

**STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION**

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In the Matter of Interest Arbitration Between :

**TOWNSHIP OF PISCATAWAY** :  
"the Township or Employer" :

and :

**PISCATAWAY PBA LOCAL 93** :  
"the PBA or Union" :

**INTEREST ARBITRATION  
DECISION  
AND  
AWARD**

Docket No: IA-2005-092

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Before: Robert M. Glasson, Arbitrator

**APPEARANCES**

**FOR THE EMPLOYER:**

Stacy D. Adams, Esq.  
DeCotiis, Fitzpatrick, Cole & Wisler, LLP  
Of Counsel & On the Brief

**FOR THE PBA:**

Marc Abramson, Consultant

### Procedural History

The Township of Piscataway (the "Employer" or "Township") and Township of Piscataway PBA Local 93 (the "PBA" or "Union") are parties to a collective bargaining agreement (the "CBA") which expires on December 31, 2006. Negotiations reached an impasse, and the PBA filed a petition with the New Jersey Public Employment Relations Commission ("PERC") on May 13, 2005, requesting the initiation of compulsory interest arbitration. The parties followed the arbitrator selection process contained in N.J.A.C. 19:16-5.6 that resulted in my mutual selection by the parties and my subsequent appointment by PERC on May 23, 2005 from its Special Panel of Interest Arbitrators.

The sole issue before me is the parties' obligation, pursuant to PERC Decision No. 2005-55:

" . . . negotiate over the portions of the June 3, 2003 promotional policy involving the order of the various components of the promotional process and when the results of the written examination will be disclosed." (P.E.R.C. 2005-55, Township of Piscataway and Piscataway PBA Local 93, issued February 24, 2005).

Mediation sessions were held on August 2 and November 30, 2005. The parties continued direct negotiations which proved unsuccessful. Formal interest arbitration proceedings were invoked and a hearing was scheduled for April 25, 2006. On April 4, 2006, I confirmed the parties' agreement to waive interest arbitration hearings and to submit briefs and reply briefs on two issues:

- (1) The order of the four components in the promotion process.
- (2) When the results of the written examination are disclosed.

The record was closed on October 2, 2006 upon receipt of the reply briefs. The parties agreed to extend the time limits for the issuance of the award.

This proceeding is governed by the Police and Fire Public Interest Arbitration Reform Act, P.L. 1995, c. 425, which was effective January 10, 1996. While that Act, at N.J.S.A. 34:13A-16f(5), calls for the arbitrator to render an opinion and award within 120 days of selection or assignment, the parties are permitted to agree to an extension.

The parties did not agree on an alternate terminal procedure. Accordingly, the terminal procedure is conventional arbitration. I am required by N.J.S.A. 34:13A-16d(2) to “separately determine whether the net annual economic changes for each year of the agreement are reasonable under the eight statutory criteria in subsection g. of this section.”

### Statutory Criteria

The statute requires the arbitrator to:

decide the dispute based on a reasonable determination of the issues, giving due weight to those factors listed below that are judged relevant for the resolution of the specific dispute. In the award, the arbitrator or panel of arbitrators shall indicate which of the factors are deemed relevant, satisfactorily explain why the others are not relevant, and provide an analysis of the evidence on each factor.

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

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

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

- (3) The overall compensation presently received by the employees, inclusive of direct wages, salary, vacations, holidays, excused leaves, insurance and pensions, medical and hospitalization benefits, and all other economic benefits received.
- (4) Stipulations of the parties.
- (5) The lawful authority of the employer. Among the items the arbitrator or panel of arbitrators shall assess when considering this factor are the limitations imposed upon the employer by the P.L. 1976, c. 68 (C.40A:4-45.1 et seq.).
- (6) The financial impact on the governing unit, its residents and taxpayers. When considering this factor in a dispute in which the public employer is a county or municipality, the arbitrator or panel of arbitrators shall take into account to the extent the evidence is introduced, how the award will affect the municipal or county purposes element, as the case may be, of the local property tax; a comparison of the percentage of the municipal purposes element, or in the case of a county, the county purposes element, required to fund the employees' contract in the preceding budget year with that required under the award for the current local budget year; the impact of the award for each income sector of the property taxpayers on the local unit; the impact of the award on the ability of the governing body to (a) maintain existing local programs and services, (b) expand existing local programs and services for which public moneys have been designated by the governing body in a proposed local budget, or (c) initiate any new programs and services for which public moneys have been designated by the governing body in its proposed local budget.
- (7) The cost of living.
- (8) The continuity and stability of employment including seniority rights and such factors not confined to the foregoing which are ordinarily or traditionally considered in the determination of wages, hours and conditions of employment through collective negotiations and collective bargaining between the parties in the public service and in private employment.

## **PARTIES' LAST OFFERS**

The following are the parties' last offers regarding the order of the various components of the promotional process:

### **PBA's Last Offer**

1. Review of File
2. Oral Interview
3. Seniority
4. Written Examination

### **Township's Last Offer**

1. Written Examination
2. Oral Interview
3. Review of File
4. Seniority

The Township's last offer includes the proviso that the numerical results of the written examination should be disclosed immediately upon completion of the examination

## **POSITIONS OF THE PARTIES**

### **PBA Local 93**

The following are the PBA's arguments and contentions in support of the statutory criteria regarding the order of the various components of the promotional process:

The PBA submits that it is important to review the procedural history of the case. The Township and the PBA commenced negotiations over the promotional process for Sergeants sometime in March 2002. At some point in time, the Township refused to negotiate over the procedural order and took the position that the "order" was nonnegotiable. On or about June 3, 2003, the PBA learned that the Township unilaterally implemented rules and regulations regarding the promotional process.

On or about June 25, 2003, the PBA filed an unfair practice Docket No. CO-2003-329 with PERC charging that the Township violated N.J.S.A. 34:13A 5.4 (a) (1) and (5). It was the PBA's position that the unilateral implementation on June 3, 2003 of department rules and regulations regarding the promotional process, constituted a refusal to negotiate in good faith on the part of the Township. (U-2).

On or about August 27, 2003, the Township petitioned for a scope of negotiations determination with PERC. The Township sought a determination on several issues, most importantly was whether the Township must negotiate over the order in which it will administer the components of the promotional process. On or about September 23, 2003, the parties attended an exploratory conference at PERC regarding the PBA's unfair practice charge. The conference failed to produce a settlement. On or about November 12, 2003, the parties informed PERC Staff Agent Lehrer that the unfair practices (the Township also filed a charge) should be stayed until PERC issues its decision in the Scope matter.

On or about April 30, 2004, PERC issued its decision regarding the Scope Petition filed by the Township. PERC determined the following:

"The promotion policy implemented by the Township has four components: a written examination, an oral examination, a review of the candidate's personal file, and credit for seniority. In its brief, the Township states that three issues remain in dispute. The primary issue is whether the Township must negotiate over the order in which it will administer the components of the promotional process. This issue was decided in our earlier decision. P.E.R.C. No. 89-32. We held that the Township had a prerogative to determine the components of the promotional testing procedures, but that the order in which the components would be administered was mandatorily negotiable. The Township did not appeal that ruling.

The Township now argues that the order of the various components of the promotion process is nonnegotiable because a passing score on the

written examination is one of the criteria to be eligible to move forward in the promotion process. We disagree.” (U-3).

The Township filed an appeal of the above PERC decision. The Appellate Court sustained PERC’s decision. On or about December 22, 2004, the PBA filed a Motion for Partial Summary Judgment regarding its unfair practice charge related to the Township’s unilateral action of implementing department rules and regulations regarding promotional procedures.

PERC determined the following:

“The Township met with the PBA and discussed many aspects of the promotional policy. The Township’s papers make clear, however, that it discussed rather than negotiated over the two disputed aspects of the policy. Negotiations require dialogue between two parties with an intent to achieve common agreement rather than employee organization presenting its view and the employer considering it and later announcing its decision. West Paterson Bd. of Ed., P.E.R.C. No. 77, NJPER Supp. 333 (77 1973). Accordingly, we grant partial summary judgment and order the employer to rescind and negotiate over the two disputed aspects of the promotional policy . . . (U-4).

### **Historical Background**

The PBA provided a historical background as to how the parties previously dealt with the promotional process. Much of this discussion is taken from the affidavit of PBA President Robert Zavistoski.

1. Initially, promotions were made strictly on the basis of seniority — the most senior was promoted.
2. On or about 1985 a written test and an oral interview were developed and added to seniority. The written test was worth 50 points and the oral test was worth 50 points along with the total years of seniority. The order was the oral interview then the written examination and at some point the seniority was added to the score.
3. The above procedure was in place until sometime in 1988, after a Scope Determination Petition was adjudicated at PERC. The PBA agreed to having the procedures changed so the written test would be completed prior to the oral interview. Seniority calculations remained the same.

4. On or about 1994, the seniority component was limited to a maximum of ten years. The Township used an outside company for the written test and conducted the oral interview in-house.
5. On or about 2003, the Township introduced the File Review component to the promotional process. The above incremental changes provided more control regarding the outcome of the promotional process. Shifting the Review of File to the last component of the promotional procedures completes the “evolution of total control.”

The PBA contends that the candidates for the contested 2003 promotions had no idea of the point values of each category within the Review of File section or what the etceteras stood for prior to the promotions being made. It was not until the PBA filed in Federal District Court, did the PBA learn the weighted values of the Review of File criteria and this occurred after the promotional process was completed. As Zavistoski stated in his affidavit, “ the PBA learned the rules of the game after the game was over.”

Prior to the 2003 promotional policy being administered, the PBA voted to file an unfair practice charged as a response to the Township’s unilateral response. It was Zavistoski’s belief that this vote was as a result of the Township’s manipulation of the test scores during the 1999 promotions. The PBA notes that the oral examination was scored in-house by the Piscataway Police Administration and was administered after the written examination was given and scored. U-5 included Township’s scores for the 1999 promotions as prepared by the Township.

The PBA asserts that the charts (developed from U-5) show why and how the level of mistrust within the police department has spiraled out of control. Chart A is simply a base chart that reflects all candidates and their weighted scores, corresponding rankings per category and a final score and ranking.

Chart B shows the numerical ranking for the candidates in each category and their final rankings. The rankings are separated into two groups of eight candidates and a group



of seven candidates. The first group of eight candidates represents the initial individuals who were promoted. What is clear by simply “eyeballing” the results, is that there is a correlative relationship between the “Oral “ ranking appearing in blue and the “Final” ranking appearing in pink. The “Oral” ranking which had a weighted value of 50% was within one to three points of the final promotional outcomes. Statistically revealing is that for the most part, the other groups also had a correlation between the oral ranking and the respective candidates’ final ranking.

Oddly, the “Written” rankings, appearing in orange, bore no such correlation. The “Written” rankings also were weighted at a value of 50%, yet the “Final” rankings did not appear to be influenced by the “Written” rankings. According to the PBA, it appears that how well a candidate scores on the “Oral” category is significantly more important in determining their “Final” rank. The PBA contends that this phenomenon “reeks” of manipulation and impropriety given the fact that both components are weighted at 50%, yet by reviewing the “Final” ranking, the “Oral” component is significantly more determinative of the final outcome.

Chart C provides a statistical, cursory analysis of the testing results that were adduced from above. By way of a brief review, the “Oral” rank correlation of .79 for those initially promoted contrasted with respective correlations of -.31 and -.13 for the next two groups are quite relevant. Conversely, the “Written” rank correlation of .47 for the promoted group contrasted with respective correlations of .72 and .81 for the next two groups are equally relevant. Similarly, the squaring of those numbers in the shaded correlation line calculating the percent of the variation in one variable that is related to the variation in the other, are likewise relevant.

The PBA notes that the above analysis is for the 1999 promotions and not for the contested 2003 promotions. One may ask why not utilize the 2003 results. The PBA contends that the 1999 results historically reveal why the level of mistrust has reached the current stage. An analysis was not conducted for the 2003 promotions since the PBA formally challenged the integrity of the promotional process and in essence, the Police Administration was formally "placed on notice" that its conduct would at some point be reviewed by a third party.

Further, it must be noted for the record, that the PBA is not suggesting in any fashion that the 2003 promotions were free of manipulation and provided all candidates with a "fair shake." In addition, as a result of the 1999 fiasco, there were many officers who simply decided not to invest the time and money in a tainted process.

As noted above, although a review was not conducted on the 2003 promotions as done for the 1999 promotions, an analysis of the 2003 Review of File component was conducted. In 2003 the Review of File was added and the Oral Examination was no longer controlled in-house but rather it was conducted by the Chiefs of Police Association.

Chart D reveals that the entire order of the 2003 promotions could be flipped after knowing the results of the written examination with a close range of 100 to 67.80. Therefore, the process can be cloaked in the appearance of fairness and equity, yet the entire order could be reversed within a 32.20 range of scores. The top candidate could be made to come out as last.

During the litigation at PERC, the Township utilized the example that Patrolman Mosier, Vice President of the PBA, was in fact promoted therefore the test was free of manipulation. However, as noted by Zavistoski, Mosier was the top candidate prior to the

Review of File component. Mosier received the second lowest score in the Review of File, making him the last of the four sergeants promoted. The PBA submits that this is significant since the claimed manipulation could be the difference between working steady midnights as opposed to steady days. It also impacts on getting holidays off. Sending Mosier to the bottom of the seniority list for sergeants sends a clear message that the PBA cannot protect its members by insuring that all candidates will get a fair shake.

Sometime in 2003, Zavistoski conducted a research survey of his PBA members. The survey had a 70.76% response rate which is clearly statistically valid. Forty of the forty-three members who responded felt that whether the Police Administration liked you or not, had a greater impact on promotion than did job knowledge or performance. This single response was the defining result of the survey and dramatically illustrates the depth of mistrust in obtaining a "fair shake" in the promotional process.

The PBA further notes that thirty-nine out of forty-six members felt that certain police officers are given preferential treatment regarding extra training/schools, special assignments or other career enhancing opportunities. Thus those officers provided with these additional opportunities will certainly have an advantage in the Review of File section of the promotional process since the above areas are part of the weighted criteria. (U-6).

The above noted scores are reflective of the rank and file's serious mistrust in the Police Administration's conduct. It is important to note that this survey was conducted prior to any of the promotional process taking place, thereby, eliminating the possibility of receiving responses from disgruntled candidates that were passed over for promotion. Conducting this survey was quite fortuitous because it provides the Arbitrator with an

opportunity to experience first hand the pervasive feelings of mistrust prior to the promotional process taking place.

The PBA maintains that it is the perception of mistrust or impropriety that needs to be considered, not whether there is actual impropriety. According to the PBA, allowing the Township and the Police Administration to have its proposed order will only exacerbate an already unhealthy situation.

#### **The PBA's Final Offer**

The PBA contends that its final offer requiring that candidates complete the most subjective components first, reduces the potential perception that the promotional process has been manipulated or tainted since it requires the Administration to complete the Review of File component on a "stand-alone basis" prior to the written test being taken. One must ask the question, if the Township has no interest in manipulating the outcome of the promotional process — "What's wrong with the PBA's proposal?" The PBA's proposal includes the provision to pay for the costs of oral interviews for all candidates that do not pass the written examination.

The PBA reviewed the Township's position noted in its brief dated August 26, 2003 in support of its petition for a Scope of Negotiations Determination. The Township stated the following:

"Another demand made by the PBA was that the oral examination be conducted before the written examination. The Township was not receptive to this proposal because passing the written examination was a prerequisite to moving on to the next step in the promotion process. The Township has to pay the NJSACOP approximately \$325 per candidate interviewed. Thus if the order was switched, it would create the unnecessary expense of paying the costs of administering the oral examination for those candidates who failed their written examination and were precluded from proceeding any further in the promotion process." (U-7 at 4).

The PBA asserts that when the Township proffered the above position it knew that the PBA had already agreed to reimburse the Township for the cost of the oral interview if the candidate did not pass the written examination. The PBA contends that the Township's position regarding the order underwent a metamorphosis in its brief in support of its appeal from PERC's Decision and Order dated April 29, 2004. The Township offered the following explanation as to why it would not agree to the PBA's proposed order:

"The Township would not agree to the PBA's proposed order for three primary reasons. First, the PBA's demand infringed on the Township's nonnegotiable right to determine promotional criteria. Namely, the Township had decided that a passing score on the written examination would be a prerequisite for advancing on through the rest of the promotion process. The standardized written examination tested fundamental police skills and knowledge aimed at the level of supervision being sought. For that reason, the Township decided that police officers who failed the written examination lacked the basic skills to become a superior officer and did not deserve to move on in the promotion process against other, more qualified candidates. Second, the Township paid \$325 per candidate for the oral examination. By conducting the written examination first, the Township avoided the expense of paying the fee for the oral examination of those candidates who failed the written examination and were disqualified from the promotion process. Third, the Township had already agreed to outsource the written examination and oral interview – a concession not required by law – to alleviate the PBA's concerns about bias. (U-8 at 10).

The PBA contends that a cursory review of the Township's position reveals certain inconsistencies. First, the scope decision determined that it was a negotiable term and condition of employment. Second, the PBA offered payment to the Township over a year before that statement and therefore there was and is no expense to the Township. Finally, if the Township wanted to address the PBA's concerns, all it had to do is agree to have the written test after the oral examination and most importantly after the Review of

File. The PBA submits that the Township appealed because it wants to manipulate the outcome of the promotional process.

The PBA contends that the Township's position regarding the order underwent another metamorphosis during the initial stages of interest arbitration. The Township now claimed that it was too time consuming for the Police Administration to have the oral examination and the file review first, when some employees may fail the test and be disqualified anyway. It was even too time consuming if the Review of File was the only component completed before the written examination.

The PBA contends that what is even more revealing regarding the Township's motivation to manipulate the promotional outcomes is found in the following excerpt from Zavistoski's affidavit:

"During our initial conference at PERC, in front of hearing officer Lehrer, the Township proposed agreeing with the PBA's order of having the written examination last, however, the weight for the written examination would be reduced from forty points to twenty points and the review of file would be increased from forty points to sixty points.

It is clear from all of the above that the Township's motivation and goal is to control the outcome of the promotional process. The Township's ever-changing position certainly casts suspicion on the explanations proffered by the Township. The PBA is simply requesting that the written examination be given last to eliminate or significantly reduce the possibility of impropriety or the perception thereof." (U-9).

#### **Impropriety or the Perception of Impropriety**

The PBA maintains that the perception of impropriety or actual impropriety is non-distinguishable and that every effort should be made to eliminate those situations that lend themselves to creating the climate for impropriety or perceived impropriety.

In a quasi-military organization such as a police department, no decision can more fully impact on the morale of its employees than the decision to promote officers. Further,

those officers have an interest in being assured that a promotional process is fair and free of favoritism or potential improprieties. (Snitow v. Rutgers, 103 N.J. 116 (1986)).

The PBA asserts that the potential for impropriety or the appearance of impropriety arises out of the Review of File component. The Review of File component is conducted by the Chief of Police and Captains and is worth 40%. In the Review of File, it states that the following areas will be reviewed:

- A. Formal Education (e.g., police schools, seminars, other police /management related schools, etc.)
- B. Special Skills (e.g., instructor, Swat Team, etc.)
- C. Performance Evaluations (3 yrs.)
- D. Performance Factors (eg., quality and quantity of work performed, accuracy, thoroughness, meet deadlines, etc.)
- E. Work habits (e.g, attendance, compliance with rules and regulations, initiative, resourcefulness, aggressiveness, etc.)
- F. Disciplinary File
- G. Performance Notices (commendations and reprimands)
- H. Personal Traits (e.g., interpersonal skills, communication skills, well rounded, experience in other sections motivated/productive, work with others in a team environment, educated in job related areas, adaptable, responsible, good attendance method, not a discipline problem, leadership, above average intelligence, knowledge of employee contracts, etc.)
- I. Experience (e.g., working in different sections, etc.)
- J. Job Knowledge (e.g., techniques/tactics, policies and procedures, laws and ordinances, skills, etc.)
- K. Resume (review)

The PBA notes that the above sections fail to list the value or weight given, i.e., what is section one worth, section two, etc. More importantly, if you review the various sections one through eleven, you will note in seven sections "etcetera" is used to complete the section. The PBA asks rhetorically: "How does one prepare for a section with an 'etcetera'?" "What does it stand for?" The PBA contends that those sections are

vague, ambiguous and are structured so that the Police Administration could score employees as they wish.

The PBA contends that the "formal education" section fails to include actual formal education such as college or graduate degrees. How does the Department arrive at a point score assuming someone has a B.S. degree in police science, a Masters degree in Public Administration and has attended several seminars, however, has not attended police schools other than what every officer was required to attend in order to become a police officer? What score would be applied to someone who does not possess a college degree, however, that individual has been given the opportunity to attend a variety of police schools but has taken no seminars or other police/ management related training?

The PBA asserts that the Review of File component fails to provide standards by which applicants can be scored or compared with one another and is a "haven" for potential bias, unfairness and impropriety by providing the Township and Police Administration with the unfettered discretion to give an officer basically any score that it wishes. In Township of Raritan v. Hubb Motors, Inc., 26 N.J. Super. 409 410-411 (App. Div. 1953), the Court stated:

"An ordinance must not be unreasonable, arbitrary or discriminatory and must lay down a standard or norm for the guidance of the authority clothed with the power to enforce it. The discretion vested in the authority must not be absolute, but limited by a norm or standard laid down for guidance in its application to all persons."

The PBA asserts that the subjectivity built into this component is enormous. Further, how does one know what is important, how does one know how a point value is reached and what does "etcetera" stand for? This is only one of eleven, vague and ambiguous sections. The PBA submits that it is well established in the state of New



Jersey that governmental entities must adopt rules, regulations, codes, and ordinances that must express with sufficient clarity and specificity, some standard on which all persons must know their rights and obligations in order to be enforceable. [ Sea Isle City v. Vinci, 34 N.J. Super. 273 (1955)]

In an unpublished Opinion dated October 26, 1983, Blanke v. Borough of Somerville (Docket #L-12423-83), the Court determined that the promotional procedures as contained in the Ordinance were violative of the due process of law and equal protection clauses of the United States Constitution. The procedures failed to specify a passing score and the Court cited [ Sea Isle City v. Vinci, 34 N.J. Super. 273, 275 (Cape May County Court. 1955)] and then stated:

“This is so that an applicant can know with reasonable clarity what is expected of him in the promotion process and he may be assured that he will be given an equal and fair opportunity for advancement. And if the promotion process leaves too much discretion in the hands of those who make the promotion decisions, the possibility for arbitrariness and unreasonableness in its application exists and the whole promotion procedure is so discretionary and subjective as to be invalid.” (U-10).

The PBA contends that the Review of File component in Piscataway is clearly devoid of any real standards and provides unfettered discretion by those making the decision. At the very least this situation creates the appearance of impropriety and certainly the possibility for arbitrariness and unreasonableness. In addition to the inherent problems with the Review of File, having the written test completed first or prior to the Review of File simply magnifies the possibilities of self-determining the desired outcome of the process and producing a procedure that appears to be cloaked in appropriateness when in reality it is a sham.

The PBA submits that its proposed order of the promotional components reduces the opportunities for further mischief in an already flawed process. In a PERC decision, State of New Jersey (State Troopers NCO Ass'n. of New Jersey), PERC No. 79-68, 5 NJPER 160 (10089, 1979), PERC determined that the following contract provisions were mandatorily negotiable, directly affected Police Officers' terms and conditions of employment, did not significantly interfere with management's functions or prerogatives and could, therefore, not be changed unilaterally during negotiations:

The ability of an employee to know what is expected of him or her for promotion so that one can prepare correctly directly affects one's work and welfare, as does that expectation that the announced criteria will, in fact, be the criteria utilized. Adhering to the criteria which it has unilaterally selected does not significantly interfere with management's functions. Even if the State were to later decide to change the criteria, this provision would really only require that it not utilize those new criteria without announcing them first and giving people an opportunity to prepare based on the new standards.

The PBA submits that the above decision is quite revealing when one reviews Piscataway's Review of File component and tries to reconcile the "etceteras" with "the ability of an employee to know what is expected of him or her so that one can prepare correctly." It is difficult enough to try to determine the criteria noted in the Review of File but how does one try to prepare correctly when one does not even know what the criteria is since it has not been stated. The PBA's proposal is an attempt to level the playing field and bring some type of equity to a process that reeks of the possibility of misuse.

What is also interesting to note, is the affirmation of PERC's analysis by the Appellate Division regarding the above case when it subsequently confirmed the interest arbitration award issued with regard to the promotional issues that were the subject to that

case. [Law and Public Safety Department v. State Troopers NCO Ass'n, 179 N.J. Super.

80 (App. Div. 1981) The Court stated the following:

“The NCO proposal merely permits candidates for promotion truly to know the basis upon which they will be evaluated. Without being aware of what is expected of them for promotion and the weight to be given to each criterion, they will be unable to prepare and conduct themselves accordingly and will not be in a position to understand how the promotional decision was made. The Division’s desire to have the freedom to use a more generalized approach, predicated an overall judgmental evaluation of the individual’s qualifications under basic criteria, does not satisfy that reasonable need of the employees.

The PBA notes that it initiated Federal litigation in order to obtain the weights given to each of the eleven criteria contained in the Review of File component. As noted in Exhibit 1, the weights do not appear because the Township and Police Administration refused to provide them and it was only after the initiation of the Federal litigation that the Township and Police Administration provided the weight afforded to each criteria. Unfortunately, this information was provided after the promotional process was completed. The prospective candidates found out what the weighting factor was after they completed the Review of File component.

#### **Conclusion**

The PBA accepts the Township and Police Administration’s Review of File component, however, this acquiescence should not be suggestive that the PBA considers the criteria contained in this section as fair and equitable. The PBA is seeking through its proposal an opportunity to go back to its membership and say that the process has been significantly improved by assuring that the Township and Police Administration will score the most subjective elements of the procedures without the benefit of knowing in any possible way what the scores of the written examination were.

The PBA maintains that sealing the scores after the written test does not provide the necessary assurance that the Township or Police Administration would not have the ability or opportunity to obtain the results from an outside source. According to the PBA, there is no trust in the Township or Police Administration and permitting the written examination to be last, would go a long way in beginning a process of validating a good faith effort to insure that the best individuals are promoted as opposed to those individuals who are the most popular with the Township and Police Administration.

The PBA maintains that having the most qualified individuals promoted is in the best interest of the residents of Piscataway. Having the most objective component of the promotional procedures, the written examination last is in the best interest of the police administration and police officers and in no way negatively impacts on the promotional process. Having police officers feeling positive about the promotional components is good for both the police department and community.

The PBA asserts that the issue before me is not an inability on the part of the Township to meet the PBA's proposal, but rather an unwillingness to do so. An unwillingness to accept the PBA's proposal without any real justification should not be persuasive to the arbitrator, since an unwillingness is not a component of any statutory criteria. The PBA submits that the record is clear regarding the Township's ability to meet the PBA's proposal. In addition, the record is also clear about the morale crisis affecting the police department, therefore, the PBA asserts that the "interests and welfare of the community" factor favors an award that will provide stability for the residents.

The PBA submits that the "interests and welfare of the community" supports a procedure that promotes the most qualified officers not the most popular. Police business

has always been a serious business and now in a post 9/11 era police business takes on even more complicated and dangerous responsibilities. The PBA maintains that allowing impropriety or the perception of impropriety will undermine any police department and render it impotent.

### **PBA's Contentions in the Reply Brief**

The PBA initially reviewed the statements of Captain Ivone and Chief Kevin Harris in their Certifications and accompanying exhibits. The PBA contends that the Certifications and exhibits are seriously flawed, inaccurate, misleading and statistically invalid.

### **Captain Ivone's Certification and Exhibits**

1. Paragraph 10. sub para. c. The "Review of Experience and Training" (or "Review of File") component would be broken down into *specific* performance factors and traits.

The PBA submits that this is the essence of the issue in this case. The PBA contends that the Township never provided any specificity regarding the components in the Review of File and in fact included "etcetera" in addition to the generalized areas of focus. The PBA notes that specificity of performance and trait factors are noted in Chief Harris's submissions. (See New Providence Police Department pages 1-4.)

2. Paragraph 42. "In preparation for the Interest Arbitration, I contacted Mitchell Sklar of the New Jersey State Association of Chiefs of Police. Mr. Sklar has confirmed, in writing that, based upon his experience with non-civil service municipalities, the written promotional exams are scheduled prior to the administration of oral examination or other oral interviews."

The PBA disputes the above statement by Captain Ivone. First, the PBA asserts that it has a letter that was issued by Mitchell Sklar based upon "unknown discussion" between Mr. Sklar and Captain Ivone. Further and perhaps more importantly, his letter

does not answer the question as to whether in his experience, the written examination comes before the Review of File which is the threshold issue before the Arbitrator.

**Kevin Harris's Certification and Exhibits**

1. Paragraph 3. "In preparation for the Interest Arbitration scheduled for November 2005, I conducted a survey of promotional testing procedures for other non-civil service Police Departments in New Jersey. I focused on similarly sized Police Departments within a reasonable geographic proximity of Piscataway. I accomplished this survey by requesting promotion information from other Chiefs of Police Departments who participate in the New Jersey State Association of Chiefs of Police."

The PBA contends that Harris failed to provide any data regarding the sample size of the survey; therefore there is no way of accurately determining whether the response was statistically valid. Further, Harris failed to provide any data that constituted what "is a similarly sized police department" or what constituted "within a reasonable geographic proximity of Piscataway." For example, Piscataway is approximately 111 officers, while Hightstown is approximately 18 officers. In fact, it appears that Piscataway's size is significantly greater than the majority of the sample response. With an example of 18, 22, 25, 45, 19, 33, 27 of total police size, the concept of "similarly sized police department" is inaccurate.

Harris stated that departments were "within reasonable geographic proximity of Piscataway." This survey criterion was simply not used and therefore the statement is invalid. For example, the sample response partially consisted of departments in Burlington County, Monmouth County Morris County, Union County and Hunterdon County. The above in no way suggests departments in "reasonable geographic proximity" but rather simply appears to be a selectively skewed sample which simply does not comport to "similarly sized or reasonable geographic proximity." In addition, the study

named certain police departments, however, there are multi named departments within the state and Harris failed to specifically identify each department.

2. Paragraph 4. "In response to my request, I received information from approximately twenty non-civil service Police Departments as to their promotional process. I have memorialized the responses I have received in a spreadsheet document, dated October 25, 2005. (See Promotion Test Results Spreadsheet, dated October 25, 2005, attached hereto as Exhibit A; see also Responses to Survey, attached hereto as Exhibit B)"

The PBA notes that the Harris' solicitation email begins by stating that:

"Our PBA is challenging the order of our testing process for the rank of Sgt. It currently is written test first, then oral interview and then review of their file."

The PBA contends that the solicitation letter immediately invalidates the responses since it informs the participant Chiefs that the PBA is challenging the existing testing process. Further, it informs the participants of the current order in Piscataway and in addition to informing them of the order, it actually provides an incorrect order. The PBA contends that the Harris' letter unfairly pre-informs the solicited participants and therefore statistically invalidates the survey.

Further, the Spreadsheet does not accurately reflect all the participants' responses. The PBA notes that for Springfield, the spreadsheet indicates written test, oral examination and file review. However, that does not accurately reflect the conditions in Springfield. The personnel files are used in Springfield to determine seniority points and any disciplinary actions. As noted in the Springfield email, seniority points are accrued at the rate of one-half point per year of service after three years of service. Each disciplinary action in the personnel file deducts one-half point per event. The Review of File in Springfield is objectively determined and in no way represents the Review of File in Piscataway, yet no mention of this difference appears on the spreadsheet. The PBA submits that this reporting procedure is grossly inaccurate and misleading.

## Stacey Adams, Esq. Certification and Exhibits

1. Paragraph 6. "In Civil Service jurisdictions, police promotion examinations for the position of Sergeant do not contain an oral component of the test. Instead, the overall final score of a candidate is based upon the written test score and the seniority score. The written exam is weighted at 80% and the seniority is 20% of the final average score."

First it must be stated for the record that the above process does not contain a "Review of File" subjective process as noted in Piscataway. The above process constitutes a large sample of participants in a procedure that is objectively determined and statistically valid. Piscataway's Review of File as noted in the PBA's brief is clearly devoid of any real standards and provides unfettered discretion to those making the promotional decision.

2. Paragraph 13. "Thus, the promotional process in the Township is consistent with industry standard and should not be modified."

Adams concluded that the promotional process in Piscataway is consistent with industry standard. She provides the Civil Service Regulations for the Sergeants' examination and notes that there are approximately 351 civil service municipalities and then concludes that Piscataway's procedures are consistent with industry standards.

However, she fails to provide any data that reflects that Piscataway's promotional procedures mirror Civil service. In fact, based on Adams' submissions, one must conclude that Piscataway's procedures significantly differ from Civil Service. First, Piscataway's procedures contain an oral examination component which is not contained in the Civil Service procedures, the Piscataway procedures contain a subjective Review of File component which is not contained in the Civil Service procedures. In essence what is similar about Civil Service and Piscataway is that both contain a written examination component. The PBA contends that since the data going into the certifications and



exhibits is inaccurate, then the data coming out in the Township's brief is inaccurate and grossly misleading. The PBA submits that the Township has mischaracterized the facts.

Further, in the Legal Argument section, the Township attempts to improperly apply the concept of past practice in rights arbitration to an interest arbitration proceeding. First, if there was a practice regarding the testing procedures which includes the order, the unfair practice filed by the PBA regarding changes in terms and conditions of employment would not have been sustained.

Second, the Township added the Review of File component which is certainly its prerogative however that addition impacts on the procedural order of the process. A change occurred first, therefore the previous practice which did not have a Review of File component is no longer the practice.

In the Township brief, it suggests that it would not be in the best interest of the taxpaying public to permit the file review prior to the written examination since said review is labor and time extensive. At no time prior to this brief did the Township establish the amount of time spent on each candidate file review. Their assumptions provide little proof regarding actual time spent. The PBA cites the following from the Township's brief:

"In addition, the Township has provided the PBA with specific numerical percentage weights for each component of the file review. This point system removes from the Township almost any discretion with respect to the only arguably objective portion of the promotional procedure. It further serves to alleviate any concerns by the PBA that the file review portion of the promotional procedure could somehow be manipulated."

The PBA contends that the above statement is false. The PBA asserts that the very essence of its argument is the unfettered discretion that management has to alter the

overall scores at will. The PBA continues to question how the Township will evaluate the “etceteras” and the how point values for each sub-factor.

For all of the above reasons, the PBA requests that I sustain its position and award the order as follows:

- I. Review of File
- II. Oral Interview
- III. Seniority
- IV. Written Examination

#### **The Township’s Position**

The Township’s position is that the components of the promotional process should be administered in the following order:

1. Written Examination
2. Oral Examination
3. File Review
4. Seniority Points

The Township also maintains that the numerical results of the written examination should be disclosed immediately upon completion of the examination, because those candidates who fail the written examination are ineligible to continue in the promotion process. The Township submits that I adopt its position with respect to these issues for the following reasons.

First, although the CBA is silent with regard to these issues, the Township’s position reflects established past practice. Second, the Township’s position is consistent with industry standard. Third, public policy compels adoption of the Township’s position. Finally, as a practical matter, the PBA has failed to articulate any sound justification for

altering either the order of the components or the timing of the release of the numerical results of the written examination. To the contrary, the evidence demonstrates that the existing process is fair, free from manipulation and well-accepted by PBA members.

The Township relies on information on promotional exams from the New Jersey Association of Chiefs of Police (“NJSACOP”). Mitchell Sklar, of NJSACOP, confirmed that, based upon his experience with non-civil service municipalities, the written promotional exams are scheduled prior to the administration of any oral examination or other components of the promotion process. See Ivone Cert., ¶ 42.

Township Police Chief Kevin Harris also conducted a survey of promotional testing procedures for non-civil service municipalities in New Jersey. The Township requested promotional information from other Police Departments who participate in the NJSACOP. Harris received information from approximately twenty non-civil service Police Departments as to their promotional process and, more specifically, the order of the components of their promotional exams. The survey revealed that fifteen of the eighteen responding municipalities who conduct a written examination as part of their promotional process administer the written test first. The survey also shows that, similar to the Township, most of the Police Departments conduct the written examination first, oral interview/test second, and file review third. See Certification of Chief Kevin Harris (“Harris Cert.”)

The Township asserts that a review of the New Jersey Department of Personnel (“DOP”) promotion procedures for police officers in civil service jurisdictions reveals a similar result. At present, the DOP has over three-hundred and fifty-one (351) jurisdictions in New Jersey. The promotion guides indicate the following:

- 1) The Police Sergeant's Orientation Guide ("Sgt.'s Guide") evidences that the promotion exam does not have an oral component. Instead, the overall final score of a candidate is based upon a written test score and seniority score. The written exam is weighted at 80% and the seniority score is 20% of the final score.
- 2) The Police Lieutenant Orientation Guide ("Lt.'s Guide") indicates that the promotional process for Lieutenants in civil service jurisdictions does not contain an oral component. Instead, there is a written examination that is worth 70% and a seniority component worth 30% of the final score.
- 3) The Police Captain Orientation Guide ("Capt.'s Guide") demonstrates that the promotional process for captains in civil service municipalities consists of a written examination that is worth 80% of the overall test score. Two months after the written examination, candidates are offered the opportunity to take the oral portion of the examination, which is worth 20% of the overall test score. The written and oral components are then averaged and worth 70% of the final score. The remaining 30% is based upon the candidate's seniority score. See Certification of Stacey D. Adams, Esq. ("Adams Cert.")

The Township notes that the written examination is the first component in each of the respective examinations for Sergeant, Lieutenant, and Captain for civil service jurisdictions under the DOP. Thus, in the vast majority of New Jersey municipalities (both Civil Service and Non-Civil Service), a written examination is administered prior to any other components of the promotion process.

#### **Past Practice**

The Township asserts that the current order of the components of the promotional process and timing of the release of the numerical results is consistent with past practice between the parties. The Township contends that the scope of an arbitrator's authority is generally limited to the agreement between the parties. If, however, the language of the contract is vague or ambiguous on a particular subject, the arbitrator may look to past practice to resolve disputes. See Hall v. Board of Ed., 125 N.J. 299, 307 (1991) ("the past

practice of the contracting parties is entitled to 'great weight' in determining the meaning of ambiguous or doubtful contractual terms"). The Township submits that the contractual language with regard to promotional procedures is vague and ambiguous. Therefore, the arbitrator may look to past practice in resolving the disputes as to the order of the components and the release of the numerical results.

The Township notes that the current CBA contains the following, limited language with regard to promotional procedures:

The Police Department promotional testing procedures for the rank of Sergeant shall be agreed upon by PBA 93 and the Police Administration. The agreed upon testing procedures will be attached to this contract as appendix B.

There is no promotional testing procedure in the CBA because the parties have been unable to reach agreement on the procedures since 2002. There is, however, an established past practice between the parties as to both the order of the various components of the promotion process and the disclosure of the results of the written examination.

Since 1989, the promotional procedures followed with respect to Sergeant promotions provided that the written examination would be administered first, followed by the oral examination and, ultimately, the file review. The written examination was scored, and the results disclosed, immediately after the completion of the examination. The procedures set forth in SO-89 were followed for Sergeant promotions made in 1989, 1994 and 1999, without any objection from the PBA. Indeed prior to commencing the promotion process in 1999, the Police Administration specifically invited the PBA to negotiate promotional procedures, but the PBA declined. Accordingly, when the Township sought to make promotions in 2002, it intended to simply follow the

established past practice that had been used in the Police Department without objection from the PBA for more than thirteen years. It was not until the 2002 promotions that the PBA attempted to challenge the established practice.

The Township contends that the ambiguous language in the CBA provides no guidance as to the sequence of the various components of the promotion process or when the results of the written examination should be disclosed. The past practice, however, is abundantly clear. The written examination has always been administered first and the numerical results of the examination have always been disclosed immediately. The PBA has presented no evidence to demonstrate any contrary practice, and has not established any basis for changing the established past practice.

#### **Industry Standard**

The Township contends that the current order of the promotional criteria and the timing of the release of the numerical results is consistent with industry standard. N.J.S.A. 34:13A-16(g) sets forth the factors that must be considered by an arbitrator in the context of an interest arbitration. One of the most significant factors is found in N.J.S.A. 34:13A-16(g)(2), which mandates that an arbitrator “compare the wages, salaries, hours, and conditions of employment of the employees involved in the arbitration proceedings with the wages, salaries, hours, and conditions of employment of other employees performing the same or similar services and with other employees generally.” Thus, arbitrators are required by statute to consider “industry standard” in rendering arbitration awards and may not reject comparable evidence unless he or she can “satisfactorily explain” why the evidence is not deemed relevant. N.J.S.A. 34:13A-16(g).

N.J.A.C. 19:16-5.14 sets forth guidelines to be used when conducting an analysis of comparable jurisdictions, and provides that arbitrators should give weight to the

“wages, salaries, hours and conditions of employment of law enforcement officers and firefighters” in other municipalities. “Comparable jurisdictions” are determined by looking at various geographic, socioeconomic and financial considerations, including, inter alia, neighboring or overlapping jurisdictions; nearby jurisdictions; size of the jurisdiction; size, density, and characteristics of population; income; property value; tax increases; size and composition of police force; revenue; etc. N.J.A.C. 19:16-5.14.

A comparison of promotion procedures followed by other municipalities demonstrates that the Township’s policy is consistent with comparable jurisdictions. In fact, a review of the promotion procedures in other New Jersey municipalities reveals that it is industry standard to conduct the written examination prior to any other components of the promotion process, and to disclose the results of the written examination immediately upon completion of the examination.

NJSACOP advised the Township that most non-civil service municipalities conduct the written examination *prior* to the oral examination. Moreover, the Township’s survey of non-civil service jurisdictions clearly indicates that the written test is almost always conducted before the oral examination. Eighteen of the twenty jurisdictions surveyed include a written examination in their promotion process. Of those eighteen municipalities, fifteen conduct the written examination prior to any other step in the promotion process. This is also true of the three hundred and fifty-one civil service municipalities in New Jersey. The DOP guidelines for police promotions for the ranks of Sergeant, Lieutenant and Captain establish that the written examination is the first component of the promotion process. In fact, in both the Sergeant’s and Lieutenant’s examinations, there is no oral interview component. The Captain’s examination provides

that the oral examination is not administered until two months after the written examination.

The Township submits that immediate disclosure of the results of the written examination is also consistent with industry standard. As set forth above, the vast majority of municipalities conduct a written examination before proceeding to any other components of the promotion process. In many of these jurisdictions, passing the written examination is a prerequisite to continuing on in the promotion process. The numerical results from the written examination must be disclosed so that the municipalities can ascertain whether their candidates passed or failed the written examination. (See id.) Not a single policy was located where release of the written examination results were delayed, as demanded by the PBA.

As the above demonstrates, the industry standard in both civil service and non-civil service municipalities is to administer the written examination prior to administering any other components of the promotion process and to disclose the numerical results on the written examination upon completion of the examination. This evidence is highly relevant and must be considered by the arbitrator. The Township's current practice with regard to both the order of the components and the release of the numerical results of the examination is consistent with industry standard and should not be disturbed.

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

The Township asserts that the current order of the components of the promotional process and timing of the release of the numerical results is consistent with public policy. Pursuant to N.J.S.A. 34:13A-16(g)(1), another factor that must be considered by the arbitrator in rendering a decision is the "interests and welfare of the public." This factor has been interpreted to mean that the arbitrator must consider the impact any award would



have on the taxpaying public in general. Hillsdale PBA Local 207 v. Borough of Hillsdale, 263 N.J. Super. 163 (App. Div. 1993) aff'd in part, rev'd in part 137 N.J. 71 (1994). The Township contends that the current practice promotes the public welfare and is in the best interests of the Township's tax payers.

The current policy requires promotion candidates to pass the written examination before they proceed to the remaining steps in the process. The Township submits that this policy is inherently reasonable, from both an economic and efficiency standpoint. It would be a waste of taxpayer money to allow candidates who failed the written examination to take the oral examination. Those candidates are ineligible for appointment because, as recognized by both PERC and the Appellate Division, the Township retains the prerogative not to promote anyone who fails the written examination – regardless of the stage in the process when the written test is administered. The oral examination costs the Township \$300 per candidate. It is senseless for the Township to pay this money for candidates who fail the written examination, when there is no chance of these individuals being promoted.

Even if, as offered, the PBA pays the testing fees of those individuals who ultimately fail the written examination, allowing these candidates to proceed through the promotion process is still a waste of taxpayer resources. The file review involves an extensive review of the promotional candidate's personnel file by several senior officers. The review is labor and time intensive. It is inefficient, and quite frankly a waste of time, for senior officers to spend the time reviewing the files of candidates who are ineligible for promotion because they failed the written examination.

The results of the most recent examination precisely demonstrate the Township's point. Seventeen of the twenty-eight officers who signed up for the 2003 written

examination passed it, nine failed. If the Township had adopted the PBA's proposal with regard to the order of the components, nine candidates would have been needlessly administered the oral examination, at a cost of \$2700. In addition, the Police Administration would have needlessly reviewed nine personnel files. Assuming conservatively that the Chief and three Captains each spent one hour per candidate conducting a file review — that would have wasted thirty-six hours of manpower time. The Township submits that this time and money could better be devoted to promoting the public welfare and safety.

The Township contends that it makes no sense to change the order of the promotional procedure since even if the PBA's demands with regard to the order of the promotional criteria and the release of the numerical results were granted, it would have no impact on the outcome of the promotional process. The Township contends that despite the PBA's allegations of favoritism and bad faith by the Township, it has not presented any evidence to demonstrate that the test results have ever been manipulated by the Township in the past or that changing the order of the components or timing of the results would somehow correct this hypothetical problem. To the contrary, the facts demonstrate that the order of the components had no effect on the number of candidates who signed up to participate in the promotional examination or the outcome of the promotion process.

As PERC acknowledged in its July 5, 2005 decision, the PBA failed to establish that the results of the promotional process would have been any different had the Township utilized the promotional procedures advanced by the PBA. In 2002, before the PBA began its challenge of the promotional procedure, twenty-nine officers signed up for the examination following the same procedure that had been in place for more than

thirteen years. Despite the PBA's representation that its members were concerned about favoritism under the existing policy, almost the exact same number of candidates signed up for the promotional examination after the Township implemented the June 3, 2003 policy. Specifically, twenty-eight officers signed up to participate in the promotion process, only one less than the number that originally signed up for the examination. This fact alone negates the PBA's assertion that its members were concerned about manipulation of test results.

In addition, the Township has provided the PBA with specific numerical percentage weights for each component of the file review. This point system removes from the Township almost any discretion with respect to the only arguably objective portion of the promotional procedure. It further serves to alleviate any concerns by the PBA that the file review portion of the promotional procedure could somehow be manipulated.

Perhaps the most compelling fact is that the four highest ranked candidates following the written examination were the same four highest ranked candidates following completion of the promotion process. These results negate any assertion by the PBA that the Township manipulated the file review to affect the candidates' rankings. To the contrary, the oral examination, file review and seniority components had absolutely no effect on the outcome of the promotion process. Although the PBA claims that the Township can manipulate the test results upon learning the numerical scores from the written examination to insure that their favorites are at the top of the list, the actual results wholly rebut this assertion. The Township asserts that an established past practice that is consistent with industry standard, promotes the public welfare and is inherently reasonable, should not be changed based upon mere speculation.

### **Township's Reply Brief**

The Township submits that the PBA failed to provide any sound basis for adopting its proposed sequence for the different components of the promotion process for Sergeants and relied upon a flawed "statistical" analysis, an unfounded "survey" and pure speculation to support its position. The Township contends that the PBA's statistical analysis is not valid because, among other reasons, it relied upon improper data, created artificial subgroups and failed to consider all relevant factors in analyzing the underlying information. The PBA's "survey" is equally unreliable, and should be discounted because it constitutes impermissible hearsay, lacks a proper foundation and is irrelevant.

### **The PBA's Statistical Analysis**

The Township disputes the PBA's claims that the results of its statistical analysis demonstrate a correlation between performance on the oral examination and the candidates' final rankings, specifically, that the individuals who were ultimately promoted scored higher on the oral examination than those who were not promoted. It uses this analysis to justify its otherwise unsupported assertion that the Township manipulated the oral examinations to insure that certain favored candidates were promoted. The PBA's statistical analysis is flawed for a multitude of reasons, not the least of which is its failure to identify the individual who conducted the analysis, or his/her credentials. To refute the PBA's statistical analysis, the Township retained Dr. Shelly Epstein, Ph.D., a statistician, published author and professor of statistics at Seton Hall University. Dr. Epstein reviewed the PBA's brief, statistical analysis and supporting data, and ultimately found that the PBA's analysis was flawed and its conclusions inaccurate.

The Township summarized Epstein's conclusions as follows:

- The method used by the PBA to rank the candidates was flawed. In some instances, the PBA assigned employees with the exact same score the same rank (e.g., seniority). In other instances, the PBA assigned employees with the exact same score different ranks (e.g., final rankings).
- The PBA erroneously relied upon ranks, rather than numerical data, in conducting its analysis. This was inconsistent with the method used by the Township to calculate the candidate's final ranking, which was based upon the actual numerical results on each portion of the promotion process. Even more significantly, the PBA's reliance upon ranks, as opposed to the numerical data, resulted in the loss of valuable information and led the PBA to draw inaccurate conclusions when analyzing the data.
- The PBA's formula in computing Correlation Coefficients ("CCs") was statistically incorrect because it measured the correlation between rankings, rather than numerical data. When properly calculated using the numerical data, the difference in CCs with respect to the oral score significantly declined.
- The pool of data upon which the PBA relied was too small to render statistically reliable results. This problem was exacerbated by the fact that, in calculating the CCs, the PBA randomly broke down the group of 15 candidates who were not promoted into two smaller subgroups.
- In calculating the CCs, the PBA, without explanation, broke down the group of 15 candidates who were not promoted into two seemingly random groups of eight and seven candidates. If these two subgroups are combined, it eliminates the negative correlation between performance on the oral examination and final score. In fact, when properly analyzed, the CCs for the oral test and the written are virtually identical (.56 vs. .52) indicating that each portion of the promotional process weighed equally upon the candidates' final scores.
- The PBA's analysis is fatally flawed because it fails to take into consideration the fact that the numerical scores on the oral examination had a far greater range than the scores for the written examination, because the written examination had a minimum passing grade of 70, while the oral examination did not. The data analyzed by the PBA was limited to only those candidates who passed the written examination. The scores on the written examination thus ranged from a low of 72 to a high of 90, or an 18 point range. In sharp contrast, the scores on oral examination had a much wider range from a low of 51.8 to a high of 91.2, or a 39.4 point range. This difference fully and logically explains why the oral examination *appears* to play a more significant role on the final scores. If

the oral examination scores are limited to a minimum passing grade of 70 – as the written examination scores were limited – the mean and standard deviation for both examinations are virtually identical and the PBA’s theory that the results on the oral examination played a greater role on the final rankings is wiped out.

- By its own admission, the PBA’s statistical analysis of the 2003 test results was completely based upon hypotheticals. The *fact* is that there is no evidence that the file review scores were manipulated. Moreover, a review of the actual test scores reveals that the four candidates who were ultimately promoted were the four highest ranked candidates both *before* and *after* the file review.

As Dr. Epstein’s report makes clear, the PBA’s statistical analysis is rife with errors and statistically invalid. It inaccurately concludes that the oral examination played a greater role on the final outcome of the promotional examination in 1999. When analyzed correctly, the data indicates that, in fact, both the written and oral examinations played an equal role in determining the final rankings.

The Township asserts that the PBA’s statistical analysis is fundamentally flawed and does not provide any basis for adopting the PBA’s proposed sequence for the components of the promotion process.

#### **The PBA’s Research Survey**

The Township disputes the results of a survey taken by the PBA President that there is a perception among officers that the Police Administration manipulated test results process to insure that certain “favorite” candidates were promoted.

The Township submits that this survey should not be considered by the arbitrator for several reasons. First, the “perception” of PBA members is wholly irrelevant in reaching a determination as to how the promotion components should be ordered. The decision must be based upon fact, not supposition or conjecture. Second, the survey asks the arbitrator to consider inadmissible hearsay. Third, the survey is fatally flawed because

it lacks any foundation, rendering the results unreliable. The Township submits that the PBA admits that there was no actual impropriety in the process. Instead, it claims that “it is the perception of mistrust or impropriety that needs to be considered, not whether there is an actual impropriety.” (PBA Brief at 14.) The Township submits that the PBA’s instructions are incorrect. The arbitrator’s decision must be based upon fact, not fiction, and the fact is that there is no evidence that the Township ever manipulated test results. By its own admission, the PBA’s extraneous and irrelevant evidence should not have any impact on the arbitrator’s decision.

Second, the PBA’s survey is based upon an extrapolation of inadmissible hearsay and, therefore, should not be considered by the arbitrator. Hearsay evidence is not admissible if offered to prove the truth of the matter asserted. Accordingly, surveys which are predicated upon the summarization and interpretation of hearsay evidence should not be considered. The PBA’s survey is based upon the statements of individual officers made outside the context of the arbitration. They are being offered by the PBA to prove its assertion of manipulation by the Township. For that reason, the survey constitutes impermissible hearsay and should not be considered by the arbitrator.

Finally, the survey must be discounted because it lacks any foundation, rendering the results unreliable. A method of analysis will only be deemed acceptable when it has “a sufficient scientific basis to produce uniform and reasonably reliable results so as contribute materially to the ascertainment of the truth.” (State v. Torres, 183 N.J. 554, 568-570 (2005). This standard is designed to insure that the methodology used “relies primarily upon objective factors for reaching a conclusion, with subjective factors playing only a minimal role in the analysis.” (Windmere, Inc. v. International Ins. Co., 105 N.J. 373, 385 (1987)). It is well established that the results of a survey should only be allowed

when properly qualified. (Great Atlantic, 51 N.J. Super. at 424). Surveys must only be “admitted upon an authentic foundation being laid for the manner of the formulation of the result of the poll as in any other expert evidence.” (Id. at 425). If the methodology of the survey, the sampling upon which it is based or its underlying predicates fail to comport with accepted standards of reliable survey technique, then the survey results are rendered unreliable and must not be considered in rendering a decision. See *North Jersey Suburbanite Co. v. New Jersey Press Ass’n*, 154 N.J. Super. 126, 133 (App. Div. 1977) (rejecting results of survey for its failure to comport with reliable survey techniques).

The PBA does not establish that its survey complied with reliable survey techniques. Indeed, the PBA fails to lay any foundation whatsoever to provide the arbitrator with a basis for evaluating whether the results of the survey are reliable. First, it fails to provide any information about the methodology used in administering the survey. For example, it fails to identify the questions asked, how those questions were developed or why the answers to those questions yield reliable results with respect to re-ordering the promotion process. It is wholly inappropriate to offer only survey results, without any of the underlying data.

Second, the PBA does not indicate who was questioned, or where, when and by whom they were questioned. Although the PBA fails to identify precisely when the survey was taken, it mentions that it occurred “sometime in 2003.” The PBA further notes that “this survey was conducted prior to any of the promotional process taking place, thereby, eliminating the possibility of receiving responses from disgruntled candidates that were passed over for promotion.” This statement precisely demonstrates why the results of the survey cannot be considered reliable. Throughout its brief, the PBA maintains that the 1999 test results were manipulated and that it was this manipulation



which prompted the PBA members to seek a re-ordering of the test components. Obviously, then, there were disgruntled PBA members from as far back as 1999. The PBA's brief not only contradicts itself, it demonstrates the individuals who participated in the survey may have, in fact, been biased since the time of the 1999 examination.

There is no way to ascertain whether the identities of individuals who participated in the survey were kept anonymous, or whether the participants felt intimidated or pressured to respond to the questions in a certain way. The only thing disclosed by the PBA is that the survey was conducted by President Robert Zavistoski. It is beyond question that the results of a survey cannot be considered reliable when administered by someone with a clear bias in favor of one party. The Township asserts that the PBA's purported survey should not be considered in rendering an arbitration award.

The Township contends that the PBA cannot dispute its justifications for adopting its proposed sequence for the promotional components. The Township contends that the PBA brief actually supports the arguments of the Township in support of maintaining the promotional components in their current order of written examination, oral examination, file review and, finally, seniority. For example, the PBA's brief acknowledges that the past practice, since at least 1988, has been to administer the written examination prior to the oral examination. Specifically, the PBA states that it "agreed to having the procedures changed so the written test would be completed prior to the oral interview." (PBA Brief at 10).

In addition, the PBA recognizes that one of the most important factors for the arbitrator to consider is the public interest. Although the PBA acknowledged that the public interest should be given due weight, it fails to explain how its proposed order promotes the public interest. In contrast, the Township, in its initial brief, specifically

indicates how its proposed order is beneficial to the public interest. Namely, conducting the written examination first is both fiscally sound and also saves a significant number of manpower hours that can otherwise be devoted to protecting the public because it reduces the number of file reviews that must be conducted. Notably absent from the PBA's Brief is any reference to industry standard or the process used in other New Jersey municipalities. This glaring omission from the PBA's Brief is further proof of the Township's claim that it is the industry norm to conduct the written examination as the first step in the promotion process.

The Township contends that the PBA's attack of the file review does not provide the arbitrator with a legal basis for changing the order of the components. The final portion of the PBA brief focuses on the File Review portion of the examination process. Specifically, the PBA criticizes the Township's failure to assign weights to each area evaluated as part of the file review, and attacks the Township's use of the term "etc." when explaining the type of information that will be reviewed for each category. The PBA claims that this vagueness exacerbates the "perception of unfairness" among the PBA. As an initial matter, this portion of the PBA brief is wholly irrelevant to the issue currently before the arbitrator. It has no bearing upon either the sequence of the components or when the written examination results should be released. It is not for this arbitrator to decide whether the explanations provided by the Township for the "Review of File" are impermissibly vague. In fact, this specific subject matter was already the subject of a Federal Court action, which was resolved without the application of any restraints upon the Township. Second, as the PBA acknowledges, the Township has provided it with a breakdown of the weights assigned to each component of the file review. Thus, the PBA members are aware of the precise value of each category and

“know with *reasonable clarity* what is expected of [them] in the promotion process....”  
(Blanke v. Borough of Somerville, PBA’s Brief, U-10).

Third, it was the PBA’s Testing Committee that proposed the specific performance factors and traits set forth in the Review of File. Moreover, the PBA’s Testing Committee helped developed the definitions ultimately used by the Township in the promotion procedure. It defies logic that the PBA is now challenging the standards it helped developed. Finally, as a matter of law, the definitions contained within the File Review section of the promotion process are not impermissibly vague. The fact that certain phrases within the promotion policy are not “impeccable specimens of draftsmanship does not impugn their legality.” (Soto v. State of New Jersey, 236 N.J. Super. 303, 327 (citing *In re Boardwalk Regency Casino License Application*, 180 N.J. Super. 324, 345 (App. Div. 1981))). That the definitions are not 100% precise does not render the promotion policy per se invalid. To the contrary, the Supreme Court of New Jersey has recognized that “the exigencies of modern government have increasingly dictated that use of general rather than minutely detailed standards in regulatory enactments under the police power.” Ward v. Scott, 11 N.J. 117, 123 (1952); Burton v. Sills, 99 N.J. Super. 516, (Law Div. 1967). Moreover, the United States Supreme Court has acknowledged that not all human conduct or characteristics can be specifically defined and that some degree of vagueness is therefore inevitable. See *Smith v. Goguen*, 415 U.S. 566, 581 (1974) (holding that there “are areas of human conduct, where . . . legislatures simply cannot establish standards with great precision); *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) (stating that “condemned to the use of words, we can

never expect mathematical certainty from our language.”). An amorphous phrase – such as “etc.” – with flexible and commonplace usage “cannot be said to be vague in and of itself, but must be given a commonsense interpretation in context with the statute and the manner in which it is used.” (Soto, 236 N.J. Super. at 328). The fact that a municipal policy leaves some subjective discretion to a public official does not render it unconstitutionally vague. In Civil Service Commission v. Letter Carriers, 413 U.S. 548 (1973), the Supreme Court set the framework for analyzing an unconstitutional vagueness challenge. The Supreme Court found that as long as “the terms of the statute were such that the ordinary person exercising common sense can sufficiently understand and comply with, without sacrifice to the public interest,” the statute passed constitutional muster. *Id.* at 579. Taking this analysis one step further, New Jersey courts have specifically held that subjectivity is permissible in the context of promotions. In fact, the Appellate Division reached this decision in State v. State Troopers NCO Ass’n of New Jersey, Inc., which, ironically, is cited in the PBA brief. (179 N.J. Super. 80 (App. Div. 1981)). In State Troopers NCO Ass’n, the Appellate Division held that, “with respect to candidates for promotion, [the public employer] is free to establish standards involving its own assessments of subjective factors, e.g., intelligence, courage, ability to deal with people, as well as objective criteria, e.g., seniority, experience . . . ” (*Id.* at 90). Moreover, the Supreme Court has expressly recognized the right to base promotion decisions on subjective criteria. (State v. State Supervisory Employees Ass’n, 78 N.J. 54, 93 (1978)). In reaching this conclusion, the Supreme Court recognized that objective examinations are “not absolutely predictive of which candidate will be best qualified to fill the appointing authority’s needs.” To that end, the Supreme Court held that a municipality does not have

to negotiate regarding its right to use subjective criteria in determining who is the best candidate for promotion. In short, the PBA's lengthy argument regarding the File Review components is irrelevant. Even if it was relevant, the PBA has no sound legal basis for challenging the components of the file review.

### **Conclusion**

For all the above reasons, the Township requests that the existing promotional process should not be modified. Specifically, the Township requests that the components of the promotional process be administered in the following order: (1) written examination, (2) oral examination, (3) file review and (4) seniority. It further requests that the numerical results of the written examination be immediately disclosed, to allow the Township to ascertain who passed and who failed the examination.

## Discussion and Analysis

I am required to make a reasonable determination of the issues, giving due weight to the statutory criteria which are deemed relevant. Each criterion must be considered and those deemed relevant must be explained. The arbitrator is also required to provide an explanation as to why any criterion is deemed not to be relevant.

I have carefully considered the evidence as well as the arguments of the parties. I have examined the evidence in light of the statutory criteria. Each criterion has been considered, although the weight given to each factor varies. I have discussed the weight I have given to each factor. I have not determined the total net economic annual changes for each year of the agreement given the nature of the issues which have no direct financial impact on either the Township or the PBA. The parties agreed that the two issues in this matter would be decided by conventional interest arbitration. The stipulated issues are: (1) The order of the four components in the promotion process; and (2) When the results of the written examination are disclosed.

It is undisputed that several of the statutory criteria are not applicable in this matter. The parties did not submit evidence, testimony and argument regarding statutory factor (g) (5). The amended statute specifically requires the arbitrator to consider the CAP law in connection with this factor. I find that statutory factor (g) (5) is not relevant in this matter. There is nothing in this award that could impact on or cause the Township to exceed its authority under the CAP law. I also find that factor (g) (6), "the financial impact on the governing unit, its residents and taxpayers" is not relevant except for the impact of the cost of the oral examination which I will discuss below. The parties did not submit evidence, testimony and argument regarding statutory factor (g) (7), the "cost of living" and I find that statutory factor (g) (7) is not relevant in this matter. Neither party

submitted evidence, testimony and argument regarding statutory factor (g) (3), “the overall compensation presently received by the employees.” While an argument could be put forth that promotions concern overall compensation, there is no issue before me that impacts on the overall compensation presently received by the employees in this bargaining unit. I find that statutory factor (g) (3) is not relevant in this matter. There are no stipulations of the parties concerning substantive matters and I find that statutory factor (g) (4) is not relevant in this matter.

I find that statutory factor (g) (1), “the interests and welfare of the public” and statutory factor (g) (2), the “comparison of the . . . conditions of employment of the employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing the same or similar services with other employees generally” are relevant in this matter. These are the two factors that the Township and the PBA emphasized in their written submissions.

The Township and the PBA have made effective arguments in support of their respective positions. However, some of those arguments have been directed to the validity or appropriateness of promotional criteria. As PERC and our courts have clearly decided in its decisions in this matter and others, the establishment of promotional criteria is a nonmandatory subject of negotiations and as such, the parties’ arguments concerning the validity or appropriateness of promotional criteria are not relevant in this matter. What is relevant is the parties’ arguments concerning the narrower issue of promotion procedures. The two issues before me — the order of the four components in the promotion process and when the results of the written examination are disclosed — are promotion procedures and as such they are mandatorily negotiable. The parties’ arguments regarding promotion procedures are relevant and have been given full consideration.

A governing principle that is traditionally applied in the consideration of wages, hours and conditions of employment is that a party seeking a change in an existing term or condition of employment bears the burden of showing a need for such change.

I shall now discuss the evidence and the parties' arguments in relation to the statutory criteria.

**Interests and Welfare of the Public**

The New Jersey Supreme Court in Hillsdale determined that the interests and welfare of the public must always be considered in the rendering of an interest arbitration award and that an award which failed to consider this might be deficient. The amended statute specifically requires the arbitrator to consider the CAP law in connection with this factor. I have determined that the terms of this award will not cause the Township to exceed its authority under the CAP law.

*The interests and welfare of the public* require the arbitrator to balance many considerations. These considerations traditionally include the Employer's desire to provide the appropriate level of governmental services and to provide those services in the most cost effective way, taking into account the impact of these costs on the tax rate. On the other hand, the interests and welfare of the public require fairness to employees to maintain labor harmony and high morale and to provide adequate compensation levels to attract and retain the most qualified employees. It is axiomatic that reasonable levels of compensation and good working conditions contribute to a productive and efficient work force and to the absence of labor unrest. The work of a Police Officer is undeniably and inherently dangerous. It is stressful work and is clearly subject to definite risks. Police Officers are certainly aware of this condition of employment. This is a given which is



usually balanced by the appropriate level of increases in compensation to be received by a Police Officer from one contract to the next.

I agree with the analysis provided by Arbitrator Jeffrey B. Tener in an interest arbitration award in Cliffside Park. Arbitrator Tener's analysis:

"The arbitrator is required to strike an appropriate balance among these competing interests. This concept has been included in the policy statement of the amended interest arbitration statute. N.J.S.A. 34:13A-14 refers to the 'unique and essential duties which law enforcement officers . . . perform for the benefit and protection of the people of this State' and the life threatening dangers which they confront regularly. The arbitration process is intended to take account of the need for high morale as well as for the efficient operation of the department and the general well-being and benefit of the citizens. The procedure is to give due respect to the interests of the taxpaying public and to promote labor peace and harmony." (In the Matter of the Borough of Cliffside Park and PBA Local 96, PERC Docket No. IA-98-91-14, page 45.)

The analysis of this factor is unique in that the dispute in this matter does not directly affect salaries. Obviously, the salary of a police officer is implicated by promotions and it is even more obvious that promotion to Sergeant carries with it a much higher salary. However, the issues before me: (1) the sequence of the various components and (2) the timing of the release of the numerical results of the written portion of the promotion process are significantly narrower than a typical interest arbitration matter.

As Arbitrator Tener clearly stated: "The arbitration process is intended to take account of the need for high morale as well as for the efficient operation of the department and the general well-being and benefit of the citizens." Promotion procedures have serious implications for both the high morale and efficient operation of a police department. It is well established and commonly understood that having the most qualified individuals promoted will contribute to the high morale and efficient operation of a police department. This benefits all parties — the Township police administration,

the Township's police officers and the Township's residents — since a police department's ability to deliver high quality policing will be enhanced by a highly qualified command structure. A promotion procedure must be designed to identify and promote the most qualified candidates for higher ranking positions.

For the following reasons, I have determined that the order of the various components in the promotion process shall be as follows:

1. Written Examination
2. Review of File
3. Oral Interview
4. Seniority

The PBA's last offer places the written examination as the last component in the promotion process. The PBA's reasoning is that placing the written examination last will ensure a fair process with all of the "subjective" components preceding the written examination. The Township, on the other hand, argues that since a candidate who fails the written examination is ineligible for promotion, it makes no sense to have these candidates continue through the remaining stages of the promotion process. The PBA contends that its final offer requiring that candidates complete the most subjective components first, reduces the potential perception that the promotional process has been manipulated or tainted since it requires the Administration to complete the Review of File component on a "stand-alone basis" prior to the written test being taken.

I am persuaded that there is a perception that the promotion process can be manipulated by having the subjective portion of the promotion process at the end of the promotion process. However, I make no finding that such perception exists. That issue is

not before me. What is before me is constructing an order that maintains the integrity of the promotion process so that all participants are confident that the promotion process will put forth the best candidates for promotion. Both the candidates for promotion and the Township "have an interest in being assured that a promotional process that is fair and free of favoritism or potential improprieties." *Snitow v. Rutgers*, 103 N.J. 116 (1986). This is clearing in the interests and welfare of the public who deserve a highly qualified command structure in the police department.

Accordingly, I am persuaded that the written examination shall be the first component in the promotion process. This is consistent with the comparisons required by statutory factor (g) (2), the "comparison of the . . . conditions of employment of the employees involved in the arbitration proceedings with the . . . conditions of employment of other employees performing the same or similar services with other employees generally." Comparability is one of the two factors, which I have found to be relevant in this matter. Comparability favors a finding that the written examination shall be the first component in the testing procedure.

This brings me to the second issue: When the results of the written examination are disclosed. It is undisputed that candidates who fail the written examination are ineligible for promotion. There is simply no reason to believe that a candidate for promotion would want to continue with an oral examination when there is no chance to be promoted. Not only is this a waste of the Township's time and resources, but it is also unreasonable to expect a candidate to continue through the oral examination phase when they are ineligible for promotion. The result of the 2003 promotion process shows that

33% of the candidates failed the written examination. There is simply no basis to require that these candidates continue through the promotion process.

I am also mindful of the concerns expressed by the PBA concerning the “perception of impropriety.” As stated above, I make no finding that such perception exists. I am convinced that the integrity of the promotion process will be maintained by requiring notification by the testing agency, immediately after the scoring of the written examination, of the names of all of the candidates that passed the written examination. The testing agency shall provide an alphabetical list of only the candidates with a passing grade on the written examination. Only those candidates with a passing grade on the written examination will be permitted to continue through the additional phases of the promotion process.

In addition, I direct that the actual scores on the written examination be withheld until the Oral Examination and the Review of File components are completed. Let me be perfectly clear on this — the actual numerical score will be “sealed” by the testing agency and will not be released until all phases of the promotion process have been completed. This will enhance the integrity of the promotion process by requiring that all phases of the promotion process be conducted independent of any knowledge of a candidate’s results on any one phase. This procedure will remove the possibility that subsequent phases of the evaluation will be consciously or subconsciously influenced by either a high passing score or low passing score in the written examination.

I have directed that the Review of File component shall follow the Written Examination. The PBA’s concern regarding the order of this component’s “subjectivity” is no longer at issue given the “sealing” of the numerical results of the written

examination. I am convinced that a fair and effective promotion procedure requires that the different components be evaluated independently and without knowledge of a candidate's results on any one component. Placing this component second obviates the need to "seal" the results of the "Oral Examination" which is currently conducted by the New Jersey Association of Chiefs of Police. The third component shall be the Oral Examination. Upon completion of the Oral Examination component and the release of the scores, all of the actual numerical results of the written examination shall be released by the testing company. This release will include the numerical scores of both the officers who passed the written examination and the officers that did not pass the written examination. The final component, seniority points, is predetermined and is not subject to dispute.

Accordingly, after carefully considering each of the statutory criteria in relation to the evidence in the record, I respectfully issue the following award:

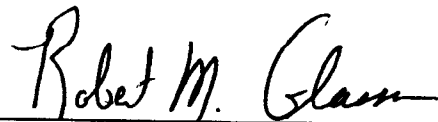
## AWARD

1. The order of the four components in the promotion process shall be as follows:
  - a. Written Examination
  - b. Review of File
  - c. Oral Interview
  - d. Seniority
  
2. The testing agency, immediately after the scoring of the written examination, shall provide an alphabetical list of only the candidates with a passing grade on the written examination. Only those candidates with a passing grade on the written examination will be permitted to continue through the additional phases of the promotion process.

The actual numerical scores on the written examination shall be withheld by the testing agency until such time as the Oral Examination and the Review of File components are completed. The actual numerical score will be "sealed" by the testing agency and will not be released until all phases of the promotion process have been completed.

3. The Review of File component shall follow the Written Examination. The third component shall be the Oral Examination. Upon completion of the Oral Examination component and the release of the scores on the Oral Examination, all of the actual numerical results of the written examination shall be released by the testing company. This release will include the numerical scores of both the officers that passed the written examination and the officers that did not pass the written examination. The final component shall be the seniority points.

Dated: January 10, 2007  
Pennington, NJ

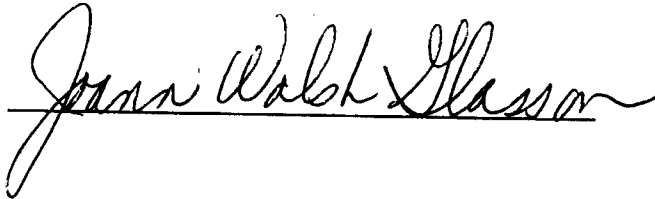


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ROBERT M. GLASSON  
ARBITRATOR

STATE OF NEW JERSEY) ss.:  
COUNTY OF MERCER)

On this 10<sup>th</sup> day of January 2007, before me personally came and appeared ROBERT M. GLASSON, to me known and known by me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

A handwritten signature in cursive script, reading "Joann Walsh Glasson", written over a horizontal line.

**JOANN WALSH GLASSON**  
**NOTARY PUBLIC OF NEW JERSEY**  
**Commission Expires 12/11/2011**