P.E.R.C. NO. 2000-33

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF TEANECK,

Appellant,

-and- Docket No. IA-97-45

TEANECK FIREMEN'S MUTUAL
BENEVOLENT ASSOCIATION,
LOCAL NO. 42

Respondent.

SYNOPSIS

The Public Employment Relations Commission affirms, with a modification, an interest arbitration award issued to resolve negotiations between the Township of Teaneck and Teaneck Firemen's Mutual Benevolent Association, Local No. 42. The Township appeals, contending that the removal of the originally appointed arbitrator violated Commission rules and was contrary to the Interest Arbitration Reform Act's policy of encouraging mediation efforts by arbitrators. It also contends that the arbitrator erred in awarding a 24/72 work schedule; that a 2% stipend for unit members with EMT/EMS certification is not supported by substantial credible evidence; and that the arbitrator did not properly analyze the statutory factors in awarding salary increases.

The Commission first concludes that the Director of Arbitration had the authority to approve the original arbitrator's request to withdraw. The Commission next concludes that the arbitrator's award of a proposal that will result in different work schedules for fire officers and firefighters raises serious supervision concerns and therefore modifies the award to provide that the schedule shall not be implemented unless and until a 24/72 schedule is agreed to or awarded with respect to the fire officers' unit. The Commission approves of the arbitrator's decision to award the 24/72 schedule on a trial basis, but clarifies that unless the parties agree, the 24/72 schedule will not become the status quo for successor contract negotiations. The Commission next concludes that the salary increases and the 2% stipend for EMT/EMS certification awarded are supported by substantial credible evidence in the record as a whole. With respect to the EMT/EMS certification stipend, the Commission notes that if the Township assumes an additional salary obligation by a large number of firefighters obtaining a certification, it may seek to remove the stipend in future agreements.

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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Respondent.

Appearances:

For the Appellant, Peckar & Abramson, P.C., attorneys (David Lew and Jeffrey M. Daitz, of counsel)

For the Respondent, Fox & Fox, LLP, attorneys (David I. Fox and Stacey B. Rosenberg, of counsel)

DECISION

The Township of Teaneck appeals from an interest arbitration award involving a negotiations unit of 68 rank-and-file firefighters. See N.J.S.A. 34:13A-16f(5)(a). It asks us both to vacate the award and to issue an order defining the scope of our power to approve an arbitrator's withdrawal from a case. As detailed later, the arbitrator who issued the award was the second arbitrator appointed in this proceeding. He was appointed after the Director of Arbitration granted the request of the first arbitrator to withdraw from the case.

The arbitrator resolved the unsettled issues by conventional arbitration, as he was required to do absent the

parties' agreement to use another terminal procedure. N.J.S.A. 34:13A-16d(2). The parties' final offers were as follows.

The Township proposed a four-year contract for 1997 through 2000. For 1997, it proposed a 2.75% across-the-board increase, effective July 1, 1997, and for 1998, 1999 and 2000 it proposed 3% increases, all effective on July 1 of the respective calendar year.

The FMBA proposed a five-year contract from 1997 through 2001, with 5% across-the-board increases on January 1 of each year. In addition, it sought "education stipends" of 3% of base salary for unit members with Emergency Medical Technician/Emergency Medical Services (EMT/EMS) certification; 2% for unit members with first responder training; 1% for unit members with a fire inspector license, and 1% for unit members with HAZMAT training, subject to a maximum total stipend of 4% of base salary. The FMBA also proposed a 24/72 hour work schedule to replace the existing 10/14 hour work schedule. In addition, it presented 22 other proposals on a variety of issues. Some proposals addressed personal days, union leave, education leave, early relief time, acting officer pay, survivors' benefits, and timing of longevity increases. Others would have required that the Township provide unit members with, or modify, certain equipment. The FMBA also proposed clauses concerning access to personnel files, work station uniforms, and establishment of overtime lists, and sought removal of a provision concerning

presentation of tours. Finally, the FMBA proposed that it have sole authority to continue a grievance through steps three and four of the grievance procedure, a proposal the Township did not oppose. In addition to their proposals, the parties signed an April 16, 1998 agreement that lowered the starting salary for new hires. The Township also agreed to fill five vacancies from a Department of Personnel list that expired on April 28, 1998.

The arbitrator issued an award that established a four-year contract from January 1, 1997 through December 31, 2000. He awarded a 4% increase effective July 1, 1997, a 4.25% increase effective July 1, 1998, and 4% increases effective July 1, 1999 and July 1, 2000. He also awarded a stipend of 2% of base salary for unit members with an EMT/EMS certification (Arbitrator's opinion, p. 45). In addition, he awarded the FMBA work schedule proposal on a trial basis and ordered that unit members be changed to a 24/72 hour work schedule "on or before May 1, 1999 or another date to be mutually agreed on..." (Arbitrator's opinion, p. 45). He stated that the schedule was to remain in effect until December 31, 2000, "or until it is altered or replaced by a subsequent collective bargaining agreement" (Arbitrator's opinion, p. 45). In connection with the award of the 24/72 work schedule, the arbitrator ordered that all time-based benefits such as vacations, holidays, personal days and sick leave be adjusted to maintain the same hourly level of costs as under the current schedule (Arbitrator's opinion, p. 45). The

award also provided that mutual exchanges must not result in a unit member working two consecutive tours of duty (Arbitrator's opinion, p. 45). Finally, the arbitrator awarded the FMBA proposal that only the FMBA be permitted to pursue a grievance through steps three and four of the grievance procedure. (Arbitrator's opinion, p. 46). He denied all other FMBA proposals (Arbitrator's opinion, pp. 42-43).

The Township appeals, contending first that the "removal" of the originally appointed arbitrator violated Commission rules and was contrary to the Reform Act's policy of encouraging mediation efforts by arbitrators. It also contends that the arbitrator erred in awarding a 24/72 hour work schedule; that the 2% stipend for unit members with EMT/EMS certification is not supported by substantial credible evidence in the record; and that the arbitrator did not properly analyze the statutory factors, N.J.S.A. 34:13A-16g, in awarding salary increases. It requests that the award be vacated or, in the alternative, remanded to the original arbitrator for reconsideration.[1/]

1/ The Township also requested oral argument, which we granted. Further, it asks that we require the FMBA to remove from its appendix a complaint that the FMBA filed against the Township alleging that it violated the Open Public Meetings Act, N.J.S.A. 10:4-6, et seq., when it voted to appeal the arbitrator's award. That complaint is not part of the record and we have not considered it in rendering this decision. However, its inclusion in the appendix is not prejudicial. On August 6, 1999, the Superior Court granted summary judgment dismissing the complaint.

We turn to the threshold issue of whether the first arbitrator should have been required to continue as arbitrator. This is the procedural history.

In January 1997, the FMBA filed a Petition to Initiate Compulsory Interest Arbitration. In February, the Director of Arbitration appointed an arbitrator who had been mutually selected by the parties. See N.J.S.A. 34:13A-16e(1); N.J.A.C. 19:16-5.6(b) and (d). During March through August 1997, the arbitrator conducted five mediation sessions. See N.J.S.A. 34:13A-16f(3); N.J.A.C. 19:16-5.7(b). The arbitrator issued two written "mediator's recommendations" that the arbitrator believed "addressed the concerns of the parties and represent[ed] an expeditious, fair and reasonable resolution of this impasse." The recommendations were issued "without prejudice to the Arbitrator's continued jurisdiction to conduct a formal hearing and issue an Award consistent with the statutory criteria, in the event that the Mediator's Recommendation is not accepted by both parties."

The recommendations did not result in a settlement and, in September, the arbitrator recommended that the parties negotiate without him until October 20. After the parties informed the arbitrator that they could not reach an agreement, he sought to schedule a formal arbitration hearing. At that point, the FMBA requested that the arbitrator withdraw from the proceeding, while the Township objected to his doing so. On January 7, 1998, the arbitrator wrote to the Director of Arbitration and set forth the above chronology. He then stated:

7. I have worked for PERC for 26 years and this is the first time I have been asked to withdraw from any proceeding. In the past thirteen years I have issued many Mediator's Recommendations and it has never resulted in a request that I withdraw from the proceeding. Although I have issued hundreds of decisions and awards, there has never been a claim that the decision or award was affected by prior settlement discussions.

8. I am fully confident that I can conduct the Interest Arbitration hearing in Teaneck and issue an award consistent with the statutory criteria without any reference to the prior settlement discussions.

9. The revised statute apparently encourages the pursuit of mediation to expedite the impasse resolution.

10. Honoring the request for an arbitrator to withdraw after the issuance of a Mediator's Recommendation may do harm to the interest arbitration process because it could inhibit aggressive mediation efforts by arbitrators.

11. The revised statute also encourages and requires the prompt resolution of impasses in Public Safety departments.

12. This matter was assigned to me on Feb. 24, 1997, based on the mutual request of both parties.

13. Litigation over the status of the arbitrator will further substantially delay the resolution of this impasse.

14. This arbitrator requests that he be relieved of this assignment by the agency so that the impasse may be expeditiously resolved.

15. At the same time, the undersigned intends to raise this issue for consideration by the panel of interest arbitrators in order to achieve a consensus on appropriate guidelines for the processing of these matters.

On January 15, 1998, the Director approved the arbitrator's request to be relieved of his assignment. However, prior to receiving the Director's letter, both the FMBA and the Township wrote to the Director concerning the arbitrator's request. The FMBA urged the Director to appoint a new arbitrator and stated that it was a common and desirable practice for an arbitrator who has issued a mediator's recommendation to withdraw from the proceeding at the request of either party. The Township countered that the arbitrator should be "urged and directed" to continue in the case. It maintained that the arbitrator had acted properly and in accordance with Commission rules in attempting mediation prior to the start of formal arbitration. It further stated that it did not accept the arbitrator's withdrawal, which was prompted by a desire to avoid an FMBA challenge to his standing. It requested "a full hearing before PERC" and reserved its rights to challenge the FMBA's "arbitrary and capricious action".

On February 5, 1998, the Director stated that, after reviewing the parties' positions, he approved the arbitrator's request to be relieved of his assignment.

On February 26, 1998, the Director appointed a new arbitrator and a formal hearing was scheduled. At the outset of the hearing, the Township's attorney stated that he was going forward under protest and was reserving the Township's right, if necessary, to challenge the assignment of the arbitrator (T7).

Against this backdrop, the Township contends that the Director should have required the first arbitrator to continue to serve. It maintains that the Act does not provide for removal of an interest arbitrator after unsuccessful mediation efforts and that, by focusing only on the arbitrator's request to be relieved of his assignment, the Director did not address the arbitrator's concern that honoring a request for withdrawal after issuance of a mediator's recommendation could inhibit mediation efforts. It asserts that while an arbitrator may be disciplined, suspended or removed for violating the Act or for good cause, see N.J.S.A. 34:13A-16e(2), no such cause was established. The Township also argues that Commission procedures for taking disciplinary action with respect to interest arbitrators were not followed; that no motion to disqualify the arbitrator was filed under N.J.A.C. 19:16-5.6(g); and that it should have been afforded a full hearing before action was taken on the arbitrator's letter. Finally, while the Township recognizes that the courts have cautioned against an interest arbitrator relying on information obtained in mediation sessions, see Aberdeen v. PBA, 286 N.J. Super. 372 (App. Div. 1996), it maintains that no such concerns were present in this case.

The FMBA counters that an arbitrator's resignation is not a proper ground for appeal of an interest arbitration award under N.J.S.A. 34:13A-16f(5)(a). It contends that the Township did not timely challenge the Director's decision to approve the first

arbitrator's request to be relieved of his assignment and is barred by laches and estoppel from doing so now, over one year after the Director's decision and after it has participated in hearings before the second arbitrator.2/ In any case, the FMBA asserts that the arbitrator's resignation was proper and that the arbitrator ultimately agreed with the FMBA that, in rendering an award, he might have been influenced by his extensive mediation efforts, including the issuance of two formal recommendations. It maintains that the Director avoided an Aberdeen problem by approving the arbitrator's request to be relieved of his assignment.

The Township responds that the doctrines of laches and equitable estoppel are inapplicable because it timely objected to the Director's action and never represented that it would not challenge his decision. It notes that while the FMBA urges that it should have filed an interlocutory appeal under N.J.A.C. 19:16-5.17, that rule allows a party to object to an interim ruling in an appeal from a final award.

We comment first on the FMBA's arguments concerning the timeliness of the Township's challenge to the arbitrator's appointment and the grounds for appeal of an interest arbitration

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2/ The FMBA suggests that the Township could have requested permission to appeal the Director's "interlocutory" decision, N.J.A.C. 19:16-5.17; appealed the Director's decision to the Appellate Division, or filed a motion to disqualify the second arbitrator.

award. The statutory goal of providing for an expeditious, effective and binding procedure for the resolution of disputes, N.J.S.A. 34:13A-14a, is not served where a party appeals an interest arbitration award based on an alleged defect in the arbitrator's appointment that was known at the outset of the proceeding. Compare Barcon Assocs v. Tri-County Asphalt Corp., 86 N.J. 179, 195 (1981)(commercial arbitrators must disclose, prior to the commencement of a proceeding, any facts which might indicate any interest or create a presumption of bias; party who does not object at that time waives the right to do so on the grounds revealed); see also Rutgers, the State Univ., P.E.R.C. No. 99-11, 24 NJPER 421 (¶29195 1998)(declining to vacate late award and holding that restarting proceedings would not serve statutory purpose of expeditiously resolving disputes).

Moreover, N.J.S.A. 34:13A-16f(5)(a) states that an award may be appealed on the grounds that the arbitrator did not apply the statutory criteria or violated the Arbitration Act. It is not clear that the allegedly improper replacement of an arbitrator falls within the ambit of the statute, particularly since a party is not harmed by having the matter heard by another member of the special panel of interest arbitrators. However, rather than resting our decision on these procedural grounds, we prefer to consider the Township's contention that the Director should have denied the arbitrator's request to withdraw. We stress that the Director's appointment of an interest arbitrator is ordinarily not

subject to review by us: the Director either appoints the arbitrator mutually selected by the parties or, lacking an agreement, assigns the arbitrator by lot. N.J.S.A. 34:13A-16e(1); N.J.A.C. 19:16-5.6(d). Where we do review an appointment or other administrative decision of the Director, we will sustain his decision absent a clear abuse of discretion.3/

The first arbitrator's letter to the Director balanced what he saw as two competing considerations: on the one hand, the Reform Act's emphasis on mediation and, on the other, its goal of providing an expeditious means of resolving impasses. While he expressed his concern that his withdrawal could inhibit aggressive mediation efforts -- and stated that he could render an award in accord with the statutory criteria -- he concluded that the balance weighed in favor of expeditious resolution of the dispute. He therefore requested that he be relieved of his assignment in order to avoid litigation over whether he had an obligation to withdraw. The Director accepted an experienced arbitrator's judgment that, given the circumstances of the case,

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3/ Should a party believe that there are circumstances surrounding the appointment of an arbitrator that warrant our review, it should move to disqualify the arbitrator, see N.J.A.C. 19:16-5.6(g), rather than wait until the arbitrator issues his award. See also N.J.A.C. 19:16-5.17.

he should withdraw from the assignment.[4/] The parties were given an opportunity to respond to the arbitrator's letter and we see no need for the Director to have held a hearing where neither party identified substantial and material facts in dispute. Compare N.J.A.C. 19:16-5.16(c). Moreover, N.J.A.C. 19:16-5.6(e) and (f) authorize the Director to select a "replacement" arbitrator where the original arbitrator is "unable to serve." These regulations necessarily permit the Director to approve an arbitrator's request to withdraw from a case.

For these reasons, we hold that the Director had the authority to approve the arbitrator's request to withdraw from the case. His decision to do so was a reasonable exercise of discretion in the circumstances of this case.

In so holding, we stress that the Reform Act, like the predecessor statute, adopts a "mediation-arbitration" model where the assigned arbitrator is authorized to assist the parties in voluntarily resolving their dispute even after the petition for interest arbitration is filed. N.J.S.A. 34:13A-16f(3); N.J.A.C. 19:16-5.7(b). Mediation is integral to the interest arbitration process and, in our administration of the Act, we have emphasized

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4/ This action plainly was not "discipline" or "removal" within the meaning of N.J.A.C. 19:16-5.16 and there was no requirement to follow the procedures outlined there, which are intended to provide due process to an arbitrator. "Removal" in the context of the regulations means removal from the special panel of interest arbitrators, not removal from a case.

its importance. See Biennial Report of the Public Employment Relations Commission on the Police and Fire Public Interest Arbitration Reform Act, p. 4 (January 1998). Far from being disqualified for attempting to mediate a dispute, arbitrators are encouraged to make such efforts. In assisting the parties in trying to reach a settlement, the first arbitrator properly exercised his authority under the Act. But the Director also properly approved the arbitrator's request to withdraw from the case after those efforts were unsuccessful and the arbitrator concluded that the purposes of the Act would best be served by his withdrawal.

We next turn to the Town's contentions that the arbitrator did not properly apply the statutory factors in 16g in awarding the 24/72 work schedule; across-the-board salary increases and the EMT/EMS stipend. The standard of review for considering such challenges to interest arbitration awards is well established. Consistent with pre-Reform Act case law, we will vacate an award if 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. Cherry Hill Tp., P.E.R.C. No. 97-119, 23 NJPER 287 (¶28131 1997); accord City of Newark, P.E.R.C. No. 99-97, 25 NJPER 242 (¶30103 1999); Borough of Lodi,

P.E.R.C. No. 99-28, 24 NJPER 466 (¶29214 1998); Borough of Bogota, P.E.R.C. No. 99-20, 24 NJPER 453 (¶29210 1998); Borough of Allendale, P.E.R.C. No. 98-123, 24 NJPER 216 (¶29103 1998); Middlesex Cty., P.E.R.C. No. 98-46, 23 NJPER 595 (¶28293 1997); cf. PBA Local 207 v. Bor. of Hillsdale, 137 N.J. 71, 82 (1994); Division 540, Amalgamated Transit Union, AFL-CIO v. Mercer Cty. Improvement Auth., 76 N.J. 245, 253 (1978). Later in this opinion, we will elaborate on how our review standard applies to an arbitrator's consideration of a non-salary proposal to change an existing term and condition of employment.

We discuss the work schedule, salary increase and stipend issues separately.

Work Schedule

The FMBA's proposal to change from the existing 10/14 to a 24/72 work schedule was a key issue and the parties were "completely at odds" over it (Arbitrator's opinion, p. 30). Under the 10/14 schedule, unit members work an eight-day tour of two ten-hour days (8:00 a.m. to 6 p.m.), followed by a day off and two 14-hour night shifts (6 p.m. to 8 a.m.), followed by three days off (Ra823). The fire officers unit -- deputy chiefs, captains and lieutenants -- also works this schedule (Aa, Exhibit F, p. 22). The FMBA proposed to change to a schedule where unit members would work an eight-day tour of one 24-hour day followed by 72 hours (3 days) off, followed by another 24-hour day on and three days off. Under a 24/72 or 10/14 schedule, an officer works the

same number of hours: 48 hours every eight days and, over eight weeks, an average of 42 hours per week (Arbitrator's opinion, p. 32; Ra560). In a September 1998 award involving the Township's fire officers' unit, a different interest arbitrator rejected the Professional Fire Officers Association's (PFOA) proposal for a 24/72 work schedule and awarded a contract from January 1, 1997 through December 31, 1999 (Aa, Exhibit F, pp. 38-39). That arbitrator found that there was insufficient justification for imposing a schedule change where the department had operated well under the 10/14 schedule since 1970 and none of the three other professional fire departments in the County had a 24/72 schedule. Ibid.

Before the arbitrator, the FMBA argued that experiences in other communities demonstrated that the 24/72 hour schedule decreased sick time, overtime and firefighter injuries; improved productivity and morale; and was a common schedule agreed to by parties and awarded by interest arbitrators in many communities in the State. It also argued that it could be implemented for this unit even if the fire officers worked the 10/14 schedule.

The Township maintained that, under Borough of Atlantic Highlands and Atlantic Highlands PBA Local 242, 192 N.J. Super. 71 (App. Div. 1983), certif. denied, 96 N.J. 293 (1983), the establishment of the department's overall work schedule was a managerial prerogative. It also urged that the proposal should not be awarded because the fire officers remained on a 10/14

schedule. Further, it cited several potential problems that the fire department chief had set out in a memorandum to the Township administrator. The chief stated that he would need more staff to implement the schedule; there would be a lack of follow-up on disciplinary matters; and officers might move farther from Teaneck because of the diminished need to commute. He also felt that the public might react negatively to the schedule and that it could result in fatigue; firefighters' giving higher priority to second jobs; and firefighter reluctance to accept day shift staff assignments. Finally, the chief was concerned that time off might have to be given in connection with intershift transfers; sick leave might increase after being reduced during a trial run; and it was unfair to other employees, who would have to take more leave time to recover from an illness than firefighters who worked only once in four days.

The arbitrator first rejected the Town's contention that the proposal was not mandatorily negotiable, reasoning that Maplewood Tp. P.E.R.C. No. 97-80, 23 NJPER 106 (¶28054 1997) held otherwise (Arbitrator's opinion, p. 31). However, the arbitrator added that he would be reluctant to order such a major change in operation unless there were compelling reasons to do so (Arbitrator's opinion, p. 31). While he stated that he would normally give "important weight" to a prior award such as that involving the fire officers, he found there was a compelling rationale for reaching a different outcome based on differences in

the evidence presented to him and to the other arbitrator (Arbitrator's opinion, p. 31). The arbitrator reasoned:

> In contrast to the evidence available to Arbitrator Buchheit provided by a member of the Fire Officer bargaining unit, the FMBA presented two expert witnesses who presented credible empirical support for the 24/72 shift schedule. Paul J. Chrystal, a Battalion Chief in the Township of Union fire department, reported on a 12-year study of the 24/72 schedule implemented in 1980 that compared various factors six years before and after the implementation of the 24/72 schedule in Union Township (TR 33-103). The findings of the study indicated that with exactly the same staffing levels before and after the change there was a 35% decline in the use of sick allowance/home illness, a 58% decline in overtime expense, a 23% decrease of line-of-duty injuries to firefighters, and a 38% decrease of tour-of-duty civilian injuries. At the same time, there was a 95% increase in productivity as measured by the numbers of classified alarms (up to 30%), tour fire hazard inspections (up 213%), and non-emergency services (up 150%). [Arbitrator's opinion, p. 31]

The arbitrator observed that the study attributed the decline in firefighter injuries to the fact that firefighters had 72 hours off to recuperate from exposure to toxic fumes, while civilian injuries were reduced because of the increased inspections and other fire prevention duties performed on the 24-hour shift (Arbitrator's opinion, p. 32). The arbitrator found that Chrystal's testimony was supported by that of William Lavin, the President of the New Jersey FMBA and the Elizabeth FMBA. Lavin stated that sick leave was reduced when Elizabeth implemented a 24/72 schedule and noted that the Elizabeth fire chief was on

record as stating that training was enhanced under the 24/72 schedule because, unlike a 10/14 schedule, a firefighter is on the day shift every four days and can be trained more frequently, at least where training takes place during the day (Arbitrator's opinion, p. 32). He noted Lavin's opinion that a 24/72 schedule improves both service and a firefighter's quality of life (Arbitrator's opinion, p. 32). The arbitrator also commented that an interest arbitrator in a 1996 award had reached conclusions similar to those of Chrystal and Lavin (Arbitrator's opinion, p. 33). He added that the 24/72 schedule existed in 26 New Jersey communities, with several changing to the schedule recently by agreement or by award (Arbitrator's opinion, pp. 37-38). The arbitrator cited a finding in another interest arbitration award that 70% of paid fire departments nationwide operate on a 24/72 schedule, a point brought out in this proceeding as well (Arbitrator's opinion, p. 38; T115; Ra164).

In contrast to the foregoing, the arbitrator found that the Township had offered no direct evidence from other communities concerning what it speculated would be the negative effects of the proposal. The arbitrator continued:

> Despite the fact that there are numerous New Jersey communities with the 24/72 schedule whose experiences could be mined to provide support for hypotheses about the negative effects of the schedule, the Town offered no direct evidence from these communities. The bottom line, however, is that the Chief testified he could live with the schedule if additional supervisory staff were made available.... [Arbitrator's opinion, p. 34]

The arbitrator concluded that the FMBA's "uncontroverted evidence" convinced him that the substantial benefits of the 24/72 schedule to the Town, unit members and the public justified "undertaking a trial run" (Arbitrator's opinion, p. 34). He found that the 24/72 schedule would further the public interest and the continuity and stability of employment by increasing productivity, reducing firefighter and civilian injuries, reducing sick leave and overtime costs and improving morale by increasing the recovery time from stress and toxic fumes (Arbitrator's opinion, pp. 43-44).

The arbitrator also tried to address two of the problems cited by the chief -- fatigue and the cost of time-based benefits. He eliminated consecutive mutual exchanges and specified that all leave time be adjusted to "maintain the same hourly level of costs as under the current schedule" (Arbitrator's opinion, p. 45). The arbitrator also noted the chief's statements that he needed another deputy chief and staff person to implement the 24/72 schedule (Arbitrator's opinion, p. 34). While the arbitrator thus found that there would be substantial costs to implementing the proposal (Arbitrator's opinion, pp. 31, 41), he concluded that there were substantial potential savings as well. He noted that the award and the continuation of the schedule were "conditioned on improvements in productivity and morale, reductions in injuries, sick leave and overtime" that would offset implementation costs (Arbitrator's opinion, pp. 31, 41). In that

vein, he stated that the work schedule would not be continued after the trial run if the schedule did not achieve "some or all" of the above-noted objectives (Arbitrator's opinion, p. 35).

Finally, the arbitrator acknowledged that "supervisory efficiency and teamwork" would best be served if the fire officers and firefighters were on the same schedule (Arbitrator's opinion, p. 35). However, he noted that he could not resolve this issue because he did not have jurisdiction over the fire officers (Arbitrator's opinion, p. 35). While he recommended that the Township implement a common schedule for both units, he concluded, based on the chief's testimony, that different schedules for the two units would not be unworkable (Arbitrator's opinion, p. 35).

The Township maintains that, under Atlantic Highlands, the work schedule of a police or fire department is a managerial prerogative and not subject to mandatory negotiations or interest arbitration. It also contends that, under Maplewood, it proved a particularized need to retain the 10/14 work schedule in order to preserve continuity of supervision and stability within the fire department. It notes that while the arbitrator relied on witnesses who testified about the success of the 24/72 work schedule in other jurisdictions, those witnesses acknowledged that those departments had implemented the schedule for both fire officers and firefighters. It maintains that "chaos" would result if officers and firefighters were on different schedules and contends that the arbitrator did not take into account the cost of implementing the schedule.

The FMBA counters that Maplewood held that a proposal to change to a 24/72 work schedule is mandatorily negotiable and that the Township was required to raise any claim that there was a particularized need to preserve the 10/14 schedule in a pre-arbitration scope petition. See N.J.A.C. 19:16-5.5(c). It also asserts that the arbitrator weighed all the evidence and reasonably concluded that there was compelling evidence to support the shift change.

Preliminarily, we reject the Town's contention that Atlantic Highlands bars all negotiations over police or firefighter work schedules: we have declined to read the case so broadly, and another Appellate Division panel commented that such a per se exclusion would be inconsistent with Local 195, IFPTE v. State, 88 N.J. 393 (1982). See In re Mt. Laurel Tp., 215 N.J. Super. 108, 113 (App. Div. 1987); Borough of Closter, P.E.R.C. No. 85-86, 11 NJPER 132 (¶16059 1985). See also City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998)(approving Mt. Laurel's approach).

We next clarify how Maplewood shapes our approach to this appeal and how we will apply our review standard in cases where the arbitrator was asked to change a term and condition of employment other than salary.

In holding that the 24/72 hour work schedule in Maplewood was mandatorily negotiable, we stressed that, based on Supreme Court cases and the Legislature's decrees, police and firefighter

work schedules are generally viewed as mandatorily negotiable. 23 NJPER at 113. Maplewood also observed that when the Legislature approved interest arbitration as the means of resolving negotiations impasses over the wages, hours, and employment conditions of police officers and firefighters, it recognized that both management and labor would have legitimate concerns and competing evidence and that interest arbitration was the best forum for presenting, considering, and reviewing those concerns and evidentiary presentations. Id. at 114.

Maplewood noted that both we and the Appellate Division had found exceptions to the rule of work schedule negotiability when the facts prove a particularized need to preserve or change a work schedule to protect a governmental policy determination. Id. at 113-114. But Maplewood held that, in the context of a pre-arbitration scope petition, the query was not whether a work schedule proposal raised legitimate concerns, but whether it so involved and impeded governmental policy that it must not be addressed through negotiations and interest arbitration. Id. at 114. After holding that the Maplewood work schedule did not, on its face, so impede governmental policy, we emphasized that we expressed no view on the merits of the proposal, a necessary caution in view of our authority to review interest arbitration awards. Ibid.

Procedurally, the Township was required to file a pre-arbitration scope petition if it sought to prevent an interest

arbitrator from considering the proposal. N.J.A.C. 19:16-5.5(c). But the Township may still argue in this appeal that the arbitrator did not give enough weight to, or consider evidence concerning, such issues as the proposed work schedule's cost or its impact on department operations, discipline or supervision. A work schedule proposal may raise legitimate concerns about these types of issues, yet still be mandatorily negotiable: the rationale of Maplewood was that the arbitrator would weigh these concerns in evaluating the evidence on all of the relevant statutory factors, including the public interest, N.J.S.A. 34:13A-16g(1). Stated another way, even though a proposal on its face would not inevitably impede governmental policy, an arbitrator may still find, based on all the evidence on all the statutory criteria, that it should not be awarded. And an employer may argue on appeal that an arbitrator should have so ruled based on the evidence presented.

Where an appeal does challenge an arbitrator's ruling on a non-salary proposal to change an employment condition, we will consider whether the arbitrator applied the traditional arbitration principle that the party proposing a change must justify it. Compare Cherry Hill Tp. (it was appropriate for an arbitrator to require a party seeking a contract change to explain why). Application of that standard is particularly important where, as here, one party proposes to change a work schedule that has been in effect since 1970 and that has implications for the

overall management and operations of the fire department. Compare Jersey City, 154 N.J. at 572 (noting that police officers are different from other public employees and that the scope of discretion accorded to the public entities that administer police departments is necessarily broad). Court and Commission decisions recognize that there is a strong governmental policy interest in ensuring appropriate discipline, supervision and efficient operations in a public safety department. See Irvington PBA Local #29 v. Town of Irvington, 170 N.J. Super. 539 (App. Div. 1979), certif. den. 82 N.J. 296 (1980); Borough of Atlantic Highlands; Jackson Tp., P.E.R.C. No. 93-4, 18 NJPER 395 (¶23178 1992); Borough of Prospect Park, P.E.R.C. No. 92-117, 18 NJPER 301 (¶23129 1992); Borough of Closter; Town of Kearny, P.E.R.C. No. 83-42, 8 NJPER 601 (¶13283 1982). Therefore, 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.

In particular, where a proposal, if awarded, would result in superior officers and rank-and-file employees working different schedules, it implicates the above-noted case law and raises serious questions as to whether supervision would be

impaired.[5/] Indeed, we have twice found that a public safety department had a dominant governmental policy interest in aligning supervisory and rank-and-file work schedules. In City of Newark, P.E.R.C. No. 88-87, 14 NJPER 248 (¶19092 1988), we held that a proposal to change from a 10/14 to a 24/72 schedule was not mandatorily negotiable where it would result in firefighters being on a different schedule than their supervisors. We reasoned that the 10/14 schedule had been in effect for 28 years and that, given the different schedules, superior officers would not be able to supervise firefighters effectively. See also Borough of Closter (prerogative found to change patrol officer starting times to conform to schedule of superior officers to ensure that each officer had direct supervision by one superior officer for the officer's entire eight-hour shift).

We do not hold that a proposal that would result in different work schedules for superior officers and rank-and-file employees is not mandatorily negotiable as a matter of law. See Jersey City (negotiability balancing test must be applied case-by-case); Maplewood Tp. (interest arbitrator may generally

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5/ Several statutes reflect the common understanding that firefighters and superior officers will be on the same schedule. See N.J.S.A. 40A:14-46 (municipality may divide the "members and officers" of a paid fire department into two platoons, one platoon serving 24 hours of duty while the other is off duty for the same period of time); see also N.J.S.A. 40A:14-47 through N.J.S.A. 40A:14-49, authorizing municipalities to divide "members and officers" of fire departments into platoons operating on a specific schedule or working a specified number of hours per week.

consider work schedule proposal in light of parties' evidence and arguments). However, an arbitrator may award such a proposal only if he or she finds that the different work schedules will not impair supervision or that, based on all the circumstances, there are compelling reasons to grant the proposal that outweigh any supervision concerns.

This arbitrator recognized that the burden was on the FMBA to justify the proposal (Arbitrator's opinion, p. 31). However, he did not have the benefit of this opinion clarifying the relationship between our scope-of-negotiations case law and the interest arbitration process, and we find more weight should have been given to the fact that the proposal would result in different work schedules for the two units. At the same time, the FMBA offered undisputed evidence as to the potential benefits of the 24/72 schedule. Absent the supervision issue, we would find that the arbitrator's decision to award the proposal on a trial basis was a reasonable determination of the issues, N.J.S.A. 34:13A-16g, that was supported by substantial credible evidence in the record as a whole. In this posture, we will exercise our authority under N.J.S.A. 34:13A-16f(5)(a) and modify the award to provide that the 24/72 work schedule shall be implemented only if and when the 24/72 schedule is adopted for the superior officers' unit.[6/] We discuss in more detail the considerations that lead us to this conclusion.

6/ Given the December 31, 1999 expiration date of the fire officers' contract, successor negotiations were required to begin by August 31, 1999. N.J.S.A. 34:13A-16a(1).

Consistent with Newark, the arbitrator concluded that "supervisory efficiency and teamwork" would be furthered if both units were on the same schedule and he recommended that the Township implement a common schedule for both units (Arbitrator's opinion, pp. 35). He also cited a statement in a 1996 arbitration award, relied on by the FMBA, where the arbitrator indicated that "common sense dictated" that firefighters and fire officers be on the same schedule (Arbitrator's opinion, p. 38; Ra543). The arbitrator decided to award the FMBA proposal, despite his concern about potential supervision problems, because he did not have jurisdiction over the fire officers' unit (Arbitrator's opinion, p. 35). But, in evaluating the public interest and welfare, the arbitrator was required to consider the desirability of having both units on one schedule regardless of whether he had jurisdiction over both units. Where an arbitrator believes a proposal should be implemented for multiple units or not at all, he or she could award the proposal but make implementation contingent upon it being agreed to or awarded for the other unit. Compare Borough of Matawan, P.E.R.C. No. 99-107, 25 NJPER 324 (¶30140 1999)(interest arbitrator may award a change in employer payments for retiree health coverage that will take effect only when employer meets uniformity requirements in N.J.S.A. 40A:10-23).

Moreover, the arbitrator made no finding that the department could be supervised as effectively with the different work schedules as it had been with both units on the 10/14 schedule. For example, the arbitrator concluded, based on the

chief's testimony, that the different schedules would not be "unworkable," inferring from the chief's statement that the different schedules would be "troublesome" and "cumbersome" but that they would not be an insuperable obstacle to operations (Arbitrator's opinion, p. 35; T516). The arbitrator's conclusion falls short of a finding that the different work schedules would not impair supervision, especially when considered together with the arbitrator's recommendation that the Township implement a common schedule.

Moreover, when Chrystal and Lavin testified as to the benefits of the 24/72 schedule in Union and Elizabeth, they stated that the schedule was implemented for both fire officers and firefighters in those municipalities (T72; T84; T108). While Chrystal appeared to state that the department could operate effectively if the 24/72 schedule was implemented for this unit only, his statement was not drawn from experience and ran counter to the chief's opinion that the different schedules would be troublesome and would interfere with continuity of supervision and the way officers direct firefighters (T73; T472).

We agree with the FMBA that the Township has offered very few particularized examples of the type of operational or supervision difficulties that would flow from the different work schedules. For example, it is not self-evident that, as the Township asserts, chaos would result when fire officers changed shifts at 6 p.m. and firefighters did not: the Township has not

shown why, with firefighters on a 24-hour shift, there would be an automatic need to make new firefighter assignments when fire officers changed shifts. But, as we have stated, the burden was on the FMBA to justify the schedule change and the different work schedules. This record does not support a conclusion that supervision would not be impaired with the two units on different schedules, despite the common sense understanding, reflected in statutes and case law, that supervisors and subordinates should be on the same schedule. See N.J.S.A. 40A:14-46 to -49. Newark; Closter.7/ Finally, because no evidence was presented as to any problems with the existing 10/14 schedule, there is no suggestion in the record that there were compelling reasons to change the department work schedule, regardless of the supervision problems that might arise from the different work schedules.

7/ The FMBA refers to an interest arbitration award where an arbitrator with jurisdiction over a rank-and-file unit only awarded a 24/72 schedule for that unit (Ra1062). However, that award does not demonstrate that the fire department in that jurisdiction operated successfully with different work schedules. The arbitrator also cited Lavin's testimony that training is enhanced under a 24/72 schedule where the training officer is on the day shift. Lavin explained that, where that is the case, a firefighter's schedule coincides with that of the training officer one out of every four days, as opposed to as seldom as one out of eight days under a 10/14 schedule (T117-T119). However, the potential supervision problems that would flow from different work schedules outweighs the possible training benefits that might be derived from that arrangement. In any case, the record does not indicate when training takes place in the Township.

In sum, we agree with the Township that an award that would result in different work schedules for fire officers and firefighters was not warranted on this record. However, we do not agree with the Township's other objections to the award of the 24/72 schedule. Absent the supervision issue, we would find no basis to disturb the arbitrator's decision to award the 24/72 schedule on a trial basis.

The Township does not challenge the arbitrator's findings that the 24/72 schedule is a common one in New Jersey and nationally and that it has improved productivity and morale, increased recovery time from stress and toxic fumes, decreased civilian and firefighter injuries, reduced sick leave and overtime, and enhanced training in other jurisdictions. Indeed, the chief testified that he saw some advantages to the schedule in terms of giving firefighters more time to recuperate from illnesses or on-the-job injuries, decreasing overtime resulting from shift changes, and improving morale (T507-508; T529). As the arbitrator noted, the Township presented no evidence as to problems in any of the municipalities that operate on a 24/72 schedule.

We are not persuaded by the Township's arguments that the arbitrator did not give sufficient weight to the cost of implementing the schedule; the chief's concerns about calculation of leave time under the 24/72 schedule; difficulty in recalling personnel; extra leave time associated with intershift transfers,

and the cost of the extra staff that the chief believed would be needed to implement the 24/72 schedule. First, the award addresses calculation of leave time. Second, the record supports the arbitrator's conclusion that the Township offered no evidence of recall problems in jurisdictions operating under a 24/72 schedule. We note that there was testimony that, in one jurisdiction, the change to a 24/72 work schedule had not resulted in firefighters moving farther from their workplace (T57). Third, in expressing some concern about "intershift transfers," the chief explained that, when a firefighter is transferred from one platoon to another, it is sometimes necessary, under a 10/14 schedule, to give a firefighter time off so as not to trigger overtime costs. He stated that that might be a greater problem under a 24/72 schedule. Even assuming that to be so, the Township does not indicate how that would affect department operations or how often firefighters are transferred from one platoon to another.

Finally, we turn to the Township's contention that the arbitrator did not consider the cost of hiring additional staff to implement the 24/72 schedule.

The arbitrator found that the 24/72 schedule would entail substantial costs and therefore considered it to be an economic issue, although the FMBA had characterized it as non-economic (Arbitrator's opinion, pp. 9, 31). He cited the chief's testimony that, in order to implement the schedule, the chief believed he would need a new supervisory position, at an estimated cost of

$115,000 per year, plus an additional staff position (Arbitrator's opinion, pp. 31, 34; T586). The arbitrator also concluded that substantial savings could flow from the work schedule in the form of reduced sick leave and overtime costs, and that the schedule would not be continued if those savings did not materialize (Arbitrator's opinion, pp. 31, 41). The arbitrator implicitly concluded that the savings would outweigh the costs since he identified those savings as one reason for awarding the unit an additional .25% salary increase for 1997 and 1998 beyond that received by the fire officers and police units (Arbitrator's opinion, p. 41).

We agree with the Township that the additional cost, if any, of implementing the 24/72 schedule on a trial basis was one of the factors that the arbitrator was required to consider. N.J.S.A. 34:13A-16g(6). Moreover, if the costs of implementing the schedule were immediate and definite -- while the savings were potential only -- those costs might well be a factor militating against the award of the schedule. However, based on our review of the record, we find that there is no basis for concluding that additional staff would be required to implement the 24/72 schedule.

The chief's opinion was based on his conversations with another chief who told him that he would need more staff; his understanding that two departments operating under a 24/72 schedule had more superior officers than the Township; and his

belief, set forth in his memorandum to the Township administrator listing his concerns about the 24/72 schedule, that he would need another deputy chief to accomplish what was assigned to the shift deputy chiefs because his and the deputy chiefs' schedules would coincide only five times a month (Aa, Exhibit N; T500; T544-T545). This evidence, considered together with the rest of the record, does not support a conclusion that more staff would be required to implement the 24/72 schedule.

For example, the chief's testimony does not indicate an optimal fire officer/firefighter ratio for a 24/72 schedule; does not reveal how many firefighters were employed in those jurisdictions that had more superior officers than the Township; does not explain why more staff would be needed under a 24/72 as opposed to a 10/14 schedule; and does not indicate any particular circumstances that would require additional staff under a 24/72 schedule. Further, the chief also stated that he knew of no jurisdiction where more staff had to be hired because of a conversion to a 24/72 schedule (T522), and Lavin and Chrystal stated that the 24/72 schedule was typically implemented without additional costs (T91; T116). Chrystal indicated that, in Union, the switch to a 24/72 schedule was made without hiring additional staff (T46-T47).

Further, the chief's memorandum identifies a problem with deputy chiefs being on different schedules than the chief, a problem that the chief stated existed under the 10/14 schedule but

might be exacerbated under a 24/72 schedule (T472). The chief also acknowledged that he had requested another deputy chief before the 24/72 schedule was under discussion, and wanted to replace one of the captain positions with a deputy chief position (T471; T517). Based on the foregoing, the asserted need for another deputy chief does not appear to be closely connected with the 24/72 schedule. Moreover, because the 24/72 schedule will not be implemented for this unit unless and until it is agreed to or awarded with respect to the fire officers, the deputy chiefs' work schedule can be explored in negotiations or interest arbitration with the fire officers. Nothing prevents the Township from proposing that some or all of the deputy chiefs work the same schedule as the chief.8/

Finally, the chief also stated that another staff person might be required to help with the day-to-day operations of the department under a 24/72 schedule (T471). However, there was no explanation as to why a change from a 10/14 schedule would require this result, given that the fire officers are now on a 10/14, not a daytime staff, schedule.

In sum, we conclude that the arbitrator's award of a proposal that will result in different work schedules for fire officers and firefighters raises serious supervision and

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8/ Under the current table of organization, four deputy chiefs are assigned to platoons and one is a "floater" (Ra820).

operational concerns and should not have been awarded on this record. At the same time, the record supports the arbitrator's conclusion that the FMBA offered undisputed evidence as to the potential benefits of the 24/72 schedule. The arbitrator reasonably gave greater weight to the FMBA's evidence as to these potential benefits, which was based on data from other jurisdictions, than to the Township's contrary evidence, which the chief acknowledged was not similarly grounded (T536). Therefore, we approve the arbitrator's decision to award the 24/72 schedule on a trial basis, with the modification that the schedule shall not be implemented unless and until a 24/72 schedule is agreed to or awarded with respect to the fire officers' unit.9/

We specifically approve the arbitrator's establishment of a trial period. Where, as here, a work schedule change was awarded because of potential benefits, as opposed to problems with an existing schedule, it was appropriate for the arbitrator to establish a mechanism to ensure that the awarded schedule will not become the new status quo unless the predicted benefits materialize. A trial period accomplishes that. However, we note that the arbitrator's "trial period" did not clearly provide that the new work schedule would not become part of the status quo for successor contract negotiations, a concept which we believe is a

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9/ If that happens, the trial period could begin after the expiration of the contract that the arbitrator awarded and during the hiatus period prior to a successor agreement.

necessary part of a trial period. Accordingly, we clarify that the 24/72 schedule will not be continued into the agreement that follows the completion of the trial period unless there is a mutual agreement to do so, or an interest arbitrator awards the schedule anew. If there is no mutual agreement, the old work schedule will effectively be restored and the burden will be on the FMBA to again justify adoption of a new work schedule proposal.

Salary Increases

We now consider the Township's contention that the arbitrator did not properly analyze the statutory criteria in awarding across-the-board salary increases.

The arbitrator awarded increases of 4% for 1997, 4.25% for 1998, and 4% for 1999 and 2000, effective July 1 of each year. His award was therefore in between the 5% increases proposed by the FMBA for 1997 through 1999 and the increases sought by the Township (2.75% for 1997, and 3% for 1998, 1999 and 2000). The four-year contract term and the July 1 effective dates corresponded to the Township's final offer.

In arriving at these increases, and in discussing the comparability and overall compensation criteria, N.J.S.A. 34:13A-16g(2) and (3), the arbitrator found that, of the four paid fire departments in the County, unit members had the lowest base wages and lagged behind firefighters in the County and other communities with respect to size and timing of longevity payments, holiday pay, shift differential, EMS stipends and amount of leave

time (Arbitrator's opinion p. 39). The arbitrator commented that the Town's offer would result in the unit falling further behind firefighter salaries in comparable communities but also observed that the comparability evidence did not support the wage increases sought by the FMBA (Arbitrator's opinion, p. 36-37).

In arriving at the particular increases that he did, the arbitrator placed primary weight on the agreements and awards involving the Township's three other public safety units, all of which received 3.75% increases in 1997 and 4% increases in 1998 and 1999 (Arbitrator's opinion, pp. 27-28, 40). The fire officers' contract ends in 1999, but the police rank-and-file and superior officers' units received 4% increases in 2000.

The arbitrator reasoned that there was no basis for this unit to receive salary increases lower than other public safety units and noted as well that the Town's offer was lower than the 3.5% increases received by the Township's non-public safety employees (Arbitrator's opinion, pp. 28-29). Further, the arbitrator concluded that certain factors -- the July 1 effective date of the increases he awarded, the FMBA's agreement to a lower starting salary during the term of the agreement, the unit's increased responsibilities with respect to emergency medical responses, and the potential for savings as a result of the 24/72 work schedule -- warranted an additional .25% for 1997 and 1998 over the increases received by the other public safety units for those years (Arbitrator's opinion, pp. 40-41).

The arbitrator noted that average private sector wages in New Jersey increased 4.3% during 1996 and that wages for federal, state and local government employees increased 3.3%, 2.2% and 3% respectively (Arbitrator's opinion, p. 38). While he commented that this data was more consistent with the Town's proposal, he concluded that it was more important that the award be consistent with "both the internal Town labor market regarding public safety wages and the local external labor market regarding increases paid to firefighters in surrounding communities" (Arbitrator's opinion, p. 39). Similarly, the arbitrator stated that the increases awarded -- and the Town's offer -- were higher than the cost of living but were consistent with other statutory criteria regarding internal and external labor market comparability (Arbitrator's opinion, p. 40).

With respect to the financial impact of the award, N.J.S.A. 34:13A-16g(6), the arbitrator stated that the award drew its essence from the internal pattern for public safety units, and that it could be presumed that the Township believed that the voluntarily agreed-to PBA and SOA increases would not have an adverse impact on the Township, its residents or taxpayers (Arbitrator's opinion, p. 40). He noted that there was no evidence that the economic climate had worsened since the settlements and that the small additional cost of the award over the internal public safety pattern -- $8,978 for 1997 -- constituted a minute portion of the Township's $36 million budget

(Arbitrator's opinion, p. 41). At the same time, he found that the Town's financial situation did not warrant the larger increases sought by the FMBA (Arbitrator's opinion, pp. 41-42).

Finally, the arbitrator considered the public interest and the continuity and stability of employment, N.J.S.A. 34:13A-16g(1) and (8). He found that there was no turnover problem in the unit and that the "continuity and stability of employment" would be furthered by the award, which maintained "reasonable parity" among the base salaries of the public safety units (Arbitrator's opinion, p. 43).10/ With respect to the public interest, the arbitrator found that this was a "global criteri[on]" that is furthered when an award both promotes continuity and stability of employment and provides the public with an adequate level and quality of services at a reasonable cost (Arbitrator's opinion, p. 44). He found that the Township had maintained public satisfaction with firefighter services while providing those services at a lower cost than in comparable communities. He stated that the award "should continue this relationship" (Arbitrator's opinion, p. 44).

Against this backdrop, the Township contends that the arbitrator did not adequately consider the public interest or its financial and cost of living evidence and that, consistent with

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10/ The top 1995 salary for the rank-and-file police unit was $56,138 vs. $50,536 for this unit (Ra405).

Bogota and Lodi, the award should be vacated. The FMBA counters that the arbitrator considered all of the statutory criteria and arrived at an award in between the parties' final offers. It urges that its financial expert demonstrated that the Township was on sound financial footing.

Our summary illustrates that the arbitrator stated what statutory factors he considered most important in arriving at the award, explained why they were given significant weight, and explained how he weighed other evidence or factors in arriving at a final award. Lodi; Bogota. The decision to place significant weight on the increases received by other public safety employees in the Township is consistent with the Reform Act, which requires the arbitrator to compare the salaries of employees performing the same or similar services in the same jurisdiction. N.J.S.A. 34:13A-16g(2)(c); N.J.A.C. 19:16-5.14(c). In any particular proceeding, an arbitrator may determine that that subfactor is important, especially where a strong internal pattern exists.

While the Township objects to elements of the arbitrator's analysis and highlights certain pieces of evidence that it alleges should have been given greater weight, we are satisfied that the salary increases awarded are supported by substantial credible evidence in the record as a whole and that the Township has offered no particularized arguments that warrant disturbing the arbitrator's judgment. Lodi; Cherry Hill Tp. We address the Borough's specific challenges to the arbitrator's analysis.

With respect to the arbitrator's assessment of the financial impact criterion, the Township contends that the arbitrator improperly presumed that an award would have no adverse financial impact if it included salary increases close to those included in the Township's agreement with its police units. However, we agree with the arbitrator that the police settlements are probative of what the Township believed it could afford given its other priorities and the financial problems - declining state aid, decreased ratables, and increased tax delinquencies -- it cited to the arbitrator. Compare Newark, P.E.R.C. No. 99-97 (affirming award that was modeled on agreements with other uniformed employees; arbitrator found that those agreements indicated what the City believed it could afford in light of its financial problems). Absent evidence of changed financial circumstances, the arbitrator's analysis was appropriate although, as discussed later, he did consider both parties' financial evidence.11/

The Township also asserts that the arbitrator did not consider how the award will affect the local property tax, each taxpayer income segment, and the Township's ability to maintain,

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11/ In its post-hearing brief before the arbitrator, the Township reviewed its financial status and urged the arbitrator to look to the fire officers' award as a proper application of the statutory criteria. Since the fire officers' award stressed the increases received by the police units, the Township at one point appears to have endorsed the consideration of internal settlements in assessing financial impact (Aa, Exhibit B, p. 18; Aa, Exhibit F, p. 35).

expand or initiate new programs or services. See N.J.S.A. 34:13A-16g(6). However, the statute requires those items to be discussed only "to the extent evidence is introduced." N.J.S.A. 34:13A-16g(6); Middlesex; Newark, P.E.R.C. No. 99-97. The arbitrator found that the "Town did not argue that an increase that met the internal pattern of the public safety units would lead to layoffs, declines in existing programs and services, or the failure to initiate new programs or services" (Arbitrator's opinion, p. 41). The Township does not dispute that finding.

The Township further contends that the arbitrator did not explain how the award could be funded given the severe reduction in State aid and did not consider the Township manager's financial analysis. The background to this issue is as follows.

Between 1993 and 1997, the amount of aid that the Township received from the Aid to Densely Populated Municipalities Program, N.J.S.A. 52:27D-384 et seq., went from approximately $3.35 million to zero. As a consequence, the Township ended fiscal year 1994 with a deficit and, in fiscal years 1995 and 1996, anticipated all but approximately $2,000 of the end-of-year surplus for use in the next year's budget (Aa, Exhibit P). However, the record supports the arbitrator's conclusion that the Township had weathered this reduction in State aid and that the

decline was not as relevant as it was several years ago (Arbitrator's opinion, p. 41).12/

Moreover, the arbitrator accepted the Township manager's conclusion that the existing surplus was not large in relation to the total budget and that other costs associated with this unit -- increments and early retirement payments -- had absorbed the savings realized from lowering starting salaries and replacing retiring officers with lower-paid officers (Arbitrator's opinion, p. 42). The arbitrator cited those factors in declining to award the FMBA's proposal (Arbitrator's opinion, p. 42). In sum, we conclude that the arbitrator considered both parties' financial evidence and arrived at salary increases in between the parties' offers and consistent with the increases included in agreements with other Township employees. The Township has not presented any budgetary information on appeal that demonstrates that the across-the-board salary increases would have a negative financial impact on the Township.

12/ In fiscal year 1997, the Township generated $2.87 million in surplus, anticipated approximately $1.865 million for use in the next year's budget, and was left with a $1 million reserve for emergencies (Aa, Exhibit T). The FMBA's expert estimated, without contradiction from the Township manager, that there would be at least a $2.3 million surplus at the end of fiscal year 1998, leaving the Township with a $500,000 surplus if it chose to anticipate $1.8 million for the fiscal year 1999 budget (Ra148;Ra153). The FMBA's expert also stated that the Township's State aid during the early 1990's was unusually high, and the Township manager stated that, between 1990 and 1998, State aid increased .47% in excess of the CPI (Aa, Exhibit Y; Ra151).

We also find that the arbitrator's discussion of the cost of living, public interest, and overall compensation criteria comported with the statute. The arbitrator's obligation is to weigh the evidence on the various, sometimes competing statutory criteria, and explain the basis for the awarded increases. Lodi. The arbitrator did that. For example, the arbitrator set forth the Township's cost of living data and recognized that the increases he awarded, as well as the increases received by other Township employees, were higher than that figure (Arbitrator's opinion, p. 39). He also discussed evidence concerning wage increases received by New Jersey public employees in general and the average increase included in 1997 and 1998 interest arbitration awards (Arbitrator's opinion, p. 38). Contrary to the Township's suggestion, he also considered its evidence concerning the increments received by unit members and the Township's early retirement obligations, albeit he did so in discussing the financial impact criterion rather than the overall compensation criterion. The arbitrator met his statutory obligation when he explained that his award was based on the internal public safety pattern and his conclusion that the unit should not fall further behind firefighters in comparable communities (Arbitrator's opinion, p. 39-40). The award is not flawed because some pieces of evidence might weigh in favor of a lower award. Lodi.

We also reject the Township's argument that the award is not supported by substantial credible evidence because it awards

increases slightly higher than the average 1997 and 1998 award figures cited in a February 1999 memorandum from the Director of Arbitration to the special panel of interest arbitrators. In setting wage increases, an arbitrator must weigh the evidence and balance the various statutory factors. Lodi. Information as to average increases is not intended to direct arbitrators as to what they should award in a particular proceeding, where circumstances may weigh in favor of lower or higher increases.

We also disagree that the arbitrator did not adequately consider the public interest or the impact of the Cap law, N.J.S.A. 40A:4-45 et seq.

N.J.S.A. 34:13A-16g(1) and (5) require the arbitrator to assess the limitations imposed on the employer under the Cap law, which limits the amount by which municipal appropriations may be increased in each year to the lesser of 5% or a bi-annually established "index rate." N.J.S.A. 40A:4-45.1a; N.J.S.A. 40A:4-45.2; see also New Jersey State PBA, Local 29 v. Irvington, 80 N.J. 271, 291 (1979); City of Atlantic City v. Laezza, 80 N.J. 255, 269 (1979). Certain expenditures are excluded from the Cap calculation, N.J.S.A. 40A:4-45.2, and if a municipality does not appropriate up to its Cap limit in a given year, that appropriation authority can be "banked" and drawn upon for the next two years. N.J.S.A 40A:-45.15a.

In light of the foregoing, it is difficult for an arbitrator to assess how an award will affect Cap limitations

unless an employer submits its Cap calculations to the arbitrator and explains how an award above a certain amount will affect Cap limits. There is no indication from the appellate record that the Township made such a presentation to the arbitrator, and it does not do so on appeal. Nor does it appear that the Township submitted the budget documents that would have allowed the arbitrator to calculate the Township's Cap limits. In this posture, the arbitrator complied with 16g(1) when he stated that there was no claim by the Township that the award would interfere with limitations imposed on it by the Cap law (Arbitrator's opinion, p. 44). The requirement to assess the impact of the Cap law is prefaced by the general language in 16g, directing the arbitrator to "provide an analysis of the evidence" submitted on each relevant factor. Laezza's and Irvington's admonitions that an arbitrator must consider Cap limitations were set forth in cases where the employer presented that information.

Similarly, we approve the arbitrator's view of the "public interest" as a broad criterion that encompasses considerations of both fiscal responsibility and the compensation package required to maintain a high-productivity and high-morale fire department. See Middlesex; see also Anderson, Krause and Denaco, Public Sector Interest Arbitration and Fact Finding: Standards and Procedures, §48.06[6], contained in Bornstein and Gosline eds., Labor and Employment Arbitration (Matthew Bender 1999)(imprecise public interest criterion included in most

interest arbitration statutes is sometimes used to accommodate the needs of employees and the employer's obligation to other employees and the community). While the Township objects that the arbitrator's analysis of this factor was cursory, it does not suggest what evidence the arbitrator should have discussed.

Finally, the Township asserts that the arbitrator did not calculate the total net annual economic changes for each year of the agreement, as required by N.J.S.A. 34:13A-16d(2). The arbitrator stated the "net annualized costs" of the agreement by setting forth the percentage increases he awarded; calculated that the annual cost of a 4% increase was $140,000, and stated the 1999 cost of the EMT/EMS stipend, which became effective January 1, 1999 (Arbitrator's opinion, pp. 26, 41-42). The arbitrator should have stated the new dollar cost of the across-the-board increase awarded for each year of the agreement, plus the year 2000 cost of the EMT/EMS stipend. Rutgers. However, we find that he substantially complied with N.J.S.A. 34:13A-16d(2). Given the range of increases awarded, we do not think it is necessary to vacate and remand the award for a more precise calculation of the net annual economic changes for each year of the agreement.

EMT/EMS Stipends

The Township contends that the arbitrator's award of a stipend for unit members who obtain an EMT/EMS certification is not supported by substantial credible evidence given the "minimal assistance" that firefighters provide to the ambulance corps and

its decision not to have the department provide EMS services. The FMBA responds that the arbitrator properly found that there were compelling reasons to award the stipend, including the increase in medical response duties and the prevalence of such stipends in other communities. The background to this issue, which is related to the FMBA's request for a 2% stipend for "first responder" certification, is as follows.

A Township witness, Captain Richard Silvia, testified that from at least the 1970s to the present, firefighters have been called upon to respond to non-fire accidents or emergencies (T394; T443). Engine companies and the fire department rescue truck are dispatched, and firefighters provide whatever assistance they can in conjunction with, or until the arrival of, the Township's volunteer ambulance corps (T394; T436; T443; T459). That corps has 100 members most of whom, we were informed at oral argument, have EMT certification.13/ The goal of the fire department in responding to such calls has been the same since the 1970s: to stabilize the patient until the arrival of more advanced help (T400; T459). When the corps arrives, patient care is turned over to it; firefighters will remain and offer whatever assistance they can or, if they are not needed, they will return to the firehouse (T448). Firefighters may also arrive after or at the same time as the ambulance corps (T449; T460). They presumably offer to provide back-up assistance in those instances as well.

13/ A hospital paramedic service may also come to the scene (T394).

While the goal of assisting the corps has remained constant, since 1985, the department has been responding to increasingly complex incidents (T403; T420). Further, in the late 1990s, three things occurred. First, beginning in approximately 1996-1997, both Silvia and the chief stated that the department began to receive more calls from the police department asking firefighters to respond to non-fire emergencies (T433-435; T541-T542). Silvia understood that the police department had been directed to send the fire department out if the ambulance corps did not respond after two alarms (T435).

Second, in March 1998, at Silvia's recommendation, all firefighters were required to complete 30 hours of "first responder" training, after which they received three certifications: American Red Cross Emergency Response certification, American Red Cross CPR for the Professional Rescuer, and the Hackensack Medical Center Certification of Pre-Hospital Defibrillation (T402; T413). Until the mandatory training, only six firefighters had these certifications, and eight others had the more advanced EMT certification (T415; Arbitrator's opinion, p. 26).[14/] Before 1998, firefighters had received first aid and CPR training, but not on a regular basis (T448).

14/ It appears that EMT/EMS responsibilities may include services at the scene of an emergency, transferring patients to a hospital, and providing necessary services during transport. First responder duties are limited to stabilizing the patient until an ambulance arrives. N.J.S.A. 26:2K-21 et seq.; Maplewood, 23 NJPER at 107.

Third, after firefighters received the first responder training, each engine company received equipment -- oxygen, blood pressure cuffs, and an automatic defibrillator - that had previously been available only on the rescue truck (T438). Silvia stated that firefighters now provide a higher level of care and that all firefighters are trained to do such things as perform an initial patient assessment, administer oxygen, resuscitate a patient, and use a defibrillator (T407; T424-T431). He believes they are also better able to communicate with the corps on medical issues (T440; T443).

Silvia stated that he had no plans to recommend that firefighters receive the more advanced EMT training and the Township administrator confirmed that no one was required to obtain an EMT certification (T445; T753). However, the administrator noted that "[u]sually, somebody volunteers for it, wants to do it, and the town cooperates" (T753). At the time of the arbitration hearing, that cooperation took the form of "encouraging" firefighters to obtain the certification and paying for continuing professional education to maintain it (T753).15/

Against this backdrop, the FMBA argued to the arbitrator that "in recognition of the additional training and duties

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15/ The FMBA had proposed a contract clause requiring the Township to give firefighters paid time off to obtain an EMT certificate -- a proposal the arbitrator denied (Arbitrator's opinion, pp. 12, 46). At oral argument, the Township attorney stated that the Township will no longer encourage firefighters to obtain EMT training (2T14).

associated with EMT and First Responder training," firefighters with an EMT certificate should receive a stipend of 3% of base salary and those with a first responder certificate should receive a 2% stipend (Ra100; Ra265). It also argued that EMT stipends were common, and cited an exhibit listing nine New Jersey jurisdictions that paid firefighters an EMT/EMS stipend, five of which provided ambulance service (Ra100; Ra688).

The Township did not, in its post-hearing brief, address the request for the EMT/EMS stipend. It did argue that additional compensation was not appropriate for the first responder training because the Township had trained the firefighters on work time. It also referred to its administrator's statement that new equipment such as the defibrillator enabled the firefighters to perform first response duties more quickly (Aa, Exhibit B, p. 27).

The arbitrator awarded an EMT/EMS stipend of 2% base salary based on "the uncontroverted evidence" that stipends for EMT/EMS certification are paid in many communities and the "demonstrable increase in the first medical response workload" of the unit (Arbitrator's opinion, pp. 35, 38). He calculated that the cost would be approximately $1000 for each of the eight unit members who have the certification and commented that, by providing an incentive to obtain this training, the award furthered the public interest (Arbitrator's opinion, pp. 26, 44). He found that the stipend, together with the 24/72 work schedule, would provide a quid pro quo for the July 1 effective dates for

the across-the-board salary increases (Arbitrator's opinion, p. 36). The arbitrator denied the FMBA's proposal for a "first responder" stipend -- a stipend which all unit members would be entitled to receive given the March 1998 training.

Several points are pertinent to resolving this issue. First, we have held that EMT certification is related to a firefighter's job duties and that, therefore, an employer may unilaterally require firefighters to undergo EMT training. City of Orange, P.E.R.C. No. 90-119, 16 NJPER 392 (¶21162 1990); Borough of Avalon, P.E.R.C. No. 93-105, 19 NJPER 270 (¶24135 1993).16/ An employer may also decide not to require such training. See, e.g., Wayne Tp., P.E.R.C. No. 98-85, 24 NJPER 71 (¶29040 1997); Borough of Dunellen, P.E.R.C. No. 95-113, 21 NJPER 249 (¶26159 1995); Town of Hackettstown, P.E.R.C. No. 82-102, 8 NJPER 308 (¶13136 1982). Second, we have also held that the decision to have a fire department provide ambulance/EMS services is a governmental policy determination that can be made outside the negotiations sphere. See Maplewood, 23 NJPER at 111. Third, additional compensation for education or training that is not a job requirement is mandatorily negotiable. See Englewood Bd. of Ed. v. Englewood Teachers Ass'n, 64 N.J. 1, 8 (1973); North Arlington Bd. of Ed., P.E.R.C. No. 79-12, 4 NJPER 448 (¶4203

16/ The Department of Personnel job specification for firefighter lists, as one responsibility, "[a]ssists victims at scene of emergency by administering appropriate treatment (such as first aid, CPR or EMT treatment)...."

1978). Fourth, and as we have stated earlier, an interest arbitration award must be supported by substantial credible evidence in the record as a whole. See, e.g., Hillsdale; Cherry Hill Tp.

Within this framework, we note that the record includes no evidence that firefighters are required to perform duties that require an EMT certification. For example, there was no testimony that firefighters transport patients to the hospital. In that sense, there is no direct connection between the increase in first response calls and the stipend awarded.17/ Further, the fact that the FMBA cited nine jurisdictions which paid a stipend does not provide strong support for the award, where five of those municipalities provided ambulance service and presumably required EMT training.

However, on balance, we conclude that the arbitrator's award, as modified by this opinion, is supported by substantial credible evidence in the record as a whole. See Allendale (Commission evaluates entire award in determining whether it is supported by substantial credible evidence). The Township encouraged some firefighters to obtain an EMT certification. Given that circumstance, the arbitrator reasonably concluded that it was appropriate, as part of an overall economic package, to

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17/ An FMBA exhibit stated that it sought a stipend for unit members who have EMS/EMT certification "and who [are] actually assigned to perform those duties" (Ra677). However, neither its final offer nor its post-hearing brief include the quoted language in describing the proposal.

compensate those unit members who obtained training that their employer believed was useful, although not required, for their position. The award of the stipend does not dictate the type of assistance the department must provide the ambulance corps or require that firefighters provide EMT/EMS services. It simply compensates employees for training their employer has encouraged, presumably because it enhances their ability to perform first responder functions and to provide assistance at fire scenes.

We recognize that the stipend could prompt more firefighters to obtain EMT training and that this could have an economic impact on the Township that it believes outweighs the benefits of firefighters having the certification. However, at the time of the hearing, only eight of 68 firefighters were eligible to receive the stipend, which is effective as of January 1999. The contract awarded expires in December 2000, and the economic impact within the contract term is relatively minor. If a large number of firefighters obtain the certification, the Township may emphasize this additional salary obligation in future negotiations and interest arbitration. See Newark, P.E.R.C. No. 99-97 (where no unit member would be eligible for "senior step" salary until after expiration of contract that arbitrator awarded, employer could consider that salary obligation in planning future negotiations strategy). It may also seek to remove the stipend from the agreement. But the possible future effects of the

arbitrator awarding the stipend do not provide a basis for disturbing this award.

We conclude with the following comments. This is the first decision that addresses the standard an arbitrator should apply in considering a major work schedule change. While the arbitrator reviewed and analyzed all the parties' evidence and arguments concerning the work schedule, he did not have the benefit of this opinion, which provides guidance as to when an arbitrator may award a proposal that would result in superior officers and rank-and-file officers being on different schedules. As we have stated, an arbitrator should award such a proposal only if he or she is satisfied that the department supervision would not be impaired by the different work schedules or finds that there are compelling reasons to award the proposal that outweigh any supervision concerns. The arbitrator here did not make such findings. However, in all other respects, the arbitrator adequately analyzed the evidence presented on the relevant statutory factors and reached conclusions supported by substantial credible evidence in the record. We also find that he gave "due weight" to each of those factors and decided the dispute based on a reasonable determination of the issues. N.J.S.A. 34:13A-16g; N.J. State PBA Local 29 v. Irvington, 80 N.J. 271, 295 (1979). We therefore affirm the award, with the modification that the trial period for the 24/72 work schedule shall not be implemented unless

and until the schedule is agreed to, or awarded, for the fire officers unit.18/

ORDER

The arbitrator's award is affirmed, with the modification that the trial period for the 24/72 work schedule shall not be implemented unless the 24/72 schedule is agreed to or awarded with respect to the fire officers' unit.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato and Ricci voted in favor of this decision. None opposed.

DATED: October 28, 1999
Trenton, New Jersey
ISSUED: October 29, 1999

18/ Because the work schedule issue was largely independent of the other proposals, there is no need, in light of our modification, to remand the award to allow the arbitrator to reconsider the award as a whole. The award of the work schedule had a minor relationship to the other aspects of the award and our modification would not appear to affect the arbitrator's overall economic package. The arbitrator stated at one point that the savings resulting from the work schedule was one of three reasons he was awarding salary increases slightly higher than those received by other Township public safety units (Arbitrator's opinion, p. 40). At another point, he commented that the work schedule, and the EMT/EMS stipend, were a quid pro quo for the July effective dates of the salary increases (Arbitrator's opinion, p. 36).