IN THE MATTER OF CITY OF PATERSON, RESPONDENT, AND PATERSON FIRE OFFICERS' ASSOCIATION, FMBA LOCAL 202, APPELLANT.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-002426-23 On Appeal From: P.E.R.C. No. 2024-41

BRIEF ON BEHALF OF APPELLANT
PATERSON FIRE OFFICERS' ASSOCIATION, FMBA LOCAL 202

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PRELIMINARY STATEMENT

Appellant Paterson Fire Officers' Association, FMBA Local 202 ("PFOA") filed this appeal challenging the decision of the Public Employment Relations Commission ("PERC" or "Commission") because it was arbitrary, capricious, and unreasonable in finding that: (1) the Arbitrator did not err when he rejected the PFOA's Revised Final Offers and considered only the PFOA's original Final Offer; (2) the Arbitrator did not make a mistake of fact regarding the PFOA's final offer on health benefits; (3) the Arbitrator did not misapply the N.J.S.A. 34:13A-16(g) criteria; (4) the Arbitrator appropriately considered the internal comparables budgeted by the City and approved by the Department of Community Affairs in applying the 16(g) factors; and (5) the Arbitrator did not err by directing that the parties, and not the Arbitrator, blend the three fire supervisory contracts into a single agreement.

In addition, this appeal addresses (a) the arbitrator's failure to follow the requirements of N.J.A.C. 19:16-5.7(g) which mandates that the City provide the arbitrator and PFOA with information related to the composition of the unit and unit salary costs; and (b) the Commission's decision which: (1) failed to address the arbitration proceeding's substantive and procedural deficiencies including the arbitrator's acceptance and adoption of Salary Cost Outs submitted by the City after the submission of post hearing briefs, without opportunity for the

PFOA to respond/rebut the information submitted, which included incorrect information as to the composition of the three bargaining units as well as inaccurate backpay calculations; and (2) failed to acknowledge that a complete award was not timely issued because the Award included six attached appendices which were not provided to the PFOA (or the City) (a) when the Award was issued; (b) prior to the PFOA's appeal of the interest arbitration award to PERC; or (c) prior to PERC's decision denying the PFOA's appeal.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Appellant, Paterson Fire Officers Association, Local 202 ("PFOA"), and Respondent, City of Paterson ("City") are parties to three separate collective negotiations agreements, each representing a different rank: Captain, Battalion Chief and Deputy Chief, which covered the period August 1, 2010 through July 31, 2019. (Aa582-739).[2] On or about September 11, 2023, the PFOA filed a petition to initiate compulsory interest arbitration with the Public Employment Relations Commission under Docket No. IA-2024-002. (Aa177). Joseph Licata was appointed as Interest Arbitrator. (Aa181). Hearings were conducted on

[1] Because the Statement of Facts and Procedural History are closely interrelated, they are combined to avoid repetition and for the convenience of the Court.

[2] "Aa" refers to the Appellant's Appendix.

September 21, 2023, October 26, 2023 and November 3, 2023. (Aa69).[3] On December 18, 2023, Interest Arbitrator Licata issued a Decision and Award in which he awarded an agreement that (a) covered the period August 1, 2019 through December 31, 2023; (b) merged the three supervisory fire units, Captain, Battalion Chief and Deputy Chief, into one consolidated agreement; (c) awarded salary increases of 0% for 8/1/2019 – 7/31/2020, 1% for 8/1/2020 – 7/31/2021, 2% for 8/1/2021 – 7/31/2022, 1.5% for 8/1/2022 – 7/31/2023, and 1.5% for 8/1/2023 – 12/31/2023; (d) awarded retro pay to be distributed among unit employees of $300,00.00 for the period 8/1/2022 – 7/31/2023 and $150,000.00 for the period 8/1/2023 – 12/31/2023; (e) awarded education benefit amendments; (f) awarded an increase in the number of leave days that can be carried over; (g) modified the health benefits section which included an acknowledgement of New Jersey State Health Benefits participation, Chapter 78 employee contributions, and a health insurance waiver incentive to match the health benefits language in the firefighter unit agreement; (h) amended the legal defense provision; and (i) amended the dues check off provision. All other proposals of the parties were denied. (Aa145-160).

[3] Only the September 21, 2023 and October 26, 2023 hearings were transcribed. Citations to the transcripts are identified as "1T" for the September 21, 2023 hearing and "2T" for the October 26, 2023 hearing.

On or about January 2, 2024, the PFOA appealed the Interest Arbitration Award to PERC. (Aa560). On February 29, 2024, PERC affirmed the Interest Arbitration Award. (Aa036-064). The Commission held that an interest arbitration award is not subject to being vacated unless it is demonstrated that:

> (1) the arbitrator failed to give "due weight" to the 16g statutory factors judged relevant to the resolution of the specific dispute; (2) the arbitrator violated the standards in N.J.S.A. 2A:24-8 and -9; or (3) the award is not supported by substantial credible evidence in the record as a whole. (citations omitted) (Aa048).

In its decision, the Commission addressed each argument of the PFOA.

First, the PFOA asserted that the arbitrator improperly rejected its revised final offers. It was only after the revised final offers were submitted in a letter to the parties dated November 2, 2024 that the arbitrator stated that, "the substance of both parties[']final offers should not have changed since the original submission." (Aa0040; Aa0053; Aa0374). The PFOA argued that the arbitrator failed to clearly state in his request for revised final offers that the parties were to provide more specific contract language and not additional substantive proposals. This, the PFOA argued, was prejudicial to the PFOA since the arbitrator accepted the City's revised final offer but not the PFOA's.

On the issue of the arbitrator rejecting the PFOA's revised final offers, the Commission held:

> Our review of the record, including comparison of the PFOA's September 12 Final Offer to its subsequent revised final offers,

> confirms the arbitrator's determination that the PFOA's revised final offers included new substantive proposals that were not included in its final offer. The City's revised final offer, by contrast, complied with the arbitrator's request by supplying specific contract language without introducing new proposals beyond the scope of its September 11 Final Offer. The arbitrator's October 12 and 18 requests sought for the parties to indicate whether their proposals required new contract provisions or changes to current contract provisions, and to provide the proposed verbatim contract language to either change existing language or add new language. There was no solicitation of, or mutual consent to, substantive additions to the final offers that the parties had already submitted prior to the start of the arbitration hearings. See N.J.A.C. 19:16-5.7(g)(2). While the arbitrator had discretion to permit revisions to final offers until the close of hearing, here he sought only submission of specific contract language concerning the parties' previously submitted offers. (Aa052-053).

Next, the PFOA objected to the health benefits proposal awarded by the arbitrator. It asserted that the arbitrator misunderstood its proposal and erred in the wholesale adoption of the health benefits language from the firefighters' unit May 2022 MOA because it only sought to add the health benefits waiver incentive language from the firefighters' MOA, and not other language which was inapplicable to the PFOA contract. (Aa054). The PFOA's revised final offers clarified any ambiguity in its health benefits proposal. However, the arbitrator's failure to accept the revised final offer, which clarified exactly what parts of the firefighters' unit MOA language was sought, lead to the PFOA being prejudiced by the arbitrator's misunderstanding of the language sought.

In its decision, the Commission found that:

> The arbitrator's award recited the full "Article VII - Health Benefits" provision from the PFA's May 2022 MOA with the City and awarded the same health benefits language, including the waiver incentive language, as requested by the PFOA in its final offer. Award at 89-91). Contrary to the health benefits proposal in the PFOA's revised final offer which, as discussed above, was properly rejected, the PFOA's final offer did not limit its health benefits proposal to only the addition of a health benefits waiver incentive. Therefore, the arbitrator did not make a mistake by replacing the PFOA's health benefits provision with the same language found in the PFA's MOA. (Aa054-055).

The PFOA next argued that the arbitrator misapplied the 16g statutory factors. The PFOA contended that the arbitrator did not give due weight to internal comparability in light of the undisputed evidence in the record that "other uniformed and non-uniformed units provided for 2% or more in salary increases." (Aa055).

On this issue, the Commission recited the arbitrator's findings without identifying whether the 16g statutory factors were misapplied. It held:

> The arbitrator's award included a section entitled "Application of the Statutory Criteria/Salary Award" in which he indicated he was considering the interest and welfare of public (16g(1)), lawful authority of employer (g(5)), financial impact on governing unit and residents (g(6)), and statutory restrictions imposed on employer (g(9)) together. (Award at 48-49). He determined that the interest and welfare of the public is entitled to the most weight because it embraces many factors and recognizes their interrelationship, including the financial impact of the award. (Award at 48-49). In applying these criteria, he appropriately considered the City's financial condition as testified to by the City's CFO, which includes the City's receipt of Transitional Aid. (Award at 49-55). Following his review of the evidence concerning the City's financial condition, the arbitrator concluded:

> In sum, the confluence of lost municipal court revenues due to COVID-19, the delay in negotiations until 2022, the structural budgetary shortfall experienced in 2022-2023 by the City, the need for it to request an additional 10 million dollars from the DCA, its moratorium on filling vacant positions (to raise 3.6 million dollars), and the City's diversion of reserves to fund an originally proposed 2% across-the-board offer to the PFOA units contributed to the significant limitations on fashioning an economic award for this group.

The arbitrator then discussed Comparability (16g(2)), recognizing the importance of considering evidence of a pattern of settlement among a public employer's units. (Award at 58-62). See Somerset Cty. Sheriff's Office and Somerset Cty. Sheriff FOP, Lodge No. 39, P.E.R.C. No. 2007-33, 32 NJPER 372 (¶156 2006), aff'd, 34 NJPER 21 (¶8 App. Div. 2008) ("[m]aintaining an established pattern of settlement promotes harmonious labor relations, provides uniformity of benefits, maintains high morale, and fosters consistency in negotiations.") As to internal comparability, the arbitrator considered the 2% salary increases received by the City's non-uniformed units and the greater than 2.9% salary increases received in the PFA unit's 2022 MOA. (Award at 61-62). However, the arbitrator noted that the PFA unit also provided economic concessions including ending terminal leave and longevity for new hires, and folding longevity into salary for existing members. (Award at 61).

Ultimately, when considering internal comparability in the context of the public interest and financial impact criteria, the arbitrator determined that he was constrained to awarding less than 2% salary increases for some years of the award based on the City's financial condition. Specifically, the arbitrator found that, in order to fund even a 2% across-the-board salary increase the City would need to divert all of its surplus and cap banking for CY 2024 and still end up approximately $400,000 short, possibly requiring layoffs or service shutdowns to make up the shortage. (Award at 55-56). Accordingly, he concluded:

> In addressing the public interest/financial criteria, even though I would otherwise find that the unit in question deserved, at a minimum, to be treated like the City treated its non-uniformed union and non-represented employees, i.e., 2% across-the-board with retroactive pay, in the current fiscal setting, I cannot award that amount. [Award at 55.]

(Aa056-058).

Finally, the PFOA argued before the Commission that while the parties jointly sought consolidation of the 3 separate units (Captains, Battalion Chiefs and Deputy Chiefs) into a single consolidated unit, the arbitrator failed to make a final and definite award because "he did not provide all the language necessary to fully unify its three units' previous contracts into a single unified contract" due to not having "enough time to merge the contracts." (Aa062). Instead, he left the consolidation of the contracts to the parties acknowledging that a mediator may be needed to resolve any dispute over the merged units. (Aa062).

On this issue, the Commission held:

> Given the 90-day statutory time frame for conducting a hearing and rendering an interest arbitration award (N.J.S.A. 34:13A-16f(5)), as well as the numerous substantive proposals and extensive financial records considered in this case, the arbitrator understandably was unable to specifically set forth how the unmodified language of the previous contracts could be efficiently blended and reformatted into a single CNA. The substantive aspect of this proposal was accomplished by the arbitrator's consideration of the three units together and his determination that for this award and going forward, the units would be consolidated into a single contract. We find that the arbitrator did not err by leaving to the parties the ministerial task of blending all of the unmodified language of the

> POA's three previous contracts into a single document. The parties have all of the information they need to unify the contracts into a single CNA that incorporates all of the changes made by this award without altering any previous terms that remain applicable to one or more of the units.

(Aa063-064).

Further, the Commission endorsed the arbitrator's suggestion for the parties to hire a mediator to address any disputed issues. (Aa064, Award footnote 10).[4]

Arbitrator Licata transmitted the 96-page Award and 6 appendices to PERC by email on December 17, 2023. (Aa549). PERC transmitted the Award to counsel for the parties by email on December 18, 2023. (Aa553). The transmittal letter to the parties with the attached Award did not include the 6 appendices that were part of the Award. By email dated March 28, 2024, counsel for the PFOA requested that Arbitrator Licata provide the PFOA's counsel with the 6 appendices that were included with the Award. (Aa558). PERC was copied on the March 28, 2024 email to Arbitrator Licata. By email dated March 28, 2024, Arbitrator Licata provided PFOA's counsel, copy to PERC, with the

[4] The PFOA also challenged the arbitrator's rejection of its external comparabilities and the weight given by the arbitrator on the New Jersey Department of Community Affairs fiscal oversight of the City of Paterson's budget and its receipt of Transitional Aid based on a 2022 Memorandum of Understanding between the City and the DCA. (Aa0058-Aa0060 and Aa0060-Aa0062). These issues are not the subject of this appeal.

6 appendices that were included with the Award and transmitted to PERC on December 17, 2023. (Aa559). By email dated April 9, 2024, PFOA's counsel provided counsel for the City with the 6 appendices that were provided to PFOA's counsel by Arbitrator Licata. (Aa557). PERC has not reissued the Award to the parties with the 6 appendices attached.

This Appeal of the February 29, 2024 PERC Decision was filed with Court by the PFOA on April 11, 2024. The Court issued its Notice of Docketing on April 12, 2024. (Aa001-Aa002). On April 15, 2024, the Court noted a deficiency in the Caption. The PFOA filed an Amended Notice of Appeal on April 15, 2024 together with an Amended Civil Case Information Statement. (Aa003-Aa010).

LEGAL ARGUMENT

POINT I

STANDARD OF REVIEW

Police and fire unions must resolve collective negotiations impasses pursuant to N.J.S.A. 34:13A-16(g)("Police and Fire Public Interest Arbitration Reform Act"). The public policy of the State pursuant to the Act is as follows:

> Recognizing the unique and essential duties which law enforcement officers and firefighters perform for the benefit and protection of the people of this State, cognizant of the life threatening dangers these public servants regularly confront in the daily pursuit of their public mission, and fully conscious of the fact that these public employees, by legal and moral precept, do not enjoy the right to

> strike, it is the public policy of this State that it is requisite to the high morale of such employees, the efficient operation of such departments, and to the general well-being and benefit of the citizens of this State to afford an alternate, expeditious, effective and binding procedure for the resolution of disputes.

N.J.S.A. 34:13A-14(1)(a).

The New Jersey Arbitration Act establishes four circumstances in which a court may vacate an arbitration award:

> a. where the award was procured by corruption, fraud, or undue means;
>
> b. where there was either evident partiality or corruption in the arbitrators, or any thereof;
>
> c. where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause being shown thereof, or in refusing to hear evidence, pertinent and material to the controversy, or any of the other misbehaviors prejudicial to the rights of any party; and
>
> d. where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made.

N.J.S.A. 2A:24-8.

When a police or fire union is unable to negotiate a new collective negotiations agreement with their public employer, either party may file a petition with the Public Employment Relations Commission for compulsory interest arbitration. N.J.S.A. 34:13A-16(b)(2). Interest arbitration "involves the submission of a dispute concerning the terms of a new contract to an arbitrator, who selects those terms and thus in effect writes the parties' collective

agreement." New Jersey State Policemen's Benevolent Ass'n v. Irvington, 80 N.J. 271, 284 (1979).

Arbitration under the Police and Fire Public Interest Arbitration Reform Act is subject to a statutorily mandated procedure, requiring the arbitrator to "decide the dispute based on a reasonable determination of the issues, giving due weight to [the statutory factors] that are judged relevant for the resolution of the specific dispute." N.J.S.A. 34:13A-16(g). The factors set forth in N.J.S.A. 34:13A-16(g) are:

> (1) The interests and welfare of the public. Among the items the arbitrator or panel of arbitrators shall assess when considering this factor are the limitations imposed upon the employer by P.L.1976, c.68 (C.40A:4-45.1 et seq.).
>
> (2) Comparison of the wages, salaries, hours, and 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 public employment in the same or similar comparable jurisdictions, as determined in accordance with

section 5 of P.L.1995, c.425 (C.34:13A-16.2); provided, however, that each party shall have the right to submit additional evidence concerning the comparability of jurisdictions for the arbitrator's consideration.

(3) The overall compensation presently received by the employees, inclusive of direct wages, salary, vacations, holidays, excused leaves, insurance and pensions, medical and hospitalization benefits, and all other economic benefits received.

(4) Stipulations of the parties.

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

(6) The financial impact on the governing unit, its residents, the limitations imposed upon the local unit's property tax levy pursuant to section 10 of P.L.2007, c.62 (C.40A:4-45.45), 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 element or, in the case of a county, the county purposes element, required to fund the employees' contract in the preceding 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 moneys have been designated by the governing body in a proposed local budget, or (c) initiate any new programs and services for which public moneys have been designated by the governing body in 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 of employment through collective negotiations and collective bargaining between the parties in the public service and in private employment.
>
> (9) Statutory restrictions imposed on the employer. Among the items the arbitrator or panel of arbitrators shall assess when considering this factor are the limitations imposed upon the employer by section 10 of P.L.2007, c.62 (C.40A:4-45.45).

N.J.A.C. 19:16-5.9(b) provides: "Each arbitrator's decision shall be accompanied by a written report explaining how each of the statutory criteria played into the arbitrator's determination of the final award. The opinion and award shall be signed and based on a reasonable determination of the issues, giving due weight to those factors listed in N.J.S.A. 34:13A-16g."

An interest arbitrator must give "due weight" to the statutory criteria. Irvington, supra., 80 N.J. at 287. "In giving due weight, the arbitrator must indicate which of the factors are deemed relevant, satisfactorily explain why the others are not relevant, and provide an analysis of the evidence on each relevant factor." N.J.S.A. 34:13A-16(g). While the arbitrator does not need to rely on all factors, the arbitrator must identify and weigh the relevant factors, and explain why the remaining factors are irrelevant. In re City of Camden, 429 N.J. Super.

309, 326 (App. Div. 2013) cert. denied 215 N.J. 485 (2013). In order to satisfy the requirement that the arbitrator gave "due weight" to each factor, the arbitrator must provide a "reasoned explanation." In the absence of such explanation, "the opinion and award may not be a 'reasonable determination of the issues'" as required by the law. Id.

While no single factor is dispositive, the New Jersey Supreme Court "observed that three of the statutory factors (1) the "interest and welfare of the public"; (5) the "lawful authority of the employer"; and (6) the "financial impact [of an award] on the governing unit, its residence…and taxpayers…were so phrased as to insure that budgetary constraints were 'giv[en] due weight' prior to the rendition of an award." Id. at 327.

The interest arbitration statute provides PERC with the authority to "affirm, modify, correct or vacate the award or may, at its discretion, remand the award to the same arbitrator or to another arbitrator. . .for reconsideration." N.J.S.A. 34:13A-16(f)(5)(a). While PERC's decision is entitled to "great weight," its decision will not stand if it is arbitrary or capricious. Id. at 327-328.

Judicial scrutiny of an interest arbitration award is "more stringent" because "such arbitration is statutorily-mandated, and public funds are at stake." Id. at 328. A reviewing court may vacate an award when (a) the decision fails

to give "due weight" to the statutory factors; (b) when the award has been procured by corruption, fraud, or undue means; (c) when arbitrators have refused to hear relevant evidence or committed other prejudicial errors; or (d) when arbitrators have so imperfectly executed their powers that they have not made a final award. Id. at 329, citing Hillsdale PBA Local 207 v. Borough of Hillsdale, 137 N.J. 71, 82 (1994).

POINT II

A. IN CONDUCTING THE ARBITRATION PROCEEDINGS, THE ARBITRATOR ENGAGED IN PROCEDURAL IRREGULARITIES REQUIRING THAT THE AWARD BE VACATED AND REMANDED.

1. The Arbitrator failed to follow the requirements of N.J.A.C. 19:16-5.7(g) which mandates that the City provide the arbitrator and PFOA with information related to the composition of the unit and unit salary costs. (Not Argued Below).

Prior to the commencement of the hearing, N.J.A.C. 19:16-5.7(g)(1) mandates that the arbitrator notify the City that it is to provide the arbitrator and the PFOA with certain "information and the format in which it shall be provided and by which the employee representative shall respond to the information." The regulations state the City is to provide:

> i. A list of all unit members during the final year of the expired agreement, their salary guide step(s) during the final year of the

> expired agreement, and their anniversary date of hire (that is, the date or dates on which unit members advance on the guide);
>
> ii. Costs of increments and the specific date(s) on which they are paid;
>
> iii. Costs of any other base salary items (for example, longevity) and the specific date(s) on which they are paid;
>
> iv. The total cost of all base salary items for the 12 months immediately preceding the first year of the new agreement; and
>
> v. A list of all unit members as of the last day of the year immediately preceding the new agreement, their step, and their rate of salary as of that same day.

The Captains, Battalion Chiefs, and Deputy Chiefs collective negotiation agreements expired July 31, 2019. According to N.J.A.C. 19:16-5.7(g), the City is to provide a snapshot of the composition of the collective negotiations units based on the last day of the expired agreement, July 31, 2019. This snapshot is intended to be used by the parties, and the arbitrator, in order to determine the unit costs going forward for the term of the awarded agreement.

The record shows that the City provided the arbitrator with the "current" unit composition (in 2023) and "current" salaries (in 2023) as Exhibit C-2 submitted into evidence at the arbitration hearing. (Aa413-Aa438).[5] There is no record of the "snapshot" on which all costs associated with an arbitration

[5] The Arbitrator is still soliciting City cost outs in emails dated November 21, 2023 and November 22, 2023. (Aa 409; Aa411). There was no opportunity for the PFOA to object to or question the calculations submitted by the City.

award is calculated. PERC has held that an arbitrator is "required to project costs for the entirety of the duration of the award…[by utilizing] the [salary] scattergram demonstrating the placement on the guide of all of the employees in the bargaining unit as of the end of the year preceding the initiation of the new contract, and [ ] simply move those employees forwarded through the newly awarded salary scales and longevity entitlements." Borough of New Milford, 2012 NJ PERC LEXIS 18, 38 NJPER 340 (¶116 2012). The Commission has specifically held that "reductions in costs resulting from retirements or otherwise, as well as any increases in costs stemming from promotions or additional new hires would not effect the costing out of the award… ." Id. However, such "breakage" may be considered by an interest arbitrator "in deciding whether it is appropriate to factor in such reductions or increases when rendering a salary award." Hopewell Tp., 2019 NJ PERC LEXIS 100, 46 NJPER 117 (¶26 2019) (August 15, 2019) .

Instead of following the Commission's mandate on complying with the interest arbitration statute and costing out the unit based on the July 31, 2019 snapshot, the arbitrator analyzed the 2023 composition of the negotiations units and used that composition in determining the cost of the Award. The cost analysis does not take into consideration promotions into the unit (Firefighter to Captain), promotions intra unit (Captain to Battalion Chief, or Battalion Chief

to Deputy Chief), salary step changes, or longevity increases. Further, the arbitrator failed to address or consider breakage even though the units had a considerable number of retirements of high salaried fire officers (32 retirements in the unit) and promotions at lower salary levels during the period covered by the Award, August 1, 2019 through December 31, 2023. (Aa475-Aa476).

A court should vacate an arbitration award where the award was procured by "undue means" which ordinarily encompasses situations where an arbitrator has made a mistake of fact or law that is either apparent on the face of the record or acknowledged by the arbitrator. New Jersey Highway Authority v. International Federation of Professional and Technical Engineers, Local 193, 274 N.J. Super. 599 (App. Div. 1994), certif. denied 139 N.J. 288 (1994). See also Borough of East Rutherford v. East Rutherford PBA Local 275, 213 N.J. 190 (2013).

The accuracy of the cost of the Award is the foundation for determining whether the Award meets the legal standards for affirmation and survives PERC and Court scrutiny. The failure of the interest arbitrator to comply with N.J.A.C. 19:16-5.7(g) and the arbitrator's use of 2023 bargaining unit data instead of the contract expiration date snapshot mandated by the regulations is a material error in violation of N.J.S.A. 2A:24–8 and fatal to the validity of the Award. Div. 540, Amalgamated Transit Union, AFL-CIO v. Mercer Cty. Imp. Auth., 76 N.J.

245, 253-254 (1978)("when…the arbitration process is compulsory, the judicial review should extend to consideration of whether the award is supported by substantial credible evidence present in the record.").

2. The Arbitrator erroneously rejected the PFOA's Revised Final Offers and considered only the PFOA's original Final Offer. (Aa049-054).

N.J.A.C. 19:16-5.7(g)(2) states:

> At least 10 days before the hearing, the parties shall submit to the arbitrator and to each other their final offers on each economic and noneconomic issue in dispute. The parties must also submit written estimates of the financial impact of their respective last offers on the taxpayers as part of their final offer submissions. The arbitrator may accept a revision of such offer at any time before the arbitrator takes testimony or evidence or, if the parties agree to permit revisions and the arbitrator approves such an agreement, before the close of the hearing. Upon taking testimony or evidence, the arbitrator shall notify the parties that their offers shall be deemed final, binding and irreversible unless the arbitrator approves an agreement between the parties to permit revisions before the close of the hearing. (Emphasis added).

The City submitted its final offer on or about September 11, 2023. (Aa359). The PFOA submitted its original final offer on or about September 12, 2023. (Aa245). In it, the PFOA proposed that the health care provisions should "mimic" the health care provisions from the Paterson Firefighters' Association Memorandum of Agreement dated May 31, 2022. (Aa246). The City's final offer did not propose any changes to the health care provision of the units' collective negotiations agreements.

After the first day of hearing, and before the second hearing date, on October 12, 2023, the arbitrator requested that the parties revise their final offers. The request stated as follows:

> I am writing to request that you each revise your final offer to include, where applicable, the existing contract language, followed by your proposal to change the existing language and the rationale for the change. If the proposal is for a new contract provision, please indicate same. Please submit your revised final offer by Friday, October 20, 2023 copying each other.

(Aa037).

The arbitrator emailed the parties on October 18, after extending the time to submit revised final offers, which stated as follows:

> Please remember to submit by 10/25/23 revised final offers to include a verbatim insert of the existing contract language (or designate the proposal as a new provision of the contract), the proposal itself and the rationale underlying the proposal. As a helpful option, if you know how many contracts the benefit has been in existence, and the changes to it over that period, if any, that will help. This work product will be accepted in lieu of testimony unless there is a factual dispute over any recitation.

(Aa037-038).

The parties agreed to submit revised final offers to the arbitrator. The City submitted its revised final offer on October 26, 2023. The City's revised final offer continued to propose no changes to the health benefits provision of the collective negotiations agreements. The PFOA submitted its revised final offer on October 25, 2023. As to the health benefits provision, the PFOA

clarified that its final offer only sought to amend the health benefits provision to include a waiver incentive payment for those members who opted not to enroll in medical and prescription coverage under the State Health Benefits Program.

On or about November 2, 2023, the PFOA further clarified and corrected its final offer to provide the arbitrator with the specific language under its health benefits provision that it sought to incorporate into the new collective negotiations agreement based on the language from the PFA MOA. (Aa274-Aa277).

It specifically identified three paragraphs (in red ink) that it sought to incorporate from the PFA MOA. It did not seek to incorporate the entire PFA health benefits article. In the Award, the arbitrator acknowledged that he would "accept the PFOA's revised Final Offer(s) only to the extent language was included which could aid in the merger of the three units into one." (Aa070; Aa080). Yet, he did not do so.

Notwithstanding the arbitrator's direction that the revised final offers were for the purpose of "reciting verbatim the contract language sought to be changed," the arbitrator rejected the PFOA's revised final offers which did just that, inserting "verbatim" contract language for the health benefits provision. The arbitrator's rejection of this verbatim language led to the arbitrator impermissibly expanding the PFOA's final offer regarding the health benefit

provision. Specifically, and as discussed more fully below, the arbitrator awarded the entire article from the PFA MOA, instead of just the three paragraphs cited by the PFOA in its revised final offer. (Aa154-Aa156).

Further, in rejecting the PFOA's revised final offers, but accepting the City's revised final offers, the arbitrator did not have the benefit of the detailed language which the PFOA sought to clarify in its original final offer. This resulted in an imbalance in the arbitrator's review of the language changes sought by both parties, and resulted in an error on the part of the arbitrator regarding the PFOA's final offer on health benefits.

B. THE ARBITRATOR MADE A MISTAKE OF FACT REGARDING THE PFOA'S FINAL OFFER ON HEALTH BENEFITS. (Aa054-Aa055).

The legal principles underlying N.J.S.A 2A:24-8(a) are well established. An arbitration award procured by undue means ordinarily encompasses a situation in which the arbitrator has made an acknowledged mistake of fact or law or a mistake that is apparent on the face of the record. Borough of East Rutherford v. East Rutherford PBA Local 275, 213 N.J. 190 (2013). An arbitration award procured by undue means should be set aside. New Jersey Highway Authority v. International Federation of Professional and Technical Engineers, Local 193, 274 N.J. Super. 599 (App. Div. 1994), certif. denied 139 N.J. 288.

As set forth above, while the arbitrator invited the parties to submit the specific language that was sought for inclusion by the arbitration award in the new contract, the arbitrator rejected the PFOA's revised final offers which included the specific language that it sought regarding changes to the health benefits provision.

In its October 25, 2023 Revised Final Offer, which was submitted on November 2, 2023, (Aa251-279), the PFOA identified the three paragraphs that it sought to have inserted into the health benefits provision of the Captain, Battalion Chief, and Deputy Chief collective negotiations agreement. Specifically, the PFOA's Revised Final Offer stated as follows:

> **8. Article XV -** Health Benefits
>
> **Section A** - Hospital, Medical, Prescription, Dental, and Optical Employees -Amended to include incentive an annual incentive payment to any City employee who, at the time of open enrollment, is eligible for and waives both medical and prescription coverage under the SHBP. The SHBP waiver incentive payment shall not exceed 25% of the amount saved by the City because of the waiver or $5,000, whichever is less. Conforms with other City labor agreements and incentivizes shared savings for the City and employees.
>
> **Proposed verbatim contract language relevant to the proposal:** (Red ink)
>
> ARTICLE XV
> HEALTH BENEFITS
> **A. HOSPITAL, MEDICAL, PRESCRIPTION, DENTAL AND OPTICAL EMPLOYEES**

1. The City shall pay the cost of hospital and medical insurance for full-time employees and their eligible dependents for the benefits currently in effect, except that active employees shall continue to contribute to the cost of health insurance as required by applicable law. The City and the PFOA recognize that when employee health benefit contributions become negotiable under P. L. 2011, Chapter 78, the contribution rate can be negotiated by the parties either up or down from the current percentage amounts required by law. In the event that a court of competent jurisdiction determines that Chapter 78 is unconstitutional and/or that it is illegal for a municipality to require its employees to contribute to the cost of health care without negotiation, the City and the PFOA agree that contributions towards the cost of hospital, medical, dental and prescription insurance shall be governed by applicable law and the collective bargaining agreement.

2. The contribution shall apply to employees for whom the employer has assumed a health care benefits payment obligation to require that such employees pay at a minimum the amount of contribution specified in this section for health care benefits coverage. An employee on leave without pay who receives benefits under the State Health Benefits Plan shall be required to pay the requisite contributions and shall be billed by the employer for these contributions. Healthcare benefits coverage will cease if the employee fails to make timely payments. The parties agree that should an employee voluntarily waive all coverage under the State Health Benefits Plan and provide certification to the City that he/she has other health insurance coverage; the City will waive the contribution for that employee.

3. The City agrees to pay an incentive payment to any City employee who waives both medical and prescription coverage under the City's State Health Benefits Program ("SHBP"). The City agrees to pay an annual incentive payment to any City employee who, at the time of open enrollment, is eligible for and waives both medical and prescription coverage under the SHBP. The SHBP waiver incentive payment shall not exceed 25% of the amount saved by the City because of the waiver or $5,000, whichever is less. In order to be deemed eligible for the payment, the employee must waive coverage at open enrollment of each year and the employee's

waiver must remain in effect for the full benefit year. The employee's waiver much follow the requirements outlined by the New Jersey Division of Pensions and Benefits. Should an employee seek reinstatement of health benefits coverage with the SHBP at any time during a benefit year, the reinstatement of coverage with the SHBP will void the employee's eligibility for the SHBP waiver payment. The City will issue the payment in full to each eligible City employee at the beginning of the next benefit year.

4. The City agrees that if the SHBP removes the Direct 10 plan, the City will immediately seek new coverage under the SHBP that is equal to or better to the Direct 10 plan. If none exists, the City agrees to notify the Association of the removal of the Direct 10 to negotiate the terms of the new health insurance benefits.

5. The City shall pay the cost of the prescription plan currently in effect for full-time employees and their eligible dependents. The prescription plan shall provide a ten dollar ($10. 00) co-pay per brand name prescription, including oral contraceptives, and a zero dollar ($0.00) co-pay per generic prescription, including oral contraceptives. City shall pay the full cost of the dental plan in effect for full-time employees and their eligible dependents.

4. The City shall implement a new dental plan for this unit's employees and their eligible family member (s) at no cost to the employee in accordance with the terms and coverage in effect as of February 1, 1999 and such benefits shall not be diminished.

5. The City shall pay the full costs of an optical plan for the full-time employees.

6. Contributions towards medical premiums shall continue to be made in accordance with applicable law.[6]

(Aa274-Aa277).

[6] Misnumbered in original.

The Revised Final Offer by the PFOA makes clear in the introductory paragraph and by highlighting the language change sought in red that it was not seeking an overhaul of the entire article. Notwithstanding, although the Award grants the Association's proposal, the Award replaces the entire Article with the exact language contained in the PFA's MOU with the City, and which is inconsistent with the fire officers' existing contracts, the Association's proposal, and proposed verbatim contract language.

More specifically, the Captains, Battalion Chiefs and Deputy Chiefs contracts contain the following separate sections in each's health benefits articles:

> Captains – Article XV – Health Benefits –
>
> A. Hospital, Medical, Prescription, Dental And Optical – Employees
>
> B. Hospital, Medical, Dental And Prescription – Retirees
>
> C. Hospital, Medical, Dental And Prescription – Widows
>
> D. Insurance Carriers
>
> E. Insurance Officer
>
> F. Vested Benefits

(Aa615-Aa622).

> Battalion Chiefs - ARTICLE IX - HEALTH BENEFITS

A. Hospital, Medical, Prescription and Dental – Employees

B. Optical

C. Hospital, Medical, Dental and Prescription – Retirees

D. Hospital, Medical, Dental And Prescription – Widows

E. The City reserves the right to self-insure or to change insurance companies

F. Vested Benefits

G. Insurance Officer

(Aa665-Aa672).

Deputy Chiefs - ARTICLE X - HEALTH BENEFITS

A. Hospital, Medical, Dental and Prescription - Employees

B. Optical

C. Hospital, Medical, Dental and Prescription - Retirees

D. Hospital, Medical, Dental and Prescription – Widows

E. Insurance Carriers

F. Vested Benefits

(Aa715-Aa721).

In the Award, the arbitrator indicated that the PFOA proposed to amend Article XV – Health Benefits – Section A to "mimic Article VII of PFA Local 2's MOA entered with the City of May 31, 2022." Yet, instead of a "mimic,"

the Award deleted and replaced an entire health benefits provision well beyond what was set forth in the final offer and in effect gutted longstanding historical language which included retirees, widows and dependents. The Award purportedly replaces the above comprehensive Article with 2 pages of language the Arbitrator copied and pasted from the City's MOU with the Paterson Firefighters Association, which contained a waiver incentive provision but was never written to replace an entire Health Benefits Article, and which contains terms that would adversely affect retirees, their families, and widows of PFOA members.

The Arbitrator awarded the following regarding the health benefits proposal:

> The PFOA's offer is granted. There is no sound reason PFOA and PFA members should have different health benefits language in their respective agreements when the City has an obligation to uniformly apply its health benefits plans and programs to both groups. The waiver provision is admittedly an economic item; however, it is an economic item benefiting both parties.

(Aa156).

While the arbitrator recognized that the PFOA sought to incorporate the medical and prescription waiver incentive payment language, his Award includes language which goes beyond what the PFOA sought in its Revised Final Offer. This is a material mistake of fact which violates the arbitrator's obligation to make a reasonable determination of the issues. Therefore, the

arbitrator exceeded his authority requiring that the Award be vacated and remanded.

POINT III

THE ARBITRATOR MISAPPLIED THE N.J.S.A. 34:13A-16(g) CRITERIA. (Aa055-058).

The parties stipulated that the term of the contract would be from August 1, 2019 through December 31, 2023. (Aa149) The only budget submitted into the record was the 2023 Municipal Budget (2T38:13-41:4) (Aa071- Exhibits J7 and C6). The arbitrator failed to consider the budgets for each year of the agreement (2019, 2020, 2021, 2022) and only considered and reviewed the 2023 budget in the salary award, which was the only economic proposal contained in the award issued by the arbitrator. (2T38:13-41:4). Moreover, the City was under an agreement with the New Jersey Department of Community Affairs for receipt of transitional aid. The Memorandum of Agreement submitted into the record was the 2022 MOU. (Aa514). No other MOUs for the other years of the Award (2019, 2020, or 2021) were part of the record before the arbitrator.[7]

[7] See City of Paterson 2023 NJ PERC LEXIS 4, 49 NJPER ¶81 (January 19, 2023)(administrative notice taken "that the City of Paterson (City) is a Civil Service jurisdiction that the State of New Jersey (State) has determined to be a "transitional aid" municipality -- i.e., eligible to receive State aid (since approximately fiscal year 2014) to balance its budget.")

In the salary award, the arbitrator awarded salary increases as follows:

August 1, 2019 through July 31, 2020 – 0%
August 1, 2020 through July 31, 2021 – 1%
August 1, 2021 through July 31, 2022 – 2%
August 1, 2022 through July 31, 2023 – 1.5%
August 1, 2023 through December 31, 2023 – 1.5%

(Aa149).

In addressing the 16(g) factors, the arbitrator found "[i]n the end, I am convinced that the 16g factors, especially the public interest and internal pattern of settlement criteria, are best served by the undersigned's Award as opposed to the acceptance of either party's proposals." (Aa149).

The arbitrator failed to provide a reasoned explanation or identify the weight that he gave the 16(g) factors, "especially the public interest and internal pattern of settlement criteria," in his salary increase award.

The arbitrator awarded the sum of $300,000 in retro pay for August 1, 2022 through July 31, 2023, and $150,000 for the period August 1, 2023 through December 31, 2023. No other retro pay was awarded. (Aa149). He provided his distribution of the $450,000 total retro pay in Appendix D to the Award. The arbitrator failed to identify or provide a reasoned explanation of the weight that he accorded the retro pay awarded. In the record, the City identified $370,000 in reserves in the 2023 budget that was available to fund the retro pay. (Aa120).

The Award indicates that there is an available levy cap bank of $1,253,156 for use in CY 2024-2025. (Aa117). The arbitrator then indicates that the City could use this available levy cap bank to "bridge the $80,000 difference in retro pay between the City's cost-out of its proposal ($370,000) and the undersigned's $450,000 award of retro pay (2022-2023: $300,000 and 2023-December 31, 2023: $150,000." (Aa117).

While the foregoing identifies the City's ability to pay the $450,000 retro pay, it fails to explain the rationale for awarding only a fraction of the retro pay that could have been awarded for the contract period, August 1, 2019 through December 31, 2023. Further, there is no explanation why the only funds that could be used to fund the retro pay was from the 2023 budget and not, for example, having full retro pay spread out over multiple budgets like 2024 or 2025.

Additionally, in the Award, the arbitrator fails to provide an accurate cost out for each year of the contract. See N.J.A.C. 19:16-5.7(f)("The arbitrator shall separately determine whether the total net annual economic changes for each year of the agreement are reasonable under the statutory criteria set forth in N.J.S.A. 34:13A-16.g."). In addition, due to the errors in the arbitrator's cost

out for the retro pay which is set forth in Appendix D to the Award, any cost out prepared by the arbitrator would be in error. (Aa172).[8]

As set forth above, according to N.J.A.C. 19:16-5.7(g), the City is to provide a snapshot of the composition of the collective negotiations units based on the last day of the expired agreement, July 31, 2019. This snapshot is to be used by the arbitrator to determine the unit costs going forward for the term of the awarded agreement.

N.J.A.C. 19:16-5.9 (c) provides, in part:

> …In all awards, whether or not subject to the two percent cap, the arbitrator's decision shall set forth the costs of all "base salary" items for each year of the award, including the salary provided pursuant to a salary guide or table, any amount provided pursuant to a salary increment, any amount provided for longevity or length of service, and any other item agreed to by the parties or that was included as a base salary item in the prior award or as understood by the parties in the prior contract. These cost-out figures for the awarded base salary items are necessary in order for the arbitrator to determine, pursuant to N.J.S.A. 34:13A-16.d, whether the total net annual economic changes for each year of the award are reasonable under the statutory criteria.

PERC has held that an arbitrator is "required to project costs for the entirety of the duration of the award…[by utilizing] the [salary] scattergram demonstrating the placement on the guide of all of the employees in the

[8] As argued in Point V below, PERC failed to provide the parties with the Appendices prepared by the arbitrator and attached to the Award. This error was prejudicial to the PFOA in its appeal to PERC.

bargaining unit as of the end of the year preceding the initiation of the new contract, and [ ] simply move those employees forwarded through the newly awarded salary scales and longevity entitlements." Borough of New Milford, 2012 NJ PERC LEXIS 18, 38 NJPER 340 (¶116 2012). In New Milford, the Commission provided a step-by-step roadmap that the arbitrator must follow:

> the arbitrator must state what the total base salary was for the last year of the expired contract and show the methodology as to how base salary was calculated. We understand that the parties may dispute the actual base salary amount and the arbitrator must make the determination and explain what was included based on the evidence submitted by the parties. Next, the arbitrator must calculate the costs of the award []. The statutory definition of base salary includes the costs of the salary increments of unit members as they move through the steps of the salary guide. Accordingly, the arbitrator must review the scattergram of the employees' placement on the guide to determine the incremental costs in addition to the across-the-board raises awarded. The arbitrator must then determine the costs of any other economic benefit to the employees that was included in base salary, but at a minimum this calculation must include a determination of the employer's cost of longevity. Once these calculations are made, the arbitrator must make a final calculation []. Id.
>
> See also Atlantic City, 2013 NJ PERC LEXIS 38, PERC No. 2023-82, 39 NJPER ¶161 (May 13, 2013)(remanded back to the interest arbitrator for re-calculation of base salary increases).

Further, the Commission specifically held that "reductions in costs resulting from retirements or otherwise, as well as any increases in costs stemming from promotions or additional new hires would not affect the costing out of the award… ." Id. Here, the arbitrator failed to follow the PERC approved

procedure for costing out the Award. Appendix D (the retro pay calculations) inappropriately contains unit members who were promoted into the unit after the term of the agreement began (August 1, 2019). Moreover, if it were intended to be an accurate calculation of retro pay, it inappropriately contained retired members of the unit who were ineligible for some or all of the retro pay because they were retired during the retro pay period (August 1, 2022 to December 31, 2023).

In Appendix D to the Award, the arbitrator identifies the salary cost in the 12 months prior to the expiration date of the contract, 7/31/2019, as $13,868,112.37. (Aa172). In the first year of the awarded agreement (8/1/2019-7/31/2020), where the arbitrator awarded a zero (0%) percent salary increase, the cost out calculated by the arbitrator is $10,327,228.10. This is a decrease of $3,540,884.27 from the expiration year (August 1, 2018-July 31, 2019). Based on New Milford, the cost in Year 1 of the Award, at zero (0%) percent, should match the cost in the expiration year of the parties' agreement. It does not. In these years and subsequent years, the arbitrator's cost out of the new salaries with salary increases awarded is as follows:

8/1/2018 - 7/31/2019 (expiration year)	$13,868,112.37
8/1/2019 – 7/31/2020 (0%)	$10,327,228.10
8/1/2020 – 7/31/2021 (1%)	$12,047,305.51

8/1/2021 – 7/31/2022 (2%)	$14,009,779.35
8/1/2022 – 7/31/2023 (1.5%)	$14,477,428.23
8/1/2023 – 7/31/2024 (1.5%)	$14,694,589.65[9]

The arbitrator's failure to properly cost out the Award renders the retro pay calculations a nullity and the awarded amounts subject to vacation and remand.

Finally, the record indicates that the City budgeted 2% salary increases for each year of the fire officers agreement. (1T106:18-107:6; 2T47:15-51:18)(Aa060). Notwithstanding, the arbitrator failed to award 2% per year across-the-board salary increases to the bargaining unit and disregarded the record regarding the City's budgeted salary increases for the PFOA bargaining unit in those calendar years. Instead, according to the Commission,

> [t]he arbitrator found that, in order to fund even a 2% across-the-board salary increase the City would need to divert all of its surplus and cap banking for CY 2024 and still end up approximately $400,000 short, possibly requiring layoffs or service shutdowns to make up the shortage. (Award at 55-56). Accordingly, he concluded:
>
> > In addressing the public interest/financial criteria, even though I would otherwise find that the unit in question deserved, at a minimum, to be treated like the City treated its non-uniformed union and non-represented employees, i.e., 2% across-the-board with retroactive

[9] The awarded term expired 12/31/2023. The cost out prepared by the arbitrator in Appendix D appears to extend to 7/31/2024 which is beyond the term of the agreement.

> pay, in the current fiscal setting, I cannot award that amount. (Emphasis added).

(Aa057-Aa058).

The arbitrator was obligated to make a reasonable determination of the issues. The record reflected that the City budgeted 2% increases for this bargaining unit in 2019, 2020, 2021, 2022 and 2023. This is substantive and dispositive evidence of the City's fiscal condition in the four (4) years prior to 2023. Yet, the arbitrator disregarded this evidence in his analysis and only focused his financial analysis on a small snapshot, the time period of the "current fiscal setting" which was the arbitration hearings in 2023.

In failing to explain why he (a) saw the City's financial condition under the narrow light of its fiscal status in 2023 and not the entire contract term 2019-2023; (b) used a small portion of the available statutory levy capacity; and (c) ignored the budgeted 2% increases for each year of the agreement, the arbitrator did not honor his statutory obligation. Accordingly, the Award must be vacated and remanded.

POINT IV

THE ARBITRATOR DID NOT APPROPRIATELY CONSIDER THE INTERNAL COMPARABLES BUDGETED BY THE CITY IN APPLYING THE 16(g) FACTORS. (Aa057-Aa058).

At the arbitration hearing, the City's Chief Financial Officer, Javier Silva, testified that the City anticipates 2% salary increases for all employees annually, and the 2% anticipated increase conforms to the Memorandum of Understanding with the Department of Community Affairs who oversees the City's receipt of transitional aid. (2T48:23-52:6)(Aa060). In her testimony, Business Administrator Kathleen Long confirmed that at least eight other bargaining units received 2% increases over the same time period as the Award at issue here. (1T157:11-159:1). Administrator Long also confirmed that the DCA's 2022 MOU capped employee salary raises at 2%. (1T41:23-42:12).

In the Award, the arbitrator improperly rejected the internal comparability factor which indisputably contained 2% salary increases for the City's non-uniformed units, and a greater-than 2.9% salary increase for the firefighters unit when the arbitrator awarded less than 2% increases to the PFOA. In rejecting the 2% annual salary increases, the arbitrator stated that the City would "need to divert all of its surplus and cap banking for CY 2024 and still end up approximately $400,000 short, possibly requiring layoffs or service shutdowns

to make up the shortage." (Aa057-Aa058). The arbitrator fails to cite to any evidence in the record to support the arbitrator's claim that the City would "have to fund most of a 2% salary increase by shutting down services and laying off numerous personnel… ." (Aa121). On this issue, the Commission recited the arbitrator's findings without identifying whether the 16g statutory factors were misapplied. (Aa056-Aa058).

This is a material error and fatal to the validity of the Award.

POINT V

THE PERC DETERMINATION WAS ARBITRARY AND CAPRICIOUS IN FINDING THAT CONSOLIDATION OF UNITS INTO ONE UNIFIED AGREEMENT IS A MINISTERIAL TASK. (Aa062-Aa064).

In the Award, the arbitrator awarded the consolidation of the three PFOA units into a single contract. (Aa149). However, the arbitrator was unable to articulate the language necessary to blend the three units' pre-existing terms and conditions into a single, unified contract. On this issue, the arbitrator stated as follows:

> For all other changes needed to create a unified contract, the parties shall endeavor to use the most clear and concise language available among the three separate contracts. If a dispute arises over the drafting of a unified contract, then either party should consider requesting the appointment of a mediator from the PER Director of Conciliation. There was simply too little time in this proceeding to

> fully work out a blending of all three contracts into one. The parties are left to finish that task.

(Aa160, fn. 17).

In affirming the Award, the Commission acknowledged that the arbitrator was "unable to specifically set forth how the unmodified language of the previous contracts could be efficiently blended and reformatted into a single CNA." (Aa063). The Commission then noted that while the arbitrator addressed the substantive aspect of consolidating the three units into a single contract, the arbitrator "did not err by leaving to the parties the ministerial task of blending all of the unmodified language of the POA's three previous contracts into a single document." (Aa063). The Commission further acknowledged that the arbitrator did not complete the task of unifying the previous contracts and deferred to another procedure, mediation, to resolve this dispute. (Aa064, fn. 10).

In an unpublished opinion, In re Borough of Bergenfield, 2021 N.J. Super. Unpub. LEXIS 2398 (App. Div. October 5, 2021) (Aa747), this Court reversed the Commission's decision in Borough of Bergenfield, 2020 NJ PERC LEXIS 47 (April 30, 2020) (Aa740) which had directed the Borough to sign a collective negotiations agreement that memorialized an interest arbitration award. Similar to the issue here, the Commission in Bergenfield saw the drafting of a collective negotiations agreement as simply a ministerial task. However, this ministerial

task was strongly disputed and led to an unfair practice charge, a hearing before a PERC hearing examiner with a recommended decision, an appeal to the Commission, an appeal of the Commission's decision to this Court, and a remand back to the Commission, and the interest arbitrator, when this Court vacated the Commission's order requiring the collective negotiations agreement prepared by the union, to be executed by the Borough.

The Bergenfield case illustrates the complicated nature of preparing a collective negotiations agreement after the issuance of an interest arbitration award. Even the arbitrator, in this matter, recognized that there may be a dispute between the parties as to unifying language which may necessitate the need for a mediator. Moreover, the Commission, in its decision, approved the interest arbitrator's delegation of this task to that of a mediator whose authority does not include binding the parties to the mediator's recommendation. The Commission's approval of the arbitrator's decision to delegate the task of unifying the three collective negotiations units into a single contract to the parties, and if necessary to a mediator, constitutes reversible error.

POINT VI

THE COMMISSION'S DECISION FAILED TO ADDRESS THE ARBITRATION PROCEEDING'S SUBSTANTIVE AND PROCEDURAL DEFICIENCIES AND THE COMMISSION FAILED TO ISSUE A COMPLETE AWARD BECAUSE THE AWARD INCLUDED SIX (6) ATTACHED APPENDICES WHICH WERE NOT PROVIDED TO THE PARTIES (Not Argued Below).

The Commission's decision failed to address the arbitration proceeding's substantive and procedural deficiencies, including the arbitrator's acceptance and adoption of Salary Cost Outs submitted by the City after the submission of post-hearing briefs, without the opportunity for the PFOA to respond/rebut the information submitted, which included incorrect information as to the composition of the three bargaining units as well as inaccurate back pay calculations. In addition, the Commission failed to issue a complete award because the Award included six attached appendices which were not provided to the PFOA when the Award was issued, prior to the PFOA's appeal of the interest arbitration award to PERC or before PERC's decision denying the PFOA's appeal.

Arbitrator Licata transmitted the 96 page Award and 6 appendices to PERC by email on December 17, 2023. (Aa549). PERC transmitted the Award to counsel for the parties by email on December 18, 2023. (Aa553). The

transmittal letter to the parties with the Award did not include the 6 appendices that were part of the Award. PERC has not reissued the Award to the parties with the 6 appendices attached.

The Award references a number of appendices that were attached to the Award. (Aa162-173). These salary cost-outs and allocation of retro pay awarded by the arbitrator inaccurately reflect the composition of the bargaining units, and inaccurately reflect the salaries used to calculate the cost-outs. For example, fire captains promoted into the bargaining unit after July 31, 2019 (the snapshot date) and during the term of the new collective negotiations agreement should not have been listed in the cost-out. Moreover, in calculating the retro pay allocations, the arbitrator gave members of the bargaining unit who retired full allocation even though they were no longer employed during all or part of the period of the retro pay.

In addition, the appendices were not issued by PERC with the Award to the parties. At the time, the parties were unaware of this error. Therefore, the PFOA was unable to submit arguments to the Commission in its appeal related to the inaccuracy of the appendices and how this material error impacts the validity of the Award. Accordingly, because the appendices were not issued with the Award, and such failure prejudiced the PFOA's appeal to the

Commission, the matter must be reversed and remanded back to the Commission.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the appeal be granted and the decision of the Public Employment Relations Commission be vacated and remanded to the Commission and Interest Arbitrator.

Respectfully submitted,

LAW OFFICES OF CRAIG S. GUMPEL LLC

By: s/ Craig S. Gumpel
CRAIG S. GUMPEL

Dated: September 5, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002426-23T1

In the Matter of	:	
	:	Civil Action
CITY OF PATERSON,	:	
	:	On Appeal From the Final
Respondent-Appellee,	:	Administrative Action of the
	:	New Jersey Public Employment
-and-	:	Relations Commission
	:	
PATERSON FIRE OFFICERS' ASSOCIATION, FMBA LOCAL 202,	:	
	:	
Appellant-Appellant.	:	

STATEMENT IN LIEU OF BRIEF
ON BEHALF OF
THE NEW JERSEY PUBLIC EMPLOYMENT RELATIONS COMMISSION

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ON THE BRIEF

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ATTORNEY ID #007122009

DATED: OCTOBER 4, 2024

STATEMENT IN LIEU OF BRIEF

Pursuant to R. 2:6-4(c), the Public Employment Relations Commission files this statement in lieu of brief. The public interest does not require that the Commission file a full brief and the parties are expected to adequately present the issues. The tripartite Commission is composed of representatives of public employers, public employee organizations, and the public. It has been granted "broad authority and wide discretion in a highly specialized area of public life" and is entrusted with deciding cases based upon its "expertise and knowledge of circumstances and dynamics that are typical or unique to the realm of employer-employee relations in the public sector." Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 328 (1989).

The scope of judicial review of Commission decisions reviewing interest arbitration awards is "sensitive, circumspect and circumscribed." Teaneck Tp. v. Teaneck FMBA, Local No. 42, 353 N.J. Super. 298, 300 (App. Div. 2002), aff'd o.b., 177 N.J. 560 (2003). The Commission's decision will stand "unless it is clearly demonstrated to be arbitrary or capricious." Hunterdon Cty., 116 N.J. at 329. "The burden of demonstrating that the agency's action was arbitrary, capricious or unreasonable rests upon the [party] challenging the administrative action." In re Arenas, 385 N.J. Super. 440, 443-44 (App. Div. 2006), certif. denied, 188 N.J. 219 (2006).

Applying its labor relations expertise, on February 29, 2024, the Commission issued a written decision affirming the December 18, 2023 interest arbitration award that established the terms of a successor agreement between the City of Paterson (City) and the Paterson Fire Officers' Association, FMBA Local 202 (PFOA) for the period of August 1, 2019 through December 31, 2023. P.E.R.C. No. 2024-41, 50 NJPER 360 (¶86 2024). (Aa036-064).

The Commission's decision held that the arbitrator properly rejected the PFOA's revised final offer because, in contravention of the arbitrator's request, it included new substantive proposals rather than more specific language and rationale for the final offers previously submitted. (Aa049-054). The Commission held that the arbitrator did not mistakenly award health benefits language consistent with that found in the Paterson Firefighters' Association (PFA) contract, because that is exactly what the PFOA had requested in its final offer. (Aa054-055).

Regarding application of the N.J.S.A. 34:13A-16g criteria (16g statutory factors), the Commission held that the arbitrator sufficiently explained which factors he found were entitled to the most weight and his rationale for grouping factors g(1), g(5), g(6), and g(9) together. Specifically, the Commission found that, in considering the interest and welfare of the public (g(1)) and the financial

impact of the award (g(6)), the arbitrator properly considered evidence and testimony concerning the City's financial condition, including the receipt of Transitional Aid and oversight by the state Department of Community Affairs (DCA). (Aa055-056; Aa060-062).

The Commission also found that the arbitrator comprehensively reviewed and analyzed both parties' submissions on internal comparability and external comparability (statutory factor 16g(2)). (Aa057-060). Specifically, the Commission found that the arbitrator fully considered the City's other negotiations units' recent contracts and explained how the City's current financial condition constrained him to awarding less than 2% across-the-board salary increases for some years of the award. (Aa057-058). Finally, the Commission held that the arbitrator did not err by leaving the parties to the ministerial task of blending the unmodified language of the previous contracts into a single document incorporating the modifications made by the arbitration award. (Aa062-064).

The Commission's decision applied the established Commission and judicial standards of review for interest arbitration awards. Teaneck, supra, 353 N.J. Super. 289, aff'd o.b., 177 N.J. 560 (2003); Hillsdale PBA Local 207 v. Borough of Hillsdale, 137 N.J. 71, 82 (1994); In re State, 443 N.J. Super. 380, 385 (App. Div. 2016); and Bedminster Tp., 2020 N.J. Super. Unpub. LEXIS 1503

(App. Div. 2020), aff'g P.E.R.C. No. 2020-11, 46 NJPER 119 (¶27 2019); see also City of Newark, P.E.R.C. No. 99-97, 25 NJPER 242 (¶30103 1999); Lodi Bor., P.E.R.C. No. 99-28, 24 NJPER 466 (¶29214 1998); and Cherry Hill Tp., P.E.R.C. No. 97-119, 23 NJPER 287 (¶28131 1997). (Aa047-049). Applying those standards, the Commission declined to vacate the arbitration award because the PFOA failed to demonstrate that: (1) the arbitrator failed to give "due weight" to the subsection 16g factors judged relevant to the resolution of the specific dispute; (2) the arbitrator violated the standards in N.J.S.A. 2A:24-8 and -9; or (3) the award is not supported by substantial credible evidence in the record as a whole.

Finally, no weight should be given to the PFOA not initially receiving the arbitrator's appendices along with the interest arbitration award. Neither party raised the issue of the missing appendices to the Commission. Moreover, the PFOA suffered no prejudice as a result of the missing appendices. The information in Appendix A (Aa162-163), except for the arbitrator's totaling of the yearly columns, was previously received by the PFOA directly from the City on November 22, 2023 as part of the parties' submission of information requested by the arbitrator. (Aa040; Aa111-112; Aa409-413; Aa426-437; Aa477). The PFOA had also previously received the information in Appendices B1 (Aa166-167) and C1 (Aa170-171) directly from the City on December 9. 2023 as part of the City's

response to the arbitrator's request for updated cost-outs from the parties. (Aa040; Aa111-112; Aa478; Aa513). Appendices B (Aa164-165) and C (Aa168-169) contain that same information, except for being modified by the arbitrator "to total the yearly columns." (Aa112). Appendix D (Aa172-173) showed the City's per officer cost out of retro pay, which the PFOA had already received during the interest arbitration proceeding, as compared to the award's retro pay cost out. (Aa145; Aa426-Aa437; Aa477-478; Aa513). The award thoroughly explained the arbitrator's "formula used for allocations of retro pay" and set forth a chart comparing the differences in retro pay for each year of the award between the City's and award's cost outs as well as under other scenarios. (Aa145-146).

In sum, all of the City's cost out data that the arbitrator included in his appendices and referenced in the award had been received by the PFOA prior to the issuance of the arbitration award. The award itself clearly explained and graphically presented how he utilized this information to calculate the salary award. (Aa111-112; Aa145-146). Therefore, the Commission's initial transmittal of the interest arbitration award without the appendices did not prejudice the PFOA in its appeal of the award to the Commission.

The Commission adequately explained its reasoning in its written decision and reasonably applied pertinent Commission and judicial precedent.

Accordingly, the Commission's decision is neither arbitrary nor capricious and should be affirmed.

Respectfully submitted,

FRANK C. KANTHER
Deputy General Counsel

DATED: October 4, 2024

SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION
DOCKET NO.: A-002426-23T__

In the Matter of CITY OF PATERSON, Respondent, – and - PATERSON FIRE OFFICERS' ASSOCIATION, FMBA LOCAL 202, Appellant.	Civil Action On Appeal From: State Of New Jersey, Public Employment Relations Commission Docket No.: P.E.R.C. No. 2024-41 Docket No.: IA-2024-002

RESPONDENT, CITY OF PATERSON'S BRIEF IN OPPOSITION TO APPELLANT'S APPEAL

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Dated: November 18, 2024

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PRELIMINARY STATEMENT

PERC's affirmation of the Arbitration Award ("Award") in this matter was well reasoned and logical rather than arbitrary, capricious or unreasonable and, therefore, its decision must be affirmed. The fundamental flaw in Appellant Paterson Fire Officers' Association, FMBA Local 202's ("the Union") appeal is that even if its belief that its members *deserved* greater raises is true, it does not entitle the Union to vacate the Award. The Arbitrator found that greater raises would be fiscally irresponsible. It also does not matter that reasonable minds could differ (although that is not the case here). Arbitrator Joseph Licata, Esq., ("Arbitrator" or "Licata") undertook an evaluation of the statutory criteria and proffered a detailed well-reasoned decision. Absent from the record is any evidence of fraud, corruption, impartiality or undue means which is what the Union would have to establish to vacate the Award with clear and convincing evidence. The Award was not indefinite or lacking in finality, and thus may not be disturbed.

The Union fails to appreciate or acknowledge the City of Paterson ("City" or "Paterson") has no comparator; it is a municipality like no other; it does not enjoy the same fiscal freedoms as all other municipalities. Paterson has been categorized by the State of New Jersey as a "distressed city." The City is enrolled in the State's Transitional Aid ("TA") Program ("Program") and receives financial assistance from the State to avoid going into receivership. TA comes at a steep price. As a

condition of the Program, the City operates under zealous oversight of the State's fiscal monitors who every week report directly to the Director of the Division of Local Government Services ("LGS") in the Department of Community Affairs ("DCA"). Every single financial decision the City makes must be vetted and approved by the State. The purpose of this oversight is to make the City fiscally self-sufficient and the transitional aid discontinued.

As recognized by Arbitrator Licata, the City is already over-extended beyond its fiscal means and the Union's demands were patently unrealistic. Paterson is the third largest municipality in the State serving approximately 160,000 residents, 21% of whom are below the poverty line. The average median income per capita is approximately $22,000, the average household income is approximately $47,373. In contrast, most of the Fire Officers earn in excess of $120,000 per year, and some earn $243,000 per year (the highest paid employees of the City). Thus, the Fire Officers earn approximately five times what the average City taxpayer earns per year. Fire Officers work approximately twenty-five years, at which time they are eligible to retire and receive 65% of their pay until death, as well as generous health benefits for themselves and their families.

Although the Union is dissatisfied with the result, it has no legitimate grounds to attack the Award, and instead makes flimsy arguments that are defeated by a cursory review of the record and the applicable law. The Union argues that

Arbitrator Licata's fifty-five-page analysis was insufficient explanation of his ruling. However, the fifty-five-page analysis is painstakingly detailed. The Union is just upset that the Arbitrator awarded what the City could afford. Contrary to all applicable law, the Union also argues that the Arbitrator should not have rejected its revised final offer submitted after the Arbitrator had already taken testimony that sought to add a myriad of additional contract changes. Apparently, the Union does not understand that a final offer is just that: final as Arbitrator Licata's decision should remain.

RELEVANT PROCEDURAL HISTORY

On September 11, 2023, the Union filed a petition to initiate compulsory interest arbitration at PERC for a successor labor agreement with the City, as the prior agreement for August 1, 2010 through July 31, 2019 had expired. PERC docketed the matter as IA-2024-002. (Aa175) On September 18, 2023, PERC selected from its special panel of interest arbitrators, Joseph Licata, Esq. ("Licata" or "Arbitrator") for the matter. (Aa181) PERC's correspondence to the parties indicated that pursuant to N.J.S.A. 34:13A-16f(5), Licata's Award had to be rendered within 90 calendar days from PERC's assignment to him, which is an expedited basis for a highly technical matter. Ibid. The City submitted its Final offer on September 11, 2023. (Aa259-364) In September 12, 2023, the Union submitted its Final Offer. (Aa245-246) In accordance with the Arbitrator's directions, on

October 26, 2023, the City submitted a revised Final Offer. On October 26, 2023 and November 2, 2023, the Union submitted revised Final Offers. (Aa 247-250, Aa251-279) On November 2, 2023, the City objected to the Union's revised Final Offers because, contrary to the Arbitrator's direction, it did not only contain proposed contract language for changes to the contract sought in its September 12, 2023 Final Offer as instructed by the arbitrator, but instead sought new and additional contract changes. (Aa374)

Licata conducted hearings on September 21, October 26, and November 3, 2023, to elicit testimony and documents regarding the facts of the matter in an informal, but adversarial, setting. (Aa69) Only the first two dates were transcribed by a court reporter. Ibid. On December 18, 2023, Licata issued his 96-page decision and award regarding the content for the parties' new/successor labor agreement for the period of August 1, 2019, through December 31, 2023. (Aa145-161) Ibid.

On January 2, 2024, the Union appealed Licata's Award to PERC (Aa560), and PERC issued its decision on February 29, 2024, affirming Licata's decision and award in all respects. (Aa36-64) Being manifestly displeased with the outcome in the matter, the Union retained its present counsel, Craig S. Gumpel, Esq., to pursue an appeal to the Superior Court of New Jersey, Appellate Division. Mr. Gumpel filed the Union's amended notice of appeal on April 15, 2024. (Aa003)

STATEMENT OF FACTS

The City provided a comprehensive statement of the operative facts of this matter in its post-hearing brief to Licata, which is in the record and incorporated herein.

The Fire Officers wish to ignore the fact that Paterson is not a wealthy City. The average median household income is $47,373.00 and the average individual income is only $22,000. (October 26, 2023 Tr., 17:11-14, 25:13-15) This is in stark contrast to the fire officers, most of whom earn in excess of $120,000 a year, and some earn $213,000 a year (October 26, 2023, Tr., 16:10-15.) Fire Officers also receive health insurance benefits from the City, which continue when they retire. The health insurance coverage that the City provides to its employees is considered a "Cadillac Plan" because it is very generous. (October 26, 2023 Tr., 42:10-13) The cost to the City for the plan is approximately $12,000 per individual, and $25,000 per family. (October 26, 2023 Tr., 42:14-19) This is an additional benefit and expense to the City beyond the employee's salary. (October 26, 2023 Tr., 42:20-22) When the Fire Officers retire, the City still has to contribute to their health insurance coverage as provided by the State, as well as their pensions. (October 26, 2023 Tr., 20:9-17, 42:23-43.3) The Fire Officers can retire with 65% of their base pay, and they can collect their pension benefit until their death. (October 26, 2023 Tr., 20:18-24)

The Fire Officers are not required to have a college degree, and they are the highest paid employees in the City. In stark contrast, the average DPW employee only earns $35,000 to $45,000 per year. (October 26, 2023 Tr., 17:3-6) In fact, the Fire Officers earn even more than the police supervisors. (October 26, 2023 Tr., 17:7-10) At the time of the hearing, the salaries for the fire officers were almost fifteen million dollars. (September 21, 2023 Tr., 74: 19-21)

The City has a population in excess of 150,000, making the City a municipality of the first class by law, pursuant to N.J.S.A. 40A:6-4a. (September 21, 2023 Tr., 76:15-15) As established by the Business Administrator for the City of Paterson, Katheen Long ("Long"), and the City's CFO Javier Silva ("Silva"), the City's resources are limited. Presently, the City has only three revenue sources: permit fees, municipal court fines, and real property taxes. (September 21, 2023 Tr., 54:14-15, 90:3-18) Regarding the municipal court, the City normally receives $5 million in revenue from fines. (September 21, 2023 Tr., 91:12-15) However, COVID-19 reduced that amount down to a low of $2.5 million, and post COVID-19, it has only risen to $3 million, so the City is still short $2 million from its municipal court revenues as a result of the pandemic. (September 21, 2023 Tr., 91 16-24) The City does not have any hotels and, therefore, does not collect any hotel room taxes like other municipalities. The City also does not receive revenue from parking because the parking authority is an independent entity from the City.

(September 21, 2023 Tr., 90:3-18) Thus, the City has limited revenue. The majority of the City's revenue comes from real property taxes.

For the past decade, the City has been a "city in distress." (September 21, 2023 Tr., 27:21-23. 82:1-8) The reason for this label is that every year the City has a structural deficit and has to rely upon aid from the State to bridge this substantial shortfall. In other words, the City does not have enough money to cover its expenses. (September 21, 2023 Tr., 92: 12-151, 28:3-10, October 26, 2023 Tr., 61:11-21) As a result, the City receives transitional aid from the State of New Jersey, specifically from the Department of Community Affairs. There are no other cities of the first class in the State that receive transitional aid. (September 21, 2023 Tr., 76: 4-7)

In exchange for transitional aid, the City must surrender its fiscal autonomy to the DCA, which monitors all aspects of the City's spending. The purpose of fiscal oversight is to enhance Paterson's financial stability and enable Paterson to function without transitional aid. In that vein, the DCA has been decreasing the transitional aid Paterson receives each year. 2023 was an exception because the City experienced increased costs that the DCA knew were outside of the City's control. (September 21, 2023 Tr., 32:17-33: 14)

In order to receive transitional aid from the State, a municipality must also enter into a Memorandum of Understanding ("MOU") with the State which gives

the State fiscal oversight over the recipient of State aid. There is no negotiation over the terms of the MOA with the DCA; the terms are dictated by the State. (September 21, 2023 Tr., 41:2-12)

The MOU is very detailed and thorough; it even covers the City's ability to participate in the annual League of Municipalities in Atlantic City every year which is an event that is normally attended by municipal leadership throughout the State to exchange ideas, bring awareness to new issues and public sector trends, and learn new best practices to properly operate a municipality in New Jersey. The DCA scrutinizes employee travel and federal grant travel expenses. The DCA requires the City to look for early bird discounts and it requires the City to book travel as soon as possible, and not to delay, because booking travel at the last minute makes it more expensive. (September 21, 2023 Tr., 63:15- 64:12) Indeed, the City gets reprimanded by the DCA if it does not take advantage of early bird discounts. (September 21, 2023 Tr., 64:3-6) With respect to backfills, the DCA will either not approve the position being filled, or if it was filled the DCA will require the salary to be reduced. For example, if an employee left the City earning a high salary of $70,000, then the DCA will insist that the employee's replacement be paid less, such as $50,000. (Aa189-197) These are examples of how stringent the oversight by the DCA is for municipalities that require transitional aid from the State. The oversight is not cursory, but all encompassing. (September 21, 2023 Tr., 64:10-12)

As explained by the City's CFO, Javier Silva ("Silva"), the oversight is all panoptic. Every Tuesday, the City meets with the DCA to go over financial best practices in regard to pending issues. (October 26, 2023 Tr., 59:20) The City's weekly meetings with the DCA generally last between one to three hours. In these meetings, the City is required to provide all of its financial data to the DCA. The DCA reviews the information which serves as the basis for the topics discussed during the meetings. (October 26, 2023 Tr., 59:20-60:15)

Once a month, the City and the DCA will review all the expenditures to date. Silva supplies all of the City's accounting information to the DCA. (October 26, 2023 Tr., 9:11-16) The DCA's role is not passive. The expenditures are approved prior to being included in the budget and presented to the City Counsel. (October 26, 2023 Tr., 10:17-11:2) The City cannot include anything in its budget that is not approved by the DCA, who freely exercises its authority to reject items.

The MOU has a section on collective bargaining agreements and imposes a two percent cap on increases for the life of the contract which includes benefits in the two percent cap. (Aa103, September 21, 2023 Tr., 41:15-16, 42 3-12) Salary increases and the replacement and/or hiring of new personnel are scrutinized as salaries represent seventy five percent (75%) of the City's $300 million budget. (Aa116) Of the remaining twenty-five percent (25%), fifteen (15%) of it is not discretionary spending. (Aa116)

The Contract in this matter expired at the end of 2019. (Aa582) Although the City typically budgets for increases, several factors resulted in only $275,000 in reserves to fund any retro payments. (October 26, 2023 Tr., 110:10-12, 123: 17-18) First, COVID-19 impacted the progress of the negotiations. Additionally, COVID-19 created a revenue shortfall from the municipal court because for a period it was required to be closed, and many sessions had to be cancelled. The City was prohibited by the State from making people appear in municipal court. COVID-19 impacted the City's collection of its property taxes because for a period of time because people were prohibited from working unless they were essential employees, and also day care facilities and schools were closed, so parents were required to remain home with their younger children. The issue with the decrease in property tax collections got to the point that the City had to plan for layoffs of staff, and this was a real concern. This is because the City is primarily dependent on the revenue it receives from property tax payments in order to operate. (Aa115-116)

"In sum, the confluence of lost municipal court revenues due to COVID-19, the delay in negotiations until 2022, the structural budgetary shortfall experienced in 2022-2023 by the City, the need for it to request an additional 10 million dollars from the DCA, its moratorium on filling vacant positions (to raise 3.6 million dollars), and the City's diversion of reserves to fund an originally proposed 2% across-the-board offer to the PFOA units contributed to the significant limitations

on fashioning an economic award." (Aa120) These financial issues left the City with very little money in reserves to fund raises. The City had settled other internal contracts within Paterson for two percent raises. (September 21, 2023 Tr., 157:11-25, 158:18-35) However, the cost of two percent increases for most of these Unions was relatively modest in contrast to what a two percent increase would cost for fire officers. (Aa61)

The City submitted its Final offer on September 11, 2023. (Aa 259-364) On September 12, 2023, the Union submitted its Final Offer. (Aa 245-246) In accordance with the Arbitrator's directions, on October 26, 2023, the City submitted a revised Final Offer. On October 26, 2023 and November 2, 2023, the Union submitted revised Final Offers. (Aa 247-250, Aa 251-279) On November 2, 2023, the City objected to the Union's revised Final Offers because, contrary to the Arbitrator's direction, it did not only contain proposed contract language for changes to the contract sought in its September 12, 2023 Final Offer as instructed by the Arbitrator, but instead sought new and additional contract changes. (Aa374)

LEGAL ARGUMENT

POINT I

ARBITRATION AWARDS MAY NOT BE LIGHTLY OVERTURNED AND PERC'S DECISIONS ARE ENTITLED TO SUBSTANTIAL DEFERENCE ON APPEAL.

A. Arbitration Awards Are Afforded Substantial Deference.

Arbitration is a favored form of dispute resolution, whose usefulness for labor-management issues is well-recognized in this State. See Borough of East Rutherford v. East Rutherford PBA Local 275, 213 N.J. 190, 201 (2013). Consistent with the salutary purposes that arbitration as a dispute mechanism promotes, courts grant arbitration awards considerable deference. Ibid.

To ensure finality, as well as to secure arbitration's speedy and inexpensive nature, there exists a strong preference for judicial confirmation of arbitration awards. Ibid. This is because arbitration is supposed to signify the matter's conclusion, rather than its beginning. Ibid. Indeed, the arbitration of public sector labor disputes, in particular, should be a fast and inexpensive way to achieve a final resolution of such disputes, and not merely a way-station on route to the courthouse. Ibid. Thus, arbitration awards are given a wide berth, with limited bases for a court's interference.

The New Jersey Arbitration of Collective Bargaining Agreements Act, N.J.S.A. 2A:24-1, *et seq.* ("Arbitration Act"), which the Legislature incorporated into the Police and Fire Public Interest Arbitration Reform Act, N.J.S.A. 34:13A-14, *et seq.* ("Interest Arbitration Act"), at N.J.S.A. 34:13A-16f(5)a, provides four statutory bases for vacating an arbitration award at N.J.S.A. 2A:24-8. See East Rutherford, supra, 213 N.J. at 202. Under that statute, a court or PERC may vacate an award:

> a. Where the award was procured by corruption, fraud or undue means;
>
> b. Where there was either evident partiality or corruption in the arbitrators, or any thereof;
>
> c. Where the arbitrators were guilty of misconduct in refusing to postpone a hearing . . . or in refusing to hear evidence . . . or of any other misbehaviors prejudicial to the rights of any party; [or]
>
> d. Where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter was not made. [N.J.S.A. 2A:24-8.]

Notwithstanding that an arbitration award *can (possibly) be vacated on the grounds listed above*, it is recognized that "the standard for vacation will be met only in *rare circumstances*." East Rutherford, supra, 213 N.J. at 202 (emphasis original). This is because if the matter is reasonably debatable, then judicial intervention is *unwarranted.* Id. at 203. See also Township of Wyckoff v. PBA Local 261, 409 N.J. Super. 344, 354 (App. Div. 2009) ("An arbitrator's award 'is entitled to a presumption of validity and the party opposing confirmation ha[s] the burden of establishing that the award should be vacated pursuant to N.J.S.A. 2A:24-8'"); Heffner v. Jacobson, 185 N.J. Super. 524, 526-27 (Ch. Div. 1982) ("Arbitration is favored by the courts as a speedy and efficient means of resolving disputes without resort to judicial intervention"; "Thus, when such award is presented for confirmation and enforcement, the presumption is in favor of its validity"; this

"furthers the goal of expeditious final resolution of disputes"); City of Atlantic City v. Atlantic City Firefighters Local, 198, IAFF, 234 N.J. Super. 596, 310 (Ch. Div. 1989) (judicial review of an arbitrator's award is much more limited in scope, than is appellate court review of a trial court decision); New Jersey Transit Bus Ops., Inc. v. Amalgamated Transit Union, 187 N.J. 546, 554 (2006) ("The policy of strictly limiting judicial interference with arbitration is intended to promote arbitration as an end to litigation"); Policeman's Benevolent Ass'n., Local 292 v. Borough of North Haledon, 158 N.J. 392, 402 (1999) ("An action to vacate challenges the underlying validity of the award and disrupts arbitration as a speedy and efficient method of resolving disputes"); and Kearny PBA Local No. 21 v. Town of Kearny, 81 N.J. 208, 221 (1979) ("An arbitrator's award is not to be cast aside lightly").

Judicial review of arbitration awards is extremely narrow and limited to the situations outlined in N.J.S.A 2A:24-8. Daly v. Komline-Sanderson Engineering Corp. 40 N.J. 175, 178 (1963). Undue means has been construed to mean basing an award on a *clearly* mistaken view of fact or law. Local Union 560, I.B.T. v. Eazor Express, Inc., 95 N.J. Super. 219, 227-28 (App. Div. 1967) (emphasis supplied); See e.g. International Ass'n. of Machinists, Lodge 1292, Ind. v. Bergen Ave. Bus Owners' Ass'n., 3 N.J. Super. 558, 566 (Law Div. 1949) ("The presumption is that an award is usually unassailable, operates as a final and conclusive determination, and, *however disappointing it may be*, is binding on the parties"; "Every intendment

is indulged in favor of the award and it is subject to impeachment only in a *clear* case" that grounds to vacate the award pursuant to N.J.S.A. 2A:24-8 exist) (emphasis supplied).

B. Police and Fire Interest Arbitration Can Only Be Performed by Arbitrators Who Are Specially Trained and Selected and Then Monitored by PERC.

It also needs to be emphasized that the Legislature did not want police and fire interest arbitrations to be performed by inexperienced arbitrators. N.J.S.A. 34:13A-16e provides that the Commission has to specially screen and select the individuals who can perform interest arbitration. The individuals have to be "chosen based on their professional qualifications, knowledge and experience, in accordance with the criteria and rules adopted by the commission," as well as on the basis of their "knowledge of local government operations and budgeting." See N.J.S.A. 34:13A-16e(2).

The Commission is required to give interest arbitrators annual training, and any arbitrator who does not satisfactorily complete the annual training "shall be immediately removed from the special panel." See N.J.S.A. 34:13A-16e(4). They remain subject to suspension, discipline or removal by the Commission on the basis of good cause at any time. See N.J.S.A. 34:13A-16e. And if they fail to render an award within the time requirements set forth in the Interest Arbitration Act, they "shall be fined $1,000 for each day that the award is late." Ibid. Clearly, it is not

easy to become or remain an IA arbitrator by PERC. Currently, the Commission's website reflects that Mr. Licata is one of only eight (8) arbitrators who have been specially selected to perform interest arbitration.

C. The Appellate Division Normally Defers to PERC in Interest Arbitration Because of Its Expertise in Such Matters Unless the Appellant Can *Clearly* Show a Basis to Reverse.

The Appellate Division is normally deferential to the determinations of administrative agencies so it does not usurp their function if it would have handled a matter differently. See e.g. In re Stream Encroachment Permit, Permit No. 0200-04-0002.1FHA, 402 N.J. Super. 582, 597 (App. Div. 2008) ("We may not second-guess those judgments of an administrative agency, which fall squarely within the agency's expertise"; "we will only reverse a decision of an administrative agency if it is arbitrary, capricious, or unreasonable"; "Courts generally defer to an agency's expertise on technical matters within the agency's field of expertise"). The New Jersey Supreme Court has held that decisions of the Commission will stand unless the decision is clearly demonstrated to be arbitrary and capricious. See In re Hunterdon County Bd. Of Chosen Freeholders 116 N.J. 322 (1989). The judicial role when reviewing an action of an administrative agency is generally restricted to three inquiries:

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains

> substantial evidence to support the findings on which the agency bases its action; and (3) whether, in applying the legislative policy to the facts, the agency erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

City of Jersey City v. Jersey City of Police Officers Benevolent Ass'n. 154 N.J. 555, 567 (1998), citing In re Musick 143 N.J. 206, 216 (1996). This general principle of review applies to PERC and its handling of appeals of interest arbitration awards. In In re City of Camden, 429 N.J. Super. 309, 327-29 (App. Div.), certif. denied, 215 N.J. 485 (2013), the Appellate Division explained:

> Appeals from the interest arbitration award are decided by PERC, which may "affirm, modify, correct or vacate the award or may, at its discretion, remand the award to the same arbitrator or to another arbitrator . . . for reconsideration." N.J.S.A. 34:13A-16(f)(5)(a). The scope of our review of PERC decisions reviewing arbitration is "sensitive, circumspect and circumscribed." PERC's "interpretation of the statute it is charged with administering . . . is entitled to great weight," and its decision "will stand unless clearly arbitrary or capricious." However, PERC's interpretation of the statute is entitled to no deference when its interpretation is "plainly unreasonable, contrary to the language of the Act, or subversive of the Legislature' intent[.]"

When a public interest arbitration award is reviewed, judicial scrutiny is "more stringent" because "such arbitration is statutorily-mandated and public funds are at stake." In addition to the public interest and welfare, the public sector arbitrator is obligated to consider "the prevailing law[ ] in rendering any award." In Hillsdale, the Supreme Court articulated principles that govern our review of the award here:

> [A] reviewing court may vacate an award when the decision fails to give "due weight" to the section 16(g) factors, when the award has been procured by corruption,

> fraud, or undue means, when arbitrators have refused to hear relevant evidence or committed other prejudicial errors, or when arbitrators have so imperfectly executed their powers that they have not made a final award[.] (citations omitted). [I moved the citation to above]

Accord In re State, 443 N.J. Super. 380 (App. Div. 2016) ("We defer to PERC's decisions because of its expertise and will only reverse if the decision is *clearly demonstrated* to be arbitrary, capricious, or unreasonable") (emphasis supplied).]

On February 29, 2024, PERC issued a decision affirming Arbitrator Licata's Award and Decision (Aa036-064) and the Union has not articulated any justifiable reason to disturb PERC's findings**.**

POINT II

THE ARBITRATOR DID NOT ENGAGE IN ANY MATERIAL PROCEDURAL IRREGULARITIES, AND THE UNION'S ARGUMENT REGARDING THE ARBITRATOR'S COMPLIANCE WITH N.J.S.A 19:16-5.7(g) IS SPECIOUS RATHER THAN CONSTITUTING PLAIN ERROR.

For the first time, the Union argues that the Arbitrator's handling of the interest arbitration proceeding below is flawed because the Arbitrator failed to require the City to provide the Arbitrator as well as the Union with the information required by N.J.S.A. 19:16-5.7 (Aa16), which states:

> (g) The arbitrator, after appointment, shall communicate with the parties to arrange for a date, time, and place for a hearing. In the absence of an agreement, the arbitrator shall have the authority to set the date, time, and place for a hearing. The arbitrator shall

submit a written notice containing arrangements for a hearing within a reasonable time period before hearing.

1. Such notice shall also set forth the dates, both of which shall precede the hearing, by which the public employer shall provide the arbitrator and the employee representative with the following information and the format in which it shall be provided and by which the employee representative shall respond to the information:

   i. A list of all unit members during the final year of the expired agreement, their salary guide step(s) during the final year of the expired agreement, and their anniversary date of hire (that is, the date or dates on which unit members advance on the guide);

   ii. Costs of increments and the specific date(s) on which they are paid;

   iii. Costs of any other base salary items (for example, longevity) and the specific date(s) on which they are paid;

   iv. The total cost of all base salary items for the 12 months immediately preceding the first year of the new agreement; and

   v. A list of all unit members as of the last day of the year immediately preceding the new agreement, and their rate of salary as of that same day.

This issue was not raised below, so it must be reviewed as plain error. R. 2:10-2 provides: "Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interests of justice, notice plain error not

brought to the attention of the trial or appellate court." See also State v. Macon, 57 N.J. 325, 330-35 (1971) ("we will neither reverse on an assumption that there was error nor remand the matter to explore that possibility;" "whether the error is reason for reversal depends finally upon some degree of possibility that it led to an unjust result"; this is true even for constitutional issues).

Not only was this issue not raised on appeal to PERC, but the information was never sought by the Union in the underlying proceeding. That is because the Union was in possession of all of the information regarding its members. The Union's attorney below never contended otherwise to Arbitrator Licata prior to or during the proceedings, in the Union's post-hearing brief, or in the Union's appeal to PERC.

The Union's financial position was presented to Arbitrator Licata by its vice president, Capt. Frank Petrelli ("Petrelli"). Petrelli's testimony occurred on the third and final hearing day, and it was not recorded. Nevertheless, Petrelli explained that he attended Montclair State College and was a college graduate. He explained that while a union official, he was required to review and analyze the labor contracts for other fire departments throughout the State to see what they provided on pay and benefits, so the Union was in a position to properly advocate its position to the City. Petrelli stated that he prepared the Union's salary grids, and they were for either a 2% or a 3% salary increase.

Petrelli claimed the Union's salary grids were on par with other municipalities, but none of those were receiving transitional aid from the State. He admitted that his pay had been frozen at $118,000 when the prior contract expired, and that it might go up to $146,000 if the Union prevailed on its position of a 3% wage increase. The Arbitrator elected to award salary increases greater than those proposed by the City. Arbitrator Licata awarded the Union 0% for the first year, 1% for the second year, 2% for the third year, and 1.5% for the final two years, as well as a total retro payment of $450,000. (Aa145)

Moreover, the requirement to produce the "snapshot" information at issue is based on a PERC regulation, not a State statute. The Union has not identified, and the City has been unable to find, *any* appellate case or PERC decision where an arbitrator's decision was reversed for failure to obtain/use the information required by N.J.A.C. 19:16-5.7(g)1.

That being the case, the Union has not *clearly* proven that an unjust result occurred below as a matter of plain error regarding the outcome because of the hyper-technical issue it found and is now trying to exploit to its advantage.

POINT III

THE UNION'S ARGUMENT REGARDING THE ARBITRATOR REJECTING ITS REVISED FINAL OFFERS IS MERITLESS AND PROPERLY REJECTED BY PERC.

In Point II, A.2, of its appellate brief, the Union claims that Arbitrator committed reversable error by not considering the Union's revised final offers that were made *after* the hearing commenced, and to which the City objected because, contrary to the Arbitrator's request, it contained new substantive proposals rather than specific contract language and rationale for the changes identified in the offers previously submitted. (Aa049-054) The Union's argument reflects a lack of understanding of what a final offer is, and the purpose of same; finality and identification of the issues prior to the arbitration hearing.

N.J.A.C. 19:16-5.7(g)2 provides:

> At least 10 days before the hearing, the parties shall submit to the arbitrator and to each other their final offers on each economic and noneconomic issue in dispute. The parties must also submit written estimates of the financial impact of their respective last offers on the taxpayers as part of their final offer submissions. *The arbitrator may accept a revision of such offer at any time before the arbitrator takes testimony or evidence or, if the parties agree to permit revisions and the arbitrator approves such an agreement, before the close of the hearing.* Upon taking testimony or evidence, the arbitrator shall notify the parties that their offers shall be deemed final, binding and irreversible unless the arbitrator approves an agreement between the parties to permit revisions before the close of the hearing. [Emphasis supplied.]

As duly noted by Arbitrator Licata, "the purpose is obvious - the parties need time, as compressed as the time may be, to prepare for the hearing based on the Final Offers submitted." (Aa091).

On September 11, 2023, the City submitted a Final Offer in connection with this proceeding. (Aa359) The Union submitted its Final Offer on September 12, 2023. (Aa245) The hearing commenced on September 21, 2023, on which date the City's Business Administrator, Ms. Long, gave sworn testimony. (Aa091) The PFOA's September 12, 2023 final offer did not include proposed contract terms, other than it included specific language for contract changes sought to the healthcare provision, or rationale for any of the contract terms that it sought to add or modify. (Ra1, Ra3, Ra7-9, Aa245-249) Thus, on October 12, 2023, Arbitrator Licata wrote to the Parties:

> "I am writing to request that you each revise your final offer to include, where applicable, the existing contract language, followed by your proposal to change the existing language and the rationale for the change. If the proposal is for a new contract provision, please indicate same. Please submit your revised final offer by Friday, October 20, 2023 copying each other. Thank you." (Aa089-090).

The purpose of Arbitrator Licata's request was to provide him with the specific contractual language sought in connection with each party's proposals in the final offer so he would not have to draft such language from scratch; it was not to give the parties an opportunity to expand the scope of the arbitration. Nevertheless, in its appeal, the Union takes the unfathomable position that this was

an invitation to expand their final offers to request additional contract changes or to include additions not in its original final offer.

On October 26, 2023, and on the evening of November 2, 2023, which was also the night before the final hearing date, at 7:43 p.m., the Union submitted revised final offers. (Aa247-250, Aa 251-279) Much to the City's surprise, it contained a multitude of new terms that were not included in the PFOA's September 11, 2023 final offer. At 8:13 p.m. on the same evening, Counsel for the City objected to the revised final offers. (Aa374)

Arbitrator Licata rightfully rejected the revised final offer in his decision:

> On October 12, 2023, the undersigned directed the parties to submit revised Final Offers by October 20, 2023 for the limited purpose of reciting verbatim the contract language sought to be changed, or indicate whether the proposal, if accepted, would establish a new contract provision, and to state the rationale for seeking to change or establish new language. *The undersigned did not request or permit a revised Final Offer which added substantive proposals.*
>
> The City complied with the directive and submitted a revised Final Offer on October 26, 2023 (after granting the parties an extension of time). However, the PFOA did not fully comply with this directive. Instead, the PFOA twice revised Final Offer (October 26 and November 23, 2023) added numerous substantive provisions not included in its September 12, 2023 Final Offer. I advised the parties that I would accept the PFOA's revised Final Offer(s) only to the extent language was included which could aid in the merger of the three units into one. Other

> than that, the PFOA's original Final Offer of September 12, 2023 would be considered. [Aa069-070.]

The City followed the rules, the Union did not, and this was the reason the Arbitrator ruled in the manner he did. Here, the City did not seek to introduce additional terms; it simply complied with the directive it received from Arbitrator Licata. In this Appeal, the Union argues that the revised final offer should have been accepted and the Arbitrator erred in not considering additional changes sought to the Health Benefits Section of the Contract arguing that it was merely proposing contract language for changes already sought and clarifying its original final offer; which argument is frivolous and dismantled by a simple comparison of the two documents. (Aa245-246, Aa251-279) In its original final offer, the Union had already requested specific language in connection with the healthcare provisions of the contract. The revised Final offer did not merely incorporate contract language for changes already sought, but instead was an attempt to enhance the Union's healthcare benefits over and above what it originally sought. The revised final offer included new and material terms to this section not included in their initial final offer such as changes to contributions and to provide that the City would pay the full cost of a dental plan and optical plan. (Aa274-276)

Interestingly, in its original final offer, the only specific language proposed by the Union was for the Healthcare Benefits section. It sought to mirror the terms in

the Firefighter MOA and attached the specific language requested. (Ra1, Ra3, Ra7-9) Specifically the Union's September 12, 2023 Final Offer stated, "Change the healthcare provisions to mimic Article VII of the PFA Local 2 MOA entered into with the City on May 31, 2022 (a copy of which is attached)." (Aa246) The Firefighter MOA was attached the final offer which MOA stated "Health Benefits" Replace this Article with the following" and then set forth specific language. (Aa246**)** This is exactly what Arbitrator Licata awarded the Union.

The Union has not and cannot cite to any legal authority to demonstrate the ruling was improper, let alone requiring a reversal and remand back to PERC. The Union's revised Final Offer was an improper attempt to broaden the issues before the Arbitrator after the hearing had already commenced. Any discretion that the arbitrator would have had to allow the parties to modify the terms would have been limited to revisions narrowing not expanding the dispute. See Newark Firemen's Mut. Benev. Ass'n., Local No. 4 v. City of Newark, 90 N.J. 44 (1982) (Allowing revisions to a final offer during the proceeding because the revised final offer narrowed the issues thus bringing the parties closer together, rather than interjecting additional issues into the proceeding). See also In the Matter of Borough of Madison and PBA Local 92, 39 NJ PER P33, 2012 NJ PERC Lexis 50, * 6 (Aug. 17, 2012) ("the Borough requested the arbitrator to permit it to revise its final offer, presumptively to match the increases settled with the FMBA"; "the arbitrator, in

reliance upon N.J.A.C. 19:16-5.7(f) denied the request"; "Under the circumstances set forth above, the refusal of the arbitrator to permit the Borough to revise its final offer does not constitute a violation of the standards set forth in N.J.S.A. 2A:24-8 and does not constitute grounds for reversal or remand of the Award"). The language sought by the Union was clearly an expansion rather than a contraction of the issues.

Thus, PERC correctly upheld Arbitrator Licata's decision to reject the Union's attempt to interject wholly new issues into the interest arbitration process at that point stating:

> We initially address the PFOA's assertion that the arbitrator improperly rejected its revised final orders for being non-compliant with his request. . . . The PFOA argues that the arbitrator's request for revised final orders did not clearly state it was only intended to provide more specific contract language and not additional substantive proposals. The PFOA asserts it was prejudicial for the arbitrator to accept the City's revised final offer but not the PFOA's. The City responds that the purpose of the arbitrator's request for revised final offers was to provide him with specific contractual language for the proposals already submitted. The City asserts that the arbitrator properly disregarded the PFOA's revised final offers because they prejudicially expanded the issues in dispute.
>
> The City and PFOA submitted their final offers to the arbitrator on September 11 and 12, 2023, respectively. The first interest arbitration hearing was held on September 21. On October 12, 2023, the arbitrator requested that the parties "each revise your final offer to include, where applicable, the existing contract language, followed by your proposal to change the existing language and the rationale for the change" or "[i]f the proposal is for a new contract provision, please indicate same." On October 18, the arbitrator reiterated that the revised final offers

should "include a verbatim insert of the existing contract language (or designate the proposal as a new provision of the contract), the proposal itself and the rationale underlying the proposal." The parties submitted revised final offers on October 26.

The arbitrator initially only noticed that the PFOA's revised final offer "does not include the verbatim contract language relevant to each proposal as I requested" and on October 30 he requested that the PFOA submit the proposed contract language. However, following the PFOA's November 2 submission of a second revised final offer, counsel for the City informed the arbitrator of "numerous changes proposed that were not part of the Union's final offer" and objected to the PFOA's submission because "the revised offer was only to include specific language proposals as well as rational[e] for the changes proposed in the final offer." On November 2, the arbitrator acknowledged that he had not had time to review the substance of the PFOA's revised final offer, but reiterated that "the substance of both parties[']final offers should not have changed since the original submissions." (Emphasis added).

. . . The arbitrator cited numerous examples of substantive additions the PFOA made to its final offer rather than just providing specific contract language for its previously submitted proposals as requested, including (Award at 27-28):

- Change to Grievance Procedure language [. . .]
- Change Longevity [. . .]
- Change Comp Time [. . .]
- Change payment for earning Certifications [. . .]
- Change Leave flexibility to be in increments of 4 hours
- Change Transfer requests to be assigned by seniority
- Change Mutual Swaps [. . .]

Our review of the record, including comparison of the PFOA's September 12 Final Offer to its subsequent revised final offers, confirms the arbitrator's determination that the PFOA's revised final offers included new substantive proposals that were not included in its final offer. The City's revised final offer, by

> contrast, complied with the arbitrator's request by supplying specific contract language without introducing new proposals beyond the scope of its September 11 Final Offer. . . . There was no solicitation of, or mutual consent to, substantive additions to the final offers that the parties had already submitted prior to the start of the arbitration hearings. See N.J.A.C. 19:16-5.7(g)(2). While the arbitrator had discretion to permit revisions to final offers until the close of hearing, here he sought only submission of specific contract language concerning the parties' previously submitted offers. . . . Furthermore, the arbitrator's ultimate rejection of the PFOA's revised final offers did not prejudice the PFOA, as the City was subject to the same parameters for its revised final offer and did not submit any additional substantive proposals beyond its original final offer. Given this record, we find that the arbitrator did not err by rejecting the PFOA's revised final offers and considering only the PFOA's original final offer. See Madison Bor., P.E.R.C. No. 2013-5, 39 NPER 93 (¶33 2012) (arbitrator did not err by rejecting Borough's request to submit amended final offer with substantive changes to salary proposal after hearing concluded). [Aa049-54.]

There is nothing arbitrary or capricious about PERC's decision on this point. To the exact opposite, it is perfectly logical. PERC affirmed Arbitrator Licata's decision because he followed PERC's regulation on the issue of when final offers may be revised. See In re Bridgewater, 95 N.J. 235, 244-45 (1984) (PERC matter, holding "administrative determination will stand unless it is clearly demonstrated to be arbitrary or capricious"; "where, as here, a substantial element of agency expertise is implicated, due weight should be accorded thereto to judicial review").

POINT IV

THE ARBITRATOR APPLIED THE N.J.S.A. 34:13A-16(g) CRITERIA CONSCIENTIOUSLY, FAIRLY AND EXPLAINING IT IN DETAIL IN HIS NEARLY 100 PAGE DECISION AND AWARD.

In Point III of its appellate brief, the Union contends that Arbitrator Licata allegedly misapplied the 16(g) criteria in rendering an award (Ab30), and in Point IV it argues that Licata did not properly consider the internal comparables in rendering an award. (Ab38) Nothing could be further from the truth of the matter.

1. The N.J.S.A. 34:13A-16(g)Criteria.

In general, compulsory interest arbitration is the statutory method of resolving collective-negotiation disputes between police and fire departments and their employers, and the purpose of the process is to resolve disputed terms for a new contract. See Hillsdale PBA Local 207 v. Borough of Hillsdale, 137 N.J. 71, 80 (1994).

N.J.S.A. 34:13A-16(g) lists the nine criteria that an arbitrator must consider in the process of fashioning an economic award, and the statute specifically indicates that of the nine criteria, *number six is of special importance to the process*, since it goes to the financial impact on the governing unit (*i.e.*, here the municipality), stating:

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

in every interest arbitration proceeding, the parties shall introduce evidence regarding the factor set forth in paragraph (6) of this subsection in an award:

(1) The interests and welfare of the public. . . .

(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 . . . .

(b) In public employment in general . . . .

(c) In public employment in the same or similar comparable jurisdictions . . . .

(3) The overall compensation presently received by the employees, inclusive of direct wages, salary, vacations, holidays, excused leaves, insurance and pensions, medical and hospitalization benefits, and all other economic benefits received.

(4) Stipulation of the parties.

(5) The lawful authority of the employer. . . .

(6) The financial impact on the governing unit, its residents, the limitations imposed upon the local unit's property tax levy . . . 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 element or, in the case of a county, the county purposes element, required to fund the employee's contract in the preceding 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 of employment through collective negotiations and collective bargaining between the parties in the public service and in private employment.
>
> (9) Statutory restrictions imposed on the employer. [Emphasis suppled.]

The arbitrator's decision must be accompanied by a written report explaining how each of the statutory criteria played into the arbitrator's determination of the final award. See N.J.S.A. 34:13A-16f(5). The arbitrator must also determine whether the total net annual economic changes for each year of the agreement are reasonable under the nine statutory criteria. See N.J.S.A. 34:13A-16d.

2. Application of the Criteria.

In Hillsdale, the New Jersey Supreme Court set forth some important rules regarding the review of an interest arbitration award as to whether it is legally compliant:

- The arbitrator should determine which factors are relevant, weigh them, and explain the award in writing. See 137 N.J., at 82.

- The relevance of a factor depends on the disputed issues and the evidence presented. Ibid.

- Regardless of whether the parties offer evidence on a particular factor, the arbitrator should explain why the arbitrator finds any factor irrelevant. Id. at 84.

- However, the arbitrator is not required to find the facts on those deemed irrelevant, only to explain why a factor is considered irrelevant. Ibid.

- The arbitrator is required to identify the relevant factors, and to analyze and explain the evidence pertaining to those factors. Id., at 84-85.

- The Subsection 16g factors expressly require the arbitrator to consider the effect of an award on the general public, and the award runs the risk of being found deficient if it does not expressly consider the interests and welfare of the public. Id., at 83.

The Union contends that the Arbitrator misapplied the 16 (g) criteria, but fails to explain the misapplication. The Commission has decided that where a party claims that an arbitrator did not follow the proper procedure and fails to explain how

this is the case, other than just generally making the contention, the contention will be rejected. See e.g. In the Matter of Borough of Englewood Cliffs and PBA Local No. 45, P.E.R.C. No. 2012-34, 2011 NJ PERC Lexis 142, ** 10-15 (Jan. 20, 2011). Rather than identify an error, the Union argues that: (1)the Arbitrator failed to explain or identify the weight he gave to the 16 (g) factors, especially the public interest and internal pattern of settlement criteria, (2) failed to explain the retro pay award, and (3) should have awarded the Union two percent increases. The Union's first and second arguments are puzzling in light of the Arbitrator's 54-page well reasoned analysis, and the third is mere argument and opinion and must be disregarded. (Aa095-149)

In connection with his analysis of the 16 (g) factors, the Arbitrator then addressed the following subjects in his Award, as a necessary background for his analysis. He discussed the Legislature's "Findings, Declarations Relative to Compulsory Arbitration Procedure" as set forth in N.J.S.A. 34:13A-14. (Award, at 30); the Special Municipal Aid Act (Law), N.J.S.A. 52:27D-118.24 *et seq.* (SMAA), which gives the State DCA fiscal control the City's finances because the City receives transitional aid from the State, (Id., at 33-36), the Memorandum of Understanding (MOU) that the State DCA required the City to enter into to receive transitional aid (Id., at 36-39), the need for the interest arbitration procedure in the NJEERA to be harmonized with the SMAA in regard to the handling of this matter.

(Id., at 40-43), the Parties' Cost Outs of Salary Proposals and 2% Pattern (Id., at 43-45), and the Percentage Increases. (Id., at 46).

In connection with his 16 (g) analysis of the economic aspects of this matter, the following information was reviewed and discussed.

- The Application of the Statutory Criteria/Salary Award. (Aa112-123)

- The Internal Comparability with the CBAs that were settled with the City's other labor unions. (Aa123-127)

- The External Comparability with CBAs from other jurisdictions. (Aa127-139) This section specifically addressed the union contracts from the below jurisdictions:

  - Elizabeth Fire Officers. (Aa129-131)
  - Jersey City Fire Officers. (Aa131-132)
  - Bayonne Fire Officers. (Aa133)
  - North Hudson Regional Fire Officers. (Aa133-134)
  - Newark Fire Officers. (Aa137-138)
  - Hoboken Fire Officers. (Aa138-139)

- The City's argument that a purported comparison to municipalities that were not receiving TA from the State DCA were irrelevant to this matter. (Aa142)
- A consideration of the Private Sector/Military Comparison in terms of pay scale. (Aa142-143)

- Stipulations made by the Parties. (Aa143-145)

- Unlike the City, which presented the testimony of its CFO, who the Arbitrator found to have expert status, the PFOA "did not have an expert witness or an audit of the 2023 budget." Thus, the Arbitrator "credited [the CFO] with respect to establishing the financial condition of the City" as unchallenged by opposing expert testimony. (Aa116)

As required by N.J.S.A. 34:13A-16f(5), the Arbitrator then explained how he took the nine statutory factors into account in rendering his Award. The Arbitrator found Factors 1, 5 , 6 and 9, which pertain to the interest and welfare of the public, the financial impact criteria, and the statutory restrictions on the employer, to be all related in this matter and set forth his analysis of these factors. (Aa113-117)

Contrary to the Union's contention, the Arbitrator explained his reasoning in detail. With respect to the public welfare, he recognized that the public is a silent party to the proceedings and that he must weigh fiscal responsibility and the public's need to ensure all necessary services are provided. (Aa 114) He further noted that the expense to be borne by the tax paying public (in this case a tax paying public with a median household income of $47,373, with the need to ensure necessary services are provided, noting case law holding that "arbitrators have reviewed the public interest as encompassing the need for both fiscal responsibility and the compensation package required to maintain effective an public safety department. (Aa114)

The Decision and Award contained a detailed discussion of the City's finances, noting both Long and Silva's testimony that the City's receipt of transitional aid from the State "is necessary because the City has a structural shortfall in its ability to match revenues with expenditures, i.e. to balance the budget." (Aa115) Arbitrator Licata further recognized that 75% of the City's $309,972,529 total budget is salary and wages, and of the remaining 25%, 15% is non-discretionary spending. (Aa116) Additionally, the two percent levy cap for taxation would result in maximum allowable taxation of $168,661,461. (Aa117) The Arbitrator went on to discuss in detail the available funds to pay for raises. (Aa117-118) Ultimately, he concluded that he could not award even two percent

because it was unaffordable. (Aa120). Rather than leave the reader to wonder why he reached such a conclusion, Arbitrator Licata's Award and decision contains a detailed discussion of the City's available funds and the basis for his decision.

Surprisingly, the Union asserts that Arbitrator Licata did not specifically explain why he did not award two percent increases when the City typically budgets two percent increase each year. Here, the parties' contract expired in 2019. Arbitrator Licata noted in his opinion that the confluence of lost municipal revenues and tax collections due to COVID-19, the delay in negotiations until 2022, the structural budgetary shortfall experienced in 2022-2023 due to unavoidable costs; namely an increase in healthcare costs, an increase in pension contributions, and a state wide increase in solid waste costs, which required the City to request an additional ten million dollars in aid from the DCA, and the use of reserves to fund PFOA resulted in significant monetary limitations. (Aa 115 and Aa120) In other words, the funds to award a two percent raise did not exist.

Arbitrator Licata specifically explained that two percent as applied to this Union would cost the City $17,817,106 including $2,628,370 in retro pay which was 2.8 million dollars over the City's salary offer and that there was at most $370,000 in reserves in the City's 2023 budget. (Aa120) He went on to state that even if the City haphazardly diverted the entire surplus and cap banking in 2024, it would still come up short. (Aa121) The decision leaves little to the imagination

with respect to the Arbitrator's thinking. Clearly, the Arbitrator thought that it was not in the best interest of the public to use every available penny to fund fire officers' raises who were already the highest paid group of employees in the City.

With respect to the retro pay award, although the Union may not like the retro pay award, the Arbitrator certainly explained his rationale in detail when discussing the City's finances and what funds he believed could be utilized to fund salary increases and retro payments. (Aa 119-122,145-146)

Contrary to the Union's assertion, internal comparables were considered, but simply did not dictate the result. Arbitrator Licata took a detailed look at the increases received by the other Unions and acknowledged the importance of maintaining a pattern of settlement among bargaining units of the same employer, but ultimately determined that it would not be appropriate to award a two percent increase. (Aa123-142)

The Arbitrator also analyzed the remainder of the Sectio 16 (g) criteria. The Arbitrator discussed and gave weight to factor 2 comparison of wages salaries, and conditions of employment of other public employees in similar comparable jurisdictions. In applying that criteria, Arbitrator Licata noted that the City is the only municipality in New Jersey that is both a city of the first class (based on a population of greater than 100,000 residents) and a recipient of transitional aid. (Aa114)

This is important, as the Legislature wanted to ensure that municipalities were compared *only* to *other relevant (similarly situated) municipalities* by virtue of N.J.S.A. 34:13A-16.2.[1] This provision required PERC to issue guidelines "for determining comparability of jurisdictions" involved in the interest arbitration process. In that regard, N.J.A.C. 19:16-5.14, sets forth PERC's guidelines, and contains a multitude of factors that an arbitrator must consider to make certain that the "[c]omparison of the wages, salaries, hours and conditions of employment" be to "the same or similar comparable jurisdictions, as determined in accordance with section 5 of P.L. 1995, c.425 (C:34:13A-16.2)." See N.J.S.A. 34:13A-16g(2). Arguably, the City does not have any comparators.

The Arbitrator also considered factor 3, which is the overall compensation received by the Fire Officers in this matter (Aa143-144); factor 4, which is the stipulations of the Parties. (Aa144-145); factor 7, which is the cost of living (Aa144); and factor 8, which is continuity and stability of employment (Aa122-123, 127, 144-145).

The Arbitrator concluded his Award by certifying that he took the statutory limitation imposed on the local tax levy into account in making his award, as well

[1] N.J.S.A. 34:13A-16.2a provides: "The commission [i.e., PERC] shall promulgate guidelines for determining the comparability of jurisdictions for purposes of paragraph (2) of subsection g. of section 3 of P.L. 1977, c.85 (C:34:13A-16)."

as explaining how the statutory criteria (nine factors) factored into his final determination. (Aa160) Clearly, the Arbitrator fully complied with his obligations in rendering a legally proper interest arbitration award in this matter.

3. Arbitrator Licata performed a thorough Analysis.

The reality is that Arbitrator Licata performed a thorough analysis. The Union simply disagrees with it. The Union argues that it should have been awarded two percent because the City had budgeted for a two percent increase in prior years and that the Arbitrator should have given greater weight to the internal comparables, but this is mere argument and opinion.

The Union's differing opinion does not constitute grounds to disturb the Award. It is irrelevant. PERC has recognized that arriving at an economic award in the interest arbitration context is not a precise mathematical process and mathematical exactitude is not expected or required. See e.g. In the Matter of Borough of Milltown and Policemen's Benevolent Ass'n Local No. 338, 38 NJPER P89, 2011 NJ PERC Lexis 144, * 8 (Dec. 28, 2011). Thus, given that N.J.S.A. 34:13A-16g sets forth general criteria rather than a formula for the arbitrator to follow, the treatment of the parties' proposals involves judgment and discretion, and an arbitrator will rarely be able to demonstrate that an award is the only "correct" one. Ibid. Some of the evidence may be conflicting and an arbitrator's award is not necessarily flawed because some pieces of evidence, standing alone, might point to

a different result. Id. at ** 8-9. Accordingly, the Commission will defer to the arbitrator's judgment, discretion and labor relations expertise, Id. at *9, as well as the arbitrator's required training in this area. See e.g. East Rutherford, 213 N.J. at 203 ("even when the award implicates a clear mandate of public policy, the deferential 'reasonably debatable' standard still governs. Thus, '[i]f the correctness of the award, including its resolution of the public policy question, is reasonably debatable, judicial intervention is unwarranted'"); International Ass'n. of Machinists, 3 N.J. Super. at 566-67 ("In a loose sense, the arbitrators may be said to have fallen into an error or mistake when they have judged wrong upon the evidence before them"; "But this is not the kind of error or mistake intended [to overturn an arbitration award], because so far as they have exercised their judgment, it is conclusive, though to other minds the result might seem palpably erroneous"; "The mistake must be of a different character, something which has deceived or misled them, and not a mere mistake in drawing conclusions of fact from observation or evidence"). See also McFeely v. Board of Pension Comm'rs., 1 N.J. 212, 215 (1948) (explaining judicial discretion as the exercise of judgment or discretion by discerning the course presented by the law in regard to some specific factual predicate; explaining that the limitation is that it cannot be arbitrary or capricious).

4. PERC properly found that Arbitrator Licata properly discharged his duties in this matter.

Based upon all the above, PERC properly and correctly rejected the Union's argument below that Arbitrator Licata did not discharge his duties properly as the interest arbitrator assigned to this complicated matter, noting the following points in the process:

- The arbitrator's salary award initially noted that because the award was almost all retroactive (*i.e.*, the term began in 2019 and was set to expire in just a few weeks at the end of 2023), the parties past payments for these unit employees already used up much of the reserves once designated for them. He stated: "The appropriate salary award is one which, by necessity, provides limited retroactive pay while fairly situating the parties as they head into 2024 and the negotiation of a successor agreement." [Aa044]

- The arbitrator found that the award, in full, yields a 5.22% salary increase for the four year have month period of August 1, 2019 through December 31, 2023. [Aa045]

- Because the Legislature entrusted arbitrators with weighing the evidence, we will not disturb an arbitrator's exercise of discretion unless an appellant demonstrates that the arbitrator did not adhere to these standards. [Aa048]

- We next address the PFOA's assertion that the arbitrator misapplied the 16g statutory factors. The PFOA argues that the arbitrator improperly grouped factors 16(g)(1), (5), (6), and (9) together. The PFOA contends that the arbitrator did not give due weight to internal comparability because the City's settlements with other uniformed and non-uniformed units provided for 2% or more in salary increases. The City responds that the arbitrator properly considered all nine 16(g) statutory factors and explained why he found factors 16(g)(1), (5), (6) and (9), pertaining to the interest and the welfare of

the public, financial impacts, and lawful authority and statutory restrictions, to all be relevant and related. The City asserts that the arbitrator thoroughly explained his reasoning for not awarding 2% salary increases based on the City's financial condition. The City notes that the arbitrator properly found that the City presented the expert financial testimony of its CFO, whereas the PFOA did not present an expert witness to challenge the City's evidence concerning the City's financial condition. [Aa055-56]

- In applying these criteria, [the arbitrator] appropriately considered the City's financial condition as testified to by the City's CFO, which includes the City's receipt of Transitional Aid. [Aa056]

- As to internal comparability, the arbitrator considered the 2% salary increase received by the City's non-uniformed units and the greater than 2.9% salary increases received in the PFA [firefighters] unit's 2022 MOA. However, the arbitrator noted that the PFA unit also provided economic concessions including ending terminal leave and longevity for new hires, and folding longevity into salary for existing members. [Aa057]

- Ultimately, when considering internal comparability in the context of the public interest and financial impact criteria, the arbitrator determined that he was constrained to awarding less than 2% salary increases for some years of the award based on the City's financial condition. Specifically, the arbitrator found that, in order to fund even a 2% across-the-board salary increase the City would need to divert all of its surplus and cap banking for CY 2024 and still end up approximately $400,000 short, possibly requiring layoffs or service shutdowns to make up the shortage. Accordingly, he concluded . . . I cannot award that amount. [Aa057-58]

- The arbitrator extensively analyzed the impact of the "Special Municipal Aid Act" (SMAA), through which the City receives Transitional Aid and is subject to DCA' oversight of its finances through its MOU with the City. The arbitrator correctly recognized that, although the DCA does not have the authority under the SMAA to nullify an interest arbitration award as it would under the "Municipal Stabilization and Recovery Act" (MSRA), it may withhold Transitional Aid funds if the City allows compensation increases that are not sustainable. The arbitrator also, consistent with Camden, 429 N.J. Super. 309, supra, properly found that the DCA is not a party to the interest arbitration and cannot be directed to fund an award. Given the significant financial impact of the DCA's oversight, which requires the City to remain in substantial compliance with its guidelines to continue receiving Transitional Aid, we find that it was appropriate for the arbitrator to consider the DCA's oversight in his application of the 16g factors. [Aa061]

- The interest arbitration award is affirmed. [Aa064] [Citations may have been omitted for some of the above.]

PERC's position on this subject is not arbitrary or capricious, it is not unreasonable, and is supported by the record. Therefore, it should be affirmed especially given the significant deference provided to PERC's decisions by the appellate courts of our State.

POINT V

PERC DID NOT ERR IN FINDING THAT IT WAS REASONABLE FOR THE ARBITRATOR NOT TO DRAFT A CONSOLIDATED CONTRACT FOR THE PARTIES.

The Union has not provided this Court with any legal authority to support its argument that the Arbitrator is compelled to write a consolidated contract for the parties.

In re Borough of Bergenfield 2021 N.J. Super Unpub. LEXIS 2398 (App. Div. October 5, 2021), does not support the Union's baseless contention that the combination of the Captain, Battalion Chief, or Deputy Chief contracts, is a task that should have been performed by the Arbitrator. In Bergenfield, the dispute did not involve contract consolidation, but instead involved a dispute as to whether the contract draft presented by the PBA to Bergenfield accurately reflected the interest arbitration award. The Award was not appealed, but a dispute arose when the parties attempted to draft a contract reflecting the terms of the Award. In Bergenfield, the Arbitrator awarded:

> Salary. 2018-0% salary increase, full step increases, longevity and senior officer differential; 2019-0% salary increase, step increases October 1, 2019, longevity compensation and senior officer differential in accordance with the terms of the Agreement; 2020-0% salary increase, no step movement, longevity and senior officer differential in accordance with the terms of the Agreement. [Id. at *15].

The PBA presented a contract draft that stated "[i]ncrements shall be paid in accordance with past practice, except that during the year 2019 only the Salary Step Increases, where applicable, shall be effective October 1, 2019. For the year 2020 there shall be no Step movement for salary increases." The Award left out the "past

practice" clause, but did include language stating that "longevity and senior officer differential [be paid] in accordance with the terms of the [expired] Agreement." Id. at *14.

In Bergenfield, the Borough contended that "the proposed language misstates the award by inclusion of the language that "increments shall be paid in accordance with past practice." It noted "the arbitrator did not include that language when he set forth the specific salary award over the life of the new contract, and his interest arbitration award modified past practice by delaying step increases until the fourth quarter of 2019 and eliminating them altogether for 2020, the final year of the contract." Id. at *7. The PBA argued that its "draft is consistent with Article III, Section 2 of the 2017 contract, which provided that "[i]ncrements shall be paid in accordance with past practice" as modified by the arbitrator's award for the second and third years of the contract." Id. at *7-8. The PBA argued this provision was not modified by the Award and is incorporated into the salary award because of the language on the award "in accordance with the terms of the Agreement The Court held that the Award was ambiguous in that regard and that the matter had to be remanded to the Arbitrator for clarification. Id. at * 13.

Here, there are no ambiguities in the Award that the Arbitrator needs to clarify or even any identified issues in the contract combination. Instead, the Union

complains that the Arbitrator did not write the actual contract for the parties. The combination of these contracts is essentially a clerical task as it does not add or subtract rights or change terms for the parties; it is a simple combination of three similar contracts into one. Moreover, the parties agreed to the combination of the three contracts and neither party raised any anticipated issues in connection with the combination. Truth be told, the PFOA only raised the issue in an ill-fated attempt to argue that their revised final offer should have been accepted because it would aid in the combination of the contracts.

It is the Arbitrator's job to adjudicate disputes, not to act as the parties' scrivener. It would be inappropriate to remand the matter to the Arbitrator to engage in this ministerial task that the parties are perfectly capable of performing. Bergenfield supports a remand to the arbitrator to clarify ambiguities in the Arbitrator's award; it does not support the Union's argument that that Arbitrator should sit down and combine the contracts for the parties. The Bergenfield holding stands for the simple proposition that a party cannot be compelled to sign a contract that does not accurately reflect the interest arbitration award, and the Arbitrator must resolve an ambiguity in the Award. In the Matter of Burlington and PBA Local 249, 2022 NJ PERC LEXIS 95, *12 (2022). ("The Bergenfield holding was narrowly applicable to the unique situation therein concerning whether the Borough "could

only be compelled to sign a contract that accurately reflected the interest arbitration award.

POINT VI

THE FACT THAT ARBITRATOR LICATA'S APPENDICES WHICH SET FORTH A CALCULATION OF RETRO TO BE RECEIVED BY EACH UNION MEMBER WERE NOT INCLUDED WITH THE AWARD IS NOT REVERSIBLE ERROR.

In Point VI of its appeal brief, the Union complains that PERC did not provide six appendices that belonged in Licata's award when the award was issued to the parties. (Ab42) The Union admits: "At the time, the parties were unaware of this error." (Ab43) The appendices were referred to in the Award, but not sought by the Union. It could have contacted PERC at any time to obtain them, but did not. The Union vaguely contends that it was prejudiced in pursuing its appeal before PERC. The Union asserts that it disagrees with the calculation. The Union has possession of the six missing appendices (Aa557), yet fails to assert any specifics, as it must. Vague assertions may not rule the day.

Moreover, PERC has repeatedly ruled that mathematical exactitude is not required and where it has been shown not to exist does not require a reversal and remand back to the arbitrator, stating/explaining:

> Arriving at an economic award is not a precise mathematical process. The treatment of the parties' proposals involves judgment and discretion, and an arbitrator will rarely be able to demonstrate that an award is the only "correct" one. Some of the

> evidence may be conflicting and an arbitrator's award is not necessarily flawed because some pieces of evidence, standing alone, might point to a different result.
>
> [In the Matter of City of Orange Township and PBA Local No. 89 and FMBA Local 10 and FMBA Local 210, Fire Officers Ass'n, 2016 N.J. PERC Lexis 83 (N.J. Admin. Sept. 8, 2016) (citations omitted).

For all of the reasons set forth above, the Union's appeal regarding this issue must be dismissed.

CONCLUSION

For all of the reasons set forth above, Respondent, City of Paterson, respectfully requests this Honorable Court deny the Union's appeal in its entirety as devoid of all merit.

PRB ATTORNEYS AT LAW, LLC

By: */s/ Susie Burns*
Susie Burns, Esq.

Dated: November 18, 2024

IN THE MATTER OF CITY OF PATERSON, RESPONDENT, AND PATERSON FIRE OFFICERS' ASSOCIATION, FMBA LOCAL 202, APPELLANT.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-002426-23 On Appeal From: P.E.R.C. No. 2024-41

REPLY BRIEF ON BEHALF OF APPELLANT PATERSON FIRE OFFICERS' ASSOCIATION, FMBA LOCAL 202

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REPLY PRELIMINARY STATEMENT

Contrary to the City of Paterson's assertion, this matter is not about entitlement. Rather, it is about fundamental errors made by the Arbitrator, and confirmed by the Public Employment Relations Commission ("PERC" or "Commission") which require that the Interest Arbitration Award issued by Arbitrator Joseph Licata ("Arbitrator") be vacated and remanded.

For many years, the City has received financial assistance from the State of New Jersey through its Transitional Aid Program. The New Jersey Department of Community Affairs, Division of Local Government Services, administers the Program, and had not reduced aid to the City when the City negotiated 2% annual salary increases for its civilian negotiations units, and a greater than 2.9% salary increase to its firefighter negotiations unit. In issuing the Interest Arbitration Award, the Arbitrator failed to appropriately consider the internal comparables of salary increases budgeted by the City and approved by the DCA when he applied the N.J.S.A. 34:13A-16(g) criteria.

The Arbitrator engaged in other material errors when he refused to accept the PFOA's revised final offer clarifying its proposed language changes on health benefits, used inaccurate data regarding the unit composition and base salaries of negotiations unit employees, which led to an incorrect analysis of the costs of the Award, and erred in refusing to blend the three fire supervisor contracts into a

single Agreement, despite having awarded the unification of the contracts as part of the Award.

These failures, along with PERC's failure to issue the six appendices that were attached to the Arbitrator's Award to the parties, constitute reversible error requiring that the Award be vacated and remanded back to the Arbitrator.

REPLY STATEMENT OF FACTS

The City is a Civil Service jurisdiction with approximately 1,800 employees (Aa066). The Fire Department is staffed with 266 firefighters and 97 superior officers with those engaged in fire suppression working a shift of 24 hours on duty followed by 72 hours off duty, or 2,184 hours annually. (Id.) The Fire Officers negotiations unit of Fire Captains, Battalion Chiefs and Deputy Chiefs comprise about 5% of the employees employed by the City.

In addition to fire suppression duties, the Fire Department provides full-time EMS operations. Fire Captains serve as company officers on each fire apparatus and Battalion Chiefs are assigned as Incident Commanders at the scene of a fire. In addition, Captains supervise EMS operations. (Aa067). EMS provides a revenue source to the City. In 2022, EMS revenues were $3,457,469. It was anticipated that revenues from the ambulance service would be approximately $3,400,000 for 2023. (Aa068). In its brief, the City identified "only three revenue sources: permit fees, municipal court fines, and real property

taxes." (Rb6). The Arbitrator noted additional sources of revenue including revenue from ambulance fees. The City received $4 million in 2022 under the CARES ACT for premium pay for essential workers. (Aa118). The City also received American Rescue Plan monies as well as at least $3 million annually in revenue from fines post-COVID-19. The City also receives grants from violent crimes, identified by the Arbitrator as $35 million in Federal aid. (Id.) The City may also bond for capital improvements, appropriating $36.7 million in 2022 and $8.3 million in 2023. (Aa119).

Other sources of revenue for the City include interest and costs on delinquent taxes (estimated at $1.9 million in 2023), and cannabis revenue of an estimated $2 million in 2023. (Aa118-119).

The City also realized savings by not filling vacancies from 2019 to 2021, and then making promotions to entry level Captain position at the lowest step on the salary guide. (Aa119). In 2023, City-wide salaries and wages rose from $112,130,728 to $115,576,944, or a 3.07% increase. (Aa120). The City budgeted 2% annual salary and wage increases with projections from 2024 through 2028. (Id.) In the Division of Fire, 2022 salaries and wages were $39.5 million. For 2023, the amount is $41 million, or a 3.66% increase. (Id.) This is before the Arbitrator's Interest Arbitration Award for this Fire Officers negotiations unit.

The expired collective negotiations agreements between the City and the PFOA (Captains, Battalion Chiefs and Deputy Chiefs) covered the period August 1, 2010 through July 31, 2019. (Aa582-739). The COVID-19 pandemic began in or about March 2020, more than seven months after the collective negotiations agreement expired and the parties were free to negotiate a successor collective negotiations agreement. During this same period of time, 2019 to 2023, the "City had settled other internal contracts within Paterson for two percent raises." (Rb11). These settlements all occurred within the same time period as the DCA's oversight of the City's finances.

LEGAL ARGUMENT

POINT I

THE PFOA HAS MET THE STANDARD FOR VACATING THE INTEREST ARBITRATION AWARD

While the Commission's decision may be entitled to deference, the decision will not stand if it is "arbitrary, capricious or unreasonable or . . . not supported by substantial credible evidence in the record as a whole." In the Matter of Brian Ambroise, 258 N.J. 180, 197 (2024). See also In re City of Camden, 429 N.J. Super. 309, 327-328 (App. Div. 2013), *certif. denied* 2015 N.J. 485 (2013). In assessing whether the Commission's decision is arbitrary, capricious or unreasonable, a court examines the following:

> (1) Whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) Whether

> the record contains substantial evidence to support the findings on which the agency based its action; and (3) Whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

In re Ambroise, *supra.*, at 197-198 (citations omitted).

In reviewing an interest arbitration award, the Commission's role is to determine whether:

> (1) the arbitrator failed to give due weight to the [statutory] factors he deemed relevant to the resolution of the specific dispute; (2) the arbitrator violated the standards in N.J.S.A. 2A:24-8 and - 9; or (3) the award is not supported by substantial credible evidence in the record as a whole.

In re State, 443 N.J. Super. 380, 385 (App. Div. 2016), citing Hillsdale PBA Local 207 v. Borough of Hillsdale, 137 N.J. 71, 83-84 (1994).

POINT II

THE ARBITRATOR COMMITTED REVERSIBLE ERROR BY FAILING TO APPLY N.J.A.C. 19:16-5.7(g).

In its brief, the City concedes that the Arbitrator failed to enforce the requirement set forth in N.J.A.C. 19:16-5.7(g) which requires the City to provide the Arbitrator and the PFOA with a list of unit members during the final year of the expired Agreement, their salary guide steps during the final year, their anniversary date of hire, costs of salary increments, costs of other base salary items, total costs of all base salary items for the 12 months preceding the first year of the new agreement, a list of all unit members on the last day of the year

immediately preceding the new agreement, and their salaries as of that date. While the City concedes that the information was never provided, the Commission fails to address this critical error in its statement in lieu of brief. (Rb20; Rb5PERC).

This information is essential in order for the Arbitrator to cost out the economic award. Had the City provided this information, the chart below illustrates the difference in the initial cost of the unit base salaries that should have been in the record compared to the data that was in the record, and used by the Arbitrator in determining the salary increases awarded.

Incorrect Base Salary - Comparison of Appendices A, B, C and D (Aa162-Aa173) and City Chart (Aa426-Aa431) to Contractual Base Salary as of 7/31/2019 (Aa449-Aa452)

Key

Captain Steps	Contractual Base Salary as of 7/31/2019
Promotion	$98,147.00
6 Months	$102,281.00
1 Year	$110,563.00
2+ Year	$118,820.00

	Promo Date	City and Arbitrator Base Salary	Correct Base Salary as of 7/31/2019	Notes 1	Notes 2
Collazo	8/1/2018	$121,016.97	$102,281.00	In 6 months Step as of 7/31/2019	See Note 2 below
Feliciano	8/1/2018	$118,820.00	$102,281.00	In 6 months Step as of 7/31/2019	
Fournier	8/1/2018	$121,016.97	$102,281.00	In 6 months Step as of 7/31/2019	See Note 2 below
Morales	8/1/2018	$118,820.00	$102,281.00	In 6 months Step as of 7/31/2019	
Tovar	8/1/2018	$118,820.00	$102,281.00	In 6 months Step as of 7/31/2019	
Angelica	4/30/2019	$118,820.00	$98,147.00	In Upon Promotion Step as of 7/31/2019	
Fender	4/30/2019	$118,820.00	$98,147.00	In Upon Promotion Step as of 7/31/2019	
Jeltema	4/30/2019	$118,820.00	$98,147.00	In Upon Promotion Step as of 7/31/2019	
Kenney	4/30/2019	$118,820.00	$98,147.00	In Upon Promotion Step as of 7/31/2019	

Krehel	4/30/2019	$121,016.97	$98,147.00	In Upon Promotion Step as of 7/31/2019	See Note 2 below
Perez	4/30/2019	$121,016.97	$98,147.00	In Upon Promotion Step as of 7/31/2019	See Note 2 below
Zaccone	4/30/2019	$121,016.97	$98,147.00	In Upon Promotion Step as of 7/31/2019	See Note 2 below
Acosta	6/11/2019	$118,820.00	$98,147.00	In Upon Promotion Step as of 7/31/2019	
Gander	6/11/2019	$118,820.00	$98,147.00	In Upon Promotion Step as of 7/31/2019	
Hascup	6/11/2019	$118,820.00	$98,147.00	In Upon Promotion Step as of 7/31/2019	
Hawkins	6/11/2019	$118,820.00	$98,147.00	In Upon Promotion Step as of 7/31/2019	
Higgins	6/11/2019	$118,820.00	$98,147.00	In Upon Promotion Step as of 7/31/2019	
Howe	6/11/2019	$121,016.97	$98,147.00	In Upon Promotion Step as of 7/31/2019	See Note 2 below
Selby	6/11/2019	$121,016.97	$98,147.00	In Upon Promotion Step as of 7/31/2019	See Note 2 below
Tierney	6/11/2019	$118,820.00	$98,147.00	In Upon Promotion Step as of 7/31/2019	
Roman	7/12/2019	$118,820.00	$98,147.00	In Upon Promotion Step as of 7/31/2019	
Hoffman	7/12/2019	$118,820.00	$98,147.00	In Upon Promotion Step as of 7/31/2019	
Pagan	7/12/2019	$118,820.00	$98,147.00	In Upon Promotion Step as of 7/31/2019	
Eggers	8/9/2019	$118,820.00	n/a	Not in negotiations unit as of 7/31/2019	
Gervat	10/30/2019	$118,820.00	n/a	Not in negotiations unit as of 7/31/2019	
Ali	7/2/2020	$121,016.97	n/a	Not in negotiations unit as of 7/31/2019	
Campagna	7/2/2020	$118,820.00	n/a	Not in negotiations unit as of 7/31/2019	
Duffy	7/2/2020	$118,820.00	n/a	Not in negotiations unit as of 7/31/2019	
Garcia	7/2/2020	$118,820.00	n/a	Not in negotiations unit as of 7/31/2019	
Gotay	7/2/2020	$118,820.00	n/a	Not in negotiations unit as of 7/31/2019	
Holmes	7/2/2020	$118,820.00	n/a	Not in negotiations unit as of 7/31/2019	
Holmes	7/2/2020	$118,820.00	n/a	Not in negotiations unit as of 7/31/2019	
Mauro	7/2/2020	$118,820.00	n/a	Not in negotiations unit as of 7/31/2019	
Salmond	7/2/2020	$118,820.00	n/a	Not in negotiations unit as of 7/31/2019	
Vargas	7/2/2020	$118,820.00	n/a	Not in negotiations unit as of 7/31/2019	
Zeidler	7/2/2020	$118,820.00	n/a	Not in negotiations unit as of 7/31/2019	
Candelo	9/10/2020	$121,016.97	n/a	Not in negotiations unit as of 7/31/2019	
Beekman	10/28/2020	$121,016.97	n/a	Not in negotiations unit as of 7/31/2019	
Brigati	2/1/2021	$118,820.00	n/a	Not in negotiations unit as of 7/31/2019	
Eickhorst	2/1/2021	$121,016.97	n/a	Not in negotiations unit as of 7/31/2019	
Estrella	2/1/2021	$118,820.00	n/a	Not in negotiations unit as of 7/31/2019	
Kalata	2/1/2021	$118,820.00	n/a	Not in negotiations unit as of 7/31/2019	
Mantilla	2/1/2021	$118,820.00	n/a	Not in negotiations unit as of 7/31/2019	
Ackerman	2/1/2021	$118,820.00	n/a	Not in negotiations unit as of 7/31/2019	
Payne	2/1/2021	$118,820.00	n/a	Not in negotiations unit as of 7/31/2019	
Roth	2/1/2021	$118,820.00	n/a	Not in negotiations unit as of 7/31/2019	
Sabia	2/1/2021	$118,820.00	n/a	Not in negotiations unit as of 7/31/2019	
Petrelli	3/1/2021	$118,820.00	n/a	Not in negotiations unit as of 7/31/2019	
Chavez	7/1/2021	$110,564.00	n/a	Not in negotiations unit as of 7/31/2019	

Gutierrez	7/1/2021	$118,820.00	n/a	Not in negotiations unit as of 7/31/2019	
Hughes	7/1/2021	$110,564.00	n/a	Not in negotiations unit as of 7/31/2019	
Gonzalez	3/10/2022	$112,760.52	n/a	Not in negotiations unit as of 7/31/2019	
Post	5/2/2022	$102,281.00	n/a	Not in negotiations unit as of 7/31/2019	
Crampton		$121,016.97	$118,820.00		See Note 2 below
Cruz		$118,820.00	$118,820.00		
Dyk Sr.		$121,016.97	$118,820.00		See Note 2 below
Falcone		$118,820.00	$118,820.00		
Gallo		$121,016.97	$118,820.00	Retired as of 2/1/2023	See Note 2 below
Harris		$118,820.00	$118,820.00		
Hook		$118,820.00	$118,820.00		
Huber		$121,016.97	$118,820.00		See Note 2 below
MacDonald		$121,016.97	$118,820.00		See Note 2 below
Paredes		$121,016.97	$118,820.00		See Note 2 below
Salina		$118,820.00	$118,820.00		
Scherer		$118,820.00	$118,820.00		
Shouldis		$118,820.00	$118,820.00		
	TOTAL	**$7,840,358.01**	**$3,822,711.00**		
				$4,017,647.01	

Note 2: Since top base pay for Captain was $118,820 prior to issuance of 12/18/2023 Award, there is no explanation as to why the City and Arbitrator designated the employee's base salary as $121,016.97

The Chart shows that the Arbitrator used the starting point to calculate the cost of the economic award with the Captains at $7,840,358.01. The actual cost calculations as per the regulations and case law which should have been used was $3,822,711, a difference of $4,017,647.01.

The City argues that the PFOA never sought the information and therefore the Arbitrator is absolved of any responsibility to ensure the City's compliance with the rules. Further, the City argues that this information is based on a PERC regulation, and not a state statute. First, the Arbitrator is responsible for

administering and enforcing the rules under which the Arbitrator is trained as an Interest Arbitrator. In addition, the Arbitrator is responsible for calculating the cost out in explaining the Award. Furthermore, the regulation is not the only place where this obligation is set forth. The obligation is also acknowledged in Commission case law, such as Borough of New Milford, 2012 NJ PERC LEXIS 18, 38 NJPER 340 (¶ 116 2012), and Atlantic City, 2013 NJ PERC LEXIS 38, 39 NJPER ¶ 161 (May 13, 2013). This fundamental error in calculations require reversal of the Award.

POINT III

THE REJECTION OF THE PFOA'S REVISED FINAL OFFER CONSTITUTES REVERSIBLE ERROR.

The City argues that the Arbitrator was justified in rejecting the PFOA's revised final offer because the PFOA impermissibly expanded its final offer seeking additional contract changes that were not in its original final offer. (Rb23-24). This is inaccurate.

The PFOA did nothing more than clarify the language it sought in its original final offer. This was not an attempt to enhance the PFOA's proposal, nor did it incorporate other language such as "changes to contributions and to provide that the City would pay the full cost of a dental plan and optical plan." (Rb25). The City's claim that the revised final offer proposed such things is inaccurate, and a misreading of the revised final offer, just as the Arbitrator did.

The PFOA's language proposal was in red in its revised final offer. This is the only language change sought which is consistent with the original final offer and the PFOA's intent. It constituted three paragraphs which state as follows:

> 2. The contribution shall apply to employees for whom the employer has assumed a health care benefits payment obligation to require that such employees pay at a minimum the amount of contribution specified in this section for health care benefits coverage. An employee on leave without pay who receives benefits under the State Health Benefits Plan shall be required to pay the requisite contributions and shall be billed by the employer for these contributions. Healthcare benefits coverage will cease if the employee fails to make timely payments. The parties agree that should an employee voluntarily waive all coverage under the State Health Benefits Plan and provide certification to the City that he/she has other health insurance coverage; the City will waive the contribution for that employee.
>
> 3. The City agrees to pay an incentive payment to any City employee who waives both medical and prescription coverage under the City's State Health Benefits Program ("SHBP"). The City agrees to pay an annual incentive payment to any City employee who, at the time of open enrollment, is eligible for and waives both medical and prescription coverage under the SHBP. The SHBP waiver incentive payment shall not exceed 25% of the amount saved by the City because of the waiver or $5,000, whichever is less. In order to be deemed eligible for the payment, the employee must waive coverage at open enrollment of each year and the employee's waiver must remain in effect for the full benefit year. The employee's waiver much follow the requirements outlined by the New Jersey Division of Pensions and Benefits. Should an employee seek reinstatement of health benefits coverage with the SHBP at any time during a benefit year, the reinstatement of coverage with the SHBP will void the employee's eligibility for the SHBP waiver payment. The City will issue the payment in full to each eligible City employee at the beginning of the next benefit year.

> 4. The City agrees that if the SHBP removes the Direct 10 plan, the City will immediately seek new coverage under the SHBP that is equal to or better to the Direct 10 plan. If none exists, the City agrees to notify the Association of the removal of the Direct 10 to negotiate the terms of the new health insurance benefits. (Ab25-26).

The City's final offer did not seek any changes to the health benefits provision. The Arbitrator's mistake resulted in the loss of four PFOA member benefits: Medicare Part B reimbursement for spouses, optical for active members, dental for retirees, and widows benefits for active members, although retained for retirees. The Arbitrator's mistake in misreading the PFOA's revised final offer, which did not add anything to the original final offer, is a material error which resulted in an Award of language that was not sought by the PFOA, nor was it sought by the City. This matter must be vacated and remanded in order for the Arbitrator to correct this material error in the Award.

POINT IV

THE ARBITRATOR FAILED TO APPLY THE 16(g) CRITERIA IN ACCORDANCE WITH LAW.

In the Award, the Arbitrator explained the factors he used in determining his economic award. Specifically, the Arbitrator cited to the "confluence of lost municipal revenues and tax collections due to COVID-19, the delay in negotiations until 2022, the structural budgetary shortfall experienced in 2022-2023 by the City, the additional financial aid needed from the DCA, the moratorium on filling vacant positions, and the City's diversion of reserves to

fund an originally proposed 2% across-the-board offer to the PFOA units." (Aa120). However, the Arbitrator fails to explain how these factors applied to his economic award.

For example, the City's loss of municipal court revenues were no different than other municipalities across the state. Further, the Arbitrator doesn't explain how, even with the lost revenues, the City was able to fund 2% salary increases for all of the other bargaining units that it settled with, including a more than 2.9% salary increase for the firefighters bargaining unit. Further, while the Arbitrator cites to a delay in negotiations until 2022, there was at least 7 months of time between the expiration of the PFOA collective negotiations agreements, and the start of the pandemic.[1] The Arbitrator provides no explanation as to how the pre-pandemic time period impacted the PFOA, nor does the Arbitrator explain how the firefighters unit was able to negotiate a more than 2.9% annual salary increase in May 2022, which was at the same time the PFOA was also negotiating with the City.

The Arbitrator also failed to provide any explanation as to why the City's

[1] In fact, N.J.S.A. 34:13A-16 provides that "[n]egotiations between a public fire or police department and an exclusive representative concerning the terms and conditions of employment shall begin at least 120 days prior to the day on which their collective negotiation agreement is to expire." (emphasis added). Thus, negotiations should have commenced by March 31, 2019, 12 months prior to the start of the pandemic.

decision to divert funds that were budgeted for 2% salary increases to the PFOA unit was acceptable without any consequence. In other words, the Arbitrator's premise is that only if a municipality funds salary increases, and keeps those funds in reserve, will he then have the authority to award those funds in interest arbitration. This reasoning is nowhere to be found in the Interest Arbitration statute. The City cannot hide behind diverting reserves that it earmarked for the PFOA unit, and then use that diversion as a shield to protect it from having to expend those funds as part of an Interest Arbitration Award. This incentivizes delay, diversion of budgeted funds for salary increases, and undermines the interest arbitration process. N.J.S.A. 34:13A-14 (the legislature finds and declares, among other things, that interest arbitration "afford[s] an alternate, expeditious, effective and binding procedure for the resolution of [police and fire contract negotiations] disputes;" and, that interest arbitrators "fairly and reasonably perform their statutory responsibilities to the end that labor peace between the public employer and its employees will be stabilized and promoted… ."). The Arbitrator provides no explanation as to why the PFOA unit is the only unit where funds earmarked for salary and wage increases were intentionally diverted by the City, and the City benefited by its actions.

Finally, the Arbitrator fails to explain why he only used the City's 2023 budget in analyzing the City's financial condition when the Award covered the

period August 1, 2019 through December 31, 2023.

The Arbitrator is required to provide a reasonable explanation for his economic award. His failure to do so constitutes reversible error.

POINT V

IT WAS NOT REASONABLE FOR THE ARBITRATOR TO REFUSE TO COMBINE THE THREE UNITS INTO ONE UNIFIED CONTRACT.

In the Award, the Arbitrator left it to the parties to prepare a unified Agreement combining the three negotiations units into one contract. The Commission found that the Arbitrator was justified in refusing to perform a "ministerial task" that the parties could perform. However, even the Arbitrator acknowledged that this "ministerial task" may not be as simple as the Commission believes. In the Award, the Arbitrator recognized that the task may be of a certain level of difficulty that it would require a mediator to assist the parties in performing this task. (Aa160, fn. 17).

There is simply no credible argument to support the claim that the task of unifying the three contracts is ministerial when the Arbitrator acknowledged that the parties may need assistance to perform the task. The Commission's denial of the PFOA appeal on these grounds was arbitrary and must be reversed.

POINT VI

THE COMMISSION'S FAILURE TO ISSUE THE SIX APPENDICES WITH THE INTEREST ARBITRATION AWARD CONSTITUTES REVERSIBLE ERROR.

The six appendices, which are in the record before this Court, illustrate the cost analysis used by the Arbitrator in issuing his economic award. However, the information used by the Arbitrator is inaccurate and materially affects how the economic award was determined.

The appendices show that the bargaining unit composition includes those that were not in the negotiations unit as of the last day of the last year of the expired contract, July 31, 2019. See Point II, *supra*. Yet they were listed as included in the negotiations unit in order to determine the base salary cost of the unit for purposes of deciding the economic award for the successor agreement. If the economic award was premised on inaccurate information, the economic award itself is inaccurate, and therefore subject to reversal.

CONCLUSION

For all of the foregoing reasons, including those set forth in the PFOA's initial brief, it is respectfully requested that the appeal be granted and the decision of the Public Employment Relations Commission be vacated and remanded to the Commission and Interest Arbitrator.

Respectfully submitted,
LAW OFFICES OF CRAIG S. GUMPEL LLC
By: s/ Craig S. Gumpel
CRAIG S. GUMPEL

Dated: January 2, 2025