

**COMPULSORY INTEREST ARBITRATION**  
New York State Public Employment Relations Board (PERB)

In The Matter of an Tripartite Interest  
Arbitration

between

THE TOWN OF ORCHARD PARK (Town)

and

ORCHARD PARK POLICE BENEVOLENT ASSOCIATION  
(PBA)

NYS. PUBLIC EMPLOYMENT RELATIONS BOARD  
RECEIVED

DEC 21 1987

CONCILIATION

OPINION

and

AWARD

PERB M86-434

IA86-31

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Before: Eric W. Lawson Jr., Esq., Chairman  
Anthony DeMarie, Esq., Employee Member  
Joseph Randazzo, Esq., Employer Member

**APPEARANCES**

For the Town, by: Norman J. Stocker, Labor Consultant  
Associated Labor Consultants  
187 Glenhurst Road  
Tonawanda, New York 14150

For the PBA, by: Charles Sherry, Police Officer  
c/o Orchard Park Police Department  
Municipal Building  
Orchard Park, New York 14127

## PROCEDURE

The parties, bound by a collectively bargained agreement [cba] which expired on December 31, 1986 entered into negotiations for a successor cba. Having failed to reach agreement by utilizing the services of a mediator, the PBA petitioned the PERB for compulsory interest arbitration on February 10, 1987. Following receipt of Respondent's Response to the Petition for Compulsory Arbitration and upon a determination as to the matters to be submitted to compulsory binding arbitration, the PERB designated the Tripartite Panel set forth above on April 10, 1987 to decide the issues to be presented to the Panel.

With the concurrence of the members of the Panel and with the consent of the parties, the Chairman convened the parties on June 5 and June 24, 1987 for the purpose of mediating the dispute. Mediation having failed to resolve all of the open items the matter was heard by the Tripartite Panel on Wednesday, September 2, 1987 at which time the parties, who had earlier prepared briefs on the open issues, presented arguments thereon and otherwise presented evidence necessary for the completion of a full record. Subsequent to the hearing the Chairman met with each of the members of the Tripartite Panel separately and thereafter on October 4th send them a copy of a preliminary draft of an arbitration award. He has also met with the Panel jointly on December 2nd in an effort to clarify and attempt to resolve any differences between the members of the Panel. Delays between the mediation sessions held in June and the arbitration hearing held on September 2nd and between the date the draft award was sent to the Panel and the date the full Panel met on December 2, 1987 were occasioned by court appearances and other obligations of the

advocate members of the Panel.

### **APPLICABLE STANDARDS**

The following statutory provisions of Article XIV CSL, Section 209.4 (as amended July 1, 1977) shall control the disposition of the matters presented to the Tripartite Panel for its decision:

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(iv) all matters presented to the public arbitration Panel for its determination shall be decided by a majority vote of the members of the Panel. The Panel, prior to a vote on any issue in dispute before it, shall, upon the joint request of its two members representing the public employer and the employee organization respectively, refer the issues back to the parties for further negotiations;

(v) the public arbitration Panel shall make a just and reasonable determination of the matters in dispute. In arriving at such determination, the Panel shall specify the basis for its findings, taking into consideration, in addition to any other relevant factors, the following:

a. comparison of the wages, hours and conditions of employees involved in the arbitration proceeding with the wages, hours, and conditions of employment of other employees performing similar skills under similar working conditions and with other employees generally in public and private employment in comparable communities.

b. the interests and welfare of the public and the financial ability of the public employer to pay;

c. comparison of peculiarities in regard to other trades or professions, including specifically, (1) hazards of employment; (2) physical qualifications; (3) educational qualifications; (4) mental qualifications; (5) job training and skills;

d. the terms of collective agreements negotiated between the parties in the past providing for compensation and fringe benefits, including, but

not limited to, the provisions for salary, insurance and retirement benefits, medical and hospitalization benefits, paid time off and job security.

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## BACKGROUND

The Orchard Park Police Department provides services to approximately 28,000 persons living on 36 square miles said area including the Village of Orchard Park. The PBA represents 28 police officers (including lieutenants and detectives)

The parties have selected different comparison basis to justify their demands (See (v), a. above). The Town relies on those police departments situated within Erie County which have been classified by the New York State Department of Civil Service as Type B police departments. The departments include: the Towns of Evans, Hamburg, Lancaster, (Orchard Park) and West Seneca and the Villages of Depew, East Aurora, Hamburg, Kenmore, Lancaster and Blasdell.\*

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\* The Town's Exhibit E, which describes the police departments set forth above, including descriptions of policies for released time for Union business, definitions of grievances etc., leave recall, posting, reassignment and transfer policies, safety practices, management rights, labor management committees, leave policies, length of work day, work schedule, overtime work etc. shift payment differentials, call back pay and court time compensation, uniform allowances, holiday and vacation time, sick leave, compensation for educational accomplishments, health insurance, life insurance and retirement coverage, salary including merit pay, salary increments, and base salary fails to highlight these benefit levels in Blasdell. The Panel has incorporated Blasdell into its deliberations, however, since that police department is classified according to the standards deemed comparable by the Town.

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The PBA compares with the Towns of Cheektowaga (population 120,000, 130 police officers), West Seneca (population 50,000, 65 police officers) and Hamburg (53,000 population, 55 police officers), all of which abut the Town of Orchard Park and with the Village of Lancaster (13,000 population, 16 police officers) and the Village of Depew (20,000 population, 30 police officers) arguing that the two villages are of comparable size to Orchard Park.

The police departments appearing in both comparison basis include the Towns of West Seneca and Hamburg and the Villages of Depew and Lancaster. Clearly, the four police departments appearing in the comparison base of each side represents the smaller of the towns and two villages which have populations somewhat similar in size to Orchard Park's. There is an additional village and town which have populations similar in size to Orchard Park. If the Villages of Kenmore (18,000 population, 27 police officers) and the Town of Evans (18,000, 18 police officers) were added to the four departments included in the common comparison, a new base is created which with regard to the size of the population served and the size of the police department, brackets Orchard Park. By excluding the Town of Cheektowaga, which has a population five times that of Orchard Park but by including the Towns of Hamburg and West Seneca which abut Orchard Park and the Town of Evans, the resulting comparison base of six police departments is the most comparable base offered by both sides. (Towns of West Seneca, Evans and Hamburg and the Villages of Depew, Lancaster and Kenmore)

**POSITION OF THE PARTIES ON THE ISSUES, DISCUSSION AND HOLDING:**

(Note: Where a party is identified [i.e (Town)] and the other party is not listed under the proposal, it may be assumed that that party rejects the proposal and offers no counter, or rejects the proposal and adopts the contractual status quo. Where neither party is listed it may be assumed that the language is being set forth for purposes of clarifying a previous agreement reached between the parties but which the Panel felt clarification was required, i.e. Article XV, Section 1, page 21.)

Where the parties were in agreement on an issue or where no substantive difference separated the parties, the agreed upon position is set forth below without rationale. The Panel unanimously supports these areas where mutual agreement has been reached in the arbitration process and incorporates said agreements into this opinion and award.

Article 1, (Recognition) Section 1 (Town) Exclude part time employees from the bargaining unit. Presently the recognition language is "...for all of its Police Officers in the unit composed of: ..."

The Town argues that the cba should exclude part time police officers. Part time employees are hired on ad hoc basis largely to supervise activities taking place in Orchard Park and should not be required to hire full time police officers to perform duties which are essentially seasonal in nature.

The PBA did not seriously oppose the Town's proposal.

**HELD** The language of the recognition clause shall be amended to exclude part time or seasonal employees.

Article 3,(Grievance Procedure) Section 1 (Town) Restrict grievances to claims of violations or misinterpretation of the terms of the cba. Presently coverage is for "...any claimed violation of this Agreement or any rules and regulations, including matters relating to working conditions, in effect over which the Town has control."

This proposal and the PBA proposal (infra) to add to Article XXVIII a Section which clearly incorporates past practice into the cba are inter related and in opposition to each other. The Town proposes limiting the language to the interpretation of the cba. While the present grievance definition extends beyond the cba itself, nothing was offered to show that the scope of the procedure has caused difficulties with the management of the police force or with the just and proper resolution of disputes which have been placed in the grievance procedure. For its part the PBA is well aware of the fact that arbitrators customarily resort to past practice where ambiguities exist with regard to disputed language which is properly before them. By specifically adding the language sought by the PBA the emphasis to be placed on past practice would be heightened. Given that past practice is presently available under certain circumstances, to aid in the resolution of ambiguous language, no further enhancement of past practice is required.

**HELD** The Town's Article III, Section 3 proposed change and the PBA's Article XVIII proposed additional language are denied.

Article 3, Section 2, Stage Two (Town) Grievances not resolved at stage One, "...shall be reduced to writing, within five (5) days of the alleged occurrence of the grievance...". Presently there are no time limits for the submission of a written grievance at

Stage Two.

The PBA acknowledges that the present procedure does not promote the expeditious processing and/or resolution of grievances. The parties are apart, not on the issue as to whether or not there should be a time limit for filing step two grievances, but on the extent of that time limit. Five days strikes the Panel as unrealistically cumbersome particularly in light of the fact that the present procedure requires that the informal meeting set forth at Step one is to take place within the time limit under discussion. A time period of two weeks is an appropriate and reasonable amount of time and will provide ample time for a grievant to engage in step one discussions and to decide to formally file a grievance after appropriate consultation with a PBA representative.

**HELD:** The language of Step two of the grievance procedure shall be amended so as to provide grievants 14 calendar days within which to file a written grievance at stage two.

The parties agree to amend the grievance procedure in the manner set forth below:

The parties agreed that where grievances have been tentatively settled at Stage One, the terms of said settlement shall be discussed with the Chief of Police.

The parties agreed that where no resolution of a grievance has occurred at the conclusion of Step two, the PBA's representative shall, within five days of the date of the employer's Step two decision, file a notice of appeal to Step three before the Town Board, said notice to contain a record of the prior proceedings.

Ten days following its receipt of the notice of appeal, the Town Board shall schedule a hearing on the grievance, said hearing to take place within 30 days of the date of the scheduling. Within five days following the date of the hearing conducted by the Town Board, it shall render its written decision. Should the decision of the Town Board at Step three fail to resolve the grievance, the PBA may, within fifteen days of its receipt of the Town Board's decision, serve notice upon the Town of its decision to appeal the grievance to arbitration.

The parties agreed that they will identify the New York PERB as the arbitration tribunal, replacing the American Arbitration Association and that they will request a list of five potential arbitrators for each grievance to be heard. The arbitrator shall be selected to hear the case shall be chosen by alternatively striking names from the list with the party winning a coin toss to be allowed to strike first. Each party may reject one entire list of potential arbitrators supplied by PERB.

Finally, it was agreed that for purposes of implementing the grievance procedure, "days" means week days (Monday through Friday, except for holidays).

Article IV, (Record of Discipline) Section 4-3-3 (PBA) "The Town will indemnify and save harmless each police officer, employed by the Town, from any and all claims arising out of the performance of duty including negligence, willful torts, claims based upon violation of civil rights and claims made for punitive damages."

(Town) The Town will indemnify and save harmless each Police Officer, employed by the Town, from any and all claims arising out of the performance of duty except that the Town shall not

indemnify a police officer for punitive damages arising out of willful and wrongful acts during the discharge of their duties as a Police Officer.

At present, indemnification is available to PBA members through a resolution adopted by the Town Board on October 1, 1986 which is similar to the language proposed by the Town (Supra)

Section 50-j General Municipal Law (GML) provides:

1."...every town...shall be liable for, and shall assume the liability to the extent that it shall save harmless, any duly appointed police officer ... for any negligent act or tort, provided such police officer, at the time of the negligent act or tort complained of, was acting within the scope of his employment.

2. "...a police officer...when within the geographical limits of his jurisdiction, although excused from official duty at the time, shall be deemed to be acting in the discharge of duty when engaged in the immediate and actual performance of a public duty imposed by law and such public duty performed was for the benefit of the citizens of the community..."

Section 50-k provides for the indemnification of employees of the City of New York against inter alia "...any civil action or proceeding"

The PBA demand would indemnify for punitive damages and damages arising out of a claim of a civil right violation as is presently provided for New York City police officers through Section 50-k.

The Town's proposed language is more restrictive than the language in GML Section 50-j since the 50-j language does not restrict indemnification to non-negligent acts nor does it specifically prohibit payment for punitive damages (Although a construction of the language could be made so as to restrict payment for punitive damages). Essentially the coverage sought by the PBA extends coverage for alleged civil rights violations.

No financial data was offered to show the cost of insuring for the indemnification sought by the PBA. The coverage required by statute is an obligation which the Town has a duty to meet without regard to the collective bargaining process. Further, nothing was shown which unequivocally established that the present 50-j language does not in fact cover civil rights violations where they constitute a "negligent act" by a police officer. In addition nothing was offered to show that, based upon experience in the Town of Orchard Park there is a need for the coverage. Of the cbas offered in evidence and within the comparison base, only the Village of Lancaster contract provides the coverage sought by the PBA. Kenmore provides false arrest and imprisonment insurance. Indemnification does not appear in the cbas for the Town of Hamburg, or the Town of Evans contracts appearing in the comparison base described above.

Based on this analysis the specific coverage sought by the PBA is not warranted. However, the language proposed by the Town being less than that required by statute it is,

**HELD** that the cba shall reiterate the language of Section 50-j of the GML with regard to indemnification of police officers.

Article V, (Bill of Rights) Section 5-10-10 (Town) The Town proposes to eliminate the prohibition against administering a polygraph examination to a bargaining unit member for any reason.

Because of questions of reliability, evidence of the results of polygraph testing are not admissible in courts of law. While polygraph test results are freely admitted into evidence in arbitration cases, the majority of arbitrators assign very little weight to the test results.\*

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\*Lawson, Eric W. "The Arbitral Response to Drug and Alcohol Testing at the Workplace," New York State Bar Journal, November, 1987.

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The polygraph test is readily available and easily administered. To the lay person the polygraph appears to provide a ready indicia of guilt or innocence with the result that persons who refuse to submit to a polygraph are often assumed to have something to hide even though their refusal to be tested may be sanctioned by the contract or by law. Accordingly, the availability of polygraph testing on a voluntary basis may work an injustice.

Since the Town has not shown an inability to conduct investigations without the use of the polygraph test, and based on the analysis set forth above it is;

**HELD:** that there shall be no change in the language of Section 5-10.

Article VI, (Compensation), Section 1 (PBA) A salary increase = to 7.5% of the senior patrol officer's current salary or

\$2,065.65 for year one of the cba and 7.5% of the 1987 base or \$2,200.57 for year two of the cba.

(Town) The Town offers to increase compensation of bargaining unit members by 5% in each of two years of the cba.

Compensation cannot be analyzed in isolation from the other economic demands which include payment for briefing time, longevity pay, insurance premiums, and clothing allowance. In addition, demands seeking additional time off must be considered in arriving at decisions affecting direct economic demands since where additional time off is granted the Town either loses the productivity of the absent police officer or must replace that officer with another officer at extra cost. Finally, demands which increase the benefits to police officers, their families or estates (i.e. vacations for police officers about to retire, diminution of benefits for a work related injury, conversion of unused sick leave days to terminating police officer or to his estate etc.) increase the cost to the Town for the services provided by that police officer and are properly considered within the context of direct economic demands. Where costs are involved with providing benefits or where a loss of service results, there are economic considerations involved which must be considered along with direct salary and economic fringe benefits.

At the urging of the Chairman of the Panel, the parties attempted to reconcile the cost of the 13 major economic items being sought by the PBA. The PBA's estimate of the total increased cost of these items was 9.6% for 1987 and 8.9% for 1988.

By way of a preamble to consideration of the economic issues or those issues with economic implications the following observation

is appropriate; the unusually large number of open items hinders the Panel in understanding which issues the parties believe have priority. Surely salary must be near the top of the list of important items. However, because of the myriad of other economic items which have not been resolved or dropped from consideration the arbitration Panel finds it difficult to distinguish between benefits which the parties deem of great significance and those of trifling importance, mere bargaining chips to which the proponent attaches only strategic significance. The bargaining process envisioned by the Taylor Law is compromised where these conditions exist.

The Town has not argued an inability to pay. Both sides support their claims with comparability arguments, the Town arguing on the basis of a percentage increase in salary and increases in the Consumer Price Index (CPI) and the PBA arguing on the basis of the relative per diem rates. The proper decision on the salary increase therefore, must turn on a comparison with salary increases or salary levels attained by police officers in the six police units forming the comparison base here.

The Town of Evans police officers shall receive 5% raises in each of the next three years.

The Town of West Seneca has 4.5%, 4.5% and 5% salary increases scheduled in each of the next three years.

The Town of Hamburg was not included in the data

The Village of Kenmore (now in a cba from 6/1/85 until 5/31/88) will receive a 5% raise plus a 1% raise in December 1987.

The Village of Depew has 6% raises scheduled for 1987 and 1988

The Village of Lancaster has an increase of either 3% or the increase in the Consumer Price Index, whichever is greater, scheduled for 1987.

While it is difficult to average these increases precisely, they appear to be approximately 5% in 1987 and 5% in 1988.

The PBA argues that police officers in Orchard Park work a five-two schedule for a total of 260 days per year, whereas police officers in the Town of Hamburg work 252 days and officers in the Villages of Depew and Lancaster work 243 days per year. The per diem rate paid in Orchard Park is \$105.93 while police officers in the Town of Hamburg receive \$120.80, in the Village of Depew \$116.17 and in the Village of Lancaster, \$115.27 (Comparisons with the other two towns and one village were not available.)

The average per diem paid in the three comparable communities is \$117.41 or 10.9% more than the rate paid in Orchard Park. The PBA states that its demand would raise the per diem rate to \$113.87 thereby narrowing the gap between the effective wage paid officers in Orchard Park. The PBA also observes that the per diem rate is an accurate way to measure other benefits such as court time, overtime pay and the holiday rate of pay so that even where these benefits appear to be comparable with Orchard Park on the basis of the amount of time available or the rate paid (i.e. time and one half for overtime or court time) the benefit is less in Orchard Park because the per diem rate underlying these calculations is less than in comparable communities.

While the Town's offer of 5% would appear to match average percentage increases in communities in the comparison base it would do nothing to compensate police officers in Orchard Park for the fact that they work a longer work year than others in the comparison base (Keeping in mind that data is available for only half of the communities in the comparison base).

An increase of 6.5% at each step and level of the salary schedule [Section 6-1, (a), (b), (c)] in the first year and an increase of 6% at each step and level of the salary schedule in the second year of a two year contract will narrow the gap identified by the PBA and is not substantially disproportionate to increases provided in other communities in the comparison base. (The increase will provide 1.5% in the first year and 1% in the second year as "catch up" money or as money to compensate for the longer work year.)

**HELD:** There will be a 6.5% salary increase in the first year and 6% in the second year of the cba as provided for in the paragraph above.

Article VI, Section 2. (PBA) Police Officers shall be paid for ten minutes of briefing time prior to the start of their regular shift, at time and one half their regular rate of pay.

(Town) The Town is not willing to pay for briefing time. Where an employee is required to work beyond an eight hour shift, because of briefing time or for other reason the Fair Labor Standards Act (FLSA) requires that they be paid time and one half or that they be given compensatory time off (with limitations) at time and one half time off their regular rate. The Town is prepared to abide

by this provision of federal law.

Briefing time, call in pay, overtime, in service training and Article X, Section 8 changes (extension of vacation) are all proposals in which the Town either seeks to eliminate compensatory time as an option to paying officers time and one half or states that it will comply with the FLSA regulations in reply to PBA demands for overtime or compensatory time.

Except for briefing time, the other three proposals set forth above are Town proposals. The Town acknowledges its duty to comply with the FLSA and agrees that where employees work beyond eight hours a day or 40 hours per week that they are eligible for time and one half pay or compensatory time calculated at time and one half, though with a ceiling as to the amount of time which may be taken. The parties agree that the application of the FLSA to public employees is clouded.

The Panel is unwilling to attempt to describe the proper method for applying the FLSA to police officers in Orchard Park who work overtime except to observe that where the mandates of that law are clear, they shall take precedence over the language of this cba. Since no legal exigency exists which compels a change in the language of the cba, with regard to the four proposals under discussion here the Panel,

**HOLDS:** that the existing language regarding briefing time, call in pay (Article VI, Section 3 [infra]), overtime, (Article IX Section 4 [infra]) and Section 8 (extension of vacation time [infra])

Article VI, Section 3 (Call in pay), (Town) Eliminate the option

whereby a Police Officer may elect compensatory time in lieu of call in pay.

**HELD:** (see Briefing Time above)

Article VII, (Longevity) Section 1, (PBA) Longevity payments of \$150 annually shall be paid for each block of four years of continuous service said improvement to be provided in the first year of the cba. In the second year of the cba this rate will be raised to \$200 and shall be paid for each block of three years of continuous service. Presently \$100 annually is paid for each block of four years of continuous service.

The Town estimates the cost of the PBA proposal at .92% the first year and .64% the second year of the cba.

The PBA offered a graph which described longevity payments made to the Towns of Hamburg and West Seneca and the Villages of Dewey and Lancaster, of the communities in the comparison base. By adding the Village of Kenmore (5 years = \$350, 7=\$400, 10=\$500, 15=\$600, 20=\$700) and the Town of Evans (5 years=\$200, 10=\$300, 15=\$450, 20=\$550, 25=\$650) the comparison base is completed. An analysis of this data indicates that Orchard Park lags behind the longevity amounts paid to other police departments particularly during the first 15 years. An increase of \$50.00 to the annual longevity calculation will narrow the gap. The cost of this improvement is far less proportionately than would be suggested by the Town's estimates of the cost of the proposal. Even if every police officer received a \$50.00 improvement in longevity, the average increase would be less than a quarter of 1 %. Additional improvements, such as shortening the period of time required to receive longevity payments shall await another round

of bargaining.

**HELD:** Annual longevity payments shall continue as before, except that the rate shall increase in the first year of the cba to \$150.00

Article IX, (Overtime) Section 4, (Town) The Town seeks the elimination of all compensatory time.

(PBA) Where compensatory time is taken instead of pay for overtime worked said time shall be computed upon the basis of time and one half.

**HELD:** (See Briefing Time above)

Article X, (Vacations), Section 1 (PBA) Police officers completing ten years of service shall have four weeks of vacation each year and Officers completing fifteen years of service be provided with five week of vacation each year. Presently Officers must complete twelve years of employment to be eligible for four weeks of vacation and eighteen years of employment to be eligible for five weeks of vacation.

The Town estimates the cost of granting the PBA's vacation proposal to be .16% in each of the two years of the cba.

Except for Evans, which grants four weeks of vacation after five years and Lancaster, which grants four weeks after 11 years, the other four communities in the comparison base all grant 4 weeks of vacation after ten years of service. On the issue of the years of service required to be eligible for 5 weeks of vacation, the comparison base is much closer to the current practice in

Orchard Park. Given that consideration must be given to the additional value of time off in Orchard Park because the work weeks are longer on average than in the comparison base (see the discussion on salary), the decision to reduce the number of years required to take four weeks of vacation shall be delayed until the second year of the cba.

**HELD:** Effective in the second year of the cba, police officers shall be eligible to receive 4 weeks of vacation after ten years of service.

Section 2, (PBA) Police officers shall be allowed to bid for vacations during the last week of the calendar year where said week laps over into the new year. Presently the demand of the PBA reflects the practice. The cba is silent on the matter.

**HOLDING:** Police officers shall be allowed to bid for vacation time during the last week of the calendar year where said week laps over into the ensuing calendar year.

Section 5, (PBA) Three Police Officers and one lieutenant shall be allowed to be on vacation at the same time. Detectives shall not be considered for purposes of applying this limitation. Presently no more than two Police Officers and one lieutenant may be allowed on vacation at one time.

Given the large number of other open and unresolved items presented in interest arbitration, the Panel does not feel that it can address this issue. Questions concerning adequate coverage, the nature of the services being provided and other matters upon which no data was submitted but which are relevant to this matter leave the Panel with no choice other than to

preserve the status quo.

**HELD:** Denied.

Section 5 (Town) Police Officers shall submit vacation requests on November 1st of each year. Presently requests shall be submitted on December 1st.

The Panel adopts the same reasoning here as in the PBA demand set forth above namely, the multiplicity of other open items and a dearth of data on this proposal suggest that it is not of compelling interest. Therefore the proposal is,

**HOLDING:** Denied.

Section 7 (PBA) Police Officers shall bid their vacation in increments no larger than two weeks. Presently this Section regards the interval within which Police Officers must bid their vacation requests.

The Panel has denied proposals which would alter the method of bidding for vacations (infra, supra) except where there is an existing practice. This proposal however, does not affect questions of coverage but rather increases the possibility that less senior officers will have an opportunity of bidding some of their vacation time into the more desirable vacation periods of the year. While the proposal creates some administrative inconvenience, that burden seems slight when compared with the benefits to the police officers.

**HELD:** Police officers shall bid their vacation requests in increments which shall be no larger than two weeks.

Section 8 (Town) Eliminate the reference to compensatory time. Presently the Chief may at his discretion extend vacation periods by one or two days if the affected Police Officer has compensatory time.

**HELD:** Denied. (See Briefing Time above.)

Section 11 (PBA) Police Officers who intend to retire and have so notified the Town may elect to be paid the value of their vacation time instead of taking this time off. The vacation time worked will be paid at the rate of time and one half. Where no retirement follows the implementation of these options, the Police Officers shall reimburse the Town one third of the money paid to them.

The PBA argues that this proposal will increase retirement benefits by enhancing the final year's salary. The Panel seriously doubts if the proposal, if accepted, would be approved by the Policemen's and Firemen's Retirement System as a valid increase in the final year's salary of a retiring police officer.

The PBA cites the City of Buffalo and the Town of Cheektowaga as communities which provide the benefit sought here. Neither community is within the comparison base being utilized in this interest arbitration. Given improvements being made elsewhere in the cba and without much greater substantiation justifying this demand, the Panel shall,

**HELD:** Deny the proposal

New Article X Section. Police Officers may use their vacation

time one day at a time with a cap of five days of such use in the first year of the cba and a cap of ten days of such use in the second year of the cba.

For the reasons set forth in proposals regarding Article X, Section 2 and in Town's Section 5 and PBA's Section 5 (supra), the proposal is,

**HELD:** Denied.

Article XI, (Holidays), Section 1, (PBA) One additional holiday shall be granted. At present there are twelve holidays available.

Of the six communities in the comparison base, five grant 13 paid holidays per year. An additional holiday achieves parity and shall be provided in the second year of the cba.

**HELD:** There shall be one additional holiday which shall become effective in the second year of the cba.

Article XII (Medical Insurance), Section 4. (Town) As of January 1, 1987 any additional premium costs for health insurance shall be borne by the Police Officers covered. Presently the Town pays for the full costs of medical insurance.

The Panel recognizes that health insurance costs continue to rise at a rapid rate. Where employees do not contribute to their health insurance coverage, the full value of the coverage may not be fully appreciated. However, every community in the comparison base provides 100% health insurance coverage for both employees and dependents. Without a substantial gain in benefits being made elsewhere in the cba, a gain not achieved by police officers

working in communities in the comparison base, there is no justification for imposing the cap on health insurance which is being sought by the Town.

**HELD:** The proposal is denied.

Section 4, New section, (PBA) Officers retiring after January 1, 1987 shall have the health insurance available to them as of the date of retirement provided for them after retirement until they reach age 65 unless coverage is secured from their spouses or is provided by another employer, at which time the coverage provided by the Town will be suspended.

The comparison base shows that three communities provide 100% of the health insurance cost for retirees only, one provides 75% and one provides no coverage at all. One, like Orchard Park, provides for the conversion of unused sick leave into its cash equivalent for the purpose of purchasing health insurance following retirement. The coverage for dependents of retired police officers, among the comparison base communities, varies widely; three provide no coverage at all and the remainder provide scattered coverage.

The Town contends that the present system should be preserved. The Town argues that the present system encourages police officers to conserve their sick leave days during their period of active employment knowing that upon retirement, their parsimonious use of the sick leave days will rebound to their benefit through the purchase of insurance at retirement.

Justification lies for providing health insurance for police officers who **retire from service from Orchard Park** {, i.e. do not

enter service elsewhere where they would become members of the State Policemen's or Firemen's retirement system}, but not for their dependents. In granting this proposal, the Panel also simultaneously strikes that portion of Article XV, Section one which provides for the purchase of health insurance by retirees with the cash equivalent for their unused sick leave days, except for the following condition. Retired police officers may use the value of their unused sick leave days, as of the date of their retirement, for the sole purpose of purchasing supplemental health insurance for themselves from age 65 forward.

**HELD:** Effective with the second year of the cba, police officers who retire from the Orchard Park Police department and who do not enter the service of another employer where such service would make the officer eligible to participate in the New York State Policemen's and Firemen's Retirement System, shall have their individual health insurance premium cost provided for by the Town until such time as they reach the age of 65 or die, said coverage to continue unless the affected officer has available to him at no cost, equivalent coverage, in which case the Town is relieved of the duty to pay for the health insurance coverage. With the exception noted below, the provisions of Article XV, Section one, which relate to the purchase of health insurance for retired police officers, shall be stricken from the cba. The exception is that police officers shall have available the value of their unused sick leave days as of the date of their retirement for the purchase for themselves, at age 65, supplemental health insurance.

Article XIII (Life Insurance), Section 5 (PBA) The Police Conference of New York shall provide a \$50,000 life insurance policy on each member of the bargaining unit with the Town paying

the full premium cost. Presently the Town provides a \$10,000 policy at no cost to the employee.

The insurance sought by the PBA costs \$252 annually, or assuming that the present \$10,000 coverage is one fifth as expensive, an additional cost to the Town of \$202.60. This would add an additional .7% to the cost of the senior patrol officer's 1987 current salary. Within the comparison base, Depew provides \$25,000 life insurance coverage, Hamburg \$20,000, Evans \$10,000, Kenmore \$20,000, Lancaster \$10,000 and Lancaster provides a lump sum of \$749 for the purchase of all insurances for their officers (except, the Panel assumes, the purchase of health insurance). The data shows that there is a modest discrepancy between the communities in the comparisons base and Orchard Park, with regard to life insurance coverage, that discrepancy is not of a proportion which requires coverage at the level sought by the PBA to rectify.

**HELD:** The Town shall provide \$20,000 worth of group, term life insurance, said increase to become effective in the second year of the cba.

Article XV ( Sick leave) Section 1, The parties have agreed that only Police Officers (Not permanent employees) shall have the right to accumulate and use sick leave. Presently permanent employees may accumulate and use sick leave.

Section 1 (PBA) In the first year of the cba sick leave may be accumulated to a maximum of ~~210~~ days and in the second year the ceiling shall be raised to 236 days. At present no more than 200 days may be accumulated.

The following ceilings are in place for the accumulation of sick leave days within the communities within the comparison base: Depew, 220, Evans, 150, Hamburg 300, Lancaster, 288, West Seneca 324, Kenmore, Unlimited. The Panel notes that, pursuant with the holding in Article XII, Section 4 (New) (Supra), where a significant reason for the preservation of sick leave days has been eliminated, the value of having the right to accumulate large numbers of unused sick leave days has been reduced. Nevertheless, banks of sick leave days have value during the police officer's days of active service since they protect against the possibility of a loss of income resulting from serious injury or illness. A modest adjustment is warranted.

**HELD:** In the second year of the cba, officers shall be allowed to accumulate their unused sick leave days to a maximum of 210 days.

Section 5, (PBA) where a work related injury occurs the affected Police Officer shall have no diminution of benefits arising from his absence from work, said provision to be supplemental to and in addition to the provisions of GML 207-C GML. At present only Section 207-C GML controls.

As a consequence of court decisions and arbitration awards, it is apparent that Section 207-C GML limits benefits to wages, salary and health insurance to employees who suffer on the job disabilities. Additional benefits may only be provided to affected employees through the cba. As a consequence of the contract remaining silent on the matter of its application to employees who are injured on the job, those employees receive fewer benefits than employees who are disabled outside of the scope of their employment.

The members of the Panel discussed this matter at considerable length. The Town argued that a provision requiring that employees injured on the job receive not only their Section 207-C benefits but also the benefits available to employees injured off the job, would remove the Town's right to negotiate the provision and/or would render the benefits available to a 207-C beneficiary, under the contract, unclear. The PBA argued on the grounds of basic fairness, stating that an employee injured in the line of duty should receive no fewer benefits than an employee injured off the job. It is difficult to understand the Town's rationale. Accordingly it is ,

**HELD:** Where a work related injury resulting in disability occurs, the injured employee shall have available to him, in addition to the benefits provided by Section 207-C of the GML, all other contractual benefits which would have been available to him had his disability arisen off of the job.

Section 6 (Town) The Town proposes eliminating the current provision which grants up to three days of absence per year for illness in the immediate family.

Changes sought by the Town and the PBA regarding Section 6 and the addition of two new Sections 7s are not warranted. Where an existing benefit is proposed for elimination (as characterizes the Town's position with regard to Section 6) or where new generic matters are proposed for incorporation into the cba (as both the Town and PBA propose with regard to the new Section 7s) a heavy burden rests on the proponent of the changes to show why they should occur where the parties themselves have not been able to agree to changes of this nature (as opposed to increasing or reducing a previously negotiated benefit). This is a cautious

position but one which must prevail if parties engaged in collective bargaining are to be encouraged to successfully negotiate as many items as possible. The Taylor Law expects this result. The practice of tripartite arbitration panels should not undermine the policy of the law.

**HELD:** The proposal is denied.

Section 7, New Section (PBA), In the first year of the cba, upon the termination of employment or death of a Police Officer the Officer or his estate shall be paid the value of 25% of all unused sick leave days. In the second year of the cba the conversion shall be raised to 45% of the value of the unused sick leave days.

**HELD:** The proposal is denied (See reasoning at Section 6 above).

New Section 7 (Town) A Police Officer on sick leave shall remain confined to his domicile for 24 hours except for necessary trips to attend to his illness on the date of his absence from work unless he shall have been given permission to leave by the Chief of Police.

**HELD:** The proposal is denied (See reasoning at Section 6 above.)

Article XVI (Personal Leave), Section 1 (PBA), Bargaining unit members shall have 4 days available as personal leave in the first year of the cba and in the second year shall have 5 days available. Presently there are three days available.

The communities in the comparison base provide the following aggregation of personal leave days: Depew, 5 days, Evans, 3 days

unused to sick leave, Hamburg, 4 days, Kenmore, 6 days, Lancaster, 2 days unused to sick leave or converted to cash, West Seneca, 4 days unused to sick leave.

An improvement in personal leave days is justified by the comparison which shows that the number of days of personal leave available in Orchard Park is generally of lesser value than in the base communities (Where, as in the case of Lancaster and Evans, the same or fewer days are available for personal leave but those days if not utilized for personal leave, may be accumulated as personal leave.)

**HELD:** In the second year of the cba, members of the bargaining unit shall have four days of personal leave available, said days to be non-cumulative and subject to the restrictions otherwise found at Sections 1,2 and 3 of Article XVI.

Article XVII (Death in Family), Section 1 (Town) A maximum of four consecutive days of leave of absence with pay shall be available to Police Officers arising from the death of members of the Officer's immediate family but shall not be available because of the death of brother, sister son or daughter in law. Presently these persons are included in the excused absence category.

The Panel applies the reasoning set forth above (At Article XV, section 5) and,

**HELD:** Denies the proposal.

Article XVIII, (Non Civil Service vacancies), Section 2, (PBA) Following service of twelve months as a detective, the incumbent shall not be removed from service as a detective except for cause

or the abolition of the position. Presently tenure for detectives is not mentioned in the cba.

As a result of legislation passed three years ago, detectives were granted tenure after three years of satisfactory service. The PBA admits that there has never been a problem whereby qualified detectives have been denied tenure without just cause or have otherwise been caused to suffer a diminution of their job status without cause. They argue however, that additional protection is required to guard against the possibility that anew and less sanguine administration will assume the reins of power in Orchard Park and then proceed to run amuck with the careers and fortunes of detectives prior to their gaining a safe tenure haven. The Panel is not convinced that the magnitude of the peril, if there be any peril at all, is such as to justify the demands of the PBA. Therefore, partly as a result of the philosophy set forth at Article XV, section 5 above and partly as a result of the view that the existing statutory protections are still in their infancy and have not been given a fair opportunity to work, there is no basis to support the PBA's demand.

**HELD:** The proposal is denied.

Article XXII,(In Service Training), Section 1 (PBA) Where in service training is required and takes place outside of an Officer's regular duty hours, they shall be paid at the rate of time and one half. Presently the rate of pay for such training is straight time pay.

**HELD:** Pursuant to the reasoning first found at Article VI, Section 2 (Briefing time; the Town agrees to abide by the provisions of the FLSA), the proposal is denied.

Article XXIII, (Clothing Allowance) (Town) The Town may supply (enumerated list of clothing) Presently the Town "shall" supply...

The Town proposes substituting "may" for "shall" with regard to both Clothing Allowance and Equipment Allowance (infra). The Town's concern appears to be that the existing language might be construed by an arbitrator literally with the result that replacement clothing and equipment, including ammunition, could be required before an actual need for replacement actually arises. The present language for both provisions states "...replaced by the Town when deemed necessary by the Chief of Police", and "...replaced when deemed necessary by the Chief of Police." It is difficult to imagine how the verb "shall" could be more effectively modified than with the existing language.

**HELD:** The proposal is denied.

Section 3, (PRA) In the first year of the cba the supplemental clothing allowance shall become \$275 and in the second year of the cba that rate shall be raised to \$300. Presently the rate is \$200.

Of the communities in the comparison base, the following provisions for supplemental or annual uniform allowances are found: Depew, \$800, Evans, replace as needed, Hamburg, \$200, Kenmore, replace as needed, \$150 cleaning allowance, Lancaster, \$600, West Seneca, \$600. On the basis of this comparison, an improvement is justified.

**HELD:** In the second year of the cba the annual uniform allowance

shall be increased to \$250.00

Article XXIV (Equipment Allowance), Section 1 (Town) The Town may supply (enumerated list of equipment). Presently the Town "shall" per man per month" stricken.

**HELD:** Denied (See reasoning at Article XXIII [supra])

Article XXVIII, (Miscellaneous Provisions), Section 4 (PBA) The agreement shall "...superseded conflicting rules, regulations or practices heretofore existing but that established practices not covered in the agreement will continue in force and effect."

**HELD:** Denied ( See reasoning at Article XXIII [supra])

Article XXIX (Duration) The parties agree that the cba shall be of two years duration. It is the further **HOLDING** of the Panel that except where set forth to the contrary, all decisions shall be retroactive to January 1, 1987.

All other items upon which the parties have reached tentative agreement are incorporated into this award by reference.

#### **SUMMARY**

Benefit improvements in salary, longevity, vacation, holiday, life insurance, and clothing allowance will cost 7.42% in the first year and 6.47% the second year for an average increase of 6.94% for each of the two years of the cba. Not factored into these per centages are the costs for health insurance for retirees or the additional cost of the personal leave day since the Panel could not estimate the utilization rate of these

benefits. It is to be noted however, that the improvement of the health insurance for retirees also substantially reduces the Town's liability for converting unused sick leave days into their cash equivalent for the purpose of purchasing sick leave coverage upon retirement.

We, Eric Lawson Jr., Esq. Chairman of the Panel, Anthony DeMarie, Esq., Employee Representative and Joseph Randazzo, Esq., Employer Representative do hereby acknowledge and affirm that, having been duly appointed pursuant with Article XIV, CSL, Section 209, 4, (c)(i), and having conducted hearings on all matters certified to be in dispute as provided for by Section 209,4,(c)(v) and Part 205.8 and 205.9 of the Rules, make this our unanimous award with respect to all issues save those specifically identified below upon which a Panel Member has dissented from a majority vote of the Panel.

Eric Lawson Jr. Esq. Chairman of the Panel. *Eric Lawson*

On this 4<sup>th</sup> day of December, 1987 there appeared before me Eric Lawson Jr. to me known and known to me to be the person who executed the forgoing document, and he signed the same in my presence.

SUSAN M. SMITH  
Notary Public, State of New York  
Qualified in Seneca County  
My Commission Expires March 30, 1989

*Susan M. Smith*  
Notary Public

Anthony DeMarie, Esq., Employee Representative

*Anthony DeMarie*

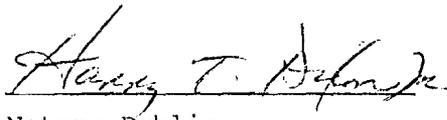
Except with regard to the following matters upon which a dissent is entered and where a dissenting opinion may be entered and attached herewith.

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On this 17<sup>th</sup> day of December, 1987 there appeared before me Anthony DeMarie to me known and known to me to be the person who executed the foregoing instrument, and he signed the same in my presence.

**HARRY T. DIXON, JR.**  
Notary Public, State of New York  
Qualified in Erie County  
My Commission Expires 2/17 1988

  
Notary Public

Joseph Randazzo, Esq., Employer Representative \_\_\_\_\_

Except with regard to the following matters upon which a dissent is entered and where a dissenting opinion may be entered and attached herewith.

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---

On this \_\_\_\_\_ day of December, 1987 there appeared before me Joseph Randazzo to me known and known to me to be the person who executed the foregoing instrument, and he signed the same in my presence.

\_\_\_\_\_  
Notary Public

LAW OFFICES  
DIXON, DEMARIE AND SCHOENBORN

A PROFESSIONAL CORPORATION

930 CONVENTION TOWER  
43 COURT STREET  
BUFFALO, NEW YORK 14202

TELEPHONE: 856-0024  
AREA CODE: 716

\*ALSO ADMITTED IN FLORIDA  
\*\*ALSO ADMITTED IN MICHIGAN

HARRY T. DIXON  
ANTHONY J. DEMARIE  
JOSEPH DEMARIE  
DANIEL L. SCHOENBORN  
THOMAS E. WOJTASZEK  
MICHAEL T. HAGELIN  
MICHAEL B. DIXON  
HARRY T. DIXON JR.  
JILL LYNCH DIBLASI\*\*

December 7, 1987

Joseph L. Randazzo, Esq.  
210 Firstmark Building  
135 Delaware Avenue  
Buffalo, New York 14202

Eric W. Lawson, Jr., Esq.  
420 Linwood Avenue  
Buffalo, New York 14209

Re: Orchard Park PBA and Town  
of Orchard Park  
PERB #M86-434  
IA 86-31  
Our file #93-1

DEC 21 1987  
CONCLIA

Gentlemen:

I am enclosing to Mr. Randazzo four copies of the Opinion and Award in the above matter, which I have executed and have had notarized, and in which I have joined in the conclusions of Mr. Lawson.

This letter will confirm that the Opinion and Award contains an omission and a typographical error, which I expect both Mr. Randazzo and Mr. Lawson are agreeable to correct.

Mr. Lawson advised me by telephone, on December 4, 1987 that the Opinion and Award should contain a provision whereby the parties are directed adopt a modification to Article X, Section 5 which will provide that detectives will no longer be included in the number of officers allowed on vacation at a time.

It is my understanding that this change is acceptable to the Town since the absence of a detective does not reduce the patrol force, anyway.

The Opinion and Award contains a typographical error: Article XV, Section 1, should read "220" instead of "210" so

Joseph L. Randazzo, Esq.  
Eric W. Lawson, Jr., Esq.  
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that officers can accumulate 220 sick days, beginning in 1988.

Based upon the telephone conversation I had with Mr. Lawson, I can assume these changes are contained in the Opinion and Award, but if Mr. Randazzo has any problem with them we can meet and discuss them.

While I have not dissented to any of the holdings of Mr. Lawson, I do not agree with the reasoning on Page 11, regarding the scope of General Municipal Law Section 50-j.

I do not agree that nothing was shown which unequivocally established that the present language of that section does not, in fact, direct indemnification for civil rights claims, where such claims constitute a "negligent act" by a police officer.

I believe that the Legislature, by adopting GML 50-k recognized that GML 50-j does not include indemnification for claims based upon violations of civil rights.

Further, I believe that reference to a "negligent act" is misplaced. The indemnification provided pursuant to the General Municipal Law, is not limited to "negligent acts". That indemnification extends to claims regarding intentional torts. Therefore, the question of whether or not defense and indemnification must be provided does not depend upon whether or not the claim is based upon negligence. The defense and indemnification is required even if the act, complained of, is intentional.

The determination as to whether indemnification must be provided for a claim which is based upon violation of civil rights, does not turn upon whether or not it is alleged that the act complained of is based upon negligence. The determining factor has always been whether or not the complaint, itself, refers to a violation of civil rights as defined in the U.S. Code.

As I have long argued, generally, civil suits brought

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Eric W. Lawson, Jr., Esq.  
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against police officers are not based upon negligent acts. They are based upon alleged intentional acts. Excessive force, false arrest, false imprisonment, assault, etc., are not negligent acts. They are willful!

It is my contention that even without the award, the Town of Orchard Park is obligated to provide the indemnification which the Legislature has dictated. It is my contention that the Legislature did not intend to exclude, from the provisions of this Section, protection against claims which are based upon violations of civil rights.

However, in the interest of bringing this process to a conclusion, I have adopted the Award, in total.

I anticipate that the same issue will arise in the future.

I am requesting that Mr. Randazzo give this matter his immediate attention.

Very truly yours,

AJD/smn  
Enc.



1  
The undersigned concurs with the majority opinion and award except as  
indicated in the following:

1. The award of interest on the award of the majority opinion and award, increase

2. The award of interest on the award of the majority opinion and award, increase

3. The award of interest on the award of the majority opinion and award, increase

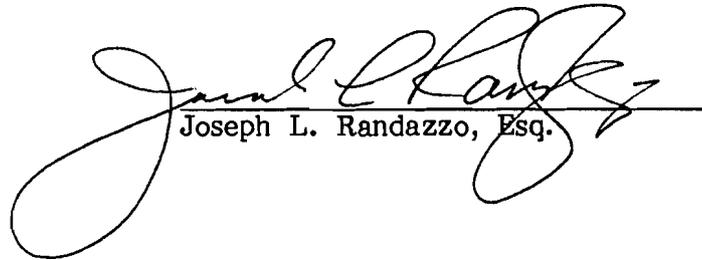
The undersigned concurs with the majority opinion and award except as follows. With respect to the economic determination of the majority opinion and award, such award provides in the first year for a salary increase of 6.5 percent; an increase in longevity; and the application of contract benefits in situations covered by 207(c) of the GML to the extent presently provided for by non-207(c) situations. In the second year, the majority award provides for a 6.0 percent salary increase; reference to Section 50-J of the GML into the contract and improvements in vacation, holidays, medical insurance on retirement, life insurance, sick leave accumulation, personal leave and clothing allowance.

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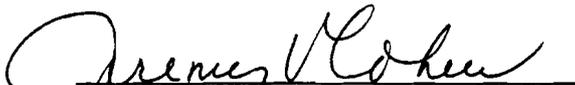
The undersigned dissents from the majority award ~~award~~ <sup>COUNCIL</sup> respect to the matters referred to above on the basis that such award is excessive and inconsistent with the majority of other settlements in comparable municipalities. In addition, the majority's determination to include the language of Section 50-J into the agreement is not only unnecessary, but unreasonably places the Town in a position of resolving disputes concerning such provision in court as well as in arbitration. On page 28 of the award, the majority, in reflecting a Town proposal regarding illness in the immediate family stated that "where new generic matters are proposed for incorporation into the cba . . . a heavy burden rests on the proponent of the changes . . .". Notwithstanding this language, the majority failed to adhere to such when granting the association's proposed changes regarding Sections 50-J and 207(c) of the GML, and the changes in medical insurance upon retirement, all of which the undersigned considers to fall into the category of issues requiring a heavy burden, which burden has not been met. In this regard, the award regarding medical insurance upon retirement changed the relationship between accumulated sick leave and medical insurance upon retirement thus in effect eliminating the inducement to avoid abuse which the parties bargained for and have had in effect for a number of years. With respect to the award regarding

personal leave, the majority implication that such does not represent an economic cost to the Town on the basis of uncertainty as to whether it could be used represents naivety which is incomprehensible. It should also be noted that every issue in dispute which was addressed by the majority involved an association proposal and the majority failed to address even one of the Town's proposals notwithstanding the obvious merit of at least one of such proposals.

In conclusion, the undersigned considers the majority award regarding the issues discussed above as endorsing and encouraging interests arbitration over negotiation and depriving the parties of an opportunity to negotiate with respect to a number of such issues. Accordingly, the undersigned considers the majority award with respect to the above issues to <sup>be</sup> unreasonable, unwarranted and irresponsible.

  
Joseph L. Randazzo, Esq.

Sworn to before me this  
14 day of December, 1987.

  
Notary Public  
STATE OF NEW YORK  
COUNTY OF ERIE  
MY COMMISSION EXPIRES 11/30/89