2(b)]. This regulation applies to municipal employees and is unambiguous in its **minimum** provisions for vacation benefits based upon periods of service rather than date of appointment. However, by its terms it expressly sets forth a **minimum** requirement (emphasis added).

Simply put, the Commission held that any contractual clause dealing with vacation benefits cannot contradict the minimums set by *N.J.A.C.* 4A:6-1.2, but it may provide greater benefits.

The Township's final offer as it relates to vacation benefits clearly violates the minimum mandatory vacation benefits established for the firefighters as set by Civil Service Rules in three different ways despite the long-standing prohibition on including terms inconsistent with express statutory provisions. First, the Township's proposal actually eliminates all vacation benefits for new probationary firefighters. Clearly, this violates the Civil Service requirement that new probationary firefighters receive one working day for each month of service up to the end of their first calendar year. The Township's proposal also only provides 10 working days (5 24-hour shifts) of vacation leave for employees with one to three years of service, however, civil service mandates that employees who have served for one to ten years receive 12 working days (6 24-hour shifts) of vacation annually (See *N.J.S.A.* 11A:6-3 and *N.J.A.C.* 46A:6-12(b)). Finally, the Township proposes to provide firefighters with more than 11 years of service only 16 working days (8 24-hour shifts) of annual vacation leave, while civil service sets 20 working days (10 24-hour shifts) as the minimum required vacation benefit for employees with over 20 years of service. *Id.*

It is without question that the vacation leave benefit contained in the Township's final offer is in direct contravention of Civil Service requirements. It is also without question that the Township is required to follow the provisions of Title 11 and Title 4A. The Township has even acknowledged this requirement in the parties' Agreement which specifically states:

> All employees who have worked one (1) year shall be known as permanent employees, and the probationary period shall be considered part of their seniority time

> subject, however, to any of the statutes and rules pertaining to Title 11 of the Laws of the State of New Jersey as amended and supplemented, and should there be any conflict between the provisions in N.J.S.A. Title 11, Title 4 (now 4A) of the New Jersey Administrative Code, and the provisions of the within agreement, the statutes or Administrative Code hereinabove referred to shall prevail.
>
> (Exhibit U39, page 8) Thus, applying the rationale of *State Service* and *Newark, supra*, as well as the express language of the parties' Agreement, the reduction in vacation benefits as proposed by the Township are preempted and cannot be incorporated into the parties' agreement. Consequently, the Township's final offer must properly be rejected, and the terms and conditions as proposed in the FMBA's final offer should be awarded and implemented.

The Union also rejects the Township's argument that the Township's vacation proposal for new hires is comparable to, or exceeds, vacation benefits received by other Township employees. The FMBA contends that the Township's conclusion is inaccurate for several reasons that it cites in its response to the Township's post-hearing brief:

> Foremost, the Township fails to address the impact of its decision to propose that vacation benefits for FMBA members with less than one year of service be completely eliminated. The Township also fails to acknowledge that although the Township is proposing the elimination of vacation benefits for all FMBA members with less than one year of service, all other Township employees with less than one year of service receive "one working day (vacation) for each month of employment" (T-7, page 9-10, T-79, T-80). Furthermore, every collective bargaining agreement offered into evidence by both the Township and the FMBA in this matter provides at least one working day of vacation for employees with less than one year of service (T63-T80, U26-U39). This fact is not surprising in that both N.J.S.A. 11A:6-3 and N.J.A.C. 4A:6-12(b) provide that vacation benefits shall be <u>at least</u> one working day for each month of service for employees with less than one year of service. As such, the FMBA's final offer must be awarded because the Township's request that employees with less than one year of service be provided with no vacation benefit is in violation of the mandatory minimum statutory requirements.
>
> Assuming the Township now recognizes the fatal defect in their final offer because they have read the FMBA's position statement, they must be

barred from attempting to alter their position. The Township's final offer states: "additionally the following sentence shall be deleted 'New probationary firefighters shall earn ½ of a 24-hour shift every month during their first calendar year of employment'" (Township's brief, page 8). The Township has always provided vacation benefits to employees with less than one year of service. In that regard, every negotiated agreement between the Township and the unions representing the Township's employees contains a provision similar to the provision the Township has proposed to delete from the FMBA's agreement that provides vacation benefits to employees with less than one year of service (T74 – T80). Furthermore, the Township's Code also contains a similar provision that provides vacation benefits to all new Township employees with less than one year of service (T7, page 9). Simply put, the Township's final offer contains no provision to provide vacation benefits to FMBA members with less than one year of service. Therefore, it is without question that the Township's final offer can only be interpreted as inappropriately proposing to eliminate vacation benefits for FMBA employees with less than one year of service, and as such, the FMBA's final offer must be awarded.

The Township apparently failed to recognize that the elimination of vacation benefits for FMBA members with less than one year of service violates the mandatory minimum requirement for vacation benefits contained in both N.J.S.A. 11A:6-3 and N.J.A.C. 4A:6-12(b). The Township also apparently failed to recognize that all Township employees are provided this benefit (T7, page 9). Furthermore, the Township failed to recognize (or just failed to acknowledge) that every collective bargaining agreement introduced into evidence provides at least this minimum vacation benefit for employees with less than one year of service (T63-T80, U26-U39). Nevertheless, the Township proposed to eliminate the vacation benefits for FMBA members with less than one year of service, and therefore, the Township's final offer cannot be implemented. Based upon the Township's failure to submit a final offer that meets the minimum statutory requirements, the FMBA's position must be awarded.

Finally, not only is the Township's final offer regarding the alteration of the FMBA's vacation benefits in violation of Civil Service rules, it is also simply unfair. If the Township's final offer is awarded, the FMBA will have the least beneficial vacation benefit out of all of the Township's employees (T74-T80). Furthermore, the FMBA members will be the only uniformed employees subject to a progressive step system for vacation benefits (T74-T78). Moreover, the FMBA members will be the only Township employees that were not provided with the minimum vacation benefits set forth in N.J.S.A. 11A:6-3 and N.J.A.C. 4A:6-12(b) (T74-T80). As a matter of fact, all other Township employees actually receive a more beneficial vacation benefit that set forth in N.J.S.A. 11A:6-3 and N.J.A.C. 4A:6-12(b). The FMBA will also be the only firefighters out of all of the fire

departments whose collective negotiations agreement were introduced into evidence not entitled to a vacation benefit if they have less than one year of service. Finally, newly hired firefighters will be the only Township employees not entitled to any vacation benefits. Therefore, the FMBA's final offer must be implemented because the Township simply failed to submit a fair offer that can be seriously considered.

It is without question that the vacation leave benefit contained in the Township' final offer is not only unfair, but it is in direct contravention of Civil Service requirements[1]. Consequently, the Township's final offer must properly be rejected, and the terms and conditions as proposed in the FMBA's final offer should be awarded and implemented.

The FMBA also submits a chart of vacation benefits that exist in many other paid municipal fire departments. From this, it argues that the existing benefits are fair and should not be reduced for new hires.

The FMBA also seeks rejection of the Township's final offer because one element concerns a proposal to change the Martin Luther King holiday from a floating holiday to a paid holiday. It alleges that the proposal that would convert time to base pay does not provide sufficient equivalent compensation. The Union notes that under the paid holiday provision that incorporates holiday pay (13 holidays) into base pay, each holiday is paid at .38% or approximately eight (8) hours of pay totaling 5%. Thus, if the Township's final offer were to be awarded, only an additional .38% would be added to base pay. The FMBA submits that the existing Martin Luther King holiday has a worth, in time, of either

[1] The FMBA also maintains the position as presented in its Post-Hearing Brief that the Township is required to provide a certain number of "working days" vacation. It is apparent that the Township believes that each tour represents 3 vacation days. Clearly, this was not the intent of N.J.S.A. 11A:6-3 and N.J.A.C. 4A:6-12(b). A working day for the West Orange Firefighters is a 10 working day shift or a 14 hour working night shift. As such, the Township must be required to provide all firefighters with the appropriate number of working days off. It is without question that neither the statute or code speak in terms of hours, both require a certain number of working days vacation.

ten (10) or fourteen (14) hours because that is the worth, in time, of a working day similar to a sick, personal or seniority day. Thus, the FMBA defines the Township's proposal as an "unjustified" because it "short changes" each firefighter between two (2) and six (6) hours for the paid holiday.

The FMBA acknowledges that it and the Township agree on the issue of a minimum number of hours pay for firefighters who are called in for duty on a scheduled day off. Currently, no such provision exists in the Agreement. In their final offers, the Township and the FMBA each propose the payment of four (4) hours pay for each call-in.

As part of its final offer proposal, the FMBA has agreed to a revision in prescription co-pay from $5.00 for generic drugs to $10.00, from $14 for brand name drugs to $20.00 and from $0 for mail order to $2.00. The Township has proposed these increases and the Union describes its agreement with the Township as being a substantial give-back to an existing benefit.

The FMBA also notes that its final offer package includes a proposal that agrees with the Township's offer to increase uniform allowance by $25.00 annually ($100 over the four years) and to provide a one-time payment of $25.00 because of a change in the firefighter's uniform. While matching the Township's proposal, the FMBA observes that the same offer was accepted by the other

public safety unions and that the others all receive $100 more in total uniform allowance than do the firefighters.

The FMBA further contends that its salary proposal is more reasonable than the Township's because of comparability evidence and its affordability. The FMBA calculates the cost difference between its proposal and the Township's as only $24,711 over the entire four year contract. It calculates the cost difference as $69.16 per firefighter in 2006 and $215.65 in 2007. Turning to contract years 2008 and 2009, the FMBA points out that the difference in 2008 is only $4.36 per firefighter and $160.13 in 2009 because the Township's proposal adds additional cost during these last two years by the payment of the Martin Luther King holiday at 0.38% of base rather than being taken as a floating holiday as is the current practice. That practice allows a firefighter to receive time off rather than pay. The Union calculates that its final offer is actually $8,000 less costly than the Township's if its final offer is selected because it has not proposed additional holiday pay for the Martin Luther King holiday. The FMBA calculates the Township's proposal for the additional paid holiday adds $15,300 in 2008 and $15,857 in 2009. Thus, the FMBA contends that Township's proposal is actually more expensive than the Union's and undermines the Township's "ability to pay" argument.

According to the FMBA, because of the insignificant difference in costs, the criteria concerning financial impact on the Township or the Budget Cap or

Tax Levy limitations are of little relevance. The Union submits that the Township is in good financial health as evidenced by a growing tax base, increasing property values, recent major redevelopment efforts, municipal grants, a high tax collection rate of over 99%, new revenue generated from the implementation of an ambulance-billing program, its ability to regenerate surplus, and a relatively moderate tax rate when compared to other Essex County municipalities.

The FMBA also contends that its salaries do not compare favorably with other paid fire departments. This is one additional reason that supports an award on salary beyond what the Township has called a pattern of settlement with its other unions. The Union submits collective negotiations agreements, and a chart flowing from those agreements, reflecting that maximum base pay in West Orange is the sixth or seventh lowest out of twenty-one (21) municipalities, including the Essex County municipalities of Irvington, South Orange Village, Millburn, Montclair and Bloomfield. Notwithstanding these pay levels, the FMBA points to total fire department calls received in 2006 that shows that West Orange ranks higher in the number of calls received than Maplewood, Belleville, Irvington, Montclair, Bloomfield, Millburn, South Orange Village and Nutley. The FMBA also submits evidence on internal comparisons that reflect that it receives the lowest compensation among the Township's four public safety units. It calculates that there is a base pay difference between firefighters and rank and file police officers of $3,451 in 2005, the last year of its expired contract. Even assuming an award of its 4% across-the-board proposal, the FMBA calculates

that the difference in pay would remain at levels of $3,516 in 2006, $3,506 in 2007 and $3,568 in 2008 and $3,548 in 2009.

The FMBA also rejects the Township's argument that the Township's final offer must be awarded because there is an established pattern of settlement. In its response, the FMBA submits the following argument on this point:

> The FMBA's final offer should be awarded because the Township's position that it established a pattern of settlement is completely unsupported and without merit. Simply put, a review of the final offers shows that the Township has failed to offer the FMBA that same terms and conditions of employment as other bargaining units. Most importantly, the Township did not require other Township employees to dramatically alter their vacation benefits (T1, T2, T74-T80). Not only did the Township request the FMBA to provide a substantial vacation give back, but the Township failed to provide the FMBA with any benefit or compensation based upon their request to radically alter such an important benefit. It is without question that the Township cannot be allowed to submit a final offer to the FMBA with the same salary percentage increase as provided to other employees and attach a major and substantial vacation give back that they did not request from any other bargaining unit and claim that a pattern of settlement has been established. Accordingly, the FMBA's final offer must be implemented.
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> The Township's position becomes more ridiculous because a comparison of the FMBA contracts to that of other Township employees proves that the Township has not provided the FMBA with the same offer of settlement as other units for over the last decade (T3-T5, T74-T80). After treating the FMBA differently than all other Township employees for at least a decade, and after failing to provide the FMBA with the same final offer received by other Township employees, the Township cannot now take the position that they have established a settlement pattern.
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> A simple review of the Township's agreements with the unionized employees proves that absolutely no pattern of settlement exists. First, FMBA members are the lowest paid uniformed employees of the Township. FMBA members are the only Township employees not paid a minimum of four (4) hours' pay at the overtime rate when called back to work. The Township's police officers (Exhibit T75, page 9, section 4), police officer superiors (Exhibit T74, page 11, section 4), fire superior

> officers (Exhibit T78, page 17), non-uniformed supervisory employees (Exhibit T80, page 15, Section C) and non-uniformed non-supervisory employees (Exhibit T79, page 15, Section C) all currently receive a minimum of four hours pay when they are called in for duty on a scheduled day off. Furthermore, this disparity has existed for years. Moreover, regardless of which final offer is awarded, the Township's police officers, police superiors and fire superior officers all currently receive (and will continue to receive) $100 more in total uniform allowance than the FMBA members. Notwithstanding the fact that all of these employees are required to buy the same or similar uniforms, the Township apparently believes that the FMBA deserves less uniform allowance to meet its obligations. It is unbelievable that the Township can continually give the FMBA the short end of the stick by providing the FMBA with fewer benefits than all other Township employees and still have the audacity to claim that they have established a settlement pattern! Clearly, there is no pattern of settlement and the FMBA's final offer must be implemented.

Based upon all of the above, and other arguments contained in the record but not set forth herein, the FMBA urges the selection of its final offer package and a rejection of the Township's.

The Township contends that its final offer package must be chosen over the FMBA's and offers a concise statement as to why:

> The Township's offer is clearly more reasonable, particularly in light of the fact that all of the Township's other public safety units (FSOA, SOA and PBA) have agreed to the identical salary increases. Moreover, the Township is facing a number of fiscal challenges brought on by ever-increasing overtime, employee health benefit, pension, and other personnel costs, rising property taxes, reduced state aid, and depleted reserves. At the same time, the Township's firefighters are already very well compensated. As such, the Township's final offer promotes stable labor relations and balances the Township's obligations to taxpayers by taking steps toward increased fiscal discipline during troubled economic times, while still maintaining high quality fire services and the Township Fire Department's status as one of the best compensated departments in Essex County. For the reasons set forth herein, the

Township's final offer should be awarded, and the FMBA's final offer should be rejected.

The Township asserts that it has demonstrated a clear pattern of settlement among uniformed public safety employees in the Township and that the FMBA is the "lone holdout" by seeking higher across the board increases than what all other public safety units have agreed upon. The Township submits numerous decisions rendered by PERC on appeal of interest arbitration awards as well as numerous interest arbitration awards that rely upon the pattern of settlement principle. In this instance, the Township submits that the 3.9%, 3.8%, 3.9% and 3.8% salary increase proposal, the revised prescription co-payment scheme, the $100 increase in clothing allowance and the granting of an additional paid holiday represents a pattern of settlement that would be broken by the selection of the FMBA's final offer package that seeks higher wages than the other agreements. The Township asserts that a deviation from an established pattern of wage settlement would undermine the bargaining units that have voluntary reached agreements with the Township and discourage parties from reaching voluntary agreements in the future by rewarding the party that "holds out" for more. The Township submits that its proposal to alter the vacation schedule for new hires beginning after the expiration of this Agreement does not defeat the pattern of settlement. The Township argues that the new vacation schedule for new hires is a minor deviation in the pattern compared to the FMBA's final offer which it submits is a substantial deviation from the pattern. The Township argues that this element of its final offer is justified. The Township

cites steep increases in the fire department's overtime budget caused by increased usage of accrued paid vacation time. The Township further argues that its proposal also compares favorably with the vacation benefit received by other Township bargaining units, including the rank and file PBA unit.

The Township rejects the FMBA's argument that the adoption of its vacation leave proposal for new hires would be illegal. It contends that its proposal complies with all applicable laws, actually exceeds the minimum benefits contained in the Civil Service Law, and compares favorably with the vacation benefit enjoyed by other Township employees. It submits a lengthy detailed response to the FMBA's arguments concerning the alleged "illegality" and lack of comparability in its proposal as follows:

> A. The Civil Service Law does not govern leaves of absences for firefighters.
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> The FMBA argues in points 2 and 3 of its brief that the Township's vacation proposal for new hires should not be awarded because it allegedly does not comply with New Jersey's Civil Service Law and its regulations. (See FMBA's Post-Hearing Brief, at 9-14). Specifically, the FMBA maintains that the Township's vacation leave proposal does not provide leave that meets the minimum requirements contained in N.J.S.A. § 11A:6-3 and N.J.A.C. § 4A:6-1.2(b). (See FMBA's Post-hearing Brief, at 9-13). In support of the specious argument, the FMBA cites to City of Newark and FMBA Local 4, P.E.R.C. No. 88-196, 14 N.J.P.E.R. 336 (¶19126 1988) and Article 4 (Probationary Period) of the expired collective negotiations agreement (the "Agreement"). (See FMBA's Post-Hearing Brief, at 11-13).
>
> However, this argument is severely flawed because it ignores the fact that the Civil Service Law was amended in 1986 to provide that: "[l]eaves of absence for police officer and fire fighter titles shall be governed by the applicable provisions of Title 40A of the New Jersey Statues and N.J.S. 11A:6-10." N.J.S.A. § 11A:6-9. There is no provision in Title 40A of the New Jersey Statutes that provides for any minimum vacation benefit for firefighters, and N.J.S.A. § 11A:6-10 merely addresses leaves of absence

for convention attendance. Likewise, N.J.A.C. § 4A:6-11, which was promulgated in 1990 provides, in relevant part, that "[v]acation and sick leaves for police officers and firefighters are established by local ordinance. See *N.J.S.A. 40A:14-7* and *40A:14-118*." As such, the FMBA's reliance on City of Newark is completely mistaken because the statutory and regulatory provisions that the New Jersey's Public Employment Relations Commission ("P.E.R.C.") relied on when it issued its decision in that case have been completely repealed and replaced.

Since 1991 P.E.R.C. has repeatedly confirmed that the Civil Service Law's leave of absence provisions do not apply to police and firefighters. City of Orange Twp. and Orange Police Dep't SOA, P.E.R.C. No. 2001-17, 26 N.J.P.E.R. 433 (¶31170 2000) (affirming the designee's holdings in that the Civil Service Law's sick leave provisions did not apply to police officers, citing N.J.S.A. § 11A:6-9 and N.J.A.C. § 4A:6-1.1); City of Union City Union City FMBA Local 12, P.E.R.C. No. 91-87, 17 N.J.P.E.R. 225 (¶22097 1991) (acknowledging that N.J.S.A. § 11A:6-9 made the minimum leave benefits provided by the Civil Service Law inapplicable to firefighters). More recently, in City of Paterson and Paterson PBA Local 1, P.E.R.C. stated, in referring to the Civil Service Law, that:

> [T]his statute and regulation do not apply. N.J.S.A. 11A:6-9 provides that "leaves of absence for police officer and firefighter titles shall be governed by the applicable provisions of Title 40A of the New Jersey statutes and N.J.S.A. 11A:6-10." The City does not argue that either Title 40A or N.J.S.A. 11:6-10 preempts negotiations so we do not consider the City's preemption argument further.

City of Paterson and Paterson PBA Local 1, P.E.R.C. No. 2005-32, 30 N.J.P.E.R. 463 (¶153 2004).

Moreover, the FMBA's reliance on Article 5 of the Agreement is similarly inapposite. Contrary to the FMBA's assertion, Article 5 is not an acknowledgement that the leave provisions of N.J.S.A. Title 11A and N.J.A.C. Title 4A apply to the Township firefighters. That article merely provides that "should there be any conflict" between Civil Service Law and the Agreement, then the applicable law controls. Since, as discussed above, the leave of absence provisions of the Civil Service Law and its regulations do not apply to firefighters, there is no conflict between the Township's proposal and the law. Thus, Article 5 of the Agreement does not support the FMBA's position.

For the foregoing reasons, it is clear that the Township's firefighters are not subject to the Civil Service Law's minimum vacation provisions, pursuant to N.J.S.A. § 11A:6-9 or N.J.A.C. § 4A:6-1.1. Therefore, the FMBA's argument that the Township's vacation proposal for new hires is void *ab initio* should be rejected, and the Township's final offer should be awarded.

B. The Township's vacation proposal exceeds the minimum benefit contained in the Civil Service Law.

Even if N.J.S.A. § 11A:6-3 or N.J.A.C. § 4A:6-1.2 apply to the Township's firefighters, the Township's proposal satisfies and exceeds the minimum standards set forth therein.

According to the FMBA, the Township's proposal violated Civil Service Law because it does not provide vacation leave of at least:

a. Up to one year of service, one working day for each month of service;
b. After one year and up to 10 years of continuous service, 12 working days;
c. After 10 years and up to 20 years of continuous service, 15 working days;
d. After 20 years of continuous service, 20 working days.

(See FMBA's Post-Hearing Brief, 9-13). Specifically, the FMBA asserts that the Township's proposal eliminates vacation for probationary firefighters, and would not provide enough leave under this statute for firefighters with 1-3 years and over 11 years of service because the term "working day" equals a half of a 24-hour shift (e.g., 12 hours). (See FMBA's Post-Hearing Brief, at 12-13).

However, both of these arrows miss the mark because the Township's proposal does not eliminate vacation pay for probationary employees, and the term "working day" must be equalized based on hours worked with other Township employees.

1. The Township's proposal does not eliminate vacation leave for probationary firefighters.

The Township's proposal does not eliminate vacation leave for probationary firefighters. Article 28 ("Vacations") of the Agreement currently provides, in relevant part:

> All Uniformed Fire Fighters shall be granted a vacation pursuant to the provisions of Section 9-13.3 of the Revised General Ordinances of the Township of West Orange, adopted 1972, as amended and supplemented, subject to the following ...
>
> *New probationary firefighters shall earn ½ of a 24-hour shift every month during their first calendar year of employment.* (Emphasis added).

The Township's proposal merely deletes the emphasized sentence. The deletion of this sentence dos not result in

probationary officers not receiving any vacation leave. Rather, it is intended merely to allow for probationary employees to receive the same benefit that firefighters with 1-3 years of service will receive – 5 (24 hour) shifts.

However, if for whatever reason this interpretation is rejected, the minimum vacation benefits contained in Section 9-13.3 of the Township's Revised General Ordinances would become operative pursuant to the express language of Article 5 quoted above. Section 9-13.3 of the Revised General Ordinances provides that firefighters during their first year of service shall receive one (1) day of vacation for each month of service. Thus, the FMBA's claim that the Township's proposal would eliminate vacation for probationary firefighters is mistaken and must be utterly rejected.

2. A Township firefighter's "working day," for purposes of calculating vacation leave, is 8 hours, not 12 hours.

The FMBA conveniently argues that the term "working day" equals 12 hours by dividing the firefighters' 24-hour shift by two. (See FMBA's Post-Hearing Brief, at 9-10). But the FMBA's assumption that the term "working day," as that term is used in the Civil Service Law, somehow equates to 12 hours is clearly false.

The New Jersey Department of Personnel, Merit System Board has stated that "working days" must be equalized based on hours within a municipality to avoid over-rewarding or penalizing an individual who works a non-traditional alternative work week. Wentz v. Salem County Correctional Facility, OAL Dkt No. (CSV) 00375-02 (Miller, ALJ 2002), aff'd, In Re: Diane Wentz, OAL Dkt No. (CSV) 00375-02 (NJ DOP 2002).

In Wentz v. Salem County Correctional Facility a county correctional officer received a 5-day suspension for various infractions. Pursuant to an alternative workweek perform, however, the employee worked a 12-hour shift, instead of a typical 8-hour shift. As a result, the employee's 5-day suspension amounted to 60 hours of lost wages. In contrast, an employee working an 8-hour shift would have lost only 40 hours of time. Thus, the employee appealed the suspension claiming that it operated as a de facto major disciplinary action, which the Civil Service regulations define as a "suspension or fine for more than five working days at any one time." N.J.A.C. § 4A:2-2.2(a)(3). The Merit System Board agreed with the employee, upholding the ALJ's determination that "working day" under the Civil Service Law meant 8 hours, not the 12-hour shift that only existed by virtue of the county's use of an alternative workweek program. The ALJ noted the "clear inequities" that would result otherwise, and that "a process of equalization must ... exist." The ALJ directed the county to either define a "workday" as 8 hours or use some other

method to bring about a fair result in light of the schedule differential.

The Township has already defined the workday as 8 hours[2]. (T-7). Sections 9-10.2 of the Township's Revised General Ordinances provide for bi-weekly pay periods and state that "[e]ach payroll period normally shall consist of ten (10) working days." (T-7). Likewise, Section 9-11.1 of the Revised General Ordinances state "[t]he normal workweek of the Township shall be a five (5) day, forty (40) hour week. Thus, pursuant to the Merit System Board's decision in Wentz, as well as the Township's own ordinances, it is clear that the term "working day," as it allegedly applies to Township firefighters, means 8 hours, not 12 hours. As a result, the Township's vacation proposal, when equalized to an 8-hour workday schedule, far exceeds the minimum vacation benefit provided under N.J.S.A. § 11A:6-3 and N.J.A.C. §4A:6-1.2.

Moreover, if "working day" meant 12 hours, as the FMBA contends, then the *current* vacation benefit embodied in the expired Agreement would violate the Civil Service Law. As noted above, the Civil Service Law requires a minimum of 20 working days for employees after 20 years of continuous service. N.J.S.A. §11A:6-3; N.J.A.C. §4A:6-1.2. If, however, "working day" meant 12 hours, then Article 28 of the Agreement only provides 16 working days of vacation for such employees. The FMBA, however, has never grieved this issue, and indeed now actively argues in favor of an award that would maintain the same vacation schedule.

It is necessary to reach such a nonsensical result. Based on the foregoing, it is clear that even if the Civil Service Law's leave of absence provisions apply to the Township's firefighters, the Township's proposal far exceeds those minimum benefits as 5 (24 hour) shifts equals 15 days off and 6 (24 hour) shifts equals 18 days off for all other Township employees. Therefore, the FMBA's final offer should be rejected, and the Township's final offer should be awarded.

The Township also contends that its final offer proposal compares favorably with agreements that it has made with its non-uniform, non-supervisory employees, with the average of settlements in public safety units between 2005-2008 within Essex County, that it exceeds state and local government settlements throughout the United States and is more reasonable than the

Union's when compared with private sector wages and benefits. The Township also submits labor agreements and statistical surveys in support of its position on comparability. In addition, the Township submits financial data from which it argues that its final offer is more reasonable when considering its financial impact on the governing unit, its residents and taxpayers. The Township submits documentation showing sharp increases in its municipal tax rate and in its total tax levy between the years 1999 and 2006, decreases in its Cap Bank, a 101% increase in health insurance costs between 2000 and 2006, a $1.1 million increase in pension contributions in 2007 compared with 2006, a $980,000 drop in state aid in 2007, and increases in utility and tipping fees as financial reasons in support of the rejection of the FMBA's offer for greater salary increases than what was received by the three other public safety units.

In addition to the above, the Township submits exhibits and argument concerning remaining statutory criteria including cost of living, overall compensation currently being received by the Township's firefighters and the continuity and stability of employment among the Township's firefighters, all of which are said to support its final offer. The Township submits that when all of the evidence and argument are considered, the selection of its final offer will, overall, further the interests and welfare of the public.

[2] In fact, as the FMBA admits, holiday pay is calculated based on 8 hours.

DISCUSSION

I am required to select one final offer package over the other by making a reasonable determination after giving due weight to the statutory criteria that I deem relevant for the resolution of the dispute. The Township and the FMBA have made very comprehensive presentations that include documentary evidence, certifications and argument on each statutory criterion in support of their respective positions. All of the evidence and arguments have been carefully reviewed and considered.

The factors set forth in N.J.S.A. 34:13A-16g (1) through (9), commonly called the statutory criteria, are as follows:

> (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:4-45.1 et seq.).
>
> (2) Comparison of 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 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, 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, vacations, 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 the P.L. 1976 c. 68 (C.40A:4-45 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 on 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 its proposed local budget.

(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.

(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).

By mutual agreement of the parties, this is a last or final offer proceeding that requires selection on a single package basis. For this reason, I must award the final offer of the Township in its entirety or the final offer of the FMBA in its entirety. The single package final offer process does not grant me the discretion to select between individually proposed issues or to fashion an accommodation on any disputed issue, or on the respective packages, that would differ from the precise proposals advanced by each party in its final offer. The Township and the FMBA have developed each last or final offer in a manner that each contends is the one that is more reasonable or more justified for selection after applying the statutory criteria.

I initially observe that there are commonalities in positions within each final offer. This reflects that the issues have been narrowed through the negotiations and mediation process. It also shows the positive impact the final offer package selection process has on the parties' motivation to reduce the differences in their

final positions. In their respective final offers, each party has proposed a four year contract covering years January 1, 2006 through December 31, 2009. Both have proposed the same revisions to prescription co-pays. The structure would require a $10 co-payment for generic drugs, a $20 co-payment for brand name prescription drugs and an increase in mail order prescriptions to $2 per order. A minor difference that the Township's proposal would make this change effective January 1, 2009 while the FMBA's proposal would make this change effective January 1, 2008. Both parties have proposed adding a new overtime call-in provision stating that "Any member called in for duty on a scheduled day off shall be paid at a minimum of 4 hours' pay at the overtime rate." The prior contract did not have a call in provision. Both parties have proposed to increase the uniform allowance by $25 per year over four years for a total increase of $100 over the life of the Agreement resulting in an overall increase in the uniform allowance from $700 to $800. Both parties have also agreed to add the following language in the uniform allowance provision:

> "By December 31, 2008 all employees hired prior to September 26, 2005 shall be paid a one time stipend of $25 for the purpose of uniform shirt upgrades as per Order Number 2005-0147, Uniform Specifications. Employees in the unit eligible for the $25 stipend shall complete the uniform shirt upgrade within 3 months after payment by the Township. This one time stipend shall not be added to base salary."

The remaining issues within each last or final offer represent the differences in the parties' positions. These differences in positions cannot be considered in isolation. They must be considered along with the various

elements that the parties have agreed upon in their last offers in order to assess the merits of each final offer in its totality. The differences in position are the following. There is a disagreement on salary. The FMBA has proposed an increase of 4.0% in each of the four years while the Township has proposed increases of 3.9%, 3.8%, 3.9% and 3.8% during the four years. The FMBA disagrees with the Township's proposal to modify the contract, effective January 1, 2008, to provide that the existing Martin Luther King Day holiday, now a floating holiday to be taken in time, to instead be paid out as compensation (with a value of 0.38%) under the current Township's pay practice. The FMBA also disagrees with the Township's proposal to amend Section B of Article 28 to provide that employees hired after December 31, 2009 receive vacation as follows: 1-3 years/5 24-hour shifts per year; 4-5 years/6 24-hour shifts per year; 6-10 years/7 24-hour shifts per year; and 11 or more years/8 24-hour shifts per year.

The package to be selected shall be the one that I deem the more reasonable one under all of the relevant considerations. Neither party's position on its face can be deemed unreasonable based solely on the respective costs of the two packages. The Township and the FMBA have each developed cost estimates over the four years that do not vary in any significant way. The Township provides a chart estimating the four year difference to be $23,178:

	FMBA FINAL OFFER				TOWNSHIP FINAL OFFER			
	2006	**2007**	**2008**	**2009**	**2006**	**2007**	**2008**	**2009**
Salary Increase over Prior Year	$137,647	$143,153	$148,879	$154,834	$134,206	$135,864	$144,738	$146,527
Uniform Allowance	$1350	$1350	$1350	$1350	$1350	$1350	$1350	$1350
One-Time Uniform Allowance	$0	$0	$1250	$0	$0	$0	$1250	$0
Prescription Co-pay Increase	$0	$0	$0	-$8703	$0	$0	$0	$-8703
Total/ Year	$138,997	$144,503	$151,479	$147,481	$135,556	$137,214	$147,338	$139,174
Total/ Contract	**$582,460**				**$559,282**			
Difference	***$23,178***							

The cost estimates in the chart do not include the impact of any salary increases to baseline cost items such as payroll taxes, longevity costs, holiday pay, pension costs and overtime. The chart also does not include the payout for the additional paid holiday (Martin Luther King) that the Township seeks to convert from a floating holiday to base pay compensation. The additional paid holiday would cost the Township an additional 0.38% per year starting January 1, 2008. It represents additional compensation not now being paid out. The FMBA does not dispute this fact because it acknowledges that firefighters currently get paid 5% of their base salary for thirteen (13) holidays. Thus, each holiday equates to 0.38% of base pay, the same cost as eight (8) hours of pay.

The FMBA offers its own chart of costs and calculates the difference between the two packages as approximately $24,000. The FMBA's calculation is as follows:

Township				
	2006 3.90%	2007 3.80%	2008 3.90%	2009 3.80%
Maximum Salary	$71,859.32	$74,589.97	$77,498.98	$80,443.94
Martin Luther King Holiday 0.38% of base	N/A	N/A	$294.50	$305.69
FMBA				
	2006 4.0%	2007 4.0%	2008 4.0%	2009 4.0%
Maximum Salary	$71,928.48	$74,805.62	$77,797.84	$80,909.76
Cost Difference Between Final Offers	$69.16	$215.65	$4.36	$160.13

The FMBA calculates the differences, based upon 55 firefighters at maximum to be $3,803.80 in 2006 ($69.16 x 55), $11,860.75 in 2007 ($215.65 x 55), $239.80 in 2008 ($4.36 x 55) and $8,807.14 in 2009 ($160.13 x 55). Notwithstanding FMBA argument that the Township's proposal exceeds the FMBA's because of the costs of the additional paid holiday, the FMBA's proposal calculates to more cost than the Township's but the difference is not significant.

There are many ways in which to cost out salary proposals. In this instance, I select a simplified method that, without compounding, adds each year's cost upon the prior year to arrive at a total. After doing so, the FMBA's proposal represents 16.0% over four years. The Township's proposal represents 15.4% plus an additional 0.38% to base costs in 2008 as a result of the extra paid holiday. This represents 15.78% over four years. The other cost impacts are identical because each party has proposed a $100 increase in uniform allowance. Based upon an average firefighter salary, this represents an additional cost of 0.15%. Each party has also proposed a new call in provision

requiring a minimum payment of four (4) hours at an overtime rate but no cost estimates have been submitted on this issue.

Given the relatively insignificant difference in costs, a conclusion cannot be reached that the selection of either package (a difference of 0.22% over four years) would interfere with the lawful authority of the Township under the spending limitations imposed on it by P.L. 1976 c. 68 (C. 40A:4-45 et. seq.), the taxing limitations imposed upon the Township by Section 10 of P.L. 2007, C. 62 or cause adverse financial impact on the governing unit, its residents and taxpayers. In other words, although the cost of the FMBA package exceeds the Township's, the minimal difference in terms of dollars spent does not, in and of itself, render one package more or less reasonable than the other's.

The record also does not reflect that the continuity and stability of employment would be impacted one way or another by the selection of either final offer package. There has been insignificant turnover in the department, no evidence that the Township has ever had any difficulty in hiring firefighters nor would the terms of either package likely create instability or lack of continuity.

The cost of living criterion is relevant but only in a minimal way. Both final offers are above the cost of living data that covers the contract years at issue. To the extent that the FMBA's salary proposal final offer modestly exceeds that of the Township, it can be said that this criterion marginally favors the position of

the Township but the cost of living criterion is not a determinative factor in this proceeding.

I have also considered the criterion concerning the overall compensation, inclusive of benefits, that are presently being received. Each party has proposed a compensation package that builds positively upon a set of existing contract terms that is already comprehensive in scope. Firefighters receive, or will receive, including, but not limited to, salaries exceeding $80,000 at maximum under either party's proposal, medical and dental insurance with no premium contributions, a prescription program with modest co-pays, various forms of paid leave (sick, personal, vacation, seniority days), longevity up to 10% of base pay, and thirteen paid holidays that are pensionable in addition to salary. The respective salary proposals would increase top step salary for a firefighter with EMT certification from $70,545 to $82,528 under the FMBA's proposal and $82,053 under the Township's proposal. The Township's proposal for an additional paid holiday adds an additional $295 in base pay for 2008 rising to $306 in 2009. The $100 increase in clothing allowance and new four (4) hour minimum for call in also enhances the existing levels of compensation and benefits. The Township's proposal for a new vacation schedule for new hires, effective upon the expiration of the agreement, will reduce the amount of paid vacation time for new hires until the eleventh year of employment but, on balance, its inclusion on January 1, 2010 would not significantly impact upon the overall scope of the existing compensation and benefit package.

The criteria to be given the most weight in the selection of the proposed final offers are the interests and welfare of the public, internal and external comparability and the subsection of the continuity and stability of employment criterion that allows for the consideration of factors that 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." The pattern of settlement principle, endorsed by a substantial body of case law, finds support in all of these criteria. [See e.g., County of Union I, P.E.R.C. No. 2003-33, 28 N.J.P.E.R. 459 (¶ 33169 2002) and County of Union II, P.E.R.C. No. 2003-87, 29 N.J.P.E.R. 250 (¶75 2003)].

I first address the FMBA's contention that the Township's proposal to provide a revised vacation schedule for new hires is illegal because it does not comply with Civil Service Law and Regulations. I note that there is no pending scope of negotiations proceeding before PERC, the agency that has primary jurisdiction to render a determination on whether a negotiations proposal is, or is not, lawful. Nevertheless, a determination must be made in this proceeding. It has been fully litigated. If the Township's proposal on this issue is illegal, the Township's final offer on a package basis could be disqualified for having an illegal component that could not be severable from its final offer package. After scrutinizing the parties' respective analysis of the legality of this issue, I am

unable to sustain the FMBA's argument that the Township's proposal and its final offer must be rejected because it is illegal. The FMBA's reliance upon City of Newark and FMBA Local 4, P.E.R.C. No. 88-196, 14 N.J.P.E.R. 336 (¶19126 1998) is undermined by the existence of Civil Service Law and Regulations that repealed and replaced the law and regulations that were relied upon by PERC at the time it issued City of Newark. Subsequent to City of Newark, PERC case law has held that Civil Service leave of absence provisions do not apply to police and firefighters due to 1986 amendments that require the regulation of vacation and sick leaves for police and firefighters by local ordinance. [See City of Orange Twp. and Orange Police Dep't SOA, PERC No. 2001-17, 26 N.J.P.E.R. 433 (¶31170 2000) and City of Union City Union City FMBA Local 12, P.E.R.C. No. 91-87, 17 N.J.P.E.R. 225 (¶22097 1991)]. I also accept the Township's representation that its proposal does not, as argued by the FMBA, eliminate vacation leave for probationary officers despite the deletion of language in Article 28 that provided a vacation scheme for probationary firefighters pursuant to a schedule in the old agreement that would no longer exist under the Township's proposal. For these reasons, I do not find the Township's proposed vacation schedule for new hires to be illegal.

I next turn to the merits of the respective final offers. Notwithstanding the comprehensive submission of the FMBA and its well articulated arguments, I am compelled to conclude that the Township's final offer package represents a more

reasonable determination of the issues than does the FMBA's. I reach this conclusion for the following reasons.

The FMBA seeks a wage package that exceeds the salary settlements that were voluntarily negotiated between the Township and the three other public safety units. Its salary offer exceeds these voluntary settlements by 0.6% over four years or by 1.4% on an accumulated actual cost basis. Neither sum of the difference is substantial in actual terms. In this regard, the FMBA's salary proposal cannot be found to be unreasonable in the abstract, especially in light of the additional costs (0.38%) attributed to the additional paid holiday the Township has proposed and the FMBA has rejected. However, in the context of this dispute, merely because the FMBA's proposal does not represent an immoderate amount of salary above what the Township has proposed, this fact does not make its proposal more reasonable than the Township's.

The FMBA attaches many reasons for why its salary proposal must be chosen over the Township's. The main reasons include the existence of the vacation schedule for new hires in the Township's proposal, the argument that the Township's firefighters fare poorly in comparison with municipal firefighters employed elsewhere (external comparability), that they earn less than rank and file police officers employed by the Township (internal comparability), and because the Township has failed to convince that there is a pattern of settlement that it must conform to.

Notwithstanding the FMBA's arguments to the contrary, the Township has demonstrated the existence of a pattern of settlement among its police and fire units. The core of that pattern has been proposed to the FMBA. It includes the payment of normal salary increments, if applicable, and a 3.9%, 3.8%, 3.9% and 3.8% increase to each step of the salary schedule during the 2006 through 2009 contract period. In addition, an additional holiday, Martin Luther King would be converted from a floating holiday to a paid holiday under the current practice which calculates to eight hours of pay effective January 1, 2008. The cost of such proposal is an additional .38% to be paid in contract years 2008 and 2009. In addition, there is a clothing allowance increase of $25 per year, reaching a total of $100 over the life of the Agreement. An additional element of the pattern is the increase in co-pays for prescription drugs; under the Township's proposal, this would commence on January 1, 2009 as opposed to January 1, 2008 under the FMBA's proposal. There is a clear pattern of settlement within the Township for its public safety units with respect to these terms. The FMBA accurately observes that the prospective new hire vacation schedule is not part of the pattern. This is not the only difference. The parties have agreed upon a new provision calling for a new benefit, the minimum four hour call-in. While this benefit has previously existed in the police contract, it is a new benefit for firefighters as part of the package.

In the case before me, the FMBA has not been persuasive in its argument that the Township's reliance upon a pattern of settlement must be defeated because it contains a proposal to modify the vacation schedule for new hires beginning 2010. In evaluating this argument, it must be noted that this is not a case in which the arbitrator is faced with a selection between a final offer from the Township advancing a pattern of settlement with, as here, a minor deviation and a final offer from the FMBA that either advances the terms of a pattern of settlement without the minor deviation or a final offer that accepts the deviation when coupled with a wage proposal that exceeds the pattern for reasons of seeking a tradeoff. The FMBA's final offer clearly varies from the terms of the pattern of settlement and, in my judgment, as proposed, it alters a more significant element of the basic terms of the pattern than does the Township's. I am persuaded that the record supports the selection of the Township's proposal that contains all of the basic elements of the settlement pattern with a modification to an existing benefit for new hires as being more reasonable than the final offer of the FMBA that exceeds the terms of the core settlement pattern. In the absence of a final offer from the FMBA that accepts the core settlement pattern on wages, I do not find the Township's vacation proposal for new hires to be so substantial a deviation that would compel the rejection of its final offer. The vacation proposal does represent a diminution of paid vacation time on a graduated basis but it does result in new hires achieving the full vacation schedule for existing employees after eleven years of employment. As such, new hires will achieve parity in the maximum tier level for existing employees.

Based upon record review of other Township agreements, I also find the benefit it has proposed for new hires represents a reasonable comparison with other Township employees in terms of hours. I also conclude that the elements of the County's final offer that touch upon vacation for new hires and a new paid holiday have been grounded in reason and are not arbitrary. The testimony and calculations offered by Administrator Sayers reflects that overtime pay has risen dramatically, at least in part due to the amounts of paid time off firefighters have accrued and that the Township's proposals on these issues can potentially serve to offset this increase in costs. I also accept the Township's representation that its proposal for probationary employees, by the deletion of language in Article 28, will result in their receipt of the same level of vacation benefit proposed for firefighters with up to three years of service.

The final offer of the Township furthers the interests and welfare of the public. The Township has established that, having voluntarily negotiated three agreements in public safety units that all contain the same basic terms of settlement, reasonable consistency within that pattern is the more favored result. Stability and predictability in collective bargaining will be of benefit to the public and the promotion of this concept is enhanced by the selection of the Township's final offer. I also conclude that when other factors that are ordinarily and traditionally taken into account in the determination of wages and other terms and conditions of employment, the Township's final offer is the more reasonable of the two. The core element of this pattern of settlement is the wage structure.

While the FMBA has rejected the concession included by the Township it has not chosen to propose an offer that accepts the core terms without the concession nor accepts the concession with salary terms that could represent a trade off. An alternative analysis would then have been required.

The comparability arguments offered by the FMBA have been vigorously presented but do not weigh in favor of the FMBA offer under the circumstances of this case. While the salary maximum in the PBA unit is higher, the agreements in evidence reflect that some, if not a majority, of PBA members make a 50% contribution towards prescription and medical insurance while the FMBA does not. Thus, direct comparison of the respective contract terms does not yield the result sought by the FMBA. The salary comparisons within the County also do not tip the balance in favor of the FMBA final offer. While some County units receive higher wages, some receive less. On this record, the internal comparisons of new contract terms outweigh terms negotiated outside the Township. In any event, the differences in the salary proposals, especially when including the addition of the additional paid holiday, would have little effect on the levels of compensation comparability between this unit and those within the County.

Accordingly, and based upon all of the above, I select the final offer package of the Township as representing the more reasonable determination of the disputed issues.

AWARD

1. Term of the Agreement: Four (4) year contract covering years January 1, 2006 through December 31, 2009.

2. Salaries:

   Effective and retroactive to January 1, 2006, 3.9% wage increase.
   Effective and retroactive to January 1, 2007, 3.8% wage increase.
   Effective and retroactive to January 1, 2008, 3.9% wage increase.
   Effective to January 1, 2009, 3.8% wage increase.

3. Holidays: Effective January 1, 2008, modify the contract to provide that the existing Martin Luther King Day holiday shall be recognized and paid out under the current Township's pay practice.

4. Uniform Allowance: Amend Article 24 – Uniform Allowance of the contract to provide that the uniform allowance shall be increased $25 per year for 2006, 2007, 2008 and 2009 for a total increase of $100 over the life of the Agreement. To effectuate this change Article 24 shall be amended to state that the uniform allowance for 2006 will be $725, for 2007 $750, for 2008 $775 and for 2009 $800.

   Add the following language: "By December 31, 2008 all employees hired prior to September 26, 2005 shall be paid a one time stipend of $25 for the purpose of uniform shirt upgrades as per Order Number 2005-0147, Uniform Specifications. Employees in the unit eligible for the $25 stipend shall complete the uniform shirt upgrade within 3 months after payment by the Township. This one time stipend shall not be added to base salary."

5. Health Insurance: Article 18 – Insurance – Amend the prescription copays to $10 for generic drugs, $20 for brand name prescription drugs and increase mail order prescriptions to $2 per order. All changes to become effective no later than January 1, 2009.

6. Overtime: Article 12 – Overtime – Amend to provide that effective January 1, 2009 Article 12 shall include the following language: "Any member called in for duty on a scheduled day off shall be paid at a minimum of 4 hours' pay at the overtime rate."

7. Vacation: Article 28, Section B – Amend Section B to provide that employees hired after December 31, 2009 will receive vacation as follows: 1-3 years/5 24-hour shifts per year; 4-5 years/6 24-hour shifts per year; 6-

10 years/7 24-hour shifts per year; and 11 or more years/8 24-hour shifts per year. Additionally the following sentence shall be deleted: "New probationary firefighters shall earn ½ of a 24-hour shift every month during their first calendar year of employment."

Dated: June 24, 2009
Sea Girt, New Jersey

James W. Mastriani

State of New Jersey }
County of Monmouth }ss:

On this 24th day of June, 2009, before me personally came and appeared James W. Mastriani to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

Gretchen L. Boone
Notary Public of New Jersey
Commission Expires 04/30/2014