STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of Interest Arbitration Between	:	
TOWNSHIP OF IRVINGTON	:	
"the Township or Employer"	:	**INTEREST ARBITRATION DECISION AND AWARD**
and	:	
IRVINGTON POLICE SOA	:	Docket No: IA-2006-057
"the SOA or Union"	:	

Before: Robert M. Glasson, Arbitrator

APPEARANCES

FOR THE TOWNSHIP:

Ramon Rivera, Esq.
Scarinci & Hollenbeck
Of Counsel & On the Brief

FOR THE PBA:

James M. Mets, Esq., Esq.
Mets, Schiro & McGovern, LLP
Of Counsel & On the Brief

Procedural History

The Township of Irvington (the "Township") and the Irvington Superior Officers Association (the "SOA") are parties to a collective bargaining agreement (the "CBA") which expired on December 31, 2005. Upon expiration of the CBA, the parties engaged in negotiations for a successor agreement. Negotiations reached an impasse, and the SOA filed a petition with the New Jersey Public Employment Relations Commission ("PERC") on February 27, 2006, 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 November 3, 2006 from its Special Panel of Interest Arbitrators.

I conducted mediation sessions on multiple dates with the parties. At the final mediation session, the parties reached a tentative agreement which was memorialized in a Memorandum of Agreement (the "MOA") for a five-year successor CBA with a term of January 1, 2006 through December 31, 2010. The MOA includes the terms of a comprehensive settlement of ten issues including salary, health insurance, prescription co-payments, detective allowance, training days, grievance procedure, bereavement leave, hours of work and overtime, and shift swaps. All of the above terms of the MOA were subsequently ratified by the membership of the SOA and approved by the Township. All of these terms of agreement have been implemented. In addition to the above terms, the parties agreed to continue direct negotiations on four unresolved issues. The MOA provides that I shall retain jurisdiction on these four issues and issue a final and binding decision if the parties fail to reach a voluntary agreement.

The MOA lists the following issues:

1. Prescription Copays & Annual Cap
2. Police Related Shootings
3. Suspension Days
4. Employee Rights, Minor Discipline

The parties continued direct negotiations in an effort to resolve the outstanding non-economic issues. Despite the parties' good faith efforts, the issues were not resolved and the parties agreed to waive a hearing and to submit briefs in support of their respective positions on each of the unresolved issues. The SOA filed the initial brief which was served on the Township and the arbitrator. The Township filed a responding brief and the record was closed on December 22, 2008 upon receipt of the Township's brief.

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 nine 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.

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

Discussion and Analysis

The issues to be decided in this matter include three non-economic issues and one economic issue. These issues were unresolved following the parties' agreement to a comprehensive five-year CBA which resolved all other issues including but not limited to salary and health insurance. 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 do not have a significant financial impact on either the Township or the SOA.

It is undisputed that many of the statutory criteria are not applicable in this matter. The parties did not submit evidence and argument regarding many of the statutory factors. 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 since neither party has argued that there is a financial impact from the three non-economic issues and the one economic issue concerning the prescription copays and annual cap. The parties did not submit evidence or 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 or argument regarding statutory factor (g) (3), "the overall compensation presently received by the employees." 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 SOA emphasized in their written submissions.

The Township and the PBA have made effective arguments in their briefs in support of their respective positions. I shall now review the parties' arguments made in the briefs followed by my analysis and my decision.

Issue 1
Prescription Copays and Annual Cap

SOA Proposal & Argument

The SOA's proposal includes two components: A $500 annual cap on out-of-pocket expenses for prescription drugs and a $5 copay for generic mail order drugs and a $10 copay for name brand mail order drugs. Prior to January 1, 2008, prescription copays under the Township's traditional plan were $10 for name brand and $5 for generic. The copays under the Horizon HMO Blue plan are $5 across-the-board. Thus, an employee had to fill 25 or 50 prescriptions to meet the out-of-pocket average. For 2008 and beyond, the co-pays for prescriptions under the traditional and HMO Blue have doubled (generic $5 to $10 and brand name $10 to $20). The SOA contends that by doubling co-pays, the Township should save between 20% and 33% on the cost of prescription drugs. (Exhibit A, *Rand Health, Research Highlights* (2002). To fill those same 25 name brand or 50 generic prescriptions will now cost an officer $500. Despite a cost savings for the Township, and the potentially tremendous financial impact on the SOA bargaining unit members, the Township refuses to consider a fair and reasonable cap on out-of-pocket prescription costs. The Township has proposed an increasing cap of $1250 in 2008, $1350 in 2009, and $1450 in 2010. The caps proposed by the Township are $1000 to $1200 more than the current out-of-pocket costs for officers.

The SOA maintains that the Township's proposed caps are not reasonable. A fair and reasonable cap should be tailored to actual costs and should consider the Township's cost-savings. Therefore, to establish a fair and reasonable cap, the SOA asks that I apply the same increase multiplier to the current annual average out-of-pocket cost of approximately $250.

According to the SOA, since prescription copays have doubled, then out-of-pocket costs should also double. This analysis favors a $500 annual cap. The SOA submits that this ensures that the Township meets its cost-savings goal by having participants' out-of-pocket costs double, while at the same time protecting the participant from incurring costs in excess of a 100% increase from the prior year.

The SOA contends that a reasonable and fair cap of $500 annually will also benefit the Township in the long run. The SOA cites studies that show that doubling out-of-pocket costs to plan participants results in patients cutting their use of common drugs for chronic conditions by as much as 23%. (Exhibit B, *Will Value Based Pharmacy Design Take Off?*, HealthLeaders-InterStudy's National Managed Care Outlook, June 2007). A 2005 survey conducted by the pharmaceutical company, Pfizer established that 35% of patients failed to take their medication because they wanted to save money. If employees do not take their medications as prescribed, there is a greater risk of complications from chronic conditions which leads to more hospitalizations and doctors' visits and consequently greater healthcare costs to employers. (Exhibit C).

The SOA submits that the evidence establishes that the corollary (i.e., employees are given incentives to take their medication) will save the Township money. One academic study concluded that an employer will save approximately $6000 per patient by eliminating heart-medication co-pays. (Exhibit E, *New Tack on Co-Pays: Cutting Them,* Wall Street Journal, Online, May 8, 2007). Another study established that eliminating co-payments for cholesterol-lowering medicines for individuals with medium to high risk of congestive heart disease avoided 110,000 hospitalizations or emergency room visits and saved $1,000,000 annually. (Exhibit F, *American Journal of Managed Care,* 2006). The SOA notes that

Fortune 500 employer Pitney-Bowes lowered co-payments for asthma and diabetes medications and saved $1,000,000 from reduced complications. (Exhibit G, *Value Based Insurance Design: A New Approach to Health Insurance That Balances Cost and Quality*, Center for Value-Based Insurance Design, University of Michigan, 2007).

The SOA maintains that by creating financial barriers that discourage the use of necessary and/or recommended prescriptions, employers lose more than they save, because of increased absenteeism and lost productivity. The SOA cites a study that found that by lowering pharmacy co-pays, productivity increased approximately $18,000 annually and average sick day use was reduced by 50%. (Exhibit H, *Journal of the American Pharm. Ass'n* (Cranor, CW, et al., 2003).

Thus, the SOA claims that the short-sighted cost savings attributed to doubling the prescription co-pays and not placing a fair and reasonable cap on out-of-pocket expense may result in greater cost to the Township. With a fair and reasonable cap, however, SOA bargaining unit members will be more likely to continue to take necessary medications thereby saving the Township from increased medical costs, lost productivity and sick time.

The SOA submits that the above analysis must be applied to the issue of the cost of the mail order prescriptions. Currently, officers can receive a 90-day supply by paying $5 for generic and $10 for name brand. The Township seeks to apply the same $10 generic and $20 name brand co-pay to mail order purchases. By making the cost of mail order prescriptions the same as pharmacy walk-in purchases, the Township is not giving officers the incentive to use a service that saves it money.

The SOA also cites two other factors that must be considered in analyzing the mail-order co-pay. First, SOA bargaining unit members were always eligible to obtain a 90-day

supply at a pharmacy for the cost of a single co-pay ($5 or $10). This benefit will be eliminated under the new CBA. The SOA understood that this was a unique benefit and decided to accommodate the Township in eliminating this benefit. However, the SOA submits that its accommodation has been negated by the Township's proposal to double mail order co-pays. The SOA maintains that this significant give-back by the SOA should be rewarded, not punished.

Second, the SOA contends that the Township will have significant savings by encouraging employees to use mail order services. The estimated cost-savings for mail order drugs, as opposed to obtaining them through a local pharmacy is 11.5% for named brand and 9.9% for generic. (Exhibit I, U.S. General Accounting Office, GAO-03-196,(2006). Other reports estimate the savings to be between 10% and 20%. (Exhibit J, Healthcare Market Overviews, December 6, 2007).

In summary, the SOA asserts that by keeping the mail-order copays at a rate lower than the pharmacy copays, rather than charging double what officers paid prior to this agreement, employees will be encouraged to use mail-order thus enhancing the Township's overall cost-savings. Thus, the copay for a mail order 90-day supply should be less than the copay for a pharmacy purchased prescription.

The SOA asks that I award its proposal to cap the annual out-of-pocket expenses at $500 and establish the mail order copays at $5 for generic drugs and $10 for name brand drugs.

Township Proposal & Argument

The Township proposes that prescription copays for mail order prescriptions be increased to $10 for generic drugs and $20 for brand name prescription drugs. The Township

also proposes to increase the cap on annual prescription drug copayments for employees to $1350 in 2009 and to $1450 in 2010. The Township contends that these provisions would further the public interest by defraying the Township's substantial health care expenses. Furthermore, the Township submits that comparability with other jurisdictions and to other Township employees is supportive of its proposal.

The SOA proposes a cap of $500 per annum. The Township contends that such a cap negates any financial savings to the Township that would result from an increase in prescription drug copays. Furthermore, the Township points out that its proposal on the annual cap is in accord with the Township's agreement with IAFF Locals 2004 and 305 pertaining to prescription cap increases. The MOA provides for an annual cap on out-of-pocket expenses for prescription drugs of $1,100 in 2008, $1,200 in 2009 and $1,300 in 2010. The MOA with the IAFF also provides that "if the prescription copay is increased, the CAP will be proportionately increased." (Exhibit A, MOA between the Township of Irvington & IAFF Locals 305 and 2004, December 17, 2007).

Moreover, comparable jurisdictions within New Jersey have increased the co-pays for prescriptions. Comparable cities, such as the City Orange increased their prescription copays to $10 for generic drugs and $20 for brand-name drugs for both retail and mail order.

The Township asks that I award its proposal.

Discussion

This issue has two components. The first component is the copays for mail order prescription drugs. The Township and the SOA agreed in the MOA that the copays for retail prescription drugs shall be increased to $10 for generic prescription drugs and to $20 for name brand prescription drugs. This was effective January 1, 2008. The issue before me is

the level of copays for mail order prescription drugs. The SOA proposes copays of $5 for generic mail order and $10 for name brand mail order prescription drugs. The Township proposes copays of $10 for generic mail order and $20 for name brand mail order prescription drugs. The SOA has made effective arguments that providing lower copays will encourage employees to use the mail order program and therefore provide considerable savings to the Township. The SOA relies on various studies and the SOA's agreement to limit the retail purchase of prescription drugs to a 30-day supply. While the SOA is correct that this concession has value to the Township, it is undisputed that this change to a 30-day limitation is long overdue as the 30-day limitation is a common feature in other prescription drug programs.

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. I have placed great weight on internal comparisons with other Township employees.

First, a review of the MOA between the Township and PBA Local 29 shows that the parties agreed to increase prescription drug copays for both retail and mail order prescriptions to $10 for generic drugs and to $20 for name brand drugs. This MOA was executed on June 18, 2007. These increased copays have been in effect for more than one year. The MOA shows that the parties also agreed to limit 90-day purchases to mail order only.

Second, a review of the 2004-2007 CBA between the Township and IAFF locals shows that the parties agreed to increase prescription drug copays for both retail and mail

order prescriptions to $10 for generic drugs and to $20 for name brand drugs. This change was effective February 1, 2005 and has been in effect for more than four years.

Third, it is important to note that the salary increases negotiated by the PBA and SOA are identical for the period January 1, 2006 through December 31, 2010. This uniformity of salary increases favors a decision in favor of uniform prescription drug copays.

Accordingly, the copayments for mail order prescription drugs shall be increased to $10 for generic drugs and to $20 for name brand drugs. This shall be effective February 1, 2009.

The second component is the level of the cap to be established for annual out-of-pocket expenses for prescription drug copayments. The SOA proposes a cap of $500 on annual out-of-pocket expenses for prescription drug copayments. The Township proposes a cap of $1,350 on annual out-of-pocket expenses for prescription drug copayments in 2009. The Township's proposal increases the cap to $1,450 in 2010. Again, I have placed great weight on internal comparisons with other Township employees.

First, a review of the MOA for a 2006-2010 CBA between the Township and PBA Local 29 shows that the parties agreed that: "No officer shall pay more per annum per plan for prescriptions as provided by the State Health Benefits Program, or HNA, whichever is lower." A review of data on the New Jersey Division of Pensions and Benefits webpage shows that the current State Health Benefits Program ("SHBP") cap on annual out-of-pocket expenses for prescription drug copayments are set at $1,092 in 2008 and $1,160 in 2009.

Second, a review of the MOA detailing the terms of the 2007-2012 CBAs between the Township and IAFF Locals 305 and 2004 shows that the parties agreed as follows:

7. Prescription Cap

a. There will be a cap on each employee's out-of-pocket expenses for prescriptions of $1,100, $1,200 and $1,300 effective on January 1, 2008, January 1, 2009 and January 1, 2010 respectively.

b. If the prescription copay is increased, the CAP will be proportionately.

The current cap for the IAFF bargaining units (including the FOA) on annual out-of-pocket expenses for prescription drug copayments is $1,200 in 2009. This cap is in the same range as the current SHBP cap on annual out-of-pocket expenses for prescription drug copayments of $1,160 in 2009 which is applicable to the PBA bargaining unit. As stated above, I have placed great weight on internal comparisons with other Township employees. I note that the cap on annual out-of-pocket expenses for prescription drug copayments for the IAFF bargaining units in 2009 is similar to the annual cap on annual out-of-pocket expenses for prescription drug copayments established by the SHBP in 2009. I conclude that the annual cap on annual out-of-pocket expenses for prescription drug copayments for the SOA bargaining unit be established on a uniform basis with the PBA bargaining unit. There is simply no basis to have different levels of prescription benefits for the supervisors of the members of the PBA bargaining unit.

Accordingly, I award the following language to be included in the CBA:

"No officer shall pay more per annum per plan for prescriptions as provided by the State Health Benefits Program, or HNA, whichever is lower."

I direct that this language be effective for the 2008 calendar year. Thus, unless the HNA cap is lower than the SHBP cap, the maximum out-of-pocket expenses for prescription drug copayments in 2008 shall be $1,092. This shall be increased to $1,160 in 2009.

Issue 2
Police-Related Shootings

SOA Proposal & Argument

The SOA has proposed the following language to provide for administrative leave after a police related shooting:

> Any officer who has discharged his/her weapon in the line of duty shall receive administrative leave for a minimum of two (2) days with pay. In addition, the officer shall not be required to submit a report or statement while on administrative leave. The officer shall also have the opportunity to consult with an attorney of his/her choosing prior to submitting his/her report or giving a statement concerning the shooting.

The SOA submits that officer firearms discharges are serious and traumatic situations involving the use of deadly force. These situations are so serious that the Attorney General and County Prosecutors requires separate reports when an officer discharges his weapon. Given the seriousness of an officer involved shooting where he has discharged his weapon, it is reasonable to request that an officer be given some minimal time off to recover from the trauma of the shooting and to collect his thoughts before being required to return to work and submit a report or statement. Quite often an officer is in shock or seriously distraught over the situation thereby requiring medical attention and possibly medication. An officer in such a state is in no condition to return to the streets of Irvington until he has had a chance to recover.

The SOA is asking for two days for an officer who has suffered a traumatic event. If he is not able to return after two days, then the officer may have to use sick time or worker's compensation until he has recovered.

As for attorney representation, quite often it is unknown if the discharge was a "good shoot" or not. Thus, the officer may be implicated criminally. Without an attorney to advise him prior to giving a statement or report an officer's 5th Amendment rights could be violated.

According to the SOA, police officers are not required to relinquish their rights under the United States Constitution in order to become a sworn member of the Township's Police Department. They retain all such rights as a citizen. They cannot be made to testify against themselves in a court of law or waive their rights regarding self-incrimination. Therefore, when police officers are to be interrogated about an act that may involve a criminal charge, those officers have the right to legal counsel, and to remain silent upon advice of counsel. In addition, no questioning may take place once the right to counsel has "attached." The SOA notes that the Attorney General Guidelines on Internal Affairs require an officer who is a target of an investigation to be allowed to be represented by counsel. It is these rights that the SOA wishes to have reaffirmed in the CBA.

The SOA asks that I award its proposal.

Township Argument

The Township is opposed to the inclusion of the SOA proposal for administrative stress leave and limits on the questioning of police officers following a police-related shooting. The Township contends that the SOA's proposal is counter to public policy and is not mandatorily negotiable. The Township contends that a mandatory administrative stress leave, after any weapon discharge, including a period of no questioning, is detrimental and injurious to the public welfare. Furthermore, such a provision places a substantial limitation on the Township's policymaking powers. An obligation of all police officers is to prevent, alleviate and solve criminal activity within the municipality and protect public safety. As

such, police employment policies and provisions must conform to the safety and investigatory obligations of the police officers. Crime detection and investigation are quintessential police functions. Camden County Prosecutor v. Camden County Assistant Prosecutors Ass'n, P.E.R.C. NO. 2007-9, 32 NJPER 117 (2006). It has been deemed traditional police work in that one sees the process through from initial investigation to apprehension. Camden County Sheriff, 27 NJPER 71 (2000).

According to the Township, the most critical time for any criminal investigation is the time contemporaneous to the incident. To provide police officers with administrative leave for stress following a criminal incident involving a weapon would not only impede the investigation, but it would hinder public and officer safety. Officers would be unavailable for questioning, to gather evidence, and to assist the investigation which he or she may have personal knowledge.

Moreover, comparable jurisdictions within New Jersey have not included provisions for "Police-Related Shootings" or "Administrative Leave for Stress" in their CBAs. The Township notes that comparable cities in crime, population and location, such as East Orange and Newark, do not provide for such "stress leave" in their CBAs. (See City of East Orange Collective Bargaining Agreement, attached hereto as Exhibit "B," and City of Newark Superior Officers' Agreement, attached hereto as Exhibit "C"). Further, the current CBA already includes a provision for sick leave should an officer be injured.

The Township submits that there is no basis to include an administrative stress leave provision for a police-related weapon discharge in the CBA.

Discussion

The SOA's proposal, requesting a "24-hour" waiting period before an officer involved in a "police related" shooting can be interviewed, is made on the basis that an officer may be under stress or in a "mentally impaired" state from the effects of the shooting and therefore should not be required to submit a report of the shooting for twenty-four hours. The Township is opposed to the SOA's proposal arguing that the proposal is not a mandatory subject of negotiations and would hinder the Township's ability to investigate the circumstances of the shooting incident.

For the following reasons, I shall deny the SOA's request for a "24-hour" waiting period before an officer involved in a "police related" shooting can be interviewed. I am guided by my decision in the matter between the Township and PBA Local 29 issued on November 29, 2008. (Township of Irvington & PBA Local 29, IA-2007-011).

First, comparability is one of the factors that must be measured in deciding the SOA's proposal. This is a critical element in evaluating the SOA's proposal. Evidence of such language in comparable New Jersey jurisdictions would suggest that other departments have chosen to provide such waiting periods for the reasons stated by the SOA. However, there is nothing in the record showing comparable jurisdictions in New Jersey with provisions in CBAs regarding "waiting periods" or administrative leave for stress when an officer is involved in a shooting incident.

Second, the record is unclear as to who has primary responsibility to investigate "deadly force" incidents in municipalities. While the record includes no guidance on this, I am aware that there are Attorney General Law Enforcement Directives that apply in the review of the use of deadly force by law enforcement. Attorney General Law Enforcement Directive No. 2006-5, issued on December 13, 2006, provides in relevant part as follows:

WHEREAS, in order to promote statewide uniformity and accountability, it is appropriate for the Attorney General, in cooperation and consultation with the County Prosecutors, to issue and enforce revised and updated procedures for review of the use of force by law enforcement officials statewide;

NOW, THEREFORE, I, Stuart Rabner, Attorney General of New Jersey, by virtue of the authority vested in me by the Constitution and the Statutes of the State, do hereby direct that:

3. When a law enforcement officer employed by a municipality or county agency is involved in the use of deadly force as defined in Paragraph 1, the County Prosecutor's Office in the county of occurrence will conduct the investigation. * * *

8. The Attorney General may issue and periodically revise Standards governing the investigation of the use of deadly force by law enforcement officers. These Standards may govern the composition, operations, supervision and investigation protocols of the SRT (Attorney General's Shooting Response Team), and may also govern investigations conducted by the County Prosecutors' Offices. Any Standards issued by the Attorney General pursuant to this Paragraph are fully incorporated into this Law Enforcement Directive as if set out fully herein, shall be binding upon all affected law enforcement agencies, and shall automatically supersede and take precedence over any rules and regulations, standard operating procedures, guidelines or protocols issued or employed by the affected law enforcement agencies.

This AG Directive places the responsibility for the investigation with the County Prosecutor's Office and makes the "standards governing the investigation of the use of deadly force by law enforcement officer . . . . binding upon all affected law enforcement agencies." The investigation of the use of deadly force and/or police-related shooting incidents are conducted by police agencies outside of the municipal police department in which the incident occurred. Establishing an automatic 24-hour waiting period could impinge on the ability of investigative agencies to conduct a timely investigation of the police-related shooting and/or deadly force incident. Investigations of these matters are sensitive and subject to strict rules as to who may question a police officer immediately following an incident involving the use of deadly force and/or a police-related shooting.

For all of the above reasons, the SOA's proposal is hereby denied.

Issue 3
Suspension Days

SOA Proposal & Argument

The SOA proposed the following: "If an officer is suspended for 4 days or less, the suspension shall not span the officers regularly scheduled days off but shall be consecutive work days. For suspensions, a "day" shall be defined as eight (8) hours."

According to the SOA, the Township is governed by the rules and regulations of the Department of Personnel. Although the DOP rules and regulations do not specifically define the number of hours in a "day's" suspension, case law has. In re Brennan, 9 Merit System Reporter 4 (NJ DOP 1999) and Wentz v. Salem County Correctional Facility, are two cases wherein the DOP held that 8 hours is equal to one day for suspension purposes. Thus, by placing this language in the CBA, the Arbitrator will be simply memorializing the law.

The SOA also proposes that suspensions are to be served in consecutive workdays. This request is necessary because if a suspension is bridged over days off, the officer will not be eligible for overtime and side jobs on his days off. This is because his gun, badge and identification will not be returned to him until he completes his suspension time. Thus, the Town is actually punishing the officer beyond the actual suspension time because he also is suspended from overtime and side jobs on his days off.

The SOA asserts that this is not equitable and should be corrected by granting the SOA's proposal.

Township Argument

The Township is opposed to any restrictions on the scheduling of disciplinary suspensions. The Township maintains that when the dominant concern is its managerial

prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. Paterson Police PBA v. Paterson, 87 N.J. 78, 91 (1981). In Local 195 and Paterson Police PBA Local No. 1 v. City of Paterson, supra, the Court held that if negotiations over a particular matter, including work schedules, would significantly interfere with the determination of a governmental policy, the matter was not negotiable. See also Borough of Paulsboro, 14 NJPER 30 (1987). It follows that scheduling of suspensions, which would also significantly interfere with government policy, is also not negotiable. Suspensions in and of themselves interfere with government policy and it is neither the duty nor the responsibility of the municipality to schedule them in accordance with the convenience of the suspended officer. When an officer is suspended for due cause, it is the managerial prerogative of the municipality to determine when the suspension should be imposed, taking in consideration manpower needs of the municipality and overtime constraints of the other employees required to fill in for the suspended officer. Furthermore, if the Township included this provision in the CBA, it would appear to be acquiescing wrongful conduct which is contrary to governmental policy. Negotiations over the ability to set a suspension policy around the schedule of the suspended officer would significantly interfere with the Township's ability to set policy and would cause a hardship to the Township and other dedicated officers. This is clearly and inherently a management prerogative pertaining to the determination of governmental policy which cannot be delegated to an arbitrator. New Jersey State Policemen's Benevolent Ass'n. v. Irvington, 80 N.J. 271, 296 (1979).

Discussion

The SOA seeks to have suspension days based on an eight (8) hour day instead of the current eleven and one-quarter (11.25) hour day. The SOA also notes that DOP defines minor discipline as a suspension of five days or less and has ruled that minor discipline means 40 working hours or less of suspension time. Thus, a four-day suspension at eleven and one-quarter hours per day is a total of 41 working hours and would constitute major discipline.

The current eleven and one-quarter (11.25) hour day for patrol and ten (10) hour day for non-patrol resulted from the change in work schedules in the 2003-2005 CBA. The new work schedule, effective January 1, 2004, replaced the 4-2 patrol schedule which had an 8.5-hour day and the 5/2 non-patrol schedule which had an 8-hour day.

The SOA's proposal asks that suspension days be meted out in "hours" instead of days. Thus, if an officer working an eleven and one-quarter (11.25) hour, 4/4 schedule is suspended for two days, the suspension should be for sixteen hours, not for twenty-two and one-half hours. The length of a disciplinary suspension (whether major or minor) is solely within the control of management. However, what is critical is the fairness and consistency of the suspension. Thus, if a certain infraction consistently received a two-day suspension when a patrol officer worked a 4/2 schedule with 8.5 hour work-days, it would be inconsistent to now assess the same two-day suspension for the same infraction to a patrol officer now working a 11.25 hour work-day. Clearly, the penalty has been increased for the same infraction. The meting out of disciplinary penalties in "days' as opposed to "hours" is further complicated by the different lengths of shifts (11.25 vs. 10) for the 4/4 and 4/3 work schedules.

Accordingly, I conclude that, effective February 1, 2009, disciplinary suspensions shall be meted out in "hours" instead of "days." This will allow the Township to maintain consistency in the meting out of disciplinary penalties without regard to the length of the officer's work-day.

The second part of the SOA's proposal is that suspensions be scheduled to allow an employee to work "Jobs-In-Blue" assignments and to work overtime. "Jobs-In-Blue" assignments are jobs that police officers perform off-duty. The SOA contends that officers are deprived of this opportunity when the suspension is scheduled during two different 4-day work cycles, i.e., an officer suspended for more than ten (10) hours (4/3 schedule) or eleven and one-quarter (11.25) hours (4/4 schedule) may be required to serve the beginning of the suspension on the last day(s) of the 4-day work cycle and then complete the suspension on the first day(s) of the next 4-day work cycle. The officer is then still suspended during the four (4) days or three (3) days off-duty and is thus precluded from working any "Jobs-In-Blue" assignments while off-duty, before finishing the remaining days of the suspension.

The Township is opposed to any restrictions on the scheduling of disciplinary suspensions. The Township maintains that it has a managerial prerogative to determine when the suspension should be imposed, taking in consideration manpower needs of the municipality and overtime constraints of the other employees required to fill in for the suspended officer.

The SOA has not met its burden on this proposal. All things being equal, the Township should schedule suspensions on consecutive work days within a 4-day work cycle. However, there is no basis to restrict the Township's scheduling of disciplinary suspensions. A police officer under suspension is not entitled to the benefit of a schedule that enhances

his off-duty employment opportunities. After all, the police officer has been disciplined and it makes no sense to require an accommodation to an officer serving a disciplinary suspension. At the same time, the Township should be mindful that a practice of suspending officers and not scheduling such suspensions within a 4-day work cycle, without legitimate business reasons, could result in additional monetary remedies if the suspension is found to be without merit.

Accordingly, I find that the SOA has not met its burden and its proposal is hereby denied.

Issue 4
Minor Discipline & Departmental Hearings

SOA Proposal & Argument

The SOA proposed the following language be added to the CBA:

> Officers charged with minor disciplinary suspensions, warnings, or other disciplinary offenses not covered by Title 11A of the New Jersey Statutes and/or Title 4A of the New Jersey Administrative Code (collectively "minor discipline") shall receive a departmental hearing, if requested by the officer, under the auspices of N.J.A.C. 4A:2-2.5. No officer who requests a departmental hearing shall be suspended without pay prior to a decision being issued after the departmental hearing is concluded. Minor discipline as defined herein may be appealed through the grievance and arbitration procedures of the CBA.

According to the SOA, the Township has taken a position that it does not have to provide a departmental hearing to officers who receive minor disciplinary suspensions (i.e., 5 days or less). The SOA submits that this position is contrary to law. The Township has taken the position that a hearing is not required for minor discipline under DOP rules and regulations. The SOA contends that the Township's position ignores N.J.S.A. 40A:14-147 which requires an officer to be served with written charges and afforded a hearing prior to receiving a disciplinary suspension.

The SOA submits that the placing of this legal requirement in the CBA will reinforce a right that is enjoyed by the SOA bargaining unit and an obligation that is already imposed on the Township. The SOA asks that I award its proposal.

Township Proposal & Argument

The Township maintains that it has already established that it will execute minor disciplinary procedures in accordance with applicable state law. The Township submits that the SOA has erroneously stated that the Township is not obligated to provide a disciplinary hearing to officers who receive minor disciplinary suspensions. The Township, in its brief, submits that the applicable case on the issue of minor disciplinary proceedings is FOP Lodge No. 1 v. City of Camden, 368 N.J. Super. 56 (Law Div. 2003) wherein the court established that N.J.S.A. 48:14-147 ("Police Statute") applies to minor disciplinary matters involving police officers in civil service municipalities. Specifically, the court defined the essential components of a minor disciplinary hearing. Those requirements are set forth below:

> (1) the officer must be served with a notice of the disciplinary charges in writing; (2) he or she is entitled to disclosure of all evidence supporting the charges; (3) the officer must also be given an opportunity to respond in writing to the charges to provide any information that could raise an issue of material fact; (4) if a review of the evidence supporting the charges and the officer's response indicates that there are no material facts in dispute then the designated hearing officer may resolve the matter on the basis of the written record; (5) in addition, if there is a material fact in dispute the officer is entitled to representation, cross-examination of any witnesses who may be called to testify against him and to present any witnesses on his behalf. City of Camden, 368 N.J. Super. at 64.

Again, in its brief, the Township of Irvington stated its intention to incorporate the required disciplinary procedures for minor disciplinary proceedings involving police officers and afford the following due process to the officers in accordance with State law:

1. The officer must be served with a notice of the disciplinary charges in writing;

2. He or she is entitled to disclosure of all evidence supporting the charges. The disclosure of evidence can be accomplished by summarizing the evidence in specifications that are attached to the notice of the disciplinary charges;

3. The officer must also be given an opportunity to respond in writing to the charges to provide any information that could raise an issue of material fact. I would recommend that the officers be given ten (10) business days to respond in writing to the charges. In addition, a hearing officer should be designated by the Township to review the officers' responses, if any, to the charges;

4. If a review of the evidence supporting the charges and the officer's response indicates that there are no material facts in dispute then the designated hearing officer may resolve the matter on the basis of the written record. In other words, if the officer fails to respond in time or his or her response does not raise a factual issue, then there is no need to conduct a hearing. The hearing officer should make the determination as to whether there are material facts in dispute and issue a written response indicating whether a hearing will be held;

5. If there is a material fact in dispute the officer is entitled to representation, cross-examination of any witnesses who may be called to testify against him and to present any witnesses on his behalf.

6. All minor discipline should be recorded in hours so that it should not exceed forty (40) hours, which has been deemed by the Courts as the threshold of major discipline. The Township will issue a minor disciplinary form for all future actions involving discipline of forty (40) hours or less.

The Township submits that the SOA's argument is moot since it has proposed disciplinary procedures for minor disciplinary proceedings involving police officers.

Discussion

It is apparent that the parties are in agreement that the Township is obligated to provide a disciplinary hearing to officers who receive minor disciplinary suspensions. Accordingly, as I stated in the PBA Local 29 interest arbitration award, I find that the requirements of *FOP Lodge No. 1* are applicable in disciplinary matters and that the essential components shall be incorporated and made part of the disciplinary procedures in

the CBA. I direct that the CBA be amended to include the essential components required by *FOP Lodge No 1*. The following are the essential components as discussed in *FOP Lodge No 1*:

> (1) an accused officer is entitled to written notice of the charges; must be served with a notice of the disciplinary charges in writing; (2) he or she is entitled to disclosure of all evidence supporting the charges; (3) he or she is to be afforded an opportunity to respond in writing to the charges; (4) if a review of the evidence supporting the charges and the officer's written response discloses that there is no material fact in dispute, the hearing officer may resolve the case on the basis of the written record; but (5) if there is a material fact in dispute, the officer is entitled to representation, to cross-examine any witnesses who may be called to testify against him or her and to present any witnesses on his or her behalf. City of Camden, 368 N.J. Super. at 64.

I shall retain jurisdiction in the event the parties fail to agree on the final language to be included in the CBA. This shall be effective February 1, 2009.

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

AWARD

1. **Prescription Copays & Annual Cap:**

   a. The copayments for mail order prescription drugs shall be increased to $10 for generic drugs and to $20 for name brand drugs. This shall be effective February 1, 2009.

   b. I award the following language to be included in the CBA:

   "No officer shall pay more per annum per plan for prescriptions as provided by the State Health Benefits Program, or HNA, whichever is lower."

This shall be effective for the 2008 calendar year. Thus, unless the HNA cap is lower than the SHBP cap, the maximum out-of-pocket expenses for prescription drug copayments in 2008 shall be $1,092. This shall be increased to $1,160 in 2009.

2. **Police Related Shootings:**

The SOA proposal regarding "Police-Related Shootings" shall be denied.

3. **Suspension Days:**

Effective February 1, 2009, disciplinary suspensions shall be meted out in "hours" instead of "days."

The SOA proposal that disciplinary suspensions must be scheduled on consecutive work day(s) within a 4-day work cycle(s) is denied.

4. **Employee Rights, Minor Discipline:**

Effective February 1, 2009, the CBA shall be amended to include the disciplinary procedures required by *FOP Lodge No 1.* I shall retain jurisdiction in the event the parties fail to agree on the final language.

Robert M. Glasson

ROBERT M. GLASSON
ARBITRATOR

Dated: January 22, 2009
Pennington, NJ

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

On this 22nd day of January 2009, 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.

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