P.E.R.C. NO. 2004-17

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NORTH HUDSON REGIONAL FIRE AND RESCUE,

Appellant-Respondent,

-and-

Docket No. IA-2000-53

NORTH HUDSON FIREFIGHTERS ASSOCIATION,

Appellant-Respondent.

SYNOPSIS

The Public Employment Relations Commission affirms an interest arbitration award, as clarified in an October 20, 2003 decision, to establish a first contract between the North Hudson Regional Fire and Rescue and the North Hudson Firefighters Association. In negotiations and interest arbitration, the parties presented proposals on salary, longevity and other compensation items, along with proposals on an entire range of topics typically included in a negotiated agreement. The arbitrator resolved the issues by conventional arbitration. Both the Regional and the Association filed appeals each challenging the award on one or more aspects of several contractual provisions. The Commission had ordered a limited remand to the arbitrator for the purpose of clarifying the arbitrator's intention concerning accumulated sick leave for firefighters from Union City and Weehawken. The Commission concludes that the parties' objections do not warrant disturbing the award. The Commission further concludes that the arbitrator painstakingly considered the parties' presentations; reached a reasonable determination of the issues; and fashioned an overall award that is supported by substantial credible evidence. The Commission finds that the arbitrator's overall approach and guiding principles are sound, and his award establishes a framework within which the parties may work.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the North Hudson Regional Fire & Rescue, The Murray Law Firm, LLC, attorneys (Robert E. Murray, of counsel; Timothy Averell, on the briefs)

For the North Hudson Firefighters Association, Cohen, Leder, Montalbano & Grossman, LLC, attorneys (Bruce D. Leder, of counsel)

DECISION

The North Hudson Firefighters Association and the North Hudson Regional Fire and Rescue both appeal from an unusual interest arbitration award, one which established their first collective negotiations agreement. An award involving the Regional's fire officers was issued by the same arbitrator on the same date and has also been appealed by both parties. [1/]

1/ The parties' Notices of Appeal were filed on October 17, 2002. The Association was given the opportunity to perfect its appeal, see Town of Newton, P.E.R.C. No. 98-47, 23 NJPER 599 (¶28294 1997), which it did on November 11. On November 1, the Commission approved a briefing schedule agreed to by both parties, which called for initial briefs to be filed by January 15, 2003 and reply briefs by March 3. Between January 7 and March 18, the parties jointly requested four

September 25, 2003, we ordered a limited remand to the arbitrator for the "purpose of clarifying whether or not he intended firefighters from Union City and Weehawken to have any accumulated sick leave that carries over into the new agreement for sick leave use and, if appropriate, modifying any aspects of the award accordingly. North Hudson Reg. Fire and Rescue, P.E.R.C. No. 2004-10, 29 NJPER ____ (¶_____ 2003). We retained jurisdiction; directed the arbitrator to issue a written statement; and provided that the parties had five days from receipt of the statement to submit comments. The arbitrator issued a Decision on Clarification on October 10, 2003.

The Regional was created in 1998, pursuant to the Consolidated Municipal Services Act (CMSA), N.J.S.A. 40:48B-1 et seq., in order to replace the paid fire departments in Weehawken, Union City, North Bergen, West New York and Guttenberg. It began operations on January 1, 1999 and employed, as of May 2000, approximately 191 firefighters, some of whom were newly hired by the Regional but most of whom were previously employed by one of the municipalities.

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extensions of time to file their initial briefs, citing the complexity of the case and the amount of material they had to review. Initial briefs were received on March 24. On May 5, the Association was granted an extension of time until May 19 to file its answering brief, and the due date for the Regional's answering brief was also extended. The Commission requested additional documents on May 28, which were received on June 6.

The parties agreed that the term of their first contract would be from July 1, 1999 through June 30, 2004. In negotiations and interest arbitration, they presented proposals on salary, longevity and other compensation items, along with proposals on the entire range of topics typically included in a negotiated agreement - including the preamble, definitions, terminal leave, insurance, work hours, military leave, drug and alcohol testing procedures, and emergency leave. They stipulated to clauses governing management rights, the definition of seniority, non-discrimination, severability and savings, salary deductions, and other items. In broad outline, the parties advanced these proposals and arguments.

The Association argued that all unit members should be governed by the same salary and benefit provisions from the outset of the agreement. It urged that the new terms on such issues as salary, longevity, terminal leave, sick leave and vacation should be set at the highest level found in any of the prior agreements. For example, Union City firefighters were the highest paid prior to the regionalization, so the Association proposed that all firefighters be paid in accordance with the Union City salary guide, which it sought to increase by 5% for each year of the new agreement. For former Union City firefighters, the Association proposed a one-time bonus, based on their years of service, in recognition of the fact that they

would not be receiving as large a salary increase as other unit members.

With respect to health insurance, the Association proposed that the Regional maintain each of the four health plans that the municipalities had contracted for prior to the regionalization, with any unit member being able to choose any one of the four plans. The Association also sought to retain the 24/72 hour work schedule used by each of the participating municipalities.[2/] Finally, with respect to contractual provisions on such issues as injury leave, outside employment, promotions, transfers, and assignments, the Association often proposed clauses similar to those in some of the predecessor agreements and in some instances sought benefits or protections not included in any of those agreements.

The Regional contended that the most weight should be given to its status as a new employer and maintained that it should not be encumbered by the terms of prior agreements. With respect to salary, it proposed a maximum base salary of $49,023 effective July 1, 1999; proposed that the salaries for the remaining contract years be negotiated; and proposed that firefighters whose salaries exceeded those on the new schedule be "red-

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2/ Prior to regionalization, Guttenberg negotiated a transition agreement that adopted the terms of the West New York contract, which included the 24/72 schedule. Before that, Guttenberg had followed a 24/48 work schedule.

circled" until the new schedule exceeded the firefighter's base compensation. It sought a single health benefits plan for all unit members; proposed to continue to pay the full premium cost for employees and retirees; and sought premium contributions for dependent coverage. The Regional also proposed a 24/48 work schedule and, with respect to various contract provisions, contended that they should be developed anew with a focus on the Regional's needs as an employer.

The arbitrator resolved the issues by conventional arbitration, N.J.S.A. 34:13A-16d(2), and issued a 467-page opinion and award that included a 68-page contract containing 56 contract articles. He set out several principles, detailed later, that guided his resolution of the dispute. Among these was the principle that, to the extent feasible, the agreement should merge or unify the terms and conditions of employment for those employees previously employed by one of the municipalities. Effective July 1 of 1999 through 2003, he awarded all such firefighters 3% annual increases, calculated using their June 30, 1999 base salaries under the prior agreements. In addition, effective January 1, 2004, the arbitrator ordered salary unification by advancing the salary maximums for former North Bergen, Weehawken, West New York and Guttenberg employees to the level of Union City. That adjustment resulted in firefighters at the maximum step on their former guides receiving additional

increases of $1,353.50 to $1,496.00 depending on the municipality by which they had been employed. Those few firefighters not at the maximum step on their former guides were to advance on the Union City salary guide. Also on January 1, 2004, former Union City firefighters were awarded a one-time $1,000 cash payment not included in base salary.

For firefighters first hired by the Regional, the arbitrator awarded the Regional's proposed salary schedule for July 1, 1999 through June 30, 2000 and increased each step on the schedule by 3% for the remaining four contract years. In addition, the arbitrator added two salary guide steps to the schedule, with the result that the schedules for previously employed and newly hired firefighters have the same maximum salaries, albeit the latter group progresses through an eight-step rather than six-step schedule.

With respect to issues such as longevity, holiday pay, and vacation, the award directed unified benefits either for all firefighters or for all firefighters previously employed by a municipality. On other issues, such as terminal leave and educational incentives, the arbitrator concluded that unification was not feasible. With respect to sick leave, he awarded a unified program for all firefighters, effective January 1, 2003. Pursuant to our September 25, 2003 limited remand order, he issued a Decision on Clarification with respect to accumulated

sick leave for firefighters formerly employed by Union City and Weehawken and changed the effective date for the new sick leave provision to January 1, 2004.

The arbitrator awarded the Association's proposal for a 24/72 work schedule and, as sought by the Regional, directed that a single health insurance contract provide benefits for all unit members. Finally, the arbitrator awarded contract provisions on all of the 56 items proposed by the parties, with the exception of the approximately 12 items on which they had agreed.

Both parties appealed the award. N.J.S.A. 34:13A-16f(5)(a). The Association and the Regional each challenge one or more aspects of these award provisions:

Salaries
Holidays
Insurance
Sick Leave
Terminal Leave
Vacation
Outside Employment
Promotions, Assignments and Transfers
Association Rights & Office Space

In addition, the Association also objects to these award sections:

Education Incentive
Compensatory Time
Service Differential
Pension and Retirement Benefits
Longevity
Emergency Leave
Funeral Leave
Grievance Procedure
Exchange of Tours
Safety and Facilities

Drug & Alcohol Testing
Parking Fees
Jury Duty
Miscellaneous

The Regional also challenges these award provisions:

Work Hours
Injury Leave
Clothing Allowance
Off-Duty Action

The Regional argues generally that the overall economic package awarded is well beyond its financial means and not supported by substantial credible evidence. It contends that the arbitrator did not properly analyze and apply the statutory criteria, N.J.S.A. 34:13A-16g, and asks us to vacate or modify the provisions it challenges, including the overall economic package.[3/]

The Association maintains that the award unjustifiably eliminated or reduced benefits that had been achieved over the course of prior negotiations, despite the fact that regionalization resulted in significant savings for the Regional

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3/ It also raises two threshold procedural arguments: that issues included in the Association's Notice of Appeal but not briefed should be deemed waived and that the Association's brief should be dismissed because it does not conform to the requirements for interest arbitration appeals. With respect to the latter point, the Association's comprehensive brief conforms to applicable standards. The Regional's objections go to the merits of the Association's arguments, which we address throughout this appeal. Further, it appears that the Association briefed all items included in its Notice.

and the municipalities as a result of State aid; a retirement incentive program; reduced pension costs; and revenue from the sale of municipal fire department assets. Like the Regional, it maintains that the arbitrator did not engage in the required analysis of the statutory factors. It asks us to vacate the award.[4/]

The standard for reviewing interest arbitration awards is now established, and was recently affirmed by the Supreme Court. We will not vacate an award unless the appellant demonstrates that: (1) the arbitrator failed to give "due weight" to the subsection 16g factors judged relevant to the resolution of the specific dispute; (2) the arbitrator violated the standards in N.J.S.A. 2A:24-8 and -9, or (3) the award is not supported by substantial credible evidence in the record as a whole. Teaneck Tp., P.E.R.C. No. 2000-33, 25 NJPER 450 (¶30199 1999), aff'd in part, rev'd and remanded in part on other grounds, 353 N.J. Super. 289 (App. Div. 2002), aff'd o.b. ___ N.J. ___ (2003); Cherry Hill Tp., P.E.R.C. No. 97-119, 23 NJPER 287 (¶28131 1997). Because the Legislature entrusted arbitrators with weighing the evidence, we will not disturb an arbitrator's exercise of discretion unless an appellant demonstrates that the arbitrator

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4/ We deny the Association's request for oral argument. The case has been thoroughly briefed.

did not adhere to these standards. Teaneck, 353 N.J. Super. at 308-309; Cherry Hill.

Arriving at a salary award is not a precise mathematical process. Given that the statute sets forth general criteria rather than a formula, the setting of wage figures necessarily involves judgment and discretion and an arbitrator will rarely be able demonstrate that an award is the only "correct" one. Borough of Lodi, P.E.R.C. No. 99-28, 24 NJPER 466 (¶29214 1998); Borough of Allendale, P.E.R.C. No. 98-123, 24 NJPER 216 (¶29103 1998). Some of the evidence may be conflicting and an arbitrator's award is not necessarily flawed because some pieces of evidence, standing alone, might point to a different result. Lodi. Therefore, within the parameters of our review standard, we will defer to the arbitrator's judgment, discretion, and labor relations expertise. City of Newark, P.E.R.C. No. 99-97, 25 NJPER 242 (¶30103 1999). However, an arbitrator must provide a reasoned explanation for an award and state what statutory factors he or she considered most important, explain why they were given significant weight, and explain how other evidence or factors were weighed and considered in arriving at the final award. N.J.S.A. 34:13A-16g; N.J.A.C. 19:16-5.9; Lodi. Once an arbitrator has provided a reasoned explanation for an award, an appellant must offer a particularized challenge to the

arbitrator's analysis and conclusions. Cherry Hill; Lodi; Newark.

I. Overview of Regionalization

We begin with an overview of the Regional; its financial foundation; and the CMSA's provisions on labor relations.

The Regional was formed as a Joint Meeting pursuant to the CMSA, which authorizes two or more municipalities to enter into a joint contract for the provision of, among other services, police and fire protection. N.J.S.A. 40:48B-2a and b. A Joint Meeting is a public body corporate and politic constituting a political subdivision of the State, N.J.S.A. 40:48B-2.1a, but does not have the authority to directly tax residents. Instead, the Regional's annual operating costs and expenses are allocated among the five participating municipalities in accordance with their joint contract. The Regional is not subject to the CAP law, N.J.S.A. 40A:4-45.1 et seq., but the participating municipalities are.

The Regional is the most densely populated, and third most populous, political subdivision in New Jersey to be served by a single fire department. It was created in order to consolidate the delivery of fire and rescue services for the participating municipalities, save costs, and improve response time. By pooling resources, the Regional provides a faster response, and sends more fire personnel to a scene, than did the participating municipalities. At the time of the hearing, it provided

firefighting services with 35 fewer firefighting personnel (firefighters and officers) than had been employed by the municipalities. Fifty-nine fire personnel (firefighters and fire officers) retired shortly after the regionalization under an early retirement incentive package, thereby reducing payroll costs by over $4 million. See N.J.S.A. 43:8C-1 et seq. (local unit entering into a joint services contract pursuant to the CMSA may offer an early retirement incentive program, after approval by the New Jersey Department of Community Affairs). By the time of the award, 25 new firefighters had been hired.[5/]

State statutes encourage consolidation or sharing of services by municipalities, counties and school districts, and the Regional and its municipalities benefitted from aid programs designed to encourage such efforts. Thus, the Regional received $4 million from the State's Regional Efficiency Development Incentive (REDI) program, N.J.S.A. 40:8B-14 et seq., which provides grants for one-time start-up costs. Most of those funds were disbursed in 1999, with $1.9 million devoted to the

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5/ In the companion fire officers' case, the Regional's Chief Financial Officer testified that the Regional was responsible for paying $14 million in pension costs attributable to the early retirement. He explained that they "had just gotten the numbers" from the State, which gave the Regional the option of paying the amount over five, ten or fifteen years, with annual costs, respectively, of $4 million, $2.5 million, or approximately $1.9 million (9T3-9T4).

Regional's start-up costs and $1.7 million distributed to the municipalities to assist them in paying for the early retirement package. In 2000, the Regional received the remaining disbursement of $396,625. In 2001, it received no State aid.

The municipalities themselves together received an additional $2 million in State aid under the Regional Efficiency Aid Program Act (REAP), N.J.S.A. 54:4-8.76, which requires municipalities to use the aid to reduce property taxes. In addition, the five municipalities received a total of $15 million from the Hudson County Improvement Authority (Authority) from the sale of their fire department assets to that entity, which issued bonds to finance the purchases. The Authority then leased the equipment and buildings to the Regional, which is obligated to make interest and principal payments on lease revenue bonds from September 2001 through September 2024. Finally, as a result of legislation applicable to all local public employers, the municipalities were relieved of their obligation to make $6 million in pension contributions to the Police and Fire Retirement System (PFRS) for 2001. N.J.S.A. 43:16A-15. The savings were required to be used to reduce the local property tax levy. Ibid.

The CMSA addresses some negotiations issues. It provides that, until the Regional's first collective negotiations agreement is in place, the terms and conditions of employment of

firefighters previously employed by a participating municipality are governed by the contracts negotiated between their former employer and majority representative. N.J.S.A. 40:48B-4.2. Employees hired after the regionalization have worked under terms set by the Regional. As a result, Regional firefighters have had varied terms and conditions of employment on such items as salary, vacation, insurance, and longevity.

II. Overview of Arbitration Award

In considering the appeals in this case and the companion fire officers' case, we have kept firmly in view the uniqueness and complexity of these interest arbitrations. The arbitrator commended the parties for their professionalism, competence and cooperation in tackling dozens of major and minor issues. We do so as well. As for the arbitrator, he was faced with the challenging task of evaluating the parties' multi-faceted proposals on 56 contract articles; considering those proposals in the context of the four predecessor agreements to which the parties frequently referred; and arriving at a single agreement that recognized, in his words, both the Regional's interest in managing and administering efficient and cost effective fire services and the employees' interests in receiving or maintaining economic benefits while working in a safe, productive environment. This was an enormous and precedent-setting

responsibility, and we commend the arbitrator's thoughtful and comprehensive analysis.

The deference that we normally accord to arbitrators is especially appropriate here, where the arbitrator had to make so many difficult judgments. We stress that this is a case about establishing the major constructs and basic terms and conditions of employment in this new relationship. As the arbitrator stated, there are reasonable limits to what can be accomplished in a first agreement that requires modifications of multiple contracts developed over many decades and encompassing a variety of circumstances; once the first agreement is established, the parties may propose modifications in future negotiations. We accept the arbitrator's analysis in this extraordinary case. The guiding principles and objectives he set out shape our consideration of the appeals.

The arbitrator described how he would explain much of his award in a preface to his discussion of what he identified as the major economic issues - salaries, sick leave, vacation, holidays, overtime, compensatory time, terminal leave, education incentive, longevity, service differential, insurance, and pre-retirement benefits. He stated that he had reviewed each party's evidence and arguments on each of the statutory criteria and that all were relevant to the resolution of the dispute, although he did not

give each factor identical weight. He wrote that he had also "strongly considered" that the public interest required that:

> [T]he policy interests supporting the regionalization of fire services should be furthered, with due consideration to the work, welfare and terms and conditions of fire personnel who perform life-saving and life-threatening duties. [Arbitrator's award at 198]

The arbitrator stated that each party bore a burden of proof in support of each of its proposals. He then explained how he would apply the statutory criteria:

> In reaching my conclusions I will summarize the position taken by each party along with the rationale each has submitted. Because of the sheer volume and complexity of the issues and the evidence, I will set forth an Award on each issue with a concise statement of reasons in support of each determination without an extensive analysis of the statutory criteria on each major economic issue. Some of the criteria are implicitly reflected in many of the issues which require decision. For example, an issue proposed by the Union which may contain excessive costs would, if granted, cause adverse financial impact on the Regional. Another example would be an issue the Regional might propose which would have such harsh economic consequences on individual firefighters which could undermine the need for continuity and stability of employment. [Arbitrator's award at 198-199]

With respect to proposals dealing with non-compensation items, the arbitrator stated that he would not discuss the statutory criteria in the same detail as he might in a typical impasse, but

that he would discuss and analyze each party's evidence and arguments in reaching his determination on that item.

After setting out this approach, the arbitrator then found that the interests of the public, the Regional and the employees were best served and balanced by following these broad guidelines and objectives:

> 1. To the extent feasible, the goal of merging or unifying major terms and conditions of employment should be attained for those employees previously employed in the five municipalities prior to regionalization. For example, certain major compensation issues should be [at uniform levels] even if accomplished over a period of time to ease the cost burden on the Regional.
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> 2. To the extent that such merger or unification is not feasible, certain benefits of certain employees employed by individual municipalities should be retained even if retention of that specific benefit level cannot be enjoyed by the remainder of the workforce. One factor traditionally employed in collective bargaining is to "red circle" an individual or class of employees due, in part, to the need to avoid unfair individual impacts. For example, certain benefits have accrued over the course of one's career with a reasonable expectation of continuation until retirement. A unity of result on issues such as these may not be achievable without producing harsh inequities either in terms of benefit elimination or excessive cost.
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> 3. Employees hired by the Regional after regionalization who were not employed by any individual municipality which helped form the Regional should have terms and

> conditions of employment which give some consideration, but less weight, to the prior terms and conditions of the individual municipalities and some consideration, but more weight, to the establishment of the Regional as a new employer. The Regional, as a new employer, must be given some latitude to offer employment on terms reflective of its own character and needs. For example, a firefighter hired after regionalization has never had any employment tie to any individual municipality. Prior terms set by an individual employer should not automatically be controlling on the Regional. This consideration, however, must be balanced by the establishment of terms not so disparate in relation to the more experienced firefighters that morale and unity among all firefighters are compromised or the continuity and stability of employment among the newly hired firefighters [are impaired].
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> 4. Consideration must also be given to internal comparability between firefighters and fire officers. Each bargaining unit faces many of the same considerations and challenges. Although each has separate bargaining units, all employees, regardless of rank, must be integrated into one department charged with the same mission serving the public's health, welfare and safety. [Arbitrator's award at 201-202]

These guidelines distill and synthesize the arbitrator's comprehensive analysis of the public interest and other statutory criteria; frame his discussion of all the major economic issues; and supplement the more specific discussion of the cost of living, comparability, financial impact, and continuity and

stability of employment woven into the arbitrator's analysis of many of the proposals, particularly the parties' salary proposals.

We reject the argument, made by each party with respect to different aspects of the award, that the arbitrator did not properly analyze the statutory factors because he did not specifically refer to them in discussing every award section. The essence of the Supreme Court's decision in Hillsdale PBA Local 70 v. Borough of Hillsdale, 137 N.J. 74 (1994), and our own interest arbitration appeal decisions, is that an arbitrator must provide a reasoned explanation for an award, after considering the relevant statutory factors and all the evidence and arguments. There is no mandatory method for accomplishing that task. See Cherry Hill (an arbitrator is not required to apply every statutory criterion to every facet of every proposal).

This award is replete with discussion of the financial underpinnings and obligations of the Regional; the relationship between that entity and the participating municipalities; and the parties' comparability evidence. The arbitrator discusses the CAP law and the cost of living. He also addresses the final criterion - the continuity and stability of employment, including the factors traditionally considered in determining terms and conditions of employment. He does so by his repeated balancing of the Regional's interest in a contract that reflects its own

mission, needs and character; the concern that the terms and conditions of unit employees' not be too disparate; and the previously employed firefighters' interest in having some weight accorded to their negotiations history, as expressed in the four municipal agreements.

For the most part, neither party points to arguments or evidence that the arbitrator did not consider. Moreover, before the arbitrator, the parties themselves said very little about the criteria per se. They argued for or against a proposal based on their respective theories of how the dispute should be decided - i.e., the Regional focused on its alleged financial limitations and its status as a new employer and the Association espoused unification of benefits at the highest level, arguing that the Regional had substantial financial resources. And in opposing its adversary's arguments to the effect that the arbitrator did not analyze the statutory factors, each party stresses that we should not disturb the arbitrator's reasoned exercise of discretion.

In this posture, there was no requirement for the arbitrator to have engaged in any more extensive discussion of the statutory factors. Hillsdale and Washington Tp. v. Washington Tp. PBA Local 206, 137 N.J. 88 (1994), which both parties emphasize, do not counsel otherwise. Those decisions involved final offer proceedings in which virtually the only issue was salary

increases; the arbitrators rejected the employers' economic offers in their entirety; and did so in brief opinions that referred only to police salaries in comparable communities. The Court underscored the obligation to consider all the statutory factors and provide a reasoned explanation for the award. We do not extrapolate from Hillsdale and Washington Tp. that this arbitrator was required to mention every criterion with respect to each of the 56 contract proposals where he issued a comprehensive 467-page opinion that discussed all the evidence and fully explained the rationale for his carefully crafted conventional award.

Further, parties rarely argue, and arbitrators rarely find, that the full panoply of statutory factors is relevant to administrative or operational proposals concerning, for example, grievance procedures or sick leave verification. This case is no different except that, because it involves a first agreement, there are dozens of such contract articles in question rather than a few.

For all these reasons, we reject the parties' generalized objections that the arbitrator did not apply the statutory criteria. However, we will specifically address contentions that the arbitrator did not address or properly weigh particular arguments or evidence concerning the statutory factors.

In addition to affirming the arbitrator's method of analysis, we also affirm the substance of the arbitrator's guidelines. In considering the parties' objections, we will evaluate whether the arbitrator's award is consistent with the principles and objectives that he derived from the statutory factors.

Further, we affirm the arbitrator's statement that each party bore the burden of proof with respect to its proposals. While the CSMA requires the Regional to preserve the various status quos of each municipal employer pending a new agreement, analytically, there is no traditional status quo for this new employer. However, the arbitrator appropriately gave weight to the terms and conditions in the prior agreements, particularly in setting employment terms and conditions with respect to firefighters previously employed by one of the municipalities. Negotiations history is one of the factors traditionally considered in determining wages and benefits, N.J.S.A. 34:13A-16g(8), and the CMSA does not require an arbitrator to disregard that evidence when negotiations units are merged.

Against this backdrop, we consider the parties' specific objections. We will organize our decision as follows. First, we address each party's contention that the award is inconsistent with the financial evidence. Second, we address each party's challenges to the arbitrator's award on the major economic

issues, as well as their objections to award sections involving more minor economic items. Third, we consider the parties' challenges to award sections - such as outside employment, Association rights, and drug and alcohol testing procedures - where the focus is on administrative, operational, or language issues, as opposed to the amount or nature of an awarded benefit. We include in this section the non-compensation aspects of some of the major economic benefits - e.g., vacation scheduling.

In addition, in several instances, the Regional or the Association contends that an award provision conflicts with a governing statute or regulation. These challenges could and should have been made prior to the arbitration, because the challenged award sections were proposed by one or the other party. See N.J.A.C. 19:16-5.5(c) (where no pre-arbitration scope petition is filed, parties are deemed to agree to submit all unresolved issues to arbitration). However, in the fourth section of our opinion, we will consider contentions that certain award sections cannot be implemented because they violate a statute or regulation. Compare Teaneck, 353 N.J. Super. at 301-302 (despite regulation requiring that scope petitions be filed before interest arbitration, Commission is not barred from considering, when it chooses to do so, post-arbitration scope challenge in an interest arbitration appeal); Old Bridge Tp. Bd. of Ed. v. Old Bridge Ed. Ass'n, 98 N.J. 523, 525 (1985) (public

sector arbitration awards must conform to statutes and regulations); Borough of Roseland, P.E.R.C. No. 2000-46, 26 NJPER 56 (¶31019 1999) (in considering whether to dismiss late-filed scope petition, we will consider whether a challenged proposal, if awarded, would require us to vacate an award). However, we do not decide the Regional's claims that certain award provisions significantly interfere with its managerial prerogatives. It does not explain why it did not raise these objections earlier and we are satisfied that the challenged provisions do not affect the overall validity of the award. Roseland.

Finally, we include a separate section addressing those parts of the award that one or both parties allege are unclear.

III. Financial Impact of Award

Both parties allege that the overall economic package awarded is inconsistent with the evidence concerning the Regional's finances. We begin with a review of the parties' financial arguments before the arbitrator.

The Regional argued that the Association's proposal, with 5% across-the-board increases and unification of salaries and benefits at the highest level in any of the agreements, was beyond its financial means. It stated that it had a general fund operating fund surplus of only $215,000 for 2000 and maintained that the participating municipalities could not afford to pay more than their 2001 contributions; were constrained by CAP law

limitations that restricted them from raising their budgets by more than 3.5% per year; and had residents with low per capita income who could not pay higher taxes. It urged the arbitrator to follow an alleged pattern of settlements between the participating municipalities and their police units, whereby three of the participating municipalities, North Bergen, Weehawken and Guttenberg, reached voluntary settlements with their police units averaging 3.5% per year for contracts during the 1998-2001, 2001-2003, and 1996-2002 time periods, and a fourth participating municipality, West New York negotiated an agreement with 3% increases for 1999 through 2002.[6/] It stressed that the CMSA did not provide a basis for departing from the longstanding labor relations concept of "pattern", which fit within such section 16g criteria as the public interest, comparability, and principles generally applied in determining wages and benefits. N.J.S.A. 34:13A-16g(1), (2) and (8).

The Regional did not attach a total dollar cost to the Association's package, but stated that the proposed increases in 1999 base salaries would amount to $700,000 for that year alone. It argued strenuously that an award of the Association's offer,

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6/ The record shows the maximum patrol officer salary for two of the units. One of those salaries ($58,698), is higher than the top step 1999 firefighter salary in any of the participating municipalities. The second salary is higher than the maximum 1999 firefighter salary in three of the four municipalities.

or anything close to it, would defeat the State-sanctioned policy of regionalization. Because it proposed a salary increase for the first year of the agreement only, and sought to negotiate increases for the remainder of the term, it is not possible to gauge precisely what the Regional believed was a reasonable salary award for the full term of the agreement.

The Association stressed that, given the financial assistance that the Regional and municipalities had received from the regionalization, award of its offer would not have an adverse fiscal impact and, further, there was no basis for the Regional's proposals to reduce wages and benefits below the levels in the predecessor agreements.

In arriving at the award and assessing its financial impact, the arbitrator rejected the Association's theory that all firefighters should immediately be raised to the top level of any benefit previously received, citing the excessive cost of such an award. For example, the arbitrator noted that the Association proposed higher than average salary increases (5% per year on the Union City schedule) and did not take into account the costs of unification. Further, he reasoned that while the State assistance received by the Regional and municipalities was relevant to an assessment of the award's financial impact, these grants did not automatically weigh against the Regional's offer because cost savings were inherent in regionalization.

The arbitrator concluded that the cost of living weighed strongly against an award consistent with or close to the Association's offer and he found that the CAP law was pertinent because of its application to the municipalities. He stated that he had accepted the Regional's financial impact arguments to the extent that the award was less than the Association's offer.

On the other hand, the arbitrator rejected the Regional's proposal to red-circle firefighters whose compensation exceeded the Regional's proposed salary, explaining that such a freeze would create a "dramatic gap" between firefighters in neighboring communities and those in the Regional. He also presumed that the participating municipalities who contribute to the Regional were aware of their and the Regional's obligation to fund an interest arbitration award for the firefighters - including costs retroactive to the time of regionalization - just as they would have been obligated to fund the retroactive terms of new labor agreements had the municipalities continued to employ the firefighters.

The arbitrator observed that the precise costs of the award were difficult to calculate, given the unique circumstances of merging four prior agreements and a new hire package. He added that the parties' cost analyses had served as useful guides. He calculated that the 3% increases awarded in each of the five contract years, plus the fifth-year unification costs of

$271,872, resulted in a five-year increase in salary costs of $1,626,310. He noted that the $650 per year clothing allowance awarded represented 1% of the final maximum salary.

In terms of annual percentages, he calculated that the annual cost of the unification adjustment, for those who received it, averaged 4.58%, or 2.29% during the contract term, given that the unification took effect in the last six months of the contract.[7/] The arbitrator reasoned that this end-of-contract adjustment, which averaged .45% per year over five years, was more reasonable and less costly than having an adjustment transition throughout the five-year period, given that the latter method would result in cumulative costs well in excess of that for implementing the adjustment on January 1, 2004. Thus, the salary increases plus the unification adjustment result in lower cumulative costs than if the arbitrator had awarded annual increases in the range of 3.5% per year.

The arbitrator concluded that this award, including its retroactive costs, could be funded without adverse impact, noting that, given the reduction in payroll costs attributable to the early retirements, "there was less cost to the municipalities compared to their obligations necessary to fund the pre-existing table of organization" (Arbitrator's award at 349). Further, he

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7/ There is a 2.29% flow-through into the July 1, 2004-June 30, 2005 contract year.

observed that long-term savings would result from the award of modified benefits for new firefighters, adding that, under the award, the per capita firefighter cost for newly hired firefighters was lower than the per capita cost for the firefighters each municipality had previously employed. He concluded that while the municipalities would have to contribute to the cost of the award, they had benefitted significantly from the REAP program and the sale of fire department assets. Finally, he found no indication in the record that the costs of the award would compel any of the municipalities to exceed their CAPs.

Neither party has offered a basis to disturb this analysis. The Regional contends that it does not have the funds required to pay the award -- including approximately four years in retroactive costs - but offers no particularized analysis to support that assertion. The award is significantly less than the Association's offer. Moreover, the record supports the arbitrator's finding that the reduction in staffing resulted in substantial savings, and the Regional agrees with the arbitrator's conclusion that the municipalities should have been aware of their obligation to fund the award, including retroactive costs. These findings support the arbitrator's determination that the Regional, which had lower salary costs after the retirements than it had before, had the financial

capability to fund an award that, over the five-year term, increases costs less than 3.5% per year and is thus within the range of the settlements between the participating municipalities and their PBAs that the Regional had urged the arbitrator to follow.

The Regional objects that the arbitrator placed too much weight on the State aid received, the disbursements to the municipalities, and the alleged savings received from the early retirements. It stresses that the State aid was for start-up costs and argues that the other savings are offset by the Regional's obligation to repay lease revenue bonds and make payments toward the cost of the early retirement package.

Preliminarily, the arbitrator noted these factors, particularly the Regional's bond obligations and the cessation of State aid in 2001, in arriving at an award significantly less than the Association's offer. However, the fact that the Regional and the municipalities have some continuing, long-term obligations associated with regionalization does not mean that the significant lump-sum disbursements they received, as well as the Regional's reduction in staff, are not also relevant in evaluating the Regional's financial status during the period in which those reductions and disbursements occurred. In this vein, the arbitrator did not award the increases he did based on the Regional's alleged ability to pay them. Compare Hillsdale.

Instead, he found that the Regional could fund the salary increases that he found to be appropriate based on the record and the statutory criteria. While an employer's financial limitations may militate against an award that would otherwise be warranted, the Regional has not shown that to be the case here.

For example, although the Regional suggests that the award will cause skyrocketing property taxes, it has not pointed to any evidence indicating that any additional municipal contributions necessary to finance the award would require tax increases or strain municipal cap limits in any of the municipalities. Indeed, the salary increases awarded, including unification costs, are within the range of the settlements the Regional had cited. Those settlements are probative of the economic package the municipalities believe they can fund without an adverse financial impact. See Teaneck, 25 NJPER at 458.

Moreover, the Regional's assertion that it lacks sufficient reserves to pay the award is not determinative where its budget is based on municipal allocations that may be adjusted, and the Regional has not shown that any required adjustments would adversely affect the municipalities' financial standing. Compare Middlesex Cty., P.E.R.C. No. 98-46, 23 NJPER 595 (¶28293 1997) (while N.J.S.A. 34:13A-14b states that the interest arbitration process should give due weight to the interests of the taxpaying public, the Reform Act does not require that the arbitrator award

the amount the employer has budgeted for wage increases or automatically equate the employer's offer with the public interest).

Nor are we persuaded by the Regional's contention that the arbitrator was required to include a more detailed calculation of award costs. In this vein, the Regional highlights the longevity, holiday pay, educational stipend, and service differential portions of the award.

N.J.S.A. 34:13A-16d(2) requires an arbitrator to identify the new costs generated in each year of the agreement. Rutgers, the State Univ., P.E.R.C. No. 99-11, 24 NJPER 421 (¶29195 1998). The items the Regional cites are not new benefits. They were included in one or more of the prior agreements. For example, the arbitrator continued the education stipend and service differential provisions in the prior agreements only for individuals who were already receiving them, so that the only new costs this red-circling generated are those attributable to an increase in base salary. With respect to the costs of newly awarded education benefits, they cannot be calculated unless and until unit members obtain degrees that entitle them to payments.

Similarly, with respect to longevity, the arbitrator unified benefits effective January 1, 2003, so that costs prior to that date are a continuation of what the Regional was already paying, plus any increases attributable to an increase in base salary.

And after unification, the longevity schedule is the same as that in West New York and less generous than that enjoyed by former Union City firefighters. The award includes a more generous schedule only for Weehawken firefighters and North Bergen firefighters.

With respect to holiday pay, the 112 hours awarded is the same as received by West New York; 8 hours more than in Weehawken; 8 hours less than in Union City; and more generous than the provisions in North Bergen, where firefighters received 5 compensatory 12-hour tours.[8/] The Regional has not shown either that these items resulted in any material net increase in costs or that any such costs undermine the arbitrator's financial impact assessment.

Finally, we comment on the Regional's contention that the award imposes $5 million in retroactive costs. It does not explain how it arrives at that figure. But even if we were to assume its accuracy, along with the Regional's contention that it has only $2.5 million available, it has not shown that the five municipalities together lack the financial ability to contribute a combined total of $2.5 million for four years of retroactive

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8/ It is not clear whether firefighters hired directly by the Regional received holiday pay. They did not receive longevity and, while the arbitrator awarded a separate longevity schedule for them, that provision will not generate costs during the term of the agreement because benefits do not begin until the 7th year of employment.

increases that the arbitrator found to be warranted by the statutory factors.

Similarly, the Association's objections to the arbitrator's financial analysis provide no basis to disturb the award. The gravamen of the Association's position is that there was no justification not to unify all benefits at the highest level from the outset of the agreement. It maintains that the municipalities and the Regional saved a total of $32 million due to retirements, State aid, saved pension costs and the sale of assets.

Preliminarily, even if we accepted the Association's characterization of the Regional's financial status, an employer's alleged ability to pay the other party's offer is not a sufficient basis to award it. Compare Hillsdale, 137 N.J. at 86; Town of Newton (financial impact criterion, N.J.S.A. 34:13A-16g(6), does not require a municipality to prove its inability to pay the other party's offer).

In any case, the record supports the arbitrator's decision to moderate the costs of the award and unification. The residents of the constituent municipalities have comparatively low per capita incomes; the State aid the Regional received was for start-up costs; and much of that assistance was allocated to items other than salary. The municipalities' REAP payments were statutorily required to be passed through to taxpayers as

property tax credits and the REDI assistance they received was to help fund the early retirement package. Moreover, the Regional received no State aid in 2001, and was required to begin making substantial semi-annual principal and interest payments to the Authority beginning in 2001 and continuing through 2024. Finally, as we explain in other sections of the opinion, the Association has not shown that the record or the statutory factors required the arbitrator to award a more substantial economic package.

For all these reasons, neither party has shown any deficits in the arbitrator's analysis of the financial evidence that warrant disturbing the award.

IV. Major Economic Issues

The arbitrator thoroughly analyzed the parties' proposals on the major economic issues, including salaries, vacation, holiday pay, clothing allowance, sick leave, terminal leave, longevity, health insurance, service differential, educational incentives and pre-retirement payments. The predecessor agreements each had clauses on most of these items and, for the most part, each party presented proposals to continue the benefits in some form, with the Association generally espousing unification of benefits at the highest level and the Regional urging that its proposals, generally for lesser benefits, be evaluated in the context of its status as a new employer. The arbitrator did not accept either

party's theory in its entirety but gave some weight to each party's position in fashioning his own approach. Thus, the main underpinnings of his analysis were that, first, benefits should be unified to the extent feasible to promote unity and morale among unit members and reflect the Regional's status as a single employer. Second, he found that the nature and history of some benefits made them difficult to unify. Neither party challenges these principles conceptually, and we affirm them.

The third principle that figured significantly in the arbitrator's analysis was that the Regional had an interest in having a compensation package for the newly hired firefighters that reflected its own character and needs, such that the terms of the prior agreements might in some instances be given less weight than in arriving at terms governing the more experienced firefighters. The Association protests that different terms are never warranted. However, the arbitrator could reasonably decide to in some instances accord less weight to the terms of the prior municipal agreements when setting the employment terms of individuals whom the participating municipalities had never employed. Those agreements were negotiated over many years and in a variety of circumstances by multiple municipal employers and we will not disturb the arbitrator's judgment that their terms should not "automatically be controlling" on the Regional.

Within this framework, the arbitrator had broad discretion to determine the degree to which benefits should be unified and the method of doing so, and we will not second-guess his decisions with respect to the numerous individual components of the package. Our focus is on the overall award, specifically, whether it was supported by substantial credible evidence and whether the arbitrator explained his reasoning in the context of the statutory factors. See Borough of Allendale, P.E.R.C. No. 2003-75, 29 NJPER 187 (¶56 2003).

Our recognition that fashioning a compensation package is not a precise mathematical process is an understatement in this case, given the number of proposals that had to be considered. In that vein, it is not grounds for vacation or remand that the arbitrator could have chosen a different method for unifying some benefits or reached another conclusion about which benefits should be merged and which should not.

Against this backdrop, we address the parties' objections to award provisions where the arbitrator for the most part unified benefits either for all unit members or for all previously employed firefighters - i.e., salary, vacation, sick leave, holiday pay, clothing allowance, health insurance and longevity. We next discuss the parties' challenges to the terminal leave and education incentive provisions, where the arbitrator decided not to merge benefits. We then consider the Association's objections

to the arbitrator's rulings on its proposals for service differential, pre-retirement payments, compensatory days off, and a legal services plan - benefits that had been included in only one or two agreements and which the arbitrator decided not to extend to all unit members. Finally, we address objections to a few other economic items.

Salaries

Both parties object to the timing of the salary unification, with the Regional contending that the record supports an award where unit members are eased into a unified structure at some point after the parties' first contract expires, and the Association protesting that the Regional's financial resources justify immediate unification. The record amply supports the decision to unify salaries during the last six months of the contract. That decision achieves what both parties recognize is a desirable goal and does so within the term of the first agreement, without jeopardizing the Regional's financial security.

As we have stated, the Regional has not shown a basis for disturbing the arbitrator's conclusion that salaries can be unified in January 2004 without adverse financial impact. With respect to the Association's contention that salaries should have been unified immediately, this objection goes to the essence of the arbitrator's broad discretion to arrive at salary increases,

see Lodi and Newark, and the record does not point ineluctably to a date when unification should occur. We defer to the arbitrator's judgment that the transition to a unified salary schedule was best accomplished at the end of the contract term rather than at its outset, given that the latter method would have resulted in higher cumulative costs throughout the term of the agreement. As we have explained in analyzing the parties' financial arguments, the arbitrator reasonably decided to moderate the costs of the award.

The specifics of the salary award are also well supported and grounded in the arbitrator's explicit and implicit consideration of comparability, the continuity and stability of employment, financial impact and the other statutory factors. We turn first to the Regional's objections.

The Regional argues that the arbitrator did not explain why he unified salaries on the Union City salary guide and also protests that there was no more basis to unify salaries by using the highest (Union City) salary guide than there was to use the lowest. However, the arbitrator stated that he linked the across-the-board salary increases awarded during the first four years of the agreement with his method of unifying salaries later. The arbitrator stated that he chose to award 3% increases - which he found to be lower than average - to balance the costs

of unification on the Union City schedule, which resulted in higher than average increases in the final contract year.

Thus, the guide used to unify salaries is only one aspect of the unification process, which the arbitrator fully explained. There is no basis to disturb his overall approach, which included use of the Union City schedule.[9/] Moreover, we note that while Union City firefighters did have the highest maximum base salary, the salaries of the other four municipalities clustered within $3,000 of each other and Union City.

The arbitrator's comparability discussion underpinned his unification analysis and, contrary to the Regional's objections, we find that discussion to be well grounded. The record supports the arbitrator's finding that the evidence showed annual firefighter increases in Hudson County and New Jersey of between 3% and 4% during 1999 through 2003, with some sporadic figures above this number, and averages for the various contract terms of between 3.5% and 4%. The Regional objects that the arbitrator focused only on salary increases for 1999 through 2003 whereas he

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9/ The Regional objects that the award did not specify whether the Union City base salary figure used by the arbitrator included the clothing allowance that had been folded into base salary. The 1995-1999 Union City agreement provided that the obligation to pay the clothing allowance "shall end in 1997" and further stated that the clothing allowance "shall be incorporated into the annual base salary of each employee as set forth in Article IX hereof." The salary listed in Article IX is the salary used by the arbitrator. Association Exhibit A-49-2-B shows that the salary figure used by the arbitrator did not include clothing allowance.

was required to consider contractual increases before or after these dates - i.e., 1998 increases included in a 1998-2003 settlement. We are not convinced that the arbitrator was required to so analyze the data but in any case, the Regional has not shown that its mode of analysis would yield materially different firefighter comparability figures. In sum, the record supports the arbitrator's conclusion that the 3% increases were below average and resulted in lower-than-average cumulative costs for the first four contract years.

Moreover, a salient point in conducting a comparability analysis is the actual salaries resulting from the percentage increases. See Fox v. Morris Cty. PBA, 266 N.J. Super. 501, 519 (App. Div. 1993), certif. denied, 137 N.J. 311 (1994); City of East Orange, P.E.R.C. No. 2003-39, 28 NJPER 581, 583 (¶33181 2002). The record shows that the maximum base salary at the end of the agreement is well within the range of those in several urban departments in the State and in three other fire departments in Hudson County.[10]

10/ The top base salary at the end of this contract, in 2004, is $64,870. The record indicates that the average 2003 top base salary for Elizabeth, Union and Englewood is $72,362; the average 2002 top base salary for those jurisdictions plus Newark and Rahway is $67,244; and the average 2001 top base salary for the same group is $64,688. The average 1999 salary for nine urban departments is $58,525. In Hudson County, the 2003 top base salary for Bayonne is $59,782; the 2002 top base salary for Hoboken is $62,332; and the 1998 top base salary for Jersey City is $58,000.

The Regional also argues that the arbitrator gave insufficient weight to its "pattern of settlement" argument with respect to agreements reached by PBA locals with North Bergen, Weehawken and West New York. However, two of the cited settlements averaged 3.5% for 2000-2003 and 1998-2001. The settlement in West New York was lower (3% for 1999 through 2002), but a fourth settlement, Guttenberg, included an average 3.5% per year increase over a seven-year, 1996-2002 contract, with 5% increases in the last five years. Thus, the percentage increases awarded by this arbitrator are well within the range of the agreements relied on by the Regional.[11]

Similarly, there was no error in the arbitrator's decision not to discuss an exhibit showing salaries for a range of public

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11/ The Regional focuses on seven agreements including four firefighter contracts (two each from two jurisdictions, for different time periods); one fire officer contract; and two police agreements. Taken together, these agreements reflect average annual increases of 3% over the contract terms. This selective comparability data does not undermine the arbitrator's findings, especially where the Regional does not explain why the two police contracts are more relevant than other police comparables and where two of the three firefighter contracts include average annual increases over the contract term of 3.5% and 3.4%.

The Association's reply brief cited two Union City awards, one involving the PBA, with average annual increases of 3.65% for July 1999 through July 2003; and the other involving the SOA, with average annual increases of 3.71% for July 1999 through July 2004. We do not consider these awards since they are not in the record and we have not been asked to take administrative notice of them.

and private sector occupations in New Jersey. That data reflects 1996 salaries and may no longer be probative, especially since many of the listed salaries appear to be entry level. In any case, the Reform Act does not mandate that a particular salary relationship be maintained between firefighters and other public or private employees. See Allendale, 24 NJPER at 219.

Nor is the arbitrator's comparability analysis undermined by private sector wage data prepared by the New Jersey Department of Labor (NJDOL) and published by the Commission. N.J.S.A. 34:13A-16.6. The Regional asks us to take administrative notice of the 2002 NJDOL document, which shows a statewide 1.2% increase in average private sector wages in 2001, and .3% decrease for Hudson County.[12/] We do take notice of the report but it does not require different salary increases where the preceding report showed a 6.9% statewide increase in average private sector wages for 2000, and an 11.7% increase for Hudson County.

In addition, we find that the arbitrator appropriately considered the continuity and stability of employment in awarding the salaries that he did. We accept his labor relations judgment that the "red-circling" proposed by the Regional, which would have resulted in freezing many firefighters salaries, would have undermined the morale of employees who already had to deal with

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12/ Each NJDOL report reflects the change in average private sector wages for the preceding year.

the significant changes resulting from regionalization. He was not required to accept the Regional's theory that this statutory factor favored the Regional's offer because unit members do not face the same possibility of layoffs as some non-public safety employees.

Finally, the Regional maintains that the arbitrator did not adequately consider the cost of living criterion. The arbitrator found that the cost of living was relevant and weighed strongly against award of the Association's offer; but stated that he could not conclude that the most weight should be given to that factor (Arbitrator's award at 353). We accept that analysis. The Regional has not shown why the cost of living should be the single most important criterion in a proceeding where, following a merger of negotiations units in a regionalization, the dominant concern was how to begin structuring a unified compensation and benefit program. Moreover, while the Regional cites the cost of living as rising .1% in 1999, 1.6% in 1998, and 1.7% in 1997, the Regional-submitted data included in the appellate record shows that the Consumer Price Index for all Urban Consumers (CPI-U) had risen by 3.1% between December 1999 and December 2000 and that the CPI for all Urban Wage Earners & Clerical Workers (CPI-W) had risen 3.3% in the same time period.

With respect to the Association's objections, we find that the arbitrator reached a reasonable determination not to award

its proposal for three hours extra pay per week, in addition to base salary, to compensate firefighters for working more than 40 hours per week. The arbitrator noted that the Weehawken and West New York agreements had provided for some extra pay for this reason and that North Bergen's salary schedule also reflected this concept. However, he observed that the number of hours worked derived from the union-proposed work schedule that he had awarded; the Fair Labor Standards Act did not require the payment; and the vast majority of municipal agreements in evidence did not provide for the sought-after payment for firefighters on a 24/72 schedule. Finally, he found that there was little support for awarding additional payment for hours worked under the normal schedule, as provided in the North Bergen, Weehawken and West New York agreements, where he had unified salaries at the Union City level and Union City did not provide for such payments.

This analysis embodies such considerations as comparability and the factors normally considered in determining wages and hours. We decline to disturb it.

Similarly, the award of an eight-step salary guide for newly hired firefighters is not inconsistent with the arbitrator's stated goal of unifying salaries. While new firefighters will be placed on a longer salary guide, they will achieve the same maximum salary as those previously employed by a municipality.

Thus, the separate salary guides do not create a significant salary disparity among unit members. This is especially so since most previously employed firefighters were at the maximum step of their former guides, and will be placed on the top step of the Union City salary guide effective January 1, 2004. Thus, there will be few if any instances where a firefighter first hired by the Regional will be earning less than a previously employed firefighter with the same years of experience.

Longevity and Holiday Pay - Association Objections

In effectuating his conclusion that benefits for previously employed firefighters should be unified to the extent feasible, the arbitrator awarded a unified longevity schedule for previously employed firefighters effective January 1, 2003, for time accrued through December 31, 2002. He unified holiday pay for all unit members effective January 1, 2003. After unification, the longevity schedule is the same as that in West New York and less generous than that enjoyed by former Union City firefighters. The award includes a more generous schedule for former Weehawken firefighters and North Bergen firefighters. The award "red-circled" some Union City firefighters already receiving longevity percentages higher than the unified benefit, but it appears that others will receive a lower percentage of salary in 2003 than they did in 2002. For example, an employee with 6 years experience received 8% under the Union City guide

but the next year, with seven years of experience, it appears that the employee would move onto the unified longevity schedule and receive 4% until the 8th year of service. The percentage would be applied to a higher salary. With respect to holiday pay, the amount awarded (14 8-hour days) was one day less than had been received by Union City firefighters but the same or more than had been received in the other municipalities.

The Association challenges these provisions, arguing that the arbitrator did not explain, in the context of the statutory criteria, why some firefighters receive more than they had previously and some less. However, these benefit adjustments and variations flow from the arbitrator's reasoned decision to unify some benefits at less than the highest level provided for under the predecessor agreements. We decline to disturb that determination: awarding the highest-level benefits in all of the prior agreements would have culled the provisions most favorable to employees, without incorporating the offsetting concessions that might also have been part of those agreements. The arbitrator anticipated a similar argument when he wrote as follows:

> [T]here will be individual effects which will cause some employees to receive more base salary compensation than others during this contract term in order to achieve a unification in base pay. To the extent that this occurs, I do not consider these individual effects as causing inequities between and among firefighters but rather the

> inevitable consequence of creating an equitable salary system. [Arbitrator's award at 339]

The same analysis applies to the fact that some firefighters will receive greater overall compensation, vis-a-vis their prior compensation package, than will others. Moreover, to the extent some firefighters' longevity benefit was reduced, that loss must be viewed in the context of the overall award for the unit, which equalized salaries at the Union City level and granted greater longevity benefits to some firefighters. The arbitrator was not required to specifically explain the rationale for each benefit reduction for each particular group of firefighters where the reductions resulted from his award of a unified compensation system and benefit structure and he set forth the principles that underpinned that structure.

We also decline to disturb the arbitrator's decision to award a separate longevity schedule for new hires, despite the Association's position that that result is inconsistent with his goal of unifying longevity benefits. The arbitrator's finding that merger of terms and conditions was desirable was balanced by his conclusion that the provisions governing new hires should be less tied to the terms in the predecessor agreement than those of previously employed firefighters, provided that those terms are not so disparate in relation to the more experienced firefighters that they undermine morale, unity, and the continuity and

stability of employment. We find no flaw in the arbitrator's reflecting these principles in the longevity portion of the award. We add that one of the prior agreements had less favorable longevity schedules for more recent hires.

Finally, the Association maintains that, assuming the longevity portion of the award is affirmed, its effective date should be changed to January 1, 2004, consistent with the adjustment the arbitrator made to the sick leave article in his Decision on Clarification. The Association argues that when the award was issued the longevity article, like the sick leave article, was intended to apply prospectively. It urges that employees who receive reduced longevity benefits under the award should not have to pay back amounts received in 2003.

The arbitrator adjusted the effective date of the sick leave article in conjunction with the changes that he made to the sick leave program pursuant to the limited remand order. That order did not direct him to re-examine the longevity provision and he did not do so. Initial briefs in this matter were filed in March 2003, after the scheduled effective date of the longevity article, but this issue was not raised. In this posture, we decline to entertain the Association's argument.[13]

13/ After submitting a letter indicating that it would not submit comments on the Decision on Clarification, the Regional sought leave to respond to those portions of the Association's comment letter that addressed longevity, (continued...)

Holiday Pay and Clothing Allowance - Regional Objections

The arbitrator awarded a unified clothing allowance benefit of $650 per year, effective July 1, 2002, along with the holiday pay benefit just discussed. The dollar amount awarded was proposed by the Association and reflected the figure that had been set out in the Union City agreement and then, on January 1, 1998, had been rolled into base salary. The Regional contends that the arbitrator exceeded his authority and issued an imperfect award, N.J.S.A. 2A:24-8d, because clothing allowance was included in the base salary for Union City firefighters and holiday pay was included in the base salary of North Bergen and Weehawken firefighters. The Regional maintains that the award thus results in an unjustified "double payment" for firefighters from the above-noted units.

The arbitrator recognized that some base salaries under some prior agreements included holiday pay or clothing allowance but nevertheless awarded unified benefits on these items for all unit members (Arbitrator's award at 339). He indicated that once an item is included in base salary it becomes an adjustment to salary in the same way as an across-the-board salary increase.

13/ (...continued)
vacation, and service differential. The Association has filed a reply to the Regional's response. Given that we decline to entertain the Association's argument on these issues, we deny the parties' requests to file further submissions.

(Arbitrator's award at 184). In that vein, the Union City contract stated that the obligation to pay the clothing allowance ended in June 1997 and that, effective January 1, 1998, it was to be "incorporated into the annual base salary of each employee."

The arbitrator could reasonably conclude that it was not relevant whether the base salaries under the predecessor agreements were achieved through successive salary increases or salary increases plus clothing or holiday pay fold-ins, particularly since a fold-in may be agreed to in exchange for lower across-the-board increases. Compare East Orange. We recognize that while a benefit can "disappear" into base salary, as was the case with the Union City clothing allowance, a benefit can also be maintained in an agreement, together with a proviso that it be paid as part of base salary. To the extent that was the case with respect to North Bergen and Weehawken, there is no double payment because any separate holiday pay or clothing allowance provisions in those contracts are superceded by those in the award.

Sick Leave

The arbitrator awarded a uniform sick leave program that pertains both to newly hired firefighters and those previously employed by one of the participating municipalities. Effective January 1, 2004, the program grants unit members a set number of sick days per year based on years of service, and includes

provisions on sick leave verification and an incentive program for non-use of sick leave.[14/] In his Decision on Clarification, the arbitrator addressed whether, after the effective date of the awarded program, firefighters from Union City and Weehawken would have an accumulated sick leave bank available to use for non-work connected illnesses or injuries.

The Association objects to the amount of sick time awarded under the new program; contends that the award conflicts with Department of Personnel (DOP) sick leave regulations; asks us to modify the Decision on Clarification; and maintains that the arbitrator should have, in calculating the award's annual net economic changes, taken into account the reduction in sick leave for some employees. The Regional objects that the award significantly interferes with its prerogative to verify sick leave. We address the Regional's objections in Section VI and turn now to the Association's concerns. We start with its challenges to the uniform sick leave program that goes into effect January 1, 2004.

With respect to the number of sick leave days awarded effective January 1, 2004, we decline to disturb the arbitrator's award of 5 to 10 24-hour sick leave days per year, based on years of service. The arbitrator was faced with the difficult task of

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14/ As noted earlier, the Decision on Clarification changed the effective date from January 1, 2003 to January 1, 2004.

unifying disparate sick leave benefits. West New York granted seven 24-hour tours and had a provision allowing unit members to apply for up to 21 months of catastrophic sick leave for a non-work-related illness. North Bergen received between 11 and 15 days depending on years of service; and Union City provided a maximum of one year of sick leave, regardless of whether or not the illness or injury was job-related. Weehawken firefighters had unlimited sick leave; no set number of days in any year; and did not accumulate days from year to year.

The arbitrator made a reasoned decision to unify sick leave benefits and awarded a set number of days that is within the range of the benefit levels in the North Bergen and West New York agreements. The Association has not shown either that the weight of the evidence supported award of its proposal for one year of sick leave or that a one-year sick leave benefit for non-work-related illnesses is a common one. We note, as did the arbitrator, that a separate Injury Leave article provides for up to one year of leave for on-duty injuries.

As we have stated with respect to other benefits, the award is not per se deficient because some firefighters receive a lesser annual sick leave benefit than before. We incorporate our earlier analysis about the difficulties and consequences of developing a unified compensation and benefits structure and note that firefighters from West New York will, after five years of

service, receive more sick leave days. Further, as discussed below, the Decision on Clarification addresses the Association's concern that firefighters who did not accumulate sick leave under their prior agreements would not have a sick leave bank to use in the event of a long-term illness.

Moreover, we are not persuaded that the amount of sick time awarded must be modified to conform to Department of Personnel (DOP) regulations governing sick leave. Preliminarily, it appears that the regulations do not apply to this unit. See N.J.A.C. 4A:6-1.1a(4) (vacation and sick leave for police officers and firefighters are set by local ordinance). In any case, the 120 sick leave hours awarded beginning firefighters equals the 15 working days granted State employees, who by regulation work seven or eight hour days. See N.J.A.C. 4A:6-2.2. The 240 hours awarded more senior employees is twice that allotment.

DOP regulations also state that an employee may take sick leave to care for a family member or if the employee is unable to work due to a death in the immediate family. However, there would be no need to modify the award to include such reference, even if the regulations applied, given that statutes and regulations setting terms and conditions of employment are incorporated in negotiated agreements. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80 (1978).

With respect to the sick leave incentive program, we defer to the arbitrator's judgment in granting a $500 stipend for employees who do not use any sick leave days in a calendar year. Both parties had proposed such a plan; the arbitrator awarded the amount proposed by the union, but declined to award an incentive for employees who do not use sick leave for four months. He explained that only North Bergen had included incentives for less than a full year, and that the Association had not specified why that type of program was necessary. On appeal, the Association makes no particularized arguments in this vein and, therefore, we will not overturn the arbitrator's analysis.

We next consider the Association's objections to the clarification decision. The arbitrator wrote as follows:

> Although not expressly stated, PERC's inquiry concerning the conversion of some employees from "unlimited" sick leave to a specific allotment of paid sick leave is whether those employees would have access to an accumulated sick leave bank, the type of which other firefighters might have accrued by virtue of having had a specific allotment, a portion of which may have been unused and therefore accumulated. If not, that employee might not have access to accumulated sick leave to apply to a non-work connected injury or illness which would force that employee to exceed his newly awarded annual allotment and therefore be put in an unpaid status. It was not my intention to allow such situation to exist as a result of the conversion. [Decision on Clarification at 9-10]

The arbitrator made these clarifications. First, he concluded that Union City and Weehawken firefighters with twenty or more

years of service as of January 1, 2004, should continue to receive the sick leave benefits to which they were entitled under the prior agreements. Second, for Weehawken firefighters with less than 20 years of service, he created an annual sick leave bank for sick leave use consisting of 72 hours for each full year of service earned prior to January 1, 2004. The bank was created without regard to prior sick leave usage. Third, for Union City firefighters, he found that the terminal leave article in their prior contract had provided for an annual sick leave bank that could be reduced by reason of sick leave use. He clarified that, for Union City firefighters with less than 20 years of service as of January 1, 2004, any accumulated sick leave time earned as of January 1, 2004 shall be carried forward into each employee's sick leave bank, to which allotments earned under the newly awarded sick leave program could be added.

The Association's asks us to modify certain aspects of the clarification decision. We decline to do so.

The Association first objects that there is no basis to red-circle the prior sick leave provisions for Weehawken and Union City firefighters with 20 or more years of service, without doing so for firefighters from other jurisdictions with equivalent experience. The distinction is grounded in the basis for the clarification. We remanded the award so that the arbitrator could review the impact of the new program on Weehawken and Union

City firefighters who might suffer a non-work related illness, given the Association's position that these employees did not accumulate sick days. In undertaking this review, the arbitrator concluded that firefighters with lengthy service should continue to enjoy their prior sick leave benefits, with the result that they would be in no greater jeopardy of being placed in a non-paid status than they would have been prior to regionalization. However, as the arbitrator stated, the concept of having a sick leave bank, and an accumulation of sick leave hours, was consistent with the program previously enjoyed by firefighters from North Bergen and West New York. Thus, the concern that triggered the limited remand did not pertain to these employees, and the arbitrator reasonably found no need to grandfather their prior sick leave benefits.

The Association next requests that we modify the award to provide for a bank of five days per year for Weehawken firefighters. It cites no particularized reason for increasing the awarded sick leave bank and we decline to do so. The clarified award substantially ameliorates the Association's initial objection that Weehawken firefighters would not have a sick leave bank available for an extended illness. For example, as of January 1, 2004, a former Weehawken firefighter with 10 years of service would have a sick leave bank of 30 24-hour days, and would earn 7.5 24-hour days that year. Moreover, the sick

leave bank must be viewed in the context of the unit's work schedule, where firefighters are scheduled to work approximately 91 days per year, less vacation and other leave time.

The Association also objects that the clarification decision may have the effect of reducing terminal leave benefits for Union City firefighters. It maintains that, under their prior sick leave and terminal leave program, Union City firefighters annually received 5 days per year of terminal leave, which could be reduced only by non-work related illness in that year. Thus, it maintains that an employee using 5 or more sick days in any given year would not accumulate any terminal leave days for that year, but the terminal leave bank for prior years would not be debited. It asks us to modify the Decision on Clarification to provide that the use of accumulated sick leave shall not impact on vested terminal leave benefits.

The original award provided that all previously employed firefighters would receive terminal leave payments in accordance with the agreements in the municipalities in which they had been employed. The Decision on Clarification addressed only the issue of accumulated sick leave; did not purport to change the Union City terminal leave provisions; and stated that "[t]his clarification is not intended to affect the contractual right of the Union City firefighters or fire officers to continue to annually credit up to 120 hours of this annual sick leave bank

towards their terminal leave program" (Decision on Clarification at 16). In this posture, we see no need to modify the decision as requested. Any disputes about the terms of the grandfathered terminal leave program may be submitted to grievance arbitration.

Finally, we are not persuaded by the Association's contention that the arbitrator was required to specifically calculate the extent to which salary and benefit increases were offset by the reduction in sick leave benefits for some unit members. It is not possible to determine if any firefighters will, as a result of the award, have insufficient leave time to cover a non-work-related illness. Nor could the arbitrator identify how many, if any, firefighters will receive a lesser terminal leave benefit because they receive fewer sick days than previously.

Vacation

The arbitrator awarded a unified vacation schedule effective January 1, 2003. As with sick leave, the Association objects to the amount of time awarded and, as with longevity, asks us to make the new vacation schedule effective January 1, 2004 if we affirm this portion of the award. We turn to those issues now. The parties' challenges to award sections concerning vacation scheduling and accumulation of time are addressed in other sections of this opinion.

We find that the arbitrator reasonably exercised his discretion in merging vacation benefits when he awarded between 5 and 10 24-hour vacation days, keyed to years of service.[15/] Neither party has pointed to evidence that the arbitrator did not consider or that is inconsistent with the award.

The arbitrator approached his analysis of vacation leave as follows:

> Looking first to the goal of unifying the amount of vacation leave to be provided to the Regional's firefighters, unification should occur, to the extent possible, in a manner consistent with the previous agreements as well as what comparability suggests for the amount of vacation leave provided to firefighters throughout Hudson County and New Jersey. [Arbitrator's award at 237]

The arbitrator explained that the Association proposed that line firefighters receive 14 24-hour vacation days and staff firefighters 42 8-hour days, while the Regional proposed a maximum of 9 days after 21 years of service. The arbitrator noted that under the predecessor agreements, firefighters generally received more generous vacation benefits than those proposed by the Regional (ranging from maximums of 7 to 12 days), but fewer days than proposed by the Association.

The arbitrator's award is in between the parties' proposals and is consistent with his extensive review of vacation benefits

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15/ Employees are entitled to 12 days if they had more than 20 years of service as of January 1, 2003.

received by other New Jersey firefighters, who receive a median of 10 days per year. To the extent firefighters lost vacation days because the arbitrator did not consider compensatory and personal days in evaluating their entitlements under the prior agreements, that circumstance has to be viewed in the context of the overall compensation package, which equalized salaries at the Union City level. With respect to the Association's challenge to the fact that some firefighters may receive a lesser vacation benefit than under a predecessor agreement, we again incorporate our discussion about the consequences of establishing a single compensation and benefits structure from four separate agreements.

We also find no error in the arbitrator's awarding staff firefighters (who work 8-hour days), 15 to 30 vacation days per year based on years of service. The record does not show that firefighters in other jurisdictions receive more than 30 days per year and the Association does not explain why, or based on what evidence, the arbitrator should have awarded its proposal for 42 vacation days. It states only that it is traditional to give staff firefighters three times the amount of vacation days as 24-hour firefighters. The arbitrator did that, albeit based on the 5 to 10 days awarded for line firefighters rather than the 14 that the Association had proposed.

Finally, for the reasons discussed with respect to longevity, we decline to entertain the Association's request change the effective date of the vacation schedule.

Health Insurance

The arbitrator was required to resolve a number of complex and significant issues with respect to health insurance including: whether all firefighters would be covered by the same plan; the type of plan or plans; benefit levels; co-payments for dependent coverage (proposed by the Regional); nature of prescription drug, dental, and eye care coverage; and the type of retiree health care coverage and the eligibility requirements for such. Each party objects to one aspect of the detailed health insurance provision that the arbitrator awarded.

The Association protests the arbitrator's decision to unify health benefit coverage instead of awarding its proposal, whereby the Regional would maintain each of the four health plans that the municipalities had contracted for prior to the regionalization, with any unit member being able to choose any one of the four plans. The Regional objects to the award of retiree dental and eyeglass coverage, arguing the arbitrator had no authority to award it because neither party had proposed it.

The arbitrator explained his decision to unify health benefit coverage as follows:

> Health insurance is a major term and condition of employment with significant

> implications for each party. Administration, costs and benefit levels are paramount considerations. This benefit is one which should be merged or unified for all employees of the Regional. The testimony of Director Welz must be credited in this regard. The interests of the Regional and all of its employees will be served by a single contract providing comprehensive health insurance benefits [to] all of its firefighting personnel regardless of unit placement. The Union's plea for a continuation of health insurance programs based upon individual prior contracts and arrangements with each municipality is simply not feasible. [Arbitrator's award at 382]

The Association argues that the difficult issue of devising a single health insurance plan should have been left to future negotiations and interest arbitration, given the many other issues the parties and the arbitrator had to address. However, it offers no explanation as to why unification of benefits, which it generally espouses, is not appropriate for health insurance. While the Association contends that the arbitrator did not analyze the cost implications of his health insurance award, neither party presented any cost information and, as we discuss later, the Regional's only cost objection on appeal is to the extension of dental and eyeglass coverage to unit members who retire after the health plan goes into effect.

Further, the Association does not allege that the award will result in benefit reductions and the Regional stated at the hearing that it proposed to enter the State Health Benefits Program (SHBP), which offered each of the plans that the

individual municipalities had offered, thereby preserving employee choice. The arbitrator awarded benefits "equal or better" than the SHBP.

For its part, the Regional maintains that the arbitrator did not have authority to award retiree eyeglass and dental coverage because it was not proposed by either party. See Cherry Hill (arbitrator may not reach out and decide issues not raised by the parties, but may award an item not proposed by either party if it is subsumed within a final offer). It also contends that the arbitrator did not explain this portion of the award and that it adds additional costs to an already expensive award.

Turning first to the arbitrator's authority, we note that the Association proposed continuation of the four individual plans one of which, North Bergen, provided for retiree dental and eyeglass coverage. Since the Association had also proposed that all unit members be able to choose any one of the individual plans, it presumably intended that they could opt for this coverage upon retirement. Further, the Regional presented comprehensive health insurance proposals, including some retiree coverage. Given this background, the issue of retiree dental and eyeglass coverage was subsumed within the parties' overall health insurance proposals. See Cherry Hill (freeze on starting salary was subsumed within the issue of salary increases).

Moreover, while the Regional sought to provide retiree dental and eyeglass benefits only for former North Bergen employees, the arbitrator's extension of the benefit to all future retirees derives from his decision to unify health benefits, an objective that the Regional generally espoused. While the Regional protests the additional cost of the benefits, it did not present argument or evidence about such costs to the arbitrator and does not do so on appeal. Further, it appears that the costs during the term of this agreement will be limited: the benefit pertains only to current employees who retire after the health benefits plan is implemented sometime after 2003. The Regional may present information about the costs of this benefit in the next round of negotiations or interest arbitration but it has not presented grounds to disturb this aspect of the award.

Terminal Leave

A major theme that runs throughout the arbitrator's discussion of the major economic issues is the desirability of merging the four salary guides and benefits structures into a single compensation system. However, as noted, the arbitrator also found that it was not feasible to merge some benefits that accrue over the course of a career, and which an individual reasonably expects will continue until retirement.

The record amply supports the arbitrator's conclusion that the terminal leave programs in the prior agreements could not be

merged without reducing benefits for some unit members or imposing substantial costs on the Regional. Also well supported is his decision to "red-circle" terminal leave benefits for certain unit members and the terminal leave provisions he awarded for firefighters hired by the Regional.

The arbitrator carefully analyzed the divergent terminal leave provisions of the prior agreements. He noted that Weehawken, whose firefighters had no fixed number of annual sick days, received 90 days of paid leave prior to retirement. Similarly, Union City firefighters received either 720 hours of paid leave or one-half of their accumulated sick leave, whichever was greater. By contrast, North Bergen's and West New York's terminal leave clauses were tied exclusively to accumulated sick leave, with firefighters from North Bergen receiving payment for one-half of their accumulated sick leave, at their daily pay rate in their last year of employment, up to a maximum of 75% of salary. West New York firefighters received a maximum payment of $15,000 for accumulated sick leave, paid at the rate of $120 per 24-hour day.

The arbitrator noted that the Association argued against a uniform terminal leave policy based on sick leave, because Weehawken firefighters would lose their 90-day payment without having had the opportunity to accumulate sick leave during their municipal employment. Instead, the Association proposed that

both previously employed and newly hired firefighters would receive payment "at the applicable rate" for all leave accumulated with a municipality or the Regional. Further, the Association proposed a unified "terminal leave" benefit, not linked to sick leave, that would entitle each firefighter to 120 hours per year for each year of service, with payment not to exceed his salary in the last 12 months of employment.

The Regional opposed the one-year payment provision, arguing that none of the prior agreements included such a clause and that it would entitle all firefighters to the same payment, regardless of how much sick time they used over their careers. The Regional did not appear to put forward a specific proposal for addressing terminal leave accrued under the prior agreements, but urged the arbitrator to apply one standard for awarding terminal leave benefits to these employees. For new employees, it proposed that one-half of unused sick leave (and all vacation) days would be paid at a maximum rate of $120 per 24-hour day, with the rate of pay based on compensation received at the time the sick leave was earned.

Against this backdrop, the arbitrator observed that the Regional's proposal was significantly less than comparable terminal leave provisions throughout Hudson County, while the Association's proposal exceeded the terminal leave benefits included in most of the prior agreements. Neither party contests

those findings. He found merit in the Regional's arguments for limiting terminal leave benefits, as well as in the Association's position that some terminal leave benefits should be maintained, since all the prior agreements had included such benefits. He then reasoned:

> Balancing the firefighter's desire to consolidate all firefighters in a single terminal leave program, while maintaining terminal leave benefits previously accrued while they were employed by the municipal fire departments with the Regional's need to control future costs warrants different terms for those employees originally employed by one of the municipalities that comprise the Regional and for those employees hired directly into the Regional department.
>
> Terminal leave is a benefit where the merger of accrued benefits under the prior agreements is simply not feasible. The benefits for those employees employed by individual municipalities should be retained even though those specific benefit levels cannot be enjoyed by the entire workforce on a uniform basis. Each of the previous agreements included different methods of accumulating time towards terminal leave and different formulas for its calculation. It is generally accepted that leave time accrued by employees towards terminal leave is vested and should not be diminished. [Arbitrator's award at 289-290]

Thus, for previously employed firefighters, the arbitrator awarded a maintenance of the terminal leave benefits received under their prior agreements. For employees directly hired by the Regional, he reasoned that they had no vested interest in a particular terminal leave program, and he awarded a benefit that

was more than that proposed by the Regional and less than that proposed by the Association: compensation for all unused sick leave, at a rate of $120 per 24-hour day, and subject to a $15,000 cap. The arbitrator found that the $120 per tour payment was reasonable and that the cap limited the Regional's future terminal leave costs and enabled it to plan for them.

We are not persuaded by the Association's objections to these terminal leave provisions. While the arbitrator considered the desirability of unifying terms and conditions throughout his award, he was not required to give dispositive weight to this objective in arriving at all award provisions. The Association does not point to any evidence that the arbitrator did not discuss and has not shown why any of the statutory factors weighed in favor of awarding its terminal leave proposal, which the arbitrator found would have had a substantial financial impact on the Regional and which was more extensive than the benefit received by firefighters in comparable jurisdictions or by firefighters under the prior agreements. The Association itself, in urging the arbitrator not to award a uniform policy based on sick leave, implicitly recognized that "merger" of this benefit was not strictly possible, since what the four municipalities had labeled "terminal leave" encompassed very different end-of-career compensation packages.

Similarly, the Regional has not provided a basis to disturb the arbitrator's analysis. Preliminarily, there is ample support for the arbitrator's conclusion that leave time accumulated toward terminal leave should not be reduced absent a knowing and intentional waiver by those adversely affected. See Morris Cty. Schl. Dist., 310 N.J. Super. 332 (App. Div.), certif. denied, 156 N.J. 407 (1998). Thus, the entitlements that previously employed firefighters had earned under the municipal agreements were reasonably preserved. Further, the arbitrator's decision to apply these terminal leave provisions to employees' time with the Regional derives from one of his guiding principles: that there are certain benefits that accrue over the course of a career that employees reasonably expect will continue until retirement. Terminal leave is one such benefit because it is tied to retirement. As we set out earlier, we have deferred to his judgment that the Association's proposal was too costly. We also defer to the arbitrator's judgment that, given the range of terminal leave programs under the prior agreements, prospective unification of terminal leave could not be accomplished without producing harsh inequities either in terms of benefit elimination or excessive cost.

Moreover, while the arbitrator could have awarded different terminal leave provisions for the future, as the Regional maintains he should have, that type of award is not compelled and

would have resulted in more of the complications that the Regional attributes to administering separate terminal leave benefit programs under the prior agreements. That is, the terminal leave entitlements for previously employed firefighters would have had to be allocated between their pre- and post-regionalization service.

In addition, while the Regional objects to the cost of continuing the prior terminal leave provisions, those costs must be considered together with the terminal leave benefits for newly-hired firefighters, which will result in future cost savings by capping terminal leave payments at levels below those in three of the four agreements. Finally, the arbitrator could not have precisely costed out the terminal leave provisions, when the payments for both previously employed firefighters and those directly hired by the Regional largely depend on the amount of sick leave accumulated by an employee at the time of retirement.

Educational Incentives

With respect to the educational incentive portion of the award, the Association contends that the arbitrator did not explain how he arrived at the amounts awarded and did not discuss the impact of creating two tiers of educational benefits.

The arbitrator reviewed in detail the parties' proposals and arguments and the "widely different" educational provisions in the prior agreements. He noted that the Regional's proposal for

flat dollar amounts for firefighters who received degrees in fire science would confer a new benefit on firefighters previously employed by Weehawken, but would reduce benefits received by some firefighters from the other participating communities, some of whom received a stipend for a non-fire science degree or for course credits short of a degree.

The arbitrator noted that the Association proposed to extend to all unit members the most generous benefits, those in Union City, which provided an additional 10% of base salary for individuals with a bachelor's degree in arts or sciences and 15% for those with a master's or doctorate. He also noted that the Association urged that those who were already receiving an education stipend should not lose it.

The arbitrator decided not to extend the Union City benefits to all unit members; awarded benefits in between the parties' offers for those who had not yet received or embarked on obtaining a degree; and continued the respective education programs under the municipal contracts for firefighters who were already receiving an education stipend or who had begun an educational program. He reasoned as follows:

> The issue of incentive pay is an example of a benefit which is difficult to merge or unify for firefighters previously employed in the municipal departments. The benefit itself is a reward for educational progress and attainment and was given widely different treatment among the various municipalities. The Regional's proposal to have a single

> benefit for all firefighters is reasonable to the extent that not all firefighters previously enjoyed this benefit. This view, however, must be weighed against the longstanding nature of the benefit, where previously provided, and the time and effort invested by each firefighter towards the incentives and goals required by the prior contracts in order to achieve the benefit. To disturb each prior scheme for those who have earned degrees or commenced participation towards a degree would be inequitable. [Arbitrator's award at 299]

This analysis reflects two of the arbitrator's guiding principles: first, that it is desirable to have uniformity if it can be achieved without excessive cost or causing harsh inequities and second, that all benefits cannot be merged at the highest level. In applying those principles, the arbitrator decided not to extend Union City's education benefits to all unit members. The Association offers no particularized reasons why the arbitrator should have done so and there is thus no basis to disturb his decision in that regard. Again, the arbitrator's decision on this benefit must be considered in the context of the overall award.

While the arbitrator determined not to award the Association's proposal, the decision to red-circle certain individuals is consistent with the Association's position that no individual should lose an education stipend. As with terminal leave, the arbitrator reasonably emphasized the reliance element in finding that it would be inequitable to reduce a benefit where

an individual had invested time and effort in completing or working towards a degree expecting to receive a particular stipend for the remainder of his or her career.

On the other hand, and again consistent with the arbitrator's key objectives, the award does unify educational benefits for those who have not yet matriculated or obtained a degree. With respect to the amounts set for future education stipends, that is the type of detailed, discretionary compensation decision that we will not second-guess. The arbitrator reasonably awarded benefits more generous than those proposed by the Regional but less generous than those the Association proposed, that is: $750 and $1,500 annual stipends for associate's and bachelor's degrees from accredited institutions, and $1250 and $2,500 annual stipends for associate's and bachelor's degrees in fire science or fire science technology from accredited institutions. Absent any particularized argument as to why he should have awarded higher amounts, we will not disturb this portion of the award.

Service Differential, Pre-Retirement Benefits, Compensatory Days Off, Legal Services Plan

The Association objects to the arbitrator's decision not to unify four other benefits: service differential; compensatory days off; the payment of additional compensation for firefighters who retire between their 25th and 26th year of service; and a legal services plan. As with longevity and vacation, the

Association asks us to change the effective date of the service differential article should we otherwise affirm it.

The arbitrator's award on all of the above issues is well supported and, as with longevity and vacation, we decline to consider the request to delay by one year the effective date of the service differential article.

The arbitrator found that the issue with respect to these benefits, included in only one or two of the prior agreements, was whether the Association had met its burden of showing that they should be extended to all Regional firefighters. Stated another way, the arbitrator was not confronted with the same task as with, e.g., longevity, sick leave and vacation, where all prior agreements had included the benefit; both parties agreed to continue it; and a major question was whether or how the benefit should be unified. We accept both the arbitrator's approach and his conclusions.

Service differential consists of 1% through 7% of base salary, based on years of service, and is in addition to longevity. The Association sought to extend this benefit to all unit members and to increase the percentage of service differential. However, its limited discussion of the issue in its post-arbitration brief did not state why that result was warranted by the evidence or the statutory factors. The arbitrator awarded a continuation of the benefit, at the

percentage earned as of December 31, 2002, for former North Bergen and Weehawken firefighters. The award thus adopted the Association's argument that no benefit should be "extinguished."

Similarly, the arbitrator reasonably decided not to extend to all firefighters a North Bergen benefit providing for a $7,000 payment for firefighters who retire between their 25th and 26th year of service. The arbitrator again found that the Association had offered an insufficient basis to extend the benefit, which was to sunset at the end of the North Bergen contract. Again, the Association argued that this benefit should not be eliminated. The arbitrator's award accomplished that by continuing the payment for former North Bergen firefighters who had accrued 20 or more years of continuous service at the time of regionalization.

In addition, the arbitrator provided a reasoned explanation as to why he chose not to award the Association's proposal for eight 12-hour tours of compensatory time. The Association offers no particularized challenge to the arbitrator's conclusion that extension of this benefit to all unit members was not warranted where only North Bergen had had a similar compensatory time provision (for five 12-hour tours off), which appeared to be in lieu of additional vacation time. The arbitrator awarded the Association's proposal that the Regional recognize compensatory time earned with a municipal department, thus adopting the

Association's position that the benefit should not be eliminated for those who were entitled to it under a prior agreement.

Given the analysis we have described, we decline to disturb the arbitrator's conclusions on these points. We also will not second-guess his determination that payment for compensatory time should be at the salary rate when the time was accumulated rather than, as the Association proposed, when the time was used.

Finally, we reject the Association's challenge to the arbitrator's decision not to extend to the Regional the legal services plan included in the Weehawken agreement. The Association does not dispute the arbitrator's finding that the record included no evidence as to the extent of the benefit or how it was used by Weehawken firefighters. Therefore, we will not second-guess the arbitrator's determination that the Association had not met its burden of justifying the proposal.

Funeral Leave, Leave of Absence, Parking Fees, Pay Rate for Acting Assignments

The Association also challenges those portions of the arbitrator's award governing leaves of absence, funeral leave, parking fees, and compensation for temporary out-of-title assignments. As with many of the "major economic items" discussed above, the arbitrator awarded uniform funeral leave and leave of absence provisions for all unit members. The Association objects that, in doing so, he diminished the leave entitlements of some firefighters without explanation and

provided no rationale for granting only one day of funeral leave for certain relatives.

We are satisfied that the arbitrator thoroughly analyzed the evidence and arguments on these items and reached a reasonable determination of the issues. With respect to funeral leave, he awarded, as both parties had proposed, a clause stating that unit members shall receive leave for two 24-hour tours for the death of an immediate family member. However, he did not include certain relatives in the definition of immediate family - nieces, nephews, brother and sister-in-law. Instead, he awarded one day of funeral leave for these "more distant" relatives. He explained that, given unit members' substantial leave time and ability to exchange tours, they could arrange for more leave if needed. He found that only West New York had defined "immediate family" as expansively as the Association sought.

Similarly, in awarding a uniform leave of absence clause providing for leave without pay, the arbitrator considered the parties' arguments and evidence, together with the prior agreements, and denied the Association's proposal for an additional leave day for a unit member's own marriage, as well as its proposal for leave time to attend certain religious ceremonies. He concluded that given the leave time already awarded, as well as the opportunity for mutual exchanges, additional leave was not warranted.

Thus, the arbitrator provided a rationale for the funeral leave and leave of absence sections and the Association has not shown what additional evidence he should have considered. He was not required to further explain why he awarded leave provisions somewhat less generous than those in a few of the prior agreements. As we stated at the outset, the arbitrator made a reasoned determination not to unify all benefits at the highest level provided in any of the prior agreements.

The Association also objects to the arbitrator's alleged failure to resolve the unsettled issues with respect to its parking fees proposal. Firefighters now park free of charge on municipal streets, but the Association proposed that the Regional pay any fees that are assessed in the future. The arbitrator did not award the proposal, reasoning that it was speculative and would obligate the Regional to pay an uncertain amount on some future date. However, he directed the Regional, upon demand, to "immediately" negotiate over the payment of parking fees should they be instituted. The arbitrator's analysis fully satisfies his obligation under N.J.S.A. 34:13A-16d(2).

Finally, the Association challenges the pay rate awarded for temporary assignments in a higher rank. The Regional had proposed that officers serve without payment and the Association had asked that the acting officer be paid at the maximum step for the higher grade. The arbitrator directed that, after serving

beyond two consecutive tours, the employee acting in a higher title be paid an additional amount equal to one-half the difference between his own rank and the higher rank. He noted that the Regional's proposal was less than provided in any of the prior agreements, while the Association's proposal exceeded those benefits.

As we discussed when reviewing the award provisions on major economic items, the selection of a pay rate is quintessentially a discretionary judgment. We decline to hold that the arbitrator was required to discuss all the statutory criteria in setting this pay rate when the Association did not present arguments or evidence under the criteria. Further, a major theme of the award was that compensation should be unified to the extent feasible and, if possible, while minimizing harsh results for particular individuals. This award section provides unification and the Association does not argue that the section will cause inequities. We also decline to second-guess the arbitrator's decision to award acting pay only after an individual serves in a higher position for two consecutive tours, which strikes a balance between the parties' positions.

V. Award Provisions on Administrative, Operational & Contract Language Proposals

We next turn to the parties' objections to a variety of award sections on administrative, operational and contract language proposals. We evaluate those objections by assessing

whether the arbitrator considered the evidence and arguments presented and offered a reasoned explanation for his award. If the arbitrator's analysis satisfies these criteria, we will not disturb his judgment because one or the other party argues that its proposal was preferable to the arbitrator's award.

Work Hours

The Regional maintains that the arbitrator erred in not awarding its proposal for a 24/48 hour work schedule, which would have increased the number of days and hours worked annually. On appeal and before the arbitrator, it urged that the substantial salary and benefit package enjoyed by Regional firefighters warranted this workload increase, given that the legislative intent in adopting the regionalization statute was to achieve cost savings.

The arbitrator rejected the Regional's proposal and instead awarded the Association's proposal to continue the 24/72 work schedule included in all of the prior agreements. The Regional had also been operating on that schedule given its obligation to maintain the status quo. The arbitrator reasoned:

> Although an important intent of regionalization was to achieve efficiencies in service and costs, I am not persuaded that this goal encompasses the major changes in work schedule and hours of work proposed by the Regional. The Regional's proposed work schedule would effect such a change by increasing the total number of hours worked annually by one third from 2,184 hours to 2,928 hours. Although Regional firefighters

> working 24 hour shifts work fewer days per year than do individuals employed in occupations working eight hour shifts or firefighters working a 10/14 schedule, its firefighters do work 2,184 hours annually. No credible evidence is offered to reflect that the work schedule the Regional proposes is one commonly accepted or adopted in New Jersey and instead reflects the old Guttenberg schedule which was abandoned in favor of West New York's schedule prior to regionalization. There would also be a substantial cost impact attached to the Regional's proposal to increase annual work hours by one-third. Under these circumstances, there is insufficient evidence of the need to modify the current work schedule. [Arbitrator's award at 87]

The arbitrator's decision to deny the schedule change is amply supported by the record. He appropriately considered that the Regional and all participating municipalities had operated on the 24/72, as well as the fact that the Regional offered no operational reasons to institute the 24/48 schedule; the record showed that the 24/72 was common in New Jersey and Hudson County; and the Regional cited no New Jersey communities on the 24/48. Compare Teaneck, 25 NJPER at 455 and City of Clifton, P.E.R.C. No. 2002-56, 28 NJPER 201 (¶33071 2002) (before awarding a major work schedule change, an arbitrator should carefully consider the fiscal, operational, supervision and managerial implications of such a proposal, as well as its impact on employee morale and working conditions).

Further, we agree with the arbitrator that the regionalization statute does not direct a change in the equation

between work hours and compensation beyond what would otherwise be required by application of the statutory factors in any interest arbitration proceeding. The Legislature believed that regionalization would save money and reduce property taxes, presumably because it would eliminate duplicate services. See N.J.S.A. 40:8B-15; N.J.S.A. 54:4-8.77b. However, there is no indication that the Legislature intended that savings would or should result by increasing the work hours or reducing the compensation of employees of local units who become employees of a regional entity. In fact, the CMSA includes a provision preserving the rights of employees of local units that join to form a regional. See N.J.S.A. 40:48B-4.2 (preserving terms and conditions of employment under prior negotiated agreements until a new agreement is reduced to writing).

Within this framework, we find to be well supported the arbitrator's conclusion that the evidence on the interest arbitration criteria did not warrant the change in the work hours/compensation equation that the Regional proposed. While the Regional claims that the compensation package for this unit is excessive unless work hours are adjusted, we have explained why we have affirmed the salary increases awarded and the other aspects of the economic package challenged by the Regional.

For all these reasons, we will not disturb the arbitrator's conclusion that there was insufficient evidence to award a 24/48

work schedule that would significantly change the equation between compensation and hours worked and which might well have a significant impact on employee morale and department operations.

Outside Employment

The arbitrator awarded an outside employment clause, proposed by the Regional, stating that employees shall consider their Regional positions as their primary employment and may not engage in any outside employment or activity that would interfere with that position or constitute a conflict of interest. Also as proposed by the Regional, the award states than an employee may not engage in outside employment while on sick or compensable work-related injury leave. However, the Regional objects that the clauses will have no effect because the arbitrator did not also award its proposal to require employees to report and request approval for all outside employment.

For its part, the Association argues that the prohibition against engaging in outside employment should be modified or vacated, because inability to perform firefighting need not mean that an individual cannot engage in less strenuous employment.

Turning first to the Regional's concerns, we hold that the arbitrator was not required to award the Regional's proposed procedures for reporting outside employment. We have recognized and deferred to the arbitrator's judgment that there is a limit to what can be accomplished in a first agreement. None of the

prior agreements included reporting requirements for outside employment and only one, North Bergen, had an outside employment section. The arbitrator could reasonably decide to incorporate general principles governing outside employment without also awarding the procedures the Regional proposed. As the Association notes, the Regional has the authority to investigate causes of poor performance or abuse of sick leave and, after experience under the award, may again choose to propose a reporting requirement.

Similarly, we will not disturb the award section prohibiting a firefighter from working while on sick or compensatory injury leave. The arbitrator cited testimony from a Regional Director, expressing the Regional's position that a firefighter on sick or injury leave should devote that time to recovering from an injury or illness, because outside work could impair that recovery. The arbitrator had the discretion to give weight to the Director's testimony, despite the Association's position that the Regional had no interest in what a firefighter does on off-duty time.

Drug and Alcohol Testing Procedures

The Association challenges the section of the award stating that the Regional may administer the drug and alcohol testing policy and procedures contained in the Attorney General's Law Enforcement Drug Testing Policy. It argues that the arbitrator stated that the Attorney General's guidelines require

individualized suspicion, whereas they also authorize random testing. It asks that the award be remanded for the arbitrator to consider whether to include a random testing provision. It maintains that no New Jersey decision holds that an employer has a prerogative to conduct random drug testing of firefighters.

The Attorney General guidelines state that law enforcement employers are authorized, but not required, to test job applicants and conduct a random drug testing program of employees. However, the guidelines stress that law enforcement employers have "an independent obligation" to test officers when there is a reasonable suspicion of drug use. The guidelines include detailed procedures for notifying employees of testing procedures; obtaining and analyzing specimens; and maintaining test records. For employers who choose to conduct random testing, the guidelines require that rules and regulations for the program be adopted and in place for 60 days before the program may be implemented. The rules specify the safeguards that will be used to ensure randomness.

Before the arbitrator, the Regional characterized the guidelines as requiring testing when there is individualized suspicion of drug use and sought to incorporate the guidelines because of the testing provisions they specified. In awarding the clause, the arbitrator wrote:

> The enormous responsibilities of the fire service, the expensive nature of equipment

> and the need for safety of the citizens and firefighters are sufficient reasons for testing. The policy requires "individualized reasonable suspicion" to be present. Although the decision to test employees for drugs is a managerial prerogative, the Regional seeks to include specific procedures for that drug testing in the agreement. Ensuring that employees are aware of the possibility of drug testing and the procedures for it is likely to act as a deterrent to use of illegal substances and affords protection by having the procedures included in the Agreement. [Arbitrator's award at 124-125]

The Association does not challenge this reasoning and we see no need to vacate or remand the award for the arbitrator to consider the random testing issue. Whether or not this employer has a right to conduct random testing is a constitutional question. See New Jersey State PBA Local 304 v. New Jersey Transit Corp., 151 N.J. 531, 556 (1997) (random drug testing of public employees permitted under Fourth Amendment to the U.S. Constitution and the New Jersey Constitution where the government can demonstrate a special need based on the safety-sensitive functions they perform). The Association may challenge the Regional's authority to institute such a program if and when it proposes to do so. We do not construe the award as conferring a contractual right to conduct random testing.

Vacation Scheduling

Both parties object to the award provisions governing use of vacation time. Before the arbitrator, the Regional argued that

it needed to limit vacation use on weekends and during the summer to control overtime costs and maintain staffing levels. Accordingly, it sought provisions limiting summer vacations to a maximum of four consecutive 24-hour tours; requiring that spring and fall vacations consist of a minimum of two consecutive 24-hour blocks; and directing that vacation time used for personal business be taken in blocks of at least 24 hours. The Association agreed that summer vacation should be limited to 24-hour blocks but opposed the Regional's other proposed restrictions on vacation scheduling.

The arbitrator thoroughly reviewed the parties' evidence and arguments, including the Regional's exhibits showing vacation patterns, and arrived at an award that recognizes and accommodates both the firefighters' desire for some flexibility in vacation scheduling and the Regional's cost and staffing concerns. The arbitrator limited summer vacations to 24-hour blocks, but allowed 12-hour blocks during the remainder of the year, provided the balance of the tour can be covered on a non-overtime basis. He also awarded contract language stating that firefighters may bid for vacation based on seniority; the Regional shall allow for vacation use throughout the year; and the Regional may consider whether granting vacation would cause an excessive or undue amount of overtime. In addition, the vacation article he awarded includes an Association-proposed

clause allowing one firefighter from each company to be on vacation.

We are not persuaded by the Regional's argument that the weight of the evidence required the arbitrator to award its seasonal scheduling proposal. By allowing the Regional to consider overtime costs in approving vacation time, the award recognizes the Regional's interest in controlling overtime costs, albeit through a different mechanism than it had proposed. With respect to staffing levels, an employer has a prerogative to deny leave requests when allowing time off would cause it to fall below minimum staffing levels; that reserved authority need not be specified in an award or contract. See, e.g., Long Hill Tp., P.E.R.C. No. 2000-40, 26 NJPER 19 (¶31005 1999); Town of Secaucus, I.R. No. 2000-6, 26 NJPER 83 (¶31032 1999).

Further, we are not persuaded that the award must be vacated because the arbitrator assertedly did not consider the implications of allowing one firefighter per company to be on vacation. Before the arbitrator, the Regional did not elaborate on those implications and, on appeal, simply states that it would result in overtime costs. That general concern is not grounds for vacating the award, especially where the article as a whole allows the Regional to consider overtime costs in approving leave. With respect to the Association's concerns, we are satisfied that the arbitrator reasonably exercised his judgment

in allowing vacation to be taken in 12-hour but not 6-hour blocks.

Moreover, the arbitrator did not decline to resolve any issues concerning scheduling and distribution of vacation time: those aspects of vacation leave are governed by award language stating that firefighters have the right to use vacation throughout the year, and by the provisions authorizing the Regional to consider overtime costs in approving vacation requests. The arbitrator did comment that he had awarded a regional-wide vacation program and encouraged the parties to negotiate a more specific vacation use and distribution schedule during the next round of negotiations. However, that language does not establish a lack of finality given the award sections we have noted. Nor does it indicate a belief that interest arbitration is not the proper forum for resolving vacation scheduling issues. Compare Cherry Hill. Rather, it is consistent with the arbitrator's earlier observation that there is a limit to what can be accomplished in a single and initial contract.

Association Rights - Regional and Association Objections

Before the arbitrator, both parties submitted comprehensive, multi-section proposals with respect to Association Rights and Office Space. The arbitrator explained those proposals and developed a contract article that he believed balanced the

Association's need for adequate time and staffing to administer the agreement in the newly-created department with the Regional's need to ensure its staffing and coverage requirements without excessive overtime costs (Arbitrator's award at 48). The Regional raises several objections to the following clause:

> The Employer will permit up to three (3) authorized representatives reasonable time off with pay to attend to Association business, including to investigate and seek to settle grievances and to attend all meetings and conferences on collective negotiations with departmental officials provided the Association gives reasonable notice to the department in advance.

It maintains that the above-quoted language is vague and does not define Association business or what constitutes reasonable notice to the employer. The Regional also states that, when combined with award sections permitting time off to attend conventions or funeral services for fire personnel, the clause could impose substantial costs.

The Regional has not persuaded us to disturb this award section. "Association business" is a term of art and "reasonable notice" is a common term that may derive its content from the circumstances presented. Both may be defined more precisely through the parties' experience and contractual grievance procedures.

For its part, the Association objects that the arbitrator did not explain why he rejected its proposal for a special day

tour for its president and the president's designee. The arbitrator set forth this proposal and the testimony presented concerning it, but did not award the provision. We infer that he found that allowing three representatives reasonable time off with pay to attend to Association business struck an appropriate balance between the Association's and the Regional's needs. We decline to remand the award on this basis.

Jury Duty; Exchange of Tours; Grievance Procedure; Safety and Facilities - Association Objections

The Association objects to the arbitrator's analysis and determinations with respect to jury duty, exchange of tours, grievance procedures, and safety and facilities - all items on which both parties had presented proposals. We have reviewed the pertinent award sections and the parties' pre- and post-award submissions and are satisfied that the arbitrator carefully considered the parties' evidence and arguments and reached a reasonable determination on these issues. The Association has not pointed to any evidence or arguments that the arbitrator did not consider when he directed that employees be granted necessary time off for jury duty; included a comprehensive exchange of tours provision that permits mutual exchanges for 12 or 24 hours; awarded a grievance procedure article that, among other things, allowed administrative decisions affecting employees to be pursued through step two, but not to arbitration; and awarded a

"safety and facilities" clause more detailed than the Regional's proposal but less specific than the Association had sought.

The salient point about these contract articles is that they address the noted topics, as both parties had sought, and thus set out a framework within which the parties may work and which they may seek to adjust during future negotiations or interest arbitration. Moreover, the arbitrator's analysis addressed the points the Association raises on appeal. For example, the Association maintains that the Jury Duty provision is flawed because it does not provide for travel time if a firefighter is required to report immediately after a shift. However, the arbitrator noted the Regional's commitment, at the hearing, to provide for travel time in these circumstances. He added that any allegedly unreasonable application of the Jury Duty article could be pursued through the grievance procedure.

In declining to allow exchanges of tours for four or eight hours, the arbitrator accepted the testimony of the Regional's Director that such a provision would be detrimental to the Regional's ability to schedule firefighters efficiently. At the same time, he rejected the Regional's proposal to allow exchanges only for a full tour, and found that allowing exchanges for 12 or 24 hours would permit firefighters to maintain some flexibility without undermining the Regional's ability to schedule efficiently. He also awarded the Regional's proposal to limit

exchanges to six per year, finding it reasonable given that firefighters work 91 days annually. The Association may disagree with these conclusions but no further analysis was required.

Similarly, in setting out the Regional's obligation to maintain a clean and safe workplace, the arbitrator explained that he did not award the Association's proposed safety reporting standards because they exceeded requirements in State statutes and regulations. With respect to the Association's proposed language concerning the Regional's obligation to provide and repair enumerated furnishings, the Association presented no pre-arbitration arguments or evidence concerning this aspect of the proposal so we will not disturb the arbitrator's decision to award a more general provision stating the Regional's obligation to provide a safe workplace.

Finally, the arbitrator awarded a comprehensive grievance procedure article that includes a broader definition of "grievance" than proposed by the Regional and, together with the "disciplinary action" article, allows employees to arbitrate all disciplinary determinations, other than major disciplinary actions under DOP's jurisdiction. The Association protests the arbitrator's determination to allow "administrative" decisions affecting employees to be pursued only through step two, the step preceding arbitration. In crafting this aspect of the award, the arbitrator struck a balance between allowing arbitration of such

matters as work assignments and supervisors' attitude, as proposed by the Association, and the Regional's proposal to limit arbitration of minor discipline to suspensions of 48 hours or more. Absent particularized arguments as to how the challenged provision will negatively affect the Association or unit members, we decline to disturb it.

We also decline to disturb the arbitrator's decision not to award the Association's proposal that discipline be initiated within 45 days of the Regional obtaining information sufficient to file the complaint. While the arbitrator noted that the proposal was modeled on a statute pertaining to police officers, he found that the time limits were not always feasible or practical and could unduly restrict the employer. Again, we will not second-guess this judgment absent arguments or evidence as to how the proposal's denial could negatively affect the Association or unit members.

VI. Scope of Negotiations and Statutorily-Based Arguments

The Regional contends that certain sections of the award conflict with governing statutes and that others impermissibly impinge on its managerial prerogatives. It asks us to vacate or modify the sections identified. Similarly, the Association maintains that the two award sections are inconsistent with pertinent statutes and asks us to remand the articles to the

arbitrator for reconsideration. As noted at the outset of our opinion, we will evaluate allegations that an award provision violates a statute or regulation but will not resolve late-raised claims that an award section significantly interferes with a managerial prerogative.

Injury Leave, Off-Duty Action, Promotions and Assignments, Sick Leave Verification - Regional Objections

The arbitrator awarded an injury leave provision that had elements of both parties' proposals. The Regional challenges the underscored language:

> Whenever a member of the Fire Department is incapacitated from duty because of an injury sustained in the performance of his duty, he shall be entitled to injury leave with full pay during the period in which he is unable to perform his duties. Typically that period shall not exceed one (1) year. The time may be extended beyond one (1) year at the sole discretion of the Department.

The Regional objects that the "beyond one year" language conflicts with N.J.S.A. 40A:14-16, stating that a municipality may provide for leaves of absences for injured firefighters "not to exceed" one year.

Preliminarily, as the Association notes, the statute may not pertain since the Regional is not a municipality. Further, the underscored sentence is a minor part of the overall award and would not prevent its implementation, even if contrary to statute, since it is not operative until a request to extend a leave is submitted to and granted by the Regional. In addition,

the Regional retains the discretion to deny extension of a leave and thus prevent the problem it fears from arising. In this posture, we decline to modify the award provision as requested.

The Regional also objects to the second clause of the injury leave article, which provides in part:

> To be eligible for injury leave benefits, both workers compensation benefit and the enhanced benefit to be paid by the Regional, the employee must report his injury as soon as is reasonably possible. The employer will direct the member to one of a panel of physicians to receive prompt and quality care. . . . A firefighter injured in the line of duty, reserves the right to be treated by a physician and/or surgeon of his own choice, whose fees will be paid by the Department, provided authorization is first obtained from the Department, which authorization shall not be reasonably withheld. A firefighter who is treated by his own physician may be required to present a certificate indicating his continued inability to return to work from time to time. Nothing herein shall prevent the Regional from independently evaluating the
>
> medical condition of an employee injured in the line of duty. [Arbitrator's award at 155]

The Regional maintains that this clause also conflicts with N.J.S.A. 40A:14-16, which conditions a municipality's ability to provide a one-year injury leave on "the examining physician appointed by the governing body" certifying to the injury, illness or disability.

Again, N.J.S.A. 40A:14-16 may not apply to the Regional. In any case, the award does not prevent the Regional from adhering

to any obligation to have its own physician certify disability or injury, while honoring the award's provisions allowing an employee to be treated by his or her own physician.

The Regional also objects that the arbitrator's award on off-duty action conflicts with workers' compensation laws. The disputed clause states:

> Any action within the State of New Jersey taken by a member of the Department on his time off, which would have been proper action taken by the employee on active duty with the NHRF&R department shall be considered proper Fire Department action, and the employee shall have all of the rights and benefits concerning such action as if he were then on active duty. This excludes an employee regularly performing duties as a member of a volunteer fire company. [Arbitrator's award at 192]

The arbitrator explained that he awarded the union-proposed provision, with some modification, so that firefighters responding to an emergency while off-duty would be entitled to the same benefits under the agreement as if they had been scheduled to work. That is the basis on which the Association had urged award of the provision, and the Regional did not file a scope petition challenging its negotiability or oppose it in its post-hearing brief.

The Regional now argues the award language does not reflect the arbitrator's intent and that, as drafted, it extends workers' compensation benefits to firefighters responding to off-duty emergencies, contrary to controlling statutes and case law.

The award does not refer to workers' compensation and an arbitrator is without authority to grant workers' compensation benefits. That determination is made by the Division of Workers' Compensation, pursuant to the workers' compensation statute and case law. N.J.S.A. 34:15-49. Therefore, there is no basis to vacate or modify the award on this ground. If a unit member claims benefits under this clause and the Regional believes that such benefits would be inconsistent with a statute or beyond the arbitrator's intent, the matter can be resolved through scope of negotiations and grievance procedures.

We turn now to the Regional's managerial prerogative arguments. It claims that the "acting pay" clause in the Promotions, Assignments and Transfers article significantly interferes with its prerogative to assign employees, because it allows employees to refuse to serve in a temporary acting capacity. It also contends that the award is flawed because, unlike the West New York provision which the arbitrator used as a model, the award does not include procedures for making temporary assignments by direct order when use of a rotational list does not identify an individual willing to fill a vacant slot.

The Regional's objections do not go to the overall validity of the award. Roseland. We recognize that employers have a prerogative to make assignments, including out-of-title assignments, to respond to emergencies. City of Newark, P.E.R.C.

No. 85-107, 11 NJPER 300 (¶16106 1985); City of Pitman, P.E.R.C. No. 82-50, 7 NJPER 678 (¶12306 1981). However, we cannot say on this record that the clause would significantly interfere with that prerogative, where employees usually seek to fill acting positions in a higher title because they generally bring premium pay and experience that may help in a future promotional bid. City of Atlantic City, P.E.R.C. No. 2001-56, 27 NJPER 186 (¶32061 2001. Therefore, we will not disturb this award section.

Further, with respect to the alleged need for procedures for making out-of-title assignments, the award provides that temporary assignments to higher rank shall "continue to be made by the Regional in conformity with DOP Rules and Regulations." The Regional has not explained why that clause does not provide the procedures it argues are necessary.

Finally, the Regional maintains that the award interferes with its managerial prerogative to verify sick leave by stating that a doctor's note shall be required when an employee has been on sick leave for more than one tour of duty and may be sought when there is reason to believe that sick leave is being abused. It maintains that, under our scope of negotiations decisions, an employer has the prerogative to determine the number of absences that trigger a doctor's note requirement.

The Association proposed that doctor's notes be required only when an employee is returning from injury leave or surgery,

or has missed two tours of duty. The Regional did not file a scope petition with respect to this proposal and in this circumstance we choose not to entertain its scope objection.[16/] We note that the award preserves the Regional's ability to require a note when abuse is suspected. If the Regional requires a doctor's note after a single absence and a grievance ensues, the Regional may then file a scope petition.

Association Rights; Accumulation of Vacation Leave - Association Objections

The Association maintains that the award section allowing four Association officials to attend FMBA, IAFF, and AFL-CIO conventions conflicts with N.J.S.A. 11A:6-10 which states:

> A leave of absence with pay shall be given to employees who are duly authorized representatives of an employee association defined as a "representative" in subsection e of section 3 of P.L. 1941, c. 100 and affiliated with the New Jersey Policemen's Benevolent Association, Inc., Fraternal Order of Police, Firemen's Mutual Benevolent Association, Inc., Professional Firefighters Association of New Jersey to attend any State or National convention of the organization, provided, however that no more than ten (10%) percent of the employee organization's membership shall be permitted such a leave of absence with pay, except that no less than 2

16/ The Regional did file a petition in the companion fire officers case, with respect to that union's proposal to require a doctor's note after three one-day absences or one absence of two or more days. North Hudson Reg. Fire & Rescue, P.E.R.C. No. 2000-78, 26 NJPER 184 (¶31075 2000). We held the proposal not mandatorily negotiable, reasoning that the clause suggested that the employer was prohibited from verifying sick leave in other circumstances.

> and no more than 10 authorized representatives shall be entitled to such leave. . . . The leave of absence shall be for a period inclusive of the duration of the convention with a reasonable time allowed for travel to and from the convention, provided that such leave shall be for no more than seven (7) days.

N.J.S.A. 40A:14-177, which the Association also cites, contains substantially similar language.

The Association argues that given that it has almost 200 members, it is entitled, contrary to the award, to send 10 representatives to the conventions of the named organizations. It also objects to this award language:

> Whenever a duly authorized representative of the Association exercises his right to attend such convention, the department's vacation schedule for that time period shall be adjusted to reflect such leave so as to avoid the unnecessary expenditure of overtime.

The Association contends that, unlike the statute, the award makes the right to attend conventions contingent on a department's vacation schedule.

The Association proposed, and the arbitrator awarded, a provision enabling four unit members to attend union conventions. To the extent the Association is entitled by statute to send more than that number, the right is incorporated in the contract, State v. State Supervisory Ass'n, and thus there is no need for the arbitrator to reconsider the award provision.

Similarly, while we agree that the statute does not condition the right to convention attendance on a department's vacation schedule, we do not believe that the award does either. It simply states that the vacation schedule may be adjusted to accommodate the statutory and contractual rights of those attending the convention.

The Association next contends that N.J.S.A. 11A:6-3 required the arbitrator to grant its proposal to allow up to one year of vacation time to be banked. The statute provides:

> Vacations not taken in a given year because of business demands shall accumulate and be granted during the next succeeding year only.

The arbitrator's award states:

> Vacation time earned may not be accumulated unless an employee was prevented by the Regional from taking scheduled vacation time due to departmental needs or disability. In either event, the employee may bank such vacation time for no more than one year. This provision shall not prevent the banking of vacation time for the purposes of placing such time in the terminal leave bank. [Arbitrator's award at 450]

Consistent with the statute, the award would allow one year's allotment of vacation time to be banked in the next succeeding year, if the employee was prevented from taking that time during the year in which it was earned. However, the statute does not grant an employee an absolute right to bank one year of vacation time, regardless of when the time was accrued or regardless of why it was not used in the year earned. See State of New Jersey

(Dept. of Higher Ed.), P.E.R.C. No. 96-47, 22 NJPER 37 (¶27018 1995) (statute bars arbitration of grievance claiming payment for vacation days they were permitted to use but did not use during the year in which they were earned or the next succeeding calendar year).

VII. Clarification Issues

In the final section of this opinion, we discuss contentions by both parties that particular award sections are ambiguous and need to be clarified. For the most part, we do not find the provisions unclear and, more to the point, the alleged ambiguities do not implicate the arbitrator's obligation to consider the statutory factors and the parties' evidence and arguments. Nor do they present grounds for delaying implementation of the parties' first agreement. Our discussion explains why we have reached these conclusions, but we stress that we are not definitively interpreting the cited award sections. The parties may jointly request clarification from the arbitrator; amend the award by stipulation, N.J.S.A. 34:13A-19; or allow grievance arbitration to resolve an issue once a dispute arises under a particular award section. Absent mutual agreement, a joint clarification request shall not stay implementation of the award or any portion thereof.

We turn first to the Association's contention that the award's sick leave article does not specify whether firefighters retain sick leave earned prior to the merger of this benefit. The award's terminal leave article provides for payment for accumulated sick and vacation leave upon retirement - and states that payment will be provided for time earned before and after the regionalization. The necessary inference is that the sick leave earned prior to regionalization and merger remains in an employee's sick leave bank. To the extent there is any question about the arbitrator's original intent, the Decision on Clarification states that the sick leave program effective January 1, 2004 shall allow for "the carry forward of any previous accumulated sick leave earned under prior provisions which contain an annual allotment of paid sick time" (Decision on Clarification at 15).

Both parties suggest that the award is unclear as to which firefighters are entitled to 12 vacation days. The pertinent award section, which sets forth a unified vacation schedule effective January 1, 2003, is as follows:

Years of Service	24 Hour Tours of Duty
1 to 5 Years	5
6 to 15 Years	7.5
16 to 20 Years	10
21 Years and above*	12*

The arbitrator explained this schedule as follows:

> I have set the number of vacation days for employees after twenty years of service at twelve days with the provision that this benefit shall only apply to firefighters, effective January 1, 2003, who were previously employed by the municipalities prior to regionalization and who achieved more than twenty years of service as of January 1, 2003. [Arbitrator's award at 241]

The award language and the discussion in the arbitrator's opinion indicate that the entitlement to 12 days attaches after completion of 20 years of service, at the beginning of the 21st year, provided the 20 years were accrued before January 1, 2003.

On another vacation issue, the Regional maintains that, in order for it to implement the award's vacation provisions, the award needs to be modified or clarified with respect to accrual of vacation time. We see no need to modify the award. Before the arbitrator, the Regional proposed that, during their first year of service, unit members would accrue vacation days at the rate of one every four months. After completing one year of service, they would then be entitled to four days. The arbitrator did not award a provision concerning accrual of leave for employees during their first year. Therefore, in granting five days for firefighters with one to five years of service, it appears that the arbitrator intended that employees would be entitled to this benefit at the outset of their first year of service.

In addition, the Regional seeks clarification on a salary calculation issue. It states that the award does not address the "sequence of adding on all fold-ins or add-ons to the base salary in order to calculate a firefighter's final salary." It suggests that "all percentage fold-ins are to be calculated individually, then added together as one number, along with any flat rate fold-ins, to the base salary." Because the Association does not offer a different interpretation on this point, we decline to clarify or remand the award on this ground.

Finally, the Association seeks clarification or modification with respect to the award's "Emergency Leave" clause, arguing that the award is ambiguous as to whether the leave is paid or unpaid. The clause provides

> Employees may be granted emergency leave, with or without pay, for the serious illness requiring hospitalization in the immediate family including childbirth, necessitating the employee's presence at the discretion of the Executive Director, which discretion shall not be unreasonably or arbitrarily exercised. Paid leave shall be limited to one tour annually. [Arbitrator's award at 164]

The text and the arbitrator's opinion indicate that paid leave is to be limited to one tour, but that unpaid emergency leave could be granted as well.

Conclusion

In our issue-by-issue review, we have concluded that the parties' objections do not warrant our disturbing the award. The

arbitrator's overall approach and guiding principles are sound, and his award establishes a framework within which the parties may work. The arbitrator painstakingly considered the parties' presentations; reached a reasonable determination of the issues; and fashioned an overall award that is supported by substantial credible evidence. It is perhaps inevitable that each party would disagree with some award provisions, given the length and complexity of this conventional award and the extraordinary number of issues it addressed. However, neither party has pointed to evidence or arguments that the arbitrator did not consider or shown that any element of the award is unsupported by the evidence.

We stress that an interest arbitration appeal is not a means to seek adjustments to award provisions with which one disagrees, particularly since, in general, an appeal decision will not vacate or remand one piece of an award without requiring a re-examination of the award as a whole. See Union Cty., P.E.R.C. No. 2003-87, 29 NJPER 240 (¶75 2003) (award vacated and remanded at employer's request to reconsider its proposals; arbitrator directed to also reconsider union's proposals); contrast East Orange (limited remand ordered for arbitrator to explain how she calculated one item). If the parties still wish to change aspects of the award, N.J.S.A. 34:13A-19 expressly authorizes them to amend or modify the award by stipulation. Absent the

parties' agreement, such efforts shall not stay implementation of the award or any portion thereof.

ORDER

The arbitrator's award, as clarified in his October 10, 2003 decision, is affirmed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, DiNardo, Katz, Ricci and Sandman voted in favor of this decision. None opposed. Commissioner Mastriani recused himself and was not present.

DATED: October 30, 2003
Trenton, New Jersey
ISSUED: October 30, 2003