

**EMPLOYMENT RELATIONS COMMISSION
CN 429
495 STATE STREET
TRENTON, N. J. 08625-0429**

Docket # LA - 95 - 143

EMERSON BOROUGH
Employer

and

**P. B. A. LOCAL 206
Union**

OPINION

&

AWARD

ARBITRATOR: Daniel J. Hussey, Esq., mutually chosen by the parties pursuant to the rules and regulations of the New Jersey Public Employment Relations Commission.

HEARING: October 10, 1995; December 8, 1995; February 5, 1996;
March 18, 1996; April 23, 1996; May 30 1996 in Emerson, N. J.

APPEARANCES:	For the Borough:	
	William J. Smith, Esq.	
	HOOK, SMITH & MEYER	Borough Counsel
	Owen D. Cassidy	Mayor
	Peter Petrosino	Councilman
	Walter J. Williams	Economist
	Robert McNerney	Real Estate Appraiser
	David Voza	Insurance Expert
	Gary W. Higgins, CPA	Borough Auditor

For the Association:	
Richard D. Loccke, Esq.	
LOCCKE & CORREIA	Association Counsel
Michael Galasso	P. B. A. Local 206
Scott O'Connor	P. B. A. Local 206
Robert H. Werner, Ph. D.	Expert Witness

PROCEDURAL BACKGROUND

Pursuant to chapter 85, Public law of 1977, the act providing for compulsory interest arbitration of labor disputes in police and fire departments and, in accordance with NJAC 19:16-5.6 (b), the undersigned was duly designated as Interest Arbitrator in the above matter. This designation was communicated to the parties and the Interest Arbitrator by letter dated July 18, 1995 from the Acting Director of Arbitration of the Public Employment Relations Commission.

Mediation session were held on October 10, 1995; December 8, 1995 and again on February 5, 1996. Attempts at a resolution of this interest arbitration which once appeared hopeful, ultimately proved to be unsuccessful. As a result, formal hearings were held on March 23, 1996; April 23, 1996 and, by special leave, based on the request of Borough counsel, a brief final session was held on May 30, 1996 for rebuttal purposes.

Although this interest arbitration was begun under the former statute, no formal hearings had occurred prior to the passage and Governor's signing of the revised statute which occurred on January 10, 1996. Accordingly, under its terms, this interest arbitration is governed by the revised statute. At the initial formal session on March 23, 1996 both counsel agreed to waive the application of various time requirements which as of that date existed merely as proposed regulations. (See T I - pp. 7 - 10). Counsel further formally executed a similar agreement.

The record should reflect that at the first session of the formal hearing Association counsel objected to the introduction of certain offers tendered by the

Borough in their proposed Final Offer. Association Counsel based his objections on the failure of the Borough to responsively plead to the Association's Formal Petition for Compulsory Arbitration within the procedural time limits set forth in the regulations. In fact the Borough had not formally replied and the Association asserted it was thus prohibited from seeking to include any issues not properly and timely raised as set forth in NJAC 19:16-5.7(f). The parties were directed to brief the issue. As a defense Borough counsel relied on the fact that these items had been discussed during the course of negotiations and his contention that the PBA clearly had notice of the issues. The undersigned issued an Interim Award sustaining the Association's argument. A copy of that Opinion & Award is attached herewith. As a result of that ruling Items numbered 4, 5, 6, and 7 of the Borough's Final Offer were excluded from consideration. They are listed below under the Borough's Final Offer to reflect the additional economic demands made by the Borough which as a result of the Association's motion have been stricken.

By virtue of the statutory revision to NJSA 34:13(a)1, et seq., by the passage of the Police and Fire Interest Arbitration Reform Act (A-3296, C. 425 L1995) as well as by agreement of the parties themselves, conventional authority is vested in the Arbitrator to decide the issues in dispute.

The revised statute cited above imposes upon the Interest Arbitrator the duty to:

" . . .g. ... 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 explained why

the others are not relevant, and provide an analysis of the evidence on each relevant factor.

(1) The interest 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:40A4-45 1 et seq.).

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

(a) In private employment in general: provided, however, each party shall have the right to submit additional evidence for the arbitrator's consideration.

(b) In public employment in general: provided, however, each party shall have the right to submit additional evidence for the arbitrator's consideration.

(c) In the public employment in the same or similar comparable jurisdictions, as determined in accordance with Section 5 of P.L. c. (C.) (now pending before the Legislature as this bill): provided, however, that each party shall have the right to submit additional evidence concerning the comparability of jurisdictions for the arbitrator's consideration.

[(b) in comparable private employment.

(c) In public and private employment in general.]

(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.

(5) The lawful authority of the employer. Among the items the arbitrator or panel of arbitrators shall assess when considering these factors are the limitations imposed upon the employer by 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 a municipality, the arbitrator or panel of arbitrators shall take into account, to the extent that evidence is introduced, how the award will affect the municipal or

county purposes element, as the case may be, of the local property tax; a comparison of the percentage of the municipal purposes required to fund the employees' contract in the proceeding local budget year with that required under the award for the current local budget year; the impact of the award for each income sector of the property taxpayers of 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 monies have been designated by the governing body in a proposed local budget, or (c) initiate any new programs and services for which public monies have been designated by the governing body in a proposed local budget.

(7) the cost of living.

(8) the continuity and stability of employment including seniority rights and such other factors not confined to the foregoing which are ordinarily or traditionally considered in the determination of wages, hours, and conditions or employment through collective negotiations and collective bargaining between the parties in the public service and in private employment. . ."

The legislature has also included in the revised Act the requirement that arbitrators: "...shall decide the dispute based on a reasonable determination of the issues, giving due weight to (the above factors)...and...indicate which of the factors are deemed relevant, satisfactorily explain why others are not relevant, and provide an analysis of evidence on each relevant factor.."

FACTUAL BACKGROUND

Emerson is a 2.5 square mile town which along with the municipalities of Hillsdale, Montvale, Old Tappan, Oradell, Park Ridge, River Vale, Washington Township, Westwood and Woodcliff Lake comprise what is known as the Pascack Valley Association of Municipalities.

The predecessor contract ran from January 1, 1992 through December 31, 1994.

It contains a two tier wage schedule with all patrolmen over five years earning \$52,591 as a base salary while those with less than five years as of 1/1/94 are on a step system with salaries ranging from \$24,000 through \$46,872. Longevity runs from 1% to 9% over the range of three years through twenty-four years.

LIST OF EXHIBITS

Attached to the Award is a list of exhibits introduced by the respective parties into the hearing record. Certain items, by leave of the chairman, were submitted after the close of the formal hearings and are reflected on the attached list which is taken from the hearing transcripts. Under date of December 12, 1996 Borough counsel submitted settlements of tax appeals involving properties owned by Frieman, R.D. Investment, Midlantic Bank and Bell Atlantic which represented reductions over 1994 through 1996 of \$2.7 million dollars, \$1.174 million coming alone in 1996. Counsel noted the Hackensack Water Company appeal (a/k/a United Properties) whose settlement is evaluated at between \$800,000 and \$1,000,000, remains open. Counsel also submitted the Franklin Lakes - P.B.A. Local 150 '95 through '98 contract with a 3.75% increase in each of the three years.

Under a similar letter dated December 23, 1996 counsel submitted the December 4, 1996 Interest Arbitration Award of Arbitrator J. J. Pierson in Borough of Midland Park, I. A.-96-061, in which he awarded increases of 3%; 3.25% and 3.25% for 1996, 1997 and 1998.

Under date of January 3, 1997 P. B. A. counsel submitted recent arbitration awards of Arbitrators Light and Brent respectively in Lakewood & Lakewood

Superior Officers, IA-95-126 and Montgomery Twp, IA-95-064. In Lakewood matching 4.5% increases were awarded for 1996 and 1997. In Montgomery, 4% and 5% increases were awarded for the same years. This submission also contained wage increases covering 1996, 1997 and in most cases 1998 in ten other units in eight different municipality or county law enforcement units - six of which are in Bergen County. The Bergen County towns (Fair Lawn, Ringwood, Closter, Glen Rock and Ridgewood) settled for an average of 4.37% in 1996 and 1997; and 4.41% in 1998. The actual cost would be slightly lower since two Ridgewood units settled for splits of 2 and 2.5% in the superior's unit and 2/3, 3/2 & 3/2 in the rank & file unit.

FINAL OFFERS OF THE PARTIES

The Final Offer of the P. B. A.,

Economic Issues

1. Wage Increase - the PBA has proposed a 5% increase effective each January 1 of the four contract years.
2. Clothing Allowance - the PBA has proposed a \$100 increase in each year of the four year contract.
3. Educational Incentive - the PBA has proposed an extension, an increase of the current \$18.00 per credit entitlement to a \$50.00 per credit entitlement.
4. Longevity improvement - the PBA is proposing a senior officer differential which would take effect upon completion of 20 years of service. This would be calculated as one-half the value of the rank differential. Therefore, a patrolman with 20 years of completed service will receive an increase equal to one-half the difference between the patrolman's base rate and the sergeant's base rate. Sergeant, upon completion of 20 years of

police service will receive an increase calculated one-half the difference between the sergeant's base and lieutenant's base, and so on. The definition of public service in this proposal and with reference to senior officer differential is the definition incorporated in the Police & Fire Pension System. There is a statutory definition and case law definition made to that statute which was adopted as part of the PBA proposal. The senior officer differential is meant to be included with and made a part of regular compensation and used for all computation purposes.

Non - economic

None.

The Final Offer of the Borough

Economic Issues

1. Three (3%) percent increase in compensation for two (2) years.
2. First year starting salary reduced to \$20,000.00
3. Patrolman steps increased from six to seven with present compensation package to be kept at the same level plus any contractual increases extended over seven (7) rather than six (6) years.
4. Sick leave reduced to ten (10) days during the first year and twenty (20) days thereafter.
5. Sick leave cumulative up to one hundred (100) days.
6. Terminal leave - Sixty (60) days terminal leave after twenty-five (25) years of service.
7. Medical Coverage modified to a 20 / 80 co-pay.

Non - economic

None.

SUMMARY OF WITNESSES' TESTIMONY

Association's Witnesses

Ptl. Michael Galasso. Officer Galasso, a 26 year veteran of the Emerson Police Department, presented through his testimony statistics documenting some 20,494 calls the Department responded to in 1994 and a similar number for 1993. The force is comprised of eleven patrolmen, three sergeants, an equal number of lieutenants and a captain. On cross examination Galasso acknowledged he had no records or knowledge as to actual number of man hours for either year or overtime hours for that period. The witness opined that the department is understaffed and requires back-up from neighboring towns at least a dozen times a week - much more often in his opinion than the reverse.

When called on rebuttal Galasso presented miscellaneous information he had obtained from the Borough Clerk and his own investigation - specifically that in 1995 there were 4,314 registered voters in the Borough; 615 of whom voted in the spring 1996 school board budget approval referendum; 733 of whom voted in the April 1995 school board budget referendum and 751 of whom voted in October 1995 to approve a 5.5 million dollar, 15 year bond issue presented by the school board. He testified that there are 35 full time borough employees and that a 54 home development on Forest Avenue is nearly complete; a 13 home project has been approved but no construction has started and ManorCare, a nursing home, is in the approval process. On cross Galasso admitted he had no idea when or if the nursing home would ever be constructed; when the 13 home development would even turn dirt to start the project and whether any or all of the 54 Forest Avenue homes are already in the tax ratable base.

Robert Werner, Ph. D. Werner, qualified as an expert on municipal finance, was called as a rebuttal witness by the Association. After citing the numerous financial records he reviewed in preparation for his testimony, together with having heard the testimony of the Borough's four expert witnesses, Werner identified an actual (albeit unaudited) surplus of \$716,949 going into 1996, of which

the Borough chose to utilize \$585,000 of that amount leaving the actual \$131,949 surplus cited by Borough Auditor Gary Higgins. Werner made the point that, as presented by Higgins, the surplus represented 2.2% of the budget while the \$716,949 figure yields a percentage surplus of 12%. While acknowledging that allocating the \$585,000 sum to the coming year's budget is a management decision, Werner argues the actual surplus remaining as of year's end should be viewed as a "snapshot" and should be compared each year at that time which then results in a more rational basis on which to assess an entity's fiscal condition. Given the snapshot of this \$716,949 surplus Werner takes exception with Higgins' claim that the Borough has a very low ratio of surplus to budget. Werner claims that his review of past budgets produced comparable surpluses and equally high percentage utilization of surpluses for the succeeding years budget.

Werner reviewed MRNA (miscellaneous revenues not anticipated) figures from the past three budgets and notes that a consistency is shown in the Borough benefiting from such funds which, he projects, "if the trend continues" the Borough could expect \$40,000 to \$50,000 MRNA funds each year. Werner also looked favorably on the Borough's record of regenerating surplus.

The expert continues his assessment of other favorable indicia such as the high tax collection rate; history of high percentage of lapsing of unspent budget monies; the existence of an appropriation reserve for police salary increases; a budgeted 7.4% police wage increase into 1996; an upward increase in assessed valuations; and a relatively low tax rate increase. His testimony on his conclusion that the borough was "undercapped" is discussed more extensively below.

On cross, while admitting that he can not actually predict or guarantee any future surpluses, Werner continues to argue that prior history strongly supports his opinion that they will exist in the future. He further acknowledged that certain MRNA funds may be "one-shot affairs" that can not be relied on to repeat. He also admitted the municipal ratable increase was being out paced by the tax rate increase.

Borough's Witnesses

Walter J. Williams. Williams, an M.B.A. from Amos Tuck Business School at Dartmouth, and a self-employed economist and consultant, testified that based on his research he concluded the Borough's 3% increase offer was "reasonable under current circumstances." He claims that 3% for 1995 "is more than was realized - - - in the local area"; is "substantially above what has been realized in wage settlements over the last year in bargaining units." He asserts that based on his analysis, the 3% offer would equate to a 5.9% cost to the Borough when the percentage is applied to salary and benefits. His analysis continued and was documented in Exhibits presented in the record.

On cross examination Williams admitted the 2.1% increase he cited as an average for police officers in Bergen and Passaic counties for 1994 to 1995 could not be verified since it represented his reliance on the increase shown in a Department of Labor publication. He noted he did not conduct the original survey, could not vouch for its accuracy, and his request for information as to who was included in the survey was denied. He further acknowledged he had no independent knowledge of any pay rates for any state or local police or of any specific contract settlements. He further acknowledged that when his original cost estimate of 5.9% to the Borough for its 3% offer is revised to factor out overtime, holidays, and Sergeant's differential the actual cost is revised down to 4.5%.

Robert McNerney. McNerney is a licensed real estate broker and a certified appraiser currently working for the Borough on, among others, a unique set of tax appeals filed by Hackensack Water Company involving 150 acres subject to an environmental use restriction. The assessment of these lots declined from \$81,000 to \$25,000, per lot. McNerney discussed other pending significant tax appeals all of which will probably result in significantly reduced ratables. McNerney estimates the totality of monies the borough will have to refund or will lose in lost revenue over the years 1992 through 1996 amounts to \$896,146. (T II; p173) (Exhibit B-5, p.1)

David Voza. Voza, a risk manager for Emerson, testified that Emerson has a "rich benefit plan" compared to surrounding towns. The plan has no co-pay and 100% coverage after a deductible. The witness discussed comparison charts introduced into the record. On cross examination he admitted some of the comparables were not Pascack Valley Towns but he was asked nevertheless to include them for comparison by Borough officials.

Gary Higgins. Higgins, a C.P.A. and a R.M.A., is the Borough auditor. In accessing the Borough's budget, Higgins noted that no anticipated new revenues exist; the tax levy had climbed exceedingly slowly for a 2.6% total increase over the past five years; tax levies will, of necessity, increase as a result of that slow growth contrasted with rises in municipal costs; and surplus regeneration will be difficult. He also notes the Borough has lost interest income with the State elimination of the deferred school tax fund. In summary he notes that as a result of these numerous factors the Borough will be faced with only two viable options - cut expenditures or raise taxes. With respect to the pending tax appeals Higgins has allowed for a one time million dollar pay-out which equates to a \$386 increased tax bill on the average \$165,000 home.

On cross examination Higgins acknowledged that from 1992 to 1996 the ratable base increased some eleven plus million dollars; towns Higgins works in have experienced declining - not increasing - tax bases; he is aware of some developments awaiting construction in the Borough; the tax collection rates have steadily increased over the past four years; and that \$49,00 in 1995 and \$50,000 in 1996 was budgeted for salary increases.

Borough counsel again called Higgins as a rebuttal witness after Dr. Werner's testimony. In rebuttal Higgins disputed Werner's "snapshot" view of surplus contending rather that the net surplus available after dedicating a portion to the next year's budget as anticipated revenue is what should be considered "available" as opposed to the entire actual \$717,000 surplus. He disagrees that any pattern exists as to revenue regeneration in Emerson and concludes that it is fairly difficult to predict

regeneration for 1996. He argues the same comment applies even more so to MRNA and at best MRNA funds are inconsistent and unpredictable. His comments as to lapsed reserves are similar. He calculates that the existing reserve as of 5/30/96 (\$89,000) less anticipated retroactive pay for the Police Department of \$36,000 would leave approximately \$50,000 - much less than Dr. Werner estimated.

POSITIONS OF THE PARTIES

The Position of the Borough

In his initial brief, Borough counsel argues the following points in support of the adoption of the Borough's Final Offer:

1. Despite Judge Stanton's comments in Fox v. Morris County Policemen's Association, 266 N. J. Super 501 (App. Div. 1993) that arbitrators had failed in the past to analyze the financial impact of an award on the public and that the parties were too concerned with solely presenting comparability figures without analysis or explanation, the P. B. A. in the present case seems determined yet again to attempt to rely on these too narrow grounds. Counsel notes that beyond forty to fifty current PBA contracts, the Association relies solely on Dr. Werner's testimony and the Borough's "perceived ability to pay" the P. B. A.'s demand. Counsel warns that, as our Supreme Court has held, the mere consideration of whether a town has the ability to pay does not equate with the statutory requirement that financial impact be considered.

2. The testimony of the PBA's expert witness, Robert Werner is worthless and lacks any value toward determining the financial impact of the

respective offers on the governing unit, its residents and taxpayers. While it is true that Emerson has had and will continue to have year end lapsed funds which will become surpluses sufficient to pay the PBA increase, so too will virtually every other municipality as Werner himself admitted. This conclusion fails to assist in the determination the arbitrator must make as to whether a three (3%) percent or a five (5%) percent increase is reasonable and equitable. Moreover the mere fact that the ability to pay may be there does not equate with the conclusion that it must be used to award the higher last offer. These surpluses provide flexibility and a cushion for the municipality for the next year. To utilize it and thus eliminate this cushion would be reckless and a violation of municipal accounting principles.

3. Counsel cites a chart comparing Emerson with seven surrounding, comparable municipalities (Harrington Park, Haworth, Oradell, Park Ridge, River Edge, River Vale, Westwood) and asserts that when total benefits combined with top level patrolman salary is compared for 1994 Emerson ranked first among the others. Comparison of remaining PBA contracts submitted by the PBA has little or no value in attempting to determine a fair, reasonable and equitable salary increase since they predate the Supreme Court decisions in Borough of Hillsdale, 137 N. J. 71 (1994) as well as the passage of the Police & Fire Interest Arbitration Reform Act (A-3296, C. 425 L 1995). Counsel thus argues that such contracts - even those resulting from settlements - were unfair and unreasonable but were accepted by towns rather than face the unfair and outrageous decisions granted by arbitrators who focused too much on comparability with PBA's and not with the impact on citizens of these municipalities.

4. Counsel highlights the recent "reasonable" Borough of Westwood settlement which provides for three 4% increases over the 1996 through 1999 period. Counsel notes such an increase is far in excess of that received by typical income earners in the Bergen - Passaic County area as testified to by Economist Walter Williams. Counsel requests that intense consideration be given to the testimony of Economist Williams particularly in light of the impact of the proposed increases on the ability to pay of the taxpayers and residents of Emerson. This testimony, it is asserted, at least as to the cost of living criteria is concerned, establishes that a 1% to 2% increase is reasonable; the Borough's 3% offer is very generous. When the testimony of the potential liability as to pending tax appeals is considered, the 3% offer can only again be concluded to be extremely generous.

In counsel's brief, request was made to supplement the record with copies of Stipulations of Settlements as to these pending appeals as well as copies of a recent three year 3.75% settlement in Franklin Lakes. In conclusion counsel argues that more than ample evidence was introduced to justify the awarding of the Borough's final offer of 3% increases for 1995 and 1996.

The Position of the P. B. A.

In his post-hearing brief PBA counsel offered the following arguments in support of his request that the PBA's final offer be selected under the statutory guidelines:

1. The Emerson Department is active and efficient as shown by the fact that the Municipal Court generated revenues 56% above what was anticipated in

1995. Police Departments traditionally are responsible for a majority of Municipal Court fines and this offers but one of the ways productivity can be measured. Testimony from Patrolman Galasso and a review of Exhibit P-1 which documents the number and nature of every call handled by the Department further establish the productivity of the Department. His further testimony concerning his personal experience in observing the extensive use of out-of-town back-ups supports his conclusion that the department is undermanned. All of this testimony went unchallenged by the Borough. Based on this productivity achieved in the face of understaffing it can only be concluded that the patrolmen should receive competitive compensation,

2. Counsel charts seven comparable departments (Westwood, Oradell, Paramus, Harrington Park, Haworth, Hillsdale, and Washington Township) and argues that as of 1994 Emerson trailed their average by over \$2,438 for the base wage rate. He asserts a 10.1% increase is required to merely meet the comparable's average for 1995 while the PBA seeks a modest 5%. Switching to a comparison of gross compensation (senior officer differential and longevity benefits), counsel asserts Emerson is among the worst of the comparables cited in charts dealing with longevity plans; education incentive plans, clothing allowance and court recall benefits.

Counsel notes that while there are few 1997 settlements, nevertheless there are numerous comparable communities which have settled for 1995 and 1996 and the average of these settlements exceed the 5% final offer requested by the Emerson PBA. In Chart #6 counsel lists 38 departments or governmental law

enforcement units which purport to show a 5.347% and 5.080% average wage increase for 1995 and 1996. Based on these figures counsel argues that although the PBA will be even somewhat further behind these comparable departments if its final offer is awarded it will be much further behind its colleagues if the Borough's final offer should ever be awarded. The PBA purposely limited its demand for an increase in light of its request for senior officer differential, increased clothing allowance and educational incentive improvement.

Beyond police comparables the PBA points to the Emerson Education Association's voluntary settlement with the Board of Education which it contends equates to an 8.15% increase. Even those at maximum step will still average a 4.4% increase. The PBA claims the Borough's attempt to square the wage shortfall by the cost of health benefits through witness David Vozza produced inconsistent answers as to the make-up of the comparables. Conversely the PBA's list of comparables included an extensive listing of comparable communities supported by the actual contracts, awards or settlements entered into evidence which far exceeded the Borough's supporting evidence.

The PBA's brief also dismisses the testimony of the Borough's financial witness, Walter J. Williams, based primarily on his reliance on surveys he did not conduct and accordingly could not attest to as to their accuracy. Counsel argues that since his admission relates directly to his reliance on a survey purporting to claim a mere 2.1% 1994 to 1995 wage increase for public law enforcement sector in Bergen and Passaic Counties, his final conclusions are not to be entitled to any weight. Counsel cites Arbitrator William Weinberg's oft-cited summary from his decision

in Ridgewood & PBA Local 20, (PERC Docket # IA-93-141) arguing most weight must be afforded comparison of closely related public law enforcement groups much more so than private or remote similar units.

3. Continuing in his review of the statutory criteria counsel points to the testimony of PBA's municipal finance expert Dr. Robert Werner that Emerson faced no cap restrictions in light of the fact that "there is clearly very significant cap banking..." to the effect that Emerson could pay the 5% sought in each of the four years requested (1995, 1996, 1997 & 1998) within its cap limitation.

4. The PBA next argues that based on the strong tax collection rate and a growing tax base the increase sought would be barely perceptible on the tax levy and in turn on the citizens and taxpayers. Emerson's Chief Financial Officer conceded a steady growth in the tax base from 449 million to 460 million from 1992 through 1996 and an ever increasing tax collection rate over the same period of time running from 96.85% to 97.85%. Counsel analyzes the budget and argues that of a theoretical real estate tax bill of \$3,500 on an Emerson home owner \$910 deals with municipal government; \$263 of which relates to the police budget producing the actual relationship between a police wage point and the total tax levy of .000754% which demonstrates any impact from wage increase will be imperceptible to the average citizen and taxpayer.

Counsel points to a line item captioned "salaries unclassified" in the amount of \$50,00 for 1996 and \$49,000 for 1995 which the Borough Auditor acknowledged was available for salary increases together with a further acknowledged \$51,000 savings resulting from revised contributions to the Police &

Fire Retirement System. These together with additional \$22,500 generated by the municipal court are funds pointed to by counsel that could cover the requested wage increases without impacting on the citizens of Emerson.

5. Under the statutory cost of living criteria counsel simply argues that as these officers did not receive double digit wage increases when inflationary times produced double digit cost of living increases, neither should they be limited to a low cost of living increase found today. Counsel argues as much attention should be paid to the prevailing rates of wage increases discussed in the comparability arguments as borough counsel contends must be paid to the cost of living. He further argues that a review of these "area standards" discloses that the Emerson patrolman's compensation falls far short of that standard and it therefore supports the adoption of the Association's final offer.

In conclusion counsel argues that the proofs it introduced supports its final offer of a four year, 5% per year increase with the educational incentive and clothing allowance increases requested and, most importantly, the creation of a senior officer differential.

The Borough's Reply Brief to the PBA Brief

In his reply brief Borough counsel responds to the PBA brief on the following points:

1. The PBA's reliance on the fact that Municipal Court realized revenues were 56% greater than the anticipated revenues for 1995 to prove this unit is "active and efficient" is misplaced. Even granted the figures it neither proves this

department is more efficient and active than other departments nor does it justify a 5% wage increase over a 3% wage increase.

2. The anecdotal testimony of Patrolman Galasso fails to establish that the Emerson police work any harder or are any more productive than any other departments. There simply was nothing to substantiate such claims and accordingly nothing for the Borough to respond to in rebuttal.

3. The PBA's brief relies on faulty comparisons in an attempt to justify the increases it seeks. The comparisons are selective in that they omit the cost of medical benefits which, if included, would reverse the Emerson patrolman's standing in these comparability assessments. Omitted is the fact that they work fewer hours in the year and enjoy medical benefits which are substantially above the average. The awarding of the Borough's final offer would also reverse the poor standing the PBA seeks to argue through these comparisons. Finally the PBA's inclusion of the Borough of Paramus skews the result since Paramus is not a truly comparable community.

4. Counsel dismisses the PBA's request for a Senior Officer Differential provision and an increase in longevity arguing that each is merely an attempt to obtain additional salary. The PBA failed to present any justification for the senior officer differential and argues that the overall package of those municipalities cited with the senior differential are comparable with Emerson's overall compensation. The chart utilized in the PBA brief in the longevity argument is inadequate for anyone to properly judge overall compensation.

5. No substantiation has been introduced to show that either clothing

costs or college credits have increased so as to offer any justification for the increases sought here by the PBA. More importantly the question that needs be asked is whether the taxpayers of Emerson who are paying these increases are experiencing the same type of increases in their employment. Counsel argues they are not and also argues that the PBA in attempting to justify its request on the basis of comparability naturally cites departments with higher levels of benefits in these categories again without making overall comparisons of all benefits.

6. Comparability of salary increases offered by the PBA is also alleged to be distorted since those cited were all awarded or settled prior to both the Hillsdale and Washington Township decisions and to the revised interest arbitration statute. Counsel for the Borough emphasizes the 1996 Westwood settlement of "four four's" and Franklin Lakes of "three - three point seven-five's". Counsel reviews each of the nine comparables listed on Chart 6 in the PBA brief and distinguishes each case by arguing effective dates of increases or background to blunt the perception the PBA attempts to create by offering raw data of the respective department's increases.

7. Counsel again defends its believe that Paramus is not truly comparable and accordingly should not be used by the parties. Moreover it is urged that the trier of fact reject the PBA's assertion that the greatest weight should be placed on comparability with public and regional law enforcement agencies. Counsel demands that the question that has to be answered and which the PBA has failed to convincingly address is why citizens who have enjoyed less than three (3%) increases themselves in salary or cost of living should now be required to fund a 5% increase for this department.

8. Counsel reviews the history of cost-of-living increases over recent history and strenuously argues that the PBA is simply not automatically entitled to equal or better wage increases. The majority of the population does not receive comparable increases and nothing justifies any automatic finding that the police should receive the same.

In closing counsel argues that a review of the statutory criteria supports the awarding of the Borough's 3% and 3 % final offer for 1995 and 1996. Such an award it is suggested will reflect a review which has properly considered the cost of living and salaries awarded in the private sector as the courts have demanded arbitrators refocus their analysis to and away from the artificial results of local arbitration decisions.

ANALYSIS & DISCUSSION

Of the eight statutory criteria charged to be reviewed in an interest arbitration the following two are of relatively slight import in the instant case.

Stipulation of the Parties. No substantive stipulations were entered into by the parties.

Continuity and Stability of Employment. All generalizations have some basis in truth. The common belief of stability of employment in uniformed services is just such a generalization that has been well founded in history. In this case the spectre of the loss of jobs was never raised by the Borough as an argument against the final offer sought by the PBA. While borough counsel vigorously argued against both the length of the contract and the compensation sought by the

Association, no argument predicting the loss of positions was raised.

Lawful Authority of the Employer. The Association's expert witness, Dr. Robert Werner, testified that Exhibit P-73, (Sheet 3c of the 1996 municipal budget) shows that the Borough was "undercapped", i.e. it had budgeted to spend \$780,666 less than the applicable 3.5% index rate the cap calculation allowed in 1996. Note was made in Dr. Werner's own words that "...there is clearly no cap problem here and there is clearly very significant cap banking...." (T II - pp. 282 et. seq.) and his conclusion "...there is cap flexibility" (T II - pp. 284). On cross examination Werner was asked specifically with regard to the full 5% cap limit the Borough has authority to spend to under the Cap the following -

Query: "We have the funds to pay the full five percent in the bank" ?

Reply: "Yes".

No rebuttal testimony was offered to contest Werner's conclusion. A review of the testimony of the Borough Auditor, the Borough's expert witness, the Association's expert, Dr. Werner and the exhibits relating to the budget and cap calculations lead to the conclusion that, even assuming arguendo an award of the PBA's final offer, payment could be accomplished by the Borough within its lawful authority. There appears to be no serious challenge to Werner's Cap conclusion. Specifically between the respective cap limits for the years in question, the "undercapping", cap banking and the right of the Borough to go to a 5% cap rate by local resolution of the governing body, funding of the maximum award could be accomplished. In summary no cap prohibition exists which would prevent the

awarding of the higher final offer.

Interest and Welfare of the Public.

The thrust of one of the Borough's main arguments which has applicability under this and other statutory criteria is the twofold effect a percentage increase would have over the increases being received in private industry by the taxpayers - the very citizens of Emerson who must foot the bill. In brief they will be paying for a wage increase of a public servant that they themselves are not receiving in their own job. The mere fact that a municipality has the power to pay and in turn to raise taxes to fund such increases can not be considered in a void. It must be considered along with the ability of those taxpayers to underwrite such increases.

Conversely the Association argues that the increases it argues for will fairly compensate a productive force that provides service to the citizens of Emerson. The argument continues that the interest and welfare of the public must not be viewed narrowly as merely what it will *cost* a citizen, but rather must be viewed broadly as to what the public *receives* from a dedicated, service oriented, under-manned, over-worked police force.

This particular statutory criteria is a vaguely worded, all-encompassing grab bag which provides both sides with the opportunity to cite almost anything in support of its final offer or against the other parties final offer. Frankly while the Association offered testimony from a well-versed veteran officer which portrayed the activities of the force it is impossible to conclude definitively that such evidence proves conclusively that the department is an active and efficient force. The

Association's evidence that the Municipal Court's 1995 realized revenues exceeded anticipated revenues by 56%, other than identifying a potential source of funding, is insufficient in and of itself to carry the day for the PBA under this category.

However note should be made that no rebuttal was offered and no superior officer testified at all on any subject testified to by a veteran patrolman. Beyond generally observing that in theory a force that feels adequately compensated will perform well contrasted with a force with low morale, very little else can be said to have been proven by the Association.

The same is true for the Borough. In brief the testimony of Economist Walter Williams while somewhat interesting and informative was not totally convincing with respect to the statistical basis on which he sought to premise his conclusions. Frankly a significant part of his conclusions were rendered worthless by his reliance on U. S. Department of Labor statistics which, on their face, seemed incredible. Williams had no option but to admit that he could not vouch for them and many of his conclusions were premised totally on these figures which he had been required to accept at face value. His failure to go beyond such reports and his obvious uncertainty as to the workings of ancillary wage and benefit costs again rendered further conclusions he reached worthless. As general background and commentary on the economy his testimony, as noted, proved interesting and his current view of the economy (e.g. "New Jersey's economy already is in recession-nearly the weakest in the country -close to near-depression status.") [Ex B-4; p. 8] proved to be, if anything, interesting.

In summary neither side presented arguments which proved to the

exclusion of the other that the interest and welfare of the public could be said to be definitively better served by the awarding of their respective final offer. In summary the Borough failed to establish that the awarding of the Association's offer would have any recognizable detrimental effect on the interest and welfare of the public beyond the mere generality that it is better to spend less than more. While neither side can exclusively count this round on their card the evidence offered has served to lead to the final conventional award issue below by at least raising topics to be considered that are essential to a proper deliberation in this matter.

Cost of Living.

While statistically there is little doubt but that the cost of living is far closer to the Borough's final offer than to the Association's, counsel's arguments nevertheless offer other insights that must be viewed before concluding that the mere mathematical proximity of the Borough's numbers warrant the adoption of its final offer. However despite Association counsel's argument that the low cost of living increases should not be given great weight or be considered as controlling, the fact is that the low CPI remains a fact of life when certain of the remaining criteria are evaluated. Eventually despite significant criteria favoring an Award very near the PBA final offer, the current CPI served to temper that conclusion and to assist in reaching the actual wage increase set forth below in this Award.

Comparability.

Although recent court decisions have attempted to instruct arbitrators and

the parties to refocus or to eliminate over reliance on the criteria of comparability, nevertheless it remains one of the most critical criteria that requires intense study and prolonged evaluation.

The most weight given within the areas of comparability must be to officers similarly situated in towns as comparable as possible. Both parties tend to spin the results of the comparability arguments they make by skewering the results where possible by the addition or deletion of certain towns. For example here Borough counsel objects to the listing of Paramus based on the entirely different demographic and commercial make-up of the town while Association counsel defends the choice based on the fact that it is a neighboring community which shares a border with Emerson. It is apparent to everyone that Paramus is either favored or disfavored as a comparable because of the fact that it has the highest paid force in the county. In his argument, Association counsel seeks to rely on the cross examination of David Vozza, Emerson's risk manager, as to the rationale for his selection of the towns he included in his health benefit cost comparability chart and Borough counsel's admission in colloquy between counsel that "there is no methodology" in Vozza's choices since he chose some from the Pascack Valley and some because they were geographically adjacent. The undersigned is well aware of each counsel's objections to opposing counsel's list of comparables. Guided initially by geographics, demographics, and other relevant criteria a generalized review of the list of comparables has been made. It is clear from that review that these comparables favor the range of the Association's offer over that of the Borough. It is concluded therefore that with other factors yet to be considered the Association's overall wage

and certain benefit proposals prevail at this level of comparability.

Several individual contentions support this conclusion. Among these the following are noted. PBA counsel contends an Emerson patrolman is \$2,438 or 4.64% behind the average of his list of seven bordering towns comparables for 1994 - (PBA Brief, p. 11). Borough counsel himself cites the Borough of Westwood four year settlement settlement at 4% a year as being a "reasonable settlement in light of percentages awarded by Arbitrators toward the end of 1995" (Borough Brief, p. 4). Similarly counsel cited the Franklin Lakes three year settlement at 3.75% increase from 1995 through 1998 (12/12/96 additional submission; p. 1) for the undersigned to consider. PBA counsel's 1/5/97 submission of recent settlements and awards [albeit only 6 of the 12 are from Bergen County] showing average increases for 1996 at 4.39%; 4.479% for 1997 and 4.527% for 1998. Culling out the Bergen (one Passaic) awards or settlements from this list discloses approximately a 4.32% average for 1996 or a 3.93 %, cost corrected for split increases; a 4.46% average for 1997 or a 4.07 %, cost corrected for split increases; a 4.41% average for 1998 or a 3.97 %, cost corrected for split increases. The Association also presented Chart #6 at page 18 of its brief which included some 38 towns. Borough counsel disputed several of those listed as being "inaccurate and misleading" for various reasons including delayed payments, splits, and tail end years of contracts negotiated in healthier economic times. As it appears in the chart the average settlements and awards for the 38 towns, all but a few in Bergen County, show average increases of 5.347% in 1995; 5.080 % in 1996 and 4.722% in 1997. Correcting for the actual cost of the ten or so split settlements these figures equate as follows: 1995 at 4.94%; 1996 at 4.59%; and 1997 at 4.62%.

When the level of comparability extends to private employment and the private and public sector in general, the offer of the Borough prevails. Note is made however of the Emerson Board of Education's recent settlements with its teaching staff represented a base increase of 4.4% to a calculated 8.15% in the maximum pay rate for 96-97 year to the succeeding academic year at the maximum BA step. This increase clearly favors the PBA's offer. While the Board of Education settlement is certainly not dispositive of the conclusion as to comparability, it nevertheless proved to be influential in the decision ultimately reached in excess of the Borough's offer involving as it does the largest employer in the town whose budget clearly has a much greater impact on Emerson's citizens. There is ample evidence in the record as well as arbitral notice having been taken from other sources in the public domain and in material reviewed in this field to establish that three per cent offer of the Borough is the more reasonable when the comparability is limited to comparable employment in the private sector (if any true comparison can ever be made between a public law enforcement official and a private security force). The Borough's offer also prevails in a general comparison with non-law enforcement public and general private employment.

The comparability with neighboring, law-enforcement units must be given substantial weight. As a result of that weight and the teacher's increases, the conclusion that the Association's offer prevails overcomes the conclusion that the Borough's offer prevails in the public and private employment in general. Consequently this criteria supports the PBA offer to the extent that the actual wage increase awarded is above the Borough's final offer.

Overall Compensation.

There is no doubt that the PBA at least has a broad spectrum of benefits which stands them in good stead. All one need do is to review PBA counsel's arguments concerning the inadequacies of their benefit plans vis-a-vis other comparable departments to gauge the full range of benefits the Association enjoys from health care coverage through longevity to clothing allowances and educational incentive benefits. While mindful of the Association's claims about the relative poor level of certain benefits which is contrasted with the Borough's assertion of its benefit-rich health insurance, the conclusion is reached that the position of the Borough prevails within this category. Although almost self-evident in these days of acute awareness of benefits the obvious must be noted that these levels of benefits enjoyed by the police exceed or at the least compare most favorably with the private sector.

Financial Impact.

One of the perceived benefits of the conventional interest arbitration method is that an arbitrator can carve out what he or she deems to be a most equitable and reasonable result. This case offers perhaps no better example of existing facts which mandate such a result. The overall economic condition of Emerson can be described as healthy. The existence of the pending tax appeals presents the most serious problem facing the town. The Borough has planned for that contingency. Regardless the impact will surely be felt both by way of lost revenues and potential retroactive payments. Aside from this problem the tax base shows small but constant growth. The tax collection rate has increased for the past four years and can

be described as enviable.

The Borough has also planned for salary increases. The 1995 amount reserved is \$58,291. The entire full time employee roster is limited to 35 with 18 of those being employed by the police department. According to the Borough Auditor for the first year a 2% wage increase for this unit would amount to \$25,000 - slightly more than a half a tax point. (T III - p. 9), Association counsel notes that of an annual \$3,500 tax bill - \$910 of which is responsible for the entire municipal tab and of that \$263.90 funds the entire Police wage & salary account. Counsel asserts that a good portion of that \$263 is taken up with non-bargaining unit salary, wage and operational expenses and as a result the actual impact of a wage point is less than \$2.63. In maintaining that the impact of its suggested award is almost "imperceptibly small", counsel relies on his estimate that the relationship between a police wage point and the total tax levy is only .000754%.

To further support his argument that the increase sought if granted would be imperceptible counsel points out that the Borough realized a saving of \$51,256 from reduced pension assessments in 1995; municipal court revenues exceeded the anticipated income by \$22,500; and \$49,000 and \$50,000 had been appropriated for these salary increases for 1995 and 1996 respectively.

While the increases offered by the Borough and sought by the PBA certainly will have financial impact the above items provide a blunting of the impact. The final award issued below allows a reasonable increase to be provided which the undersigned concludes will not have a significant detrimental effect on the Borough's budget. Little, if any, of the PBA's assertions as to the minor impact the

requested increase would have on the budget have been refuted. Nothing in the record exists which establishes that the awarding of any final wage increase in excess of its offered 3% would have a significant detrimental financial impact so as to preclude an award in excess of the 3%. At the same time, ever mindful of the tax appeal burden, the increases awarded were intended to provide the most reasonable outcome in this interest arbitration by awarding figures on balance, closer to the Borough's final offer.

DISCUSSION

Due weight has been given to all of the statutory criteria in varying degrees as warranted and as discussed within each sub-heading above. Based on the record put before me I have concluded that the total net economic change for each year of the agreement which I have awarded below is reasonable under the eight statutory criteria set forth in NJSA: 34: 13A-16g.

Competing Offers of the Parties.

Term of the Contract. This award is being issued in the third year of a potential four year contract. The award shall be for a term of three and a half years to run from January 1995 through June 30, 1998. To limit the contract to the two years - 1995 and 1996 - as the Borough proposes would be unreasonable both economically and from the point of view of the parties relationship. Were the two year term granted the parties would soon find themselves back in negotiations for a new contract in a unit with only thirteen employees. The process is far along

enough at this time to project for the balance of this year. The increase awarded for the first half of 1998 is modest enough to place both parties in equipoise for negotiations to cover the balance of that year and contract years to come.

Wage Increase. After an extensive review of the documentary evidence supplied by the parties, including sixty some odd contracts; summaries of wage settlements and interest arbitration awards in Bergen, Passaic counties and throughout the state; the entire overall economic report from Borough expert Walter J. Williams, pertinent assessment of the Emerson budget from the Borough auditor and the Association's expert, together with other miscellaneous exhibits, it has been determined that the most reasonable wage increase to apply to this period of time is as noted:

1995 4.5% 1996 4% 1997 3.5% 1998 2% (1/1/98 through 6/30/98)

In determining the most reasonable wage increase to be awarded the financial impact, comparability, cost of living, interest & welfare of the public, overall compensation, lawful authority criteria proved most relevant and were extensively evaluated in reaching the wage increase awarded. The Borough Auditor offered the estimate that a 2% increase in the first year of the contract would effectively cost approximately \$25,000. Based on the undersigned's calculations the cost of the respective final offers against the wage increases *alone* as awarded are as follows:
1995 and 1996: Emerson = \$47,268; PBA = \$79,300; Award = \$68,563. If an additional

third year were to be premised on the Borough's offer at 3% the difference over those three years as to the cost of wage increases alone would be as follows: 1995, 1996 and 1997: Emerson = \$95,486; PBA = \$161,265; Award = \$133,452. Due heed has been paid to the fact that these results do not encompass benefit cost increases.

Based on the testimony of the PBA's expert, the Borough's auditor and a review of the existing budgets the impact of this award is deemed reasonable. Again these figures have not factored any rollover effect. Top patrolman's salary as of the end of 1994 was \$52,591. Under the increases set forth in this Award he would progress to \$54,958, \$57,958, \$59,156 and finally \$60,339 as of January 1, 1998. These figures appear to be most reasonable when weighed against the top patrolman's salaries in comparable and adjoining towns. In effect from a salary comparasion he would be paid less in 1998 than patrolmen were earning in 1996 in Paramus, Wyckoff, Waldwick, Oakland, Mahwah, Rochelle Park, Demarest, Norwood, Ho-Ho-Kus, and Midland Park. In a comparasion with those five Pascack Valley Towns whose contracts were introduced, the Emerson patrolman will earn less than he would in four of the towns in 1995 and 1996.

While note was taken about Borough counsel's comparasion of an Emerson patrolman's relative position with these and other municipalites when health benefits are cossed into the mix, the final analysis does not change that the Award set forth below is the most reasonable outcome.

As noted there were no stipulations between the parties and as described the continuity and stability of employment was never made an issue by the parties nor did it deserve such status under the present set of facts.

The Association's Final Offer.

Clothing Allowance. Counsel has charted some 20 odd towns and the clothing allowance paid within those towns. The average compensation paid is \$175 ahead of Emerson. In light of the increased cost of clothing and dry cleaning a yearly increase of \$50 is reasonable for 1995 through 1997. No provision is made for 1998.

Educational Incentive. The PBA seeks an increase in credit entitlement from the current \$18 a credit to \$50 a credit. While the current payment is modest the officers are receiving a wage increase and in economic times of low inflation and modest wage increases the need for such an increase has not convincingly been proven to be necessary or reasonable at this time.

Longevity Improvement. The Association has in place a reasonable longevity program. Under the wage increases awarded herein it is calculated that as of the beginning of 1998 a patrolman with 20 plus years will be entitled to a longevity payment of \$4,223 and a patrolman at maximum (after 24 years of service) would receive \$5,430. The senior officer differential sought by the Association, if awarded, would appear to provide an additional sum of nearly \$1,900 in addition to the quoted longevity payment. Association counsel referred to this proposal as a longevity improvement which it sought to achieve by the adoption of the senior officer differential.

As Borough counsel successfully argued the differential is nothing more than an attempt to boost up salaries prior to retirement. The Association simply has not made out a convincing case for such a proposal. Without extensively restating the financial reasons for such a denial, attention is called to the financial condition of

the Borough and the absence of such a benefit generally in the public and private sectors. Although Emerson might stand below an average in comparing longevity and differential with other towns chosen for comparison, the facts remain that there are no guarantees of parity with comparable departments and the addition of this financial burden to the Borough is not reasonable at this time. In brief the Association has failed to prove that the granting of such a request would be more reasonable than denying the request under the facts present here.

Borough's Final Offer.

Revised Starting Salary. The Borough made two economic demands beyond those relating to the wage increase and term of the contract. It proposed the reduction of the starting salary to \$20,000 from the present \$24,000. No evidence was introduced as to the need of such a proposal such as anticipated hirings which would offer the likelihood of a specific savings for the Borough. In light of the fact that only slightly more than a year is left on the new contract term and the absence of any support beyond the theoretical saving of slightly better than four thousand dollars in the event a new officer is hired within that year, sufficient cause has not been shown to justify the awarding of this provision.

Additional Step. The Borough also seeks the addition of an extra step from the present six to seven with the present compensation package to be kept at the same level plus any contractual increases extended over seven (7) rather than six (6) years. Again no evidence was presented as justification for the proposal. Beyond the apparent projected savings none were documented for the chair, no testimony

was offered as to any actual savings projected for the term of the contract nor was any testimony offered from a management perspective for this request. Accordingly the request is denied.

Previously noted is the fact that an Interim Opinion issued precluding the consideration by the arbitrator of Items numbered four through seven under the Borough's Final Offer found on page seven above.

In summary, the undersigned has examined both parties final offers in light of the statutory criteria noted above and has issued an Award deemed to be the most reasonable under those criteria and one which represents an appropriate balance of the proposals sought by the parties. Specifically for the reasons set forth above the undersigned under statutory conventional authority hereby awards the following:

AWARD

Economic Issues

1. The term of this contract shall be January 1, 1995 through June 30, 1998.

2. The wage increase awarded shall be as follows:

1995 4.5% 1996 4% 1997 3.5% 1998 2% (1/1/98 to 6/30/98)

All retroactive pay shall be calculated and paid out to the bargaining unit members as soon as is practicable.

3. The clothing allowance is increased to \$550 a year beginning in 1995.

4. The requested increase in Educational Incentive is denied.

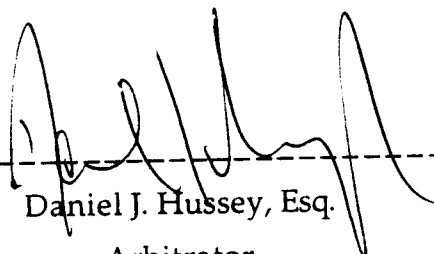
5. The Longevity Improvement/ Senior Officer Differential is denied.

6. The Borough's requested starting salary deduction is denied.

7. The Borough's requested increase in step numbers is denied.


8. The Borough's requested Economic Items numbered 4 through 7 will not be considered for the reasons stated in the Interim Award which accompanies the Final Award in this matter.

Dated: January 22, 1997


Daniel J. Hussey, Esq.
Arbitrator

STATE OF NEW JERSEY:
COUNTY OF MIDDLESEX:

On this 22nd day of January 1997 personally came and appeared DANIEL J. HUSSEY, ESQ., known to me to be the individual described herein, who executed the foregoing instrument and duly acknowledged to me that he executed the same.


Ellen Orlandini
Notary Public of New Jersey

EXHIBITS

NO.	DESCRIPTION	EV.	ID.
A-1	Notice of Appointment		6
A-2	Petition		6
J-1	Contract	22	
P-1	Document containing calls for service	28	24
P-2	Westwood Contract	44	
P-3	Rutherford Contract	44	
P-4	River Edge Contract	45	
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P-31	Washington Township Contract	50
P-32	Fairview Interest Arbitration Award	50
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PUBLIC EMPLOYMENT RELATIONS COMMISSION
CN 429
495 STATE STREET
TRENTON, N. J. 08625-0429

Docket # IA - 95 - 143

EMERSON BOROUGH
Employer

and

P. B. A. LOCAL 206
Union

INTERIM

OPINION

ARBITRATOR: Daniel J. Hussey, Esq., mutually chosen by the parties pursuant to the rules and regulations of the New Jersey Public Employment Relations Commission.

HEARING: March 18, 1996 in Emerson, New Jersey.

APPEARANCES: **For the Borough:**
William J. Smith, Esq. Borough Counsel
HOOK, SMITH & MEYER Mayor
Owen D. Cassidy Councilman
Peter Petrosino

For the Association:
Richard D. Loccke, Esq. Association Counsel
LOCCKE & CORREIA P. B. A. Local 206
Michael Galasso P. B. A. Local 206
Scott O'Connor

ISSUE: ABSENT THE FILING OF A RESPONSE BY THE BOROUGH
PURSUANT TO NJAC 19:16-5.5(a) TO THE PBA'S PETITION
FOR INTEREST ARBITRATION, CAN PROPOSALS THE
BOROUGH INCLUDES IN ITS FINAL OFFER BE CONSIDERED
IF THEY DEAL WITH ISSUES NOT CONTAINED IN THE
PBA'S PETITION?

Background

The parties contract expired on December 31, 1994. Unsuccessful negotiations took place over the winter and spring of 1994 - 1995. On June 12, 1995 PBA Counsel filed a Petition to Commence Interest Arbitration. Contained as Schedule A was a list identifying the following issues:
ECONOMIC: 1. Wage Increase, 2. Clothing Allowance, 3. Educational Incentive, and 4. Longevity

Improvement. Under NON-ECONOMIC ISSUES appeared: 1. Bereavement days, and 2. Vacation Scheduling. No response was filed by the Borough.

The Commission appointed the undersigned as Interest Arbitrator on July 18, 1995. An initial session was held October 10th. At that meeting the issues were preliminarily explored. A settlement appeared possible and the parties agreed to meet privately before the next scheduled session to attempt to achieve such a result. The parties next met on December 8th, 1995. Discussion at that time were also unfruitful. A Formal Hearing date of February 5, 1996 was scheduled. This was later adjourned to March 18, 1996.

Based on the timing of the passage of the amended Interest Arbitration statute this Arbitration falls under the coverage of the revised statute. At the March 18th hearing the parties submitted their final positions. Among those listed by the Borough in its submissions were the following: ECONOMIC: 1. Wage Proposal, 2. Reduction of starting salary, 3. Increase in Steps, 4. Reduced sick leave, 5. Reduced accumulation of sick days, 6. Reduced terminal leave, 7. Modified medical insurance coverage. PBA Counsel took exception to the arbitrability of Issues numbered 4 through 7 on the grounds that the employer had not filed a responsive pleading and hence had never raised these issues which therefore should be precluded from consideration. Borough counsel opposed PBA counsel's motion. PBA counsel referred to decisions on this very issue which he contended should control. Briefs were directed to be filed prior to the April 22, 1996 scheduled continuation date of the hearing on this issue and a decision was promised to the parties in advance of that date.

RELEVANT STATUTORY, REGULATORY & EXHIBIT LANGUAGE

N. J. A. C. 19:16-5.5 (a) reads:

"In the absence of either a jointly submitted notification or joint petition requesting the initiation of compulsory interest arbitration, the respondent shall file within seven days of receipt of such notification or petition, a statement of response setting forth the following:

- 1. Any additional unresolved issues to be submitted to arbitration;*
- 2. A statement as to whether it disputes the identification of any of the issues as economic or non-economic;*
- 3. A statement as to whether it refuses to submit any of the issues listed on a notification of petition to arbitration on the ground that they are not within the required scope of negotiations; and*
- 4. Any other relevant information with respect to the nature of the impasse."*

N. J. A. C. 19:16-5.5 (b) reads:

"Proof of service on the petitioner of the respondent's statement shall be supplied to the Director of Arbitration. If a party has not submitted a response within the time specified, it shall

be deemed to have agreed to the request for the initiation of compulsory interest arbitration as submitted by the filing party. The substance of this response shall not provide the basis for any delay in effectuating the provisions of this chapter,"

N. J. A. C. 19:16-5.7 (f) reads:

The Arbitrator may, in his or her discretion, accept a revision of position by either party on any issue until a hearing is deemed closed, provided that the other party is given an opportunity to respond".

THE POSITION OF THE P. B. A.

Counsel argues that no dispute exists that the Borough first advanced added issues at the first formal hearing on March 18, 1996. To final the inception of this matter beginning with the PBA's June 14, 1995 filing of its petition the Borough neither filed a formal response nor any request for an extension to file. The attempt to add issues at this point violates the Public Employment Relations Commission rules and its rulings that have taken place over the years.

In support of his position counsel cites a letter memorandum from Director of Arbitration, Robert Glasson, dated September 10, 1987, in **Borough of Rutherford and Rutherford PBA Local 300**, Docket # 1A-87-169 in which he stated:

"If a party has not submitted a response within the time specified, it shall be deemed to have agreed to the request for the initiation of compulsory Interest Arbitration as submitted by the filing party." (emphasis in the original)

Counsel also cites **Borough of Bogota**, 9 NJ PER 14110(1983) and **Newark Firemen's Mutual Benefit Assn.** 90 NJ 44 (1982) which are peripherally relevant. Counsel also relies on Arbitrator Frank Mason's interim ruling in **Borough of Carlstadt** (1A-94-129) in which he foreclosed the Borough from adding issues which it hadn't submitted at any time in a responsive pleading to PERC.

In conclusion PBA counsel asks that this Interest Arbitration proceeding be limited to a consideration of the issues set forth in its petition filed June 14, 1996.

THE POSITION OF THE BOROUGH

In responding to PBA counsel's motion and supporting brief, Borough counsel argues the following points:

1. Counsel dismisses any significance to the one judicial decision cited, viz: **Newark Firemen's Mutual Benefit Assn. v Newark**, 90 NJ 44 (1982) since it deals with modification of offers and the interpretation of NJSA 34:13-1 et. seq.

2. The PBA does not contest that any of the issues submitted by the Borough in the first day of hearing are arbitrable but rather relies on a strict interpretation of the rules to eliminate them from consideration.

3. The intention of the Rules is to provide the arbitrator with great flexibility and discretion in determining what may be considered at arbitration as witnessed by N.J.A.C. 19:16-517(f).

4. Counsel notes that the statute has been amended and the proposed new rules will not be considered for adoption until April 25, 1996 at the earliest. He further notes that under the old rules an arbitrator could allow either party to modify its position until the process had been completed. Based on that flexibility as well as the import of the statutory revisions intended to allow the arbitrator the opportunity to reach findings different from the last offer of either party, counsel argues that the arbitration proceed with the consideration of all issues presented by the Borough.

DISCUSSION

This arbitration is governed by the statutory revisions to NJSA 34:13A-1, et seq. Accordingly the proposed revisions to NJAC 19:16-1.1 et. seq. presently under consideration also are of interest. No changes have been proposed to 19:16-5.5(b) and the changes proposed to sub section (a) have no effect on the issue presented for decision by PBA counsel. The outcome of Borough counsel's reliance on NJAC 19:16-5.7(f) is similarly not effected whether the present language or the proposed revised language is used. Other than it having been noted that revised regulations are pending neither counsel has contended that such revisions might effect the determination of this issue presently under consideration.

Borough counsel noted in his brief that as a direct result of the amendment to the legislation and the resulting substantial modification of the arbitration process, the Borough determined that it was in its best interest to request that the Arbitrator consider the additional proposals on the Borough's behalf. While that may be true, the fact remains that the resulting proposed revisions to the regulations have not substantially changed NJAC 19:16-5.1(a & b), upon which the PBA relies and NJAC 19:16-5.7(f), upon which the Borough relies. In brief there is nothing contained in the statutory revisions which justifies failure to comply with subsection 5.1(a) or from being subject to the directive contained in subsection (b) which directs that the party by such failure "shall be deemed to have agreed to the request for the initiation of compulsory interest arbitration as submitted by the filing party." (emphasis supplied). In brief nothing has been submitted to me which would distinguish the outcome reached here from Director Glasson's opinion in *Rutherford*, op. cit., that a party shall be deemed to have agreed to the submission of the filing party if it has not submitted a timely response. While there may well be factual circumstances where discretion can be exercised in deeming that notice has been provided by way of negotiations or correspondence that substantially meets the requirement of the regulations, no such circumstances exist here.

Although the Mason decision in *Carlstadt*, op. cit., has a significantly different factual background, the ultimate decision is consistent with the decision reached herein. Borough counsel's reliance on NJAC 19:16-5.7(f) is unavailing. That regulation is not directive but rather acknowledges a granting of discretion to the arbitrator. Moreover the revisions spoken of in that regulation relate to changes in positions offered during the hearing on issues that have been previously and properly submitted by the parties. I do not read that discretion to allow the introduction of issues previously not submitted by either party.

In conclusion the motion by PBA counsel to limit this proceeding to a consideration of issues set forth in the Formal Arbitration Petition filed June 14, 1995 is granted.

Dated: April 15, 1996

/S /

Daniel J. Hussey, Esq.

Arbitrator

STATE OF NEW JERSEY:
COUNTY OF MIDDLESEX:

On this 15th day of April 1996 personally came and appeared DANIEL J. HUSSEY, ESQ., known to me to be the individual described herein, who executed the foregoing instrument and duly acknowledged to me that he executed the same.

/S/

Notary Public of New Jersey