TW-3344-97T1

RECD
APPELLATE DIVISION
MAY 18 1998

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30, and JOSEPH VENA, Respondents/Plaintiffs, v. DELAWARE RIVER PORT AUTHORITY, Appellant/Defendant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003344-97T1 CIVIL ACTION **ON APPEAL FROM A FINAL JUDGMENT ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, CAMDEN COUNTY GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** SAT BELOW: HONORABLE M. ALLAN VOGELSON, P.J.S.C.

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BRIEF OF APPELLANT/DEFENDANT DELAWARE RIVER PORT AUTHORITY

BLANK ROME COMISKY & McCAULEY LLP
A Pennsylvania LLP
PETER A. GOLD, ESQUIRE
Resident Partner
SAMUEL M. FIRST, ESQUIRE
Woodland Falls Corporate Park
210 Lake Drive East, Suite 200
Cherry Hill, New Jersey 08002
(609) 779-3600

Attorneys for Defendant/Appellant
Delaware River Port Authority

Dated: May 18, 1998

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I. INTRODUCTION AND SUMMARY

This case presents issues with substantial and far reaching public policy considerations for each of the branches of New Jersey Government, each branch of Pennsylvania's Government, all bi-state and multi-state authorities, and the United States of America. Yet, it was summarily disposed of on a Motion for Summary Judgment notwithstanding the fact that: 1) discovery was still open, and 2) Defendant Delaware River Port Authority ("DRPA") sought to offer additional evidence.

A. Orders Appealed From

Pursuant to New Jersey Rule of Court ("Rule") 2:2-3, Defendant DRPA, by and through its counsel, submits this Brief in support of its Appeal of the following final Orders entered by the New Jersey Superior Court, Camden County, Law Division ("Trial Court"):

1. The November 21, 1997 Final Judgment Order of Judge M. Allan Vogelson granting Plaintiffs Fraternal Order of Police Penn-Jersey Lodge 30 and Joseph Vena's ("Plaintiffs") Motion for Summary Judgment on Count I of the Amended Complaint, ordering the parties to engage in mediation to develop a procedure and mechanism to resume good faith negotiations and arrive at an agreement over the terms and conditions of employment for DRPA police officers, ordering that ***"if the parties remain at impasse the Court 'can and will' order binding interest arbitration,"*** and denying Defendant DRPA's Cross-Motion for Summary Judgment, or in the Alternative to Strike Plaintiffs' Proffered Expert Testimony or to Continue Plaintiffs' Motion in order that the DRPA may submit additional affidavits, take discovery of Plaintiffs' expert or submit its own expert testimony. (Da3-4) (emphasis added);

2. The December 19, 1997 Order of the Trial Court requiring the DRPA to appropriate funds to "equally share the mediator's fees with the Plaintiffs for the first three (3) mediation sessions," and denying the DRPA's request to file an additional report, proffered as an expert report in connection with its Motion for Reconsideration. (Da5-6); and

3. The February 17, 1998 Order of the Trial Court denying the DRPA's Motion for Reconsideration and/or to Alter or Amend Judgment, and Stay All Proceedings. (Da7-8).

Defendant DRPA is a bi-state entity created by legislation of the Commonwealth of

Pennsylvania and New Jersey, and an Act of the United States Congress. Thus, it is not a political subdivision of New Jersey, Pennsylvania or the United States -- it is a sovereign of all three entities. The DRPA submits that the Trial Court's Orders are erroneous as a matter of law for several alternative and independent reasons. First, the Trial Court Orders improperly interfere with the DRPA's exclusive right under Federal law to control all aspects of its operations including its labor relations, and its right to "fix and determine" the compensation of its employees. Second, the Trial Court erred as a matter of law in holding that the New Jersey Police and Firefighters Interest Arbitration Reform Act, N.J. Stat. Ann. § 34:13A-14a, as amended (1997 Supp.) ("NJIARA"), and Act 111 of Pennsylvania, 43 Pa. Stat. Ann. § 217.1, et seq. ("Act 111") are substantially similar, and therefore, the DRPA is subject to mandatory interest arbitration. These statutes differ dramatically in language, policy, objective and practice, and under applicable bi-state entity law, do not apply, nor have they ever applied, to the DRPA. The DRPA submits that these errors of law, along with the Trial Court's other substantive legal and procedural errors described in detail below, require this Court to reverse the Trial Court's November 21, 1997, December 19, 1997 and February 17, 1998 Orders, and grant Summary Judgment in favor of Defendant DRPA.

II. PROCEDURAL HISTORY

On August 20, 1996, Plaintiffs filed a two-count Complaint against the DRPA alleging a violation of the New Jersey Constitution and a breach of contract. Specifically, the Complaint alleged that the DRPA refused to bargain in good faith over a successor agreement setting terms and conditions of employment for DRPA police officers, and unilaterally implemented terms and conditions of employment over the objection of Plaintiffs. (Da9-81). The DRPA filed a Motion for Summary Judgment in lieu of an Answer on October 7, 1996. Shortly thereafter, on October

29, 1996, Plaintiffs' filed an Amended Complaint. (Da82-101). On December 20, 1996, the DRPA's Motion for Summary Judgment was denied permitting Plaintiffs' case to proceed.

On January 7, 1997, the DRPA filed with the Appellate Division an Emergent Motion to Stay All Proceedings in the Law Division, and a Motion for Leave to File An Appeal of the Law Division's Interlocutory Order Denying the DRPA's Motion for Summary Judgment. On January 29, 1997, the Appellate Division denied the DRPA's Motion for Leave to Appeal. On February 24, 1997, the DRPA timely filed an Answer to Plaintiffs' Amended Complaint raising numerous affirmative defenses (Da102-118), and on April 2, 1997, the DRPA filed an Amended Answer. (Da119-136).

On June 13, 1997, Plaintiffs filed a Motion for Summary Judgment on Count I of their Amended Complaint ***which for the first time sought final and binding interest arbitration before a neutral third party as their requested relief.*** On July 15, 1997, the DRPA filed its opposition papers to Plaintiffs' Motion and a Cross Motion for Summary Judgment on Plaintiffs' Amended Complaint, or in the Alternative, to Strike Plaintiffs' Proffered Expert Testimony or to continue Plaintiffs' Motion to provide Defendant with the opportunity for additional discovery ("Cross Motion"). After numerous delays, caused in good measure by the reassignment of the pre-trial Judge (Hon. Samuel Supnick) and three (3) administrative adjournments by Judge Vogelson, oral argument was finally heard on October 20, 1997, still well within the discovery period which was not scheduled to close until November 26, 1997.

By Order dated November 21, 1997, the Trial Court granted Plaintiffs' Motion for Summary Judgment on Count I of the Amended Complaint as follows:

> (a) The Parties shall select a mediator from a list supplied by the American Arbitration Association to develop a procedure and mechanism to resume good faith negotiations and arrive at an agreement over the terms and conditions of employment for DRPA

police officers; . . . (c) If the Parties remain at impasse the Court can and will order binding interest arbitration.

(Da4). At the same time, and without any prior notice, the Trial Court also denied Defendant's Cross-Motion for Summary Judgment, or in the Alternative to Strike Plaintiffs' Proffered Expert Testimony or to Continue the Motion in order that the DRPA may submit additional affidavits, take discovery of Plaintiffs' expert or submit its own expert testimony, and denied Defendant's Motion for Stay (Da4). The Trial Court certified this Judgment Order as Final for purposes of Appeal pursuant to Rule 4:42-2 (Da4).

On December 5, 1997, pursuant to Court Rules 4:49-2 and 4:50-1, Defendant filed a Motion for Reconsideration of the Court's Judgment and/or to Alter or Amend Judgment, and Stay All Proceedings ("Motion for Reconsideration") which attached an expert opinion and requested leave of court to file an additional expert report. By Order dated December 19, 1997, the Court ordered the Commissioners of the DRPA to appropriate funds at their next regularly scheduled meeting, "to equally share the American Arbitration Association ("AAA") mediator's fees with the Plaintiffs for the first three (3) mediation sessions" in order to carry out the Court's Order of November 21, 1997. (Da5-6). The December 19, 1997 Order also denied the DRPA's Motion to Stay all proceedings pending the Court's consideration of the DRPA's Motion for Reconsideration, and denied the DRPA's "request to file an additional report, proffered as an 'expert report', in connection with its Motion for Reconsideration." (Da6). Finally, Count II of Plaintiffs' Amended Complaint, which asserted Breach of Contract, was withdrawn by Plaintiffs, with prejudice. (Da6).

By Order dated February 17, 1998, the Trial Court denied Defendant's Motion for Reconsideration. Pursuant to this Order, the Trial Court's November 21, 1997 Order continued in full force and effect, and the Trial Court's December 19, 1997 Order remained in full force

and effect, except as modified by the Trial Court to postpone the action to be taken by the DRPA Commissioners to appropriate funds for the Mediator's fees until February or the next regularly scheduled meeting of the DRPA Commissioners (Da7-8). ***This determination disposed of all issues as to all parties as Summary Judgment was granted as to Count I of Plaintiffs' Amended Complaint, and Count II was withdrawn, with prejudice.***

On February 17, 1998, Defendant DRPA filed a Notice of Appeal with the Appellate Division appealing the November 21, 1997, December 19, 1997 and February 17, 1998 Orders of the Trial Court (collectively referred to as "Orders") (Da1-2).

III. STATEMENT OF FACTS

The DRPA maintains a unique legal status as a United States Congressionally approved bi-state public corporate instrumentality of Pennsylvania and New Jersey.

A. Origin Of The DRPA And Its Congressionally Authorized Compact.

In 1931, the State of New Jersey and the Commonwealth of Pennsylvania entered into an Agreement to form the Delaware River Joint Commission ("Joint Commission"). The purpose of the Joint Commission was to operate, maintain and construct certain interstate transportation routes between the two states and regulate the flow of ship and barge traffic in the Delaware River Port. *See*, N.J. Stat. Ann. §32:3-2; 36 Pa. Stat. Ann. § 3503. On June 14, 1932, pursuant to the Compact Clause of the United States Constitution, (Article 1, Section 10, cl. 3), the United States Congress gave its consent to the Agreement between the State of New Jersey and the Commonwealth of Pennsylvania, thereby creating a valid interstate Compact. Public Resolution No. 26, Public Law, Chapter 258 (6/14/32). In accordance with the strict language of the Compact Clause of the United States Constitution, Congressional consent was required in order to make this Agreement between New Jersey and Pennsylvania creating the Joint Commission

legally valid. U.S. Const. art. 1, §10, cl. 3. In 1951, the name of the Joint Commission was changed to the Delaware River Port Authority ("DRPA"). N.J. Stat. Ann. §32:3-2; 36 Pa. Stat. Ann. § 3503.

The DRPA's Congressionally approved Compact was formed by New Jersey and Pennsylvania each enacting almost identical legislation authorizing the creation of the DRPA. *See*, N.J. Stat. Ann. 32:3-1 - 32:3-4 (New Jersey authorization to create DRPA) and 36 Pa. Stat. Ann. §§ 3501-3505 (Pennsylvania authorization to create DRPA) ("Compact"). The DRPA is a "public corporate instrumentality of the Commonwealth of Pennsylvania and the State of New Jersey." *Id.* As such, it is significant to note that **both states' statutes authorized the DRPA to undertake only those activities and operations which have been approved by the governments of both states in their enabling and creating legislation.** *Id.*

Thus, the provisions of the DRPA's Congressionally approved Compact are particularly relevant to this matter. Article 1 of the DRPA Compact clearly identifies twelve (12) specific "public purposes" for which the DRPA was created, and provides that the DRPA is deemed to be exercising an "essential governmental function in effectuating such purposes." N.J. Stat. Ann. § 32:3-2, 36 Pa. Stat. Ann. § 3503. Such essential governmental functions include, but are not limited to, operation, maintenance and construction of certain bridges across the Delaware River and their approaches, promotion, development and use of the Delaware River and the Port District, and promotion of the Delaware River a "highway of commerce." *Id.* Compact, Article I (a), (c), (d), (f) & (g).

The DRPA's Federal Compact established a Board of sixteen (16) Commissioners, eight (8) from Pennsylvania and eight (8) from New Jersey to govern ***all*** affairs of the DRPA. Compact, Article II, N.J. Stat. Ann. § 32:3-3, 36 Pa. Stat. Ann. § 3503. The Compact

specifically provides that "[t]he Commissioners ***shall have charge of the [DRPA's] property and affairs*** and shall for the purpose of doing business constitute a board. . ." Article III; N.J. Stat. Ann. § 32:3-4, 36 Pa. Stat. Ann. § 3503 (emphasis added). There are only two limitations placed on the ability of the DRPA Commissioners to control DRPA property and affairs: First, no action of the Commissioners shall be binding unless the majority of the members of the DRPA from both Pennsylvania and New Jersey shall vote in favor thereof. *Id.* This limitation protects against either state (or its courts) improperly attempting to assert its will on the other.[1]

Second, the DRPA Compact provides each state with the right to provide by law for the exercise of a veto power by the Governor of that state over any action of any DRPA Commissioner from that state within 10 days after receipt at the Governor's office of a certified copy of the minutes of the meeting at which such action was taken. *Id.* New Jersey has chosen to exercise this right contained in the Compact providing the Governor of New Jersey with the power to veto any action of a New Jersey Commissioner within 10 days from receipt of the DRPA meeting minutes where such action was taken. N.J. Stat. Ann.§§ 32:3-4a - 4c. This power is significant because if the Governor of New Jersey chooses to veto an action of a New Jersey Commissioner, such action is rendered "null and void and of no effect." N.J. Stat. Ann. § 32:3-4c. The veto power provides the Governor of New Jersey with the ability to protect the interests of the State of New Jersey and its citizens from any improper actions taken by the DRPA Commissioners, as no action by the DRPA can become binding unless a majority of Commissioners from both states vote in favor thereof. N.J. Stat. Ann. § 32:3-4.

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[1]One of the most important considerations of the constituent states and the federal government is to safeguard against one state imposing its will on the other and/or one or both states imposing their will on the federal government. This is a basic tenet of federalism set out in the United States Constitution.

In order to effectuate the DRPA's twelve (12) authorized "public purposes" and permit the DRPA to perform its "essential governmental functions," Article IV of the Compact specifically grants certain powers to the DRPA. Article IV, N.J. Stat. Ann. § 32:3-5; 36 Pa. Stat. Ann. § 3503. These express powers granted to the DRPA include, but are not limited to, the power:

> (e) ***To appoint, hire or employee . . . agents and employes***, as it may require for the performance of its duties, by contract or otherwise, ***and fix and determine their qualifications, duties and compensation.***
>
> (n) ***To exercise all other powers*** not inconsistent with the constitutions of the two States or of the United States, ***which may be reasonably necessary or incidental to the effectuation of its authorized purposes or to the exercise of any of the foregoing powers, . . . and generally to exercise in connection with its property and affairs***, and in connection with property within its control, any and all powers which might be exercised by a natural person or a private corporation in connection with similar property and affairs.

N.J. Stat. Ann. § 32:3-5(e), (n), 36 Pa. Stat. Ann. § 3503 (emphasis added). The DRPA Compact grants to the DRPA Board of Commissioners broad powers to exert complete control over all DRPA **property and affairs.** This unfettered control is further exemplified in Article IX of the Compact which expressly provides that the Commonwealth of Pennsylvania and the State of New Jersey "will not diminish or impair the power of the [DRPA] to own, operate or control said properties and facilities. . ." Compact, Article IX, N.J. Stat. Ann. §32:3-10; 36 Pa. Stat. Ann. § 3503.

B. DRPA Police Operations

1. Statutory Authority

Consistent with the DRPA's bi-state operations, in 1957 both New Jersey and

Pennsylvania enacted separate, but identical legislation which expressly authorized the DRPA to establish and maintain an independent police force. *See*, N.J. Stat. Ann. § 32:4-6 and 36 Pa. Stat. Ann. § 3504.1. Both states authorized the DRPA to appoint such number of police officers as the DRPA found necessary to:

> keep in safety and preserve order upon such bridges and tunnels and approaches thereto, and upon the rapid transit systems, ferries, facilities and other property as the Delaware River Port Authority or such subsidiary corporations does or may hereafter own, lease or operate; . . . .

Id. That same parallel legislation from each state indicates that the DRPA must provide for the payment of compensation to these police officers. *Id.* From 1957 to date, the DRPA has continuously operated an independent police force to patrol its properties. (Da137, ¶2).

2. Relationship Between FOP Lodge 30 And DRPA

Plaintiff FOP Lodge 30 holds itself out to represent the interests of some of the DRPA employees who perform the above-mentioned police functions. On or about September 30, 1975, a representative of Plaintiff FOP Lodge 30 sent a letter to the DRPA indicating that it had requested the National Labor Relations Board ("NLRB")[4] to conduct a representation election in order to determine the majority representative of the DRPA police officers. On October 3, 1975, the DRPA responded to this letter advising the FOP Lodge 30 representative that the DRPA "is not subject to the jurisdiction of the NLRB or any state Labor Relations Board or Commission", but indicated that it would ***voluntarily*** hold a representation election, if an issue of representation

[4]The NLRB is the Federal Agency responsible for administering some sections of the National Labor Relations Act, as amended.

was deemed to exist by the DRPA Board of Commissioners.[5] The DRPA did not in any way waive or relinquish any powers it possesses under the DRPA Compact.

On or about October 16, 1975, the DRPA ***voluntarily*** chose to hold a representation election for its police officers. (Da138, ¶ 3). Two groups, FOP Lodge 30 and the Transport Workers Union Local 234 ("TWU Local 234"), sought to represent the interests of the DRPA police officers. By a vote of 45 (FOP Lodge 30) to 39 (TWU Local 234), the majority of DRPA police officers voted to have FOP Lodge 30 represent their interests. (Da138, ¶¶ 4&6). Significantly, the election was not conducted by, nor subsequently certified by, the NLRB, the New Jersey Public Employee Relations Commission ("PERC") or the Pennsylvania Labor Relations Board ("PLRB"), none of which have jurisdiction over the DRPA.[6] (Da138, ¶ 5). FOP Lodge 30 never contended that the election was invalid because it was voluntarily conducted by the DRPA and not a by a federal or state governmental agency.

After the election in 1975, the DRPA entered into a series of successive contracts with FOP Lodge 30 as the representative for certain of the DRPA Police Officers who are otherwise at-will employees. (Da138, ¶ 7). None of the contracts, however, ever obligated the parties to adhere to the requirements of the National Labor Relations Act ("NLRA"), the New Jersey Public Employer-Employee Relations Act ("NJPERA"), the Pennsylvania Public Employee Relations Act ("PERA") or the Pennsylvania Labor Relations Act ("PLRA"). (Da138, ¶ 8)).

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[5]October 3, 1975 letter from Roland Morris, Esq., to Anthony D. Pirillo, Jr., Esq. (Da141-142). The DRPA is not subject to the National Labor Relations Act ("NLRA") as Section 2(2) of the NLRA, 29 U.S.C. § 152(2), expressly excludes "political subdivisions" from being statutory employers. *Stinson v. Delaware River Port Auth.*, 935 F.Supp. 531 (E.D.Pa. 1996).

[6]*See, Stinson v. Delaware River Port Auth.*, 935 F.Supp. 531 (E.D.Pa. 1996); *PLRB v. Delaware River Port Auth.*, 13 PPER ¶13072 (1982); *Delaware River Port Auth.*, 22 NJPER ¶27083 (1996).

At the expiration of each contract the parties were free, both by law and contract, to negotiate a new agreement, extend the existing agreement, or reach no agreement at all. This has been their practice.

On November 4, 1995, prior to the expiration of the parties' 1992 Agreement on December 10, 1995, the DRPA voluntarily opened negotiations with FOP Lodge 30 to discuss changes the DRPA intended to make to the terms and conditions of employment. The DRPA also received the positions of its employees, through their FOP Lodge 30 representatives. (Da139, ¶ 10). No less than fourteen (14) negotiation sessions were held between the parties. There was agreement between the parties on many terms. However, on August 20, 1996, the extension to the 1992 Agreement expired without the parties having reached a successor agreement. (Da139, ¶ 12).

On August 21, 1996, the DRPA Board of Commissioners approved a resolution to implement certain changes to the terms and conditions of employment for DRPA Police Officers. (Da79); (Da139, ¶14). The minutes were forwarded to the Governor of New Jersey for approval or rejection. (Da139, ¶14). In accordance with N.J. Stat. Ann. § 32-3-4a, any actions taken by New Jersey DRPA Commissioners have no force or effect for "a veto period" of 10 business days from the Governor's receipt of the minutes, unless the Governor approves the meeting minutes within the 10 day period.[7] N.J. Stat. Ann. § 32-3-4a. Governor Whitman's veto period for the DRPA August 21, 1996 meeting minutes expired at the end of the day on September 11, 1996, without her taking action to veto the minutes. As of the expiration of the veto period, the Resolution authorizing implementation of the terms and conditions of employment for the DRPA

[7]Although Pennsylvania has the right under the Compact to pass legislation providing its Governor with the same veto power, it has chosen not to do so.

police officers went into effect.[8] (Da140, ¶ 15)(Da79).

C. **Plaintiff's Lawsuit**

Plaintiffs' filed their original Complaint on August 20, 1996, and an Amended Complaint on October 29, 1996. (Da9-81)(Da82-101). Neither Plaintiffs' Complaint nor Amended Complaint ever sought final and binding interest arbitration as a remedy. In fact, the only remedies sought by Plaintiffs were: (1) A Declaratory Judgment that the DRPA violated the New Jersey Constitution and parallel legislative enactments of New Jersey and Pennsylvania; (2) injunctive relief enjoining the DRPA from unilaterally implementing terms and conditions of employment upon Plaintiffs; (3) an Order for the DRPA to return to negotiations; (4) the appointment of a "mediator . . . or another neutral entity selected by the court, to assist the parties in the negotiations process;"[9] and (5) "such further relief that the Court deems necessary to effectuate the Constitutional guarantees of Article I, Section 19 of the New Jersey Constitution and as the needs of justice require." (Da24-27)(Da98-101).

1. **Defendant's Motion For Summary Judgment**

On October 7, 1996, Defendant DRPA filed a Motion to Dismiss Plaintiffs' original Complaint, in lieu of an answer, styled as a Motion for Summary Judgment. On December 20, 1996 Trial Court Judge Samuel Supnick denied Defendant's Motion for Summary Judgment, and permitted Plaintiffs' case to continue. Judge Supnick denied Defendant's Motion because he determined that the laws of Pennsylvania and New Jersey set forth parallel and complementary

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[8]FOP Lodge 30 filed the present suit on August 20, 1996, one (1) day before the DRPA Board of Commissioners even voted on the resolution, and twenty-two (22) days before the expiration of Governor Whitman's veto period for the meeting minutes.

[9]Mediation is non-binding whereas arbitration is binding. Thus, the concept of arbitration was not before the Trial Court when the first Motion for Summary Judgment was denied.

legislation ***giving public employees a right to freely organize, designate a representative and engage in good faith negotiations with their public employer.***[10] Judge Supnick specifically held:

> I think that Pennsylvania law and New Jersey law, even though New Jersey makes reference to the right of governmental employees of course to organize and so forth as set forth in the Constitution -- I do think that Pennsylvania has set forth parallel and complementary legislation of a different nature but which is nevertheless -- which nevertheless recognizes those same rights and ***clearly gives public employees a right to freely organize and designate representatives and also to negotiate in good faith.***

(Da165-166) (emphasis added). Any reading of the December 20, 1996 Hearing Transcript (Da143-168) confirms that at no time did Judge Supnick ever consider the issue of final and binding interest arbitration, nor did he consider the similarity of the NJIARA and Act 111.

2. Plaintiffs' Motion For Summary Judgment And Defendant's Cross-Motion

On June 13, 1997, Plaintiffs served the DRPA with their Motion for Summary Judgment on Count I of their Amended Complaint ("Plaintiffs' Motion"). Attached as an exhibit in support of Plaintiffs' Motion was the Certification of Professor Clyde Summers. (Da169-179). Professor Summers was retained by Plaintiffs' counsel to provide an opinion on:

> the prevalence and desirability of interest arbitration as a method for the resolution of impasses in collective bargaining between police officers and their employers, and upon ***the extent to which the New Jersey and Pennsylvania laws*** relating to collective bargaining by police and settlement of disputes between the union of police officers and public agencies ***are parallel or substantially similar.***

(Da170, ¶ 5). Plaintiffs asserted that Professor Summers' Certification was an "expert opinion,"

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[10]The issue of binding interest arbitration and the question of whether New Jersey and Pennsylvania's laws were substantially similar on this issue was never before Judge Supnick.

and based the Brief in support of their Motion in large part on Professor Summers' statements. Plaintiffs' insertion of this alleged "expert" to opine on a purely legal issue -- a comparison of Pennsylvania and New Jersey law -- took Defendant DRPA by complete surprise. There was never any indication from Plaintiffs that they planned to utilize an expert.

The original return date for Plaintiffs' Motion was set for July 25, 1997. Therefore, in accordance with Camden Differentiated Case Management Rule 4:46-1 ("DCM Rule 4:46-1") and New Jersey Rule of Court 4:46-1 ("Rule 4:46-1"), the DRPA was required to file all papers in opposition to Plaintiffs' Motion not later than ten (10) days prior to the return date. On July 15, 1997, Defendant DRPA timely filed a Brief in Opposition to Plaintiffs' Motion and in Support of the DRPA's Cross-Motion for Summary Judgment **or, in the Alternative, to Strike Plaintiffs' Proffered Expert Testimony or to Continue the Plaintiffs' Motion to permit the DRPA to take necessary discovery of Plaintiffs' alleged expert and to locate an expert of its own**. ("Cross-Motion"). The DRPA specifically moved the Trial Court, in the alternative, to continue Plaintiffs' Motion in order to allow it to take discovery of Plaintiffs' surprise "expert," to permit adequate time to determine if an "expert" to counter Professor Summers was necessary, and to locate an appropriate expert of its own. The continuance was also especially important because Professor Summers was unavailable from June 3, 1997 through on or about August 25, 1997, as he spent the entire summer in Vermont. (Da299). Plaintiffs filed a Reply Brief in support of their Motion, and in Opposition to Defendant's Cross-Motions, on July 21, 1997.[11]

At the July 25, 1997 return date, Trial Court Judge Samuel Supnick notified the parties

[11]Under the Camden Differentiated Case Management Rule, Defendant would have had only 30 days to identify its own expert, obtain an expert report and take discovery regarding Plaintiffs' "expert". A virtual impossibility. Thus, Defendant sought a continuance.

that he had been reassigned to the Gloucester County vicinage, effective September 1, 1997, and that the case would go to Judge M. Allan Vogelson for reassignment. Judge Supnick also advised the parties that the new return date was set for August 22, 1997. Defendant DRPA requested an adjournment for one return date until September 12, 1997; however, due to the vacation schedule of Plaintiffs' counsel, the return date was again moved to September 26, 1997. On or about September 23, 1997, the parties agreed to extend the discovery deadline until November 26, 1997 to allow both parties to engage in, and complete, fact discovery.

On September 23, 1997, Judge Vogelson advised the parties that he was administratively adjourning the September 26, 1997 return date until October 10, 1997. On September 30, 1997, Judge Vogelson, for the second time, adjourned the return date until Friday, October 17, 1997. On Thursday, October 16, 1997, Judge Vogelson once again adjourned the return date until Monday, October 20, 1997 at 2:00 p.m.

On November 3, 1997, in a decision from the bench, the Trial Court granted Plaintiffs' Motion for Summary Judgment on Count I of the Amended Complaint, and denied Defendant DRPA's Cross-Motions. (Da362-419). Judge Vogelson relied exclusively on the December 20, 1996 Decision of Judge Samuel Supnick (Da143-168) and the Certification of Professor Summer (Da169-179) to conclude that the police interest arbitration laws of Pennsylvania and New Jersey are "parallel and complementary" and, therefore, applicable to police officers of the DRPA. After reciting Professor Summers' Certification verbatim into the record, Judge Vogelson specifically held:

> **The Court is then presented with the finding of Judge Supnick that the laws of New Jersey and Pennsylvania are parallel and complementary. *That's the law of the case.*** But, even without that ruling, Professor Summers has set forth with great specificity and particularity, uncontradicted other than by a bare denial, that

> that same conclusion should be reached by the Court in his opinion as having credibility and substance as if I were listening to the Professor in court from the stand. ***That then is a non-issue as we proceed, that is whether or not these laws exist and they are complementary and parallel.*** (emphasis added).

(Da387). Later in his colloquy from the bench, Judge Vogelson again stated: "*I have already held as did Judge Supnick*, and as based on the opinion of Professor Summers, uncontradicted, *that there is similarity and complementary nature of the laws*." (emphasis added) (Da393).

Notwithstanding the fact that Defendant DRPA had timely sought to introduce more evidence and the discovery period had not closed, Judge Vogelson decided this important case on a Summary Judgment Motion. Specifically, as to the DRPA's Motion to submit its own expert report and depose Plaintiffs' purported expert, the Trial Court summarily stated: **"I just think it's too little, too late."** (Da416).

3. **Defendant's Motion For Reconsideration**

On December 5, 1997, Defendant DRPA filed a Motion for Reconsideration. By Order dated December 19, 1997, the Trial Court ordered the DRPA Commissioners to appropriate funds at their next regularly scheduled meeting to equally share the American Arbitration Association ("AAA") mediator fees with Plaintiffs for the first three (3) mediation sessions in order to carry out the Trial Court's November 21, 1997 Order. (Da5-6). The December 19, 1997 Order also denied the DRPA's Motion to Stay All Proceedings pending the Trial Court's consideration of the Motion for Reconsideration, and denied the DRPA's "request to file an additional report, proffered as an 'expert report', in connection with its Motion for Reconsideration." (Da6). Finally, Count II of Plaintiffs' Amended Complaint was withdrawn by Plaintiffs, with prejudice. (Da6).

Oral Argument on Defendant's Motion for Reconsideration was held before Judge

Vogelson on January 23, 1998. Judge Vogelson denied Defendant's Motion. In doing so he stated:

> Let me make it very clear for the record that I read the Statute of New Jersey, that I read the Statute of the State of Pennsylvania, and I compared the two, and I came to a conclusion. And, by reading those statutes and the sections, I came to the conclusion that they were parallel laws, that there were some differences between them, clearly, but that they were substantially parallel in the context of this case . . . .
>
> Counsel has indicated that there are a number of pages of differences. Conceded. The purpose of the two statutes are to provide for, and it is the state policy of both states as a result of those statutes that when the covered employees of each are unable to reach agreement with their employer that there is a means by which that impasse is resolved . . . .

(Da468-469). Thus, Judge Vogelson's decision on the Motion for Reconsideration was based solely on his belief that the general purpose behind the NJIARA and Act 111 was substantially similar notwithstanding the differences in the laws. In his own words, Judge Vogelson stated:

> . . . simplistically the policy is dispute resolution without a strike, providing a vehicle by which that can be done. That's the stated policy and I so find, and I find that they are substantially similar for that purpose.
>
> While acknowledging that there are specific, but -- I hesitate to use the work unimportant -- recognizing that they are -- there are differences that don't change the policy -- do not change the policy.

(Da481). Although Judge Vogelson indicated that he did read and consider the DRPA's expert report, he did not address any of the significant differences in policy raised by the expert.

By Order dated February 17, 1998, Defendant's Motion for Reconsideration was denied. (Da7-8).

IV. STANDARD OF REVIEW

The DRPA takes this appeal pursuant to Rule 2:2-3 as a matter of right from the Trial Court's final judgment granting Plaintiffs' Motion for Summary Judgment. The Trial Court's decision disposed of all issues as to all parties. For purposes of appeal, this Court must review the Trial Court's decision under the same standard that applied in the Trial Court. *Pinkowski v. Township of Montclair*, 299 N.J. Super. 557, 566, 691 A.2d 837 (App. Div. 1997). Consistent with Rule 4:46-2, Summary Judgment is only appropriate where the:

> . . . pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that **there is not genuine issue as to any material fact challenged and that *the moving party is entitled to a judgment or order as a matter of law.***

Rule 4:46-2(c) (emphasis added); *See also, Brill v. Guardian Life Ins. Co. of America*, 142 N.J. 520 (1995). The DRPA submits that the Trial Court's grant of summary judgment to Plaintiffs was erroneous because Plaintiffs were not entitled to a judgment or order as a "matter of law." Further, the Trial Court made various procedural errors which should result in a reversal of its determinations.

V. LEGAL ARGUMENT

The DRPA respectfully submits that this Court must reverse the Orders of the Trial Court because it erred as a matter of law in ordering that if the parties remain at impasse over terms and conditions of employment, the court "can and will" order binding interest arbitration, etc.

A. THE TRIAL COURT'S ORDERS VIOLATE THE EXPRESS LANGUAGE OF THE DRPA'S FEDERALLY APPROVED COMPACT, THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION AND FEDERAL LAW

The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., art. VI, cl.2. The DRPA Compact was approved by the United States Congress pursuant to the Compact Clause of the United States Constitution, U.S. Const. art. I, § 10, cl. 3. **As a result the DRPA Compact is *a law of the United States.*** *Texas v. New Mexico*, 462 U.S. 554 (1983); *Cuyler v. Adams*, 449 U.S. 433 (1981). Since the DRPA Compact is a law of the United States, pursuant to the Supremacy Clause of the United States Constitution, it is the "supreme law of the land" which the New Jersey Courts are bound to follow.

1. **The DRPA's Compact Is Clear And Unambiguous On Its Face And The Trial Court Should Have Complied With Its Terms As It Is Federal And State Law.**

The United States Supreme Court has expressly stated: **"Unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms."** *Texas v. New Mexico*, 462 U.S. 554, 564 (1983) (emphasis added). As a result, **"where the terms of the compact are unambiguous, [a] Court must give effect to the express mandate of the signatory States."** *Oklahoma v. New Mexico*, 501 U.S. at 245 (emphasis added).

This is consistent with basic principles of jurisprudence. Where a statute is clear and unambiguous on its face, a court cannot read ambiguity or uncertainty into the statute -- it is required to apply and follow the law. A "court cannot superimpose its concept of what is fair and just when interpreting a statute which is clear and unambiguous on its face." *State v. Alfano*, 257 N.J. Super. 138, 142, 607 A.2d 1381, 1378 (Law Div. 1992), citing, Sutherland Stat. Const

§45 02 (5th Ed). As noted in *Sutherland on Statutory Construction*:

> Where statutory language is plain and admits of no more than one meaning, the duty of interpretation does not arise and rules which are to aid doubtful meanings need no discussion.

Id., citing *McCord v. Bailey*, 636 F.2d 606 (D.C.Cir. 1980). Although the DRPA Compact is Federal law, it is also to have effect of a law of the State of New Jersey Law to which courts must adhere:

> Upon its signature on behalf of the state of New Jersey and by the governor of Pennsylvania on behalf of the commonwealth of Pennsylvania, ***the aforesaid compact or agreement shall be and become binding and shall have the force and effect of a statute of the state of New Jersey***, and the [DRPA] shall thereupon become vested with all the powers, right and privileges and be subject to the duties and obligations contained in said compact or agreement as though the same were specifically authorized and imposed by statute and ***the state of New Jersey shall be bound by all of the obligations assumed by it under said compact or agreement***. . .

N.J. Stat. Ann. § 32:3-14 (emphasis added).

The clear and unambiguous language of the DRPA Compact provides that the DRPA Commissioners shall operate and control DRPA operations, and that it is the Board of Commissioners (not the legislature of either state, not a court of either state, and not an unrelated, third party arbitrator) which must "fix and determine" the "duties and compensation" of DRPA employees. The DRPA's Federal Compact also specifically provides that the powers of the Commissioners shall not be impaired by either creator state (including its courts). N.J. Stat. Ann. § 32-3-10.

For the reasons set forth below the Trial Court's imposition of mediation and its Order

that it "can and will" order binding interest arbitration to resolve an impasse between the DRPA and certain of its police officers over terms and conditions of employment (including wages), violates several express and unambiguous provisions of the DRPA's Federal Compact. These provisions are:

- The *DRPA's express right to appoint, hire or employ . . . agents and employees*, as it may require for the performance of its duties, by contract or otherwise, and "*Fix and Determine Their Qualifications, Duties And Compensation.*" N.J. Stat. Ann. §32:3-5(e); 36 Pa. Stat. Ann. § 3503.

- The DRPA's right to "*Own, Operate and Control*" its Properties and Facilities; N.J. Stat. Ann. §32:3-10; 36 Pa. Stat. Ann. § 3503.

- The DRPA's right to set rates of pay for its police officers consistent with the language of the compact which gives the DRPA the right to "fix compensation." N.J. Stat. Ann. §32:4-6; 36 Pa. Stat. Ann. § 3503.

- The DRPA's purpose and essential government function to *operate and maintain certain bridges and approaches*; N.J. Stat. Ann. §32:3-2(a), (f); 36 Pa. Stat. Ann. § 3503.

- The DRPA Commissioners' right to have "*charge*" of the DRPA's Property and Affairs; N.J. Stat. Ann. §32:3-4; 36 Pa. Stat. Ann. § 3503.

- The DRPA's express right to *exercise all other powers. . . which may be reasonably necessary or incidental to the effectuation of its authorized purposes or to the exercise of any of the foregoing powers, . . . and generally to exercise in connection with its property and affairs*, and in connection with property within its control, any and all powers which might be exercised by a natural person or a private corporation in connection with similar property and affairs. N.J. Stat. Ann. §32:3-5(n); 36 Pa. Stat. Ann. § 3503.

- *The Governor of New Jersey's Veto Power* over Actions of the New Jersey DRPA Commissioners. N.J. Stat. Ann. §32:3-4c; 36 Pa. Stat. Ann. § 3503.

a. The Trial Court's Orders Violate The DRPA's Express Right to Appoint, Hire Or Employ Agents And Employees, As It May Require For The Performance Of Its Duties, And Fix and Determine Their Qualifications, Duties And Compensation.

Article IV of the DRPA's Congressionally-approved Federal Compact grants to the

DRPA's Commissioners certain express powers to effectuate and carry out the DRPA's authorized purposes and functions as established by the Compact. N.J. Stat. Ann. § 32:3-5, 36 Pa. Stat. Ann. § 3503. Amongst these express powers granted to the DRPA Commissioners is the power:

> (e) ***To appoint, hire or employ . . . agents and employes***, as it may require for the performance of its duties, by contract or otherwise, ***and fix and determine their qualifications, duties and compensation.***

N.J. Stat. Ann. § 32:3-5(e), 36 Pa. Stat. Ann. § 3503 (emphasis added). It is this express grant of power to the DRPA Commissioners, along with the other powers specifically enumerated in the Compact, that permits the DRPA Commissioners to effectively *"own, operate and control"* its properties and facilities and have *"charge"* of all DRPA Property and Affairs without any outside interference. See, N.J. Stat. Ann. §§ 32:3-10, 32:3-4; 36 Pa. Stat. Ann. § 3503.

Article 4, Section (e) of the DRPA's Federal Compact is plain on its face -- **The DRPA Commissioners have the right and responsibility under Federal Law to hire and fire their employees, and *to fix and determine their qualifications, duties and compensation***. The DRPA Board of Commissioners exercised this Federal power on August 21, 1996, when it passed a Resolution imposing certain terms and conditions of employment upon Plaintiffs and fixing their compensation for the next three (3) years.

The Trial Court's decision and Orders directly violate this express power granted by the Compact. The Trial Court ordered that it "can and will" order binding interest arbitration to address an impasse between Plaintiffs and the DRPA on terms and conditions of employment including employee wages. The Trial Court's action essentially strips the DRPA Commissioners of their express right and responsibility under both Federal and State law to fix compensation for

its employees, and unilaterally delegates this power to an unrelated third party arbitrator. Clearly, the Trial Court's action violates the statutory admonition that New Jersey will not "diminish or impair" the power of the DRPA to operate and control its properties and facilities. N.J. Stat. Ann. §32:3-10; 36 Pa. Stat. Ann. §3503. The Trial Court's Order that it "can and will" order binding interest arbitration is directly contrary to the DRPA Commissioner's rights under the Compact, and therefore, must be reversed by this Court.

b. The Trial Court's Orders Violate The Express Terms Of The Compact By Improperly Diminishing And Impairing The DRPA's Right To Own, Operate and Control Its Properties And Facilities.

Article IX of the DRPA's Congressionally approved bi-state Compact expressly provides that the Commonwealth of Pennsylvania and the State of New Jersey "will not diminish or impair the power of the [DRPA] to own, operate or control said properties and facilities. . ." N.J. Stat. Ann. §32:3-10; 36 Pa. Stat. Ann. § 3503. Pursuant to the New Jersey State Constitution, action by the New Jersey Courts is action by New Jersey State government. N.J. Const. art. III, ¶1. As the United States Supreme Court stated in *Shelley v. Kraemer*, 334 U.S. 1 (1948), "a State acts by its legislative, its executive, or its judicial authorities. It can act in no other way." *Id.* at 14. The unilateral action taken by the Trial Court in this matter, therefore, constitutes action by the State of New Jersey.

Under the laws of the United States (DRPA Compact, Article IX), the DRPA maintains an express right to ***"own, operate or control" its properties and facilities -- a right that cannot be impaired or diminished by either State.*** N.J. Stat. Ann. §32:3-10; 36 Pa. Stat. Ann. § 3503. Included in this express grant to "operate" and "control" its properties and facilities without impairment is the right for the DRPA to exercise discretion and control over all aspects of its

labor relations, including decision making authority with respect to all terms and conditions of employment at the DRPA. The Trial Court's Orders forcing the DRPA to engage in mediation, and ultimately to adhere to some type of undefined interest arbitration procedure, unquestionably acts to diminish and impair the DRPA's express rights under Article IX of the Compact, and constitutes a violation of the Compact clause of the United States Constitution.

c. The Trial Court's Orders Violate The Express Terms Of The DRPA's Compact By Improperly Interfering With The DRPA's Right To Set Compensation For Its Police Officers.

The DRPA Compact specifically provides that the DRPA has the right to appoint such number of police officers as it finds are necessary, and to provide for payment of such police officers. N.J. Stat. Ann. §32:4-6; 36 Pa. Stat. Ann. §3503. Taken in conjunction with its express right under Article IV of the Compact to ***fix and determine compensation*** for its employees discussed above, the DRPA has the right and obligation to fix and determine what compensation will be paid to its police officers. The Trial Court's Orders improperly interfere with the clear and unambiguous language of the DRPA's Federal Compact, and serve to illegally "diminish and impair" the DRPA's express rights under the Compact. A determination of what compensation will be paid to DRPA police officers is within the exclusive province of the DRPA, not the Court's of New Jersey or some third party arbitrator to be appointed by a New Jersey Court.

d. The Trial Court's Orders Violate The Express Terms Of The DRPA's Compact By Improperly Interfering With The DRPA's Public Purpose And Essential Governmental Function To Operate and Maintain Bridges and Approaches.

Article 1 of the DRPA Compact expressly sets forth that New Jersey and Pennsylvania formed the DRPA to perform a variety of specifically identified "public purposes" which are

deemed to be "essential governmental functions." N.J. Stat. Ann. § 32:3-2, 36 Pa. Stat. Ann. § 3503. Among those "essential governmental functions," the DRPA is expressly authorized by Article I(a) & (f) of the Compact to provide for:

> (a) The *operation and maintenance of the bridge*, owned jointly by the 2 states across the Delaware River between . . . Philadelphia and . .. Camden, including its approaches , and the making of additions and improvements thereto; and
>
> (f) The construction, acquisition, *operation and maintenance of other bridges and tunnels across or under the Delaware river* between . . . Philadelphia or the county of Delaware . . . and . . . New Jersey, including approaches and the making of additions and improvements thereto.

DRPA Compact, Article 1(a) & (f). Part of this express power to "operate and maintain" the bridges is the DRPA's right to retain complete control over, and responsibility for, its workforce, and all terms and conditions of employment for that workforce. The Trial Court's Orders forcing the DRPA to submit to mediation and ultimately to binding interest arbitration violate the express terms of the Compact because they remove the DRPA's express right to control its operations, which unquestionably includes its labor relations, and places decision making authority in the hands of a third party arbitrator.

e. The Trial Court's Orders Violate The Express Terms Of The Compact By Improperly Interfering With The DRPA Commissioners' Right To Have Charge Of The DRPA's Property And Affairs.

Pursuant to Article II of the Compact, the DRPA "shall consist of sixteen (16) Commissioners, eight (8) resident voters of the Commonwealth of Pennsylvania and eight (8) resident voters of the State of New Jersey. . ." N.J. Stat. Ann. § 32:3-3, 36 Pa. Stat. Ann. § 3503. Article III of the DRPA Compact expressly provides that these sixteen (16) DRPA Commissioners "*shall have charge of the commission's property and affairs. . .*" N.J. Stat. Ann.

§ 32:3-4, 36 Pa. Stat. Ann. § 3503 (emphasis added).

The Compact's express grant of authority to the DRPA's Commissioners to control the "property and affairs" of the DRPA once again reemphasizes Congress' intent to vest the Commissioners with exclusive responsibility for the actions of the DRPA, and to prevent a single compacting State or its Courts from attempting to exert any unilateral control. The sixteen (16) Commissioners, eight (8) from each participating State, are to make all decisions affecting the affairs of this bi-state entity. As a further precaution, the DRPA's Compact also provides that actions taken by the DRPA Commissioners are binding ***only if*** a majority of Commission members from Pennsylvania and a majority of Commission members from New Jersey vote in favor thereof. *Id.*

The Trial Court's Orders unilaterally forcing the DRPA into Court imposed mediation and ultimately binding interest arbitration, constitute an improper interference with the duties and rights of the DRPA's Commissioners to have "charge" over all DRPA "property and affairs."

f. The Trial Court's Orders Violate The Express Terms Of The Compact By Improperly Interfering With The DRPA's Right To Exercise All Other Powers Which May Be Reasonably Necessary Or Incidental To The Effectuation Of Its Authorized Purposes Or To The Exercise Of Any Powers Under The Compact.

In addition to the specifically identified powers granted to the DRPA under Article IV of the DRPA Compact, Article IV also grants to the DRPA the broad right:

> ***to exercise all other powers*** not inconsistent with the constitutions of the two States or of the United States, ***which may be reasonably necessary or incidental to the effectuation of its authorized purposes or to the exercise of any of the foregoing powers, . . . and generally to exercise in connection with its property and affairs***, and in connection with property within its control, any and all powers which might be exercised by a natural person or a private corporation in connection with similar property and affairs.

Compact, Article IV, N.J. Stat. Ann. § 32:3-5 (n), 36 Pa. Stat. Ann. § 3503 (emphasis added). This catch-all provision just serves to reemphasize the fact that the State of New Jersey and the Commonwealth of Pennsylvania, with the approval of Congress, intended that the DRPA Commissioners maintain complete and unrestricted control over, and responsibility for, all aspects of DRPA operations including its labor relations. By interjecting itself into DRPA labor relations, the Trial Court has illegally interfered with the DRPA's express right to exercise all other powers reasonably necessary to retain absolute control over the property and affairs of the DRPA, and operate and maintain the bridges. The Trial Court's Orders violate this express grant of power by the DRPA Compact, and therefore, must be reversed.

g. The Trial Court's Holding That It "Can And Will" Order The DRPA To Submit To Binding Arbitration Violates The Express Terms Of The Compact By Improperly Interfering With The Governor Of New Jersey's Veto Power Over Actions Of The New Jersey Commissioners.

Article III of the DRPA Compact specifically reserves for each State a right to provide by law for the exercise of a veto power by the Governor of the State over any action of the DRPA Commissioners. *See*, N.J. Stat. Ann. § 32:3-4, 36 Pa. Stat. Ann. § 3503. Consistent with this Compact provision, New Jersey has passed the requisite legislation giving the Governor of New Jersey an ultimate veto power over any action taken by the DRPA's Board of Commissioners. N.J. Stat. Ann. § 32:3-4c. When the Governor's office exercises its veto power, any action of a Commissioner from New Jersey is rendered null and void and of no effect. *Id.* As a majority of Commissioners is needed from both Pennsylvania and New Jersey for the Board of Commissioners to take an action, a Governor's veto would act to render an action of the DRPA to be null and void and of no effect. N.J. Stat. Ann. § 32:3-4; 36 Pa. Stat. Ann. § 3503.

After review, the Governor of New Jersey determined not to veto the August 21, 1996

Resolution of the DRPA Board of Commissioners setting certain terms and conditions of employment for Plaintiffs for the following three (3) year period.

The action of the Trial Court holding that it "can and will" order the DRPA to engage in binding interest arbitration over terms and conditions of employment for DRPA police officers is entirely inconsistent with the Governor's ultimate, federally based veto power, and acts to improperly interfere with the Governor's right to exercise final discretion over all actions taken by the DRPA's Board of Commissioners. The Trial Court's Order in this matter effectively strips the Governor's office of its right to exercise its veto power which is specifically provided for under Federal law. Binding interest arbitration by its very nature places decision making authority in a third party arbitrator. The Trial Court's Order improperly removes the Governor's ability to object to, and override such decisions that will likely have a dramatic effect on the DRPA and the citizens of New Jersey.

The Governor's veto power is a creature of federal law and, therefore, under the Supremacy Clause, supersedes the power of New Jersey Courts. Therefore, this Court must reverse the erroneous ruling of the Trial Court and grant Defendant's Motion or Summary Judgment.

B. THE TRIAL COURT'S ORDERS VIOLATE THE DOCTRINE OF SEPARATION OF POWERS CONTAINED IN THE NEW JERSEY CONSTITUTION.

The New Jersey Constitution specifically provides for the separation of powers between the three branches of New Jersey State Government. Article III, paragraph 1 states:

> The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.

N.J. Const. art. III, ¶ 1. The aim of the doctrine of separation of powers is to assure that the branches of government stay within their Constitutionally-delegated boundaries. It is a fundamental principle that courts should not engage in legislating. Likewise, it is also fundamental that the legislature should not decide legal disputes. Curiously, while doing exactly the opposite, even the Trial Judge recognized these fundamental principles:

> I -- the Court believes that judicial conservatism is the best road to follow *at all times* and that if there is changes to be made, those changes -- in the law, I mean, those *changes are best undertaken by the appropriate legislative body.*

(Da358)(emphasis added). However, only two weeks later on November 3, 1997, he completely disregarded this doctrine and proceeded to engage in what can only be construed as legislating from the bench.

1. The Trial Court's Orders Improperly Usurp The Power Of The Legislative Branch Of New Jersey Government.

The DRPA's Compact expresses the unambiguous legislative policy decisions of lawmakers of both New Jersey and Pennsylvania. *See*, N.J. Stat. Ann. § 32:3-2; 36 Pa. Stat. Ann. § 3503, Article I. The New Jersey Supreme Court has always recognized that "policy matters are the exclusive responsibility of the legislative branch of government." *Vornado, Inc., v Hyland, et al.*, 77 N.J. 347, 355, 390 A.2d 606, 610 (1978) (citing *Two Guys from Harrison, Inc. v Furman*, 32 N.J. 199, 229, 160 A.2d 265, 281 (1960)).

a. Courts Should Apply Clear Law, Not Ignore It.

The Trial Court's imposition of mediation and its holding that it "can and will" impose interest arbitration on the DRPA directly interferes with the policy making domain of the New Jersey and Pennsylvania State legislatures. To date, neither state legislature has made a policy

decision authorizing a state court to unilaterally interfere with the DRPA's labor relations and impose binding interest arbitration for disputes involving its police officers. The New Jersey legislature had the opportunity in both 1977 when it drafted the NJIARA, and again in 1996 when it amended the NJIARA, to **specifically include** DRPA police officers in its Interest Arbitration laws, but did not.[12] **Moreover, it is clear that when the New Jersey and Pennsylvania legislatures want to change the rights of, or otherwise effect the terms and conditions of employment for the DRPA's police officers, they do so with specific bi-state legislation.**[13] As the New Jersey Court's have stated, "it is incumbent upon the judiciary to

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[12]The plain language of the 1977 NJIARA and its 1996 amendments demonstrate that the New Jersey legislature was well aware of bi-state instrumentalities when it specifically chose to include police officers of the bi-state, Congressionally approved interstate Compact between New Jersey and New York known as the Palisades Interstate Park Commission ("PIPC") in the NJIARA's definition of "Public Police Department." N.J. Stat. Ann. § 34:13A-15. The specific inclusion of the PIPC police officers for NJIARA coverage, along with the absence of any reference to the DRPA police officers or the police officers of all other New Jersey bi-state, Congressionally-approved Compacts (*i.e.* The Delaware River and Bay Authority, N.J. Stat. Ann. § 32:11E-1, *et seq.*, (bi-state Compact with Delaware) and the Port Authority of New York and New Jersey, N.J. Stat. Ann. § 32:1-1, *et seq.*, (bi-state Compact with New York)), demonstrates the New Jersey legislature's intent to exclude DRPA police officers from the NJIARA's coverage. Had the New Jersey legislature intended to cover DRPA police officers under the terms of the NJIARA, it would have specifically done so as it did with the PIPC police officers. The inclusion of this one group of police officers evidences that when the New Jersey legislature wants to cover certain police officers of bi-state entities it expressly does so.

[13]An example of this type of bi-state legislative action is the statutory scheme which currently governs the power, authority and training requirements of the DRPA's police officers. N.J. Stat. Ann. § 32:4-6, *et seq.*, 36 Pa. Stat. § 3504.1 *et seq.* In 1986, the New Jersey legislature enacted legislation enhancing the DRPA Police Powers. N.J. Stat. Ann. § 32:4-6, *et seq.* ("Police Powers"). New Jersey accorded DRPA police officers the authority to arrest for offenses committed on property owned or operated by the DRPA and its subsidiaries, and provided them with all powers and immunities of police officers or municipal police officers in enforcing the law -- "including the right to carry firearms on duty," -- provided the officers held the necessary qualifications. N.J. Stat. Ann. § 32:4-6. The 1986 New Jersey amendment would have permitted DRPA officers to legally carry a firearm away from DRPA property and expanded training and qualifications requirements for DRPA officers. N.J. Stat. Ann. § 32:4-6.1. However, consistent with the bi-state status of the DRPA, none of New Jersey's 1986 Police Powers Amendments

interpret and enforce legislative will as written and not in accordance with some unexpressed and ephemeral intention." *Gallagher v. Irvington*, 184 N.J. Super. 225, 234, 445 A.2d 477, 481 (1982), *rev'd on other grounds*, 463 A.2d 969 (1982) (citing *White v. North Bergen*, 77 N.J. 538, 554-55, 391 A.2d 911, 919 (1978); *Burton v. Sills*, 53 N.J. 86, 95, 248 A.2d 521 (1968)). "The judiciary is not at liberty to indulge in the presumption that the Legislature intended something more than that which was written into law." *Gallagher v. Irvington*, 184 N.J. Super. at 234, 445 A.2d at 481. As the New Jersey Supreme Court has recognized: "[a]ny attempt by the court to construct and interpret the meaning of a clear and unambiguous statute is to do violence to the principle of separation of powers. *Watt v. Mayor of Franklin*, 21 N.J. 274, 277 121 A.2d 499 (1956); *State v. Alfano*, 257 N.J. Super. at 143, 607 A.2d at 1380.

The Trial Court's Order imposing mediation and stating that it "can and will" impose binding interest arbitration on the DRPA is an improper interference with the ability of the legislatures of New Jersey and Pennsylvania to effectuate policy. By its action the Trial Court has formulated policy and thus improperly usurped legislative powers in violation of the

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could take legal effect until Pennsylvania adopted "legislation having a substantially similar effect as [New Jersey's] act . . ." N.J. Stat. Ann. § 32:4-9.

Eight (8) years later, in 1994, the Pennsylvania legislature finally passed almost identical legislation effectuating the Police Powers legislation passed in New Jersey in 1986. 36 Pa. Stat. Ann. §§ 3504.1, 3504.1a. Although New Jersey sought to give DRPA police officers certain Police Powers in 1986, not until 1994 did DRPA police officers gain the legal authority to carry a firearm while off of DRPA property. In this situation, the DRPA police officers obtained certain new rights and privileges through proper and legal channels -- the adoption by both Compact States of nearly identical State legislation expressly intended to apply to the DRPA.

The New Jersey and Pennsylvania legislatures, although eight (8) years apart, made a limited bi-state policy decision that was ultimately followed with proper, and almost identical bi-state legislation. This procedure was the correct and legal way to implement a change at the DRPA, not through judicial activism that violates the express terms of the DRPA's federally approved Compact.

Doctrine of Separation of Powers.

b. Binding Interest Arbitration Must Be Created By The Legislature

In addition, binding interest arbitration for domestic public employees in New Jersey is solely a creation of the Legislative Branch of New Jersey Government. Prior to the passage of the NJIARA in 1977, police officers in New Jersey were **not** entitled to binding interest arbitration as a matter of right or law. No such procedure existed for police officers under the common law of the State of New Jersey. Legislation was required to be enacted to create such a procedure. As discussed in footnote 12 above, the New Jersey Legislature was certainly aware of bi-state instrumentalities when it passed the NJIARA, and decided to include **only** police officers of the bi-state PIPC under the NJIARA's definition of "Public Police Department." N.J. Stat. Ann. § 34:13A-15. Thus, it must be presumed that the New Jersey Legislature did not include police officers from any other bi-state entity including, but not limited to, the DRPA, the Port Authority of New York and New Jersey, the Delaware River and Bay Authority.

There is no statute which provides DRPA police officers with binding interest arbitration, nor does binding interest arbitration under common law. As a result, the Trial Court's Orders, which effectively create common law binding interest arbitration for DRPA police officers (with none of the safeguards for the public set out in the statute), constitutes improper policy making by the Trial Court, and an improper usurpation of legislative power.

2. The Court's Orders Improperly Usurp The Power Of The Executive Branch of New Jersey Government

As discussed above, by Federal Compact, the Governor of New Jersey has an ultimate veto power over any action taken by the DRPA's Board of Commissioners. N.J. Stat. Ann. § 32:3-4c. When the Office of the Governor exercises its veto power any action of a New Jersey

Commissioner is rendered null and void and of no effect. *Id.* As a majority of Commissioners is needed from both Pennsylvania and New Jersey for the DRPA Board of Commissioners to take an action, a veto by the Governor of New Jersey effectively renders any action of the DRPA null, void and of no effect. *See*, N.J. Stat. Ann. § 32:3-4; 36 Pa. Stat. Ann. § 3503.

The action taken by the Trial Court in ordering that the court "can and will" order the DRPA to engage in binding interest arbitration improperly usurps the Governor's federally based veto power, and improperly interferes with her right to exercise final discretion over all actions taken by the DRPA's Board of Commissioners. Court-Ordered binding interest arbitration contemplates that a third party arbitrator makes a ***binding*** decision concerning terms and conditions of employment, including wages, benefits and working conditions. The Trial Court's Orders strip the Governor's Office of its right to decide if a decision affecting the DRPA is in the best interest of the citizens of New Jersey. A New Jersey court cannot eliminate the ultimate veto power of the Governor. Therefore, the action of the Trial Court determining that it "can and will" order final and binding interest arbitration violates the doctrine of separation of powers.[14]

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[14]As in all separation of power cases if a court determines the Trial Court determined that a wrong occurred, it should defer to the New Jersey and Pennsylvania Legislative and Executive Branches of Government to remedy the wrong -- not create its own remedy. Thus, even if the Trial Court properly determined that there was a wrong in this case, the proper remedy is ***not*** court-imposed mediation and binding interest arbitration. Consistent with the doctrine of separation of powers and past New Jersey Court precedent, the Trial Court should have deferred to the Legislatures and Executives of both New Jersey and Pennsylvania to remedy the wrong perceived by the Trial Court. At a minimum, the Trial Court should have charged the DRPA Commissioners with the issue and given the Board of Commissioners an opportunity to consider formulating its own impasse resolution procedure. That may have been a proper remedy. *See, South Burlington County NAACP v. Tp. of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713 (1975); and *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973).

In *Robinson*, the New Jersey Supreme Court determined that New Jersey's system of financing public education violated the New Jersey Constitutional provision which imposes upon the State an obligation to furnish a thorough and efficient system of public schooling. *Id.*

C. THE TRIAL COURT ERRED IN HOLDING THAT THE POLICE INTEREST ARBITRATION ACTS IN PENNSYLVANIA AND NEW JERSEY ARE SUBSTANTIALLY SIMILAR, AND THEREFORE, APPLICABLE TO THE DRPA.

1. Judicial Activism At Its Height: The Trial Court Created and Adopted Its Own Standard For Determining Obligations Of The DRPA And Other Bi-State And Multi-State Entities.

The Trial Court erred as a matter of law in holding that the New Jersey Police and Firefighters Interest Arbitration Reform Act, N.J. Stat. Ann. § 34:13A-14a, as amended (1997

However, the Court went to great lengths not to create and impose a new system of public financing; rather, it deferred to the State Legislature to create a new statutory system consistent with the Court's decision. *Id.* at 520-21, 303 A.2d at 298. The *Robinson* court made its position on the legal issue in question known, but also made a conscious decision not to overstep its bounds into the realm of the legislature. It gave notice to the Legislature of the wrong and allowed it a reasonable period of time to remedy it.

Likewise, in *South Burlington County NAACP*, the New Jersey Supreme Court invalidated part of a Township's zoning ordinance. Recognizing that it was not appropriate for the Court to legislate, it properly deferred to the Township to remedy the deficiencies in the legislation. The Court stated:

> The township is granted 90 days from the date hereof, or such additional time as the Trial Court may find it reasonable and necessary to allow, to adopt amendments to correct the deficiencies herein specified. *It is the local function and responsibility, in the first instance at least, rather than the court's, to decide on the details of the same within the guidelines we have laid down.*

Mt. Laurel, 67 N.J. at 191, 336 A.2d at 734. (emphasis added). The Court in *Mt. Laurel* properly recognized its role in deciding legal issue, but in light of the doctrine of separation of powers, deferred to the proper body to formulate a remedy.

The Trial Court in the present action erred as a matter of law by imposing mediation and holding that it "can and will" impose binding interest arbitration if the parties remain at impasse. (Da4). As confirmed in both *Robinson* and *Mt. Laurel*, where the Court perceives a wrong that must be remedied by Legislation, it should have deferred to the Legislatures and Executives of New Jersey and Pennsylvania to remedy the perceived wrong. In light of these precedents, this Court must reverse the decision of the Trial Court on this basis alone as its remedial Orders are entirely inappropriate and illegal.

Supp.) ("NJIARA"), and Act 111 in Pennsylvania, 43 Pa. Stat. Ann. § 217.1, et seq.("Act 111") are "substantially similar." The DRPA submits that the Trial Court completely ignored the dramatic language and policy differences between these two extremely complex statutes in direct contravention of applicable New Jersey law. Judge Vogelson's decision was based solely on the belief that the **general overriding policy** behind the NJIARA and Act 111 was substantially similar. In his own words, Judge Vogelson stated:

> . . . simplistically the policy is dispute resolution without a strike, providing a vehicle by which that can be done. That's the stated policy and I so find, and I find that they are substantially similar for that purpose.
>
> While acknowledging that there are specific, but -- I hesitate to use the word unimportant -- **recognizing that they are -- there are differences that don't change the policy -- do not change the policy.**

(Da481). This "simplistic" general policy approach is completely inconsistent with applicable law as it completely ignores the dramatically different duties, safeguards and obligations imposed by these statutes, and the numerous additional duties that would necessarily be unilaterally imposed by each state on the DRPA. Even if general policy may be a consideration in determining substantial similarity, it is entirely inconsistent with applicable law for the Trial Court to have relied exclusively on general policy to impose binding interest arbitration under two dramatically different legislative schemes on the DRPA.

a. *DRBA* Affirmed *Eastern Paralyzed Veterans*

In *International Union of Op. Engineers, Local 68 v. The Delaware River and Bay Auth.*, 147 N.J. 443, 688 A.2d 569 (1997) ("*DRBA*"), the New Jersey Supreme Court reaffirmed its decision in *Eastern Paralyzed Veterans Ass'n, Inc. v. City of Camden*, 111 N.J. 389, 545 A.2d 127 (N.J. 1988), and the standards for applying law to bi-state entities. *DRBA*, 147 N.J. at 444-

446, 688 A.2d at 574-575. First, it is essential to note that as a general rule, "neither creator state [may] impose additional duties, powers or responsibilities" on a bi-state agency such as the DRPA. *DRBA*, 147 N.J. at 444-445, 688 A.2d at 574. As a result, a bi-state entity such as the DRPA is not subject to a *law* (let alone a policy) unilaterally adopted by one of its creator states (or imposed by the Courts of only one state) unless: (1) the DRPA voluntarily agrees to meet the requirements of the law; (2) the DRPA's enabling compact expressly contemplates that the law will apply to it; or (3) complementary and parallel ***legislation*** exists in each of the creator states.[15] *DRBA*, 147 N.J. at 445, 688 A.2d at 575 (citing *Eastern Paralyzed Veterans Ass'n, Inc. v. City of Camden*, 111 N.J. 389, 545 A.2d 127 (N.J. 1988). While *DRBA* does suggest that the policy behind the statutes is certainly a relevant consideration, it does not relieve a court from actually analyzing the language of the laws at issue. Courts must compare the provisions of both statutes, they cannot just pick and choose among provisions. *See Eastern Paralyzed Veterans, supra*, 111 N.J. 389, 545 A.2d 127 (1988); *Bell v. Bell*, 83 N.J. 417, 416 A.2d 829 (1980); and *Nardi v. Delaware River Port Authority*, 88 Pa. Commw. 558, 490 A.2d 949 (1985). This is an essential element in determining whether application would result in a creator state unilaterally imposing additional duties, powers, or responsibilities upon the bi-state agency.

As this Court only recently confirmed in *Ballinger v. DRPA*, A-5584-95T2 (App. Div. May 8, 1998) and *Ruggiero v. DRPA*, A-5622-95T2 (App. Div. May 8, 1998)(Consolidated Opinion attached hereto as Exhibit "A")(hereinafter "*Ballinger/Ruggiero*"), a ***comparison of the laws*** at issue is vital to determine ***whether the legislatures ever intended such laws to apply to***

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[15] This standard has been applied by various courts to determine the applicability of a single state's law to a bi-state entity. For purposes of this argument only, the DRPA will assume *arguendo* that this standard is applicable; however, by doing so, the DRPA does not waive its right to challenge this standard.

the DRPA. There is a two step process: 1) are the laws substantially similar, which requires a comparison of the laws, and if so, 2) is there some agreement in the laws that they are intended to apply to the DRPA. Specifically, the *Ballinger/Ruggiero* Court stated:

> ***a comparison*** of New Jersey's CEPA statute, . . . to Pennsylvania's counterpart, . . . ***must be made to determine whether they are complementary or parallel such that both legislatures intended for the laws to apply to DRPA***. *See, Eastern Paralyzed Veteran Ass'n, supra*, 111 N.J. at 400. Mindful of the principles enunciated in *Eastern*, in order to be complementary or parallel the court must find the legislative acts of both states to be "substantially similar" in nature. *Id.* At 401. Furthermore, the ***court must find some agreement between the states that CEPA and the Whistleblower Law are intended to apply to DRPA***. *Id.* at 402. (Statutory Citations Omitted).

Ballinger/Ruggiero, Exhibit "A", p. 11. (emphasis added). The *DRBA* case, *Eastern Paralyzed Veterans*, and now *Ballinger/Ruggiero* all confirm that the Trial Court erred by failing to conduct a detailed and "painstaking" analysis and comparison of Act 111 and the NJIARA to determine if the laws are substantially similar and if they are to apply to the DRPA.

These complex statutes are substantially different. In addition, there is no evidence of any kind that the Legislatures of New Jersey and Pennsylvania ever intended to apply the NJIARA or Act 111 to the DRPA. A court analyzing these laws would be forced to improperly pick and choose among their provisions to find similarity in language.

b. Substantially Similar General Policies Are Not Enough To Impose Additional Duties And Obligations On A Bi-State Entity.

Respectfully, the Trial Court determined, and even said so, that notwithstanding the differences in statutory language if the **general** policies of the two State statutes are substantially similar, it can impose any provision or policy or concept of either law as it deems it appropriate. The Trial Court stated:

> While acknowledging that there are specific, but -- I hesitate to use the word unimportant -- recognizing that they are -- there are differences that don't change the policy -- do not change the policy.

(Da481). However, to the extent that the Trial Court read the *DRBA* decision as relieving it of an obligation to compare the language of the two statutes to determine the intent of the legislatures, the Trial Court was wrong. The Trial Court's adoption of a standard which permits New Jersey Courts and New Jersey to impose additional duties or obligations on a bi-state entity based merely on what it determines as substantial similarity of general policies flies in the face of the United States Constitution, well-settled Federal and State jurisprudence of bi-state entities.

Similarity in a general overriding policy alone, without determining whether the legislatures intended to apply such laws to the DRPA, cannot justify imposition of an additional obligation on the DRPA. *Eastern Paralyzed Veterans, supra, Nardi, supra, King, supra, Ballinger/Ruggiero* (Exhibit "A"). If so, then many laws of New Jersey and Pennsylvania, though dramatically different in language, practice and procedures, would either: (i) be binding on the DRPA, or (ii) trial courts would be free to fashion their own common law which would then be imposed on the DRPA and other bi-state and tri-state entities. For instance, under the Trial Court's flawed logic in this case, the following types of state laws might be erroneously imposed on the DRPA:

- Construction Codes — *See, Eastern Paralyzed Veterans,* 111 N.J. 389, 545 A.2d 127 (1988) (Do not apply to DRPA);
- State Ethics Laws — *See, DRPA v. Pennsylvania, State Ethics Commission,* 137 Pa. Commw. 170, 585 A.2d 587 (1991) (Do not apply to DRPA);
- Disability Benefits — *See, Nardi v. Delaware River Port Authority,* 88 Pa. Commw. 558, 490 A.2d 949 (1985) (Do not apply to DRPA);

- Tort Claims Acts — *See, Bell v. Bell*, 83 N.J. 417, 416 A.2d 829 (1980) (Do not apply to DRPA);
- Anti-Discrimination — *See, Clark v. DRPA* (D.N.J. Civil Action No. 93-5162, 1996) (Attached hereto as Exhibit "B"); *See, Eick v. DRPA* (D.N.J. Civil Action No. 91-2707, 1992)(Attached hereto as Exhibit "C") (Do not apply to DRPA);
- Whistleblower laws — *See, Ballinger/Ruggiero* (Exhibit "A")(Do not apply to DRPA);
- Landlord - Tenant laws;
- Land Use (Zoning, Eminent Domain, Etc.);
- Fire Regulations;
- Bidding protocols;
- Public finance laws;
- Securities laws;
- Corporate laws;
- Tax laws; and
- Uniform commercial code laws; etc.[16]

This just cannot be the case. Each area of law cited above arguably contemplates or embodies at least one general policy that is the same or similar in each state. Notwithstanding this, these laws cannot be applied, and in many cases have been expressly rejected as applying to the DRPA. The standard applied by the Trial Court in this matter would turn bi-state entity law on its head and permit parties to improperly try to apply each and every such state law, with at least one similar **general policy**, to bi-state and multi-state entities. This was not contemplated under Federal law, or by either New Jersey or Pennsylvania, and would certainly constitute an improper imposition of "additional duties, powers or responsibilities" upon the DRPA. *Eastern Paralyzed Veterans*, supra. The Trial Court is just plain wrong.

[16]Nothing herein should be construed as the DRPA's consent to have these laws apply to it.

2. The Standard And Procedure For Imposing Duties On The DRPA Must Be Uniform Between The States Within Our Federal System

If the Trial Court interpretation of *DRBA* is correct and allowed to stand, New Jersey will have created a far different standard than that which exists in Pennsylvania to determine when additional laws or duties may be imposed on the DRPA. Unlike New Jersey, Pennsylvania courts look to the specific language of the statutes that are sought to be applied to the DRPA. For instance, in *Nardi v. Delaware River Port Authority*, 88 Pa. Commw. 558, 490 A.2d 949 (1985), the Pennsylvania Commonwealth Court reviewed the police disability benefits laws of Pennsylvania and New Jersey to determine whether a police officer of the DRPA was entitled to additional disability benefits provided by a Pennsylvania statute. *Id.* The Pennsylvania Commonwealth Court compared the **specific language** of the two statutes and determined that the benefits laws of Pennsylvania and New Jersey were not substantially similar, and that application of either state's benefits law to the DRPA would constitute an improper, unilateral imposition of an additional burden on the DRPA. *Id.* The Commonwealth Court's decision was based in large part on two **specific** words: "shall" and "may". Although both statutes provided for a level of additional benefits for a DRPA police officer, Pennsylvania's law stated the police officer "**shall** be paid . . . by the [DRPA]" while the New Jersey statute provided "the port authority **may** pay to such employee." *Id.* Despite the fact that both states' laws arguably had the same general policy which was to extend police disability benefits, the Pennsylvania Court carefully interpreted the specific language of the statutes to find that they were not substantially similar and that application would unilaterally impose an additional burden on the DRPA.

Applying the standard espoused by the New Jersey Trial Court in this case, Mr. Nardi arguably would have received additional benefits because the **general policy** of both states is to

pay disability benefits to DRPA officers injured on the job. Clearly this was not the case under the standard utilized in Pennsylvania, which was, for all intents and purposes, the same in New Jersey prior to the Trial Court's interpretation of *DRBA*.

The Supreme Court of the United States has made it clear that the **construction of an interstate compact** established pursuant to the Compact Clause of the United States Constitution **is a matter of federal law, not the law of the party states**. *Petty v. Tennessee-Missouri Bridge Com'n*, 359 U.S. 275, 279-280 (1959); *League To Save Lake Tahoe v. Tahoe Reg. Plan. Agcy*, 507 F.2d 517, 523 (1974). As a result, the courts of the states that have enacted an interstate compact must "**interpret the [compact] according to a single standard - a federal one.**" *United States Ex Rel. Esola v. Groomes*, 520 F.2d 830, 842 (1975)(Garth, J., Concurring). In recognizing the need for uniformity of application and interpretation, Third Circuit Judge Garth stated:

> I recognize, . . ., that the enactment of the [interstate] Agreement by each party state is undoubtedly in identical statutory terms. Nevertheless, the gloss which may be imparted by the courts to identical language may vary significantly among the states which have separately enacted the Agreement. **It is for this reason that I consider the need for a uniform interpretation of the Agreement to be significant, *and indeed mandatory*.**

United States Ex Rel. Esola v. Groomes, 520 F.2d at 841, n. 3. (Garth, J., Concurring).

The Trial Court's Orders have moved New Jersey away from a uniform application of Federal law to the DRPA. As a creature of Pennsylvania, New Jersey and the Federal Government, it is incumbent on each state to maintain a uniform standard for reviewing cases involving the DRPA. Any divergence in application will unquestionably permit plaintiffs to forum shop, and place the DRPA in a precarious legal position. If the Trial Court's interpretation of *DRBA* is allowed to stand, the New Jersey Courts have improperly and illegally changed that

uniform standard.

3. The Interest Arbitration Laws Of Pennsylvania And New Jersey Are Not "Substantially Similar" Either In Policy Or Text

a. Pennsylvania's Act 111, As Interpreted By The Pennsylvania Supreme Court, Does Not Cover The DRPA Or Its Police Officers.

There clearly is no intent on the part of Pennsylvania to have Act 111 applied to the DRPA. Act 111 specifically covers only "[p]olicemen or firemen **employed by a political subdivision of the Commonwealth or by the Commonwealth** . . ." 43 P.S. § 217.1 (emphasis added). Clearly, the DRPA is not the Commonwealth of Pennsylvania for purposes of Act 111. *See, Philadelphia Housing Auth. v. PLRB*, 508 Pa. 576, 586, 499 A.2d 294, 299 (1985) (Security Officers of the Philadelphia Housing Authority are not covered by Act 111). The question then becomes: is the DRPA a "political subdivision of the Commonwealth." Although the term "political subdivision of the Commonwealth" is not defined in Act 111, the Pennsylvania Supreme Court has looked to the Statutory Construction Act, 1 Pa.C.S.A. § 1991 to define that term for purposes of Act 111. *Philadelphia Housing Auth. v. PLRB*, 508 Pa. at 585, 499 A.2d at 299 (1985). The Statutory Construction Act defines "political subdivision" as:

> any county, city, borough, incorporated town, township, school district, vocational school district and county institution district.

1 Pa.C.S.A. §1991. The DRPA clearly is not included in this limited definition, and therefore cannot be covered by Act 111.

The Pennsylvania Supreme Court has recognized that the restrictive language of Act 111 was "by design. Act 111 was intended to carve out a select group of public employees for special treatment because of the essential nature of the services they perform." *Philadelphia*

Housing Auth. v. PLRB, 508 Pa. At 588, 499 A.2d at 300. Applying these definitions strictly, the Pennsylvania Supreme Court found that Philadelphia Housing Authority ("PHA") was not a "political subdivision of the Commonwealth" and as a result, its police or security officers were not covered under Act 111. *Id.* at 509, 499 A.2d at 301. The Pennsylvania Supreme Court noted that "unlike the Commonwealth or one of its political subdivisions, PHA does not have the ability to fund an Act 111 arbitration award since PHA has no power to levy taxes." *Id.* The DRPA is neither the Commonwealth nor a Political Subdivision of the Commonwealth, and similarly is prohibited by its Federal Compact from levying taxes or assessment. Compact, Article IV, N.J. Stat. Ann. § 32:3-5(e), 36 Pa. Stat. Ann. § 3503. As a result, Act 111 cannot apply to the DRPA.

Since Pennsylvania clearly intended that Act 111 should not apply to entities such as the DRPA, the Trial Court erred as a matter of law in finding that Act 111 and the NJIARA are substantially similar. There is clearly no sharing of agreement between the two states that such interest arbitration laws should be applied to the DRPA or its police officers.

b. **The NJIARA And Act 111 Are Substantially Different**

As discussed in detail below, the NJIARA and Act 111 are "substantially different" in statutory scheme, language and policy. While both statutes generally provide certain rights to certain public sector police and firefighters upon reaching impasse in labor negotiations, the scope, policies, procedures and remedies set out in each legislative enactment **differ dramatically**. Further, a trial court may not pick and choose among the various provisions of a statute to determine which to apply. The laws of the states must be substantively similar ***in all respects*** in order to be imposed on a bi-state entity like the DRPA. *King v. Port Auth. of New York & New Jersey*, 909 F. Supp. 938, 945 (D.N.J. 1995).

i. A Point-By-Point Comparison Of The Two States' Laws Clearly Demonstrates That There Is No Substantial Similarity In The Laws And The Policies Each Reflect

The Trial Court completely ignored the dramatic differences between the NJIARA and Act 111. The following comparison outlines in summary fashion the dramatic differences between the laws of New Jersey and Pennsylvania with respect to public sector dispute resolution procedures. These differences include:

- Substantial Limitations on Scope of What Issues are Arbitrable in New Jersey
- No Mediation Option In Pennsylvania
- No Fact-Finding Option In Pennsylvania
- No Right of Appeal In Pennsylvania
- Selection and Qualification Criteria of Arbitrators In New Jersey
- Choice of Terminal Procedures In New Jersey
- Express Statutory Factors To Be Applied by Arbitrators In New Jersey
- Required Timing And Number Of Negotiation Sessions In New Jersey

1. Unlike Act 111, The NJIARA Does Provide For Mediation.

A. New Jersey - NJIARA

First, the NJIARA provides for a formal mediation process. If the parties fail to reach agreement through direct negotiations, either party may submit a request to the New Jersey Public Employment Relations Commission ("PERC" or "Commission") (an executive agency accountable to the Governor) to initiate mediation. PERC may also initiate mediation on its own. N.J. Stat. Ann. § 34:13A-16(a)(2), N.J.A.C. 19:16-3.1(a)-(d). The PERC Director of Conciliation has the ultimate authority to appoint a mediator, who "shall assist the parties to reach a voluntary agreement. A mediator may hold separate or joint conferences as he or she deems expedient to effect a voluntary, amicable and expeditious adjustment and settlement of the

differences and issues between the parties." N.J.A.C. § 19:16-3.2, § 19:16-3.3. Under the NJIARA's detailed legislative scheme, the mediator is required to submit one or more confidential reports to the PERC Director of Conciliation describing in detail what has occurred in the process. N.J.A.C. 19:16-3.5.

B. Pennsylvania - Act 111

By contrast, ***Act 111 in Pennsylvania does not offer parties mediation or any other kind of alternative dispute resolution procedure*** short of binding arbitration. Once the parties reach impasse in Pennsylvania, the only option is to proceed with binding arbitration -- an adversarial proceeding. Pennsylvania's other public sector labor statute governing *non-police* and fire public employees, the Public Employee Relations Act, 43 Pa. Stat. Ann. § 1101.101, et seq. ("Act 195"), however, provides for mediation. Accordingly, Pennsylvania's decision to exclude mediation from Act 111 for police officers was intentional. Pennsylvania made a clear policy choice not to offer such a remedy for its police officers. Had Pennsylvania intended to provide mediation for police officers it would have done so as it did in Act 195 for other types of public employees in the State.

This critical difference between the two statutes is alone sufficient to provide a basis for this Court to reverse the decision of the Trial Court. There is ***no*** substantial similarity both as to the policy and laws with respect to the availability of mediation.

2. Unlike Act 111, The NJIARA Does Provide For Fact-Finding.

A. New Jersey - NJIARA

In addition to providing for mediation, the NJIARA also has a detailed fact-finding procedure. N.J. Stat. Ann. § 34:13A-16(b)(1); N.J.A.C. § 19:16-4.1, et seq. If the parties cannot

resolve an impasse in negotiations through mediation, the NJIARA permits the PERC Director of Conciliation, at the request of either party, to invoke "factfinding with recommendation for settlement of all issues in dispute. . ." *Id.* When fact-finding is invoked, the Director of Conciliation submits to the parties a list of names of three (3) fact-finders. Within three (3) days, the parties may each eliminate no more than one name and then indicate an order of preference. N.J.A.C. § 19:16-4.2(a). The Director of Conciliation then appoints the fact-finder. *Id.* The fact-finder appointed is considered an officer of the PERC "for the purpose of assisting the parties to effect a voluntary settlement and/or making findings of fact and recommending the terms of settlement." N.J.A.C. § 19:16-4.2(b).

It is the function of the fact-finder to meet with the parties, make inquiries and investigations, and hold hearings. N.J.A.C. § 19:16-4.3(a). The fact-finder also has the authority and power to:

1. Subpoena witnesses;
2. Compel witness attendance;
3. Administer oaths;
4. Take the testimony or deposition of any person under oath; and
5. Require the production and examination of any governmental or other books or papers relating to any matter under investigation by or in issue before the fact-finder.

N.J.A.C. § 19:16-4.3(b). If the parties do not resolve the impasse during fact-finding, the fact-finder is required to make findings of fact and recommend terms of settlement as soon as possible after the conclusion of the process. N.J.A.C. §. 19:16-4.3(d). Within five (5) days of receipt of the fact-finder's report, the parties are required to meet to exchange statements of position and to have an opportunity to reach an agreement. N.J.A.C. § 19:16-4.3(g).

As with mediation, the New Jersey legislature has made a policy decision that fact-finding *is available* to parties covered by the NJIARA as an alternative form of dispute

resolution procedure. As with mediation, this formal process is also subject to oversight by PERC. Fact-finders have been give broad powers under the NJIARA with the ultimate goal to have the parties voluntarily resolve their impasse situation. Regardless of the frequency of usage of fact-finding by parties in New Jersey, it is an important available option.

B. Pennsylvania - Act 111

By contrast, ***Act 111 in Pennsylvania does not offer parties fact-finding.*** In Pennsylvania, the policy and law is that parties at impasse have only one (1) option -- binding arbitration. Pennsylvania made a conscious decision not to include fact-finding in Act 111, as evidenced by the fact that the Pennsylvania legislature **did** include a fact-finding procedure in Act 195, 43 Pa. Stat. Ann. § 1101.802, the Act that covers non-police and firefighter public employees.

Act 111 does not offer any alternative to binding arbitration, and PERC's equivalent in Pennsylvania, the Pennsylvania Labor Relations Board ("PLRB"), does not provide any assistance in resolution of impasse situations. Pennsylvania and New Jersey clearly have widely diverging policies and laws on how an impasse can and should be resolved.

3. Unlike Act 111, NJIARA Binding Arbitration Is Limited To Subjects That Are Within The Proper Scope of Collective Negotiations.

New Jersey and Pennsylvania have substantially different policies and laws as to the scope and range of issues that may be subject to interest arbitration. While Pennsylvania generally allows arbitration over ***all*** disputed issues, New Jersey's policy as expressed in its legislative scheme substantially limits both the scope of issues subject to interest arbitration, that is, what issues are subject to arbitration in the first place, and the arbitrator's discretion in reviewing those matters.

A. New Jersey - NJIARA

The NJIARA specifically provides that:

> *arbitration shall be limited to those subjects that are within the required scope of collective negotiations*, except that the parties may agree to submit to arbitration one or more permissive subjects of negotiations.

N.J. Stat. Ann. § 34:13A-16(f)(4). Therefore, arbitrators may only decide issues that are required subjects of negotiations or agreed upon permissive subjects. New Jersey has charged PERC by establishing various procedural safeguards designed to prevent abuse of this limitation. Significantly, PERC is an Executive Agency of the State of New Jersey specifically charged with the interpretation and enforcement of New Jersey's public sector labor laws. The DRPA is not covered by or subject to any such entity. *See DRBA*, 688 A.2d at 575.

A petition requesting the initiation of compulsory interest arbitration uhder the NJIARA must include:

> 9. A statement indicating which issues are in dispute, identifying the issues as economic or noneconomic . . . [and]
>
> 10. A statement as to whether a dispute exists as to the negotiability of any of the unresolved issues.

N.J.A.C. § 19:16-5.3(a)(9)&(10). If the petition is not made jointly, the opposing party must within seven (7) days of receipt of the petition, submit:

> 2. A statement as to whether it disputes the identification of any of the issues as economic or noneconomic;
>
> 3. *A statement as to whether it refuses to submit any of the issues listed on the notification or petition to arbitration on the ground that such issue is not within the required scope of negotiations.*

N.J.A.C. § 19:16-5.5(2)&(3)(emphasis added).

If a dispute exists as to whether an unresolved issue is within the required scope of negotiations, the party asserting the challenge must file a Petition for Scope of Negotiations Determination with PERC within 10 days of receipt of the petition requesting interest arbitration, or within 5 days after receipt of the response to the petition requesting interest arbitration. N.J.A.C. § 19:16-5.5(c). PERC has the authority to make a determination as to whether a matter in dispute is within the scope of collective negotiations. N.J. Stat. Ann. § 34:13A-5.4(d). Once a Petition for Scope of Negotiations Determination is filed, PERC will utilize its detailed administrative regulations found in N.J.A.C. § 19:13-1.1, *et seq.*, to make a determination.

For purposes of the NJIARA, the PERC determination typically turns on whether an item is mandatorily negotiable, is a managerial prerogative or is permissibly negotiable. In New Jersey an item is mandatorily negotiable ***only*** if it:

> intimately and directly affects the work and welfare of police and firefighters, like any other public employees, *and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives . . .*

Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78, 91, 432 A.2d 847, 854 (1981). An item will remain a ***non***-negotiable managerial prerogative "if it places substantial limitations on government's policy-making powers . . ." *Id.* If the "government powers remain essentially unfettered by agreement on that item, then it is permissively negotiable." *Id.*

The ability of a party to seek PERC intervention in defining what issues may properly be submitted to the arbitrator is an essential element of the NJIARA. The scope of negotiations in New Jersey is particulary limited and, with the help of PERC, New Jersey has assured that the

issues that the arbitrators may hear will not exceed the limitations on the scope of negotiations.[17]

B. Pennsylvania - Act 111

By contrast, Pennsylvania's Act 111 has no such limitations. Act 111 arbitrators are allowed to ***decide any issue that is raised by the party requesting arbitration***. Section 4(a) of Act 111 provides that interest arbitration is triggered by a party giving written notice to the other party "containing the specifications of the issue or issues in dispute. . ." 43 Pa. Stat. Ann. § 217.4(a). As the Pennsylvania Commonwealth Court described: "Section 4(a) of Act 111 is a codification of the longstanding common law rule that ***arbitrators must decide all issues presented to them***, and only those issues. . ." *Arbitration Between Yoder Police & Tp.*, 654 A.2d 651, 653 (Pa. Cmwlth. 1995). Once an issue is properly placed in dispute by the party requesting arbitration, the arbitration panel has the "power to resolve that issue in a fair manner within the total context of the award." *Board of Supervisors v. Butler Tp. Police*, 153 Pa. Commw. 306, 310, 621 A.2d 1061, 1064 (1993). Act 111 arbitrators are only restricted by what is submitted to them by the party requesting arbitration.

Thus, the issues that may be decided by an Act 111 arbitration panel are significantly broader than the issues that are subject to arbitration under the NJIARA. As discussed above, NJIARA arbitrators are precluded from hearing items that are non-negotiable, managerial prerogatives because they are outside the scope of negotiations. Under Pennsylvania law, however, an issue will be considered a mandatory subject of bargaining if it just "bears a rational

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[17]Examples of issues which are managerial prerogative and not subject to arbitration include, but are not limited to: subcontracting, *State of New Jersey*, 88 N.J. 393, 443 A.2d 187 (1992); promotion, layoff, demotion, *City of Paterson*, 7 NJPER ¶12190 (N.J. Super. 1981), transfers, *New Jersey State Troopers*, 7 NJPER ¶12026 (1981), shifts and work schedules, *Town of Kearny*, NJPER Supp2d ¶90 (App. Div. 1982).

relationship to employees' duties." *Township of Upper Saucon v. PLRB*, 152 Pa. Commw. 530, 620 A.2d 71 (1993). Pennsylvania law does not require the balancing of employer's managerial purposes and objectives in making a determination as to whether the issue is rationally related to an employees' duties. *Id.*

In summary, New Jersey has made a specific policy decision to limit the issues an arbitrator may properly consider. Pennsylvania has the opposite policy and law. There, once a party requests arbitration on a particular issue, the opposing party has no remedy except to oppose it during the arbitration hearing -- the arbitrator alone ultimately will decide. As the policies of New Jersey and Pennsylvania differ so dramatically as to what issues may be subject to arbitration, the decision of the Trial Court must be reversed.

4. Unlike Act 111, The NJIARA Provides Parties With The Choice Of Six (6) Different Statutory Terminal Arbitration Procedures.

A. New Jersey - NJIARA

The 1996 amendments to the NJIARA provide parties to an interest arbitration proceeding with a wide range of choices regarding the selection of a terminal arbitration procedure. The NJIARA specifically provides that parties have the option to agree to any of the following terminal arbitration procedures:

1) Conventional arbitration of all unsettled items ***within*** the scope of collective negotiations;

2) Choice between the last offer of each party by single package;

3) Choice between the last offer of each party on an issue-by-issue basis;

4) If fact-finding report with recommendations has been issued, a choice between the last offer of each party or the fact-finder's recommendation as a single package;

5) If fact-finding report with recommendation has been issued, a choice between the

last offer of each party or the fact-finder's recommendation on an issue-by-issue basis;

6) A decision on economic issues confined to a choice between the parties' last offer as a single package, and a decision on non-economic issues confined to a choice between the parties' last offer on an issue-by-issue basis.

N.J. Stat. Ann. § 34:13A-16(c)(1) - (6). If the parties are unable to agree on a terminal procedure the statutory conventional arbitration procedure will be utilized. N.J. Stat. Ann. § 34:13A-16(d)(2).

B. Pennsylvania - Act 111

Reflecting contrasting policies, Act 111 does not provide any choice among statutory terminal arbitration procedures. Under Act 111, once an issue is submitted to arbitration, the arbitrators must resolve that issue in a fair manner within the total context of the award. *Board of Supervisors v. Butler Tp. Police Dept.*, 153 Pa. Commw. 306, 621 A.2d 1061 (Pa. Cmwlth 1993). Parties in Act 111 arbitrations are bound by the protocol established by the arbitrators. Act 111 does not allow the parties to choose the terminal arbitration procedure to be utilized.

5. Unlike Act 111, The NJIARA Provides Selection and Qualification Criteria For Interest Arbitrators Who Must Be On The PERC Special Panel Of Arbitrators.

A. New Jersey - NJIARA

Recognizing the need for specially qualified arbitrators to serve in the role of interest arbitrator, the 1996 amendments to the NJIARA provide that PERC shall maintain a "special panel of interest arbitrators," and that the arbitrator(s) selected to serve under the NJIARA **must** come from the PERC special panel. N.J. Stat. Ann. § 34:13A-16(e)(1), N.J.A.C. § 19:16-5.6(a), as amended (Supp. 1997).

Arbitrators who apply for appointment or reappointment to the PERC special panel

undergo a screening process where they must meet strict and detailed qualification standards set forth by PERC. N.J.A.C. § 19:16-5.15, as amended (Supp. 1997). Qualifications consist generally of demonstrated experience, knowledge of labor relations and governmental and fiscal principles, performance, ability to write a well-reasoned decision consistent with applicable legal standards, etc. *Id.* If an applicant can satisfy the requirements of the strict screening process he/she will be appointed for a three (3) year term, with reappointment contingent on the same rescreening. N.J. Stat. Ann. § 34:13A-16(e)(2). Once an arbitrator is selected to the PERC special panel, he/she must complete yearly continuing education requirements. N.J. Stat. Ann. § 34:13A-16.1. PERC retains the power to suspend, remove or otherwise discipline a special panel arbitrator. N.J. Stat. Ann. § 34:13A-16(e)(2). Thus, regardless of the wishes of the disputing parties, if the desired arbitrator is not on PERC's approved list he or she cannot be selected. **Significantly, New Jersey has certified only approximately 22 arbitrators to hear and decide cases under the NJIARA.** ***New Jersey has chosen to safeguard the public and its municipalities by assuring that only the most competent arbitrators will decide a case under the NJIARA.***

B. Pennsylvania - Act 111

By contrast, Act 111 has no requirements relating to the expertise, education or other qualifying standards for arbitrators. It has no selection or qualifi ation criteria. In fact, under Act 111, a selected arbitrator does not have to have any knowle ige of labor relations or government or fiscal principles. Under Act 111, there is no limitation on who may be selected as an arbitrator. The only limitation that may arise is where the parties cannot agree on a third arbitrator, he/she will be selected from an extensive list maintained by the American Arbitration Association. 43 Pa. Stat. Ann. § 217.4(b). Pennsylvania has not instituted the same rigorous

standards New Jersey utilizes in selecting arbitrators.[18] Obviously, there is also no governmental agency to qualify arbitrators for the DRPA.

6. Unlike Act 111, The NJIARA Sets Out Eight (8) Statutory Factors An Arbitrator Must Address In Deciding A Dispute.

A. New Jersey - NJIARA

Under the 1996 amendments to the NJIARA, the New Jersey legislature set out eight (8) detailed factors that a PERC special panel interest arbitrator ***must*** consider in making a determination and fashioning an award. N.J. Stat. Ann. § 34:13A-16(g). Specifically the NJIARA requires the arbitrator in his/her award "*to 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.*" *Id.* (emphasis added). The eight (8) factors an arbitrator is required to consider are:

(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;

[18] The fact that only those arbitrators who are on New Jersey's PERC list are eligible to arbitrate itself creates a substantial issue. By imposing New Jersey's system on the DRPA, the majority of the arbitrators in Pennsylvania would be ***ineligible*** to decide a DRPA matter because they are not on the New Jersey "approved list of 22." This means that while any number of arbitrators might be acceptable to Pennsylvania, they would not be acceptable in New Jersey. Conversely, to appoint a NJIARA arbitrator to the DRPA would effectively foist New Jersey's statute imposing qualifications for police arbitrators on Pennsylvania, even though Pennsylvania has ***never adopted*** such standards. Such a unilateral burdening would outright violate the mandates of *Bell* and *Eastern Paralyzed Veterans*, in that no state is to unilaterally impose its laws on the other compact state.

(a) In private employment in general;
(b) In public employment in general;
(c) In public employment in the same or similar comparable jurisdictions, as determined in accordance with N.J. Stat. Ann. § 34:13A-16.2;

(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 parties. Among the items the arbitrator or panel of arbitrators shall assess when considering this factor are the limitations imposed upon the employer by N.J. Stat. Ann. § 40A:4-45.1, et seq.;

(6) The financial impact on the governing unit, its residents and taxpayers. When considering this factor in dispute in which the public employer is a county or municipality, the arbitrator shall take into account, to the extent the evidence is introduced, how the award will affect the municipal or county purposes element of the local property tax; a comparison of the percentage of purpose 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; and

(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.

N.J. Stat. Ann. § 34:13A-16(g)(1)-(8). In addition to these eight (8) statutory factors, PERC has promulgated detailed Comparability guidelines to help the parties and the arbitrator identify what evidence may support comparability arguments. N.J.A.C. § 19:16-5.14. Adoption of these specific statutory guidelines further evidences New Jersey's policy decision to limit the

discretion of an arbitrator in rendering an award.

B. Pennsylvania - Act 111

By contrast, ***Act 111 does not mandate any factors that an arbitrator must consider in fashioning an award***, nor does it identify any comparability guidelines. With limited exceptions, Act 111 arbitrators are free to resolve the issue in dispute in what they consider to be a fair manner. *Board of Supervisors v. Butler Tp. Police Dept.*, 153 Pa. Commw. 306, 621 A.2d 1061 (Pa. Cmwlth 1993). Therefore, Plaintiffs' Motion must be dismissed and the DRPA's Cross Motion must be granted.

7. Unlike Act 111, Under The NJIARA All Appeals From The Decision Of An Arbitrator Are First Taken To The Expert Administrative Agency, PERC, Then To The Courts.

A. New Jersey - NJIARA

The NJIARA specifically provides for a statutory right of appeal. A party may appeal a decision and award of the arbitrator to **PERC** within 14 days of receiving the award. N.J. Stat. Ann. § 34:13A-16(f)(5)(a). The only grounds for an appeal to PERC are that the arbitrator: (1) ***failed to apply the statutory criteria in subsection (f), infra,*** or (2) violated the standards set forth in N.J. Stat. Ann. §§ 2A:24-8 or 9. *See* N.J. Stat. Ann. § 34:13A-16(f)(5)(a). PERC may permit oral argument and will decide whether to affirm, modify, correct or vacate the arbitrator's award. *Id.* PERC, in its sole discretion, may even remand the award to the same arbitrator, or another arbitrator, for reconsideration. *Id.* The decision entered by PERC may be appealed to this Court, the New Jersey Superior Court, Appellate Division, if a party believes that it has been aggrieved. *Id.* This scheme again clearly evidences New Jersey's policy to have its expert executive agency, PERC, be intimately involved with public sector labor relations. New Jersey

also clearly recognizes the right of the parties to appeal a PERC decision to Court. Thus, New Jersey's arbitration policy specifies that any appeal must be to an expert administrative agency, and then court review. This is not so in Pennsylvania.

B. Pennsylvania - Act 111

Act 111 specifically states that "***[n]o appeal [from the arbitrators' determination] shall be allowed to any court.***" 43 Pa. Stat. Ann. § 217.7(a)(emphasis added). Similarly, there is no government agency within Pennsylvania that has jurisdiction to hear the appeal of an interest arbitrator's decision and award. Simply put, in Pennsylvania, there is no statutory right to appeal the decision of an Act 111 arbitration panel.

Even the very limited right of appeal, established under the Pennsylvania common law, underscores that the rights of appeal element of arbitration policy are dramatically dissimilar between New Jersey and Pennsylvania. An Act 111 interest arbitration award may only be reviewed in court to determine whether:

1) the arbitrators lacked jurisdiction to decide the issue in dispute;

2) the arbitration proceedings were conducted improperly;

3) the arbitrators exceeded their authority; and

4) the arbitrators decided constitutional questions properly decided by a Court.

Swatara Tp. v. Swatara Tp. Police Dept., 164 Pa. Commw. 378, 642 A.2d 660 (1994), appeal denied, 540 Pa. 589, 655 A.2d 519 (1995).[19]

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[19]The issue of appeal rights is directly relevant to Court ordered arbitration. With Court ordered arbitration it is entirely unclear what the proper procedure for appeal would be for either party, if there is an improper arbitration decision. There is no government agency, such as PERC, which can review the decision, let alone a body of law to govern the appeal. Moreover, in view of Pennsylvania's express displeasure with judicial review, it is clear that Pennsylvania would not want review, even of a limited nature, to proceed through New Jersey's administrative

8. Unlike Act 111, The NJIARA Requires That Three (3) Negotiating Sessions Take Place Within A Specific Period

A. New Jersey - NJIARA

The NJIARA requires the parties to begin negotiations at least 120 days prior to the expiration of the collective bargaining agreement, and requires the parties ***to meet at least three (3) times*** during that 120 day period. N.J. Stat. Ann. § 34:13A-16(a)(1); N.J.A.C. § 19:16-2.1. A violation of this provision shall constitute an unfair labor practice. *Id.* Since interest arbitration cannot be initiated under the NJIARA until on or after the date the collective bargaining agreement expires, this policy attempts to force the parties to have face to face negotiations to attempt to work out disputed issues before arbitration is invoked.

B. Pennsylvania - Act 111

Under Act 111, however, there is no parallel requirement. A party can declare an "impasse" and request arbitration within 30 days after bargaining allegedly has been initiated. 43 Pa. Stat. Ann. § 217.4(a). There is no statutory requirement to engage in any type of face to face negotiation prior to declaring impasse and seeking binding arbitration. Contrary to New Jersey, Pennsylvania has made a clear policy decision that the parties can proceed to binding arbitration without any requirement to negotiate, engage in mediation or fact-finding. This clearly is contrary to the policies and laws of New Jersey.

In summary, it is thus clear that the NJIARA and Act 111, and the policy decisions they codify, are substantially different and the test required in *Eastern Paralyzed Veterans* and *DRBA* cannot be met. As a result, the Trial Court's decision finding that the NJIARA and Act 111 are

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agencies or courts. On the other hand, New Jersey and the DRPA's New Jersey Commissioners would otherwise expect a right of appeal. This simply cannot be reconciled by a Court.

substantially similar is erroneous and must be reversed.

5. The Experts Retained By The Parties Further Confirm That The Policies Underlying The NJIARA And Act 111 Are As Substantially Different As Is The Language Of Those Statutes

Despite Defendant DRPA's objections, the Trial Court permitted Plaintiffs to utilize the so-called "expert" Certification of Professor Clyde Summers to establish that the laws of New Jersey and Pennsylvania relating to collective bargaining by police and settlement of disputes between union of police officers and public agencies are "parallel or substantially similar."[20] (Da170, ¶ 5). On Motion for Reconsideration, the Trial Court similarly considered the expert opinion of Professor of Law, Emeritus, David Weinstein submitted by Defendant DRPA. (Da477). After reviewing Summers' and Weinstein's reports, the Trial Court erroneously concluded that "[t]hey disagree in detail not in what the objective or policy of the legislation is." (Da477). 43). In fact, even a cursory review of these two reports reveals a major disagreement between Summers and Weinstein with regard to the objectives and policies of the NJIARA and Act 111, as well significant differences in procedure.

Contrary to Professor Summers' report, Professor Weinstein expertly[21] concluded that "Pennsylvania's Act 111 and the New Jersey's Police and Fire Public Interest Arbitration

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[20]New Jersey courts have recognized that "[e]xpert witnesses simply may not render opinions on matters which involve a question of the law." *Healy v. Fairleigh Dickinson Univ.*, 287 N.J. Super. 407, 413, 671 A.2d 182, 184 (App. Div. 1996). *See State v. Grimes*, 235 N.J. Super. 75, 79, 561 A.2d 647 (App. Div.), *cert denied*, 118 N.J. 222, 570 A.2d 976 (1989) (expert opinion concerning the domestic law of the forum is not admissible); *see also Clohesy v. Food Circus Supermarkets*, 293 N.J. Super. 217, 679 A.2d 1230 (App. Div. 1996); *Caputa v. Aliles*, 296 N.J. Super. 123, 686 A.2d 35 (App. Div. 1996) (expert testimony as to legal standard of duty is not proper). See arguments and authorities set in Section E, subsection 3 below.

[21] Professor Weinstein has served as an interest arbitrator in many police interest arbitrations, including cases under Act III involving the Philadelphia Police Department and Pennsylvania State Police Contracts. (Da421).

Reform Act are neither complementary, parallel nor similar." (Da433). He also concludes "both that the police arbitration systems in Pennsylvania and New Jersey are ***substantially dissimilar*** and that there is no rational basis for constructing an arbitration system which would effectuate the disparate policies of the two states." (Da422)(emphasis added). Supporting his expert report with extensive detail, Professor Weinstein first concluded that Pennsylvania and New Jersey have substantially different outlooks and approaches to police collective bargaining. Weinstein stated:

> Pennsylvania adopted a system which evidenced little concern with either promoting collective bargaining to resolve police contract formation disputes or controlling the arbitration process to protect the public interest. New Jersey, by way of contrast, designed a system both to promote collective bargaining as the preferred method for resolving such disputes and to control tightly the arbitration process in the public interest. ***As a result, the two states have pursued incompatible objectives through incompatible means. In terms germane to this matter, the statutory schemes for police bargaining and arbitration are substantially dissimilar and neither complementary nor parallel.***

(Da423) (emphasis added).

Professor Weinstein's Certification provided the Trial Court with a detailed analysis that demonstrates precisely how ***dissimilar*** the statutory schemes and objectives of Pennsylvania and New Jersey are with respect to police interest arbitration. He contrasts the "highly structured and administratively controlled arbitration system" in New Jersey "where the emphasis is on achieving a correct result" with a system in Pennsylvania that is "virtually unregulated . . . [and] where the emphasis is on finality." (Da431) As part of this discussion, Professor Weinstein details the **dramatic difference in the public policies** of New Jersey and Pennsylvania with regard to police interest arbitration. Professor Weinstein opines that through the enactment of the recent amendments to the New Jersey Police and Fire Public Interest Arbitration Act, the

New Jersey Legislature has:

> announced an explicit public policy of ensuring that the dispute resolution procedures fairly and adequately recognize and give due consideration to the interests and welfare of the "taxpaying public." Moreover, the legislature mandated that it is now public policy to ensure authority delegated to arbitrators be, "infused with strident safeguards," while still affording enough decision-making authority to, "protect the public good." Additionally, stated public policy is that in exercising their delegated authority arbitrators, "fully recognize and consider the public interest and the impact that their decisions have on the public welfare," as well as pursuing labor peace and the general public interest and welfare.

(Da428-429). Professor Weinstein states that the Pennsylvania General Assembly, to the contrary, has never articulated a similar public policy and, indeed, prefers finality over protecting the taxpayers or the public interest. (Da429).

Professor Summers' Certification does not provide the detailed policy review that Professor Weinstein conducted. The only discussion on policy found in Professor Summers' Certification is his general, unsupported comment that "it is hardly surprising that many jurisdictions, including Pennsylvania and New Jersey, provide interest arbitration, rather than permitting police officer strikes, as the method to resolve impasses." (Da173, ¶8).

Possibly recognizing the weaknesses in his position, Professor Summers attempted to down play some of the significant differences between Act 111 and the NJIARA. For example, in paragraph 19 of his Certification, Summers suggests it is "insignificant" that New Jersey has a statutory requirement that arbitrators give "due weight" to eight (8) listed statutory factors and that Pennsylvania has no such requirement. (Da177) Professor Summers concluded that "the factors listed in the New Jersey statute are those which any competent arbitrator will weigh without any statutory direction." (Da177). To the contrary, Professor Weinstein's experience is that in Pennsylvania, where there is no statutory criteria an arbitrator must consider in fashioning

an award, there "is the general absence of well articulated and reasoned opinions accompanying Act 111 arbitration awards." (Da429.) This experience directly counters Professor Summers conclusory statement and, more significantly, renders this difference between the New Jersey and Pennsylvania laws particularly significant.

Professor Weinstein's expert opinion provided the Trial Court with a clear discussion on the significantly different public policy considerations, as well as a detailed analysis of the substantive and procedural differences in the laws. His expert opinion directly opposes the conclusions of Professor Summers. The Trial Court erroneously concluded that Summers and Weinstein disagreed only in detail "not in what the objective or policy of the legislation is." (Da477). Somehow, the Trial Court completely overlooked Professor Weinstein's extensive discussion of the numerous policy differences the statutes. These dramatic differences in public policy between the two states are more than sufficient to safely conclude that the NJIARA and Act 111 are not substantially similar.

D. THE TRIAL COURT'S DECISION IS ERRONEOUS BECAUSE IMPOSING INTEREST ARBITRATION WOULD ULTIMATELY REQUIRE THE COURT TO DETERMINE WHICH SUBSTANTIALLY DIFFERENT STATE POLICIES AND STATUTORY SCHEMES WILL APPLY, AND TO FASHION ITS OWN BINDING INTEREST ARBITRATION COMMON LAW AND PROCEDURE APPLICABLE TO THE DRPA.

Imposing binding interest arbitration on the DRPA is improper as it would require the court to choose among the dramatically different language of, and policies underlying, the two acts. If the Trial Court's Orders are allowed to stand, ultimately, the Court will have to decide and supervise its decisions respecting:

1. **What issues may be subject to negotiations?**
   Limited to scope of collective negotiations as defined by New Jersey law, or any issue in dispute as under Act 111?

2. **Whether formal alternative dispute resolution procedures will be available prior to binding arbitration?**
Mediation and Fact-Finding as provided for under the NJIARA, or no alternative dispute resolution procedures as under Act 111?

3. **When will the parties have access to binding arbitration?**
After three (3) negotiation sessions within the 120 day period prior to the expiration of the agreement as under NJIARA, or 30 days after the parties begin negotiating as under Act 111?

4. **Who will be the arbitrator(s)?**
Qualified, knowledgeable, experienced interest arbitrators from the New Jersey PERC[22] special panel, or anybody off the street with no required qualifications, knowledge or experience as under Act 111?

5. **How will the arbitrator be selected?**
By PERC appointment from its special panel(if no agreement) as under New Jersey law,[11] or from the American Arbitration Association (if no agreement) as under Act 111?

6. **What standards or factors must be addressed in the arbitrator's award and decision?**
Each of the eight (8) statutory factors, indicating which of the factors are deemed relevant, satisfactorily explaining why the others are not relevant, and providing an analysis of the evidence on each relevant factor as required by the NJIARA, or no requirement for what must be addressed as under Act 111?

7. **Are appeals allowed, who does an appeal go to and what will be the standard for appeal and review of an arbitrator's decision?**
PERC review to determine if the statutory factors have been properly addressed, with the possibility of subsequent court review as under the NJIARA, or no appeal as specifically stated under Act 111?

8. **Who will enforce the decision of the arbitrator?**
PERC, with the possibility of subsequent review by a New Jersey court as under the NJIARA, or no judicial review as specifically provided by Act 111?

The DRPA respectfully submits that a New Jersey State court cannot make these

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[22]The DRPA is not subject to PERC. *Delaware River Port Auth.*, 22 NJPER ¶ 27083 (1996).

determinations without violating the *DRBA*, precedent set out in *Eastern Paralyzed Veterans, supra, Ballinger/Ruggiero, supra,* and *Nardi, supra*. In essence the Court would be creating "new law" which is offensive to one or both of the creator states. Moreover, this would open the door to the parties necessarily appearing before a Court to address every procedural and substantive issue which would arise pre, during, and after the arbitration process. The Trial Court's decision is erroneous and its Orders must be reversed.

E. THE TRIAL COURT COMMITTED NUMEROUS SUBSTANTIVE AND PROCEDURAL ERRORS THAT REQUIRE REVERSAL OF THE TRIAL COURT'S ORDERS.

1. The Trial Court Improperly Relied On The Prior Decision of Judge Supnick.

The Trial Court's Decision should be reversed because it incorrectly interpreted and relied on Judge Supnick's December 20, 1996 decision denying Defendant DRPA's initial Motion for Summary Judgment as "law of the case." A review of Judge Supnick's decision reveals that he did not, at any point, consider whether the police interest arbitration statutes in Pennsylvania and New Jersey -- Act 111 and the NJIARA — are "substantially similar" or "complementary and parallel," or even whether those laws are applicable to the police officers of the DRPA. (Da143-168). Moreover, Judge Supnick never made any findings with respect to whether DRPA police officers are entitled to "binding interest arbitration," nor did he ever look at, or even for a fleeting moment consider or analyze, the statutory frame work of Act 111 and the NJIARA. (Da143-168). The only thing before Judge Supnick on December 20, 1996 was Defendant DRPA's motion to dismiss Plaintiffs' original Complaint, in lieu of an answer, styled as a Motion for Summary Judgment. Judge Supnick denied Defendant's Motion for Summary Judgment, finding that the laws of Pennsylvania and New Jersey set forth parallel and complementary legislation **giving public employees a right to freely organize, designate a**

representative and engage in good faith negotiations with their public employer. Judge Supnick specifically held:

> I think that Pennsylvania law and New Jersey law, even though New Jersey makes reference to the right of governmental employees of course to organize and so forth as set forth in the Constitution -- I do think that Pennsylvania has set forth parallel and complementary legislation of a different nature but which is nevertheless -- which nevertheless recognizes those same rights and clearly gives public employees a right to freely organize and designate representatives and also to negotiate in good faith.

(Da165-166)(emphasis added). Even Plaintiffs' expert, Professor Summers, concurred in the limited nature of Judge Supnick's holding, stating: "As this Court has already found, New Jersey and Pennsylvania have enacted *substantially similar laws respecting the bargaining rights of police officers generally.*" (Da174, ¶ 10) (emphasis added).

2. The Trial Court Erred In Denying Defendant's Motion For A Continuance To Take Discovery Of Plaintiffs' Expert, To Obtain An Expert Of Its Own, And Subsequent Motion To Obtain An Additional Expert.

Second, the Trial Court relied extensively on the Certification of Plaintiffs' surprise "expert" Clyde Summers, and erroneously denied the DRPA's Cross-Motion for a continuance to take discovery of Plaintiffs' "expert" and obtain an expert of its own. Defendant DRPA first learned of Professor Summers' Certification on June 13, 1997 when Plaintiffs submitted it as part of their Motion for Summary Judgment. The New Jersey Rules of Court and the Camden Differentiated Case Management Rules are clear with regard to Motions for Summary Judgment: "opposing affidavits, briefs, objections, and cross-motions shall be served and filed not later than 10 days before the return date;" DCM Rule 4:46-1 and Rule 4:46-1. (emphasis added). The return date for Plaintiffs' Motion was set for July 25, 1997, therefore, Defendant DRPA was required to submit its opposing affidavits and other opposing papers not later than July 15, 1997.

Thus, without leave of Court, Defendant DRPA was precluded after July 15, 1997 from submitting any additional affidavits in opposition to Plaintiffs' Motion. As a result, on July 15, 1997, Defendant DRPA properly moved this Court to dismiss Plaintiffs' expert or to continue Plaintiffs' Motion so that Defendant DRPA could conduct the necessary discovery and obtain an expert report opposing Plaintiffs' alleged expert. Defendant DRPA acted properly and in accordance with the Rules of Court by seeking a continuance from the Court while Plaintiffs' motion was still pending and while discovery was still open. Despite the proper measures taken by Defendant, on November 3, 1997, the Trial Court, denied the DRPA's timely Motion to Continue Plaintiffs' Motion for Summary Judgment so that it could take discovery of Plaintiffs' surprise "expert" and obtain an expert of its own. (Da4). *See, Ziegelheim v. Apollo,* 128 N.J. 250, 264, 607 A.2d 1298, 1305 (1992), citing with approval, *Sholtis v. American Cyanamid Co.*, 238 N.J. Super. 8, 19, 568 A.2d 1196, 1202 (App. Div. 1989); *Baldyga v. Oldman*, 261 N.J. Super. 259, 618 A.2d 877 (App . Div. 1993).

Further, as part of its Motion for Reconsideration, Defendant DRPA moved the Trial Court to obtain an additional expert report. By Order dated December 19, 1997, the Trial Court summarily denied this Motion. (Da6). As with its denial of Defendant's initial Motion for a Continuance to conduct discovery and obtain an expert opinion, the DRPA asserts that this decision constituted an unjust and improper exercise of judgment. The New Jersey Appellate Courts have unequivocally held that in the summary judgment context, it is the ***duty*** of the trial court to err in favor of adducing all relevant facts, and to allow the parties to obtain and submit all material information to the court. *Ziegelheim v. Apollo,* 128 N.J. 250, 607 A.2d 1298 (1992), *Sholtis v. American Cyanamid Co.*, 238 N.J. Super. 8, 568 A.2d 1196 (App. Div. 1989); *Baldyga v. Oldman*, 261 N.J. Super. 259, 618 A.2d 877 (App . Div. 1993).

3. The Trial Court Erred In Relying On An Expert Opinion On A Question Of Law.

Third, the Trial Court improperly relied on an "expert" opinion on a purely legal question, and failed to conduct a hearing, or in any other way consistent with principles of due process, determine whether Plaintiffs' so-called "expert" Professor Summers was even competent to be an expert witness. New Jersey courts have recognized that "[e]xpert witnesses simply may not render opinions on matters which involve a question of the law." *Healy v. Fairleigh Dickinson Univ.*, 287 N.J. Super. 407, 413, 671 A.2d 182, 184 (App. Div. 1996). *See State v. Grimes*, 235 N.J. Super. 75, 561 A.2d 647 (App. Div.), *cert denied*, 118 N.J. 222, 570 A.2d 976 (1989). Professor Summers' analysis and opinion on the "substantial similarity" of the laws of New Jersey and Pennsylvania did not raise or include any factual issues that could possibly be appropriate for an expert witness. As the question before the Trial Court was purely a legal question, the Trial Court's acceptance of, and reliance upon, the purported expert testimony of Professor Summers was wholly inappropriate.[23]

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[23]The Trial Court erred in relying on Professor Summers as an expert as he is neither competent nor qualified to be an "expert." Based on his Certification (Da169-179) and his November 18, 1997 deposition (Da180-336), it was clear that Professor Summers has absolutely no personal knowledge with respect to the laws and/or practices of the State of New Jersey. Summers has no experience, practical or otherwise, with any aspect of New Jersey law, nor specifically with the NJIARA. (Da169-179)(Da212-213, 240-275, 294). He is not even licensed to practice law in New Jersey or Pennsylvania. (Da294). He has never heard a case as a police interest arbitrator in New Jersey, nor does he have any personal knowledge of the legislative policies behind the NJIARA. (Da169-179)(Da212-213, 294). Additionally, it is apparent from the face of Professor Summers' Certification and his deposition that he has absolutely no experience with the DRPA, any other bi-state entity, or the police officers of any bi-state entity, (Da169-179), and has no idea what "parallel" or "substantially similar" legislation is. (Da226-228).

Had the Court granted Defendant's request for a continuance, so that Defendant could take discovery of Professor Summers prior to rendering its decision, evidence could have been introduced to establish why Professor Summers is not an expert.

Each of these significant substantive and procedural errors by the Trial Court is grounds for reversal of its Orders.

VI. CONCLUSION

For the foregoing reasons, Defendant Delaware River Port Authority, respectfully requests that this Court **REVERSE** the Trial Court's November 21, 1997 Judgment Order, December 19, 1997 Order and February 17, 1998 Order, and **GRANT** Defendant DRPA's Motion for Summary Judgment.

Respectfully submitted,

BLANK ROME COMISKY & McCAULEY LLP
A Pennsylvania LLP

PETER A. GOLD, ESQUIRE
Resident Partner
SAMUEL M. FIRST, ESQUIRE
210 Lake Drive East, Suite 200
Woodland Falls Corporate Park
Cherry Hill, NJ 08002
(609) 779-3600

Attorneys for Defendant,
Delaware River Port Authority

Dated: May 18, 1998

In the eight (8) days between Professor Summers November 18, 1997 deposition and the close of discovery on November 26, 1997, Defendant DRPA was able to obtain an expert report from the eminent Professor David Weinstein. (Da420-434). Professor Weinstein's expert opinion reveals numerous policy differences between Act 111 and the NJIARA. *See, supra.*

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-5584-95T2

FILING DATE
APPELLATE DIVISION

APPROVED FOR PUBLICATION

MAY 8 1998

APPELLATE DIVISION

MAY 8 1998

Clerk

RALPH S. BALLINGER,

Plaintiff-Appellant,

-v-

DELAWARE RIVER PORT AUTHORITY, PAUL DRAYTON, VINCENT BORELLI, RICHARD SULLIVAN, ALVIN WOODHOUSE, DAVID MCCLINTOCK, and ALAN DANIELS,

Defendants-Respondents.

A-5622-95T2

GREGORY RUGGIERO,

Plaintiff-Appellant,

v.

DELAWARE RIVER PORT AUTHORITY and PAUL DRAYTON, Individually and as agent for the Delaware River Port Authority,

Defendants-Respondents.

Argued March 3, 1998 and by telephone on March 9, 1998 - Decided MAY 8 1998

Before Judges Long, Kleiner & Kimmelman.

On appeal from Superior Court of New Jersey, Law Division, Camden County.

Daniel M. Replogle, III, argued the cause for appellant Ballinger (DuBois, Sheehan, Hamilton & Levin, attorneys; Mr. Replogle, on the brief).

Mario A. Iavicoli argued the cause for appellant Ruggiero.

Scott F. Cooper argued the cause for respondents in both appeals (Blank Rome Comisky & McCauley, attorneys; Peter A. Gold, Mr. Cooper and Jennifer J. Platzkere of counsel; Mr. Gold, on the brief).

The opinion of the court was delivered by

LONG, P.J.A.D.

The primary issue addressed in these appeals, which we have consolidated for the purpose of this opinion, is whether the Delaware River Port Authority (DRPA), a bi-state agency created by compact between New Jersey and Pennsylvania is subject to the provisions of the New Jersey Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -8. Our review of this record, in light of relevant legal principles, has led us to conclude that the answer is "no." We have also concluded that the waiver provisions of CEPA cannot be invoked where, as here, plaintiffs lacked the right to make a CEPA claim. Therefore, the dismissal of Gregory Ruggiero's common law claims against DRPA was erroneous as was the refusal to allow Ralph Ballinger to amend his complaint to assert such claims.

A-5584-95T2

Ralph Ballinger began his employment as a police officer with DRPA in April of 1984 and worked there until his termination on February 8, 1995. On December 29, 1995, he filed a single count complaint alleging that he had been discharged from his employment by DRPA in violation of CEPA. More particularly, he claimed that he had been terminated in retaliation for disclosing information to

the New Jersey State Police concerning a criminal activity (theft) by DRPA employees. He later filed an amended complaint alleging that various individual employees of DRPA also violated CEPA. In lieu of an answer, DRPA and the individual employees filed a notice of motion to dismiss the complaint for failure to state a claim for relief, pursuant to R. 4:6-2(e). The trial judge granted the motion and dismissed the amended complaint because he concluded that DRPA is not subject to CEPA.

In the interim, Ballinger filed a notice of cross-motion to file a second amended complaint to include a common law retaliatory discharge claim against the individual employees.[1] On May 28, 1996, the judge denied Ballinger's cross-motion and entered a final judgment in favor of all defendants.

A-5622-95T2

Gregory Ruggiero began his employment at DRPA as a toll collector on the Benjamin Franklin Bridge around 1987 and worked there until his termination on December 30, 1994. During this time, Ruggiero was a member and officer of the International Union of Operating Engineers, Local 716 (Union). On December 13, 1994, along with other toll takers, he shut down his toll booth in order to address his concerns about asbestos in the tunnel which the toll takers had to use to gain access to the toll booths. Approximately 9 minutes after the shut down, the toll takers

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[1] Ballinger contends the proposed amendment was against both DRPA and individual employees. However, at argument on this motion, he appears to have limited his application to individual employees.

returned to their respective booths. All of the other toll takers involved in this incident were suspended for no more than three days without pay. Ruggiero, however, was terminated from employment.

Ruggiero filed a five count complaint on December 26, 1995 against DRPA asserting he was wrongfully discharged in violation of CEPA; that various DRPA employees violated CEPA by retaliating against him for the work stoppage to protest health and safety violations; that he was wrongfully discharged for his union activities; that he was wrongfully discharged in violation of public policy; and that defendants breached the collective bargaining agreement. Defendants filed a notice of motion to dismiss the complaint for failure to state a claim for relief, pursuant to R. 4:6-2(e). At the same time, an arbitration proceeding was instituted against DRPA pursuant to the labor agreement between Ruggiero's Union representative and DRPA. The issue presented at the arbitration proceeding, which was based on the same facts as this appeal, was whether Ruggiero was discharged in violation of the collective bargaining agreement. The arbitrator found Ruggiero was not discharged for good cause; that he should be awarded back pay and returned to his former position less a three day suspension without pay.

On April 26, 1996, the trial judge (a different judge from the one in Ballinger's case) heard oral argument on defendants' motion to dismiss. At the conclusion of argument, he granted defendants' motion in its entirety and dismissed Ruggiero's complaint with

prejudice. In so doing, he ruled that Ruggiero's claims regarding the collective bargaining agreement between DRPA and the Union were governed by the agreement and through the grievance procedure initiated by the Union. The judge also concluded that DRPA was not subject to a CEPA claim and dismissed the remaining elements of the complaint because they arose out of the same facts as the CEPA claim. Ballinger and Ruggiero appeal.

I

In reviewing a motion to dismiss made pursuant to R. 4:6-2(e), for failure to state a claim for relief, it is essential to canvass the complaint to determine whether "a cause of action can be found within its four corners." Van Natta Mechanical Corp. v. Di Staulo, 277 N.J. Super. 175, 180 (App. Div. 1994). In so doing, we must accept the facts asserted in the complaint as true. Craig v. Suburban Cablevision, Inc., 140 N.J. 623, 625-26 (1995). A reviewing court must "'search[] the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned from an obscure statement of claim, opportunity being given to amend if necessary.'" Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (quoting Di Cristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957)). Accordingly, all reasonable inferences are given to plaintiff. Ibid.; Van Natta Mech. Corp., supra, 277 N.J. Super. at 181. Courts should grant these motions with caution and in "the rarest instances." Printing Mart-Morristown, supra, 116 N.J. at 772; Van Natta Mech. Corp., supra, 277 N.J. Super. at 181.

A review of Ballinger's complaint reveals that both counts are based on CEPA as are the first two counts of Ruggiero's complaint. Defendants moved to dismiss these counts because CEPA is a unilaterally enacted state law which does not apply to DRPA, as a bi-state agency, nor to its agents or employees.

DRPA was created by an interstate compact between the Commonwealth of Pennsylvania and the State of New Jersey for the purpose of developing and maintaining bridges and port facilities between the two states. See N.J.S.A. 32:3-1 to - 3-18; 36 Pa. Cons. Stat. §§ 3503-3505 (1998). Among the powers granted to DRPA is the power "[t]o sue and be sued." N.J.S.A. 32:3-5(b). This grant is considered a waiver of sovereign immunity. See Bell v. Bell, 83 N.J. 417, 423 (1980). This agency, however, derives its powers, including its waiver of sovereign immunity, from joint legislation. Id. at 424. Accordingly, one state cannot modify this waiver of sovereign immunity by unilateral action. Ibid.

A series of cases have addressed the issue of the viability of suits against compact agencies. The New Jersey Supreme Court first addressed the applicability of a single-state's law to DRPA in Bell v. Bell, supra. The question presented was whether a person, injured by an unmarked girder on the railroad bridge, could bring a claim against DRPA under the New Jersey Tort Claims Act. Id. at 420-21. The court noted that DRPA theoretically falls under the definition of a "public entity" in the Tort Claims Act. Id. at 423. Nevertheless, the court determined the New Jersey Legislature "does not have the power to modify by unilateral action the waiver

of sovereign immunity set forth in the bi-state compact; yet that would be the result were the Tort Claims Act held to apply to DRPA." Id. at 424. In reaching its decision, Ball adopted our rationale in Delaware River & Bay Auth. v. New Jersey Pub. Employment Relations Comm'n., 112 N.J. Super. 160 (App. Div. 1970), aff'd o.b., 58 N.J. 388 (1971). There, we stated that to allow one state to regulate a bi-state agency would destroy the purpose of the agency. Id. at 166-66. (finding New Jersey could not unilaterally vest the Public Employment Relations Commission with jurisdiction over the Delaware River & Bay Authority in violation of its compact which made no provision for such jurisdiction).

In Eastern Paralyzed Veterans Ass'n v. City of Camden, 111 N.J. 389, 398 (1988), the Supreme Court applied the same rationale in refusing to hold DRPA subject to the New Jersey Uniform Construction Code and Law Against Discrimination. The court declared that a single-state's law is applicable to DRPA when the compact itself explicitly recognizes that it is subject to single-state jurisdiction. Id. at 399. However, the court noted that the bi-state agency may be "subject to complementary or parallel state legislation." Id. at 400. The court defined complementary and parallel legislative acts as those which are substantially similar in nature. Id. at 401. By way of example, the court said that employees of DRPA are required to observe traffic signals in New Jersey because both states have similar legislation. Id. at 400. However, "[s]ome showing of agreement by both states" that the laws are intended to apply to the agency is required. Id. at 402. If

the states do not have complementary legislation then the court must make additional findings to determine whether the bi-state agency impliedly consented to unilateral state regulation. Ibid. To hold otherwise, the court explained, would allow one state to impose "additional duties, powers or responsibilities" upon DRPA. Id. at 398.

The most recent Supreme Court decision on this issue is Int'l Union of Operating Eng'r v. Delaware River & Bay Auth., 147 N.J. 433, cert. denied, ___ U.S. ___, 118 S.Ct. 165, 139 L.Ed.2d 108 (1997) which involved a suit against the Delaware River & Bay Authority (DRBA), a bi-state agency created by compact between the states of New Jersey and Delaware. The court reaffirmed that a bi-state agency is subject to New Jersey law when 1) the compact explicitly provides for unilateral state action; 2) both states have complementary or parallel legislation; or 3) the bi-state agency impliedly consented to a single-state's jurisdiction. Id. at 446. Applying these principles, the court determined that DRBA was subject to New Jersey labor laws regarding collective bargaining for employees because Delaware has complementary, although not identical, legislation. Id. at 447.

The court did not delineate the differences, if any, between the two laws. See id. at 446-47. However, in arriving at its decision, it noted that the Delaware court had previously determined that its public employment legislation was not applicable to DRBA until New Jersey enacted similar legislation. Id. at 446. (citing, Delaware River & Bay Auth. v. Carella, 222

A.2d 794, 798-99 (Del. Ch. 1966)). The New Jersey labor law at issue in Int'l Union of Operating Eng'r constituted the subsequently adopted similar legislation. Id. at 446. Therefore, implicit in the Supreme Court's decision that New Jersey and Delaware labor laws are similar, even though not identical, is the finding that both state legislatures agreed, as a matter of public policy, that public employees should have the right of collective negotiation. Id. at 447. See also Bunk v. Port Authority of New York & New Jersey, 144 N.J. 176, 185-86 (determining that New York and New Jersey's provisions providing for workers' compensation benefits and disability benefits are parallel).

These principles have also been applied to bi-state agencies in other state and federal courts. For instance, in Nardi v. Delaware River Port Auth., 490 A.2d 949 (Pa. Commw. Ct. 1985), the plaintiff, who was injured during the course of his employment as a DRPA police officer, sought and was denied supplemental benefits under Pennsylvania Enforcement Officers Disability Benefits Law (Pennsylvania Benefits Law). Id. at 949-950. The court noted the general rule that additional duties, powers or responsibilities cannot be imposed unilaterally by one state on DRPA. Id. at 950. The court then compared section 1(a) of the Pennsylvania Benefits Law, 53 P.S. § 637(a), to the New Jersey counterpart, N.J.S.A. 32:3A-1, to determine whether they are substantially similar. Id. at 950-51. In concluding that they are not, the court noted that Pennsylvania's law states that an injured DRPA police officer "shall be paid ... his full salary ... until the disability

therefrom has ceased," while New Jersey's law provides that an injured DRPA employee "may" be paid his full salary for up to one year. Ibid. Nardi, however, argued he should receive benefits for a period of one year, contending New Jersey concurred to this extent with Pennsylvania. Id. at 950. The court rejected this contention, finding the two statutes distinct enough to refuse application of both laws as unilateral action. Id. at 952.

In Delaware River Port Authority v. Pennsylvania. State Ethics Comm., 585 A.2d 587 (Pa. Commw. Ct. 1991) the court determined that Pennsylvania's State Ethics Commission Act (Act) did not apply to DRPA, its officers or employees. The court opined that the compact did not expressly authorize the imposition of the Act's requirements, nor did Pennsylvania and New Jersey have substantially similar laws. Id. at 588. Finding the reasoning in Nardi applicable, the court held the imposition of the Act would result in additional duties and would constitute unilateral legislation. Id. at 589.

More recently, the court in King v. Port Auth. of New York & New Jersey, 909 F.Supp. 938 (D.N.J. 1995), aff'd, 106 F.3d 385 (3d Cir. 1996) discussed whether the rationale of the foregoing New Jersey cases was applicable to the Port Authority of New York and New Jersey (Port Authority). King filed suit against the Port Authority for discrimination in violation of New Jersey's Law Against Discrimination (LAD). Id. at 943. The court held that one state could not unilaterally impose a law against the Port Authority as a bi-state agency and that LAD is not applicable to

the Port Authority because New York has not concurrently adopted the same or similar legislation. Id. at 944-45.

In sum, DRPA can only be subject to CEPA if 1) its compact expressly authorizes unilateral action, 2) both New Jersey and Pennsylvania have complementary or parallel legislation or 3) DRPA has impliedly consented to the exercise of single-state jurisdiction. Int'l Union of Operating Eng'r, supra, 147 N.J. at 446.

We turn first to the compact in which there is no express authorization for unilateral action under New Jersey's CEPA law. This does not end the inquiry, however. Next, a comparison of New Jersey's CEPA statute, N.J.S.A. 34:19-1 to -8, to Pennsylvania's counterpart, 43 Pa. Cons. Stat. §1421 - §1428 (1988) (Whistleblower Law), must be made to determine whether they are complementary or parallel such that both legislatures intended for the laws to apply to DRPA. See Eastern Paralyzed Veteran Ass'n, supra, 111 N.J. at 400. Mindful of the principles enunciated in Eastern, in order to be complementary or parallel the court must find the legislative acts of both states to be "substantially similar" in nature. Id. at 401. Furthermore, the court must find some agreement between the states that CEPA and the Whistleblower Law are intended to apply to DRPA. Id. at 402.

Ruggiero and Ballinger argue the two statutes are substantially similar because both were enacted to prohibit employees from being discharged for whistleblowing; the intent of both laws is to confer a benefit on public employees; and the

remedies available are similar. Defendants counter there are substantial differences between the laws and thus they are not complementary or parallel.

Upon comparing the two laws, four basic differences appear. First, there is a difference in scope. CEPA encompasses both private and public employees whereas the Whistleblower Law applies only to public employers. See N.J.S.A. 34:19-2(a) and 43 Pa. Cons. Stat. § 1422 (1998). Hence, The New Jersey Legislature enacted a law which covers a broader range of employers and employees than the Whistleblower Law. This is an important difference although it does not affect this case.

The second difference is the time period for the filing of a claim. CEPA allows an employee to institute a civil action up to one year from the date of violation while the Whistleblower Law only allows a civil action to be brought within 180 days (or 6 months) from the date of violation. See N.J.S.A. 34:19-5 and 43 Pa. Cons. Stat. § 1424(a)(1998). Importantly, both Ruggiero's and Ballinger's claims would have been barred by the statute of limitations if brought under Pennsylvania law. Ruggiero was terminated on December 30, 1994 and filed a complaint on December 26, 1995, almost one year after the date of violation. Ballinger was terminated on February 8, 1995 and filed his complaint on December 29, 1995, approximately ten months after the date of violation. This discrepancy clearly demonstrates that the two states have not reached an agreement about the application of the whistleblower laws. It also eliminates the need for us to address

the "least common denominator" theory of applicability rejected in Mardi because application of the shorter Pennsylvania statute of limitations would result in an automatic dismissal of both complaints.

A third difference between the statutes is that CEPA allows for the recovery of punitive damages while the Whistleblower Law does not. See N.J.S.A. 34:19-5(f) and 43 Pa. Cons. Stat. § 1426 (1998). See also Banking v. City of Philadelphia, 963 F.Supp. 463, 478-79 (E.D. Pa. 1997) (holding the Whistleblower Law does not extend punitive damages to plaintiffs, distinguishing the case, Feldman v. Philadelphia Housing Auth., 43 F.3d 823 (3d Cir. 1994), where the court allowed punitive damages to be awarded for a general verdict, and not for a whistleblower claim). Finally, CEPA provides for a trial by jury while the Whistleblower Law does not. See N.J.S.A. 34:19-5 and 43 Pa. Cons. Stat. § 1424 (1998).

These differences are not insignificant and they fully support the conclusion that CEPA and the Whistleblower Law are neither complementary nor parallel. A DRPA employee suing under CEPA could wait a year to file his or her claim and would be entitled to a jury trial and punitive damages. The same employee suing under the Pennsylvania law would have to file within 6 months and then would only be entitled to a bench trial for compensatory damages. In other words, the employee's remedy would depend on which state law he or she invoked. This demonstrates that New Jersey and Pennsylvania are not in agreement over the applicability of CEPA or the Whistleblower Law to DRPA. Further, it is not clear that

either state's legislature intended to confer this benefit upon DRPA employees.

The last issue is whether DRPA has impliedly consented to the exercise of single-state jurisdiction. Implied consent is found when either DRPA voluntarily cooperates with New Jersey in the exercise of jurisdiction or agrees to meet the requirements of CEPA. Int'l Union of Operating Eng'r, supra, 147 N.J. at 445. Ruggiero and Ballinger argue that implied consent can be found based upon 1) the "to sue and be sued" provision in DRPA's compact which in their opinion is a waiver of sovereign immunity that generally authorizes suits against it; 2) the provision in its compact which states that DRPA may have duties "imposed upon it from time to time by the action of either State concurred in by legislation of the other," pursuant to N.J.S.A. 32:3-5(q); and 3) that DRPA falls within the definition of an employer in N.J.S.A. 34:19-2(a) of CEPA.

These arguments are unavailing. As defendants point out, the compact provision "to sue and be sued" does not provide either state the right to unilaterally impose liability upon DRPA. Rather, as stated in Ball, supra, DRPA derives its powers, including its waiver of sovereign immunity, from joint legislation. Ball, supra, 83 N.J. at 424. Therefore, one state's legislature "does not have the power to modify by unilateral action the waiver of sovereign immunity." Ibid.

Plaintiffs' contention that DRPA consented to suit under N.J.S.A. 32:3-5(q) is also incorrect. This provision does not

state that DRPA agrees to meet the requirements of CEPA. Rather, it recognizes that DRPA will be subject to legislation by either state where both states concur that the legislation will apply. There is no evidence showing a concurrence between New Jersey and Pennsylvania that CEPA will apply to DRPA.

Finally, plaintiffs' argument that DRPA is subject to CEPA because it falls within the definition of employer in the statute is unavailing. "Employer" is partially defined as "any authority, commission, or board or any other agency" of the State. See N.J.S.A. 34:19-2a. While DRPA may arguably fall within this definition, all that this connotes is that DRPA could be subject to CEPA if the concurrence of Pennsylvania or the consent of DRPA had been established. See, e.g., Bunk v. Port Authority of New York & New Jersey, supra, 144 N.J. at 183 (noting that New York and New Jersey agreed to waive the Port Authority's sovereign immunity by consenting to worker compensation suits).

Because there is no express authority for unilateral action in the compact, New Jersey and Pennsylvania have not enacted complementary or parallel legislation and DRPA has not impliedly consented to the exercise of single-state jurisdiction, CEPA is not applicable to DRPA.

II

Plaintiffs also contend that it was error to dismiss the CEPA charge brought against the individual employees of DRPA, arguing they are subject to a CEPA suit independent of their employer. They base this contention on Printing Mart-Morristown v. Sharp

Elecs. Corp., supra, which holds that individual employees can be liable for torts committed while at work. However, neither plaintiff alleges that the DRPA employees acted outside of the scope of their employment. Because the employees were at all times acting within their official capacity, the same analysis and conclusion as to their employer applies to them. Accordingly, because CEPA is not applicable to DRPA itself, it is also inapplicable to its employees.

III

Ballinger contends it was error to refuse to allow him to amend his complaint to assert a common law action for retaliatory discharge against the individual employees. Ruggiero likewise claims entitlement to maintain his common law claims for retaliatory discharge in violation of public policy and for union activities. However, the trial judges ruled that these employees waived their right to pursue both statutory and common law retaliatory discharge causes of action upon asserting a CEPA claim. See Young v. Schering Corp., 141 N.J. 16 (1995); Mehlman v. Mobil Oil Corp., 291 N.J. Super. 98 (App. Div.), aff'd, ___ N.J. ___ (1998); Catalane v. Gilian Instrument Corp., 271 N.J. Super. 476 (App. Div.), certif. denied, 136 N.J. 298 (1994). It is here that we part company from the trial court rulings.

The CEPA waiver provision, N.J.S.A. 34:19-8, states:

> Nothing in this act shall be deemed to diminish the rights, privileges, or remedies of any employee under any other federal or State law or regulation or under any collective bargaining agreement or employment contract; except that the institution of an action in accordance with this act shall be

> deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, State law, rule or regulation or under the common law.

The purpose of the provision, as interpreted by the Supreme Court in Young, supra, is to prevent multiple or duplicative claims on retaliatory discharge. The court held:

> [O]nce a CEPA claim is "instituted," any rights or claims for retaliatory discharge based on a contract of employment; collective bargaining agreement; State law, whether its origin is the Legislature, the courts, the common law or rules of court; or regulations or decisions based on statutory authority, are all waived.
>
> [Young, supra, 141 N.J. at 29.]

Young however left open the question of "whether the statutory waiver is applicable if the CEPA claim is withdrawn or otherwise concluded prior to judgment on the merits." Id. at 32. In Cruseo v. Oakland Care Ctr., Inc., 305 N.J. Super. 605 (App. Div. 1997) we addressed this issue directly. There we held that a former employee's assertion of a CEPA claim in a complaint did not bar her from bringing a common law wrongful discharge claim in a case in which the CEPA claim was barred by CEPA's statute of limitations. N.J.S.A. 34:19-5 and 34:19-8. We said:

> Plaintiff was, from the outset, barred by reason of the passage of time, i.e., the one-year statutory limitation in N.J.S.A. 34:19-5, from litigating her rights under CEPA. Because plaintiff lacked the right to make the CEPA claim after the statutory time limit had passed, it was illogical to view her as barred by the effect of asserting it. There is nothing in the whole of CEPA that can be taken to suggest a legislative intendment to extinguish other claims of employment right. Indeed, the introductory language of the

> waiver provision itself belies any such purpose: "Nothing in this act shall be deemed to diminish the rights, privileges, or remedies of any employee under any other federal or State law or regulation or under any collective bargaining agreement or employment contract[.]" N.J.S.A. 34:19-8. the provision goes on to prescribe an exception to this general design by way of merely requiring a plaintiff, effectively, to make an election of available remedies. Young v. Schering Corp., supra, 141 N.J. at 27, 660 A.2d 1153. It is, in sum, quite obvious that an employee who is barred from making a CEPA claim has no remedy under the Act and cannot, therefore, be seen to have any options from which to elect. See ibid. Thus, when this plaintiff erroneously pled an unavailable CEPA claim, no bar could attach in respect of any other available claims of wrongful discharge. The second count, as originally formulated, had no more legal effect than a smudge on the face of the complaint.
>
> [Crusco, supra, 305 N.J. Super. at 612-13.]

We are satisfied that this is the analysis which is applicable here. From the outset, Ballinger and Ruggiero were barred from pursuing statutory CEPA claims against DRPA because the compact does not authorize unilateral action; the legislation of New Jersey and Pennsylvania is not complementary or parallel, and DRPA has not impliedly consented to the exercise of single-state jurisdiction. Nothing in CEPA suggests to us that, in such circumstances the Legislature intended to bar plaintiffs from pursuing their common law remedies. Essentially, these plaintiffs, like Crusco, erroneously pled an unavailable CEPA claim, and thus no bar attaches in respect of other available claims of wrongful discharge. That said, the dismissal of Counts 3, 4 and 5 of Ruggiero's complaint was error and must be reversed.

Likewise, R. 4:9-1 provides that a party may amend a pleading "by leave of court which shall be freely given in the interests of justice." A motion for leave to amend should be liberally granted. Fisher v. Yates, 270 N.J. Super. 458, 467 (App. Div. 1994). While this is a discretionary matter for the trial judge (see ibid.), the judge here did not exercise discretion, but relied on the CEPA waiver provision to deny Ballinger's amendment to add common law claims against DRPA's employees. That amendment should have been allowed.

We affirm the dismissal of plaintiffs' CEPA claims. We reverse the dismissal of the remaining counts of Ruggiero's complaint. We reverse the denial of Ballinger's motion to amend his complaint to add common law claims. Both cases should be handled by a single judge who should be chosen by the Assignment Judge of Camden County. Naturally, a painstaking comparison of the common law of New Jersey and Pennsylvania, like the one we engaged in as to CEPA and the Whistleblower Law, will have to be undertaken if DRPA contends that it is immune from such claims.

Affirmed in part; reversed and remanded in part.

I hereby certify that the foregoing is a true copy of the original on file in my office.

Clerk

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LISA D. CLARK,	:	
Plaintiff,	:	Civil Action No. 93-5162 (JBS)
v.	:	
THE STATE OF NEW JERSEY, THE DELAWARE RIVER PORT AUTHORITY, JOHN T. REIM, JAMES PORECCA,	:	
Defendants.	:	

ORIGINAL FILED
FEB 27 1996
WILLIAM T. WALSH, CLERK

ORDER

This matter having come before the court upon the motion of defendant Porecca for summary judgment and the motion of defendants Reim and DRPA for partial summary judgment;* and the court having considered the submissions of the parties in connection with these motions; and for the reasons expressed in the Opinion of today's date; and for good cause shown,

IT IS this 27th day of February, 1996,

ORDERED that defendant Porecca's motion for summary judgment be and hereby is GRANTED; and it is

FURTHER ORDERED that summary judgment be and hereby is GRANTED to all defendants as to the NJLAD claims; and it is

FURTHER ORDERED that defendant Reim's motion for summary judgment as to the Title VII claims be and hereby is GRANTED; and it is

* Although the motion of defendants DRPA and Reim was styled as a motion for summary judgment, it did not address Counts 4, 5, and 6 and this court expresses no view as to the viability of those claims.

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LISA D. CLARK,	:	
Plaintiff,	:	Civil Action No. 93-5162 (JBS)
v.	:	OPINION
THE STATE OF NEW JERSEY, THE DELAWARE RIVER PORT AUTHORITY, JOHN T. REIM, JAMES PORECCA,	:	
Defendants.	:	

ORIGINAL FILED
FEB 2 7 1996
WILLIAM T. WALSH, CLERK

APPEARANCES:

Mary Cay Trace, Esq.
728 Black Horse Pike
Suite F-3
Turnersville, NJ 08012
Attorney for Plaintiff

Warren J. Borish, Esq.
Charles T. Joyce, Esq.
Spear Wilderman, Borish, Endy, Spear and Runckel
260 South Broad Street
Suite 1500
Philadelphia, PA 19102
Attorneys for Defendant Porecca

William Tambussi, Esq.
Brown & Connery
360 Haddon Avenue
P.O. Box 539
Westmon, NJ 08108
Attorney for Defendants Delaware River Port Authority and John T. Reim

SIMANDLE, District Judge:

Presently before the court are the motions by defendant James Porecca for summary judgment and by defendants Delaware River Port

Authority ("DRPA") and John Reim for partial summary judgment pursuant to Fed. R. Civ. P. 56.[1] For the reasons discussed herein, we will grant defendant Porecca's motion for summary judgment, and will grant in part and deny in part the motion for summary judgment by defendants DRPA and Reim.

Background

Plaintiff Lisa D. Clark has brought this action against the defendants for alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), et seq., and the New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. 10:5-1, et seq., as well as for the intentional and negligent infliction of emotional distress. She has sued John Reim individually for intentional and negligent infliction of emotional distress. She also has sued James Porecca individually for defamation.

Ms. Clark is a police officer employed by the DRPA. On April 2, 1992, she notified the DRPA that she was pregnant. (Pl. Br. at 2; Ex. B Report of Physical Status to Captain Ballinger, dated April 2, 1992). On or about April 22, 1992, Officer Jerome Jones told Ms. Clark that defendant Porecca had made comments about her.

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[1] We note that defendants DRPA and Reim did not address Counts Four, Five and Six of the complaint, which allege intentional and negligent infliction of emotional distress by the defendants in general as well as intentional and negligent infliction of emotional distress by defendant Reim individually. Ms. Clark stated in her deposition that, with the exceptions of defendant Porecca's allegedly defamatory comments, these counts did not apply to defendant Porecca. (Clark 9/12/94 Dep. at 11). Although we cannot reach this issue now, we welcome motion practice concerning whether or not Workers' Compensation potentially bars any allegations of tortious conduct against defendants DRPA and Reim.

(Id.). Ms. Clark filed a grievance regarding these comments and afterwards claims that she became the focus of a telephone abuse investigation. (Id. at 3; Ex. D, Clark 7/25/94 Dep. at 88-94). In June 1993, Ms. Clark filed a charges with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination and harassment due to her pregnancy.[2] (Df DRPA and Reim Br. at 2; Ex. B EEOC Form 5). DRPA submitted a response to the EEOC questionnaire in July 1993. (Id.; Ex. C Response to Questionnaire Charge Number 170930308). EEOC conducted an investigation and determined that DRPA had not discriminated against or harassed Ms.

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[2] On her Charge of Discrimination Form, she described her complaints as follows:

I. Since April 2, 1992, I have been harassed due to my pregnancy. I have been employed by the Delaware River Port Authority (DRPA) as a Police Officer since 1991.

II. On April 2, 1992, I informed Captain Ballinger (male) Supervisor, that I was pregnant.

III. I believe that I have been discriminated against because of my pregnancy in that :

1. On or about April 28, 1992, I received telephone calls from fellow police officers advising my that Officer Porecca (male) told other officers that I was pregnant and that he was getting a line-up together to find out who the father was.

2. After I informed the DRPA of my pregnancy, I was required to dress in uniform even thought there was no maternity uniform bullet-proof vest shoulder holster to accommodate my condition. When I dressed in civilian clothes due to my condition, I was questioned by Captain Ballinger and other supervisors about my civilian attire.

3. I received continual harassment during my pregnancy from my fellow police officers. Some officers in my department continually commented about how they were forced to pick up the slack for me.

4. During my pregnancy my personal telephone calls were investigated; however, to my belief no other police officer had his person[]al telephone calls investigated.

(Df. DRPA and Reim Br., Ex. B, EEOC Form 5, Charge of Discrimination at 1-2). Clearly, at this point, Ms. Clark alleged that her pregnancy was the basis for the discrimination and harassment she faced.

Clark. (Id.). On November 24, 1993, Ms. Clark filed a complaint against the DRPA, Mr. Reim, Mr. Porecca, and the State of New Jersey.

In her complaint, Ms. Clark alleges that the defendants "did knowingly, intentionally and negligently harass, discriminate against and treat Plaintiff adversely on the basis of her sex and status as a pregnant woman with respect to the terms or conditions of her employment."[1] (Compl. at ¶ 6). Ms. Clark claims that the defendants did not have policies in effect regarding pregnant employees; failed to treat her the same as other non-pregnant employees for all employee-related purposes; refused to issue her properly fitting bullet proof vest and uniform; subjected her to routine questioning regarding her attire after they permitted her to wear civilian clothing; instructed other employees to report on her attire on a daily basis; discriminated against her by instructing her on how to dress and giving her work assignments that secluded her from the public eye; made disparaging comments about her attire and her pregnancy; harassed her by repeatedly contacting her physician for information concerning her pregnancy; denied her overtime pay; assigned her only to light duty despite

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[1] Although Ms. Clark alleges discrimination based on both gender and pregnancy is this statement, her EEOC complaint only describes discrimination based on pregnancy and, with two exceptions, the specific instances she alleges in her complaint revolve around pregnancy related issues. The two exceptions are the lack of storage space for female employees to store their weapons and uniforms and the lack of separate locker rooms and changing facilities for female employees. Therefore we will treat her complaint as alleging gender discrimination for these two instances and discrimination based upon her pregnancy for the rest of the instances.

physician's clearance to perform all normal duties; further discriminated against her in work assignments by refusing her work assignments offered to other light duty employees; harassed her by investigating her phone calls; improperly handled her report of harassment against Mr. Porecca; arbitrarily dismissed her from roll call; told other employees not to speak with her; refused to reassign her to another location when paint fumes caused her nausea and she worried about potential harm to her unborn baby; refused her police transportation between bridges even though such transportation was regularly afforded to civilians and employees; harassed her by phoning her work locations to ensure that she was performing her duties; required her to "treat" with the company doctor despite her physician's orders of complete bed rest after a fall she experienced at work, this fall allegedly jeopardized her pregnancy and eventually led to premature labor; withheld paychecks; refused or delayed police transportation that was normally given to employees and civilians; refused to allow a fellow employee to transport her to a hospital when she experienced premature labor; required fellow employees to report any time she was seen on police premises; improperly terminated her "injury on duty" status; improperly denied her grievance regarding the termination of her "injury on duty" status and subsequent loss of pay and/or work related benefits; refused her and other female employees separate locker room and changing facilities; did not provide storage facilities to female employees for weapons and uniforms. (Compl. at ¶¶ 7-33).

Ms. Clark further alleges that Defendant Porecca made defamatory remarks about her pregnancy and reputation to third parties. (Compl. at ¶ 78). In addition, the plaintiff alleges that Defendant Reim harassed her; instructed her to dress in "nice maternity dresses or skirts;" instructed subordinates to investigate frequently made phone calls to see if she made them; told subordinates to inform him every time she was seen on police premises; falsely informed DRPA personnel and legal offices that she requested light duty; instructed subordinate to deliver correspondence from him to her home while she was off duty and recuperating from childbirth; interfered with her reputation and ability to perform her work; improperly terminated her "injury on duty" status without following established procedure; improperly handled and denied the grievance she filed concerning that termination; and failed to afford her the same employment benefits and opportunities given to other employees regarding light duty assignments and "injury on duty" status. (Id. at ¶¶ 57-73).

Discussion

I. Summary Judgment Standard

The standard for granting summary judgment is a stringent one. A court may grant summary judgment only when the materials of record "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). See Hersh v. Allen Prods. Co., 789 F.2d 230, 232 (3d Cir. 1986); Lang v. New York Life Ins. Co., 721

F.2d 118, 119 (3d Cir. 1983). A dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact is "material" only if it might affect the outcome of the suit under the applicable rule of law. Id. Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment. Id.

In deciding whether there is a disputed issue of material fact the court must view all doubt in favor of the non-moving party. Meyer v. Riegel Prods. Corp., 720 F.2d 303, 307 n.2 (3d Cir. 1983), cert. dismissed, 465 U.S. 1091 (1984); Smith v. Pittsburgh Gage & Supply Co., 464 F.2d 870, 874 (3d Cir. 1972). The threshold inquiry is whether there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

The moving party always bears the initial burden of showing that no genuine issue of material fact exists, regardless of which party ultimately would have the burden of persuasion at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Jalil v. Avdel Corp., 873 F.2d 701, 706 (3d Cir. 1989), cert. denied, 493 U.S. 1023 (1990). However,

> the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that part will bear the burden if proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof

concerning an essential element of the nonmoving party's case necessarily renders other facts immaterial.

Celotex, 477 U.S. at 322-323. In such situations, "the burden on the moving party may be discharged by 'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Id. at 325.

The non-moving party, here, the plaintiff, "may not rest upon the mere allegations or denials of" its pleading in order to show the existence of a genuine issue. Fed. R. Civ. P. 56(e). It must do more than rely only "upon bare assertions, conclusory allegations or suspicions." Gans v. Mundy, 762 F.2d 338, 341 (3d Cir.), cert. denied, 474 U.S. 1010 (1985) (citation omitted). See also Liberty Lobby, 477 U.S. at 249-50; Celotex, 477 U.S. at 324-25. Once the moving party has carried its burden of establishing the absence of a genuine issue of material fact, "its opponent must do more than simply show that there is some metaphysical doubt as to material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

In short, Supreme Court decisions mandate that "a motion for summary judgment must be granted unless the party opposing the motion can produce evidence which, when considered in light of that party's burden of proof at trial, could be the basis for a jury finding in that party's favor." J.E. Mamiye & Sons, Inc. v. Fidelity Bank, 813 F.2d 610, 618 (3d Cir. 1987) (Becker, J., concurring) (citing Anderson, 477 U.S. 242, and Celotex, 477 U.S. 317). Thus, if the non-movant's evidence is merely "colorable" or is "not significantly probative," the court may grant summary

judgment. Anderson, 477 U.S. at 249-50. However, when determining whether summary judgment is appropriate, "[t]he role of the trial judge 'is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial.'" Weldon, 896 F.2d at 797 (quoting Anderson, 477 U.S. 242, 248).

II. NJLAD Claims

The defendants argue that because the DRPA is not subject to the NJLAD, the plaintiff's NJLAD claims must be dismissed. (Df. DRPA and Reim Br. at 27). The defendants allege that they made a motion to dismiss these claims and that Ms. Clark did not oppose the motion and agreed to dismiss her NJLAD claims. Although we do not find any evidence that the defendants filed the motion or that the court reached a decision concerning the alleged motion to dismiss, we do agree with the defendants' assertion that the NJLAD does not apply to them and that NJLAD claims against the DRPA and its employees must be dismissed.

The defendants correctly argue that the DRPA is an instrumentality of both Pennsylvania and New Jersey and therefore not subject to NJLAD. (Id. at 27-28) (citing Eick v. Delaware River Port Auth., No. 91 Civ. 2707 (D.N.J. Jan. 16, 1992) (holding that DRPA is not subject to NJLAD)). As a bi-state agency,[4] a

[4] The DRPA was created with the approval of Congress by an Interstate compact between New Jersey and Pennsylvania. See N.J. Stat. Ann. 32:3-2; Eastern Paralyzed Veterans v. Camden, 111 N.J. 389 (1988).

public corporate instrumentality of both New Jersey and Pennsylvania, the DRPA derives its power solely from a compact between the respective States and neither state may "unilaterally impose additional duties, powers, or responsibilities upon the Authority." Eastern Paralyzed Veterans v. Camden, 111 N.J. 389, 398 (1988) (quoting Nardi v. Delaware River Port Authority, 88 Pa. Commw. 558, 560). Furthermore, New Jersey and Pennsylvania exercise jurisdiction and authority over the DRPA only to the extent agreed upon in the compact or through complementary state legislation.[3] Eastern Paralyzed, 111 N.J. at 398; Bell v. Bell, 83 N.J. 417 (1980) (New Jersey cannot unilaterally exercise jurisdiction over DRPA without agreement of Pennsylvania because the compact does not provide for such jurisdiction); Delaware River Bay Auth. v. New Jersey Pub. Employment Relations Comm., 112 N.J. Super. 160, 165-66 (App. Div. 1970) (single state cannot enact laws regarding bi-state agency unless both states expressly agree)). The defendants argue that the compact which created the DRPA does not provide for sex discrimination claims and, therefore, they cannot be subject to NJLAD. (Id.).

We find that the NJLAD does not apply to the DRPA or its employees. See Eastern Paralyzed, 111 N.J. at 400 (holding that the trial court erred when it ruled that the New Jersey Department of Community Affairs could impose the obligations set forth in

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[3] Because the NJLAD and the Pennsylvania Human Relations Act, 43 P.S., § 951 et seq, significantly differ, we cannot consider them parallel or complementary legislation. As a result, we cannot enforce either against the DPRA.

NJLAD upon the DRPA). Consequently, we will dismiss the plaintiff's NJLAD claims against the defendants.

III. Claims Against Defendant Porecca

Defendant Porecca argues that he is entitled to summary judgment because Ms. Clark's Title VII and defamation claims are not viable as a matter of law. We agree.

The sole basis of Ms. Clark's allegations against defendant Porecca is a conversation Mr. Porecca had with Officer Jerome Jones, a friend of the plaintiff's, on April 22, 1992.[6] Defendant Porecca claims that in a joking manner he said something along the lines of "congratulations, Lisa Clark's [sic] pregnant and you're the father" because he had heard rumors that Mr. Jones and Ms. Clark were dating. (Porecca Dep. at 22-23). Ms. Clark, however, alleges that defendant Porecca said that she likes to party all the time, sleeps around, does not know who is the father of her baby, and that he was going to put together a line-up of patrolmen to determine who is the baby's father. (Clark Dep. at 9).

Ms. Clark learned of the defendant's statement from Mr. Jones and called Police Chief John Reim to complain about Mr. Porecca's

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[6] Ms. Clark admitted that this conversation constituted the sole basis for her Title VII claim against defendant Porecca. (Clark dep. at 10-11). Other than the possibility of her unborn baby being affected by stress caused by the mental anguish of hearing about Mr. Porecca's statements, (id. at 18-19), Ms. Clark stated that the specific allegations made in her complaint do not apply to Mr. Porecca. (Id. at 11-22). She also said that the counts of her complaint alleging intentional and negligent infliction of emotion distress did not apply to Mr. Porecca. (Id. at 19-22).

comments that same day. (Id. at 24). On March 24, 1993, after an investigation, Mr. Porecca apologized to Ms. Clark in person. (Id. at 30-33; Porecca dep. 25-26). Ms. Clark also stated that Mr. Porecca had no further contact with her and, to her knowledge, made no further derogatory comments about her during the time between the March meeting and the filing of the complaint. (Clark Dep. at 33-34). On December 3, 1993, Mr. Porecca wrote a letter to Chief Reim explaining the statement he made and the context in which he made it.[7] (Porecca Dep. at 27-30).

Ms. Clark admitted during her deposition that defendant Porecca does not supervise her, cannot discipline her, does not give her work assignments, and had not worked on an assignment with her prior to April, 1992. (Clark 9/12/94 Dep. at 6-7). Based on the plaintiff's and defendant Porecca's testimony we conclude that Mr. Porecca does not hold a position of authority over the plaintiff and that instead he is one of her co-workers.

A. Title VII Claims

Defendant Porecca argues that because he is not a supervisory employee the plaintiff cannot sue him under Title VII. (Df. Porecca Br. at 6-7) (citing Guyette v. Stauffer Chemical Co., 518 F. Supp. 521, 526 (D.N.J. 1981) ("if defendant Meszaros is a non-supervisory employee of Stauffer, he is not subject to liability

[7] In her deposition the plaintiff acknowledged that the Mr. Porecca wrote this letter after she filed the complaint and that her defamation claims only concern the alleged conversation. (Clark 9/12/94 Dep. at 9-10, 34).

under Title VII"); Crawford v. West Jersey Health Systems, 847 F. Supp. 1232, 1236, n.5 (D.N.J. 1994) (a Title VII claim cannot be stated against a non-supervisory employee)). We agree.

Mr. Porecca is a co-employee of the plaintiff, he does not supervise her and has no authority over her. Consequently, Ms. Clark cannot establish the employer-employee relationship that is necessary to an employment discrimination case under Title VII. Non-supervisory employees are not employers or agents and do not fall within the meaning of "employer" as this term is used in Title VII; consequently, non-supervisory employees are not subject to liability under Title VII. See Guyette, 518 F. Supp. at 526; Crawford, 847 F. Supp. at 1236, n. 5; Harvey v. Blake, 913 F.2d 226, 228 (5th Cir. 1990); Henson v. City of Dundee, 682 F.2d 897, 902, n.6 (11th Cir. 1982); Dom v. Jersey Printing Co., Inc., 871 F. Supp. 732, 737 (D.N.J. 1994); Duva v. Bridgeport Textron, 632 F. Supp. 880, 882 (E.D.Pa. 1985). Moreover, the Third Circuit recently held that individual employees cannot be sued under Title VII. Sheridan v. E.I. Dupont de Nemours and Co., 1996 WL 36283, *13 (3d Cir. Jan. 31, 1996).

The plaintiff has not alleged that Mr. Porecca was a supervisory employee nor has she responded in any way to Mr. Porecca's arguments. Because the Third Circuit has held that individual employees cannot be sued under Title VII, we will grant Mr. Porecca summary judgment as to the plaintiff's Title VII claims.

B. Defamation Claims

Defendant Porecca asserts that Ms. Clark's defamation allegations are barred by statute of limitations. (Df. Br. at 8) (citing N.J.S.A. § 2A:14-3). We agree.

The alleged comments that the plaintiff complains of were spoken, i.e., published, on April 22, 1992, but Ms. Clark did not file her complaint until November 24, 1993. Pursuant to N.J.S.A. 2A:14-3, an "action at law for libel or slander shall be commenced within 1 year next after the publication of the alleged libel or slander." Consequently, to be timely, Ms. Clark would have needed to file a complaint by April 22, 1993. Ms. Clark has not claimed that the statute was tolled or that any extenuating circumstances existed; in fact she has not responded in any way to Mr. Porecca's argument. We find that Ms. Clark's defamation allegations are barred by the statute of limitations.

IV. Title VII Claims Against Defendant Reim

As mentioned above, the Third Circuit has held that a plaintiff cannot bring Title VII claims against an individual employee. Sheridan, 1996 WL 36283 at *13. Consequently, we must grant defendant Reim summary judgment for all Ms. Clark's claims of harassment and discrimination under Title VII.

V. Title VII Claims Against Defendant DRPA

Defendant DRPA argues that Ms. Clark has not presented a prima facie case of discrimination or sexual harassment. (Df. DRPA and

Reim Br. at 5). DRPA contends that she has not proven that she faced discrimination due to her pregnancy or that DRPA created a hostile work environment. (Id. at 7). The plaintiff, however, contends that she has established both discrimination and harassment and that the defendant's arguments are premature because they have not submitted to discovery. (Pl. Br. at 5).

Section 2000e(k) of Title VII defines employment discrimination based upon pregnancy as discrimination because of or on the basis of sex. Moreover, the "Supreme Court has recognized that Title VII's protection is not limited to 'economic' or 'tangible' discrimination, such as the denial or loss of a job or promotion. It is violated as well by a 'work environment abusive to employees because of their race, gender, religion, or national origin.'" West v. Philadelphia Elec. Co., 45 F.3d 744 (3d Cir. 1995) (quoting Harris v. Forklift Systems, Inc., ___ U.S. ___, _ , 114 S.Ct. 367, 371 (1993)).

A. Burdens of Proof Under Title VII

A plaintiff may establish her case with direct evidence. Direct evidence is "'smoking gun' evidence of intentional discrimination." Lockhart v. Westinghouse Credit Corp., 879 F.2d 43, 48 (3d Cir. 1989). It is evidence which "upon its face, indicates that age or a forbidden criterion was identified with an aggrieved employee or a member of his class; it is evidence which does not require an inference to indicate a discriminatory motivation." Castle v. Sangamo Weston, Inc., 837 F.2d 1550, 1558,

n.13 (11th Cir. 1988). See also Perry v. Prudential-Bache Securities, Inc., 738 F. Supp. 843, 851 (D.N.J. 1989), aff'd, 904 F.2d 696 (3d Cir.), cert. denied, 498 U.S. 958 (1990); Randle v. LaSalle Telecommunications, Inc., 876 F.2d 563, 569 (7th Cir. 1989) ("[D]irect evidence, if believed by the trier of fact, will prove the particular fact in question without reliance upon inference or presumption. . . . '[D]irect evidence' must not only speak directly to the issue of discriminatory intent, it must also relate to the specific employment decision in question.").

But because direct, "smoking gun" evidence is rarely available in employment discrimination cases, the Supreme Court has set forth a special method of proof based upon presumptions and shifting burdens of production.[1] Id. This now familiar three-prong framework was first articulated by the Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Its viability was later reaffirmed by the Court in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981):

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[1] We note, however, that "the McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination." Hill v. Bethlehem Steel Corp., 729 F. Supp. 1071, 1073 n.3 (E.D. Pa. 1989), aff'd, 902 F.2d 1560 (1990) (quoting Trans World Airlines v. Thurston, 469 U.S. 111, 121 (1985)); see also Weldon v. Kraft, Inc., 896 F.2d 793, 796 (3d Cir. 1990) (recognizing that "[a]bsent direct evidence, [a] plaintiff may prove intent through the framework established in McDonnell Douglas Corp. v. Green ... and refined in Texas Department of Community Affairs v. Burdine"); Lindsey v. American Cast Iron Pipe Co., 772 F.2d 799, 801-02 (11th Cir. 1985) (holding that "in cases in which there is direct evidence that discrimination was a significant factor in an employment decision, the allocation of proof prescribed in McDonnell Douglas does not apply"). Since plaintiff herein presents no direct, "smoking gun," evidence of discrimination, this court will consider the pronouncements of the McDonnell Douglas/Burdine framework.

> First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Id. at 252-53 (citations omitted); see also Bennun v. Rutgers State University, 941 F.2d 154, 170 (3d Cir. 1991), cert. denied, 502 U.S. 1066 (1992) (discussing the alternating burdens of proof in Title VII discrimination cases); Siegel v. Alpha Wire Corp., 894 F.2d 50, 52-53 (3d Cir.), cert. denied, 496 U.S. 906 (1990) (discussing the analytical framework for ADEA claims). The McDonnell Douglas/Burdine test is "designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'" Trans World Airlines v. Thurston, 469 U.S. 111, 121 (1985) (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979)). This method of indirect proof permits a plaintiff to rely, in the absence of direct evidence, on a presumption that actions such as those taken against Ms. Clark "if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Id. (quoting Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978) (involving claims of race discrimination)).

If plaintiff establishes a prima facie case, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the employment decision. Burdine, 450

U.S. at 255. "A satisfactory explanation [by the defendant] dispels the inference of discrimination arising from the plaintiff's initial evidence." Id. Once the defendant produces evidence which would allow a trier of fact to rationally conclude that the employment decision had not been motivated by discriminatory animus, "the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity." Id. The ultimate burden of persuasion remains with the plaintiff, who then must prove by a preponderance of the evidence that the reasons asserted by the defendant were a pretext for discrimination, i.e., that the proffered reason is merely a fabricated justification for the discriminatory conduct. Id. at 256. This may be accomplished either directly, by showing that a discriminatory reason more likely motivated the employer, or indirectly, by showing that the asserted reason is unworthy of credence. Id. The plaintiff's initial evidence may be considered by the trier of fact when determining whether the plaintiff has met the above standard. Id. at 255 n.10.

A plaintiff need not carry this burden, however, to withstand a motion for summary judgment. Weldon, 896 F.2d 793, 797 (3d Cir. 1990); Siegel, 894 F.2d at 53. In other words, a plaintiff is not required to produce evidence which "necessarily leads to the conclusion that the employer did act for discriminatory reasons." Chipollini, 814 F.2d at 900 (emphasis in original). Instead, the moving party, even with these shifting burdens, still bears the burden of persuasion on summary judgment. "The employer must

persuade the court that even if all of the inferences which could reasonably be drawn from the evidentiary materials of record were viewed in the light most favorable to [the plaintiff], no reasonable jury could find in his favor." Sorba v. Pennsylvania Drilling Co., Inc., 821 F.2d 200, 203 (3d Cir. 1987), cert. denied, 484 U.S. 1019 (1988).

"[T]he defendant employer must show that the plaintiff will be unable to introduce either direct evidence of a purpose to discriminate, or indirect evidence of that purpose by showing that the proffered reason is subject to factual dispute." Chipollini, 814 F.2d at 899. In effect, where the employer has satisfied its McDonnell Douglas/Burdine burden of "produc[ing] evidence of a non-discriminatory motive for the employee's dismissal, the appropriate summary judgment question is whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown . . . discrimination directly or that the plaintiff has shown that the employer's proffered non-discriminatory reason is unworthy of credence." Sorba, 821 F.2d at 203 (citing Chipollini, 814 F.2d at 898) (emphasis in original). "[W]here [plaintiff] proffer[s] evidence of pretext and create[s] a genuine issue of material fact as to the credibility of the employer's 'legitimate' business reasons, summary judgment is foreclosed." Healy v. New York Life Ins. Co., 860 F.2d 1209, 1219 (3d Cir. 1988). In short, a plaintiff

> may defeat a motion for summary judgment by either (i) discrediting the proffered reasons, either circumstantially or directly, or (ii) adducing evidence, whether circumstantial or direct, that discrimination was

> more likely than not a motivating or determinative cause of the adverse employment action. Thus, if the plaintiff has pointed to evidence that sufficiently to discredit the defendant's proffered reasons, to survive summary judgment the plaintiff need not also come forward with additional evidence of discrimination beyond his or her prima facie case.

Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994).

The Third Circuit further explained the plaintiff's burden of proof by holding that, once the defendant proffers non-discriminatory reasons for the alleged conduct, the court, when ruling on a defense motion for summary judgment, "should inquire directly whether, based on all of the evidence in the record when viewed in the light most favorable to the plaintiff, a reasonable trier of fact could find that discrimination on the ground alleged was, more likely than not, a determinative cause of action at issue." Sheridan, 1996 WL 36283 at *9. The Third Circuit held that when making this inquiry, the court should consider four categories of evidence: 1) the inference of discrimination that arises from the elements of the prima facie case; 2) the inference of discrimination that may be drawn from by ruling out the employer's proffered reasons; 3) the inference that the employer was trying to conceal discrimination on the ground asserted by the plaintiff based on the disbelief of the employer's proffered reasons; and 4) any other relevant evidence of discrimination on the ground asserted by the plaintiff. Id. at *10-11.

B. Discrimination Claims Under Title VII

A plaintiff can prove a violation of Title VII through proof

of either disparate treatment or disparate impact.[9] McDonnell Douglas, 411 U.S. 792; E.E.O.C. v. Metal Serv. Co., 892 F.2d 341, 347-49 (3d Cir. 1990). As the plaintiff, Ms. Clark bears the ultimate burden of proof. St. Mary's Honor Center v. Melvin Hicks, ___ U.S. ___, ___, 113 S.Ct. 2742, 2749 (1993). A plaintiff must establish proof of intent to succeed under a disparate treatment theory. Metal Serv., 892 F.2d at 347; International Brotherhood of Teamsters v. United States, 431 U.S. 1035, 335 n.15 (1977). The plaintiff therefore must prove a difference in treatment and a discriminatory motive on the part of the employer. Weldon, 896 F.2d at 796-97; Underwood v. Jefferson Memorial Hospital, 639 F.2d 455, 457 (8th Cir. 1981).

To establish a prima facie case of discrimination based upon pregnancy under Title VII, a plaintiff must show by a preponderance of the evidence that (1) she was a member of the class protected by Title VII;[10] (2) she was qualified for benefit she sought; (3) she was denied that benefit despite those qualifications; and (4) the benefit was provided to others who were not pregnant to allow an inference of discrimination based on pregnancy. See Sorba, 821 F.2d at 202; Siegel, 894 F.2d at 53 (citing Healy v. New York Life Ins. Co., 860 F.2d 1209, 1214 (3d Cir. 1988), cert. denied, 490 U.S. 1098 (1989)). "Establishment of the prima facie case in

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[9] The plaintiff does not allege any disparate impact claims.

[10] The Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), provides protection from discrimination based upon pregnancy. Because Ms. Clark was pregnant at the time the alleged incidents took place, she falls within a protected class.

effect creates a presumption that the employer unlawfully discriminated against the employee." Burdine, 450 U.S. at 254. Plaintiff's initial burden of proving a prima facie case by a preponderance of the evidence is not an onerous one. Id. at 253.

C. Harassment Claims Under Title VII

Although not specifically mentioned, sexual harassment violates Title VII because it constitutes discrimination based on sex. See, e.g., Harris v. Forklift Systems, Inc., ___ U.S. ___, 114 S.Ct. 367 (1993) (Title VII encompasses sexual harassment and prohibits a hostile work environment); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) (harassment based on sex is discrimination within Title VII).

The Third Circuit has held that "[t]o be cognizable within the meaning of Title VII, harassment, whether based on race or sex, must affect a 'term, condition or privilege' of the plaintiff's employment." West, 45 F.3d at 753 (footnote omitted). Moreover, sexual harassment "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive work environment.'" Meritor, 477 U.S. at 67. The Supreme Court explained that this standard

> takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury. . . . Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive -- is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment and

there is no Title VII violation.

Harris, ___ U.S. at ___, 114 S.Ct. at 370.

When considering the conditions of a work place, the Supreme Court has held that

> whether an environment is 'hostile' or 'abusive' can be determined only by looking at the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant in determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

Id. at 371. See also, Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990) (court must consider the totality of the circumstances when evaluating the existence of a hostile or abusive working environment). The Court explicitly stated that, if the plaintiff did perceive and a reasonable person also could perceive the work environment as hostile or abusive, the work environment did not have to cause psychological injury. Id. However, a court should not "necessarily examine each alleged incident of harassment in a vacuum. What may appear to be a legitimate justification for a single incident of alleged harassment may look pretextual when viewed in the context of several other related incidents." Andrews, 895 F.2d at 1484 (quoting Vance Southern Bell Tel. and Tel. Co., 863 F.2d 1503, 1510 (11th Cir. 1989)).

The Third Circuit has established five conditions a plaintiff must satisfy in order to bring a successful hostile work environment claim:

(1) the plaintiff suffered intentional discrimination because of his or her membership in the protected class;
(2) the discrimination was pervasive and regular;
(3) the discrimination detrimentally affected the plaintiff;
(4) the discrimination would have detrimentally affected a reasonable person of the same protected class in that position; and
(5) the existence of respondeat superior liability.

West, 45 F.3d at 753 (citing Andrews, 895 F.2d at 1482). After Harris, the second, third, and fourth factors should be analyzed together to determine if they constitute a hostile or abusive work environment. Ascolese v. Southeastern Pennsylvania Transp. Auth., 902 F. Supp. 533 (E.D.Pa. 1995).

D. Ms. Clark's Claims

If we accepted all of Ms. Clark's allegations as true, we would find that she has made a prima facie case of both sexual discrimination and sexual harassment. In a summary judgment motion, however, while we resolve all doubt in favor of the nonmoving party, we do not accept everything the nonmoving party alleges as true in the face of actual evidence to the contrary. This is so because the plaintiff, as the party opposing summary judgment, cannot rest on the allegations of her complaint or of her lawyer's brief, but must come forward with facts sufficient to create a general dispute. We will examine the facts surrounding Ms. Clark's claims and determine whether those claims support a prima facie case of discrimination or harassment and, if so, whether the defendants have provided a reasonable explanation for the alleged incidents. If the defendants do provide a reasonable

explanation', the burden shifts back to Ms. Clark to discredit the proffered reasons or adduce evidence that discrimination was more likely than not a motivating or determinative cause of the adverse employment action.

1. Maternity Police Uniforms, Bullet Proof Vests, and Comments on Ms. Clark's attire

Ms. Clark alleged that the defendants failed to provide her with a bullet proof vest and a police uniform that would fit or one which she could have altered to fit. She further claims that the defendants placed her in danger by giving her street assignments during the Rodney King unrest even though she did not have a bullet proof vest that would fit. (Pl. Br. at 7; Ex. M, Clark 7/25/94 Dep. at 24-25). In addition, she asserts that the defendants do not have a policy regarding what constitutes professional civilian attire. (Id.).

DRPA claims that Ms. Clark did not request a maternity uniform until after she had retained counsel. (Df. DRPA and Reim Br. at 8; Clark 7/25/94 Dep. at 40-44). DRPA also alleges that during a conversation between defendant Reim, the Deputy General Counsel for DRPA, and Ms. Clark's attorney, Ms. Clark's attorney stated that she knew of several police departments that provided maternity uniforms but did not provide the names of those departments when asked for them. (Id.; Ex. C, DRPA EEOC Response at 1-2). Defendant Reim claims that he assigned Lieutenant McGinnis to obtain a maternity police uniform and that Lt. McGinnis contacted two vendors, Love Brothers of Philadelphia and Miller Uniform of

New Jersey. (Id.). Lt. McGinnis reported that neither vendor carried maternity uniforms and that most departments simply allowed pregnant officers to wear civilian attire. (Id.). Consequently, Ms. Clark was told that no maternity uniform was available and that she should wear civilian clothes. (Id.).

Defendant DRPA argues that there was nothing else they could have done; maternity uniforms simply were not available. (Id.). It further notes that Ms. Clark never provided the defendants with any information regarding how they could obtain such uniforms and, in fact, has not established that any such uniforms are available. (Id.). DRPA asserts that allowing Ms. Clark to wear civilian clothing was reasonable and did not constitute harassment or discrimination in any way. (Id.). We agree. There is no dispute that the defendants made reasonable efforts to locate a maternity uniform and, finding none, offered a reasonable solution -- wearing civilian clothes. Instructing the plaintiff to wear professional civilian attire did not constitute harassment or discrimination.

In addition, the DRPA contends that the plaintiff's claims of harassment and questioning regarding her attire are groundless. (Id. at 9). The defendant notes that the first day Ms. Clark came to work she wore sweatpants; Captain Ballinger told her that her attire was inappropriate and explained what was appropriate. (Df. DRPA and Reim Br., Ex. C. at 2). After that, there were no further reports of problems with Ms. Clark's attire. (Id.). The defendant asserts that Ms. Clark concedes that she was questioned on only two occasions by defendant Reim and Lt. Shimberger and that defendant

Reim had a right to inspect her attire. (Df. DRPA and Reim Br. at 9) (citing Clark 7/25/94 Dep. at 46, 194-95). DRPA argues that Ms. Clark has not produced any evidence that she was subjected to more scrutiny than any other officer wearing civilian attire. (Id.). DRPA further asserts that making sure the plaintiff wears professional and appropriate attire to work and questioning her on two occasions does not constitute harassment or discrimination. (Id.). We agree.

Since there was no established policy regarding civilian attire, it is not surprising that the defendants and the plaintiff may have had different opinions concerning what constituted appropriate attire. Under such circumstances it is natural that the defendants would have discussed Ms. Clark's clothing with her. Speaking with Ms. Clark twice regarding her attire and trying to make sure that she dressed appropriately while on duty does not constitute harassment or discrimination.

Defendant DRPA does not make any arguments in its brief concerning Ms. Clark's allegation that no one provided her with a properly fitting bullet proof vest. In a response to EEOC questions dated August 26, 1993, however, the defendant stated that Ms. Clark never submitted a request for body armor. (Pl. Ex. L, Letter dated 8/16/93 from Asst. General Counsel Kelly Campbell to EEOC Investigator Joseph Danese responding to EEOC questions, at 1). Defendant Reim had issued memoranda stating that the DRPA would provide body armor to anyone who submitted a request for it with the understanding that the officer would wear the body armor

whenever on active duty. (Id.). Because of this restriction, some officers chose to purchase their own body armor. (Id.). Consequently, DRPA asserts that "if Officer Clark was assigned to street duty and was not wearing a bullet proof vest, it was because she did not request one from the DRPA police department and she did not purchase her own." (Id. at 2).

Although Ms. Clark claims that the defendants denied her request for a bullet proof vest, she admits during her deposition that she only requested the vest orally; she did not request the vest in writing.[11] (Clark 7/25/94 Dep. at 43-44). Consequently, she did not follow the procedures outlined in DRPA's response to EEOC's questions because she did not formally submit a request for a new bullet proof vest. Moreover, since defendant Reim issued one of the DRPA memoranda outlining the willingness of the department to purchase body armor on April 13, 1992, (Pl. Ex. L, Letter dated 8/16/93 from Asst. General Counsel Kelly Campbell to EEOC Investigator Joseph Danese responding to EEOC questions, at 1), Ms. Clark cannot claim that she did not know what she had to do to get another bullet proof vest. Because she did not follow the correct procedure and has not alleged that despite its memoranda DRPA does not ordinarily require officers to submit a formal request for body

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[11] Ms. Clark was asked "did you specifically ask Chief Reim to provide you with body armor that would fit you in light of your pregnancy?" (Clark 7/25/94 Dep. at 43). She responded, "No, I asked him -- when we had that meeting, since he put me on the street, I said, well, can you give me a vest? If I am going to have to go out there, I need a larger vest." (Id.). When the plaintiff was asked if she made her request in writing and he replied, "No, we talked about it." (Id.).

armor, she cannot claim that the defendants' failure to provide her with another bullet proof vest constituted harassment or discrimination.

2. Assignment to Light Duty

Ms. Clark has claimed that she was assigned to light duty status and transferred to the radio room despite her doctor's approval to continue full duties. (Id. at 9; Ex. E, DRPA memoranda dated 5/18/92 and 6/15/92). Defendant DRPA, however, argues that despite her claims of discrimination, Ms. Clark did not want to work on the street while she was pregnant and thought that pregnant officers should be placed on light duty. (Id. at 9-10; Clark 7/25/94 Dep. at 197-201). The defendant contends that Ms. Clark's preferences and beliefs regarding light duty for pregnant officers are contrary to her claims of discrimination. (Id. at 10). Consequently, DRPA argues that her complaints arise not from her light duty status but rather from her dissatisfaction with her work assignment. (Id.). DRPA asserts that it was not required to give Ms. Clark any particular light duty assignment; once she had been placed on light duty DRPA had satisfied its legal obligations. (Id.) (citing Kebler, 799 F. Supp. 326, 334-35 (S.D.N.Y. 1992) (failure to accommodate pregnant officer may constitute intent to discriminate); Adams v. Nolan, 962 F.2d 791 (8th Cir. 1992) (finding discrimination where pregnant officers denied light duty assignments but make officers given light duty for non-work related disabilities); Roller v. City of San Mateo, 399 F. Supp. 358 (N.D.Ca. 1975), aff'd, 572 F.2d 311 (1977) (granting judgment to

police department because no violation of Title VII if pregnant officers are afforded light duty jobs in the same way temporarily disabled male officers are offered light duty jobs)). We agree.

The defendants assigned Ms. Clark to light duty after they learned about her pregnancy. In doing so they afforded her the same opportunity to keep working that they offered other disabled male officers. Ms. Clark expressed her preference not to work the street while pregnant and even stated that she believed all pregnant officers should be assigned to light duty during their pregnancies. Her complaints regarding her light duty status, therefore, appear to be directed at the particular light duty assignment she received rather than the assignment to light duty status in general. As DRPA correctly argued, Ms. Clark was not entitled to a specific job when she was transferred. Furthermore, the defendants were restricted to transferring her to a position for which there was an opening. Ms. Clark has not established that she was qualified for another position, was denied that position, and that other officers who were not pregnant received that position. Consequently, the plaintiff has not made a prima facie case of discrimination based on her assignment to light duty in general or her assignment to the radio room.

3. Refusal to Transfer After Complaints of Nausea from Paint Fumes

Ms. Clark alleges that the defendants discriminated against her because they did not assign her to a different location quickly

enough after she complained about paint fumes.[12] After becoming nauseous due to paint fumes in the radio room, the plaintiff gave her supervisor a note from her doctor which stated that she should not be exposed to paint fumes because of her pregnancy and requested a transfer. (Clark 7/25/94 Dep. at 138-141). One and a half weeks later Ms. Clark was transferred to the Ben Franklin Bridge. (Id.).

Defendant DRPA notes that Ms. Clark admitted that her request for transfer was a special situation. (Df. DRPA and Reim Br. at 11) (citing Clark 7/25/94 Dep. at 136-37). The defendant further argues that given her restriction to light duty and the dearth in openings, she was transferred within a reasonable period of time. We agree. The defendants did not have an unlimited number of positions available to which they could transfer Ms. Clark; they responded to her complaints in a reasonable period of time. The delay in transfer does not allege a prima facie case of discrimination or harassment.

4. Investigation of Telephone Calls

The plaintiff alleges that the defendants harassed and discriminated against her when they investigated the phone calls she made. She claims that the defendants had the duty assignments, phone logs, and identity of the people she had called by February 10, 1992, but had not interviewed anyone or made her an investigation target until after they learned about her pregnancy.

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[12] The defendants explain that construction took place while Ms. Clark was working in the radio room of the Betsy Ross Bridge. (Df. DRPA and Reim Br. at 11).

(Pl. Br. at 9).

Defendant DRPA, however, argues that the investigation of phone calls involved everyone on the DRPA premises and that the investigation began on December 26, 1991, more than three months before they knew the plaintiff was pregnant. (Df. DRPA and Reim Br. at 12; Ex. H, DRPA Memoranda dated December 26, 1991, January 29, 1992, and May 6, 1992; Ex. A, Report of Physical Status to Captain Ballinger, dated April 2, 1992). Consequently, DRPA asserts that it is impossible for the investigation to be motivated by the plaintiff's pregnancy; the fact that she was investigated in May, after everyone learned of her pregnancy, was only coincidence.

On January 29, 1992, a memorandum was circulated to all DRPA bridge personnel stating that an investigation had revealed an abuse of personal phone calls and that excessive personal calls would have to be reimbursed. (Id.) Ms. Clark was aware of the ongoing investigation. (Clark 7/25/94 Dep. at 90). The May 6, 1992 DRPA memorandum stated that the plaintiff was in the radio room when excessive calls were being made. (Df. DRPA and Reim Br. at 13, Ex. H). Defendant DRPA claims that when Sgt. McClintock attempted to speak with the plaintiff about the calls in June, 1992, she refused to do so outside the presence of her lawyer. (Id.). The sergeant asked her to arrange a time with her attorney but Ms. Clark never did so and no further action was taken. (Id.).

Defendant DRPA argues that the investigation of phone calls could not have been motivated by the plaintiff's pregnancy because it was started several months before they knew of her condition.

Moreover, the defendant claims that any attention Ms. Clark received during the investigation was reasonable and did not constitute harassment or discrimination. We agree. Ms. Clark was not singled out more than any other employee. Furthermore, the defendants had probable cause to question her about calls that may have been excessive, since their investigation had revealed the fact that she was in the radio room when excessive calls were made from that post of duty. Ms. Clark's allegations that the defendants' actions during the investigation constituted harassment or discrimination simply do not match the facts before us. Her claims regarding this investigation do not support a prima facie case of discrimination or harassment, and no reasonable jury could find otherwise in these circumstances.

5. Transportation over the Bridge

The plaintiff alleges that the defendants discriminated against her and harassed her by delaying and, at times, refusing to transport her across the bridge. In her deposition, she lists as her primary examples, the refusal to transport her across the Ben Franklin Bridge to the hospital when she was in premature labor[13] and the delay in picking her up from the Port Authority doctor's office.[14] (Clark 7/25/94 Dep. at 142-48, 165-67). She further claims that this transportation service was provided to other

[13] Ms. Clark stated that she requested transportation to the hospital because she was in premature labor and was taking medicine to stop the contractions. (Clark 7/25/94 Dep. at 145-46).

[14] In her deposition, Ms. Clark states that she had to wait at the Port Authority doctor's office for two hours before she was picked up by a co-worker. (Clark 7/25/94 Dep. at 165-66).

employees and to civilians. (Id.).

Defendant DRPA responds that it is not obligated to provide such transportation and that Ms. Clark has not proven that it did in fact provide such transportation to other employees. (Df. DRPA and Reim Br. at 14). DRPA argues that Ms. Clark has not been able to name any employee to whom DRPA granted transportation privileges. (Id.) (citing Clark 7/25/94 Dep. at 142-44). Moreover, defendant DRPA asserts that Ms. Clark was not on-duty at the time she was in labor and requested transportation to the hospital, she was on injury on duty status. (Id. at 13-14) (citing Clark 7/25/94 Dep. at 142-48). The defendant DRPA further points out that Ms. Clark ultimately was able to drive herself to the hospital without incident. (Id.) (citing Clark 7/24/94 Dep. at 142-48). Defendant DRPA also argues that the delay in picking up Ms. Clark from the Port Authority doctor's office was caused by traffic and that Ms. Clark has no evidence to support any allegations to the contrary. (Id. at 14, n.6) (citing Clark 7/25/94 Dep. at 165-68). In addition, DRPA contends that transportation beyond the bridge is generally not provided to employees and that any refusal or delay in transporting the plaintiff was not intended to harass or discriminate against the plaintiff. We agree.

While we do not doubt the DRPA has provided transportation across bridges to employees and civilians, we do not believe that the DRPA is required to provide such transportation any time that an employee or civilian requests it. With regard to the denial of

transportation to the hospital, Ms. Clark has not alleged that non-pregnant officers or any other employee would have been treated differently. In fact, during her deposition, Ms. Clark admitted that she would not expect employees to be taken to the hospital and that she did not know that of any other employee who had been taken to the hospital under circumstances similar to hers. (Clark 7/25/94 Dep. at 147) ("Employees, certainly they wouldn't take them to the hospital."). [15] Additionally, Ms. Clark acknowledged that she did not suffer any physical consequences as a result of having to drive herself to the hospital; when asked to describe the damages she suffered, Ms. Clark responded:

> I feel it was harassment, stress. I feel as though they singled me out, mentally. I just feel as though I went through extra mental strife trying to determine whether or not my child was going to be born, and they didn't care one way or the other. But they'll give a civilian the red carpet.

(Clark 7/25/94 Dep. at 148).

With regard to the delay in picking up Ms. Clark from the Port Authority doctor's office, we note that Ms. Clark was aware that Sergeant Sullivan, the person who had taken her to the office, would not be able to pick her up because her shift would be over before she could bring Ms. Clark back. (Clark 7/25/94 Dep. at 166). In addition, Ms. Clark knew that Sergeant Hamilton, the person who picked her up, left to get her as soon as he came on shift: Sgt. Hamilton's shift began at 2:30; Ms. Clark called the

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[15] Ms. Clark stated that civilians would be taken to the hospital and that, since she was on injury on duty status, she should have been treated like a civilian. (Clark 7/25/94 Dep. at 147). We find this argument to be without merit.

desk at 3:00 and was told that he had left already to get her; Ms. Clark called the desk again at 3:30 and was told that Sgt. Hamilton had left an hour ago to get her. (Id.). When Sgt. Hamilton arrived he told Ms. Clark that traffic had delayed him but Ms. Clark did not believe him because she did not see sufficient traffic on the return trip, she thought that Sgt. Hamilton was lying. (Id. at 165-66). When asked what facts she had to support her claim, Ms. Clark stated that she "know[s] the way he [Sgt. Hamilton] works, I know how he is manipulated by people that are over him, because he's not the most professional person, I'll put it that way." (Id. at 166-67). Ms. Clark admitted that she made an assumption that someone told Sgt. Hamilton to delay getting her in order to harass her. (Id. at 167-68). This sort of surmise is not sufficient to raise a genuine dispute of material fact. Based on her own testimony, it is apparent that Sgt. Hamilton left to get her as soon as he came on duty. Ms. Clark's belief that Sgt. Hamilton was lying about the traffic and her assumption he was told to delay getting her are not sufficient, in the light of Sgt. Hamilton's explanation and Ms. Clark's failure to identify any specific reason why he intentionally delayed or was told to delay getting her, to support her allegations.

Ms. Clark has not presented any evidence or arguments that imply that the defendants' refusals or delays in transportation were motivated by an intent to harass or discriminate based on her pregnancy. We find that no reasonable jury could conclude that Ms. Clark's allegations regarding her transportation support a prima

facie case of harassment or discrimination.

6. Difficulty in Receiving Paychecks and Overtime Pay

Ms. Clark claims that as a result of the defendants' discrimination and harassment, she encountered difficulty in receiving her paychecks and that she did not have the opportunity to earn overtime. She alleges that the defendants withheld her paychecks and that three or four times over an eight week period she did not receive her paycheck on payday. (Clark 7/25/94 Dep. at 160-61, 164). As defendant DRPA notes, however, the only reasoning she uses to support her allegation is her assumption that the "chief is the person who's in charge of receiving the checks. So in turn the check responsibility falls on the chief. So if something happens to somebody's check and he signs all the checks, who's it going to fall back on?" (Clark 7/25/94 Dep. at 162). The plaintiff has not presented any further information or argument that supports her allegation.

Moreover, as DRPA points out, the finance department of the DRPA, not defendant Reim, is responsible for distributing the checks to the proper bridges. (Df. DRPA and Reim Br. at 15). The defendant asserts that the plaintiff did not experience any difficulty in receiving her check until she was temporarily transferred to the Betsy Ross Bridge. (Id.). Defendant DRPA believes that Ms. Clark's paychecks were sent to the wrong bridge due to administrative error caused by the reassignment and further note that Ms. Clark's paychecks were mailed to her home to resolve the confusion. (Id.). Consequently, DRPA argues that the evidence

does not support an allegation of discrimination or harassment but rather demonstrates an administrative oversight that they remedied. We agree. Nothing Ms. Clark claims establishes a prima facie case of discrimination or harassment.

With regard to the plaintiff's complaints concerning overtime pay, defendant DRPA argues that overtime work, when available, is distributed on a rotating basis and generally involves street assignments. (Id.). Ms. Clark has admitted that she did not want and would not have accepted an overtime street assignment while she was pregnant. (Clark 7/25/94 Dep. at 38-39). By her own estimation, street assignments comprise ninety percent of the overtime available, id., so her opportunities to receive overtime were extremely limited. She has argued that she has lost the ability to receive overtime for work in the radio room because she cannot backup her fellow officers on the bridge and that "until Defendants submit to discovery, it is impossible to determine how much overtime was offered to the persons working in the administrative office." (Pl. Br. at 8).

Just as we found that defendant DRPA did not have to offer her a particular light duty assignment in the administrative office just because she requested it, we also find that the amount of overtime employees in the Administrative Office received is not indicative of any harassment or discriminatory intent on the part of the defendant. Discovery on this issue would not be dispositive. Moreover, nothing Ms. Clark has alleged suggests that overtime light duty assignments for which she was qualified were

available and that she was denied those assignments. We cannot find discrimination or harassment in what she has alleged.

7. Dismissal from Roll Call and Instructions Not to Speak to Ms. Clark

Ms. Clark claims that the defendants harassed and discriminated against her by arbitrarily dismissing her from roll call and, after she left, instructing other employees not to speak to her. Defendant DRPA argues that "even plaintiff concedes that DRPA regulations prohibit officers from congregating in the radio room [the area to which the defendants assigned Ms. Clark]." (Df. DRPA and Reim Br. at 16) (citing Clark 6/22/94 Dep. at 43). DRPA claims that Ms. Clark has no evidence to support her claims or to suggest that she was singled out or treated differently from anyone else. (Id.). Ms. Clark asserts, however, that prohibiting visitors in the radio room "is one of the established rules, it was not regularly enforced and, in fact, one of Plaintiff's fellow officers had a visitor in the radio room later that same day [that the officers were told at roll call that the plaintiff was not to have visitors]." (Pl. Br. at 10).

Defendant DRPA has not provided any explanation as to why the plaintiff was dismissed from roll call and why the defendants choose to enforce the no visitors rule against her but not against the other officers. The defendants' actions indicate potential harassment or discrimination.

8. Contacting Ms. Clark's Doctor Regarding Her Pregnancy

Ms. Clark alleges that the defendants harassed and

discriminated against her by repeatedly contacting her physician and inquiring about her medical status. Defendant DRPA claims that the plaintiff has not produced any evidence to suggest that contacting the doctor was discriminatory, meant to harass, or not done for officers on disability leave who were not pregnant. (Df. DRPA and Reim Br. at 16-17, n.7) (citing Ackerman, 956 F.2d at 947 (finding discrimination when health status of pregnant officers investigated but not health status of non-pregnant officers)). The defendant, however, has not stated that it is normal procedure to contact the physicians of officers who are on disability. Taking everything in the light most favorable to the plaintiff, this conduct could be construed as harassing and discriminatory.

9. Termination of Injury on Duty Status

Ms. Clark alleges that the defendants improperly terminated her injury on duty status because "[a]s soon as Defendants learned of the delivery, they terminated her from IOD [injured on duty status] without receiving a doctor's report justifying that course of action." (Pl. Br. at 10). Ms. Clark lost ten days of pay and filed a grievance, which the defendants denied as being out of time. (Id.). Ms. Clark alleges that "she was treated differently than others because Defendants had never followed this rule before." (Id.). She notes that she cannot prove this allegation until the defendants submit to discovery. In its brief, defendant DRPA has not denied or even addressed Ms. Clark's allegations. Assuming what she alleges is true, the defendants' actions in terminating her injury on duty status and denying her grievance

constitute harassment and discrimination.

10. Defendant Porecca's Comments

Ms. Clark claims that defendant Porecca made defamatory remarks concerning her pregnancy and the father of her baby. Defendant DRPA claims that while the alleged statement may have been offensive, it was insufficient to implicate Title VII. (Id. at 17). DRPA further claims that because it took immediate remedial action, the plaintiff did not complain of any other similar incidents, and the plaintiff stated that she was willing to work with defendant Porecca, this comment does not support an allegation of a hostile work environment. (Id.). We agree. By themselves, defendant Porecca's alleged comments, while inappropriate, do not constitute harassment based upon pregnancy and are not sufficiently severe to contribute to a hostile work environment. Instead they represent an isolated incident of inappropriate behavior. Therefore, they cannot support a prima facie case of harassment or discrimination.

E. Did the defendant DRPA discriminate against Ms. Clark?

Several of Ms. Clark's allegations do not appear to fit the contours of a discrimination claim because they do not represent a denial a benefit or job. Of the allegations that we analyzed above, only the refusal to place the plaintiff in the administrative office for her light duty assignment, the delay and, at times, refusal to provide her with transportation between and beyond the bridges, the failure to provide her with a properly

fitting uniform and bullet proof vest, her dismissal from roll call, the instructions to the other officers not to speak to or visit her, the termination of injury on duty status, and the denial, based of timeliness grounds, of her grievance concerning that termination allege potential discrimination. As discussed previously, of these, only the allegations concerning her dismissal from roll call, the instructions not to speak with or visit her, the termination of injury on duty status, and the denial of her grievance concerning that termination are viable discrimination claims.

As we explained, to establish a prima facie case of discrimination, Ms. Clark must show that she was a member of the class protected by Title VII; that she was qualified for benefit she sought; that she was denied that benefit despite those qualifications; and that the benefit was provided to others who were not pregnant to allow an inference of discrimination based on pregnancy. Because The Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), provides protection from discrimination based upon pregnancy and Ms. Clark was pregnant at the time the alleged incidents took place, she falls within a protected class. Moreover, no one has argued that Ms. Clark was unqualified to receive any of the benefits listed above. There is some argument, however, as to whether she was denied all of these benefits. In other words, does the fact that the defendants failed to provide Ms. Clark with certain benefits constitute a violation of Title VII when those benefits, e.g., a maternity size uniform and bullet

proof vest or a specific light duty job, do not exist or are not currently available. Finally, with the exceptions of the termination of her injury on duty status, denial of her grievance concerning that termination, her dismissal from roll call, and the instructions not to speak to or visit her, Ms. Clark has not successfully alleged that other non-pregnant officers were provided with the benefits that were denied to her.

We find that there are issues of material fact and that Ms. Clark has met her burden to survive summary judgment for her allegations that defendant DRPA discriminated against her by terminating her injury on duty status, denying her grievance based on timeliness grounds concerning the termination of injury on duty status, dismissing her from roll call, and instructing the other officers not to speak to or visit her. We do not find, however, that Ms. Clark's other allegations support a case of discrimination. Consequently, we will grant the defendant DRPA's motion for summary judgment as to the charges of discrimination under Title VII for all of the plaintiff's allegations except her claims for the termination of her injury on duty status, the denial of her grievance concerning that termination, her dismissal from roll call, and the instructions to the other officers not to speak to or visit her.

F. Was there a hostile work environment?

Defendant DRPA argues that many of Ms. Clark's allegations are contradicted both by her deposition testimony and the factual

circumstances. (Df. DRPA and Reim Br. at 17). Even if these allegations were true, however, the defendant asserts that they would not constitute a hostile work environment because they are not sufficiently severe, frequent, or pervasive. (Id.). DRPA contends that a few isolated incidents do not create an abusive or hostile work environment. Ms. Clark, however, argues that the defendants' actions created a hostile work environment. Moreover, the plaintiff argues that an employer can be found liable for a hostile work environment if it is "responsible for the policies allowing the incidents to occur or, through acquiescence, for the customs allowing such incidents to occur." (Pl. Br. at 6) (citing Andrews, 895 F.2d at 1480).

Based on our review above, the only acts which suggest harassment involve the defendants dismissing her from roll call, instructions to co-workers not to speak with or visit her, repeatedly contacting her doctor, terminating her injury on duty status, and denying her grievance concerning the termination of her injury on duty status on the basis of timeliness. In addition, we note that no party has addressed the following allegations that Ms. Clark raised in her complaint: disparaging comments made about Ms. Clark's attire; secluding Ms. Clark from the public eye; phoning Ms. Clark's work locations to see if she was there and performing her job; requiring Ms. Clark to treat with the company doctor; asking employees to report anytime they see Ms. Clark on the premises; and asking employees to report what Ms. Clark was wearing on a daily basis. Because DRPA has not made any arguments with

regard to these allegations, we cannot grant summary judgment for these claims. Finally, we keep in mind the Supreme Court's finding that explanations that may seem satisfactory in isolation may appear or be indicative of discrimination or harassment when viewing all the incidents together.

Using the guidelines established by the Supreme Court and more specifically articulated by the Third Circuit, we must consider the totality of the circumstances and determine if the plaintiff has established a prima facie case of harassment. We must decide whether a reasonable jury could find that the incidents alleged would have created a work environment that a reasonable person would have found hostile and whether the plaintiff did in fact find the work environment hostile. In doing so, we engage in both a subjective and an objective analysis. In short, we must decide whether the evidence could establish that (1) Ms. Clark suffered intentional discrimination because of her pregnancy; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the her; (4) the discrimination would have detrimentally affected a reasonable person who was a pregnant police officer; and (5) respondeat superior liability existed.

Resolving all doubt in the favor of Ms. Clark, as we must for the nonmoving party in a summary judgment motion, we find that while Ms. Clark has met her burden to survive summary judgment and has alleged a prima facie case of harassment and a hostile work environment, she has not sufficiently presented her arguments or rebutted the defendant's explanations for many of the alleged

incidents. We find that the lack of colorable evidence requires the conclusion that Ms. Clark cannot use the following alleged incidents to support her claim of harassment or a hostile work environment: refusal to issue her properly fitting bullet proof vest and uniform; routine questioning of the plaintiff regarding her attire after permission to wear civilian clothing; instructions on how to dress; denial of overtime pay; assignment to light duty despite physician's clearance to perform all normal duties; refusal of work assignments offered to other light duty employees; investigation of her phone calls; improper handling her report of harassment against Mr. Porecca; delay in her reassignment to another location when paint fumes caused her nausea and she worried about potential harm to her unborn baby; refusal or delay in police transportation between bridges; and withholding or delay of paychecks. We will grant the defendant DRPA's motion for summary judgment with regard to these allegations.

With regard to several other allegations, however, Ms. Clark has sufficiently met her burden to survive summary judgment. The following allegations support Ms. Clark's claim of harassment and a hostile work environment: instructions other employees to report on her attire on a daily basis; work assignments that secluded the plaintiff from the public eye; disparaging comments about her attire and her pregnancy; repeated communication with Ms. Clark's physician for information concerning her pregnancy; arbitrary dismissal from roll call; instructions to other employees not to speak with or visit Ms. Clark; phone calls to her work locations to

ensure that she was performing her duties; requirement that she "treat" with the company doctor despite her physician's orders of complete bed rest after a fall she experienced at work; requirement that fellow employees to report any time she was seen on police premises; improper termination of her "injury on duty" status; and improper denial of Ms. Clark's grievance regarding the termination of her "injury on duty" status and subsequent loss of pay and/or work related benefits. For these allegations, we will deny the DRPA's motion for summary judgment.

VI. Liability of DRPA for Defendant Porecca's Comments

Ms. Clark alleges that defendant DRPA is liable for defendant Porecca's comments because it did not sufficiently investigate and respond to her complaints. She argues that the defendants took too long address her concerns and that they did not discipline defendant Porecca sufficiently because defendant Porecca was not counselled about his comments until July 24, 1992, did not meet with her to apologize until March 24, 1993, and was never disciplined.[16] (Pl. Br. at 12-13). In addition, she argues that the defendants' investigation could not have been complete or satisfactory because they developed additional information after she filed her complaint: defendant Porecca, at defendant Reim's

[16] We note that defendant Porecca's apology was delayed in part because Ms. Clark was absent from work after an injury at work and delivery of her baby and because Ms. Clark did not respond, at her lawyer's direction, to a letter the defendants sent to her home which attempted to set up a meeting of Ms. Clark with defendant Porecca. (Df. Porecca Br., Ex. A, Clark 9/12/94 Dep. at 31-32).

direction, submitted a letter detailing a new excuse for his comments, i.e., that Officer Jones (the person to whom he made the comments) had previously stated that Ms. Clark likes to party and have sex all night. (Id. at 13). The plaintiff notes that while defendant "Porecca's later memo explaining his comment was pertinent enough to be placed in Plaintiff's personnel file after the filing of this Complaint, it was apparently not pertinent to the 'investigation' the Defendants claimed they undertook, as it was not revealed to them." (Id.). She argues that this proves that the defendants did not take the investigation of her complaints regarding defendant Porecca seriously.

Defendant DRPA claims that its prompt response to the plaintiff's complaints about defendant Porecca's comments prevents it from being liable for those comments. (Id. at 19-20). DRPA further contends that Ms. Clark's allegations concerning the defendants' treatment and investigation of her complaint of harassment as well as their failure to discipline defendant Porecca are groundless. (Id.). Defendant DRPA claims that an employer is not strictly liable for a hostile work environment and, moreover, an employer who responds quickly and effectively to an employee complaint is relieved of liability. (Id. at 20) (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. at 72-73 (agency principles determine employer liability for sexually hostile work environments); Bouton v. BMW of North America, Inc., 29 F.3d 103, 106-07 (3d Cir. 1994)).

Defendants DRPA claims that it took prompt action to

investigate and remedy Ms. Clark's complaint. (Id. at 21). DRPA asserts that, upon receiving the plaintiff's complaints, defendant Reim ordered Sgt. Crognale to conduct an internal investigation. (Id.). Upon reviewing the investigation results, defendant Reim ordered defendant Porecca to receive counselling regarding "the inappropriate and insensitive comment he made about Officer Clark" and further stated that defendant Porecca's comment "offended Officer Clark and that such a comment is unacceptable within this Authority's police department." (Id.) (citing Df. DRPA and Reim Br, Ex. K, DRPA Memorandum dated 7/16/92 at ¶ 1). In addition, defendant Reim ordered defendant Porecca to meet with Ms. Clark and apologize to her. (Id.). Defendant Porecca did apologize, received counselling from Sgt. McClintock regarding his comment, and went to a class on sexual harassment at Rutgers University. (Id. at 21-22) (citing Df. DRPA and Reim Br., Ex. K, DRPA Memorandum dated 7/24/92, DRPA Memorandum dated 3/25/93; Ex. L, Porecca Dep. at 30, 34).

Defendant DRPA contends that the remedial actions insulate it from liability for defendant Porecca's comments. (Id. at 22). It further claims that because it did not know and should not have known that defendant Porecca made those comments until Ms. Clark made her complaint it cannot be liable for not preventing defendant Porecca's alleged conduct. (Id. at 22) (citing Bouton, 29 F.3d at 108). In addition, DRPA argues that its general grievance procedure was sufficient since the plaintiff used it to complain of alleged sexual harassment. DRPA contends that the presence of a

grievance procedure strongly favors a finding of immunity from liability. (Id.) (citing Bouton, 29 F.3d at 110 (employer not liable for harassment even though no separate sexual harassment grievance procedures existed where harassment complaints sufficiently pursued through general grievance procedures); Nash v. Electrospace System, Inc., 9 F.3d 401, 404, n.2 (5th Cir. 1993) (availability of formal grievance procedure should weigh in employer's favor)).

Defendant DRPA argues that the actions taken in response to the plaintiff's complaints concerning defendant Porecca's comments were effective in terminating any harassment and preventing any future harassment because Ms. Clark did not make any further complaints and because she admitted during her deposition that she has not had any further problem with defendant Porecca or any other officer since the alleged incident. (Id. at 23). Likewise, such DRPA actions would negate any claim that DRPA tolerated, let alone ratified, defendant Porecca's comments. Consequently, DRPA contends that Ms. Clark's allegations that the defendants did not investigate her claims properly and did not sanction defendant Porecca severely enough are without merit. (Id.). DRPA claims that it is not liable to Ms. Clark if she is dissatisfied with the outcome of the investigation and punishment because the remedial actions "were ultimately effective in stopping and preventing further harassment of plaintiff regarding her pregnancy. This is all that is required of an employer under Andrews and Bouton." (Id.).

The Supreme Court held in Meritor that while employers are not strictly liable for hostile work environments, neither are they insulated from liability by the mere existence of a grievance procedure. 477 U.S. at 72-73. Rather, the Supreme Court held that courts should look to agency principles to determine employer liability. Id. The Third Circuit has held that the "Restatement (Second) of Agency § 219 provides three potential bases for holding employers liable for sexual harassment perpetrated by their employees." Bouton, 29 F.3d at 106. These bases provide liability for acts of the employee committed within the scope of their employment; acts committed outside the scope of employment for which the employer was reckless or negligent; and acts committed outside the scope of employment for which either the employee purported to act/speak on behalf of the employer causing reliance upon the apparent authority or the employee was aided in committing the act by the existence of an agency relationship with the employer. Restatement (Second) of Agency, § 219. Only the second of the three bases, negligence, applies to this case.

Courts will apply the negligence principles of § 219 if the employee has reported the harassment to the employer. Bouton, 29 F.3d at 107. Under these principles, an employer is liable if it fails to investigate and remedy the problems and, conversely, not liable if it takes prompt and effective action. Id. Moreover, "an effective grievance procedure -- one that is known to the victim and that timely stops the harassment -- shields the employer from Title VII liability for a hostile environment. By definition,

there is no negligence if the procedure is effective." Id. at 110. An employer, however, will face "liability when the employer knew or should have known of the harassment and failed to take prompt remedial action." Id.

Ms. Clark has not alleged that the defendants knew or should have known about the harassing comments before she brought the comments to their attention by filing her grievance. The only remaining basis of the defendant DRPA's liability therefore involves a consideration of whether or not the defendants responded quickly and effectively to Ms. Clark's complaint. Upon receiving Ms. Clark's complaint, defendant Reim ordered an internal investigation and decided upon a course of remedial action, i.e., having defendant Porecca apologize to Ms. Clark, receive counselling, and attend a sexual harassment class. While there may have been delay in completing this course of action, as noted above, that delay was caused in part by Ms. Clark's absence from work and lack of response to the letter that attempted to set up the meeting to apologize. See, supra, n.12. The remedial action arguably was effective because the plaintiff has had no further incidents with defendant Porecca and has not filed any additional complaints against defendant Porecca or any other officer. Consequently, no reasonable jury could find that Ms. Clark has established that defendant DRPA is liable for defendant Porecca's comments and we must grant defendant DRPA summary judgment with regard to this charge.

VII. Allegations Concerning Locker Rooms and Weapons Storage Facilities for Female Officers

The plaintiff alleges that the defendants harassed and discriminated against her because they failed to provide separate locker rooms and weapons storage facilities. Defendant DRPA, however, argues that because Ms. Clark did not include such claims in her EEOC charges we do not have jurisdiction to adjudicate these claims.[17] (Id. at 24). The plaintiff responds that while she did not make allegations concerning the locker rooms in her original EEOC charges, "it is undisputed that the EEOC investigated this charge during the course of its investigation." (Pl. Br. at 11) (citing Pl. Br., Ex. L, Letter dated 8/16/93 from Asst. General Counsel Kelly Campbell to EEOC Investigator Joseph Danese responding to EEOC questions). The letter to which Ms. Clark refers, clearly discusses the provision of locker rooms and indicates that the EEOC brought the issue of locker rooms to the attention of the defendants during the investigation.[18]

Before bringing a claim in district court a plaintiff must file a complaint with the EEOC; the parameters of the plaintiff's

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[17] While the defendants only make their arguments with regard to the locker rooms, we note that their arguments also apply to the allegations concerning the weapons storage facilities.

[18] In that letter, Ms. Cambell states "[i]n response to your recent questions . . . [e]ach of the four DRPA bridges is equipped with locker room facilities for female operational bureau employees. . . . On or about January 23, 1993, Officer Clark filed a grievance concerning the lack of separate locker room facilities . . . . Officer Clark's grievance was denied because the DRPA did provide locker room facilities for its female employees." (Pl. Br., Ex. L, Letter dated 8/16/93 from Asst. General Counsel Kelly Campbell to EEOC Investigator Joseph Danese responding to EEOC questions at 1).

civil action generally are determined by the scope of the investigation that reasonably could have grown out of the EEOC charges. Hicks v. ABT Assoc., Inc., 572 F.2d 960, 966 (3d Cir. 1978); Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398-99 (3d Cir. 1976), cert. denied, 429 U.S. 1041 (1977).

Defendant DRPA claims that because Ms. Clark's EEOC complaint only alleged incidents relating to her pregnant status, allegations concerning locker rooms, which relate to gender in general, are not within the scope of what an EEOC investigation based on her EEOC charges reasonably would have uncovered.[19] (Df. DRPA and Reim Br. at 25). DRPA claims that because such charges require a different kind of analysis, i.e., treatment of pregnant and non-pregnant officers as compared to male and female officers, the plaintiff cannot bring them in the instant action. (Id. at 25-26) (citing Castro, 755 F.2d at 403 (dismissing claims of discrimination based upon national origin where EEOC charge alleged only age discrimination because claims were reasonably within original charges); Hill v. Human Rights Comm'n, 735 F. Supp. 255 (N.D.Ill. 1990) (dismissing claims of discrimination based upon plaintiff's status as female where EEOC complaint alleged discrimination based only upon plaintiff's marital status because claims and factual allegations distinct); Gavin v. Peoples Natural Gas Co., 464 F.

[19] Ms. Clark's EEOC complaint alleged that she experienced discrimination and harassment due to (1) comments regarding her pregnancy, including the father of her child, be fellow officers; (2) lack of maternity uniforms and difficulties when wearing civilian attire; (3) her work load while she was pregnant; and (4) her personal telephone calls. (Df. DRPA and Reim Br., Ex. B, EEOC Complaint).

Supp. 622, 624 (W.D.Pa. 1979), vacated on other grounds, 613 F.2d 482 (3d Cir. 1980) (dismissing claims of race discrimination where EEOC charge raised only charges of religious discrimination and claims not reasonably within the scope of EEOC charge)).

DRPA distinguishes Hicks, 572 F.2d at 965-68, wherein the court denied summary judgment because there was an issue of material fact as to whether the new charges would have grown out of a reasonable EEOC investigation, by arguing that in this case the EEOC did perform a complete and competent investigation and did not develop any charges concerning the weapons storage facilities or the locker rooms. (Id. at 26). Moreover, DRPA asserts that, unlike the plaintiff in Hicks, Ms. Clark participated in the EEOC investigation. (Id.). Defendant DRPA also distinguishes EEOC v. Westinghouse Elec. Corp., 632 F. Supp. 343 (E.D.Pa. 1986), vacated and remanded in part on other grounds, 869 F.2d 696 (3d Cir. 1989), vacated and remanded, 493 U.S. 801 (1989), wherein the court found that an investigation of one plaintiff's sexual discrimination claim could lead to other plaintiffs alleging the same sexual discrimination claims, by asserting that in this case the new charges would not add additional plaintiffs alleging the same claims but rather would add new theories of discrimination. (Id. at 27).

The plaintiff, however, argues that because the EEOC actually investigated the provision of locker rooms and the defendants knew that the locker rooms were an issue, she "should not be faulted if the EEOC failed to follow it's [sic] own regulations in amending

the charges." (Pl. Br. at 11) (citing Hicks, 572 F.2d at 964 ("This right [to a civil action] should not be defeated by the EEOC's failure to comply with its statutory obligations."); Waters v. Heublein, Inc., 547 F.2d 466, 468 (9th Cir. 1976), cert. denied, 433 U.S. 915 (1977)).

We find that there is at least an issue of material fact as to whether Ms. Clark's claims regarding the provision of locker rooms and weapons storage facilities were within the scope of the EEOC's investigation and whether they would have reasonably grown out of an investigation based upon the original EEOC charges. Consequently, we must deny defendant DRPA's motion for summary judgment as to these claims.

In summary, we will grant defendant Porecca's motion for summary judgment in its entirety. We will also grant summary judgment to all defendants as to the NJLAD claims. In addition, we grant defendant Reim summary judgment with regard to all Title VII claims. We will grant defendant DRPA summary judgment as to the charges of liability for defendant Porecca's comments, but deny summary judgment as to the provision of locker rooms and weapons storage facilities for female officers.

With regard to the remaining Title VII discrimination charges, we will grant defendant DRPA summary judgment with regard to the following incidents: the refusal to place the plaintiff in the administrative office for her light duty assignment; the delay and, at times, refusal to provide her with transportation between and beyond the bridges; and the failure to provide her with a properly

fitting uniform and bullet proof vest. We will deny defendant DRPA summary judgment for the following alleged incidents of discrimination: her dismissal from roll call; the instructions to the other officers not to speak to or visit her; the termination of injury on duty status; and the denial, based on timeliness grounds, of her grievance concerning the termination of her injury on duty status.

With regard to the remaining Title VII harassment charges, we will grant defendant DRPA summary judgment as to the following charges: refusing to issue her properly fitting bullet proof vest and uniform; subjecting her to routine questioning regarding her attire after they permitted her to wear civilian clothing; instructing her on how to dress; denying her overtime pay; assigning her only to light duty despite physician's clearance to perform all normal duties; refusing her work assignments offered to other light duty employees; investigating her phone calls; improperly handling her report of harassment against Mr. Porecca; delaying her reassignment to another location when paint fumes caused her nausea and she worried about potential harm to her unborn baby; refusing or delaying police transportation between bridges; and withholding or delaying paychecks.

We will deny DRPA summary judgment for the following alleged incidents of harassment: instructing other employees to report on her attire on a daily basis; giving her work assignments that secluded her from the public eye; making disparaging comments about her attire and her pregnancy; repeatedly contacting her physician

for information concerning her pregnancy; arbitrarily dismissing her from roll call; telling other employees not to speak with her; phoning her work locations to ensure that she was performing her duties; requiring her to "treat" with the company doctor despite her physician's orders of complete bed rest after a fall she experienced at work; requiring fellow employees to report any time she was seen on police premises and to report what she was wearing; improperly terminating her "injury on duty" status; and improperly denying her grievance regarding the termination of her "injury on duty" status and subsequent loss of pay and/or work related benefits.

The accompanying Order will be entered.

Feb. 27 1996
DATE

Jerome B. Simandle
JEROME B. SIMANDLE
U. S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LISA D. CLARK,	:	
Plaintiff,	:	Civil Action No. 93-5162 (JBS)
v.	:	
THE STATE OF NEW JERSEY, THE DELAWARE RIVER PORT AUTHORITY, JOHN T. REIM, JAMES PORECCA,	:	
Defendants.	:	

ORIGINAL FILED
FEB 27 1996
WILLIAM T. WALSH, CLERK

ORDER

This matter having come before the court upon the motion of defendant Porecca for summary judgment and the motion of defendants Reim and DRPA for partial summary judgment;* and the court having considered the submissions of the parties in connection with these motions; and for the reasons expressed in the Opinion of today's date; and for good cause shown,

IT IS this 27th day of February, 1996,

ORDERED that defendant Porecca's motion for summary judgment be and hereby is GRANTED; and it is

FURTHER ORDERED that summary judgment be and hereby is GRANTED to all defendants as to the NJLAD claims; and it is

FURTHER ORDERED that defendant Reim's motion for summary judgment as to the Title VII claims be and hereby is GRANTED; and it is

* Although the motion of defendants DRPA and Reim was styled as a motion for summary judgment, it did not address Counts 4, 5, and 6 and this court expresses no view as to the viability of those claims.

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UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

AMY EICK, :

Plaintiff :

Civil Action No. 91 - 2707

v. :

: ORDER

DELAWARE RIVER PORT AUTHORITY

AND :

EUGENE J. McCAFFREY, SR. Individually and in his capacity as Executive Director of the Delaware River Port Authority :

AND :

JAMES R. KELLY, Individually and in his capacity as President of the Delaware River Port Authority :

AND :

ALEXANDER BONAVITACOLA, Individually and in his capacity as Acting Bridge Director of the Delaware River Port Authority :

AND :

JOHN T. REIM, Individually and in his capacity as Chief Inspector of the Delaware River Port Authority Police :

AND :

DENNIS McERLANE, Individually and in his capacity as an officer of the Delaware River Port Authority Police, :

FILED

Clerk

AND :

RALPH BALLINER, Individually and in his capacity as Captain of the Delaware River Port Authority Police, :

Defendants :

This matter having come before the Court on a motion by defendants, the Delaware River Port Authority, Eugene J. McCaffrey, James R. Kelly, Alexander Bonavitacola, John T. Reim, Dennis McErlane and Ralph Ballinger, for dismissal of Counts III, IV, V, and VI pursuant to Fed. R. Civ. P. 12(b)(6); and

For the reasons set forth in the Court's opinion filed this day; and

For good cause shown;

It is on this 16th day of January, 1992

ORDERED that the motion is hereby GRANTED.

WILLIAM G. BASSLER, U.S.D.J.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

AMY EICK, :

Plaintiff :

Civil Action No. 91 - 2707

v. :

: OPINION

DELAWARE RIVER PORT AUTHORITY

AND :

EUGENE J. McCAFFREY, SR. Individually and in his capacity as Executive Director of the Delaware River Port Authority :

AND :

JAMES R. KELLY, Individually and in his capacity as President of the Delaware River Port Authority :

AND

ALEXANDER BONAVITACOLA, Individually and in his capacity as Acting Bridge Director of the Delaware River Port Authority :

AND

JOHN T. REIM, Individually and in his capacity as Chief Inspector of the Delaware River Port Authority Police :

AND

DENNIS McERLANE, Individually and in his capacity as an officer of the Delaware River Port Authority Police, :

FILED

WILLIAM T. WALSH
Clerk

AND

RALPH BALLINER, Individually and in his capacity as Captain of the Delaware River Port Authority Police,

Defendants

APPEARANCES:

BROWN & CONNERY
360 Haddon Avenue
PO Box 539
Westmont New Jersey 08108
By: William M. Tabussi, Esq.
Attorneys for Defendants

SPRAGUE, CREAMER & SPRAGUE
26 W. Main Street
Marlton, NJ 08053
By: Howard K. Goldstein, Esq.
Attorneys for Plaintiff

BASSLER, DISTRICT JUDGE:

This matter comes before the court on a motion by defendants, Delaware River Port Authority ("DRPA"), Eugene J. McCaffrey, James R. Kelly, Alexander Bonavitacola, John T. Reim, Dennis McErlane and Ralph Ballinger, who seek a dismissal of Counts III, IV, V and VI of the Complaint pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons set forth below, defendants' motion shall be granted.

I. BACKGROUND

The plaintiff, Amy Eick, instituted this action in the United States District Court for the District of New Jersey on June 24, 1991. Essentially, she alleges that during the course of her employment as a police officer for the DRPA, she was subjected to sexual harassment, discrimination and retaliation in violation of 42 U.S.C. §1983, the Fourteenth Amendments of both the United States and New Jersey Constitutions as well as N.J. Stat. Ann. 10:1 et seq. and 10:5 et seq. She is seeking compensatory and punitive damages from defendants, DRPA, Eugene J. MaCaffrey, Sr., James R. Kelly, Alexander Bonavitacola, John T. Reim, Dennis McErlane and Ralph Bellinger. Each of the individual defendants is or at one time was an employee of the DRPA, and each is named in both their individual and official capacities.

II. DISCUSSION

A. The Standard Under Fed. R Civ. Pro. 12(b)(6).

The test to be applied in deciding a motion to dismiss for failure to state a claim upon which relief can be granted, requires the court to accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn from them and to refrain from granting a dismissal unless it is certain that no relief could be granted under any set of facts which could be proved. Harmon v. Holmes, 712 F. Supp 451, 452 (D.N.J. 1989), quoting Ransom v. Marazzo, 848 F2d 398,401 (3d Cir. 1988).

When a federal court reviews the sufficiency of the complaint before receiving any evidence, the issue is not whether the plaintiff will prevail, but rather whether he or she is entitled to offer evidence to support the claims. Scheuer v. Rhodes, 426 U.S. 232 (1974).

While the motion can be successfully urged , as where the complaint states a wrong for which there is no remedy, or a claim which the plaintiff is without power to assert and for which no relief can be granted, legal sufficiency and not the probability of success is the test; no matter how unlikely it may seem that the pleader will be able to prove a case, he or she is entitled, upon alleging a claim to an opportunity to try to prove it. Melo-Sonics Corp. v. Cropp, 342 F2d 856 (3d Cir. 1965).

A complaint should not be dismissed because all of the elements that give rise to a legal basis for recovery have not been stated; "to the contrary, all the rules require is a short and plain statement of the claim that gives the defendant fair notice of the plaintiff's claim and the grounds upon which it rests. Bogosian v. Gulf Oil Corp., 561 F2d 434,446 (3d Cir. 1977) quoting Conley v. Gibson, 355 U.S. 41, 47 (1957). But even under these generous standards, conclusory recitations of law may not be considered in determining a complaints' sufficiency. Haines v Kerner, 404 U.S. 519, 520 (1972).

Finally, in considering a motion to dismiss, only the complaint and the motion to dismiss are to be considered and not the supporting briefs of counsel. Travelers Indemnity Co. v. Abrogast, 45 F.R.D. 87,88 (D.Pa. 1968).

B. Analysis of Counts IV and V.

Count IV of the Complaint sets forth a cause of action for a violation of plaintiff's civil rights, generally invoking N.J. Stat. 10:1 et seq.; whereas Count V of the Complaint sets forth a civil rights claim under the New Jersey Law Against Discrimination, N.J. Stat. 10:5 et seq.

The DRPA was created with the approval of Congress by an interstate compact between the State of New Jersey and the Commonwealth of Pennsylvania. See, N.J. Stat. Ann. 32:3-2. The DRPA is thus not the agency of a single state, but a public corporate instrumentality of both New Jersey and Pennsylvania. Eastern Paralyzed Veterans v. Camden, 111 N.J. 389 (1988). As

such it is a "law of the Union," Delaware River Joint Toll Bridge Comm'n v. Colburn, 310 U.S. 419, 427 (1940), whose interpretation is a question of federal law. Cuyler v. Adams, 449 U.S. 433, 438 (1981). Thus, "neither creator state can unilaterally impose additional duties, powers or responsibilities upon the Authority". Nardi v. Delaware River Port Authority, 490 A.2d 949, 950 (Pa. Cmwlth 1985).

In Bell v. Bell, 83 N.J. 417 (1980), Justice Sullivan explained that New Jersey could not unilaterally exercise jurisdiction over the DRPA because to do so would violate a compact that made no provisions for such jurisdiction. In so stating, the New Jersey Supreme Court wrote:

> We fail to see how either state could enact laws involving and regulating the bi-state agency unless both states agree thereto. To sanction such practice would lead to discord and destruction of the purposes for which such bi-state agencies are formed.

Id., at 424, quoting, Delaware River Bay Authority v. New Jersey Pub. Employment Relations Commission, 112 N.J. Super 160, 165-66 (App. Div. 1070).

Both New Jersey and Pennsylvania have consistently required complementary legislation for single-state jurisdiction to be exercised over the authority. See, Nardi, supra. But in so holding the courts have not required that the legislation be identical; rather they have given effect to legislation that is clear in its intent to confer a benefit on authority employees.

Id.[1] Thus, it is only when the compact itself recognizes the jurisdiction of the compact states that it may be subject to single-state jurisdiction, as the DRPA compact itself does not contemplate single-state jurisdiction in general.[2] Eastern, supra at 399-400, see also, People v. City of Lake Tahoe, 466 F.Supp. 527, 537 (E.D. Cal. 1978).

The same rationale applies in this case. The provisions of the New Jersey Law Against Discrimination ("LAD"), N.J. Stat. Ann. 10:5-1 et seq., and the provisions of the Pennsylvania Human Relations Act ("PHRA"), 43 P.S. § 951 et seq. differ significantly so as to prohibit the enforcement of either against the DRPA. See, Nardi, supra. To unilaterally hold that the DRPA is subject to New Jersey law against discrimination would result in the imposition of additional duties or responsibilities on the Authority that were not recognized by the compact itself.

The PHRA contains a provision requiring the aggrieved party to first file a complaint with the Pennsylvania Human Relations Commission before proceeding to court. See, P.S. § 962(c); Lukus v. Westinghouse Elec. Corp., 419 A.2d 431 (1980).

---

1. The Nardi Court held that disability pay enactments of New Jersey and Pennsylvania were not substantially similar to the extent that the court could find an agreement between the states concerning the extent of disability pay.

2. The Eastern Court concluded that the trial court erred in ruling that the New Jersey Department of Community Affairs could unilaterally impose on the DRPA the obligations set forth in the New Jersey Uniform Construction Code and the New Jersey Law Against Discrimination.

The complainant must then wait one year before initiating suit in the Court of Common Pleas unless the Commission dismisses the complaint earlier.

Conversely, the LAD permits a complainant to file suit directly in Superior Court. See, N.J. Stat. Ann. 10:5-13. (West 1976 & Supp. 1991). In addition the LAD provides that if the complainant elects to file with the division, once 180 days have elapsed, the complainant may file a request to present the action to the Office of Administrative Law. Essentially, this difference provides that an individual who has not exhausted the administrative remedies may be barred from further pursuing a claim in Pennsylvania but not in New Jersey.

The above difference in the PHRA and LAD is illustrative of the fact that the two legislative acts are not complimentary or parallel. Nor is there is any evidence of agreement among the two states. It then follows that New Jersey's unilateral application of the LAD on the DRPA is violative of the compact itself. See, Eastern, supra. I am therefore dismissing Counts IV and V of plaintiff's complaint pursuant to Fed.R.Civ.P. 12(b)(6).

C. Analysis of Count III.

In Count III of the complaint, plaintiff asserts a cause of action based on the denial of equal protection of the laws in violation of Article I, ¶1 of the New Jersey Constitution and the denial of liberty, property, and reputational interests without due process of the laws in violation of Article I, ¶1 of

the New Jersey Constitution. Plaintiff maintains that a comparison of the relevant constitutional provisions of the respective jurisdictions will conclusively demonstrate that they are substantially similar so as to warrant subjecting the DRPA to liability under either. I disagree.

While the pertinent provisions of both the New Jersey and Pennsylvania Constitutions contain similar language and guarantee both due process and equal protection of the law, a review of case law in the respective jurisdictions illustrates that the two states view their constitutional guarantees differently.

With regard to equal protection, Pennsylvania applies the "tripartite" analysis, applying either a strict, heightened or rational relationship scrutiny, depending on the class of persons or the right involved. James v. SouthEastern Pennsylvania Transp. Auth., 477 A.2d 1302, 1305-07 (1984). Conversely, New Jersey has rejected the tripartite analysis and instead applies a balancing test to equal protection claims under its constitution. Brown v. City of Newark, 113 N.J. 565, 573-74 (1989).

With regard to due process, Pennsylvania follows federal guidance and rules that no greater constitutional protections are afforded than those granted in the federal constitution. Commonwealth v. Heck, 491 A.2d 212 (1985). aff'd, 535 A.2d 575 (1987), By contrast, New Jersey has determined that its state constitution affords greater due process rights than

those granted under the federal constitution. Southern Burlington City NAACP v. Mount Laurel Township, 67 N.J. 151, 174-75.

In light of New Jersey's more general equal protection analysis and broader due process guarantees, a claimant could have the grater opportunity to establish an equal protection or due process violation in New Jersey that would be unsuccessful in Pennsylvania. It is clear to me that the respective constitutional provisions of the two states are not parallel. Thus, in the absence of any agreement among the states themselves, New Jersey may not unilaterally apply its equal protection and due process guarantees on the DRPA. To do such would violate the compact itself that made no provision for such jurisdiction. Eastern, supra, at 398. I am therefore granting defendant's request to dismiss Count III of the complaint pursuant to Fed. R. Civ. P. 12(b)(6).

D. Analysis of Count VI.

Defendants seek dismissal of plaintiff's punitive damage claim raised in Count VI of the complaint on the grounds that (1) plaintiff has failed to state any cognizable state law claims against the defendant, and (2) punitive damages are not recoverable against public entities or individuals acting in an official capacity in an action under 42 U.S.C. § 1983.

Based upon my dismissal of plaintiff's state law claims, I shall only address defendant's second contention for dismissal.

In support of their request for dismissal, defendants cite City of Newport v. Facts Concerts, 453 U.S. 247 (1981), as standing for the proposition that municipalities are not subject to punitive damages in § 1983 actions. An analysis of Facts Concerts reveals that while the Supreme Court did hold municipalities to be immune from punitive damage claims arising in conjunction with § 1983 actions, they did not address whether such immunity extended to an agency, such as the DRPA, that was created by way of an interstate compact.

However, there is precedent that punitive damages are not recoverable against governmental bodies in §1983 actions. See, Bolden v. Southeastern Pennsylvania Transportation Authority, Nos. 90-1435 and 90-1478 (3d Cir. December 31, 1991); Rockford Principals and Sup'rs Ass'n v. Board of Educ. of Rockford School Dist. No. 205, 721 F. Supp. 948 (N.D. Ill. 1989). In addition, immunity from punitive damages has been extended to government officials who have been sued in their official capacities, but not officials sued in their individual capacities. O'Leary v. Luongo, 692 F. Supp. 893, 904 (N.D. Ill. 1988).

It therefore stands to reason that because the DRPA is a public corporate instrumentality, it can be classified as a governmental agency. Consequently, the DRPA is immune from a claim of punitive damages arising in conjunction with a § 1983 action. In addition, the individual defendants are immune from a claim of punitive damages in conjunction with their official

capacities. I am therefore granting defendants' motion to dismiss Count VI as it pertains to the DRPA and the defendant's in their official capacities.[3] An appropriate order shall follow.

WILLIAM G. BASSLER, U.S.D.J.

3. The claim for punitive damages against the individual defendants in their "individual" capacity is not dismissed.

FM-3344-97T1

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30, and JOSEPH VENA, Respondents/Plaintiffs, v. DELAWARE RIVER PORT AUTHORITY, Appellant/Defendant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003344-97T1 CIVIL ACTION **ON APPEAL FROM A FINAL JUDGMENT ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, CAMDEN COUNTY GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** SAT BELOW: HONORABLE M. ALLAN VOGELSON, P.J.S.C.

RECD
APPELLATE DIVISION
MAY 18 1998
FILED
MAY 18 1998

APPELLANT/DEFENDANT DELAWARE RIVER PORT AUTHORITY'S APPENDIX - VOLUME 1 OF 3

BLANK ROME COMISKY & McCAULEY LLP
A Pennsylvania LLP
PETER A. GOLD, ESQUIRE
Resident Partner
SAMUEL M. FIRST, ESQUIRE
Woodland Falls Corporate Park
210 Lake Drive East, Suite 200
Cherry Hill, New Jersey 08002
(609) 779-3600

Attorneys for Defendant/Appellant
Delaware River Port Authority

Dated: May 18, 1998

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A-3344-97T

NOTICE OF APPEAL

PLEASE PRINT OR TYPE

SUPERIOR COURT OF NEW JERSEY - APPELLATE DIVISION

TITLE OF ACTION AS CAPTIONED BELOW:

Franternal Order of Police, Penn-Jersey Lodge 30 and Joseph Vena,

Plaintiffs,

v.

Delaware River Port Authority,

Defendant.

ORIGINAL FILED

FEB 17 1998

Emilie A. Cox, Esq.
Clerk

ATTORNEY OF RECORD

NAME Peter A. Gold/Samuel M. First
Blank Rome Comisky & McCauley, LLP

ADDRESS a Pennsylvania LLP
210 Lake Drive East, Suite 200
Cherry Hill, NJ 08003

PHONE NO. (609) 779-3600

ATTORNEY FOR Delaware River Port Author

ON APPEAL FROM:
Superior Court of New Jersey, Law Division, Camden County
TRIAL COURT/STATE AGENCY

L-7547-96
TRIAL DOCKET OR INDICTMENT NUMBER

Hon. M. Allan Vogelson, P.J.S.C.
TRIAL COURT JUDGE

CIVIL [X] CRIMINAL [ ] JUVENILE [ ]

NOTICE IS HEREBY GIVEN THAT Defendant Delaware River Port Authority

APPEALS TO THE SUPERIOR COURT OF NJ, APPELLATE DIVISION, FROM THE JUDGMENT [X] ORDER [ ]

OTHER (SPECIFY) [ ]

ENTERED IN THIS ACTION ON 11/21/97 (DATE), IN FAVOR OF Plaintiffs FOP Lodge 30 and Vena, from an Order entered on December 19, 1997, and from an Order dated February 17, 1998 denying Defendant DRPA's Motion for Reconsideration.

IF APPEAL IS FROM LESS THAN THE WHOLE, SPECIFY WHAT PARTS OR PARAGRAPHS ARE BEING APPEALED:

ARE ALL ISSUES AS TO ALL PARTIES DISPOSED OF IN THE ACTION BEING APPEALED? YES [X] NO [ ]

IF NOT, IS THERE A CERTIFICATION OF FINAL JUDGMENT ENTERED PURSUANT TO R. 4:42-2? YES [ ] NO [ ]

PRIORITY UNDER R. 1:2-5 YES [ ] NO [ ] APPLICABLE SECTION UNDER THE RULE

IN CRIMINAL, QUASI-CRIMINAL, AND JUVENILE CASES...NOT INCARCERATED [ ] INCARCERATED [ ]

CONFINED AT

GIVE A CONCISE STATEMENT OF THE OFFENSE AND OF THE JUDGMENT, DATE ENTERED AND ANY SENTENCE OR DISPOSITION IMPOSED

ATTACH ADDITIONAL SHEETS IF NECESSARY

1 NOTICE OF APPEAL HAS BEEN SERVED ON:

NAME	DATE OF SERVICE	TYPE OF SERVICE
TRIAL COURT JUDGE Hon. M. Allan Vogelson, P.S.C.	2/17/98	Hand Deliver
TRIAL COURT CLERK/STATE AGENCY		
ATTORNEY GENERAL OR GOVERNMENTAL OFFICE UNDER R. 2:5-1(h)		

OTHER PARTIES:

NAME AND DESIGNATION	ATTORNEY NAME, ADDRESS & TELEPHONE NO.	DATE OF SERVICE	TYPE OF SERVICE
FOP Lodge 30 & Joseph Vena (SERVE THIS PARTY WITH TRANSCRIPT)	Benjamin Eisner, Esquire Charles Joyce, Esquire Spear, Wilderman, Borish, Endy, Spear & Runkel 36 Tanner Street, 2nd Floor Haddonfield, NJ 08033	2/17/98	Hand Deliver

I HEREBY CERTIFY THAT I HAVE SERVED A COPY OF THIS NOTICE OF APPEAL ON EACH OF THE PERSONS REQUIRED AS INDICATED ABOVE.

2/17/98 (DATE) SIGNATURE OF ATTORNEY OF RECORD

2 PRESCRIBED TRANSCRIPT REQUEST FORM HAS BEEN SERVED ON: (ALSO INDICATE IF SOUND RECORDED)

NAME	DATE OF SERVICE	AMOUNT OF DEPOSIT
ADMINISTRATIVE OFFICE OF THE COURTS CHIEF, COURT REPORTING SERVICES		
COURT REPORTER'S SUPERVISOR/ CLERK OF COURT OR AGENCY		
COURT REPORTER		

I HEREBY CERTIFY THAT I SERVED THE PRESCRIBED COURT TRANSCRIPT REQUEST FORM ON EACH OF THE ABOVE PERSONS AND PAID THE DEPOSIT AS REQUIRED BY R. 2:5-3(d).

(DATE) SIGNATURE OF ATTORNEY OF RECORD

3 I HEREBY CERTIFY THAT:

[ ] THERE IS NO VERBATIM RECORD.

[X] TRANSCRIPT IS IN THE POSSESSION OF THE ATTORNEY OF RECORD.

[ ] A MOTION FOR ABBREVIATION OF TRANSCRIPT HAS BEEN FILED WITH THE COURT OR AGENCY BELOW.

[ ] A MOTION FOR FREE TRANSCRIPT HAS BEEN FILED WITH THE COURT BELOW.

2/17/98

Da2

BLANK, ROME, COMISKY & McCAULEY
PETER A. GOLD, ESQUIRE
Resident Partner
SAMUEL M. FIRST, ESQUIRE
210 Lake Drive East, Suite 200
Woodland Falls Corporate Park
Cherry Hill, NJ 08002
(609) 779-3600
Attorneys for Defendant,
Delaware River Port Authority

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30, and JOSEPH VENA, Plaintiffs, v. DELAWARE RIVER PORT AUTHORITY, Defendant.	SUPERIOR COURT OF NEW JERSEY CAMDEN COUNTY LAW DIVISION DOCKET NO. L-7547-96 CIVIL ACTION **JUDGEMENT ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON COUNT I OF THE AMENDED COMPLAINT** BEFORE: The Honorable M. Allan Vogelson, P.J.S.C.

This matter having been opened to the Court by Spear, Wilderman, Borish, Endy, Spear and Rumckel, attorneys for Plaintiffs, Fraternal Order of Police, Penn-Jersey Lodge 30 and Joseph Vena, for an Order Granting Plaintiffs' Motion for Summary Judgment on Count I of the Amended Complaint, and by Blank Rome Comisky & McCauley, attorneys for Defendant, the Delaware River Port Authority, for an Order Granting Defendant's Cross-Motion for Summary Judgment on Plaintiffs' Amended Complaint, or in the Alternative to Strike Plaintiffs' Proffered Expert Testimony or to Continue the Motion in order that the DRPA may submit additional

affidavits, take discovery of Plaintiffs' expert or submit its own expert testimony, and the Court, having considered the papers and the argument of counsel.

It is this 21st day of November, 1997, for the reasons set forth in my November 3, 1997 bench opinion, **HEREBY ORDERED THAT:**

(1) Plaintiffs' Motion for Summary Judgment on Count I of the Amended Complaint, filed June 13, 1997, is **GRANTED** as follows: (a) The Parties shall select a mediator from a list supplied by the American Arbitration Association to develop a procedure and mechanism to resume good faith negotiations and arrive at an agreement over the terms and conditions of employment for DRPA police officers; (b) On December 3, 1997, at 1:30 p.m. the Parties shall appear before the Court to report on the progress of the above mediation; (c) If the Parties remain at impasse the Court can and will order binding interest arbitration.

(2) Defendant's Cross-Motion for Summary Judgment on Plaintiffs' Amended Complaint, or in the Alternative to Strike Plaintiffs' Proffered Expert Testimony or to Continue the Motion in order that the DRPA may submit additional affidavits, take discovery of Plaintiffs' expert or submit its own expert testimony, filed on July 15, 1997, is **DENIED**;

(3) Defendant's Motion for a Stay of this Order, made orally to the Court on November 3, 1997, is **DENIED**;

(4) The Court certifies this Judgment Order as Final for purposes of Appeal pursuant to Rule 4:42-2.

/s/ M. Allan Vogelson

M. Allan Vogelson, P.J.S.C.

BLANK ROME COMISKY & McCAULEY
PETER A. GOLD,
New Jersey Resident Partner
SAMUEL M. FIRST
Woodland Falls Corporate Park
210 Lake Drive East, Suite 200
Cherry Hill, NJ 08002
(609) 779-3600

Attorneys for Defendant,
Delaware River Port Authority

SPEAR, WILDERMAN, BORISH,
& RUNCKEL
BENJAMIN EISNER
CHARLES T. JOYCE
36 Tanner Street, Second Floor
Haddonfield, NJ 08033
(609) 428-5255

Attorneys for Plaintiff,
FOP, Lodge 30 and VENA

FOP, LODGE 30 and VENA,

Plaintiffs,

v.

DELAWARE RIVER PORT AUTHORITY,

Defendant.

SUPERIOR COURT OF NEW JERSEY
CAMDEN COUNTY
LAW DIVISION

DOCKET NO. L-7547-96

CIVIL ACTION

ORDER

THIS MATTER having been opened to the Court by the Parties by telephone conferences held before the Honorable M. Allan Vogelson, P.J.S.C., on the 10th and 12th days of December, 1997, and Judge Vogelson having heard and considered the arguments of both parties through their attorneys, and both parties having advised the Court that the following reflects Judge Vogelson's Rulings; and the Court having had the opportunity to confer with Judge Vogelson's Chambers;

In Judge Vogelson's absence, IT IS on this 19th day of December, 1997, ORDERED that:

1. At their next regularly scheduled meeting, the Commissioners of the Defendant Delaware River Port Authority ("DRPA") shall appropriate funds to equally share the American Arbitration Association ("AAA") mediator's fees with the Plaintiffs for the first three (3)

mediation sessions, as set out in the Grievance Mediation Rules of the AAA, in order to carry out the Court's Order of November 21, 1997, directing the parties to proceed to Mediation before the AAA;

2. The DRPA Motion to Stay all proceedings pending the Court's consideration of the DRPA's Motion for Reconsideration, etc., filed on December 5th, 1997, is denied;

3. Count II of Plaintiff's Amended Complaint is withdrawn with Prejudice;

4. The DRPA request to file an additional report, proffered as an "expert report", in connection with its Motion For Reconsideration, etc. is denied; and

5. The Return Date for the DRPA's Motion for Reconsideration is adjourned until January 23, 1997.

J.S.C.

JOHN A. FRATTO, J.S.C.

BLANK, ROME, COMISKY & McCAULEY LLP
A Pennsylvania LLP
PETER A. GOLD, ESQUIRE
Resident Partner
SAMUEL M. FIRST, ESQUIRE
JENNIFER J. PLATZKERE, ESQUIRE
210 Lake Drive East, Suite 200
Woodland Falls Corporate Park
Cherry Hill, NJ 08002
(609) 779-3600
Attorneys for Defendant,
Delaware River Port Authority

TRUE COPY

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30, and JOSEPH VENA, Plaintiffs, v. DELAWARE RIVER PORT AUTHORITY, Defendant.	SUPERIOR COURT OF NEW JERSEY CAMDEN COUNTY LAW DIVISION DOCKET NO. L-7547-96 CIVIL ACTION **JUDGMENT ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION AND/OR TO ALTER OR AMEND JUDGMENT, AND STAY ALL PROCEEDINGS** BEFORE: THE HONORABLE M. ALLAN VOGELSON, P.J.S.C.

This matter having been opened to the Court by Blank Rome Comisky & McCauley LLP, Counsel to Defendant Delaware River Port Authority for an Order Granting Its Motion For Reconsideration And/Or To Alter Or Amend Judgment, And Stay All Proceedings, and opposed by Plaintiffs' Counsel Spear, Wilderman, Borish, Endy, Spear and Runckel, and the Court having considered the papers and argument of Counsel:

It is this 17th day of January, 1998, for the reasons set forth in my January 23, 1998 bench opinion, HEREBY ORDERED THAT:

(1) Defendant's Motion For Reconsideration And/Or To Alter Or Amend Judgment, and Stay All Proceedings is denied; thus;

(2) The Court's Order of November 21, 1997 continues in full force and effect; and

(3) The Court's Order of December 19, 1997 remains in full force and effect (as subsequently modified by Court postponing the action to be taken by the Commissioners set out in Paragraph 1 until the February or the next regularly scheduled meeting of the DRPA Commissioners).

M. Allan Vogelson, P.J.S.C.

TRUE COPY

SPEAR, WILDERMAN, BORISH,
ENDY, SPEAR AND RUNCKEL
BY: WARREN J. BORISH, ESQUIRE
BENJAMIN EISNER, ESQUIRE
126 White Horse Pike
Haddon Heights, New Jersey 08035
(609) 547-6199
Attorneys for Plaintiffs

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30, an unincorporated labor organization P.O. Box 68 Bellmawr, NJ 08099-0233	SUPERIOR COURT OF NEW JERSEY
and	CAMDEN COUNTY
JOSEPH VENA 39 White Birch Road Turnersville, NJ 08012	CHANCERY DIVISION GENERAL EQUITY
Plaintiffs,	DOCKET NO.
v.	Civil Action
THE DELAWARE RIVER PORT AUTHORITY One Port Center Two Riverside Drive Camden, NJ 08101	COMPLAINT
Defendant.	

INTRODUCTION

This is an action for permanent and mandatory injunctive relief to order Defendant, The Delaware River Port Authority ("DRPA") to rescind terms and conditions of employment

unilaterally and unlawfully imposed upon employees of the DRPA and members of Plaintiff labor organization, the Fraternal Order of Police, Penn-Jersey Lodge 30 ("FOP Lodge 30"), and Plaintiff Joseph Vena, ("Vena") a citizen of New Jersey and an employee of the Defendant and member of FOP Lodge 30. This action also seeks to compel the DRPA to bargain in good faith with FOP Lodge 30 over the terms and conditions of employment for the police officers of the DRPA. Plaintiffs request equitable relief from this Honorable Court because the DRPA has been engaged in a pattern of bad faith collective bargaining with FOP Lodge 30, culminating in its unilateral imposition of employment conditions, conduct that is violative of Article I, Paragraph 19 of the New Jersey Constitution and of parallel legislative enactments of the Commonwealth of Pennsylvania, as well as the existing Collective Bargaining Agreement between the FOP Lodge 30 and the DRPA.

THE PARTIES

1. Plaintiff, Fraternal Order of Police Penn-Jersey Lodge 30 ("FOP Lodge 30") is an unincorporated labor organization with a business address of P.O. Box 68, Bellmawr, New Jersey 08099-0233. FOP Lodge 30 represents police officers employed by the Defendant.

2. Plaintiff, Joseph P. Vena ("Vena") is a patrol officer employed by the DRPA Department of Public Safety, and is a Vice-President of FOP Lodge 30. Plaintiff Vena resides at 39 White Birch Road, Turnersville, New Jersey 08012.

3. Defendant, Delaware River Port Authority, ("DRPA") is a corporate instrumentality of the State of New Jersey and the Commonwealth of Pennsylvania, created pursuant to a Bi-State Compact between those two states. N.J.S.A. 32:3-2 et seq; 36 P.S. § 3503 et seq. The DRPA's mailing address is One Port Center, Two Riverside Drive, Camden, New Jersey 08101.

4. The DRPA is administered by a Board of sixteen (16) Commissioners, appointed by the Governors of the State of New Jersey and the Commonwealth of Pennsylvania, respectively.

5. The Bi-State Compact provides that the DRPA may be sued in either the State of New Jersey or the Commonwealth of Pennsylvania. N.J.S.A. 32:3-5(b); 36 P.S. § 3503.

6. The DRPA is an employer within the meaning of Article I, Section 19 of the Constitution of the State of New Jersey, and within the meaning of the Pennsylvania Labor Relations Act ("PLRA") and the Pennsylvania Public Employe Relations Act, ("Act 195") and the Act of June 24, 1968 ("ACT 111").

JURISDICTION

7. The jurisdiction of this Court is founded upon the Bi-State Compact between the State of New Jersey and the Commonwealth of Pennsylvania, N.J.S.A. 32:3-2; 36 P.S. § 3503;

Article I, Paragraph 19 of the New Jersey Constitution; Article 6, Section 3, Paragraph 2 of the New Jersey Constitution; the Pennsylvania Labor Relations Act ("PLRA"), 43 P.S. § 211.1 et seq.; the Act of June 24, 1968 ("Act 111"), 43 P.S. § 217.1 et seq.; the Pennsylvania Public Employe Relations Act ("Act 195"), 43 P.S. § 1101.101 et seq.; and the general equitable power of this Court.

FACTUAL AVERMENTS

A. The Existing Collective Bargaining Agreement Between FOP Lodge 30 and DRPA

8. The FOP Lodge 30 is the exclusive collective bargaining representative of the police officers employed by the DRPA Department of Public Safety. The police officers patrol DRPA property including the four (4) bridge facilities spanning the Delaware River operated and maintained by the DRPA -- The Betsy Ross Bridge, the Benjamin Franklin Bridge, the Walt Whitman Bridge, and the Commodore Barry Bridge.

9. For a number of decades, the DRPA and the FOP Lodge 30 have negotiated successive multi-year Collective Bargaining Agreements covering the terms and conditions of employment of the DRPA police officers.

10. The term of the current collective bargaining agreement (the "Collective Bargaining Agreement") extended from December 11, 1992 through December 10, 1995, and was extended by mutual agreement up to and including August 20, 1996. (A copy of the

Collective Bargaining Agreement is attached hereto as Exhibit "A").

11. The Collective Bargaining Agreement provides, inter alia, at Article III, Section 1, that police officers are protected from layoffs during the term of the Agreement.

12. The Collective Bargaining Agreement provides, at Article III, Section 3, that certain job assignments, i.e., the building person and police radio person, shall be filled by police officers only.

13. The Collective Bargaining Agreement provides, at Article VI, Section 10, that police officers work fixed work shifts at each bridge facility, shifts they select by seniority.

14. The Collective Bargaining Agreement provides, at Article XIII, that police officers injured in the line of duty shall receive the difference between their workers compensation benefit and their regular pay for a minimum period of 26 weeks (hereinafter referred to as "make whole payments").

15. The Collective Bargaining Agreement also provides, at Article XVII, Section 1, that the DRPA shall provide police officers with medical and hospitalization benefits, including mental health coverage, a prescription plan and dental plan, and a choice of two (2) medical insurance plans.

B. Initial Attempts by FOP Lodge 30 to Negotiate a Successor Collective Bargaining Agreement with DRPA

16. On or about November 4, 1995, representatives of FOP Lodge 30, including Plaintiff Vena, met with representatives of the DRPA to begin negotiating a successor collective bargaining agreement.

17. At this November 4, 1995 meeting, the FOP Lodge 30 and the DRPA exchanged written proposals to enact changes in the current Collective Bargaining Agreement.

18. The FOP Lodge 30 proposal consisted of a comprehensive plan to harmonize the language of the existing Collective Bargaining Agreement, as well as a request for additional protections and benefits.

19. The DRPA proposal demanded that the FOP Lodge 30 agree to surrender, inter alia, its contractual protection against layoffs, and its members' rights to select their work shift by seniority.

20. The DRPA proposal also demanded the full right to subcontract out any and all police functions, including but not limited to the building and police radio functions.

21. The DRPA proposal also demanded that the FOP Lodge 30 give up its right to receive make whole payments for injuries suffered on duty.

22. At the November 4, 1995 meeting, the DRPA representatives informed the FOP Lodge 30 that it would submit its wage and health care benefits proposals at a later date, and simultaneously withdrew its proposal to abolish the make whole payments provision.

C. Evidence of DRPA Bad Faith Bargaining

23. Over the course of the next eight (8) months, the parties met infrequently, averaging less than two (2) bargaining sessions per month. During one six week period of time, the DRPA refused to meet at all with the FOP Lodge 30 to bargain collectively. The last time the DRPA agreed to meet with the FOP Lodge 30 to engage in collective bargaining negotiations was July 1, 1996.

24. During the course of negotiations, the DRPA both refused to move from its initial demands for drastic givebacks and concessions, and engaged in bad faith bargaining.

25. As one example of bad faith bargaining, the DRPA initially proposed that police officers' health benefits stay generally the same. At a later date, however, the DRPA announced that, beginning January 1, 1997, it would provide police officers only with the health care benefits it chose to give to its non-represented employees, while refusing to give FOP Lodge 30 any guarantee as to whether it was planning on providing any benefits at all to its non-represented employees, and without any indication as to what such benefits, if granted, might consist of as of January 1, 1997.

26. Additionally, after initially withdrawing its proposal to abolish make whole benefits at the first negotiation session on November 4, 1995, the DRPA, without discussion or prior notice to the Union, restored this proposal to its list of bargaining demands when it presented its "final" offer to FOP Lodge 30 on July 1, 1996.

27. Additionally, the DRPA engaged in a pattern of agreeing to certain FOP Lodge 30 demands, and then, at a later date, rescinding its assent. This occurred on at least three (3) occasions regarding FOP Lodge 30 proposals to: 1.) alter the grievance procedure; 2.) to protect the building and radio room positions from subcontracting; and 3.) to provide overtime pay for police officers.

28. Throughout the course of negotiations, the DRPA representatives constantly stressed to FOP Lodge 30 that it was demanding such givebacks and concessions because it wanted to "set an example" to follow in negotiations it intended to commence in late 1996 with the International Union of Operating Engineers Local 716 ("Local 716"), which is the majority bargaining representative for the toll takers and maintenance personnel employed by the DRPA.

29. However, when FOP Lodge 30 requested that the DRPA agree to a "most favored nations" clause in the new Collective Bargaining Agreement, whereby the DRPA would provide FOP Lodge 30 with any terms and conditions it negotiated with Local 716 that were more favorable than those contained in the FOP Lodge 30 - DRPA Collective Bargaining Agreement, the DRPA consistently and without explanation refused.

30. The DRPA also refused to make any wage proposal at all to the FOP Lodge 30 until the final minutes of the last scheduled day of negotiations, July 1, 1996. At that time, the DRPA simply and summarily announced what it would provide in the area of wages, and allowed for no discussion of its wage proposal and no consideration of any wage counter-proposal by the Union.

31. On or about July 17, 1996, the DRPA demanded that FOP Lodge 30 schedule a vote of its membership on the DRPA's "Final Contract Proposal". (A copy of the DRPA "Final Contract Proposal" is attached hereto as Exhibit "B").

32. On or about July 24, 1996, the Executive Director of the DRPA, Paul Drayton, Jr., without waiting for the outcome of the Union's ratification vote, which the DRPA itself had demanded, ordered that the agenda for the next meeting of the DRPA's Board of Commissioners, scheduled for August 21, 1996, include a vote to unilaterally implement the DRPA final contract proposal.

33. On July 29, 1996, the membership of FOP Lodge 30, by a secret ballot vote of 76-0, unanimously rejected the DRPA final contract proposal.

34. On July 30, 1996, FOP Lodge 30 President James Stewart sent a letter to all DRPA commissioners, explaining the reasons behind the unanimous rejection of the DRPA contract proposal, and requesting that the DRPA extend the current Collective Bargaining

Agreement and negotiate in good faith over a successor agreement. (A copy of FOP Lodge 30 President Stewart's July 30, 1996 letter to the DRPA Commissioners is attached hereto as Exhibit "C").

35. On or about August 1, 1996, the Labor Subcommittee of the DRPA, an Executive Committee of the DRPA, voted to seek the approval of the full DRPA Board of Commissioners "for the imposition of a labor contract upon" FOP Lodge 30. (A copy of the Labor Subcommittees' Summary Statement and Resolution regarding the proposal is attached hereto as Exhibit "D").

36. On August 5, 1996, the DRPA Labor Subcommittee met with the Executive Board of the FOP Lodge 30 to inform the FOP Lodge 30 of their planned action. At the conclusion of the meeting, DRPA Board of Commissioners Chairman Manuel Stamatakis expressed hope that the parties could "work out their differences" in advance of the Board's August 21, 1996 meeting. The FOP Lodge 30 representatives replied that the Union was prepared to meet at any time and at any place to negotiate.

37. Since August 5, 1996, despite written requests from FOP Lodge 30 to bargain, the DRPA has refused to meet to negotiate a successor collective bargaining agreement with the FOP Lodge 30.

COUNT I - CONSTITUTIONAL AND STATUTORY VIOLATIONS

38. Plaintiffs incorporate the allegations contained in paragraphs 1-37 of this Complaint as if fully set forth.

39. Article I, Paragraph 19 of the New Jersey Constitution provides:

> Persons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing.

40. The Pennsylvania Labor Relations Act, 43 P.S. § 211.1, 211.2(c)(d), provides, in relevant part:

> In the interpretation and application of this act and otherwise, it is hereby declared to be the public policy of the State to encourage the practice and procedure of collective bargaining and to protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection, free from the interference, restraint or coercion of their employers... . All the provisions of this act shall be liberally construed for the accomplishment of this purpose.

41. Act 111, 43 P.S. § 217.1 et seq. concerning "Collective Bargaining by a

Policeman and or Fireman," provides, in relevant part:

> Policemen...employed by a political subdivision of the Commonwealth shall, ...have the right to bargain collectively with their public employers concerning the terms and conditions of their employment, including compensation, hours, working conditions, retirement, pensions and other benefits... .

42. The Pennsylvania Public Employe Relations Act, ("PERA"or Act 195"), 43 P.S. § 1101.101 et seq., provides in relevant part:

> it is the public policy of the Commonwealth and the purpose of this act to promote orderly and constructive relationships between all public employers and their employees... the General Assembly has determined that the overall policy may best be accomplished by (1) granting to public employees the right to organize and choose freely their representatives; (2) requiring public employers to negotiate and bargain with employee organizations representing public employees and to enter into written agreements evidencing the result of such bargaining...

43. These Constitutional and Statutory guarantees of the State of New Jersey and Commonwealth of Pennsylvania evince a parallel intent on the part of both states to require the DRPA to accord its employees certain fundamental rights of self-organization and mutual protection, including the right to bargain freely and fairly, through a collective bargaining representative, over the terms and conditions of their employment, and to require the DRPA to bargain in good faith over the terms and conditions of their employees' employment.

44. The DRPA has violated the above-cited Constitutional and Statutory guarantees by engaging in a pattern of bad faith bargaining with FOP Lodge 30 over the provisions of a successor collective bargaining agreement to govern the terms and conditions of employment for DRPA police officers.

45. Evidence of the DRPA's failure to engage in good faith Collective Bargaining with FOP Lodge 30 include, but is not limited to:

(a) The DRPA's demands for unreasonable and draconian givebacks and concessions;

(b) The DRPA's insistence that the FOP Lodge 30 accept a Collective Bargaining Agreement that contains absolutely no contractual guarantee of health care benefits;

(c) The DRPA's last minute restoration of its demand to abolish make whole payments for police officers injured in the line of duty, after initially withdrawing the proposal to abolish said payments;

(d) The DRPA's repeated withdrawal of agreement on FOP Lodge 30 contract proposals to which it had previously agreed;

(e) The DRPA's refusal to bargain over wages, and its refusal to submit a wage proposal to FOP Lodge 30 until the final minutes of the last scheduled day of collective bargaining negotiations;

(f) The DRPA's expressed vow to use its bargaining with FOP Lodge 30 as a means to "set an example" for the demands and concessions it intended to achieve with IUOE Local 716;

(g) The DRPA's unreasonable delay in meeting with the representatives of FOP Lodge 30 to negotiate a successor Collective Bargaining Agreement, including a hiatus of some six (6) weeks in which the DRPA declined to negotiate at all with FOP Lodge 30;

(h) The DRPA's steadfast refusal to meet further with representatives of FOP Lodge 30 to continue negotiations, despite the Union's repeated requests that it do so;

(i) The DRPA's decision instead to unilaterally impose its contract proposal upon the unwilling members of FOP Lodge 30, who have voiced their outrage with this process by voting unanimously, in a secret ballot vote, to reject the DRPA contract

proposal.

46. If the DRPA is allowed to forcibly impose austere, unreasonable, and uncertain terms and conditions of employment upon FOP Lodge 30 and its members without engaging in good faith collective bargaining, Plaintiffs' fundamental rights under the New Jersey Constitution and parallel legislative enactments in the Commonwealth of Pennsylvania to bargain collectively the conditions of their employment, through representatives of their own choosing, will be violated.

47. If the DRPA is allowed to forcibly implement its terms and conditions of employment upon FOP Lodge 30 and its members without engaging in good faith collective bargaining, police officers will be forced to work without any meaningful measure of job security, will be subject to transfer from shift to shift on short notice, will be without any sense of what kind of medical insurance, if any, they and their families will be entitled to, and will be forced to work in a highly dangerous environment with the knowledge that if they are disabled due to an injury on the job, they will not be made whole for any resultant loss of income.

48. Correspondingly, if the DRPA is enjoined from implementing its terms and conditions until the parties can complete good faith collective bargaining negotiations over a successor Collective Bargaining Agreement, the DRPA will suffer no harm whatever. Moreover, the public will suffer no harm from the grant of such an injunction.

49. If the DRPA is permitted to forcibly impose its terms and conditions of employment upon FOP Lodge 30 and its members over their vigorous protest, the rights and the potential safety of the public will be dangerously compromised, in that FOP Lodge 30 members may be forced to engage in a stoppage of work to protest the DRPA's actions.

50. Given the high profile and dangerous role DRPA police officers perform everyday in protecting the public and ensuring vehicular and pedestrian safety on the Delaware River Bridges and on all DRPA property, the public interest strongly demands that the DRPA be enjoined from implementing its terms and conditions of employment until and unless it agrees to commence and complete good faith collective bargaining negotiations with FOP Lodge 30 over a successor Collective Bargaining Agreement.

WHEREFORE, Plaintiffs request this Honorable Court:

A. To issue a Declaratory Judgment that the DRPA is in violation of Article I, Paragraph 19 of the New Jersey Constitution;

B. To issue a mandatory and permanent injunction enjoining the DRPA from unilaterally implementing its terms and conditions upon FOP Lodge 30 and its members (or, if appropriate, rescinding any such unilateral implementation that has occurred);

C. To order the DRPA to return to collective bargaining negotiations with FOP Lodge 30 for a reasonable time, and with orders to commence bilateral, good faith negotiations to reach a successor Collective Bargaining Agreement;

D. To appoint a mediator through the auspices of the New Jersey State Board of Mediation, the Pennsylvania Bureau of Mediation, the Federal Mediation and Conciliation Service or another appropriate neutral entity selected by the court, to assist the parties in the negotiation process;

E. To award its attorney's fees and costs;

F. To order such further relief that this Court deems necessary to effectuate the Constitutional guarantees of Article I, Section 19 of the New Jersey Constitution and as the needs of justice require.

COUNT II - BREACH OF CONTRACT

51. The Plaintiffs incorporate paragraphs 1-50 of this Complaint as if fully set forth.

52. The Collective Bargaining Agreement between FOP Lodge 30 and the DRPA

provides, at Article II, Section 1, that the "DRPA recognizes the FOP Lodge 30 as the majority representative for all hourly paid employees classified as police officers."

53. Article II, Section 1 of the Collective Bargaining Agreement establishes that the DRPA will deal fairly and in good faith with FOP Lodge 30 in all matters relating to the FOP's representation of its members, including specifically the requirement that the DRPA negotiate successor Collective Bargaining Agreements with FOP Lodge 30 in good faith.

54. By the conduct described in this Complaint, particularly paragraphs 45 a-i, the DRPA has violated the Collective Bargaining Agreement between it and FOP Lodge 30, by refusing to engage in good faith collective bargaining with FOP Lodge 30.

WHEREFORE, Plaintiffs request this Honorable Court:

A. To issue a mandatory and permanent injunction enjoining the DRPA from unilaterally implementing its terms and conditions upon FOP Lodge 30 and its members;

B. To order the DRPA to return to collective bargaining negotiations with FOP Lodge 30 for a reasonable time, and with orders to commence bilateral, good faith negations to reach a successor Collective Bargaining Agreement;

C. To appoint a mediator through the auspices the New Jersey State Board of Mediation, the Pennsylvania Bureau of Mediation, the Federal Mediation and Conciliation Service, or another appropriate neutral entity selected by the Court, to assist the parties in the negotiation process;

D. To award Plaintiffs attorney's fees and costs;

E. To order such further relief as this Court deems necessary to remedy the breach of contract by the DRPA.

Respectfully submitted,

SPEAR, WILDERMAN, BORISH, ENDY, SPEAR AND RUNCKEL

BY: _____

WARREN J. BORISH
BENJAMIN EISNER
126 White Horse Pike
Haddon Heights, NJ 08035
(609) 547-6199
Attorneys for Plaintiffs

Of Counsel

CHARLES T. JOYCE
Spear, Wilderman, Borish,
Endy, Spear and Runckel
230 S. Broad St., Ste. 1400
Philadelphia, PA 19102
(609) 732-0101

DATED: August 20, 1996

Exhibit A

AGREEMENT

between

DELAWARE RIVER PORT AUTHORITY

and

FRATERNAL ORDER OF POLICE, LODGE 30

Term: December 11, 1992
through
December 10, 1995

000005

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THIS AGREEMENT effective the 11th day of December, 1992 between DELAWARE RIVER PORT AUTHORITY (hereinafter called "DRPA"), and the FRATERNAL ORDER OF POLICE, LODGE 30 (hereinafter called "FOP").

WITNESSETH THAT:

ARTICLE I

This Agreement shall replace and supersede any previous Agreement between the Delaware River Port Authority and bargaining representatives for police classified as police officers.

ARTICLE II

Section 1 DRPA recognizes the FOP as the majority representative for all hourly paid employees classified as police officers.

Section 2 This unit shall apply to DRPA or to any subsidiary corporation it forms to operate bridges after the date of this Agreement and shall apply to the bridges and approaches and bridge-associated structures thereto presently operated by DRPA and to any other bridge constructed and operated by Delaware River Port Authority in the future.

Section 3 If during the period of this Agreement a new bridge is constructed and operated by DRPA, the FOP agrees that police officers may be transferred to a new location to assist in the operation of the new bridge facility or breaking in of new personnel, or the general startup of the new facility. In connection with such assignments, the police officers shall not be adversely affected in their seniority rights granted in this Agreement.

Section 4 Executives, private secretaries, foremen and assistant foremen, corporals, summer help, professionals, supervisors, maintenance, highway, electrical, controls, tolls and toll accounting clerks shall be excluded from the bargaining unit.

Section 5 This Agreement shall bind and inure to the benefit of the successors and assigns of the parties signatory hereto.

Section 6 The DRPA and FOP agree that they will not discriminate against any employee or applicant because of union membership or activities, race, color, religion, sex, age, national origin, or non-job related disability, except where sex or age is a bona fide occupational qualification.

Section 7 References in this Agreement in one gender shall be deemed to include both genders.

ARTICLE III

Section 1 During this Agreement, the Delaware River Port Authority shall not lay off any police officer who has successfully completed his or her probationary period. However, this provision will not apply in the event of the complete curtailment of the use of any bridge over which curtailment the DRPA has no control whatsoever, direct or indirect.

Section 2 Notwithstanding any provision in this Agreement, the Delaware River Port Authority shall not require any police officer to perform the work of any member of the bargaining unit in the event of a strike by Local 716, International Union of Operating Engineers.

Section 3 The job assignments of building and police radio room shall be part of the unit and filled from within the unit only.

Section 4 It is recognized that the business of the DRPA is to render efficient and courteous service to the public and the FOP and its members agree that police officers should present a neat appearance, be efficient and courteous.

Section 5 The DRPA may establish reasonable standards of performance and take steps to upgrade the skills of police officers.

Section 6 The DRPA may from time to time assign police officers to work at any bridge, but an assignment or transfer of police officers from one bridge to another shall not be done for disciplinary purposes or arbitrary reasons. A police officer who after arriving at work must work at another bridge shall be transported in a police vehicle.

Section 7 It is recognized that the DRPA may discipline police officers up to and including the discharge for just cause. The FOP shall be notified in writing of all such disciplinary action by the DRPA within three (3) working days of such action.

ARTICLE IV

Section 1 DRPA agrees that subject to any applicable law it will deduct from the wages of its police officers, who at the time of the signing of this Agreement are members of the FOP and who authorize such deduction, the FOP established initiation fee and regular weekly dues, as certified by the FOP. The amount so deducted shall be paid to Lodge 30. This clause shall also apply to a police officer who joins the FOP after the signing of this Agreement.

Section 2 The initiation fee shall be deducted from the first five (5) pays received by the police officer following the execution and delivery of the authorization card. The dues shall be deducted from the weekly pay of the police officer.

Section 3 A facsimile of the authorization card to be used for the deduction shall be as follows:

"To the Delaware River Port Authority":

"I, the undersigned, an employee of the Delaware River Port Authority, authorize the Delaware River Port Authority to deduct from my wages an initiation fee and weekly dues and to remit the amount so deducted to Lodge 30, Fraternal Order of Police at its offices in Philadelphia, Pennsylvania."

"This authorization shall be irrevocable for a period of one year and shall automatically renew itself for a successive yearly period unless I give written notice to the Delaware River Port Authority at least sixty (60) days and not more than ninety (90) days before any periodic renewal of this authorization of my desire to revoke the same."

"Signature_____

Date_____

Address _____

_____

Employee's No._____"

This authorization card is subject to further revocation pursuant to Section 8 of this Article

Section 4 If any police officer shall at any time claim that the Delaware River Port Authority acted wrongfully or improperly in making any checkoff of dues or initiation fee, the FOP will defend, indemnify and hold harmless the Delaware River Port Authority from any such claims.

Section 5 It is a continuing condition of employment that on the effective date of this Agreement, all police officers who are, or who thereafter become members of the FOP, shall during the term of this Agreement remain members of the FOP.

Section 6 The FOP will notify the DRPA in writing that an FOP member has failed or refused to tender the initiation fee and/or FOP dues. This notice is to be dated and signed by the proper FOP officials. The DRPA shall be given seven (7) calendar days from receipt of notice before action is taken on the police officer.

Section 7 The DRPA, if it has been given proof positive that the FOP dues or initiation fees have not been paid, shall terminate the employment of any such regular employee who within seven (7) days after receipt of the DRPA of such written notice pursuant to Section 6 of this Article has not paid the FOP initiation fee and regular weekly FOP dues.

Section 8 The parties have agreed that the following terms shall apply irrespective of any inconsistent provision in the foregoing, namely, that subject to the provisions of Section 9 of this Article, any police officer may by letter not only resign from the FOP, but also revoke any existing dues deduction authorization at any time during the last thirty (30) days of this contract. Any such resignation or revocation letter shall be effective as of 12:01 a.m. the day following the expiration of this contract.

Section 9

A. Representation Fee - DRPA agrees that subject to any applicable law, the FOP shall be entitled to a representation fee from any police officer who elects not to join the FOP under the provisions of Article IV of this Agreement. Such fee shall be in lieu of police officer dues paid to the FOP by its members for collective bargaining and contract administration services rendered by the FOP on behalf of all police officers covered by this Agreement.

B. The representation fee, which shall be paid by payroll deduction as hereafter set forth, shall be in an amount equivalent to that part of the FOP's regular dues which does not represent expenses for benefits inuring only to its members or political and ideological activities, but in no event shall such representation fee exceed eighty-five percent (85%) of the FOP's regular membership dues.

C. As a condition of the above deduction, DRPA shall be provided by the FOP an annual statement from its independent auditors setting forth information sufficient to confirm the amount of its police officers' membership dues which benefits only its members and the cost of any expenditures by the FOP for political or ideological activities.

D. Payroll Deductions - This Section 9 shall become effective upon receipt by DRPA from the FOP of the statement prescribed by Section 9C. Thereafter, upon successful completion by an employee of sixty (60) days of employment DRPA will deduct the appropriate percentage of the FOP police officers' membership dues from the pay received by the affected employee each pay period. Such fee shall be transmitted to the FOP under separate identification with dues provided for in Article IV, Section 1.

E. The FOP agrees to cooperate fully with DRPA should there be any claim that DRPA acted wrongfully or improperly in making any deduction of the representation fee provided herein. The FOP further shall indemnify and save DRPA harmless against any and all claims, suits or other forms of liability that shall arise out of action taken by DRPA for the purpose of complying with the provisions of this Section 9.

ARTICLE V

Section 1 The FOP and its members recognize that all management functions, including the full and exclusive control, direction and supervision of bridge operations and personnel are vested solely in DRPA, except as may be otherwise provided in this Agreement.

Section 2 Nothing in this Agreement shall be construed to permit the FOP or any of its members to assume that they have authority to officiate in any managerial or supervisory capacity.

ARTICLE VI

Section 1 The length of service or seniority with DRPA of all police officers shall be computed from the date of hiring of each police officer's last period of continuous employment at DRPA in this bargaining unit.

Section 2 The DRPA shall prepare and keep available an overall length of service list and also a Bureau Seniority list.

Section 3 Qualified applicants for the position of police officers will be hired without regard to the source of application. Police officers shall be considered as probationary during the first twelve (12) months of their employment and may be terminated, laid off, promoted, demoted or transferred at the sole discretion of the DRPA. Each new police officer must successfully complete a training course at an approved Police Academy within his twelve (12) calendar month probationary period as a condition of his employment.

Section 4 DRPA may employ temporary summer employees from May 1 through October 1 in any calendar year. Such employees shall perform administrative work only and not patrol police work and shall not accumulate seniority.

Section 5 A police officer in this bargaining unit may apply for a position in a bargaining unit of other employees and DRPA may grant the transfer.

Section 6 Bureau seniority shall accumulate from the date of last hire in the bureau.

Section 7 Police officers requesting a transfer shall be transferred to vacancies (all within the unit) in accordance with (a) bureau seniority; (b) skill; (c) ability; and (d) fitness. When factors (b), (c) and (d) are relatively equal as between two (2) or more police officers, seniority shall prevail. In the event there is no qualified applicant, the DRPA may fill the vacancy from the unit.

Section 8

A. Police officers who are promoted to a supervisory position shall continue to accumulate seniority for a period of six (6) months, provided they return to their former position within such time period.

B. A police officer who at his request is transferred to another bureau shall retain his seniority in his old bureau for three (3) months which will inure to him if he returns to his old bureau within the three (3) months.

Section 9 Any seniority rights inuring to any police officer shall terminate on:

A. Discharge;

B. Voluntary termination of employment;

C. Failure to return to work at the expiration of an approved leave-of-absence, without an excuse acceptable to DRPA;

D. Failure to report to work for three (3) consecutive days without notice to the DRPA or without an excuse for failure to give such notice acceptable to DRPA;

E. Absence from work because of sickness or accidental injuries for a period of two (2) years. During such period, the employee shall accumulate seniority. Before the expiration of the two-year period, police officers may apply for a special leave of absence.

Section 10 Police officers shall work the following fixed shifts at each facility: 7:00 a.m. to 3:00 p.m.; 3:00 p.m. - 11:00 p.m.; 11:00 p.m. to 7:00 a.m. on a 5-2, 5-2, 5-1 rotational basis. When a police vacancy occurs at a bridge, the vacancy will be posted and made available to all police officers from all bridges up to a maximum of four (4) transfers, including the original opening.

The basis for a transfer to another bridge shall be Police Bureau seniority.

Section 11 Irrespective of the seniority provision in the Agreement, a police officer who is temporarily disabled from regular work as a result of accident, or sickness may be transferred to available jobs at the discretion of the DRPA.

Section 12 Posting of all police officer level jobs and all lists for tested positions shall expire after one (1) year from the date of the test. All criteria for a position will be included in the posting of the position. All vacancies shall be filled within one (1) year from within the unit in accordance with the contract.

Section 13 Police officers required to work in a higher classification (such as corporal) shall be paid at the applicable pay rate for such classification. The most senior qualified officer working shall be selected to perform such work.

ARTICLE VII

During the term of this Agreement, the FOP and its members shall not authorize, call, support, sanction, approve or take part in any strike, slowdown, reporting of pretended illness or the cessation of work, and they agree not to sponsor, authorize, call, support, sanction, approve or take part in any sympathy strike, secondary boycott or political strike.

Any police officer who violates this Article may be deemed to have terminated his employment.

ARTICLE VIII

Section 1 Should any difference arise between the DRPA and any police officer covered by the bargaining unit as to the meaning or application of this Agreement, such differences or disputes shall constitute a grievance and shall be settled in the following

manner:

A. A police officer who believes he has a grievance shall discuss the matter with his immediate supervisor in an attempt to settle the same. The police officer may have an FOP representative present if he so desires. No grievance shall be considered unless Step A takes place within three (3) working days of the incident giving rise to the difference (excluding holidays and weekends), but only one grievance need be filed as to the same underlying action. This Step shall not apply to grievances involving disciplinary suspensions or discharges, which shall be referred directly to Step B within three (3) working days of the imposition of such suspension or discharge.

B. If the grievance is not settled in Step A, it may then be reduced to writing and presented in five (5) calendar days by the FOP to an appropriate supervisory employee designated by the DRPA to the FOP for such purposes. (In cases of disciplinary suspensions or discharges, the Inspector and Captain shall represent the DRPA.) The DRPA shall respond in writing to a grievance within five (5) calendar days from its receipt of the written grievance under this Step B, unless such time limitation is extended by mutual agreement in writing. In the event no response is given within this time period, the grievance shall be deemed to have been denied.

C. If the grievance is not satisfactorily settled in Steps A and B, the matter may be discussed further within ten (10) days from the decision in Step B by an appropriate management official selected by the DRPA. (In cases of disciplinary suspensions or discharges, the Division Director shall represent the DRPA.) The DRPA shall respond in

writing to a grievance within fifteen (15) calendar days from its receipt of the written grievance under ...in Step C, unless such time limitation is ...tended by mutual agreement in writing. In the event no response is given within this time period, the grievance shall be deemed to have been denied.

The time and place for the discussion will be set by mutual agreement. If the time set requires an FOP section officer, who is off duty, to attend the discussion under this subparagraph C, the DRPA will pay not more than two (2) such FOP section officer(s) four (4) hours' pay at his base rate.

Section 2 Any police officer or representative of the FOP may be absent from work for the purpose of attending conferences and handling grievances, if he or she has obtained permission for the absence from the Chief Inspector and if such attendance does not conflict with operational matters.

Section 3 If a grievance is not satisfactorily adjusted under Section 1C of this Article, either party may, within forty-two (42) days from the decision and in writing, submit the matter to arbitration. The arbitration shall be submitted to the American Arbitration Association in accordance with its rules and regulations.

The arbitrator, in his decision, shall be guided by the interests of the parties herein and said arbitrator shall have no power to add to, alter, amend or repeal this Agreement, any provisions thereof, or to fix or change any rate or rates of pay.

The expenses of the arbitrator and the expenses of the American Arbitration Association shall be borne one-half (½) by the DRPA and one-half (½) by the FOP.

ARTICLE IX

Section 1 When operational needs warrant, a police officer may be called to work on a day off in accordance with the present overtime procedure. The regular overtime list at each bridge shall be used in such situations. Such procedure shall be consistent with Article XV, Section 8.

Section 2 Police officers shall not operate salt trucks for more than one hour per call-in or hold-over period, unless Highway Bureau employees cannot report to work within that time as a result of road conditions.

ARTICLE X

In any terms of this Agreement are declared invalid by any court, such decision shall not invalidate any other provisions of this Agreement.

ARTICLE XI

Section 1 The DRPA will provide bulletin boards at each bridge for use by the FOP for posting announcements and social affairs, provided such announcements are signed by an FOP officer.

Separate bulletin boards shall be maintained by the DRPA for the purpose of posting general directives and notices. All police officers during any tour of duty shall be deemed to have read and to have become familiar with all items posted as if they have signed such notice. Copies of such bulletin board notices shall be placed in a mail box of the FOP President.

Section 2 A police officer may request and the DRPA may in its sole discretion grant a leave of absence without pay of any duration up to sixty (60) days. During such leave of absence, the police officer shall accumulate seniority. When a police officer fails to report to work at the end of his or her leave of absence, or any extension thereof, he or she may be deemed by the DRPA to have terminated his or her employment.

Section 3 During the term of this Agreement, the DRPA will check off sums of money for the FOP Credit Union: Provided, however, that the DRPA is in no way responsible in connection with such deductions except to turn them over to a designated person.

ARTICLE XII

Any police officer who shall have entered the armed services of the United States shall be re-employed by the DRPA upon his return to work in compliance with applicable law.

ARTICLE XIII

Any police officer disabled as a result of an industrial accident at DRPA shall receive the difference between his or her Workers' Compensation benefit and his weekly pay for a regularly scheduled workweek for a period of up to twenty-six (26) weeks. The DRPA in its sole discretion may extend such payments and if the payments are extended they may be discontinued at any time in the sole discretion of the DRPA.

ARTICLE XIV

The DRPA will place non-work-related temporarily disabled police officers able to do so on light or limited duty status to the extent that such duty is available, even if on an intermittent basis. This provision shall also apply to those employees temporarily disabled due to injury on the job before they have fully recovered if approved by a physician.

ARTICLE XV

Section 1 Schedules A and B with Notes constitute an integral part of this contract and are incorporated herein by reference.

A. On account of December 11, 1992 through December 10, 1993, police officers shall be paid the base hourly rate set forth in Schedule A attached.

B. From December 11, 1993 through December 10, 1994, police officers shall be paid the base hourly rate set forth in Schedule B attached.

C. From December 11, 1994 through December 10, 1995, police officers shall be paid the base hourly rate set forth in Schedule C attached.

Section 2

A. Eight (8) hours of work shall constitute a normal day's work. A police officer's normally scheduled workweek shall consist of five (5) days of work at eight (8) hours per day, except when steady shifts are being used pursuant to Article VI, Section 10.

B. Police officers shall receive lunch and relief breaks as follows:

1) 7:00 a.m. to 3:00 p.m. - Forty-minute lunch period and two (2) fifteen minutes relief periods, one before lunch and one after lunch;

2) 3:00 p.m. to 11:00 p.m. - Forty-minute lunch period and one (1) thirty (30) minute relief period after lunch;

3) 11:00 p.m. to 7:00 a.m. - Forty-minute lunch period and two (2) fifteen-minute relief periods, one before lunch and one after lunch.

Section 3 During the period of this Agreement, the work schedules applicable to the Police Bureau shall not be changed.

Section 4 Time and one-half shall be paid for any police officer working more than eight (8) hours in his scheduled workday. Time and one-half will be paid for work performed on the sixth (6th) workday in a scheduled 5-2 workweek. Double time will be paid for work during the seventh (7th) workday in a scheduled 5-2 workweek. When a police officer is on a short turnover of forty-eight (48) hours for purposes of this clause, the first twenty-four (24) hours following the end of his scheduled shift shall be considered as the sixth (6th) day in a scheduled workweek, and the second twenty-four (24) hours shall be considered as the seventh (7th) in a scheduled workweek. If any employees is called into work while off duty, he shall be guaranteed a minimum of four (4) hours' work for which proper payment will be made.

Section 5 Every police officer shall be allowed to accumulate up to but not exceeding eighty (80) hours of overtime on the computer. Police officers shall have the option to sell back accumulated overtime up to forty (40) hours annually, such option to be exercised in December of each year.

Section 6 Effective December 11, 1992, lunch money of Eight Dollars ($8.00) shall be paid for every four (4) hours of overtime worked.

Section 7 The provisions of this Article shall not affect in any way the Authority's right to schedule hours of work and the scheduled workweek so as to avoid scheduling overtime work. Daily and weekly overtime will not both be paid for the same hours of work. This means that any hours worked beyond eight (8) hours in a day, for which overtime is paid, will not be counted at the end of the week in computing total hours worked in the week. When two or more overtime payments might be applicable to the same hours of work, only the highest will be paid. In no case will premium payments be duplicated or pyramided.

Section 8 Insofar as it is practical and consistent with efficient operation, the DRPA will endeavor to divide overtime equally among regularly scheduled qualified police officers with DRPA who regularly perform such work. The regular overtime list which is posted at each bridge shall be utilized to assign overtime. In the event it is necessary to force an employee to work overtime, the DRPA shall use the forced overtime list posted at each bridge. If a police officer is excused from working overtime, he will be charged with such overtime for the sole purpose of this section. Except in cases of emergency, the DRPA will make its best effort to provide police officers with at least one (1) hour notice that overtime is required or that overtime previously scheduled is no longer required.

Section 9 The weekly pay program now in existence will continue. Police officers' checks will become available on a given day each week, and there shall be no distribution of checks prior to the established payday. All paychecks will be itemized showing vacation, sick, overtime and computer time, plus hours worked. All checks will be issued in sealed envelopes. All payment for all straight time hours worked and scheduled

overtime shall be made by the next regular pay period. All payment for unscheduled overtime, holiday, vacation and sick time shall be made by the second following regular pay period.

ARTICLE XVI

During the period of this Agreement, the DRPA will make available the following items, including any limitations or conditions that now exist:

A. The present Pension Plan.

B. Life insurance benefits at the level of one times the individual's salary, rounded to the higher $1,000, and without upper limitation. Accidental death benefits in addition to the aforementioned life insurance at the level of one times the individual's salary rounded to the higher $1,000; provided, however, that such benefits shall not exceed $20,000 on the second indemnity. A patrolman may further purchase at his own expense additional life insurance up to 50% of his salary.

C. The present Tuition Program.

D. The present allotment of free bridge tickets.

E. Military leave.

F. Uniforms, rubber boots for inclement weather and safety shoes for building men and building backup men. Such shoes and boots shall be replaced on the basis of fair wear-and-tear.

G. A clothing maintenance allowance of Three Hundred Fifty Dollars ($350) per employee per year, payable during the month of January, 1993; January, 1994, and January, 1995.

H. A shoe allowance of One Hundred Fifty Dollars ($150) per employee per year payable during the month of January in each contract year.

I. Prescription eyeglass safety glasses for all patrolmen requiring the use of glasses, as directed by their doctor, and regular safety glasses for the other.

J. The replacement of lost or damaged personal property at fair market value not to exceed One Hundred Dollars ($100) per item upon presentation of reasonable proof of loss or damage. The replacement cost for the item will not be the basis for reimbursement.

K. Effective December 11, 1992 to December, 1993, all permanent FOP represented police officers shall be entitled to sick leave at the rate of fifteen (15) days per calendar year. Effective December 11, 1993 to December 10, 1994, all permanent FOP represented police officers shall be entitled to sick leave at a rate of twelve (12) days per calendar year. Effective December 11, 1994 to December 10, 1995, all permanent FOP represented employees shall be entitled to sick leave at a rate of ten (10) days per calendar year. Sick leave may be accumulated up to a maximum of thirty (30) days; provided, however, that during the first year of service for new employees, sick leave time will be prorated at one and one-quarter (1¼) days per month of service. If an FOP represented police officer has accumulated sick leave in excess of 30 days as of January 1, 1993, such excess will be eligible for reimbursement under the one time option or upon separation as described more fully below, but such excess will no longer be available to be used as sick leave.

As of January 1, 1993, unused sick leave will no longer be accumulated for the purpose of reimbursement at the time of separation. The total amount of sick leave accumulated prior to January 1, 1993 up to 180 days will be eligible for reimbursement as a one-time option or upon separation.

Present employees will have a one-time option to be reimbursed for unused sick leave, up to 180 days, or reimbursement of up to 180 days will occur upon separation. Reimbursement for the one-time option will be on the following basis:

> 5% reimbursement after one year's continuous service;
> 10% reimbursement after two year's continuous service;
> and so on, with 5% reimbursement after each additional year of continuous service up to a maximum of 100% after 20 years of continuous service.

Continuous service will be calculated from the police officer's present date of employment for both permanent employees and temporary employees later appointed as permanent. Periods of unpaid absence will not be included in the computation of continuous service.

When a police officer separates from DRPA employment, the amount of sick leave accumulated as of January 1, 1993 and not previously reimbursed under the one-time option will be compensated for in time or money for retirees and in money for all others on the following basis:

> 50% reimbursement after 10 years' continuous service;
> 75% reimbursement after 15 years' continuous service;
> 100% reimbursement after 20 years' continuous service.

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Police officers will use sick leave credited in the current year before any sick leave previously accumulated. Police officers will normally accumulate all sick leave days not used in a given year, up to a maximum of thirty (30) days, adding these to the previous total of accumulated and unused sick leave days, if any.

Newly accumulated sick leave shall not be payable upon separation; however, a police officer who was employed on or before June 30th of the current calendar year who uses less than five (5) days of sick leave in a given year may elect to be paid for the difference between the number of days used and five (5). For example, if the employee uses one (1) day of sick leave, he may elect to be paid for four (4) days and accumulate the remainder of his sick leave, up to thirty (30) days. Payment will be based on the police officer's base salary at the time payment is made (this excludes overtime). This payment will be made in mid-December of the year in which the sick leave was credited. The request for cash payment for the eligible sick leave must be made by forwarding Form P-029 through the chain of supervision to the Human Relations Division prior to December 1st of the current calendar year. There will be no payment for unused sick leave for police officers hired on or after July 1st of any calendar year.

If a police officer is paid for any or all five (5) days in mid-December and between that point and the end of December takes sick leave time, he will have deducted from his pay the number of days utilized that he had already been reimbursed for.

For a police officer to receive payment for five (5) days or less of unused sick leave in the current calendar year, he or she must be actively and continuously employed from the applicable date of eligibility through December 31st of that calendar year.

When a police officer is ill and unable to report to work, his or her immediate supervisor should be advised of this fact on or before the normal starting time. Police officers on shift work shall give notice at least one (1) hour before their scheduled starting time to permit re-arrangement of schedules. Police officers shall make every effort to contact their supervisors personally to ensure delivery of the message. If the supervisor cannot be reached, the individual taking the message shall relay it to the supervisor as soon as possible. Failure to provide notice of sick leave absence in accordance with this policy may, upon review by the police officer's supervisor, be considered unauthorized absence for which the police officer will not be paid. When reporting in sick, a police officer should advise the expected date of return to work, if known.

If a police officer is absent prior to a scheduled day(s) off and the absence will extend through the subsequent workdays, he or she must notify his or her supervisor of his or her intent to remain on sick leave after the scheduled day(s) off. If notification is not received from the police officer, it will be assumed the police officer intends to return to work after the day(s) off, and if he or she does not report for duty he or she will be charged with unauthorized absence.

A doctor's certificate is not normally required for illness causing absence for two (2) consecutive working days or less. A certificate is normally required for illness resulting in absence of more than two (2) consecutive working days. (Note: Sick

Leave absence separated by a day off or days off for any reason is considered absence on consecutive workdays). The doctor's certificate must be presented to the police officer's supervisor upon return to work.

If a police officer is scheduled to work on an approved holiday and reports as absent due to illness, the absence will be charged to the holiday and not to sick leave.

Absence due to work-related injuries will not be charged to sick leave if the physician assigned by the DRPA indicates that the police office is unable to work. If the physician certifies that a police officer is able to work and the police officer continues to remain absent, the absence will fall under the provisions of the sick leave policy. If subsequent abuse of sick leave policy is indicated, it is handled accordingly.

Police officers who had previously been employed by the DRPA who terminated their employment and who subsequently were re employed will not receive any sick leave credit for unused sick leave days for the periods of prior service; nor will any period of this prior service be used to compute current sick leave balance.

During the year in which the police officer leaves DRPA service, sick leave will be credited at the rate of 1-1/4 days per month, or portion thereof, up to the effective date of termination.

When a police officer retires, sick leave accumulation of time accrued prior to January 1, 1993 and not previously reimbursed will be reimbursed in money only. When a police officer retires on length of service before reaching age 65 and chooses to take accumulated sick leave in time, his or her salary will not be affected by any general

increase granted after his or her last day of work. When unused accumulated sick leave is being liquidated on a time basis, it will be computed at the rate of five (5) days per week, excluding Saturday and Sunday. During this period of liquidation, vacation leave, sick leave and administrative leave will not accrue, nor will holidays be credited.

In case of the death of a police officer eligible for reimbursement, all accumulated sick leave accrued prior to January 1, 1993 and not previously reimbursed, will be paid to his beneficiary as previously designated by the police officer on the DRPA "Statement of Assignment".

In all other cases of separation, a police officer eligible for reimbursement will be paid a cash settlement of all unused non-reimbursed accumulated sick leave accrued prior to January 1, 1993 and will not be given the option of time or money.

Police officers who were receiving their regular pay for any reason (pay for time worked, vacation pay, sick leave pay, etc.) within thirty (30) days prior to year's end, will receive the new year's sick leave entitlement on January 1st of the new year. Police officers who exhausted all leave pay entitlement prior to thirty (30) days before the end of the year will not receive the new sick leave entitlement of fifteen (15) days until they return to work on a full-time basis in the new year.

Sick leave is a valuable privilege, which should not be abused and not be confused with time off for job-connected injuries. In order to substantiate payroll records, supervisors must be assured to their satisfaction that sick leave absence is in fact due to illness. The Director of the Bridge Division shall review cases of apparently excessive or unjustified sick leave and take appropriate action.

L. DRPA will provide a Short-Term Disability policy which, after thirty (30) days of sickness, accident, or injury, will provide each employee with an amount equal to 60% of current salary. The DRPA will also provide a Long-Term Disability policy which, after 180 days, will provide an amount equal to 60% of current salary. Under the long-term disability policy, which may continue until the death of the disabled officer, or until normal retirement age, whichever occurs first, the amount of "current salary" will be adjusted upward each year for a maximum of five (5) years by an amount not to exceed 50% of the increase in the Consumer Price Index, or by 6%, whichever is less.

Employees who accumulated more than thirty (30) days of sick leave, prior to January 1, 1993, and chose not to have the full accumulated amount reimbursed, may in the case of accident, sickness or injury or other hardship, draw their accumulated sick leave money prior to separation before having to be covered under the Short-Term Disability program. Such draw shall be under the same terms as the foregoing one-time option.

M. The DRPA shall provide liability insurance for police officers sued as a result of the performance of their duties and will hold them harmless and indemnify them for any cost arising therefrom or from any criminal proceeding arising from the Same occurrence in accordance with Article XIII of DRPA By-Laws. A copy of the relevant provisions are attached hereto as Exhibit "A". DRPA may self-insure such insurance coverage.

N. Police officers shall forward a list of prescription medications that they may be taking to the Chief Inspector, who in strict confidence, shall pass these lists on to a physician selected by the DRPA. The physician shall review these lists within three (3) working days to determine whether any medications may have an adverse effect upon an officer's abilities to perform his duties. At no time, however, shall the DRPA act upon the results of such review in a way that causes any officer to suffer a loss or reduction in compensation.

ARTICLE XVII

Section 1 The DRPA shall pay the full cost of the following benefits, continuing through December 10, 1995.

A. Medical, hospitalization and major-medical benefits with deductibles of $100.00 per patient and $200 per family (with a limit of two (2) deductibles per family) previously provided employees, except as changed by this Agreement. Such coverage shall be provided to age 65 and include retirees. (Retirees must pay for major-medical coverage, however.)

1) Diagnostic X-Ray coverage of $250 per year;

2) Outpatient Diagnostic Laboratory coverage of $200 per year;

3) Extended Care Facility coverage.

B. Non-member Hospital Rider.

C. Medical Outpatient Emergency coverage.

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D. Unlimited Major-Medical coverage with a limit of (2) deductibles per family. The amount of Major Medical subject to 20% of co-pay shall be $4000 per individual, $8,000 pe family.

E. Mental Health coverage.

F. Prescription Program rider with $3.00 co-pay for the present employees and retired employees for generic prescriptions and $5.00 co-pay for brand name prescriptions (retirees must pay the premium through the year in which they reach 54 years of age and the DRPA will pay the premium thereafter).

G. Delta Dental Plan, or equal benefits, which may be administered by CHA.

H. Pre-Admission Review and Mandatory Second Surgical Opinion programs.

Section 2 Police officers shall have the option to elect, in lieu of coverage outlined in Section 1, coverage under an HMO plan, selected by DRPA, the full cost of which shall also be paid by DRPA.

Section 3 The DRPA may, with the FOP concurrence, which shall not be unreasonably withheld, take steps to substitute insurance carriers or to self-insure medical, hospitalization, major-medical, prescription and/or dental insurance coverage during the term of this Agreement, provided that there shall be no loss of benefits already provided and agreed to herein.

Section 4 Retirees shall have a one time option to switch their health care coverage at a time after retirement designated by the DRPA from traditional health care coverage to HMO or from HMO to traditional health care coverage.

ARTICLE XVIII

Police officers shall be paid for twelve (12) holidays as follows:

New Year's Day	Labor Day
Lincoln's Birthday	Columbus Day
Washington's Birthday	Veterans Day
Good Friday	Election Day
Memorial Day	Thanksgiving Day
Independence Day	Christmas Day

Any officer who so desires may elect to substitute Martin Luther King, Jr.'s Birthday for any of the above-listed holidays. In each year, the police officer in employment shall be guaranteed three (3) administrative leave days for which they shall be paid: provided, however, that during the first year of service for new employees, eligibility for administrative leave days shall occur once every four (4) months of service.

Non-shift workers will celebrate any holiday falling on Saturday the preceding Friday and any holiday falling on Sunday will be celebrated on the following Monday.

ARTICLE XIX

Section 1 . Police officers shall receive vacation with pay for the regularly scheduled workweek as follows:

A. Less than six (6) months of continuous employment - none

B. After six (6) full months through completion of twelve (12) months of continuous employment - 5/6 of a vacation day for each full month worked.

C. After completion of one (1) full year through completion of five (5) full years of employment - two weeks.

D. After completion of five (5) full years through completion of fifteen (15) full years of employment - three weeks.

E. After completion of fifteen (15) years through completion of twenty-five (25) full years of employment - four weeks.

F. After completion of twenty five (25) full years of employment - five weeks.

Section 2 Vacation time may be used in days, subject to manpower needs. Individual days in increments of less than five (5) days are to be scheduled administratively.

Section 3 The selection of vacation time shall begin in February of each year and shall be granted on the basis of seniority within the unit.

Section 4 A police officer who retires at any time after January 1st of a given year shall be entitled to a full year of vacation pay for that forthcoming year.

ARTICLE XX

All police officers shall receive four (4) workdays off with pay following the death of a police officer's spouse, parent, child, step-parent, stepchild, grandparent, grandchild, sister, brother, mother-in-law, father-in-law, or any relative residing in such police officer's principal residence immediately prior to death.

Police officers shall receive one (1) workday off with pay on a scheduled workday for the purpose of attending a funeral held on such workday for a son-in-law, daughter-in-law, brother-in-law, sister-in-law, uncle, aunt, cousin, niece, nephew or spouse's grandparents.

ARTICLE XXI

There shall be uniform committee consisting of such members for the DRPA as the Employer shall appoint. The FOP members shall consist of its Negotiating Committee. The purpose of the Committee shall be to discuss appropriate parts of uniforms but the decision of the DRPA in that connection shall be final.

ARTICLE XXII

At any time during the term of this Agreement, the FOP may present to the DRPA a proposal for a new working schedule. If the proposal is deemed acceptable to the DRPA, in its sole discretion, it may implement the new schedule.

ARTICLE XXIII

This Agreement shall be in full force and effect from December 11, 1992 and shall remain in effect through December 10, 1995, unless and until either of the parties hereto has given the other party sixty (60) days' written notice prior to the end of the original term in 1995, or sixty (60) days written notice prior to the end of any subsequent year of an intention to terminate at the end of the original term or the then current year.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals as of the 11th day of December, 1992.

DELAWARE RIVER PORT AUTHORITY

BY:_____

FRATERNAL ORDER OF POLICE, LODGE NO. 30

BY:_____

SCHEDULE "A"

Police – Effective December 11, 1992 ..... $17.06

NOTE:

The rate which is effective December 11, 1992 reflects the effect of having prior guaranteed overtime payments rolled into the previous hourly pay base rate, resulting in an additional $1.17 per hour for a new base rate of $17.06 per hour.[1] This new total base rate is to be paid for each hour of scheduled work (approximately 2182 hours under the present schedule). The applicable overtime rate, either one and one-half times the new rate or double times the new rate, shall be paid for all unscheduled overtime hours worked.

The starting rate will be Seventy-Five Cents ($.75) per hour less than the contract rate. New hires will receive an increase to the contract rate after one (1) year of service.

SCHEDULE "B"

Police – Effective December 11, 1993 ..... $17.45

NOTE:

The starting rate will be Seventy-Five Cents ($.75) per hour less than the contract rate. New hires will receive an increase to the contract rate after one (1) year of service.

SCHEDULE "C"

Police – Effective December 11, 1994 ..... $18.35

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[1] Prior to December 11, 1992, each employee was guaranteed scheduled overtime of approximately 8.5 hours per month at the rate of time and one-half his regular straight-time rate of pay. Payment for this scheduled overtime was paid each week to each employee in his paycheck in even installments in addition to payment of his straight-time hours of work, the hourly rate for which was $1.17 less than that provided as of December 11, 1992 in this agreement. No obligation exists hereunder for any further payment for scheduled overtime since full payment therefore is now included in the regular straight-time hourly rate of pay.

EXHIBIT "A"

LEGAL ASSISTANCE AND INDEMNIFICATION OF COMMISSIONERS, OFFICERS AND EMPLOYEES

A. When an action is brought against a commissioner, officer or employee of the Authority for damages on account of an injury to person or property, or other alleged wrongful act, or omission, and it is alleged that the act or omission or other alleged wrongful act or omission of the commissioner, officer or employee which gave rise to the claim was caused while acting on behalf of the Authority by the commissioner, officer or employee, the Authority, through its counsel shall defend the action. The Authority may refuse to provide for the defense and indemnification of the commissioner, officer or employee in the following situations:

1. Failure within ten (10) calendar days of the time the commissioner, officer or employee is served with any summons, complaint, process, notice, demand or pleading to deliver it to the General Counsel;

2. The act or omission was not within the scope of employment;

3. The act or omission was because of actual fraud, willful misconduct or actual malice;

4. The defense of action or proceeding by the Authority's counsel would create a conflict of interest between the Authority and the commissioner, officer or employee.

B. When the Authority defends an action against a commissioner, officer or employee, it may assume exclusive control of the defense of the commissioner, officer or employee, keeping said individual advised with respect thereto, and the commissioner, officer or employee shall cooperate fully with the defense, provided that in situations where the legal counsel provided by or through the Authority determines that the interests of the commissioner, officer or employee and the Authority conflict, the Authority shall obtain the express written consent of the commissioner, officer or employee for such interested representation, or, in its discretion, shall supply independent representation.

C. When an action is brought against a commissioner, officer or employee of the Authority for damages to person or property or other alleged wrongful act or omission, and there is a settlement, or a judicial determination that an act or omission by the commissioner, officer or employee caused the injury and such act or omission was caused while acting on behalf of the Authority shall indemnify the commissioner, officer, or employee for the payment of any amounts in settlement or pursuant to a judgment as a result of the lawsuit.

D. In the lawsuit against a commissioner, officer or employee for damages caused by the act or omission of the commissioner, officer or employee in which lawsuit the commissioner, officer or employee has not fully cooperated with the Authority, or its counsel, in the defense of the action, the indemnification provisions of this section shall not apply.

E. The Authority shall not provide indemnification to a commissioner, officer or employee for any damages resulting from the commission of an intentional crime. The Authority shall provide indemnification to a commissioner, officer or employee for an award of punitive or exemplary damages unless it shall be determined by the Board that the act or omission resulting in the award of punitive or exemplary damages was one of knowing and intentional willful misconduct.

Exhibit B

DRPA FINAL CONTRACT PROPOSAL
FOR FOP LODGE 30

1. Article II, Section 4 - Change to conform to express agreement limiting recognition to patrol officers.

2. Article III, Section 1 - Delete in its entirety.

(a) Add to Article VI, a new Section 7, providing for layoffs to be made in accordance with seniority in the bargaining unit in accordance with attached provisions concerning layoffs and recalls from layoff.

3. Article V, Section 1 - Delete and substitute the following Management Rights provision:

> "The DRPA reserves to itself as employer all management functions, including but not limited to the full and exclusive right to assign and transfer employees, whether temporarily or permanently, to schedule work and to contract out or sub-contract the same, to adopt reasonable rules and regulations governing the workforce, and solely to direct all operations affecting the Police Department, subject to the terms and conditions of this agreement."

4. Article VI, Section 7 shall be deleted.

5. Article XIII shall be deleted.

6. Article XV, Section 7 at the end of the first sentence, change the first sentence to read: "Except as otherwise agreed, the provisions of this Article shall not affect the DRPA's sole right to change the schedule of hours of work and the scheduled work week, whether to avoid overtime or for any other reason." (The remainder of present Section 7 shall be changed to a new Section 7(a).)

7. Article XVII, Section 3 - Eliminate proviso at the end of this Section and substitute the following proviso: "provided that the benefits provided as of the effective date of this Agreement are substantially the same."

8. Article XVII - Add to the entire Article the following conditions:

(a) Effective 1/1/97, the DRPA shall pay the cost of the least expensive health care plan and any employee opting for

a more expensive plan shall pay the additional cost thereof by payroll deduction.

(b) In the case of a police officer married to another employee of the DRPA, only the more senior one shall receive coverage as an employee with respect to all prescription drug, medical, hospitalization and dental options provided by the DRPA.

(c) The DRPA may change any provision of Article XVII which in its sole judgment is appropriate as a result of any laws enacted applicable to the DRPA with respect to mandatory health care for employees.

(d) Effective 1/1/97, the DRPA shall provide the same medical and hospitalization insurance coverage to patrol officers as it provides for its non-represented employees.

9. Schedules "A" through "C" - Add a new Second Tier salary structure for police officers newly hired after December 12, 1995, as follows:

(a) Start at $30,000 per year for the first year of employment.

(b) During the second year of employment such newly hired police officer's salary shall be $34,000 annually.

(c) During the third year of employment, such newly hired police officer's salary shall be $38,000 annually.

(d) After three continuous years of employment, such newly hired police officer's salary shall be the full rate.

N.B.: The Second Tier salary shall not apply to anyone hired as a certified graduate of the Philadelphia Police Academy or its full equivalent with at least three years of police experience elsewhere. (A Police Recruit shall continue to be exempt from the Agreement as a probationary employee and any such police officer hired with prior academic or work experience elsewhere shall nonetheless be on probation for a period of one year, as set forth in Article VI, Section 3.)

10. Article XXI shall be deleted.

11. Transfers shall be by seniority as agreed 7/1/96.

12. Three-year contract as of 12/11/95.

13. All items proposed by Union or DRPA which have previously been agreed to by DRPA and Union negotiating Committee shall become terms of employment

14. Further economic changes shall be set forth below:

(a) Election Day shall be eliminated as a holiday, effective December 11, 1995.

(b) General hourly straight time rate wage increase of 3% at start of third year of contract.

(c) There shall be a bonus of 1% of straight-time and scheduled overtime earnings for the calendar year 1996 and 2% of such earnings payable in the second pay period of December, 1996.

(d) The clothing allowance arbitration of the POP shall be withdrawn from the AAA.

TRANSFERS

1. All patrol officers will be given transfer forms on request and they may select up to four (4) positions at any one time for future consideration.

2. When the patrol officer turns in a transfer request form, a copy will be delivered to the President of the FOP.

3. If a vacancy cannot be filled from previously submitted transfer forms, the DRPA will fill the same by selecting a patrol officer for transfer in the inverse order of seniority.

4. Each patrol officer shall be subject to a mandatory transfer only once every two (2) years.

5. A patrol officer shall be given a minimum of seventy-two (72) hours notice before he or she is transferred to another bridge or shift for the convenience of the DRPA. If such notice is not provided, overtime will be paid at the applicable rate for any time worked in furtherance of such transfer until seventy-two (72) hours have elapsed from the start of such transfer.

(a) A copy of the transfer order will be sent to the President of the FOP.

6. No transfers shall be made to discipline patrol officers and transfers shall only be made for operational reasons.

7. With respect to special units, the DRPA will post any vacancy therein for five (5) calendar days. Selection from those signing the posting shall be made in accordance with

seniority if the skill and ability of those signing the posting are relatively equal.

(a) The DRPA may transfer a patrol officer out of a special unit for a disciplinary reason, notwithstanding item 6 above, but in that event, no other discipline may be imposed, unless serious misconduct is involved.

LAYOFFS

1. Layoffs shall be made in the inverse order of seniority, provided that skill and ability, as acquired during the course of DRPA employment, is relatively equal.

2. Recall rights shall obtain for a period of two (2) years from layoff and shall be offered to the most senior patrolman on layoff.

3. The failure to accept a recall within one week of notice shall terminate the patrol officer's seniority for all purposes forthwith.

(a) Notice of layoff shall be sent by certified mail to the last known address on record at the DRPA. It shall be the patrol officer's duty to update any address change with the DRPA.

TRAINING

1. All patrol officers will be provided with equal access to training programs approved by the DRPA. The following procedure will be applied:

(a) All training programs approved by the DRPA shall be announced at all bridge facilities. All patrol officers may apply for the same. This procedure shall not apply to re-

certifications or to programs involving specialized units, however.

2. If more than one patrol officer applies for any such program, the DRPA shall determine in its sole discretion who may attend the same.

Exhibit C

Mr. Manuel Stamatakis
P.O. Box 878
Valley Forge, PA 19087

July 31, 1996

Dear Mr. Stamatakis:

On behalf of the Fraternal Order of Police Lodge 30, which as you know, represents the 78 patrol officers employed by the Delaware River Port Authority, I am writing you this letter to attempt to explain some of the reasons why the contract proposal advanced by the Delaware River Port Authority was unanimously (74 - 0) rejected by a secret ballot vote of the Lodge 30 rank and file on July 29, 1996. It is my hope that the outcome of that vote, and the contents of this letter, will impress upon you the sense of frustration, helplessness and dismay that my membership is currently experiencing.

Our current Collective Bargaining Agreement featured an expiration date of December 10, 1995, and we have been working under an extension of that Agreement since that date. Negotiations for a successor Collective Bargaining Agreement began on November 9, 1996 and the last negotiation session concluded on July 1, 1996. Although the parties met on some 14 occasions during this period of time, most of the sessions were exceedingly brief in duration, lasting not more than two or three hours each, and the DRPA requested an extremely long hiatus in bargaining, of some six weeks, between April and July. Nevertheless, the Union was initially heartened by the progress in the first rounds of negotiations; the Union had presented the DRPA with a comprehensive proposal to revise and rationalize the current Collective Bargaining Agreement, and the DRPA initially seemed willing to go along with some of our suggestions.

However, as negotiations advanced, the DRPA Negotiating Committee began to back off from some of its earlier positive reactions to our proposals and continued to demand that the Union accept several major give-backs, including the elimination of the no lay-off clause, the elimination of the right of employees to select their work shift by seniority, and insistence that the DRPA have full and unfettered right to subcontract any and all functions currently performed by DRPA police, and an insistence that the FOP agree to accept the same type and level of benefits to be offered to the non-represented DRPA employees, even though the DRPA could not then, or now, tell us exactly what those benefits might be. All the while, the DRPA negotiating team refused to comment specifically on what economic proposal they would be placing on the bargaining table, but implied on numerous occasions that it would not be very attractive to the Union.

It was at this point that I began reaching out numerous Commissioners regarding this situation, and the DRPA responded by forming a Labor Sub-Committee. The reason I chose to contact Commissioners was to attempt to open a dialogue and assure the Commissioners that all the Union was looking for was to be treated, and bargained with, fairly and in good faith. When I began this process, I was hopeful that some positive understanding could be reached with the Commissioners, and that the negotiations could be taken in a more fruitful direction than they were proceeding. As time went on, I was never promised anything by any Commissioner, but I left most discussions and meetings optimistic that some good would come of my attempts to reach out to you. Despite what happened since, I remain hopeful; hence, the reason for writing this letter.

As you undoubtedly know, collective bargaining negotiations is a give and take process. But, historically, and particularly in this last round of negotiations, that has not been the case. From first to last, the DRPA contract proposal has been nothing but a demand for serious and substantial give-backs and concessions. The DRPA has asked us to surrender one of our most cherished contractual rights - job security - by eliminating the lay-off clause, and has repeatedly refused to even consider simply grandfathering present employees so that at least current police officers could retain a measure of job security. The DRPA has insisted that we give up our hard won right to select our work shift, and has demanded that we replace it with a system by which the DRPA could, whenever "operational needs warrant," transfer officers from bridge to bridge and shift to shift, totally disrupting that employee's personal and family life. The DRPA has insisted upon a complete and absolute right to subcontract out any and all police functions, and has rebuffed our attempts to merely get a written guarantee from them that core police functions would not be affected during the life of the agreement. Additionally, the DRPA has insisted upon a radical transformation of the present system of handling worker's compensation payments, demanding that the contractual make-whole payments for officers who are injured or disabled in the line of duty be eliminated. Finally, as to health benefits, the DRPA demands that the FOP accept a contract that has absolutely no guarantee that the Authority will provide patrol officers with any measure of benefits after December 31, 1996, insisting that the Union take a "leap of faith" that whatever benefits DRPA decided to bestow upon to its non-represented employees will be adequate recompense for the concessions and give-backs it wants the Union to now provide.

It was not until the last fifteen or twenty minutes of the very last negotiation session on July 1, 1996 that the DRPA presented its economic proposals to the Union. There was absolutely no negotiation, no give and take, whatsoever. The Union was simply told the DRPA would give a one percent bonus the first year, a two percent bonus the second year and a three percent salary adjustment the third year. Frankly, it is difficult to characterize the one percent bonus as anything less than an insult. It constitutes several hundred dollars less than what we are currently contractually entitled to receive for a clothing and shoe allowance. It also serves to further increase the disparity between the DRPA and every other bridge authority in the region, all of which pay their senior patrol officers substantially more in income than does the DRPA. Finally, it does nothing to correct the absurd imbalance between the pay of a DRPA toll collector and a DRPA police officer. Although a DRPA police officer must carry and be trained in the use of deadly weapons, and must lay his or her life on the line every day, our pay amounts to only $ 0.01 more per hour than a DRPA toll collector. When this proposed economic package is placed alongside the fact that the DRPA plans to contribute up to $450,000.00 to a fish farm at the Navy Yard, and is insistent upon generously contributing to numerous charities throughout the region, it is difficult for the average DRPA police officer to feel that he or she is a valued member of the DRPA

Throughout the course of contract negotiations, and in my discussions with some of you, I have been told that the DRPA needs our Union to agree to this contract so that it can force these terms upon the other labor unions with which the DRPA must deal,

including IUOE Local 716. I cannot tell you how many times in the past my Union has been forced to give back hard won contractual rights and benefits, and assured that the same treatment was going to be meted out to our sister union, only discover that when Local 716's contract was negotiated, such give-backs and concessions were not required of it. To avoid this unfortunate set of circumstances from recurring, the Union requested that the DRPA would commit to treat us in the same manner as any other labor organization with which it dealt with during the term of our agreement. Inexplicably, the DRPA has flatly refused to make even this commitment to us. Of course, we wish that we could be treated and dealt with as we are; trained, skilled, professional police officers. Barring that, we only wish that we would be treated no worse than any other labor organization that represents DRPA employees. But, the DRPA refuses to do even this.

For all these reasons, I think that any reasonable person reviewing this situation could only conclude two things. First, and simply put, there is no way any police officer with any measure of dignity and self respect could vote to accept the proposal that was presented to us. Second, it must now be concluded that, notwithstanding its contractual commitment to do so, the DRPA has not up to now bargained with the FOP fairly or in good faith.

As the exclusive bargaining representative of the DRPA patrol officers, it is the Union's duty to explore outside avenues of redress for this intolerable situation, and you may rest assured that we are doing that. However, I think you know that my loyalty, and the loyalty of the vast majority of the rank and file, remains with the DRPA, and the Union

as an institution urgently wishes to rectify this situation ***internally***, through continued and meaningful collective bargaining. Therefore, in view of our rejection of your contract proposal, I ask for your assistance to urge the Labor Subcommittee to extend the current Collective Bargaining Agreement through the month of October, and to order the DRPA negotiating team back to the bargaining table to engage in good faith discussions with a goal of arriving at a Collective Bargaining Agreement that both parties can be satisfied to sign.

Very truly yours,

James R. Stewart

JAMES R. STEWART
President, FOP Lodge #30

Exhibit D

SUMMARY STATEMENT

ITEM NO. _____ **SUBJECT: F.O.P. CONTRACT**

COMMITTEE: **EXECUTIVE**

COMMITTEE MEETING DATE: **08/01/96**

BOARD ACTION DATE: **08/21/96**

PROPOSAL: Board approval is sought for imposition of a labor contract upon the Fraternal Order of Police, Penn-Jersey Lodge 30, representing approximately 79 DRPA police officers, effective December 11, 1995 through December 10, 1998.

PURPOSE: To set terms and conditions of employment for DRPA police officers.

BACKGROUND: The previous labor contract with the F.O.P. expired by its terms on December 10, 1995. Negotiations between the DRPA and the F.O.P. commenced in December, 1995, and the contract has been extended several times by mutual agreement, pending the conclusion of negotiations. The most recent extension is through July 31, 1996. The last collective bargaining session was held on July 1, 1996, at which time the DRPA made its best and final offer to the F.O.P. The DRPA has bargained in good faith, and believes its final offer represents a fair resolution of all outstanding issues between the DRPA and the Union. On July 29, 1996, the members of the F.O.P. voted to reject the DRPA's best and final offer. DRPA and the F.O.P. are now at an impasse, and staff requests Board authorization to impose upon the F.O.P. the terms and conditions contained in its best and final offer, as a three year contract effective December 11, 1995, through December 10, 1998.

Major differences between the 1992 - 1995 contract and the terms of the proposed new contract are summarized as follows:

1. No layoff clause eliminated. Any layoffs will be in inverse order of seniority, provided that skill and ability, as acquired during the course of DRPA employment, are relatively equal. Recall rights for two years, with one week time limit to accept recall.
2. Management rights to include broader transfer rights (shift to shift and facility to facility). DRPA will first attempt to fill vacancies voluntarily, based on seniority and transfer request forms to be kept on file. If a vacancy cannot be filled voluntarily, mandatory transfers will be made in inverse order of seniority. Officers will be provided 72 hours notice prior to mandatory transfer, and DRPA will be limited to one mandatory transfer per officer every two years. Transfers will be made for operational reasons only, and not for discipline, excepting that DRPA can transfer out of special units for disciplinary reasons. Posting process is eliminated except for special units.
3. DRPA regains right to contract out/subcontract as necessary.

4. Benefits package to remain same as previous contract until new benefits package for DRPA non-represented employees is determined, at which time F.O.P. members will get the same benefits package as all non-represented DRPA employees. Duplicate health coverage for married employees eliminated.

5. Officers permitted to accumulate sick leave up to 180 days, for sick use only (increase from current cap of 30 days).

6. Elimination of one holiday (Election Day), reducing total from 12 to 11 holidays.

7. Elimination of 26-week salary continuation for employees on worker's compensation.

8. Tiered wage structure for new hires after December 12, 1995 (except employees hired as certified graduate of Philadelphia Police Academy or equivalent plus at least three years of police experience elsewhere: Starting rate $30,000 during first year of employment; Rate increase to $34,000 in second year of employment; Rate increase to $38,000 for third year of employment; Full rate is reached after three continuous years of employment.

9. Further wage items as follows: Bonus of one percent of straight time plus scheduled overtime effective December 11, 1995; Two percent bonus effective December 11, 1996; Three percent increase in hourly base rate, effective December 11, 1997.

10. DRPA will provide all officers with increased access to job-related training.

11. Union representatives gain access to DRPA phones and fax machines for union business.

12. Temporary transfers subject to time limit (180 days).

13. Upon request, and on a monthly basis, DRPA to provide each officer with two boxes of ammunition (50 rounds per box), paper targets, and access to firing range. Requesting officer will coordinate appointment with range instructor.

SUMMARY:	Amount	
	Source of $ (Operating/Capital)	
	Other Sources of $	N/A
	Duration of Contract	Three Years
	Other Party(ies) Involved	Fraternal Order of Police, Penn-Jersey Lodge 30

RESOLUTION

DRPA-96-
Executive Comm. 08/01/96
DRPA Board 08/21/96
F.O.P. Labor Contract for the term 1995-1998

WHEREAS: The labor contract between the Delaware River Port Authority and the Fraternal Order of Police, Lodge 30, was to expire on December 10, 1995, but has been extended several times during the collective bargaining process, the most recent extension being through July 31, 1996; and

WHEREAS: The DRPA and the F.O.P. have met numerous times to bargain over this contract and have negotiated exclusively; and

WHEREAS: The DRPA has bargained in good faith, seeking to reach a contract that is fair and appropriate under current conditions; and

WHEREAS: The Delaware River Port Authority made its best and final contract offer to the F.O.P. on July 1, 1996, after engaging in good faith collective bargaining negotiations since December, 1995; and

WHEREAS: On July 29, 1996, the members of the F.O.P. voted to reject the DRPA's best and final offer; and

WHEREAS: The DRPA and the F.O.P. are now at an impasse;

NOW THEREFORE BE IT RESOLVED: That the proper officers of the DRPA are hereby authorized to impose upon the F.O.P. the terms and conditions contained in DRPA's best and final offer as a three year contract effective from December 11, 1995, through December 10, 1998.

Executive Committee: 08/01/96
Board Meeting: 08/21/96

VERIFICATION

JAMES STEWART, of full age, upon his Certification, says:

1. I am the President of the plaintiff labor organization in this action.

2. I have read the foregoing Verified Complaint, and I hereby certify that all allegations contained therein are true and correct, except those made on information and belief.

By: James R. Stewart

Dated: August 20, 1996

CERTIFICATION

Pursuant to R. 4:5-1, plaintiff, by its attorneys, hereby certifies that the matter in controversy is not the subject of any pending or contemplated judicial or arbitration proceeding. Plaintiff is not aware of any other parties that should be joined in this action.

By: _____

Dated: August 20, 1996

SPEAR, WILDERMAN, BORISH,
ENDY, SPEAR AND RUNCKEL
BY: WARREN J. BORISH, ESQUIRE
BENJAMIN EISNER, ESQUIRE
126 White Horse Pike
Haddon Heights, New Jersey 08035
(609) 547-6199
Attorneys for Plaintiffs

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30, an unincorporated labor organization P.O. Box 68 Bellmawr, NJ 08099-0233	SUPERIOR COURT OF NEW JERSEY
and	CAMDEN COUNTY
JOSEPH VENA 39 White Birch Road Turnersville, NJ 08012	LAW DIVISION
Plaintiffs,	DOCKET NO. L-7547-96
v.	Civil Action
THE DELAWARE RIVER PORT AUTHORITY One Port Center Two Riverside Drive Camden, NJ 08101	AMENDED COMPLAINT
Defendant.	

INTRODUCTION

This is an action for permanent and mandatory injunctive relief to order Defendant, The Delaware River Port Authority ("DRPA") to rescind terms and conditions of employment

unilaterally and unlawfully imposed upon employees of the DRPA and members of Plaintiff labor organization, the Fraternal Order of Police, Penn-Jersey Lodge 30 ("FOP Lodge 30"), and Plaintiff Joseph Vena, ("Vena") a citizen of New Jersey and an employee of the Defendant and member of FOP Lodge 30. This action also seeks to compel the DRPA to bargain in good faith with FOP Lodge 30 over the terms and conditions of employment for the police officers of the DRPA. Plaintiffs request equitable relief from this Honorable Court because the DRPA has been engaged in a pattern of bad faith collective bargaining with FOP Lodge 30, culminating in its unilateral imposition of employment conditions, conduct that is violative of Article I, Paragraph 19 of the New Jersey Constitution and of parallel legislative enactments of the State of New Jersey and the Commonwealth of Pennsylvania, as well as the existing Collective Bargaining Agreement between the FOP Lodge 30 and the DRPA.

THE PARTIES

1. Plaintiff, Fraternal Order of Police Penn-Jersey Lodge 30 ("FOP Lodge 30") is an unincorporated labor organization with a business address of P.O. Box 68, Bellmawr, New Jersey 08099-0233. FOP Lodge 30 represents police officers employed by the Defendant.

2. Plaintiff, Joseph P. Vena ("Vena") is a patrol officer employed by the DRPA Department of Public Safety, and is a Vice-President of FOP Lodge 30. Plaintiff Vena resides at 39 White Birch Road, Turnersville, New Jersey 08012.

3. Defendant, Delaware River Port Authority, ("DRPA") is a corporate instrumentality of the State of New Jersey and the Commonwealth of Pennsylvania, created pursuant to a Bi-State Compact between those two states. N.J.S.A. 32:3-2 et seq; 36 P.S. § 3503 et seq. The DRPA's mailing address is One Port Center, Two Riverside Drive, Camden, New Jersey 08101.

4. The DRPA is administered by a Board of sixteen (16) Commissioners, appointed by the Governors of the State of New Jersey and the Commonwealth of Pennsylvania, respectively.

5. The Bi-State Compact provides that the DRPA may be sued in either the State of New Jersey or the Commonwealth of Pennsylvania. N.J.S.A. 32:3-5(b); 36 P.S. § 3503.

6. The DRPA is an employer within the meaning of Article I, Section 19 of the Constitution of the State of New Jersey, and within the meaning of the Pennsylvania Labor Relations Act ("PLRA") and the Pennsylvania Public Employe Relations Act, ("Act 195") and the Act of June 24, 1968 ("ACT 111").

JURISDICTION

7. The jurisdiction of this Court is founded upon the Bi-State Compact between the State of New Jersey and the Commonwealth of Pennsylvania, N.J.S.A. 32:3-2; 36 P.S. § 3503;

Article I, Paragraph 19 of the New Jersey Constitution; Article 6, Section 3, Paragraph 2 of the New Jersey Constitution; the New Jersey Employer-Employee Relations Act, NJSA 34:13A-1 et seq., the Pennsylvania Labor Relations Act ("PLRA"), 43 P.S. § 211.1 et seq.; the Act of June 24, 1968 ("Act 111"), 43 P.S. § 217.1 et seq.; the Pennsylvania Public Employe Relations Act ("Act 195"), 43 P.S. § 1101.101 et seq.; and the general equitable power of this Court.

FACTUAL AVERMENTS

A. The Existing Collective Bargaining Agreement Between FOP Lodge 30 and DRPA

8. The FOP Lodge 30 is the exclusive collective bargaining representative of the police officers employed by the DRPA Department of Public Safety. The police officers patrol DRPA property including the four (4) bridge facilities spanning the Delaware River operated and maintained by the DRPA -- The Betsy Ross Bridge, the Benjamin Franklin Bridge, the Walt Whitman Bridge, and the Commodore Barry Bridge.

9. For a number of decades, the DRPA and the FOP Lodge 30 have negotiated successive multi-year Collective Bargaining Agreements covering the terms and conditions of employment of the DRPA police officers.

10. The term of the current collective bargaining agreement (the "Collective Bargaining Agreement") extended from December 11, 1992 through December 10, 1995, and was extended by mutual agreement up to and including August 20, 1996. (A copy of the

Collective Bargaining Agreement is attached hereto as Exhibit "A").

11. The Collective Bargaining Agreement provides, inter alia, at Article III, Section 1, that police officers are protected from layoffs during the term of the Agreement.

12. The Collective Bargaining Agreement provides, at Article III, Section 3, that certain job assignments, i.e., the building person and police radio person, shall be filled by police officers only.

13. The Collective Bargaining Agreement provides, at Article VI, Section 10, that police officers work fixed work shifts at each bridge facility, shifts they select by seniority.

14. The Collective Bargaining Agreement provides, at Article XIII, that police officers injured in the line of duty shall receive the difference between their workers compensation benefit and their regular pay for a minimum period of 26 weeks (hereinafter referred to as "make whole payments").

15. The Collective Bargaining Agreement also provides, at Article XVII, Section 1, that the DRPA shall provide police officers with medical and hospitalization benefits, including mental health coverage, a prescription plan and dental plan, and a choice of two (2) medical insurance plans.

B. **Initial Attempts by FOP Lodge 30 to Negotiate a Successor Collective Bargaining Agreement with DRPA**

16. - On or about November 4, 1995, representatives of FOP Lodge 30, including Plaintiff Vena, met with representatives of the DRPA to begin negotiating a successor collective bargaining agreement.

17. At this November 4, 1995 meeting, the FOP Lodge 30 and the DRPA exchanged written proposals to enact changes in the current Collective Bargaining Agreement.

18. The FOP Lodge 30 proposal consisted of a comprehensive plan to harmonize the language of the existing Collective Bargaining Agreement, as well as a request for additional protections and benefits.

19. The DRPA proposal demanded that the FOP Lodge 30 agree to surrender, inter alia, its contractual protection against layoffs, and its members' rights to select their work shift by seniority.

20. The DRPA proposal also demanded the full right to subcontract out any and all police functions, including but not limited to the building and police radio functions.

21. The DRPA proposal also demanded that the FOP Lodge 30 give up its right to receive make whole payments for injuries suffered on duty.

22. At the November 4, 1995 meeting, the DRPA representatives informed the FOP Lodge 30 that it would submit its wage and health care benefits proposals at a later date, and simultaneously withdrew its proposal to abolish the make whole payments provision.

C. **Evidence of DRPA Bad Faith Bargaining**

23. Over the course of the next eight (8) months, the parties met infrequently, averaging less than two (2) bargaining sessions per month. During one six week period of time, the DRPA refused to meet at all with the FOP Lodge 30 to bargain collectively. The last time the DRPA agreed to meet with the FOP Lodge 30 to engage in collective bargaining negotiations was July 1, 1996.

24. During the course of negotiations, the DRPA both refused to move from its initial demands for drastic givebacks and concessions, and engaged in bad faith bargaining.

25. As one example of bad faith bargaining, the DRPA initially proposed that police officers' health benefits stay generally the same. At a later date, however, the DRPA announced that, beginning January 1, 1997, it would provide police officers only with the health care benefits it chose to give to its non-represented employees, while refusing to give FOP Lodge 30 any guarantee as to whether it was planning on providing any benefits at all to its non-represented employees, and without any indication as to what such benefits, if granted, might consist of as of January 1, 1997.

26. Additionally, after initially withdrawing its proposal to abolish make whole benefits at the first negotiation session on November 4, 1995, the DRPA, without discussion or prior notice to the Union, restored this proposal to its list of bargaining demands when it presented its "final" offer to FOP Lodge 30 on July 1, 1996.

27. Additionally, the DRPA engaged in a pattern of agreeing to certain FOP Lodge 30 demands, and then, at a later date, rescinding its assent. This occurred on at least three (3) occasions regarding FOP Lodge 30 proposals to: 1.) alter the grievance procedure; 2.) to protect the building and radio room positions from subcontracting; and 3.) to provide overtime pay for police officers.

28. Throughout the course of negotiations, the DRPA representatives constantly stressed to FOP Lodge 30 that it was demanding such givebacks and concessions because it wanted to "set an example" to follow in negotiations it intended to commence in late 1996 with the International Union of Operating Engineers Local 716 ("Local 716"), which is the majority bargaining representative for the toll takers and maintenance personnel employed by the DRPA.

29. However, when FOP Lodge 30 requested that the DRPA agree to a "most favored nations" clause in the new Collective Bargaining Agreement, whereby the DRPA would provide FOP Lodge 30 with any terms and conditions it negotiated with Local 716 that were more favorable than those contained in the FOP Lodge 30 - DRPA Collective Bargaining Agreement, the DRPA consistently and without explanation refused.

30. The DRPA also refused to make any wage proposal at all to the FOP Lodge 30 until the final minutes of the last scheduled day of negotiations, July 1, 1996. At that time, the DRPA simply and summarily announced what it would provide in the area of wages, and allowed for no discussion of its wage proposal and no consideration of any wage counter-proposal by the Union.

31. On or about July 17, 1996, the DRPA demanded that FOP Lodge 30 schedule a vote of its membership on the DRPA's "Final Contract Proposal". (A copy of the DRPA "Final Contract Proposal" is attached hereto as Exhibit "B").

32. On or about July 24, 1996, the Executive Director of the DRPA, Paul Drayton, Jr., without waiting for the outcome of the Union's ratification vote, which the DRPA itself had demanded, ordered that the agenda for the next meeting of the DRPA's Board of Commissioners, scheduled for August 21, 1996, include a vote to unilaterally implement the DRPA final contract proposal.

33. On July 29, 1996, the membership of FOP Lodge 30, by a secret ballot vote of 76-0, unanimously rejected the DRPA final contract proposal.

34. On July 30, 1996, FOP Lodge 30 President James Stewart sent a letter to all DRPA commissioners, explaining the reasons behind the unanimous rejection of the DRPA contract proposal, and requesting that the DRPA extend the current Collective Bargaining

Agreement and negotiate in good faith over a successor agreement. (A copy of FOP Lodge 30 President Stewart's July 30, 1996 letter to the DRPA Commissioners is attached hereto as Exhibit "C").

35. On or about August 1, 1996, the Labor Subcommittee of the DRPA, an Executive Committee of the DRPA, voted to seek the approval of the full DRPA Board of Commissioners "for the imposition of a labor contract upon" FOP Lodge 30. (A copy of the Labor Subcommittees' Summary Statement and Resolution regarding the proposal is attached hereto as Exhibit "D").

36. On August 5, 1996, the DRPA Labor Subcommittee met with the Executive Board of the FOP Lodge 30 to inform the FOP Lodge 30 of their planned action. At the conclusion of the meeting, DRPA Board of Commissioners Chairman Manuel Stamatakis expressed hope that the parties could "work out their differences" in advance of the Board's August 21, 1996 meeting. The FOP Lodge 30 representatives replied that the Union was prepared to meet at any time and at any place to negotiate.

37. Since August 5, 1996, despite written requests from FOP Lodge 30 to bargain, the DRPA has refused to meet to negotiate a successor collective bargaining agreement with the FOP Lodge 30.

COUNT I - CONSTITUTIONAL AND STATUTORY VIOLATIONS

38. Plaintiffs incorporate the allegations contained in paragraphs 1-37 of this Complaint as if fully set forth.

39. Article I, Paragraph 19 of the New Jersey Constitution provides:

> Persons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing.

40. The Pennsylvania Labor Relations Act, 43 P.S. § 211.1, 211.2(c)(d), provides, in relevant part:

> In the interpretation and application of this act and otherwise, it is hereby declared to be the public policy of the State to encourage the practice and procedure of collective bargaining and to protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection, free from the interference, restraint or coercion of their employers... . All the provisions of this act shall be liberally construed for the accomplishment of this purpose.

41. Act 111, 43 P.S. § 217.1 et seq. concerning "Collective Bargaining by a

Policeman and or Fireman," provides, in relevant part:

> Policemen...employed by a political subdivision of the Commonwealth shall, ...have the right to bargain collectively with their public employers concerning the terms and conditions of their employment, including compensation, hours, working conditions, retirement, pensions and other benefits... .

42. The Pennsylvania Public Employe Relations Act, ("PERA"or Act 195"), 43 P.S. § 1101.101 et seq., provides in relevant part:

> It is the public policy of the Commonwealth and the purpose of this act to promote orderly and constructive relationships between all public employers and their employees... the General Assembly has determined that the overall policy may best be accomplished by (1) granting to public employees the right to organize and choose freely their representatives; (2) requiring public employers to negotiate and bargain with employee organizations representing public employees and to enter into written agreements evidencing the result of such bargaining...

43. The New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, A-2, A-5.3, provides in relevant part: .

> It is hereby declared the public policy of this State that the best interests of the people of the State are served by the prevention or prompt settlement of labor disputes both in public and private sectors;... . To carry out such policy, the necessity for the enactment of the provisions of this Act is hereby declared as a matter of legislative determination... . Except as hereinafter provided, public employees

> shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization... . Representatives designated or selected by public employees for the purposes of collective negotiation by the majority of the employees in a unit appropriate for such purposes...shall be the exclusive representatives for a collective negotiation concerning the terms and conditions of employment of the employees of such unit. ...A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit... . In addition, the majority representatives and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment.

44. These Constitutional and Statutory guarantees of the State of New Jersey and Commonwealth of Pennsylvania evince a parallel intent on the part of both states to require the DRPA to accord its employees certain fundamental rights of self-organization and mutual protection, including the right to bargain freely and fairly, through a collective bargaining representative, over the terms and conditions of their employment, and to require the DRPA to bargain in good faith over the terms and conditions of their employees' employment.

45. The DRPA has violated the above-cited Constitutional and Statutory guarantees by engaging in a pattern of bad faith bargaining with FOP Lodge 30 over the provisions of a successor collective bargaining agreement to govern the terms and conditions of employment for DRPA police officers.

46. Evidence of the DRPA's failure to engage in good faith Collective Bargaining with FOP Lodge 30 include, but is not limited to:

(a) The DRPA's demands for unreasonable and draconian givebacks and concessions;

(b) The DRPA's insistence that the FOP Lodge 30 accept a Collective Bargaining Agreement that contains absolutely no contractual guarantee of health care benefits;

(c) The DRPA's last minute restoration of its demand to abolish make whole payments for police officers injured in the line of duty, after initially withdrawing the proposal to abolish said payments;

(d) The DRPA's repeated withdrawal of agreement on FOP Lodge 30 contract proposals to which it had previously agreed;

(e) The DRPA's refusal to bargain over wages, and its refusal to submit a wage proposal to FOP Lodge 30 until the final minutes of the last scheduled day of collective bargaining negotiations;

(f) The DRPA's expressed vow to use its bargaining with FOP

Lodge 30 as a means to "set an example" for the demands and concessions it intended to achieve with IUOE Local 716;

(g) The DRPA's unreasonable delay in meeting with the representatives of FOP Lodge 30 to negotiate a successor Collective Bargaining Agreement, including a hiatus of some six (6) weeks in which the DRPA declined to negotiate at all with FOP Lodge 30;

(h) The DRPA's steadfast refusal to meet further with representatives of FOP Lodge 30 to continue negotiations, despite the Union's repeated requests that it do so;

(i) The DRPA's decision instead to unilaterally impose its contract proposal upon the unwilling members of FOP Lodge 30, who have voiced their outrage with this process by voting unanimously, in a secret ballot vote, to reject the DRPA contract proposal.

47. If the DRPA is allowed to forcibly impose austere, unreasonable, and uncertain terms and conditions of employment upon FOP Lodge 30 and its members without engaging in good faith collective bargaining, Plaintiffs' fundamental rights under the New Jersey Constitution

and parallel legislative enactments in the Commonwealth of Pennsylvania to bargain collectively the conditions of their employment, through representatives of their own choosing, will be violated.

48. If the DRPA is allowed to forcibly implement its terms and conditions of employment upon FOP Lodge 30 and its members without engaging in good faith collective bargaining, police officers will be forced to work without any meaningful measure of job security, will be subject to transfer from shift to shift on short notice, will be without any sense of what kind of medical insurance, if any, they and their families will be entitled to, and will be forced to work in a highly dangerous environment with the knowledge that if they are disabled due to an injury on the job, they will not be made whole for any resultant loss of income.

49. Correspondingly, if the DRPA is enjoined from implementing its terms and conditions until the parties can complete good faith collective bargaining negotiations over a successor Collective Bargaining Agreement, the DRPA will suffer no harm whatever. Moreover, the public will suffer no harm from the grant of such an injunction.

50. If the DRPA is permitted to forcibly impose its terms and conditions of employment upon FOP Lodge 30 and its members over their vigorous protest, the rights and the potential safety of the public will be dangerously compromised, in that FOP Lodge 30 members may be forced to engage in a stoppage of work to protest the DRPA's actions.

51. Given the high profile and dangerous role DRPA police officers perform everyday in protecting the public and ensuring vehicular and pedestrian safety on the Delaware River Bridges and on all DRPA property, the public interest strongly demands that the DRPA be enjoined from implementing its terms and conditions of employment until and unless it agrees to commence and complete good faith collective bargaining negotiations with FOP Lodge 30 over a successor Collective Bargaining Agreement.

WHEREFORE, Plaintiffs request this Honorable Court:

A. To issue a Declaratory Judgment that the DRPA is in violation of Article I, Paragraph 19 of the New Jersey Constitution, and of parallel legislative enactments of the State of New Jersey and the Commonwealth of Pennsylvania;

B. To issue a mandatory and permanent injunction enjoining the DRPA from unilaterally implementing its terms and conditions upon FOP Lodge 30 and its members (or, if appropriate, rescinding any such unilateral implementation that has occurred);

C. To order the DRPA to return to collective bargaining negotiations with FOP Lodge 30 for a reasonable time, and with orders to commence bilateral, good faith negotiations to reach a successor Collective Bargaining Agreement;

D. To appoint a mediator through the auspices of the New Jersey State Board of Mediation, the Pennsylvania Bureau of Mediation, the Federal Mediation and Conciliation Service or another appropriate neutral entity selected by the court, to assist the parties in the negotiation process;

E. To award its attorney's fees and costs;

F. To order such further relief that this Court deems necessary to effectuate the Constitutional guarantees of Article I, Section 19 of the New Jersey Constitution and as the needs of justice require.

COUNT II - BREACH OF CONTRACT

52. The Plaintiffs incorporate paragraphs 1-50 of this Complaint as if fully set forth.

53. The Collective Bargaining Agreement between FOP Lodge 30 and the DRPA provides, at Article II, Section 1, that the "DRPA recognizes the FOP Lodge 30 as the majority representative for all hourly paid employees classified as police officers."

54. Article II, Section 1 of the Collective Bargaining Agreement establishes that the DRPA will deal fairly and in good faith with FOP Lodge 30 in all matters relating to the FOP's

representation of its members, including specifically the requirement that the DRPA negotiate successor Collective Bargaining Agreements with FOP Lodge 30 in good faith.

55. By the conduct described in this Complaint, particularly paragraphs 45 a-i, the DRPA has violated the Collective Bargaining Agreement between it and FOP Lodge 30, by refusing to engage in good faith collective bargaining with FOP Lodge 30.

WHEREFORE, Plaintiffs request this Honorable Court:

A. To issue a mandatory and permanent injunction enjoining the DRPA from unilaterally implementing its terms and conditions upon FOP Lodge 30 and its members;

B. To order the DRPA to return to collective bargaining negotiations with FOP Lodge 30 for a reasonable time, and with orders to commence bilateral, good faith negations to reach a successor Collective Bargaining Agreement;

C. To appoint a mediator through the auspices the New Jersey State Board of Mediation, the Pennsylvania Bureau of Mediation, the Federal Mediation and Conciliation Service, or another appropriate neutral entity selected by the Court, to assist the parties in the negotiation process;

D. To award Plaintiffs attorney's fees and costs;

E. To order such further relief as this Court deems necessary to remedy the breach of contract by the DRPA.

Respectfully submitted,

SPEAR, WILDERMAN, BORISH, ENDY, SPEAR AND RUNCKEL

BY: _____
WARREN T. BORISH
BENJAMIN EISNER
126 White Horse Pike
Haddon Heights, NJ 08035
(609) 547-6199
Attorneys for Plaintiffs

Of Counsel

CHARLES T. JOYCE
Spear, Wilderman, Borish,
Endy, Spear and Runckel
230 S. Broad St., Ste. 1400
Philadelphia, PA 19102
(609) 732-0101

DATED: October 29, 1996

BLANK ROME COMISKY & McCAULEY
PETER A. GOLD, ESQUIRE
SCOTT F. COOPER, ESQUIRE
SAMUEL M. FIRST, ESQUIRE
210 Lake Drive East
Suite 200
Woodland Falls Corporate Park
Cherry Hill, NJ 08002
(609) 779-3600

Attorneys for Defendant,
Delaware River Port Authority

FILED
CAMDEN COUNTY SUPERIOR COURT

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30, and JOSEPH VENA,	SUPERIOR COURT OF NEW JERSEY CAMDEN COUNTY LAW DIVISION
Plaintiffs,	DOCKET NO. L-7547-96 CIVIL ACTION
v.	
DELAWARE RIVER PORT AUTHORITY,	ANSWER TO AMENDED COMPLAINT
Defendant.	

Defendant, Delaware River Port Authority ("DRPA"), by and through its undersigned counsel, states as follows in answer to Plaintiff's Amended Complaint:

THE PARTIES

1. Admitted in part and denied in part. It is admitted that Plaintiff, Fraternal Order of Police Penn-Jersey Lodge 30 ("Lodge 30"), represents certain police officers employed by the DRPA. The DRPA is without sufficient knowledge, information or belief to form an opinion as to the truth of the remaining allegations contained in paragraph 1 of the Amended Complaint and, therefore, denies those allegations.

2. Admitted in part and denied in part. It is admitted that Plaintiff Joseph P. Vena ("Vena") is a patrol officer employed by the DRPA. The DRPA is without sufficient knowledge, information or belief to form an opinion as to the truth of the remaining allegations contained in paragraph 2 of the Amended Complaint, and therefore, denies those allegations.

3. Admitted. By way of further answer, the DRPA is a United States Congressionally approved bi-state public corporate instrumentality of New Jersey and Pennsylvania.

4. Admitted.

5. Denied.

6. Denied. By way of further answer, paragraph 6 of the Amended Complaint states a legal conclusion to which no responsive pleading is required at this time.

JURISDICTION

7. Denied. By way of further answer, this Court is without jurisdiction to grant the relief sought.

FACTUAL AVERMENTS

8. Admitted in part, and denied in part. It is admitted only that the police officers patrol DRPA property including the DRPA bridge facilities spanning the Delaware river. The remaining allegations contained in paragraph 8 of the Amended Complaint are denied as stated.

9. Admitted in part, and denied in part. It is admitted only that since 1975, the DRPA has voluntarily entered into a series of agreements with Lodge 30 setting certain terms and

conditions of employment of DRPA police officers. It is denied that the Agreements referred to in paragraph 9 of the Amended Complaint are "Collective Bargaining Agreements" as that term of art may be applied under state or federal labor law. The remaining allegations contained in paragraph 9 of the Amended Complaint are denied as stated.

10. Admitted in part, and denied in part. It is admitted only that the most recent agreement between the DRPA and Lodge 30 was effective from December 11, 1992 through December 10, 1995, and was extended by mutual agreement until August 20, 1996, when it expired. It is denied that the Agreement referred to in paragraph 10 of the Amended Complaint is a "Collective Bargaining Agreement" as that term of art may be applied under state or federal labor law. The remaining allegations contained in paragraph 10 of the Amended Complaint are denied.

11. Denied as stated. By way of further answer, Article III, Section 1 of the expired Agreement speaks for itself. The DRPA specifically denies that the Agreement referred to in paragraph 11 of the Amended Complaint is a "Collective Bargaining Agreement."

12. Denied as stated. By way of further answer, Article III, Section 3 of the expired Agreement speaks for itself. The DRPA specifically denies that the Agreement referred to in paragraph 12 of the Amended Complaint is a "Collective Bargaining Agreement."

13. Denied as stated. By way of further answer, Article VI, Section 10 of the expired Agreement speaks for itself. The DRPA specifically denies that the Agreement referred to in paragraph 13 of the Amended Complaint is a "Collective Bargaining Agreement."

14. Denied as stated. By way of further answer, Article XIII of the expired Agreement speaks for itself. The DRPA specifically denies that the Agreement referred to in paragraph 14 of the Amended Complaint is a "Collective Bargaining Agreement."

15. Denied as stated. By way of further answer, Article XVII, Section 1 of the expired Agreement speaks for itself. The DRPA specifically denies that the Agreement referred to in paragraph 15 is a "Collective Bargaining Agreement."

16. Admitted in part, and denied in part. It is admitted only that on November 4, 1995 representatives of FOP Lodge 30, including Plaintiff Vena, met with representatives of the DRPA to discuss the possibility, and substance, of a successor Agreement to cover the terms and conditions of employment for DRPA police officers. The remaining allegations contained in paragraph 16 of the Amended Complaint are denied as stated.

17. Admitted in part, and denied in part. It is admitted only that Lodge 30 and the DRPA exchanged written proposals at the November 4, 1995 meeting. The remaining allegations contained in paragraph 17 of the Amended Complaint are denied as stated.

18. Denied. By way of further answer, Lodge 30's proposals were neither comprehensive, nor in harmony with the expired Agreement or the DRPA's own proposals. Further, Lodge 30 demanded extraordinary additional items to which the DRPA was unwilling to acquiesce. The remaining allegations contained in paragraph 18 of the Amended Complaint are denied as stated.

19. Denied as stated. By way of further answer, the DRPA submitted proposals which covered the subjects of layoffs, work shifts and seniority. The remaining allegations in paragraph 19 are denied.

20. Denied. By way of further answer, the DRPA submitted proposals which addressed subcontracting of certain DRPA police functions. The remaining allegations contained in paragraph 20 of the Amended Complaint are denied.

21. Denied as stated. By way of further answer, the DRPA submitted proposals which addressed payment of the difference between Workers' Compensation benefits and weekly pay.

22. Denied as stated. By way of further answer the DRPA continued negotiating with Lodge 30 concerning wages and health care benefits, as well as the amount of benefits to be received by a police officer on workers' compensation.

23. Admitted in part, and denied in part. It is admitted only that July 1, 1996 was the last meeting date between the parties. It is expressly denied that the DRPA refused to meet with Lodge 30. The remaining allegations contained in paragraph 23 of the Amended Complaint are denied as stated.

24. Denied.

25. Denied as stated.

26. Denied as stated. By way of further answer, the DRPA only presented a "final offer" after Lodge 30 demanded it prior to the expiration of the Agreement.

27. Denied.

28. Denied as stated. By way of further answer, any other reference to other labor agreements demonstrates the DRPA's non-discriminatory efforts to reach financial stability.

29. Admitted in part, and denied in part. It is admitted only that the DRPA would not, at that point in negotiations, promise Lodge 30 a "most favored nations" clause. The remaining allegations contained in paragraph 29 of the Amended Complaint are denied.

30. Denied as stated. By way of further answer, the DRPA presented its wage proposal on July 1, 1996 because Lodge 30 demanded it at that time.

31. Denied as stated.

32. Admitted in part, and denied in part. It is admitted only that the DRPA scheduled a vote for August 21, 1996 at the next regularly scheduled DRPA commissions meeting, after the expiration of the Agreement. The remaining allegations contained in paragraph 32 of the Amended Complaint are denied as stated.

33. Denied. The DRPA is without sufficient knowledge, information or belief to form an opinion as to the truth of the

allegations contained in paragraph 33 of the Amended Complaint, and therefore, denies those allegations.

34. Admitted in part, and denied in part. It is admitted only that on July 31, 1996, FOP Lodge 30 President James Stewart sent a letter to DRPA Chairman Stamatakis announcing that the DRPA's contract proposal had been rejected, and asking to extend the Agreement and continue bargaining.

35. Admitted.

36. Admitted in part, and denied in part. It is admitted only to extent that there was a meeting on August 5, 1996, between the DRPA Labor Subcommittee and the Lodge 30 Executive Board. The remaining allegations contained in paragraph 36 of the Amended Complaint are denied as stated.

37. Admitted only to the extent that there have been no meetings between the DRPA and Lodge 30, exclusive of this litigation, since August 5, 1996, concerning the subject matter of a successor Agreement. The remaining allegations contained in paragraph 37 of the Amended Complaint are denied.

COUNT I - CONSTITUTIONAL AND STATUTORY VIOLATIONS

38. Defendant DRPA incorporates by reference, its answers contained in the above paragraphs, as if fully set forth herein.

39. Paragraph 39 of the Amended Complaint purports to cite legal authority, and makes no factual averments to which a responsive pleading is required at this time.

40. Paragraph 40 of the Amended Complaint purports to cite legal authority, and makes no factual averments to which a responsive pleading is required at this time.

41. Paragraph 41 of the Amended Complaint purports to cite legal authority, and makes no factual averments to which a responsive pleading is required at this time.

42. Paragraph 42 of the Amended Complaint purports to cite legal authority, and makes no factual averments to which a responsive pleading is required at this time.

43. Paragraph 43 of the Amended Complaint purports to cite legal authority, and makes no factual averments to which a responsive pleading is required at this time.

44. Denied. By way of further answer, paragraph 44 of the Amended Complaint states a legal conclusion to which no responsive pleading is required at this time.

45. Denied.

46.(a) - (i) Denied. By way of further answer, the DRPA engaged in legitimate good faith discussions regarding the possibility and substance of a successor agreement, and did not take unreasonable positions like those taken by Lodge 30.

47. Denied.

48. Denied.

49. Denied. By way of further answer, the DRPA and the public at large will suffer irreparable harm in the event of an injunction.

50. Denied.

51. Denied.

WHEREFORE, having fully answered the First Count of Plaintiffs' Amended Complaint, Defendant DRPA requests the Court dismiss the First Count of Plaintiffs' Amended Complaint and grant any other relief which this Court deems just and proper.

COUNT II - BREACH OF CONTRACT

52. Defendant DRPA incorporates by reference, its answers contained in the above paragraphs, as if fully set forth herein.

53. Admitted in part, and denied in part. The DRPA expressly denies only that the expired Agreement referred to in paragraph 53 of the Amended Complaint is a "Collective Bargaining Agreement" as that term of art may be applied under state or federal labor law.

54. Denied.

55. Denied. By way of further answer, Lodge 30 has no rights or claims against the DRPA after expiration of its Agreement.

WHEREFORE, having fully answered the Second Count of Plaintiffs' Amended Complaint, Defendant DRPA demands that the Second Count of Plaintiffs' Amended Complaint be dismissed and judgment be entered granting any other relief which this Court deems just and proper.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

This Court lacks subject matter jurisdiction over all claims raised by Plaintiff.

THIRD AFFIRMATIVE DEFENSE

All actions taken by the DRPA were lawful and not in violation of any law.

FOURTH AFFIRMATIVE DEFENSE

The labor laws of Pennsylvania and New Jersey do not apply to the DRPA.

FIFTH AFFIRMATIVE DEFENSE

Neither the National Labor Relations Act nor any other federal or state labor law applies to the DRPA.

SIXTH AFFIRMATIVE DEFENSE

Congress, New Jersey and Pennsylvania have expressly declined to enact labor legislation covering the DRPA, notwithstanding the fact that these government bodies have done so for other public sector employers under their jurisdiction. Therefore, this area is not to be occupied by any state legislative or judicial body.

SEVENTH AFFIRMATIVE DEFENSE

Express statutory language is required by both New Jersey and Pennsylvania or Congress to set labor policy for the DRPA which is inconsistent with its Compact.

EIGHTH AFFIRMATIVE DEFENSE

Neither Pennsylvania nor New Jersey have consented to this Court asserting jurisdiction over matters involving labor

relations of the DRPA, a United States Congressionally approved, bi-state entity.

NINTH AFFIRMATIVE DEFENSE

The concept of "bad faith bargaining" is a term of art found only in Federal and State labor laws, none of which apply to the DRPA.

TENTH AFFIRMATIVE DEFENSE

Even if concept of "bad faith bargaining" did apply to the DRPA, the DRPA did not engage in "bad faith bargaining."

ELEVENTH AFFIRMATIVE DEFENSE

Pennsylvania has not consented to the application of Article I, Paragraph 19 of the New Jersey Constitution to the DRPA, nor is there a substantially similar Pennsylvania provision. Therefore, Article I, Paragraph 19 of the New Jersey Constitution does not apply to the DRPA.

TWELFTH AFFIRMATIVE DEFENSE

The DRPA did not breach any contractual agreement that it had with Plaintiffs, as the most recent contract expired on August 20, 1996, prior to the DRPA taking any action to change terms and conditions of employment.

THIRTEENTH AFFIRMATIVE DEFENSE

The DRPA did not breach its contract with Lodge 30 because it was not under any legal or contractual obligation to reach a successor Agreement.

FOURTEENTH AFFIRMATIVE DEFENSE

The State of New Jersey and the Commonwealth of Pennsylvania have expressly provided in the DRPA Compact that the DRPA is solely responsible for the "operation and maintenance of the Bridges owned jointly by the two (2) States,. . . including its approaches, and the making of additions and improvements thereto." N.J.S.A. 32:3-2(b). Any actions taken by this Court to interfere with DRPA labor relations would violate the DRPA's express grant of power to operate and maintain the bridges, and constitute a violation of the terms of a United States Congressionally approved, bi-state Compact.

FIFTEENTH AFFIRMATIVE DEFENSE

The State of New Jersey and the Commonwealth of Pennsylvania have expressly provided in the DRPA Compact that one of the essential functions of the DRPA is the "promotion as a highway of commerce of the Delaware river, . . ." N.J.S.A. 32:3-2(g). Any attempt by this Court to improperly interfere with DRPA labor relations would violate the DRPA's express grant to promote the Delaware river as a highway of commerce, and constitute a violation of the terms of a United States Congressionally approved, bi-state Compact.

SIXTEENTH AFFIRMATIVE DEFENSE

The State of New Jersey and the Commonwealth of Pennsylvania have expressly agreed in the DRPA Compact that the DRPA's power to own, operate or control its properties shall not be "diminish[ed] or impair[ed]." N.J.S.A. 32:3-10. Any attempt by

this Court to interfere with DRPA labor relations would act to improperly diminish and impair the DRPA's ability to operate its properties, and would constitute a violation of the terms of a United States Congressionally approved, bi-state Compact.

SEVENTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' Amended Complaint raises labor-related issues that are exclusively within the jurisdiction of the executive branches of Pennsylvania and New Jersey government. Accordingly, any action taken by this Court that affect the DRPA's labor relations would violate the doctrine of separation of powers.

EIGHTEENTH AFFIRMATIVE DEFENSE

The DRPA's United States Congressionally approved, bi-state Compact does not permit this Court to manage the labor relations of the DRPA. Any action taken by this Court that affects DRPA labor relations would constitute a violation the Compact Clause of the United States Constitution.

NINETEENTH AFFIRMATIVE DEFENSE

Plaintiffs' Amended Complaint asks this Court to interject itself into DRPA labor relations. Any action taken by this Court that affects DRPA labor relations would constitute an improper interference with interstate commerce, and is a violation of the Commerce, Supremacy and other Clauses of the United States Constitution.

TWENTIETH AFFIRMATIVE DEFENSE

Plaintiff's Amended Complaint raises substantial political questions that can only be addressed by the Legislatures of New

Jersey and Pennsylvania and not by the court system of New Jersey.

TWENTY-FIRST AFFIRMATIVE DEFENSE

Plaintiffs are not entitled to attorneys fees because there is no statutory basis for such an award.

TWENTY-SECOND AFFIRMATIVE DEFENSE

The Amended Complaint and relief sought by Plaintiffs requires the New Jersey Court System to fashion a body of comprehensive and extensive procedural and substantive laws regulating labor relations of bi-state entities which is in excess of the power of the Judiciary of New Jersey.

TWENTY-THIRD AFFIRMATIVE DEFENSE

The Amended Complaint and the relief sought by Plaintiffs interferes with the ability of the DRPA to discharge its obligation and duty to New Jersey, Pennsylvania and their residents and toll payers. Relations between the DRPA and certain representatives of certain employees have been eroded by their action.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

This Court lacks jurisdiction to decided any matter relating to bi-state labor relations because the field is preempted by federal law in that Congress chose not to legislate and that the field should be free from state regulation.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

The Commissioners, Directors and Managers of the DRPA, at all times related to this matter, acted within their authority under the Compact and all applicable laws.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

Lodge 30 has attempted to use the judicial system to improperly affect its labor relations, and to force the DRPA to accept terms and conditic s of employment that it would not otherwise accept or approve. This case has implications for all bi-state entities.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

Lodge 30 had knowledge that it had to reach a successor Agreement prior to the expiration of the 1992-1995 Agreement because there was no automatic contract renewal language in that Agreement.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

Any action taken by this Court that affects DRPA labor relations constitutes a violation of Article III, Section 1, of the New Jersey Constitution.

TWENTY-NINTH AFFIRMATIVE DEFENSE

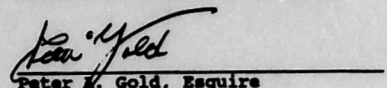
Lodge 30 has no rights or claims against the DRPA as the Agreement between the parties expired on August 20, 1996.

THIRTIETH AFFIRMATIVE DEFENSE

To the extent permitted by law, DRPA is entitled to an award of attorney's fees.

WHEREFORE, having fully answered Plaintiffs' Amended Complaint, Defendant DRPA demands that Plaintiffs' Complaint be dismissed and that judgment be entered in its favor, for its costs and its reasonable attorney's fees.

BLANK ROME COMISKY & McCAULEY



Peter M. Gold, Esquire
Scott F. Cooper, Esquire
Samuel M. First, Esquire
1200 Four Penn Center Plaza
Philadelphia, PA 19103-2599
(215) 569-5500

Attorneys for the Defendant,
Delaware River Port Authority

Dated: February 24, 1997

BLANK ROME COMISKY & McCAULEY
PETER A. GOLD, ESQUIRE
SCOTT F. COOPER, ESQUIRE
SAMUEL M. FIRST, ESQUIRE
210 Lake Drive East, Suite 200
Woodland Falls Corporate Park
Cherry Hill, NJ 08002
(609) 779-3600

Attorneys for Defendant,
Delaware River Port Authority

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30, and JOSEPH VENA,	:	SUPERIOR COURT OF NEW JERSEY CAMDEN COUNTY LAW DIVISION
Plaintiffs,	:	
v.	:	DOCKET NO. L-7547-96
DELAWARE RIVER PORT AUTHORITY,	:	CIVIL ACTION
Defendant.	:	**CERTIFICATE OF SERVICE**

I, Scott F. Cooper, a member of the Bar of this Court, hereby certify that on this date I caused a true and correct copy of the Defendant Delaware River Port Authority's Answer, Case Information Statement, Certification Pursuant to Ruel 4:5-1(b)(2) and Certificate of Service to be served via Hand Delivery, upon Plaintiffs FOP Lodge 30's and Joseph Vena's Counsel of Record:

Benjamin Eisner, Esquire
Charles Joyce, Esquire
SPEAR, WILDERMAN, BORISH,
ENDY, SPEAR and RUNKEL
36 Tanner Street
Second Floor
Haddonfield, New Jersey 08033
(609) 428-5255

SCOTT F. COOPER, ESQUIRE

Dated: February 24, 1997

BLANK ROME COMISKY & McCAULEY
PETER A. GOLD, ESQUIRE
SCOTT F. COOPER, ESQUIRE
SAMUEL M. FIRST, ESQUIRE
210 Lake Drive East
Suite 200
Woodland Falls Corporate Park
Cherry Hill, NJ 08002
(609) 779-3600

Attorneys for Defendant,
Delaware River Port Authority

2

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30, and JOSEPH VENA,	:	SUPERIOR COURT OF NEW JERSEY CAMDEN COUNTY LAW DIVISION
Plaintiffs,	:	DOCKET NO. L-7547-96 CIVIL ACTION
v.	:	
DELAWARE RIVER PORT AUTHORITY,	:	
Defendant.	:	**AMENDED ANSWER TO AMENDED COMPLAINT**

Defendant, Delaware River Port Authority ("DRPA"), by and through its undersigned counsel, states as follows in answer to Plaintiff's Amended Complaint:

THE PARTIES

1. Admitted in part and denied in part. It is admitted that Plaintiff, Fraternal Order of Police Penn-Jersey Lodge 30 ("Lodge 30"), represents certain police officers employed by the DRPA. The DRPA is without sufficient knowledge, information or belief to form an opinion as to the truth of the remaining allegations contained in paragraph 1 of the Amended Complaint and, therefore, denies those allegations.

2. Admitted in part and denied in part. It is admitted that Plaintiff Joseph P. Vena ("Vena") is a patrol officer employed by the DRPA. The DRPA is without sufficient knowledge, information or belief to form an opinion as to the truth of the remaining allegations contained in paragraph 2 of the Amended Complaint, and therefore, denies those allegations.

3. Admitted. By way of further answer, the DRPA is a United States Congressionally approved bi-state public corporate instrumentality of New Jersey and Pennsylvania.

4. Admitted.

5. Denied.

6. Denied. By way of further answer, paragraph 6 of the Amended Complaint states a legal conclusion to which no responsive pleading is required at this time.

JURISDICTION

7. Denied. By way of further answer, this Court is without jurisdiction to grant the relief sought.

FACTUAL AVERMENTS

8. Admitted in part, and denied in part. It is admitted only that the police officers patrol DRPA property including the DRPA bridge facilities spanning the Delaware river. The remaining allegations contained in paragraph 8 of the Amended Complaint are denied as stated.

9. Admitted in part, and denied in part. It is admitted only that since 1975, the DRPA has voluntarily entered into a series of agreements with Lodge 30 setting certain terms and

conditions of employment of DRPA police officers. It is denied that the Agreements referred to in paragraph 9 of the Amended Complaint are "Collective Bargaining Agreements" as that term of art may be applied under state or federal labor law. The remaining allegations contained in paragraph 9 of the Amended Complaint are denied as stated.

10. Admitted in part, and denied in part. It is admitted only that the most recent agreement between the DRPA and Lodge 30 was effective from December 11, 1992 through December 10, 1995, and was extended by mutual agreement until August 20, 1996, when it expired. It is denied that the Agreement referred to in paragraph 10 of the Amended Complaint is a "Collective Bargaining Agreement" as that term of art may be applied under state or federal labor law. The remaining allegations contained in paragraph 10 of the Amended Complaint are denied.

11. Denied as stated. By way of further answer, Article III, Section 1 of the expired Agreement speaks for itself. The DRPA specifically denies that the Agreement referred to in paragraph 11 of the Amended Complaint is a "Collective Bargaining Agreement."

12. Denied as stated. By way of further answer, Article III, Section 3 of the expired Agreement speaks for itself. The DRPA specifically denies that the Agreement referred to in paragraph 12 of the Amended Complaint is a "Collective Bargaining Agreement."

13. Denied as stated. By way of further answer, Article VI, Section 10 of the expired Agreement speaks for itself. The DRPA specifically denies that the Agreement referred to in paragraph 13 of the Amended Complaint is a "Collective Bargaining Agreement."

14. Denied as stated. By way of further answer, Article XIII of the expired Agreement speaks for itself. The DRPA specifically denies that the Agreement referred to in paragraph 14 of the Amended Complaint is a "Collective Bargaining Agreement."

15. Denied as stated. By way of further answer, Article XVII, Section 1 of the expired Agreement speaks for itself. The DRPA specifically denies that the Agreement referred to in paragraph 15 is a "Collective Bargaining Agreement."

16. Admitted in part, and denied in part. It is admitted only that on November 4, 1995 representatives of FOP Lodge 30, including Plaintiff Vena, met with representatives of the DRPA to discuss the possibility, and substance, of a successor Agreement to cover the terms and conditions of employment for DRPA police officers. The remaining allegations contained in paragraph 16 of the Amended Complaint are denied as stated.

17. Admitted in part, and denied in part. It is admitted only that Lodge 30 and the DRPA exchanged written proposals at the November 4, 1995 meeting. The remaining allegations contained in paragraph 17 of the Amended Complaint are denied as stated.

18. Denied. By way of further answer, Lodge 30's proposals were neither comprehensive, nor in harmony with the expired Agreement or the DRPA's own proposals. Further, Lodge 30 demanded extraordinary additional items to which the DRPA was unwilling to acquiesce. The remaining allegations contained in paragraph 18 of the Amended Complaint are denied as stated.

19. Denied as stated. By way of further answer, the DRPA submitted proposals which covered the subjects of layoffs, work shifts and seniority. The remaining allegations in paragraph 19 are denied.

20. Denied. By way of further answer, the DRPA submitted proposals which addressed subcontracting of certain DRPA police functions. The remaining allegations contained in paragraph 20 of the Amended Complaint are denied.

21. Denied as stated. By way of further answer, the DRPA submitted proposals which addressed payment of the difference between Workers' Compensation benefits and weekly pay.

22. Denied as stated. By way of further answer the DRPA continued negotiating with Lodge 30 concerning wages and health care benefits, as well as the amount of benefits to be received by a police officer on workers' compensation.

23. Admitted in part, and denied in part. It is admitted only that July 1, 1996 was the last meeting date between the parties. It is expressly denied that the DRPA refused to meet with Lodge 30. The remaining allegations contained in paragraph 23 of the Amended Complaint are denied as stated.

24. Denied.

25. Denied as stated.

26. Denied as stated. By way of further answer, the DRPA only presented a "final offer" after Lodge 30 demanded it prior to the expiration of the Agreement.

27. Denied.

28. Denied as stated. By way of further answer, any other reference to other labor agreements demonstrates the DRPA's non-discriminatory efforts to reach financial stability.

29. Admitted in part, and denied in part. It is admitted only that the DRPA would not, at that point in negotiations, promise Lodge 30 a "most favored nations" clause. The remaining allegations contained in paragraph 29 of the Amended Complaint are denied.

30. Denied as stated. By way of further answer, the DRPA presented its wage proposal on July 1, 1996 because Lodge 30 demanded it at that time.

31. Denied as stated.

32. Admitted in part, and denied in part. It is admitted only that the DRPA scheduled a vote for August 21, 1996 at the next regularly scheduled DRPA commissions meeting, after the expiration of the Agreement. The remaining allegations contained in paragraph 32 of the Amended Complaint are denied as stated.

33. Denied. The DRPA is without sufficient knowledge, information or belief to form an opinion as to the truth of the

allegations contained in paragraph 33 of the Amended Complaint, and therefore, denies those allegations.

34. Admitted in part, and denied in part. It is admitted only that on July 31, 1996, FOP Lodge 30 President James Stewart sent a letter to DRPA Chairman Stamatakis announcing that the DRPA's contract proposal had been rejected, and asking to extend the Agreement and continue bargaining.

35. Admitted.

36. Admitted in part, and denied in part. It is admitted only to extent that there was a meeting on August 5, 1996, between the DRPA Labor Subcommittee and the Lodge 30 Executive Board. The remaining allegations contained in paragraph 36 of the Amended Complaint are denied as stated.

37. Admitted only to the extent that there have been no meetings between the DRPA and Lodge 30, exclusive of this litigation, since August 5, 1996, concerning the subject matter of a successor Agreement. The remaining allegations contained in paragraph 37 of the Amended Complaint are denied.

COUNT I - CONSTITUTIONAL AND STATUTORY VIOLATIONS

38. Defendant DRPA incorporates by reference, its answers contained in the above paragraphs, as if fully set forth herein.

39. Paragraph 39 of the Amended Complaint purports to cite legal authority, and makes no factual averments to which a responsive pleading is required at this time.

40. Paragraph 40 of the Amended Complaint purports to cite legal authority, and makes no factual averments to which a responsive pleading is required at this time.

41. Paragraph 41 of the Amended Complaint purports to cite legal authority, and makes no factual averments to which a responsive pleading is required at this time.

42. Paragraph 42 of the Amended Complaint purports to cite legal authority, and makes no factual averments to which a responsive pleading is required at this time.

43. Paragraph 43 of the Amended Complaint purports to cite legal authority, and makes no factual averments to which a responsive pleading is required at this time.

44. Denied. By way of further answer, paragraph 44 of the Amended Complaint states a legal conclusion to which no responsive pleading is required at this time.

45. Denied.

46.(a) - (i) Denied. By way of further answer, the DRPA engaged in legitimate good faith discussions regarding the possibility and substance of a successor agreement, and did not take unreasonable positions like those taken by Lodge 30.

47. Denied.

48. Denied.

49. Denied. By way of further answer, the DRPA and the public at large will suffer irreparable harm in the event of an injunction.

50. Denied.

51. Denied.

WHEREFORE, having fully answered the First Count of Plaintiffs' Amended Complaint, Defendant DRPA requests the Court dismiss the First Count of Plaintiffs' Amended Complaint and grant any other relief which this Court deems just and proper.

COUNT II - BREACH OF CONTRACT

52. Defendant DRPA incorporates by reference, its answers contained in the above paragraphs, as if fully set forth herein.

53. Admitted in part, and denied in part. The DRPA expressly denies only that the expired Agreement referred to in paragraph 53 of the Amended Complaint is a "Collective Bargaining Agreement" as that term of art may be applied under state or federal labor law.

54. Denied.

55. Denied. By way of further answer, Lodge 30 has no rights or claims against the DRPA after expiration of its Agreement.

WHEREFORE, having fully answered the Second Count of Plaintiffs' Amended Complaint, Defendant DRPA demands that the Second Count of Plaintiffs' Amended Complaint be dismissed and judgment be entered granting any other relief which this Court deems just and proper.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

This Court lacks subject matter jurisdiction over all claims raised by Plaintiff.

THIRD AFFIRMATIVE DEFENSE

All actions taken by the DRPA were lawful and not in violation of any law.

FOURTH AFFIRMATIVE DEFENSE

The labor laws of Pennsylvania and New Jersey do not apply to the DRPA.

FIFTH AFFIRMATIVE DEFENSE

Neither the National Labor Relations Act nor any other federal or state labor law applies to the DRPA.

SIXTH AFFIRMATIVE DEFENSE

Congress, New Jersey and Pennsylvania have expressly declined to enact labor legislation covering the DRPA, notwithstanding the fact that these government bodies have done so for other public sector employers under their jurisdiction. Therefore, this area is not to be occupied by any state legislative or judicial body.

SEVENTH AFFIRMATIVE DEFENSE

Express statutory language is required by both New Jersey and Pennsylvania or Congress to set labor policy for the DRPA which is inconsistent with its Compact.

EIGHTH AFFIRMATIVE DEFENSE

Neither Pennsylvania nor New Jersey have consented to this Court asserting jurisdiction over matters involving labor

relations of the DRPA, a United States Congressionally approved, bi-state entity.

NINTH AFFIRMATIVE DEFENSE

The concept of "bad faith bargaining" is a term of art found only in Federal and State labor laws, none of which apply to the DRPA.

TENTH AFFIRMATIVE DEFENSE

Even if concept of "bad faith bargaining" did apply to the DRPA, the DRPA did not engage in "bad faith bargaining."

ELEVENTH AFFIRMATIVE DEFENSE

Pennsylvania has not consented to the application of Article I, Paragraph 19 of the New Jersey Constitution to the DRPA, nor is there a substantially similar Pennsylvania provision. Therefore, Article I, Paragraph 19 of the New Jersey Constitution does not apply to the DRPA.

TWELFTH AFFIRMATIVE DEFENSE

The DRPA did not breach any contractual agreement that it had with Plaintiffs, as the most recent contract expired on August 20, 1996, prior to the DRPA taking any action to change terms and conditions of employment.

THIRTEENTH AFFIRMATIVE DEFENSE

The DRPA did not breach its contract with Lodge 30 because it was not under any legal or contractual obligation to reach a successor Agreement.

FOURTEENTH AFFIRMATIVE DEFENSE

The State of New Jersey and the Commonwealth of Pennsylvania have expressly provided in the DRPA Compact that the DRPA is solely responsible for the "operation and maintenance of the Bridges owned jointly by the two (2) States,. . . including its approaches, and the making of additions and improvements thereto." N.J.S.A. 32:3-2(a). Any actions taken by this Court to interfere with DRPA labor relations would violate the DRPA's express grant of power to operate and maintain the bridges, and constitute a violation of the terms of a United States Congressionally approved, bi-state Compact.

FIFTEENTH AFFIRMATIVE DEFENSE

The State of New Jersey and the Commonwealth of Pennsylvania have expressly provided in the DRPA Compact that one of the essential functions of the DRPA is the "promotion as a highway of commerce of the Delaware river, . . ." N.J.S.A. 32:3-2(g). Any attempt by this Court to improperly interfere with DRPA labor relations would violate the DRPA's express grant to promote the Delaware river as a highway of commerce, and constitute a violation of the terms of a United States Congressionally approved, bi-state Compact.

SIXTEENTH AFFIRMATIVE DEFENSE

The State of New Jersey and the Commonwealth of Pennsylvania have expressly agreed in the DRPA Compact that the DRPA's power to own, operate or control its properties shall not be "diminish[ed] or impair[ed]." N.J.S.A. 32:3-10. Any attempt by

this Court to interfere with DRPA labor relations would act to improperly diminish and impair the DRPA's ability to operate its properties, and would constitute a violation of the terms of a United States Congressionally approved, bi-state Compact.

SEVENTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' Amended Complaint raises labor-related issues that are exclusively within the jurisdiction of the executive branches of Pennsylvania and New Jersey government. Accordingly, any action taken by this Court that affect the DRPA's labor relations would violate the doctrine of separation of powers.

EIGHTEENTH AFFIRMATIVE DEFENSE

The DRPA's United States Congressionally approved, bi-state Compact does not permit this Court to manage the labor relations of the DRPA. Any action taken by this Court that affects DRPA labor relations would constitute a violation the Compact Clause of the United States Constitution.

NINETEENTH AFFIRMATIVE DEFENSE

Plaintiffs' Amended Complaint asks this Court to interject itself into DRPA labor relations. Any action taken by this Court that affects DRPA labor relations would constitute an improper interference with interstate commerce, and is a violation of the Commerce, Supremacy and other Clauses of the United States Constitution.

TWENTIETH AFFIRMATIVE DEFENSE

Plaintiff's Amended Complaint raises substantial political questions that can only be addressed by the Legislatures of New

Jersey and Pennsylvania and not by the court system of New Jersey.

TWENTY-FIRST AFFIRMATIVE DEFENSE

Plaintiffs are not entitled to attorneys fees because there is no statutory basis for such an award.

TWENTY-SECOND AFFIRMATIVE DEFENSE

The Amended Complaint and relief sought by Plaintiffs requires the New Jersey Court System to fashion a body of comprehensive and extensive procedural and substantive laws regulating labor relations of bi-state entities which is in excess of the power of the Judiciary of New Jersey.

TWENTY-THIRD AFFIRMATIVE DEFENSE

The Amended Complaint and the relief sought by Plaintiffs interferes with the ability of the DRPA to discharge its obligation and duty to New Jersey, Pennsylvania and their residents and toll payers. Relations between the DRPA and certain representatives of certain employees have been eroded by their action.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

This Court lacks jurisdiction to decided any matter relating to bi-state labor relations because the field is preempted by federal law in that Congress chose not to legislate and that the field should be free from state regulation.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

The Commissioners, Directors and Managers of the DRPA, at all times related to this matter, acted within their authority under the Compact and all applicable laws.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

Lodge 30 has attempted to use the judicial system to improperly affect its labor relations, and to force the DRPA to accept terms and conditions of employment that it would not otherwise accept or approve. This case has implications for all bi-state entities.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

Lodge 30 had knowledge that it had to reach a successor Agreement prior to the expiration of the 1992-1995 Agreement because there was no automatic contract renewal language in that Agreement.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

Any action taken by this Court that affects DRPA labor relations constitutes a violation of Article III, Section 1, of the New Jersey Constitution.

TWENTY-NINTH AFFIRMATIVE DEFENSE

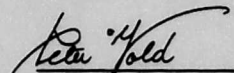
Lodge 30 has no rights or claims against the DRPA as the Agreement between the parties expired on August 20, 1996.

THIRTIETH AFFIRMATIVE DEFENSE

To the extent permitted by law, DRPA is entitled to an award of attorney's fees.

WHEREFORE, having fully answered Plaintiffs' Amended Complaint, Defendant DRPA demands that Plaintiffs' Complaint be dismissed and that judgment be entered in its favor, for its costs and its reasonable attorney's fees.

BLANK ROME COMISKY & McCAULEY



Peter B. Gold, Esquire
Scott F. Cooper, Esquire
Samuel M. First, Esquire
210 Lake Drive East
Suite 200
Woodland Falls Corporate Park
Cherry Hill, NJ 08002
(609) 779-3600

Attorneys for the Defendant,
Delaware River Port Authority

Dated: April 2, 1997

REQUEST FOR STATEMENT OF AMOUNT OF DAMAGES CLAIMED

Pursuant to Rule 4:5-2, you are hereby requested to submit to the undersigned, within 5 days after service hereof, a statement of the amount of damages claimed by you in each count of the Complaint in the above entitled action.

DESIGNATION OF TRIAL COUNSEL

Pursuant to Rule 4:5-1(c), Peter A. Gold, Esquire, and Scott F. Cooper, Esquire, are hereby designated as trial counsel for Defendant Delaware River Port Authority in this matter.

BLANK ROME COMISKY & McCAULEY

Peter A. Gold, Esquire
Scott F. Cooper, Esquire
Samuel M. First, Esquire
210 Lake Drive East
Suite 200
Woodland Falls Corporate Park
Cherry Hill, NJ 08002
(609) 779-3600

Attorneys for the Defendant,
Delaware River Port Authority

Dated: April 2, 1997

BLANK ROME COMISKY & McCAULEY
PETER A. GOLD, ESQUIRE
SCOTT F. COOPER, ESQUIRE
SAMUEL M. FIRST, ESQUIRE
210 Lake Drive East, Suite 200
Woodland Falls Corporate Park
Cherry Hill, NJ 08002
(609) 779-3600

Attorneys for Defendant,
Delaware River Port Authority

2

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30, and JOSEPH VENA,	:	SUPERIOR COURT OF NEW JERSEY CAMDEN COUNTY LAW DIVISION
Plaintiffs,	:	
v.	:	DOCKET NO. L-7547-96
DELAWARE RIVER PORT AUTHORITY,	:	CIVIL ACTION
Defendant.	:	**CERTIFICATE OF SERVICE**

I, Samuel M. First, a member of the Bar of this Court, hereby certify that on this date I caused a true and correct copy of the Defendant Delaware River Port Authority's Amended Answer, Request for Amount of Damages, Designation of Trial Counsel and Certification to be served via Hand Delivery, upon Plaintiffs FOP Lodge 30 and Joseph Vena's Counsel of Record:

Benjamin Eisner, Esquire
Charles Joyce, Esquire
SPEAR, WILDERMAN, BORISH,
ENDY, SPEAR AND RUNKEL
36 Tanner Street
Second Floor
Haddonfield, New Jersey 08033
(609) 428-5255

Samuel M. First

Samuel M. First, Esquire

Dated: April 2, 1997

BLANK ROME COMISKY & McCAULEY
PETER A. GOLD, ESQUIRE
SAMUEL M. FIRST, ESQUIRE
SCOTT F. COOPER, ESQUIRE
210 Lake Drive East, Suite 200
Woodland Falls Corporate Park
Cherry Hill, NJ 08002
(609) 779-3600

Attorneys for Defendant,
Delaware River Port Authority

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30, and JOSEPH VENA, Plaintiffs, v. DELAWARE RIVER PORT AUTHORITY Defendant.	SUPERIOR COURT OF NEW JERSEY CAMDEN COUNTY LAW DIVISION DOCKET NO. L-7547-96 CIVIL ACTION AFFIDAVIT OF JOY FABER, ESQUIRE

I, Joy Faber, Esquire, being duly sworn according to law, depose and say:

1. I am currently employed by the Delaware River Port Authority ("DRPA") as Assistant General Counsel. I am a member of the Bar of the State of New Jersey in good standing, and authorized to make the following statements in connection with the above-captioned legal action.

2. The DRPA is a bi-state public, corporate instrumentality of the State of New Jersey and Commonwealth of Pennsylvania, approved by the United States Congress. The DRPA has continuously operated an independent police force to patrol its properties since 1957. The current force is composed of 78 patrol officers.

3. On or about October 16, 1975, the DRPA voluntarily chose to hold a representation election for its police officers.

4. Two groups, the Fraternal Order of Police Lodge 30 ("FOP Lodge 30") and the Transport Workers Union Local 234 ("TWU Local 234"), sought to represent the interests of the DRPA police officers.

5. The election was not conducted by, nor subsequently certified by, the National Labor Relations Board, the New Jersey Public Employee Relations Commission or the Pennsylvania Labor Relations Board.

6. By a vote of 45 (FOP Lodge 30) to 39 (TWU Local 234), the majority of DRPA police officers voted to have FOP Lodge 30 represent their interests.

7. Since the election of FOP Lodge 30 in 1975, the DRPA has voluntarily entered into a series of successive contracts with FOP Lodge 30 setting terms and conditions of employment for the DRPA Police Officers, who are otherwise at-will employees.

8. None of the contracts ever obligated the parties to adhere to the requirements of the National Labor Relations Act, the New Jersey Public Employer-Employee Relations Act, the Pennsylvania Public Employe Relations Act, the Pennsylvania Labor Relations Act or Pennsylvania's Act 111.

9. The most recent agreement between the parties, was effective from December 11, 1992 through December 10, 1995 ("1992

Agreement"), but was extended by mutual agreement between the parties until August 20, 1996.

10. On November 4, 1995, prior to the expiration of the 1992 Agreement, the DRPA voluntarily opened negotiations with FOP Lodge 30 to discuss changes the DRPA intended to make to the terms and conditions of employment. The DRPA also received the positions of its employees, through their FOP Lodge 30 representatives.

11. Even though the DRPA was under no legal duty or obligation to negotiate with FOP Lodge 30, it continued to solicit proposals from, and discuss those proposals with, FOP Lodge 30 through August of 1996.

12. On August 20, 1996, the extension to the 1992 Agreement expired without the parties having reached a new agreement.

13. On August 21, 1996, the DRPA submitted a resolution to its Board of Commissioners ("DRPA Board"), its governing body, seeking authorization to implement certain changes to the terms and conditions of employment for the DRPA Police. ("Resolution").

14. At the August 21, 1996 Board Meeting, the DRPA Board approved the resolution, and forwarded the meeting minutes to the Governor of New Jersey for approval. Although the Resolution affected the Pennsylvania components and employees of the DRPA, the enabling legislation does not require a 'veto period' by the Governor of Pennsylvania.

15. Governor Whitman's veto period expired at the end of the day on September 11, 1996, without her having taken action to veto the DRPA Board Meeting Minutes of August 21, 1996. As of September 12, 1996, the resolution authorizing implementation of the terms and conditions of employment for the DRPA police officers went into effect.

I certify that the foregoing statements made by me are true and correct to the best of my knowledge, information and belief. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to appropriate sanctions.

JOY FABER, ESQUIRE

Dated: October 7, 1996

DUANE, MORRIS & HECKSCHER

16TH FLOOR, 100 SOUTH BROAD STREET
PHILADELPHIA, PA. 19110

PHILADELPHIA TELEPHONE: 215-568-6300
PAOLI TELEPHONE: 215-647-2255
CABLE & TELEGRAM: TWX 710-670-1164

PAOLI OFFICE
45 DARBY ROAD
PAOLI, PA. 19301

October 3, 1975

Anthony D. Pirillo, Jr., Esquire
Suite 600
1420 Walnut Street
Philadelphia, Pennsylvania 19102

RE: DRPA — TWU LOCAL 234 — FOP
REPRESENTATION QUESTION

Dear Mr. Pirillo:

We represent the Delaware River Port Authority. This will acknowledge your letter of September 30, 1975 (cc- NLRB and TWU Local 234) and a copy of your letter dated September 30, 1975, to the Transport Workers Union Local 234 (cc- NLRB and DRPA) and a copy of your letter of September 30, 1975 to the National Labor Relations Board (cc- DRPA and TWU Local 234). We understand that your letter suggests that a question of representation exists with respect to the collective bargaining agent for police employed by the Delaware River Port Authority. Please be advised that the Delaware River Port Authority is not subject to the jurisdiction of the NLRB or any state Labor Relations Board or Commission in accordance with its policies of long-standing. When representation questions are deemed to exist, following investigation, the Delaware River Port Authority has conducted representation elections.

If you desire that the Delaware River Port Authority conduct such an election in the present case, we suggest you promptly request such an election so that the Commissioners may act thereon at their next scheduled meeting, Wednesday, October 8. A letter request will be sufficient and the documents you have previously forwarded will be regarded as supporting material. By a copy of this letter to the Transport Workers Union Local 234, they are advised that they should similarly forward the Delaware River Port Authority any objections to such an

election setting forth therein any reasons which they wish to advance in support of the proposition that a representation question does not exist.

Sincerely yours,

Roland Morris
for DUANE, MORRIS & HECKSCHER

RM/mv

Cc: Transport Workers Union Local 234
National Labor Relations Board

Pc: John E. Yeomans, Esquire

SUPERIOR Court OF NEW JERSEY
LAW DIVISION, CAMDEN COUNTY
DOCKET NO. L-7547-96
A. D. # A-003344-97T1

FOP LODGE 30, ET AL.,

Plaintiffs,

vs.

DELAWARE RIVER PORT AUTHORITY,

Defendant.

TRANSCRIPT
OF
HEARING

Place: Camden County Superior Court
Hall of Justice
Camden, NJ 08103

Date: December 20, 1996

BEFORE:

HON. SAMUEL L. SUPNICK, J.S.C.

TRANSCRIPT ORDERED BY:

SAMUEL M. FIRST, ESQ. (Blank, Rome, Comisky & McCauley)

APPEARANCES:

BENJAMIN EISNER, ESQ. (Spear, Wilderman)
CHARLES T. JOYCE, ESQ.
Attorneys for Plaintiffs

SCOTT F. COOPER, ESQ. (Blank, Rome, Comisky & McCauley)
SAMUEL M. FIRST, ESQ.
Attorneys for Defendant

Transcriber Kathleen Nazarok
DIANA DOMAN TRANSCRIBING
P. O. Box 67
Audubon, NJ 08106
(609) 547-2506
(609) 547-8973 FAX

LASER STOCK FORM FM5NN
THE COMEY GROUP 1-800-288-5040

THE COURT: Number 44, FOP Penn Jersey Lodge 30 v. Delaware River.

MR. EISNER: Here for the plaintiff, Your Honor.

MR. FIRST: For the defendants.

THE COURT: Come forward. Enter your appearances please.

MR. COOPER: Good morning, Scott Cooper with Blank, Rome, Comisky & McCauley and Sam First.

THE COURT: I'm sorry. Scott what?

MR. COOPER: Cooper, C-O-O-P-E-R. We're the defendant and the moving party.

THE COURT: Okay.

MR. EISNER: Your Honor, Benjamin Eisner, for the plaintiffs, of Spear, Wilderman, and I have with me today to introduce to the Court Charles Joyce of my firm, a member of the Bar of the Commonwealth of Pennsylvania who has been admitted pro hac for the purposes of this matter.

MR. JOYCE: Good morning, Your Honor.

MR. COOPER: If we may, Your Honor --

THE COURT: Did you enter your appearance?

MR. FIRST: Sam First, Blank, Rome, Comisky & McCauley for the defendant FOP Lodge -- I'm sorry -- for the defendant DRPA.

THE COURT: Okay.

MR. COOPER: As Your Honor has --

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THE COURT: It's DRPA's motion.

MR. COOPER: That's correct, and it is a motion for summary judgment, but it's in effect a motion to dismiss the underlying complaint and to ask that you deny the request for equitable relief that's before the Court. This case presents a similar issue to when we were before Your Honor back in April in which a theory of liability is being asserted against the Port Authority and we have --

THE COURT: May I just ask a question before you -- this was before Judge Davis?

MR. COOPER: Judge Fluharty originally.

THE COURT: It was what?

MR. COOPER: Before Judge Fluharty originally.

THE COURT: Where did I see that this was before Judge Davis before and he transferred it to the Law Division?

MR. JOYCE: That's correct.

MR. COOPER: That is correct.

MR. JOYCE: Your Honor, if I may, that's correct. He transferred it to the Law Division sua sponte.

THE COURT: Why did he do that?

MR. JOYCE: The Court did it on its own, Your Honor. We don't know why the Court did it.

THE COURT: All right. Go ahead.

MR. COOPER: We wondered the same thing, especially in view of what they're asking for.

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THE COURT: I mean in view of the relief, that's why I say that. I don't understand it.

MR. COOPER: The quick -- I think both sides have the same question.

MR. JOYCE: That's correct, Your Honor, but both sides also I think are in agreement that --

THE COURT: Maybe you gave him big briefs and he didn't want to read them.

MR. JOYCE: We apologize, Your Honor. It's an important case.

THE COURT: I know. You were before me before with regard to --

MR. COOPER: With another one of these --

THE COURT: It was a different matter, yes.

MR. COOPER: Different matter, but basically, we begin in the same point which is a question of whether what would undoubtedly be a very valid legal theory in any other arena except that the defendant is a bistate instrumentality. The question is where are we going? I just want to note for the record up front we are not counsel involved in the underlying labor negotiations. So what we know of what happens there or don't happen, the facts will be somewhat shorter, but I think it ultimately won't make a difference based on the legal theory here. There's no dispute that the FOP has been the bargaining representative for the police going back into

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the mid-1970's and that the FOP and the DRPA currently do not have a present labor contract of any kind. It expired in August of I believe 1995 -- of this year after a mutual extension. And the question before the Court right now is whether the plaintiff's request to do things, number one, make a finding that our client has violated either the New Jersey Constitution or some parallel set of laws in Pennsylvania --

THE COURT: Your contention is that there is no complementary law or parallel legislation that exists between the two states.

MR. COOPER: That is correct. That is the --

THE COURT: Inasmuch as you're a bistate agency, set up through the authority of a special act of Congress.

MR. COOPER: That is correct.

THE COURT: And which you're a separate agency, right?

MR. COOPER: That would be the --

THE COURT: Your adversary contends that there is parallel --

MR. COOPER: That's correct.

THE COURT: -- legislation.

MR. COOPER: That's correct, and I think for the record, it's important to note that because this is such a complicated issue, the cases continue to evolve in terms of the legal theory. I think when it first started, it was a claim

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that we had directly violated the New Jersey Constitution. As we filed our first set of papers and point out you can't bring such a claim, I think the plaintiffs have properly advanced the theory to say, no, you've got to look at the policy of the two states and see if we can create some kind of a remedy here in the Law Division. And that is why in our reply brief, we have pointed out to the Court just how unworkable that would be and more importantly that Pennsylvania and New Jersey have never consented to such a concept. Public sector labor rights exist as we've pointed out in a very intricate working with executive agencies ranging from executive directors to labor boards to determining what rights have been violated in the process of collective negotiations. None of that can exist if the remedy the plaintiffs are looking for is allowed to go forward, and that's why we've asked that the case be dismissed right now.

THE COURT: What would you say the status is at this time?

MR. COOPER: The status as I understand it --

THE COURT: Is there any representation that exists at the present time?

MR. COOPER: Yes, I mean there --

THE COURT: Representation in what regard?

MR. COOPER: In the regard --

THE COURT: Do you recognize any representation?

MR. COOPER: Yes, of course we do. We're dealing

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only with --

THE COURT: All right. Now, what is the status or the condition of the situation now?

MR. COOPER: As I --

THE COURT: I know you contend that there is no contract. Now, their argument is that unilaterally, the commissioners enacted certain work -- I don't know what they were that were enacted. I don't think they were set forth, but that's unimportant, and there's been unilateral action.

MR. COOPER: That's correct.

THE COURT: All right.

MR. COOPER: Our position is is that absent a contract, that's exactly right.

THE COURT: Now, you say that they have to live by the unilateral action?

MR. COOPER: Until such time as the parties get back to the table, that's correct.

THE COURT: So that you can modify the agreement in any respect that you see fit by merely terminating it.

MR. COOPER: Actually, it's just to the contrary. As long as there's a contract in place, we're powerless to do anything except live by the agreement --

THE COURT: I say but it --

MR. COOPER: -- which is why it's so important, and I think both sides knew it was so important.

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THE COURT: But the contract had a provision in it that permitted termination at the end of its term, didn't it?

MR. COOPER: And in fact, that's a critical point in this case, that this contract unlike previous contracts did not say that there would be, as is often the case in traditional labor cases, a right of successorship or an automatic right of renewal at the end, and I think --

THE COURT: That was left out sometime --

MR. COOPER: Sometime in --

THE COURT: -- after 1990 I think was indicated.

MR. COOPER: That's correct, and again --

THE COURT: Was that deliberately left out or was it by accident or does anybody know?

MR. JOYCE: May I respond to that, Your Honor?

THE COURT: Yes.

MR. JOYCE: It's unclear from the record why that was left out, and I would hold that the termination of a renewal clause is ambiguous at this point because although it doesn't have the standard language that says the contract will continue in force and effect from year to year, it says the only way the contract is terminated is if either party gives notice to terminate the contract. So it's somewhat unclear, and also, it's undisputed that both parties in the fall of 1995 agreed to renegotiate a new contract. So there was an agreement going forward to renegotiate a new contract. They have admitted that

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in response to our material statement of fact number 19. So I think -- we think it's immaterial whether or not the contract terminated by its terms on December 10th, 1995 or not. The parties had an agreement to go forward and negotiate a new agreement. They in our view breached that agreement, breached that promise to renegotiate the contract, and that's why we're here.

MR. COOPER: Your Honor, our position is obviously that an offer to sit down and continue negotiation for something that will happen when you do not have a legal obligation to make another contract at the end of this one is the same as when any other two parties know that a contract's about to expire.

THE COURT: Tell me, let me ask you this. Suppose you sat down and you attempted to negotiate and you couldn't agree. What then?

MR. COOPER: Then the parties are free to go their own way unfortunately.

THE COURT: But what would that have to do with the initial recognition that you gave, the fact that you voluntarily on a mutual basis recognized the union when they offered -- when they submitted a basis for recognition? You conducted or allowed to be conducted through the three A's an election in order to determine who the appropriate bargaining agent for the employees would be, and they were appropriately

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designated. I know that there is no law -- I don't think there's any law that exists other than as I recall except under the NLRB insofar as recognition is concerned. I don't think the State has any such -- what is it, three years under NLRB or five years? Three years?

MR. COOPER: It's usually a three-year contract.

THE COURT: But NLRB doesn't apply here I know.

MR. COOPER: It does not apply here.

THE COURT: But you have the recognition. You've had a practice of contracts over the years. You've negotiated the contract with this group right along, and you contend that you're in a position and that there's no complimentary law. There's not a law that exists between the two states that entitles them to --

MR. COOPER: I think that against the background of the sovereign immunity that we have raised here, that until the legislatures get around quite candidly to passing the laws that they have in New Jersey and in Pennsylvania created --

THE COURT: Well, your adversary argues that there are parallel or complimentary laws, and they also set forth the provisions both in the Pennsylvania law that was set up in connection with governmental employees that requires negotiations in good faith as well as the fact that the New Jersey --

MR. COOPER: Correct.

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THE COURT: -- Constitution which permits -- recognizes the right of government employees to organize also recognizes that obligation of good faith. You mean to say -- did I understand your argument that unless they have a constitutional provision, that since we have a constitutional provision here, that there are no parallel or complimentary law?

MR. COOPER: No, Your Honor. In fact, that's the way the case started, but I think where we are now is and the one part that's missing I think in the analysis here -- you're absolutely right. New Jersey has a set of laws that nobody can debate, and you have certain rights as a public sector employee, and 95 percent of those are the same in Pennsylvania. The crucial difference is those rights don't exist in a vacuum. They exist to the extent that a government agency, whether it's the Pennsylvania Labor Relations Board or our PERC, has oversight jurisdiction not only to suggest that those rights exist but to interpret them and to enforce them when the parties break down. The thing that is missing in this case is any government agency that would have oversight authority to monitor what I would call the traditional labor concepts, that New Jersey and Pennsylvania clearly recognize for their own domestic employees. That's the critical piece that's missing. New Jersey can pass all the laws it wants subject to PERC regulation for our employees, no dispute. Pennsylvania can do

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the same thing. Why? Because there's a Pennsylvania Labor Relations Board that says, this is what it means when you bargain in bad faith; if you don't like it; you go to the commissioner; he'll issue a complaint; you have a mini-trial; you can appeal it and you do all those things. What the plaintiffs cannot point to in this case is any such government agency, whether it's the NLRB or PERC or the PLRB. Indeed they concede none of these agencies affect it, and that's the critical difference. The concepts --

THE COURT: You don't think --

MR. COOPER: The concepts, if I may, that we're throwing around in Court, they're terms of art. The terms of art don't exist unless you got an administrative structure to enforce them and to create them. There is no such thing, and that's not a problem. It's just a separation of powers issue.

THE COURT: I don't know -- I don't know if that question has ever come up in connection with any of the other governmental employee contracts, that situation has ever arisen, but I would like to ask this question. Wouldn't you think that the Courts could step in to fill a vacuum?

MR. COOPER: Well, obviously, I mean that is the million-dollar question in this case, and the plaintiffs say yes and we obviously say no for the reasons I think we set forth substantially in our reply brief. It's not just a question of stepping in and creating some kind of an equitable

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remedy. The question is have the legislatures decided to give the executive branch or some entity the authority to create the scheme that exists in New Jersey and exists in Pennsylvania and obviously exists at the federal level at the NLRB? Yes, the Court could in some manner make it up as we go along, and I know that this is, as I said in our brief, the uncomfortable position they want us to be in to suggest this Court can't do it. Obviously, you can come up with a remedy. The question isn't whether you can. The question is whether you should.

THE COURT: The area or the extent to which a Court could go -- I mean I'm not --

MR. COOPER: Yes.

THE COURT: I can appreciate the fact that there could be an area that the Court would certainly --

MR. COOPER: Correct.

THE COURT: -- be exceeding its authority, or at least it would be overreaching.

MR. COOPER: And, Judge, we contend obviously that in an area such as this where the backdrop in the defense really is a form of sovereign immunity, that to the extent you can't find the consent of the two states to do what they are asking, this is an extraordinary remedy because as you pointed out, we will be making this up as we go along. I mean when you appoint mediators, will your law clerk be a fact-finder, is somebody from this Court going to sit at the table? All the things that

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would be so garden variety if we were before PERC, because they've got the agency, they've got the funding, they have the expertise in the field. I mean I suppose the Superior Court could make this up, but the whole point of this is that Pennsylvania and New Jersey have never ever envisioned that the trial Court of either state would in the first instance be the party to do what routinely happens at PERC and at the PLRB, and as I say, it's an extraordinary leap to give them what I know we all want which is some sense of fairness here. When New Jersey and Pennsylvania get around to creating the kind of agency structure as they've done with the commission board and as exists at PERC or the PLRB, yeah, they would have a claim, and we would have to go through all the other things you have to do. But until that day comes, I respectfully submit that it is wrong to ask the Court to create this as we go along because that's what this will be.

THE COURT: Yes, but you're moving -- at this point, you're moving for a summary judgment.

MR. COOPER: That is because, Your Honor, there is nothing left to do in this case. If you allow either the injunctive relief that they're asking for -- and I'm not sure how this would happen. We would be forced back to the table I guess under the supervision of the Court. But if the complaint can go forward, that we have bargained in bad faith as I believe is what Count 2 has presently pled, again that is a

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term that doesn't mean anything in the public sector outside of the administrative agency. As I said, in Pennsylvania or New Jersey, you can't walk forward and argue you're bargaining in bad faith under the statute. You've got to convince the commissioner that you have violated the act, and the commission becomes the advocate after issuing the complaint, all the things that exist in New Jersey as well as at the NLRB. Now, a point here is I just don't see how the Court fits into that mix. I mean would Your Honor then be the prosecutor if we have been found to violate in bad faith? And then who do we try our case to? All of that -- and I don't even want to get into all the detail.

THE COURT: I don't know. The Court might have to conduct a full hearing in connection with that. As I say, you have now a motion to dismiss the action in its entirety --

MR. COOPER: That's correct.

THE COURT: -- on the basis of the fact that you say none of these things could possibly occur.

MR. COOPER: I'm not saying it couldn't occur. That's what I'm most afraid of. I actually think the Court probably could fashion a remedy, but the point is your remedy won't look anything like the administrative scheme that the states have debated up in Trenton or in Harrisburg or even in Washington, DC. It won't look anything like that.

THE COURT: Yes. Well, I can't jump to that

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conclusion because I really --

MR. COOPER: But unfortunately, Judge, what I'm suggesting is you'll have to because if this complaint goes forward, there's really no discovery to be had here. The only question is can the Court get involved to implement the kind of procedures that would exist if we were a purely domestic employer here in New Jersey in the public sector. And from day one, that will implicate the Court directly, whether it's sitting down and sending a mediator, whether it is conducting findings of fact. This isn't one of those lawsuits where we get by the motion to dismiss and the parties go away and deal with discovery and we come back to the Court in six or seven months. The Court will be immediately brought into this, and as I say -- and I keep repeating -- you'll be making this up as we go along. That is not what any legislature has ever intended to have happen in this area. Parties are supposed to know the procedural rights going in. We'll be making this up as we go along. It's not what Trenton's envisioned. It's not what Harrisburg ever envisioned, and until they sit down and give us some more guidance, there isn't a legal theory that can go forward here without the remedy being worse than the underlying problem.

THE COURT: In what respect are you looking for them to give you some kind of guidance? Would that be by enacting legislation that would be on a complimentary or a mutual basis?

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MR. COOPER: I think in all candor, we're beyond complimentary legislation.

THE COURT: Yes, I think so.

MR. COOPER: What I'm looking for is an agency that would have the power and the resources to do what would happen if we were a purely domestic public employer in New Jersey or in Pennsylvania. I mean there's no dispute. If you're in New Jersey, you go to PERC. Everybody knows what your guidelines are. There's an extensive administrative code on this point. There are statutes that tell you what there are. There is judicial case law that talks about how to interpret the Public Employer/Employee Relations Act. That's the kind of thing we're looking for. That's what's missing in this case. It's not a complimentary legislation. There's no executive agency.

THE COURT: You don't necessarily say that the Court couldn't provide that, but you're questioning whether it could provide it --

MR. COOPER: Whether you should.

THE COURT: -- in an effective manner in its entirety.

MR. COOPER: I'm raising two points; number one, whether you should and, number two, whether New Jersey and Pennsylvania have ever consented to allowing a trial Court to do what you would in effect have to be doing going forward from this day.

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THE COURT: Let me hear from your adversary.

MR. JOYCE: Thank you, Your Honor. Your Honor, first of all, it seems to me that DRPA's argument at this stage in the proceedings boils down to the proposition that because these rights that we are alleging we have may be somewhat difficult to effectuate and enforce, these rights don't exist. Well, that argument ignores the long history of New Jersey Courts stepping in, enforcing and protecting both private sector and public sector labor rights precisely because there was no administrative agency that was either able or willing to enforce those rights. Remember, Your Honor, that between 1947 when the New Jersey Constitution was enacted giving the public sector labor protections and 1968 when the administrative agency was developed, the Courts determined what the rights were of public employees.

THE COURT: Even before the NLRB.

MR. JOYCE: No; before the New Jersey Public Employer/Employee Relations Act.

THE COURT: PERC, okay, sure.

MR. JOYCE: Exactly, Your Honor.

THE COURT: Okay.

MR. JOYCE: In 1964, the New Jersey Turnpike Authority case, the Court ruled that public employees don't have the right to strike.

THE COURT: What happened in Pennsylvania?

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MR. JOYCE: Excuse me?

THE COURT: What happened in Pennsylvania?

MR. JOYCE: Well, in Pennsylvania, Your Honor, there was a legislative scheme. So Courts did not have to get involved, but New Jersey Courts have historically gotten involved. And it had no hesitancy in getting involved where there's no administrative agency. And, Your Honor, to this very day, the Courts get involved where there's no administrative agency in protecting labor rights. Just last May in a case that Mr. Eisner actually argued and won in the Appellate Division which we didn't cite in our brief -- but it's South Jersey Catholic Teachers Association v. The Lay Diocese of Camden, 290 New Jersey Super 359. The Appellate Division ordered the Chancery Court to order and oversee a union representation election among lay Catholic teachers precisely because no administrative agency either could or would assert jurisdiction over those workers. So this is not a novel proposition of law we're advancing here. This is entirely within the competence of this Court, and it's what Courts have historically done where there is no administrative agency to step in and effectuate the rights.

As a matter of fact, in one of the cases that the defendant cites in their brief, in one of the PERC decisions, the DRPA/PERC decision, PERC says in cases such as this where there's complimentary legislation, we can't, PERC can't assert

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jurisdiction; rather State Courts must decide these disputes. So there's precedent for this, Your Honor, and the argument also -- their argument also overlooks the fact that this is a Court that can exercise equity powers. You have enormous flexibility, enormous creativity to craft a remedy here. You can, as New Jersey Courts have done in the past, look to federal law to determine what the rights and remedies are. Under the Molanany (phonetic) case in the New Jersey Supreme Court, that's what they did. You can appoint a special master to oversee negotiations. You can ask the triple A to appoint an arbitrator if the parties cannot reach an agreement after good-faith negotiations, trying to reach an agreement over the terms and conditions of employment. The Court's authority here is limited only by its imagination, and there are enormous sources of law and sources of authority that you can dwell upon. It is no answer to say because it may be difficult to do, that these law officers who enforce the laws of the New Jersey and Pennsylvania have no rights. It's just no answer to say that.

And if I might, Your Honor, briefly talk about -- it's clear to me that you've read our papers very carefully, and I appreciate that. But if I might briefly talk about the whole issue of complimentary regulation and this Court's ruling in the Ruggiero case. I think that the Ruggiero case is different from this case. In the Ruggiero case, as Your Honor,

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will recall, you found clear differences between the New Jersey Whistle-Blower Act and the Pennsylvania Whistle-Blower Act --

THE COURT: I think there were differences, yes.

MR. JOYCE: Yes. Most similarly, Your Honor, there were two different statutes of limitations. If Mr. Ruggiero would have brought his action in Pennsylvania, he would have been time barred, but in New Jersey, he wouldn't have been time barred. So you couldn't apply that law to the bistate agency. That clearly would have been improper. Also, Your Honor, your decision in Ruggiero came down one month before the New Jersey Supreme Court came down with its decision in Bunk v. Port Authority, a decision that the defendants don't even address in either their original brief or their reply brief. The Bunk case is at once the most expansive and the most recent application of the principle of parallelism --

THE COURT: Which case?

MR. JOYCE: Bunk v. Port of New York and New Jersey, Your Honor. It was cited --

THE COURT: Yes, I have it.

MR. JOYCE: -- in our brief. The Bunk case is extremely important, Your Honor, and I think it's a precursor of what is to come, the Local 68 case, which we rely on heavily in our brief and as I understand defendant says we can't cite because it hasn't been approved for publication by the Appellate Division, is currently on appeal in the New Jersey

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Supreme Court, and a decision is imminent in that case. Oral argument was held three months ago, and I've spoken to the attorney that is arguing that case, and he believes a decision is coming out any day. If the Court -- if the New Jersey Supreme Court follows what they did in Bunk, they will affirm the Local 68 case, and the Local 68 case is on all fours with this case. In that case, the Appellate Division ruled that the employees of the Delaware River and Bay Authority had the right to organize into unions on the basis of the New Jersey Constitution and the complimentary Delaware Right-to-Organize Statute. It was immaterial to the Court whether or not the laws were identical. They don't have to be identical. They just have to be somewhat similar. It was immaterial to the Court that there was no administrative agency to effectuate these rights. Rather, it was the job of the Court to effectuate those rights, and that's all we're asking you to do, Your Honor. The defendant has raised a parade-of-horribles argument as to what ills will befall them and what problems will ensnare this Court. But all we're asking, Your Honor, is very little. All we're asking is to be treated like every other police officer in New Jersey and Pennsylvania. These officers -- and many of them are in this courtroom today, Your Honor -- suffer the same frustrations --

THE COURT: Is that why I had a crowded courtroom? I thought I had a few cases today.

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MR. JOYCE: They're not wearing their uniforms, Your Honor, but they're here.

THE COURT: I want to tell you you frightened the devil out of me before I got on the bench.

MR. JOYCE: Your Honor, these --

THE COURT: My law clerk came back and said, there are a lot of people out there. I knew there shouldn't be.

MR. JOYCE: It's an important case for them, Your Honor. These officers suffer the same frustrations as their brethren. They have the same dangers, the same work pressures. They enforce all the laws of New Jersey and Pennsylvania, and if Your Honor dismisses this case, it means that they have no laws to protect them in their employment.

THE COURT: Gentlemen, the Court recognizes the problem, and the basic argument of course in connection with the fact that there is no parallel or complimentary law as it exists between the two states, that this Delaware River Port Authority -- it can be applied to the Delaware River Port Authority, a bistate agency. In the Court's opinion, that is not so. I think that Pennsylvania law and New Jersey law, even though New Jersey makes reference to the right of governmental employees of course to organize and so forth as set forth in the Constitution -- I do think that Pennsylvania has set forth parallel or complimentary legislation of a different nature but which is nevertheless -- which nevertheless recognizes those

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same rights and clearly gives public employees a right to freely organize and designate representatives and also to negotiate in good faith. And the fact that there might be some problem which might exist as has been argued by Delaware River Port Authority in connection with no agencies existing whereby -- of a nature that would be able to deal with the problems that might be ultimately encountered and resolve them, I think that the Court has the power, the inherent power, to deal with matters of that nature.

The Court's of the opinion that the motion should be denied for the reasons that I have stated. I find that there is a basis for this cause of action proceeding, and I do not find that there is a lack of mutual law that exists between the two states to permit it to proceed. I'm going to deny the motion.

MR. JOYCE: Thank you very much, Your Honor.

MR. COOPER: Your Honor, before we leave, may we ask some -- as I prefaced we would, we already are going to need some direction from the Court then. As I say, I'm not counsel for the Authority in negotiations, but I'm not sure whether they're even talking. Where do we now go from here? Is the Court going to appoint some --

THE COURT: I do not -- I intend to call a meeting of all counsel immediately after we return the beginning of the year and see if something cannot be set up on a mutual basis as

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to avoid any further court action and possibly to expedite this matter. Of course, at this point --

MR. JOYCE: That will be fine, Your Honor.

THE COURT: -- I'm doing that because I think -- and I recognize the importance of proceeding and not waiting for other applications to be made. So immediately after the first of the year, we will call counsel. I assume you wanted me to call counsel that is -- not you.

MR. COOPER: Here in this proceeding and to the extent we need to bring other counsel who may not be admitted to this Bar, we will.

THE COURT: Well, we'll notify you.

MR. COOPER: Please do.

THE COURT: And you can bring in whatever counsel is necessary, and we'll schedule meetings accordingly. I don't have anything scheduled as I know of yet after the first of -- do I? I think my calendar's pretty much cleared up.

MR. JOYCE: Your Honor, you set the meeting. We'll be there.

MR. COOPER: Yes, we'll be there.

THE COURT: And we'll call you and set it up on a mutual basis, all right?

MR. JOYCE: Thank you very much, Your Honor.

MR. COOPER: Thank you, Your Honor.

THE COURT: You're welcome.

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CERTIFICATION

I, KATHLEEN NAZAROK, the assigned transcriber, do hereby certify that the foregoing transcript of proceedings in the Camden County Superior Court on December 20, 1996, Tape No. 13852L, Index 1129-2365, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate record of the proceedings.

KATHLEEN NAZAROK, #134
DIANA DOMAN TRANSCRIBING

12/31/96
DATE

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SPEAR, WILDERMAN, BORISH,
ENDY, SPEAR AND RUNCKEL
BY: BENJAMIN EISNER, ESQUIRE
CHARLES T. JOYCE, ESQUIRE
36 Tanner Streets, Second Floor
Haddonfield, New Jersey, 08033
(609) 428-5255
Attorneys for Plaintiffs, Fraternal Order of Police, Penn-Jersey, Lodge 30 and Joseph Vena

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30, and JOSEPH VENA Plaintiffs, v. **THE DELAWARE RIVER PORT AUTHORITY** Defendant.	SUPERIOR COURT OF NEW JERSEY CAMDEN COUNTY LAW DIVISION DOCKET NO. L-7547-96 CIVIL ACTION **RETURN DATE: JULY 11, 1997; 9:00 A.M.**

CERTIFICATION OF CLYDE W. SUMMERS

1. I am Clyde W. Summers. I am Jefferson B. Fordham Professor Emeritus at the Law School of the University of Pennsylvania.

2. I have been teaching Labor Law for more than 50 years in the law schools at the University of Toledo, University of Buffalo, Yale University and the University of Pennsylvania. I have been teaching courses and seminars in public employee bargaining from time to time during the last twenty-five years.

3. I was an alternate member of the Connecticut Labor Relations Board for four years and on the panel of arbitrators for the Connecticut State Mediation board for six years.

4. I have been engaged in grievance arbitration for more than 45 years, and in public employee fact-finding and interest arbitration for approximately 30 years. I have served as arbitrator in police and fire interest arbitration disputes in Connecticut, Rhode Island, Massachusetts, and Pennsylvania.

5. I have been asked by Charles T. Joyce, attorney for the Plaintiff in the *Fraternal Order of Police, Penn-Jersey Lodge 30 v. The Delaware River Port Authority*, to provide my expert opinion, based on my experience as an arbitrator, and as an academic in the field of labor law, on the prevalence and desirability of interest arbitration as a method for the resolution of impasses in collective bargaining between police officers and their employers, and upon the extent to which the New Jersey and Pennsylvania laws relating to collective bargaining by police and settlement of disputes between union of police officers and public agencies are parallel or substantially similar. The purpose of this certification is to assist the Court in understanding the evidence before it, the issues raised and potential resolution of those issues.

6. I have been provided the following documents by Mr. Joyce, and I have studied them. The opinions set forth in this certification are based on those documents, my experience and knowledge concerning public employee bargaining generally, and about unionization and collective bargaining respecting police in particular:

a. 43 P.S. § 217.1 *et. seq.*, the Pennsylvania Act on Collective Bargaining by Policemen or Firemen, commonly known as Pennsylvania "Act 111".

b. New Jersey Public Employment Relations Commission, Mediation, Fact Finding and Arbitration Rules, as revised February 3, 1997.

c. *N.J.S.A.* § 34:13A-13B, 1 *et seq*, the New Jersey Employer-Employee Relations act, including the New Jersey Police and Fire Interest Arbitration Reform Act, as amended in 1996, *N.J.S.A.* § 34:13A-14a.

d. Opinion of Superior Court of New Jersey, Appellate Division, in *International Union of Operating Engineers, Local 68, AFL-CIO, et al. v. The Delaware River and Bay Authority* (decided August 2, 1995).

e. Opinion of Supreme Court of New Jersey in *International Union of Operating Engineers, Local 68, AFL-CIO, et al. v. The Delaware River and Bay Authority*, 147 N.J. 433 (1997).

f. Transcript of Hearing in *FOP Lodge 30, et al. v. Delaware River Port Authority*, in the Superior Court of New Jersey, Law Division, Camden County, December 20, 1996.

g. Brief on Behalf of Plaintiffs in *Fraternal Order of Police, Penn-Jersey Lodge 30 and Joseph Vena v. The Delaware River Port Authority*, and attached Exhibits, filed December 10, 1996, and the Brief on Behalf of the Defendant, and attached Exhibits, filed October 7, 1996.

h. The Amended Complaint and Amended Answer of the Parties in *Fraternal Order of Police, Penn-Jersey Lodge 30 and Joseph Vena v. The Delaware River Port Authority*, Docket No. L-7547-96.

7. In my opinion and in my experience, interest arbitration is an appropriate and indeed desirable process by which to resolve impasses that may occur in collective bargaining between police officers and public employers. Interest arbitration provides for a peaceful, orderly process by which the parties may seek impartial review and adjudication of their positions, without the threat to public order that may result from a strike, or the potential damage to officer morale that may occur when officers have no right to strike or other means of redress after impasse is reached.

8. Thus, it is hardly surprising that many jurisdictions, including Pennsylvania and New Jersey, provide interest arbitration, rather than permitting police officer strikes, as the method to resolve impasses. Jurisdictions that provide for interest arbitration to resolve such impasses include: Alaska, Connecticut, Hawaii, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Washington, Wisconsin, Wyoming, the Virgin Islands, and the District of Columbia.

9. Turning to the question of whether New Jersey and Pennsylvania feature complementary policies regarding interest arbitration for police collective bargaining impasses, the fundamental elements to be examined in the measuring the similarity of the laws of two states concerning collective bargaining by police are, in my opinion, the following:

a. The right of police officers to form and join unions.

b. Exclusive representation for purposes of collective bargaining by the majority union.

c. The duty of the union and employer to bargain in good faith concerning terms and conditions of employment.

d. The scope of subjects on which the parties are required to bargain.

e. The method of resolving impasses reached in bargaining; the choice between giving the employer final authority, allowing the union to strike, or requiring the parties to submit the dispute to arbitration.

f. The availability of review of the arbitration award.

These are the basic issues faced by the legislature in drafting a statute or by the court in cases which come before it. If the law in two states are parallel on these issues, the operation and impact of the law will be substantially the same.

10. As this Court has already found, New Jersey and Pennsylvania have enacted substantially similar laws respecting the bargaining rights of police officers generally.

11. In New Jersey, under the Employer-Employee Relations Act, police are included in the definition of "employee" (*N.J.S.A.* § (34:13A-3(d)) and public employees are expressly guaranteed the "right, freely and without fear of penalty or reprisal to form; join and assist any employee organization" with the only limitation on police being that they cannot join any

employee organization which admits employees other than police. *N.J.S.A.* (34:13A-5.3).

In Pennsylvania, under Act 111 labor organizations representing policemen and firemen are given the right to bargain collectively. This, by implication, guarantees them the same right to form and join unions enjoyed by other public employees.

12. In both states, the organization selected by the majority of employees is the exclusive representative of all employees in the bargaining union. *N.J.S.A.* 34:13A-5.3, 43 P.S. § 217.1.

13. In both states, the statute expressly imposes a duty to bargain or negotiate in good faith and to enter into written agreements. *N.J.S.A.* 34:13A-5.3, 43 P.S. § 217.1.

14. In both states, the scope of bargaining is stated in broad terms. In New Jersey the scope is described as "with respect to grievances, disciplinary disputes and other terms and conditions of employment. *N.J.S.A.* 34:13A-5.3. In Pennsylvania, the statutory words are "terms and conditions of employment, including compensation, hours, working conditions, retirement, pension and other benefits." the legal effect of the two provisions is substantially the same.

15. Thus, it is logically consistent that both states also have chosen what are in my opinion parallel and substantially similar policies of prohibiting police strikes and requiring the parties to submit to binding arbitration by a neutral arbitrator. The New Jersey statute provides

that whenever the parties reach an impasse, the Public Employment Relations Commission ("PERC") may, upon request of either party or on its own motion, assign a mediator. If this fails, the Commission may, upon the request of either party, invoke fact finding with non-binding recommendations. If the impasse continues beyond a time prescribed by the Commission, the parties are bound to mutually agree on a terminal procedure to provide finality. The parties may choose conventional arbitration or one of various forms of last offer arbitration. If the parties fail to agree on a form of terminal arbitration, then the dispute shall be submitted to conventional arbitration. Arbitrators are drawn from a panel of arbitrators named by the Commission. If the parties cannot agree on a selection from the panel, the Commission selects one by lot. *See N.J.S.A.* 34:13A-16.

16. Although the Pennsylvania Statute has no express provisions for mediation or fact finding, mediation by the state agency is in fact available. The statute does not expressly provide for the parties choosing some form of last offer arbitration, but there is nothing in the statute limiting the parties in how they can resolve their dispute and they can, by mutual agreement, use last offer arbitration. The ultimate resort in Pennsylvania, as in New Jersey, is by conventional arbitration.

17. The actual of process of interest arbitration in the two states is likewise parallel. In Pennsylvania, the board of arbitration is composed of three persons, one chosen by the employer, one by the union, and the third chosen by those two. If they cannot agree on a third, then the neutral arbitrator is chosen by striking from list provided by the American Arbitration

Association. 43 P.S. § 217-4. In New Jersey, the statute and the enabling regulations provide that the parties may opt for a triparte panel of arbitrators, and if they cannot agree on the identity of the neutral, he or she is selected by PERC. In practice, the arbitrators chosen by the parties are not in fact neutral, but are chosen by the parties to speak for their interests. They become the ultimate advocates and the neutral arbitrator must make the ultimate decision.

18. The two states provide for certain time limits within which the various steps of beginning negotiations and arbitration must take place. The time limits are not exactly the same, but both are keyed to the parties reaching a final settlement in time for adoption of the budget by the involved public agency. These differences are details of no substantial consequence, and in any case the true limits are commonly waived by the parties. What is of importance is that the crucial element of the settlement process in both states is the same: the ultimate resort is to conventional arbitration by a neutral arbitrator.

19. The New Jersey statute requires the arbitrator to give "due weight" to eight listed factors. *N.J.S.A.* 34-13A-16(g). The Pennsylvania statute has no such provision. This difference is insignificant. The factors listed in the New Jersey statute are those which any competent arbitrator will weigh without any statutory direction. One of the purposes of an arbitration statute listing the factors to be weighed is to provide an express standard which will shield the arbitration from being invalidated as an unconstitutional delegation of power without any legislative standard. See *State v. Traffic Telephone Workers Federation of New Jersey* 2 N.J. 335, 352-6, 66A.2d 616, 626 (1949).

20. New Jersey provides that the arbitrator's orders are subject to review by the Commission on the grounds that the arbitrator failed to apply the criteria referred to above, but the statute provides no standard of review. The Pennsylvania statue provides no provision for judicial review, but judicial review is clearly available as to the jurisdiction of the arbitrator, the regularity of proceedings, excess of the arbitrator's powers, and deprivation of constitutional rights. *Fraternal Order of Police, Haas Memorial Lodge No. 7 v. City of Erie*, 668 A.2d 241 (1995).

21. Thus, my opinion is that the New Jersey statute on collective bargaining by police and arbitration of disputes is substantially the same as the Pennsylvania statue on that subject. Both articulate the same basic policy and proceed from the basic premise of providing collective bargaining for police with ultimate resort for resolving impasses to binding arbitration by neutral arbitrators. Both empower the majority organization as exclusive representative for the bargaining unit and define the bargainable subjects in equivalent board terms. The procedures for resolving impasses are substantially parallel, with both culminating in conventional arbitration. The standards applied by the arbitrator in deciding disputed issues are operationally the same, and the arbitrator's award is subject to limited review. In terms of the responsibilities of the parties, the actual process of reaching agreement or settlement, and the substantive terms of the settlement, both will have the same practical impact of resolving the impasse peacefully, finally and fairly. In substantive terms, it will be a matter of indifference which procedure is followed, or if the inconsequential procedural differences are prescribed by the court, if that becomes necessary.

I certify that the statements made by me are true. I am aware that if any of the statements made by me are willfully false, I am subject to punishment.

CLYDE W. SUMMERS

Deborah A. Jozwiak

Notarial Seal
Deborah A. Jozwiak, Notary Public
Philadelphia, Philadelphia County
My Commission Expires May 9, 1994
Member, Pennsylvania Association of Notaries

A-3344-97T1

FILED
APPELLATE DIVISION
MAY 19 1998
Clerk

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30, and JOSEPH VENA, Respondents/Plaintiffs, v. DELAWARE RIVER PORT AUTHORITY, Appellant/Defendant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003344-97T1 CIVIL ACTION **ON APPEAL FROM A FINAL JUDGMENT ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, CAMDEN COUNTY GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** SAT BELOW: HONORABLE M. ALLAN VOGELSON, P.J.S.C.

APPELLANT/DEFENDANT DELAWARE RIVER PORT AUTHORITY'S APPENDIX - VOLUME 2 OF 3

BLANK ROME COMISKY & McCAULEY LLP
A Pennsylvania LLP
PETER A. GOLD, ESQUIRE
Resident Partner
SAMUEL M. FIRST, ESQUIRE
Woodland Falls Corporate Park
210 Lake Drive East, Suite 200
Cherry Hill, New Jersey 08002
(609) 779-3600

Attorneys for Defendant/Appellant
Delaware River Port Authority

Dated: May 18, 1998

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ORIGINAL TRANSCRIPT

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION - CAMDEN COUNTY

DOCKET NO. L-7547-96

- - -

FRATERNAL ORDER OF POLICE: PENN-JERSEY LODGE 30, and: JOSEPH VENA, : Deposition of
VS. : CLYDE SUMMERS
DELAWARE RIVER PORT AUTHORITY :

- - -

Transcript of deposition taken by and before Debra Sapio Lyons, a Certified Shorthand Reporter and Notary Public of the State of New Jersey, at the offices of SPEAR, WILDERMAN, BORISH, ENDY, SPEAR & RUNCKEL, Suite 1400, 230 South Broad Street, Philadelphia, Pennsylvania 19102 on Tuesday, November 18, 1997 commencing at 1:45 p.m.

- - -

KRAUSS, KATZ & ACKERMAN, INC.
Legal Support Services
1880 John F. Kennedy Boulevard
15th Floor
Philadelphia, Pennsylvania 19103
(215) 988-9191

A P P E A R A N C E S :

SPEAR, WILDERMAN, BORISH, ENDY,
SPEAR & RUNCKEL
BY: BENJAMIN M. EISNER, ESQUIRE
and
CHARLES T. JOYCE, ESQUIRE
Second Floor
36 Tanner Streets
Haddonfield, New Jersey 08033
Counsel for the Plaintiffs

BLANK, ROME, COMISKY & McCAULEY
BY: PETER A. GOLD, ESQUIRE
and
SAMUEL M. FIRST, ESQUIRE
210 Lake Drive East
Cherry Hill, New Jersey 08002
Counsel for the Defendants

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* * *

CLYDE SUMMERS, after having been duly sworn, was examined and testified as follows:

* * *

E X A M I N A T I O N

* * *

BY MR. GOLD:

Q. Dr. Summers, my name is Peter Gold and sitting to my right is Sam First. Good afternoon. You're here today to give a deposition in the matter of Fraternal Order Of Police Penn-Jersey Lodge 30 and Joseph Vena, V-E-N-A, versus the Delaware River Port Authority, Docket Number L-7547-96.

You're giving this deposition today at our invitation and our request and we have been working through Mr. Eisner and Mr. Joyce to arrange for this deposition and I understand that they are not your counsel; is that correct?

A. That's right.

MR. EISNER: Peter, if I

could interrupt at this point. I just wanted to put on the record, as we discussed earlier, that, first of all, the DRPA has graciously agreed pursuant to Rule 4:10-2(d)(2) to $100.00 an hour appearance fee for Professor Summers for today, and also as we discussed earlier, that in presenting Professor Summers, that we are not consenting to any inclusion of anything that arises from this deposition in any Appellate record that might be created in this case, nor any waiver of any work product protections that might attach to any material related to this deposition.

Go ahead.

BY MR. GOLD:

Q. Professor Summers, just for purposes of identifying you before we get into some preliminary matters, would you

spell your name, please, for the purposes of the record?

A. Clyde, C-L-Y-D-E, Summers, S-U-M-M-E-R-S.

Q. And what is your date of birth?

A. November 21, 1918.

Q. And your marital status?

A. Married.

Q. Okay. And do you have any children?

A. Four.

Q. And what are their ages?

A. I think 40, 46, 44, 43 and 41.

Q. Okay. I understand that you're giving this deposition today under oath and the oath has been administered?

A. Yes.

Q. It is important that you understand before you answer my questions exactly what my question is and you understand my question.

A. Yeah.

Q. If you do not understand my question, would you please tell me you do

not understand my question?
A. Yes.
Q. When you answer, would you please answer in a way that the court reporter can hear you; and I'm sure --
A. Yeah.
Q. -- she won't in any way be shy about speaking up if she doesn't.
If you answer the question, I will assume that you have understood my question. And, obviously, only one of us can speak at a time. I would appreciate it, please, if you listen to my question and then respond.
If you need a break at any time in this deposition, please let me know and tell me that.
Are you taking any medication today?
A. No. Well, I had an aspirin this morning.
Q. Professor Summers, what did you do to prepare for this deposition today?
A. I went over the, I went over the

documents that had been provided to me and my statement.

Q. And who provided you those documents?

A. Mr. Joyce provided them.

Q. Okay. And do you have those documents with you now?

A. I have some of them but not all of them.

Q. Which specific documents did you review?

A. Well, they're listed in, they're listed in my statement.

Q. So the only documents which you reviewed are those listed in your certification in preparation for today's deposition?

A. Other than research and -- concerning cases and in the library, those are the only documents.

Q. Okay. And you reviewed in preparation for today's deposition all the documents and papers specified in your certification?

A. I went through them very, very -- some of them I read very carefully, some of them I didn't, I only scanned. I read them -- before I made the statement I read them, but I did not, not go through them carefully this time.

Q. Okay. And did you review any correspondence or letters from anyone in preparation for today's deposition?

A. I had copies of them but I didn't bother to read them. I knew what was in them.

Q. What are "they"?

You said you have copies of them. Were there any correspondence, letters or written communications to you that you received in preparation for today's deposition?

A. No, not in preparation other than it was being scheduled at a certain time. I had a letter in the summer that said that you wanted to take my deposition, when did I have time available, and then I had a letter that it was a tentative schedule and

a letter.

Q. Let's get some of these things into the record as exhibits so that we can be very specific about them.

A. Yes.

MR. GOLD: Okay. I'm going to show you something that I'm going to be asked to be marked as Defendant-1.

I'll give you one copy now, Professor.

(Exhibit D-1 is marked for identification.)

BY MR. GOLD:

Q. Professor, for your knowledge and also for purposes of the record I just want to establish that what I've asked to be marked as Exhibit D-1 is a letter to you from the law firm of Spear, Wilderman, Borish, Endy, Spear & Runckel signed by Mr. Joyce and it is dated August 29th and it's Re: Fraternal Order Of Police Penn-Jersey Lodge 30 and Joseph Vena versus The Delaware River Port Authority, Docket

Number L-7547-96.

Do you recognize this letter?

A. Yes, yes.

Q. Did you ever receive this letter?

A. Oh, yes.

MR. GOLD: Okay. For the record, we just received this a few minutes prior to the deposition commencing today.

BY MR. GOLD:

Q. Is this one of the letters you reviewed?

A. Yes.

Q. Okay.

A. This is the one I referred to as saying that they wanted to set up a time for a deposition.

MR. GOLD: Okay. I ask that a letter dated November 6th to Professor Summers also from the same author, Mr. Joyce, be marked as D-2.

(Exhibit D-2 is marked for

identification.)

BY MR. GOLD:

Q. Professor Summers, the court reporter just handed you the letter that I was describing. Do you recognize it?

A. Yes, I recognize it.

Q. Is there a part of this letter --

MR. EISNER: Want to give him a moment just to review it?

MR. GOLD: Okay.

MR. EISNER: He's reading as you're asking so...

MR. GOLD: Okay. Thank you.

(Pause.)

THE WITNESS: Yes, I remember this letter.

BY MR. GOLD:

Q. Professor Summers, I assume from the face of the letter that this letter has been redacted?

A. Yes.

Q. Do you know whether this letter has been redacted from its original form?

A. I assume so. There's a blank in

there. I have no recollection what might be in there.

MR. GOLD: Okay. We'll mark this as Defendant-3, please. This is a letter of November 13th, 1997 to you again, Professor, signed by Mr. Joyce.

(Exhibit D-3 is marked for identification.)

BY MR. GOLD:

Q. Do you recall ever receiving this letter, Professor?

A. Yes, I received this letter.

Q. I assume from looking at it, since there's a space between where it says, "Dear Mr. Summers" and "Also," that something has been redacted from the letter?

A. I assume so. I have no recollection. These letters were in my file but I -- they were irrelevant to the deposition.

MR. GOLD: I'm now giving to the court reporter to be marked, I believe we're up to D-4, Exhibit

D-4 and ask her to mark it and share it with you.

(Exhibit D-4 is marked for identification.)

BY MR. GOLD:

Q. Want to take a second and look at this document --

A. Yes.

Q. -- which I will just say for the record that it appears to be on your stationery to Mr. Joyce and it's dated August 17th, 1997.

Do you recognize this document?

A. Yes.

Q. Is this your letter?

A. Yes.

Q. Okay. We'll return to that.

By the way, Professor, when is it that you set your fee arrangement with Mr. Joyce, that is you actually came to an arrangement with him that you would be charging him $200.00 an hour? What date was that?

A. On August 17, I suggested this, I suggested. I don't -- I have no recollection that when we first talked I set any fee, and then when I thought -- I had sent this bill, I realized I didn't have a number so I said -- as I said here, I didn't have any correspondence with me, I think it was $200.00, but I'm not sure. That's --

Q. But it is correct when you first began this project you had not set a number with Mr. Joyce?

A. As far as I remember I did not.

Q. And that was not an important element to this engagement?

A. No, I figured I would get paid a reasonable amount.

Q. Do you remember the date that you actually did come to an agreement with Mr. Joyce as to the amount that you would be paid?

A. Well, in one of these, one of these letters, Exhibit D-2, he says $200.00 is reasonable. I take it that constituted an

agreement.

Q. It does, if you agreed.

A. Well, that's what I set, so he said yes, so...

Q. And that was November 6th --

A. I guess.

Q. -- 1997?

A. I guess that's right.

Q. I think we'll return to these exhibits in a little bit so forgive me for asking you to put them aside and let's move on for a moment or two.

What time did you arrive in this building today?

A. Oh, about quarter to one. No, no. It was more -- it was more like one o'clock.

Q. And when you arrived in the building, did you have any discussions with anyone?

A. Yes.

Q. With whom?

A. These two men.

Q. With "these two men," you're referring to Mr. Joyce and Mr. Eisner?

A. That's right.

Q. And what were your discussions?

MR. EISNER: I'll object to the form, instruct the witness not to answer to the extent that calls on impressions, mental impressions of counsel concerning this case.

MR. GOLD: Well, just so the record is perfectly clear on this, that you do not represent the witness who's testifying today, that you cannot instruct him not to answer any question, he may choose in his own discretion not to do that, and let's see how he wants to respond to it.

BY MR. GOLD:

Q. My question precisely was, Professor, what was discussed and if you want me to be more specific about that, I will definitely do that. I'm just trying to save time in this and not get into the precise words.

A. Well, the first question I asked was what was the sense of this deposition because from what I knew of the case it seemed like it was a totally worthless operation. That was the first question.

Q. Okay.

A. And so then he tried to indicate what might be the usefulness of it. And then he asked me what documents I had and I showed him what documents I had brought and then he, then he made some statements about what kinds of things might be going in the deposition and that was about the extent of it.

Q. When you say "he," who is he?

A. Most of it was with Mr. Eisner.

Q. Okay. And so did Mr. Eisner tell you the types of questions that might be asked today?

A. In a general way.

Q. And you reviewed your file with him?

A. I showed him what I brought with me.

Q. Can I see that, please?

A. Sure.

MR. EISNER: I think it's all -- you can take it off the record.

(Discussion is held off the record.)

BY MR. GOLD:

Q. Professor, in this off-the-record moment you have provided to me and to Mr. First partial contents of your working file in this case. As I understand it, you are an expert witness in this case and have been accepted as a witness capable of testifying and will testify at trial if necessary; is that correct?

A. Let me cut it short.

Q. Is that correct, Professor?

A. You can have the thing. I don't see anything in there. I don't know why anything was redacted if there was.

Q. Would you mind answering my question please?

A. Oh, sure, sure.

Q. The question simply is that you have been accepted by the court --
A. Yes.
Q. -- as I understand the Court's --
A. Yeah.
Q. -- judgment --
A. Yeah.
Q. -- as a trial expert --
A. That's right.
Q. -- and expert witness in this case --
A. Yeah.
Q. -- is that correct?
A. That's right.
Q. Okay. There are some other papers that you had with these, Professor?
A. Yeah.
Q. May I look at those as well?
A. You want to see this?
Q. Any other papers in your file, Professor.
A. This is the draft of the opinion which I sent to Mr. Joyce last spring, last

summer.

Q. Okay.

A. That was the draft from which the final statement was prepared.

Q. Right. We're going to get into that a little bit.

A. I want this letter about the National Academy back.

Q. May I hand it to you now?

A. Yes.

Q. And I'll accept it as not part of your working file.

A. Okay.

Q. Unless you for some reason believe it is part of your working file.

A. No, I don't think it is. You wanted to know all the papers I had.

Q. Okay. Thank you. Thank you for your courtesy.

MR. GOLD: Let the record reflect in this case that Professor Summers has provided us with documents which we'll go through and then probably -- let's

do it now so we don't forget. There's a letter from Mr. Joyce dated November 13th which I'm going to be asked to be marked as Defendant-5 by the court reporter.

(Exhibit D-5 is marked for identification.)

MR. GOLD: There's also a -- let me stick with D-5 for a second.

BY MR. GOLD:

Q. There's only one copy here, sir. So I'm going to approach you --

A. Okay.

Q. -- and we'll look at it together if you don't mind.

A. Sure, sure.

Q. Professor, let me just ask you: Have you ever seen that?

A. Yes.

Q. It looks to me to be the same as Exhibit Defendant-3 except that one is not a redacted version; is that correct?

A. I think that's correct.

Q. Thank you, sir.

MR. GOLD: Okay. And next exhibit that I'm going to asked to be marked I believe as 6 is a double-spaced document on white bond paper entitled Expert Opinion. It is eight pages in duration and it contains 14 numbered paragraphs and I'd ask the court reporter to mark that, please.

(Exhibit D-6 is marked for identification.)

BY MR. GOLD:

Q. Professor Summers, I'm now handing you Defendant's 6?

A. Yeah.

Q. Would you please identify this for purposes of the record and for Mr. First and myself?

A. Well, this was the draft of the expert opinion I prepared for Mr. Joyce and I sent it to, I sent it to Spear, Wilderman and from that, they typed up the statement and

then they gave that statement to me. I read it and I signed it. So this is the, this is the document that I prepared.

Q. Now, Professor, I'm going to come back to that in a second, but when you say "statement," I have a document in my hand --

A. Yeah.

Q. -- which I'm going to be asked to be marked as Defendant-7 --

A. Yeah.

Q. -- unless you want it to be joint in this which is something called Certification of Clyde W. Summers.

Is that the statement --

A. Yes, that's the statement.

Q. -- which you're -- sir, please, let me finish my question and then you can respond. We're going to hear your responses I'm sure, but let me do it this way.

MR. GOLD: Can we mark this as 7, please.

(Exhibit D-7 is marked for

identification.)

BY MR. GOLD:

Q. Let me hand you D-7, Professor.

A. Yeah.

Q. Would you describe what that is?

A. That's the, that's the certification which I signed.

Q. How many pages is that, Professor?

A. Ten and two lines.

Q. And how many paragraphs are set out in that certification?

A. 21.

Q. Thank you. We'll return to that obviously in a little while.

A. Okay.

MR. GOLD: Off the record for a second.

(Discussion is held off the record.)

MR. GOLD: Are you ready, Ben?

MR. EISNER: Yes, go ahead.
BY MR. GOLD:
Q. Okay. For the sake of saving trees and paper, I'm going to hand back to you --
A. Okay.
Q. -- the aspects and parts of your file that seem to me to be merely copies of cases or statutes or regulations.
A. Okay.
Q. And they are, again, those which were referred to in your certification?
A. That's right.
Q. Okay. Professor, by whom are you employed?
A. The University of Pennsylvania.
Q. And for how long have you been employed by the University of Pennsylvania?
A. 22 years.
Q. And in what capacity are you employed?
A. Professor of Law.
Q. And do you have income apart

from the income provided to you I guess through salary by the University of Pennsylvania?

A. Arbitration, some expert witness fees, incidental matters.

Q. I'm looking at a resume that Mr. Eisner provided to me before the deposition began --

A. Yeah.

Q. -- a few minutes before the deposition began.

Would you look at this which I'm going to asked be marked as D-8 so that you can identify it and you can tell me whether it's accurate.

(Exhibit D-8 is marked for identification.)

BY MR. GOLD:

Q. May I look at your copy while you're looking at D-8?

MR. EISNER: Here.

MR. GOLD: Thanks.

BY MR. GOLD:

Q. Professor, just would you look

at this and tell me whether this is your curriculum vitae.

MR. EISNER: Just off the record.

(Discussion is held off the record.)

THE WITNESS: Okay. Yes.

BY MR. GOLD:

Q. This is?

A. Yes.

Q. Okay. We'll take D-8 back then. And could we have the other exhibits too, please?

A. Sure.

Q. Thanks. So we'll keep track of them and return to them.

Professor, just one or two things about this that I have some specific questions about.

Under Honors and Awards it says, "Employee Advocate of the Year, National Employment Lawyers Association."

What is that?

A. That's a national association of

lawyers who engaged -- who practice employment law.

Q. What is Employee Advocate of the Year?

A. That's an award they give to somebody every year.

Q. And what does the award mean?

A. I got a little plaque.

Q. And Employee Advocate of the Year, does that mean you are an advocate for employees or they viewed you that way and give you an award for that?

A. Because I've written considerable about the rights of individual employees and rights of not to be discharged, rights of individual employees, that's the basis, not because I -- I don't practice law but I advocate on behalf of individual employees in law reviews and so on.

Q. Okay. I'm just trying to find out --

A. Yeah.

Q. -- what this is.

A. Yeah.

Q. Now, on the second page, Page 2, at the very bottom it says, "National Academy of Arbitrators, 1964."

Does that mean you have been a member since 1964?

A. No, I wasn't -- I was a member from 1964 till about 1977 and then I dropped my membership and I was reinstated in the membership this summer so I am now a member.

Q. Okay. And this summer, when in the summer, early summer, mid-summer, late summer?

A. I guess mid-summer.

Q. Okay. And what is the National Academy of Arbitrators?

A. The National Academy of Arbitrators, it's an organization of people who engaged regularly in arbitrations, national organization I think it was. Came into existence in about 1947 or '48. I think it has maybe a thousand members and it is an organization to which most leading arbitrators belong.

Q. Does it have a Code of Ethics, Professor?
A. Yes.
Q. And are you familiar with the Code of Ethics?
A. Reasonably so.
Q. Did you read that Code of Ethics before agreeing to consult Mr. Joyce and Mr. Eisner in this case?
A. No.
Q. Now, turning specifically to these questions regarding your status as an arbitrator, how long have you arbitrated cases?
A. Oh, I've been arbitrating since about 1950.
Q. And that would include grievance arbitrations?
A. Yes.
Q. Would it also include interest arbitration?
A. Yes.
Q. And when was the first interest arbitration case you had as arbitrator?

A. I don't know. Sometime in the late 1960s.

Q. Okay. And in that case were you a neutral?

A. Yes.

Q. How many police interest arbitration cases have you had in the Commonwealth of Pennsylvania?

A. Four or five.

Q. When I refer to police I mean police, state troopers.

A. I'd say four or five. I think five.

Q. Can you tell me what they were, please, sir --

A. Well --

Q. -- and when they were?

Let me do it this way for you.

A. I can't do that. I don't remember.

Q. When was the last time, and what was it?

A. Oh, it's been seven or eight years ago and my recollection is some small town to the west of here, but I don't remember the

name of it. I remember particularly Lehighton and I think Lancaster and -- but I can't remember specifically the others.

Q. But your recollection, that was how many years ago? I'm sorry.

A. Oh, it's been seven or eight years ago. I haven't done any in the last few years.

Q. And in that arbitration, the one you're referring to which was seven or eight years ago, what capacity did you serve?

A. I was neutral.

Q. Have you ever served in a capacity other than a neutral --

A. No.

Q. -- in an interest arbitration?

A. No.

Q. Have you ever done firefighter arbitrations, Professor, in the Commonwealth of Pennsylvania?

A. No.

Q. Okay. Turning now to the State of New Jersey, have you ever been an

interest arbitrator in the State of New Jersey with police --

A. No.

Q. -- interest arbitration?

A. No.

Q. Firefighter?

A. No.

Q. Would you tell me a little bit, please, about the process you used to render this certification, assuming you did, in Exhibit D-7, which has been submitted to the court as your certification, the process you used to render this certification?

MR. EISNER: Object to the form.

THE WITNESS: What?

MR. EISNER: I just object to the form of the question because it's a big question, but if you feel comfortable answering, go ahead.

THE WITNESS: Well, I -- as I remember, Mr. Joyce talked to me

on the telephone and he described generally what the problem was, and that was the question of the extent to which the New Jersey and Pennsylvania law were parallel, similar, dissimilar, and he asked me to prepare an opinion on that, and he sent me some documents concerning the case which are listed in the -- in my statement; and from there I, I studied the documents that I looked up on my own. I looked up the statutes in Pennsylvania and in New Jersey. I read, actually, looked at some of the cases in both states, and so I read all the information I had including the things in the statement and the library work and then I sat down and wrote up -- wrote up the draft of my opinion.

BY MR. GOLD:

Q. Okay.

A. Which is there.

Q. Did you --
A. I had no conversations with Mr. Joyce from the time he, from the time he told me what the issue was until I sent him the opinion. I said, "This is the opinion I have."
Q. Okay. And from your initial telephone conversation with Mr. Joyce, did he mention to you his view on whether, as you put it, the laws were parallel or substantially similar?
A. I don't remember that he did. He just put it in terms of what the issue was as being posed in the case.
Q. And I'm looking at Exhibit D-4 which is your letter to Mr. Joyce dated August 17 which appears to me to be an invoice --
A. Yeah.
Q. -- for billing purposes.
As I understand this, your total time on this matter was two hours reading the pleadings and other documents, one and a half hours researching New Jersey

and Pennsylvania law and two and a half hours for preparation of the report. I'm sorry. A half-hour on research of New Jersey and Pennsylvania law.

A. Yeah.

Q. For a total of five and a half hours?

A. Yes.

Q. Am I?

A. That's right.

Q. Am I reading it correctly? And this document is accurate?

A. As far as I know. That's what I put down at the time.

Q. Well, it's your document, Professor.

A. Well --

Q. Thank you. May I have that?

A. -- that's what I billed him for.

Q. Okay. Now, was there any other, in this project, in the project which you undertook, was there any other information that you needed other than that which was provided to you by Mr. Joyce and

which you've identified for purposes of this deposition and previously --

A. No.

Q. -- identified?

A. No. All the documents, information I got from Mr. Joyce are indicated in the statement.

Q. Did you talk to anybody, any of the plaintiffs, Mr. Vena, the other plaintiff in case?

A. No.

Q. Did you talk to any member of Fraternal Order Of Police?

A. No.

(Mr. Spear entered the room.)

MR. EISNER: Can we go off the record for a second.

(Discussion is held off the record.)

MR. GOLD: Back on the record.

BY MR. GOLD:

Q. Did you make any requests of Mr. Joyce or of Mr. Eisner in preparing

this report?
A. Not that I remember. I have no -- as far as I remember I never had any conversation, communication or anything with Mr. Joyce from the time, from the time he submitted the question to me until I sent him the opinion.
Q. Was this --
A. And I never had any contact with Mr. Eisner until today.
Q. Was this the first occasion you had to address an issue with respect to bi-state entities?
A. Yes.
Q. Okay. And, therefore, I assume, this is the first occasion that you've had to address an issue with respect to police officers of bi-state entities?
A. Yes.
Q. Did you request of, just for the record now, Professor, in preparing this expert certification, did you request of Mr. Joyce or Mr. Eisner or anyone else an opportunity to interview anyone at the

Delaware River Port Authority?
A. No.
Q. Did you request an opportunity to interview any member of Penn-Jersey Lodge 30?
A. No.
Q. You had, therefore, no knowledge of the actual date-to-day operations of police officers on the Delaware Bridge?
A. Of this bridge --
MR. EISNER: Objection to the form. Go ahead. I'm sorry.
THE WITNESS: I knew nothing about the specifics of their operation.
BY MR. GOLD:
Q. So in preparing this report, this report is based exclusively on what you have read, correct, the cases which you have recited --
A. No.
Q. -- in this report?
A. No.
Q. You have researched; am I

correct in that?
A. No.
Q. Okay. What else is the basis?
A. All of that is against the background of my knowing how these processes work and the experience of both police arbitration and the general process of arbitration otherwise. That experience provides the basis for an understanding of what the laws mean, how they function and all of that, so that I did not purport to be an authority on the Delaware River Authority. I was, I was asked to make a comparison of the law in the two states, not only in terms of what they were legally, but in terms of what their practical operation would be from their legal character.
Q. But I am correct in understanding your testimony that you had no firsthand personal experience with any bi-state entity; is that correct?
A. That's right.
Q. And you had no experience with any interest arbitration whether in 1996,

1997 or any other time in the State of New Jersey?

A. That's right.

Q. Now, Professor, are you aware that New Jersey's Public Sector Interest Arbitration Law was modified in 1996?

A. When?

Q. 1996.

A. Yes.

Q. Are you familiar with the law prior to its modification?

A. Yes.

Q. And are you familiar with the law after its modification?

A. Yes, to some degree.

Q. What would --

A. I'm not sure I know all the details of the changes, but...

Q. Do you recall any of the changes sitting here?

A. Well, there was one, one change that was -- that seemed to me to be important in this situation and that is before 1996 New Jersey provided the arbitration of being a

last offer arbitration and when the statute was amended, the ultimate result is to conventional single arbitrator arbitration, not last offer as a conventional arbitration and there was that change at that time.

Q. And is that the only change you recall?

A. It's the only one I recall.

Q. But you are aware that there were other changes?

A. I don't know whether there were or not.

Q. Okay. 3 of your certification indicates that you were an alternative member of the Connecticut Labor Relations Board for four years. What four years was that?

MR. EISNER: Mr. Gold, he doesn't have a copy in front of him. If we can just get a copy in front of him, move things along a little better. Thank you.

MR. EISNER: You said

Paragraph 3?

MR. GOLD: Correct.

THE WITNESS: I think it was something like 1970 to 1974.

BY MR. GOLD:

Q. And why were you no longer a member for the period after 1974?

A. Well, I became an alternate member because the Chairman of the Board wanted to take a sabbatical and then he was gone, so they needed an alternate member and then when he was back permanently there was no longer a need, plus they got a new governor and so I was out.

Q. So you were not reappointed?

A. I was not reappointed. I don't know that anybody was appointed as alternate at that point.

Q. But you were not reappointed?

A. I was not reappointed.

Q. Now, as I read Paragraph 4 of your certification it indicates that you served as an arbitrator in police and fire interest arbitration disputes in

Connecticut, Rhode Island, Massachusetts, and Pennsylvania.

A. Yeah.

Q. Am I correct on that?

A. Yes.

Q. Okay. Well --

A. I -- let me say at the moment I don't remember that any were specifically firemen, though in these states the police and fire statute is exactly the same so the process is exactly the same.

Q. So your certification is not accurate?

A. In that I served under police and fire arbitration statutes in these states.

Q. Well, as I read it, it said, "I served as arbitrator in police and fire interest arbitration disputes."

A. Okay. To that extent it's inaccurate.

Q. Right. Thank you.

Let's take each of those states and go through them. In Connecticut, did you serve as interest arbitrator in Connecticut in police

disputes?
A. Yes.
Q. How many of those?
A. I think two or three.
Q. And in what capacity?
A. Neutral.
Q. In any of those states did your matters include any bi-state entity --
A. No.
Q. -- or what we would...
Have you worked with this law firm, Professor, previously, or anyone in this law firm?
A. I was -- my recollection is I was an expert witness for them in a case five or six years ago which involved an internal union problem.
Q. And who did you work with at Spear, Wilderman?
A. I think with Mr. Spear.
Q. With Sam Spear who's now sitting at the table?
A. Yes. Isn't that right?
MR. SPEAR: Right.

MR. GOLD: You're next.

MR. SPEAR: I have the file in the back.

BY MR. GOLD:

Q. Professor Summers, do you believe sitting here today that you are an expert in determining the interest arbitration laws of Pennsylvania and New Jersey, whether they are parallel or substantially similar?

A. Yes.

Q. What does parallel or substantially similar mean?

A. It means parallel or substantial --

Q. Well, let's get into that.

A. It means substantially similar, that's all.

Q. Well, let's get into it just a little bit.

Parallel or substantially similar is used in your certification which you've submitted and in coming to that conclusion I wonder what you meant, what you take by it and what you meant by it.

A. I don't understand the question.

Q. Well, you've stated that you found the laws to be parallel or substantially similar and I'm wondering what you meant by that.

What does parallel or substantially similar mean to you as you've used it in your certification?

A. When you take the statutes and examine their provisions, they look, most of them, very much alike and they in practical terms will work out substantially the same. That's what I meant.

Q. In practical terms?

A. In practical terms and in legal terms.

Q. So in your judgment they're substantially similar both in practical terms and legal terms?

A. Yes.

Q. Okay. And they're parallel both in practical terms and in legal terms?

A. Substantially so.

Q. Did you read any cases, Professor, that gave you a definition of

what parallel or substantially similar means?

A. No.

Q. Now, prior to, I guess it was your initial phone conference with Mr. Joyce and the papers that he had sent you, were you familiar with the terms of parallel and substantially similar for purposes of analyzing the laws in two states?

A. No. I assumed they had normal natural meaning. They had no special legal meaning.

Q. That is what you assumed?

A. Apart from the normal meaning.

Q. That is what you assumed --

A. That's right.

Q. -- in rendering your opinion?

A. That's right.

Q. You said that is right.

Now, one of the or some of the documents which Mr. Joyce was kind enough to provide to you was the briefs which were submitted to the court on this matter --

A. Yes.

Q. -- is that correct?

A. Yes.

Q. And those briefs contained, I would say, scores of cases referenced --

A. I don't remember.

Q. -- in those briefs?

A. I don't remember.

Q. You don't remember if the briefs contained citations to cases?

A. I don't remember specifically. I assume they did. I just assume they did, but I don't remember.

Q. Well, would it be helpful then Professor, if we got out those briefs and we went through them?

A. Do you have them?

Q. Yeah.

(Pause.)

(Discussion is held off the record.)

MR. GOLD: Okay. Back on the record.

BY MR. GOLD:

Q. Professor Summers, did you investigate firsthand the duties of Fraternal Order Of Police Lodge 30 members who work at the Delaware River Port Authority?

A. No.

Q. Your answer was no?

A. That's right.

Q. Do you know, Professor, whether police officers at the Delaware River Port Authority can strike?

A. I think not. My understanding is no.

Q. You think not?

A. Certainly under my opinion they cannot strike. They're governed -- they'll be governed by the parallel of Pennsylvania and New Jersey law and under both those statutes strikes are prohibited.

So if I'm right in the conclusion that these are parallel and similar, then they cannot strike. They cannot strike under either law.

Q. Did your research disclose any cases, Professor, which were on point on

that question, that is which either allowed or prohibited police officers of the Delaware River Port Authority to strike or not strike --

A. It's in these statutes, the statute prohibits strikes.

Q. The statutes prohibit the Delaware River Port Authority police officers from striking --

A. The Delaware --

Q. Please, just in fairness to the court reporter --

A. Yeah.

Q. -- let me ask the question and then you could --

A. Yeah.

Q. -- take as much time as you want answering --

A. Yeah.

Q. -- but let me ask the question so that we have an accurate record of at least my question and then your answer.

A. Yeah.

Q. Okay. In any of the cases that

you have examined, did any of those cases either permit or preclude police officers of the Delaware River Port Authority from striking?

A. I --

MR. EISNER: He's saying that DRPA police officers.

THE WITNESS: I saw no cases involving those police.

MR. JOYCE: Can we go off the record for a second?

MR. GOLD: Yes.

(Discussion is held off the record.)

(Mr. Spear is not present.)

MR. GOLD: Back on the record.

BY MR. GOLD:

Q. Professor, did you research that particular issue whether Delaware River police officers have the legal right to strike or are precluded from striking under whatever law?

A. My charter was to, was to write an

opinion on the parallelism or divergence of Pennsylvania law and New Jersey law. I was not asked to write an opinion on the rights of the Delaware Police Authority or on the police in that. I was only asked to write an opinion on the parallelism of the, or divergence of the statutes, and that's all I researched, and that's all my opinion dealt with.

I made no -- I gave no opinion concerning the right of the, of the Authority's police to strike because that was not within my charter.

Q. Well, okay, then I guess I don't understand your certification then, Professor, because it says that, I think -- I believe this is -- let me just read this. I'm reading Paragraph 7 on Page 4 of this and you could follow along there in the second sentence:

"Interest arbitration provides for a peaceful, orderly process by which the parties may seek impartial review and

adjudication of their positions, without the threat to public order that may result from a strike, or the potential damage to officer morale that may occur when officers have no right to strike or other means of redress after impasse is reached."

So I assume you conclude in writing that that the Delaware River police officers have no right to strike?

A. That's a general statement concerning police officers generally and it's a statement of opinion of whether they ought to be allowed to strike or not.

Q. Now --

A. It's not a statement of any legal conclusion concerning the Delaware Police Authority.

Q. It is not?

A. No.

Q. Okay. And did you, Professor, conduct any firsthand investigation into the morale of the Delaware River police

officers?
A. No.
Q. Did you conduct any investigation into whether they had any redress after impasse?
A. No. The documents I had indicated that the Authority refused to bargain with them so there was an impasse and that's where the question arose, but I didn't -- that wasn't my charter.
Q. It was not your charter, as you viewed it, it was not your charter to conduct any independent firsthand investigation as to what redress, if any, would be available to the DRPA police officers if, in fact, they reached impasse; is that correct --
A. That's right.
Q. -- my statement?
A. That's right.
Q. I just want to make sure I understand you. Professor, Paragraph 9 of your certification which is on Page 5, you say:

"Turning to the question of whether New Jersey and Pennsylvania feature complementary policies regarding interest arbitration for police collective bargaining impasses, the fundamental elements to be examined in the measuring the similarity of the laws of two states concerning collective bargaining by police are, in my opinion, the following."

And then you proceed to list --

A. Yeah.

Q. -- A, B, C, D, E and F.

You use the term "fundamental elements" there and I'm just wondering what did you mean by that term, "fundamental elements"?

A. What I mean by that is in terms of all the various statutes and legislative debates and considerations, all the writing concerning police and fire collective

bargaining, these are what are generally considered the crucial elements, these are the, these are -- they're, they are the common elements in practically every state, where they have statutes dealing with police and fire arbitration, and this is just my opinion these are, these are the elements which are -- if I'm going to make a comparison, this is the basis on which I'm making the comparison --

Q. So --

A. -- because these are what I consider fundamental elements.

Q. And am I correct in understanding that there are no other fundamental elements, this is the entire list of what you would consider to be fundamental elements in any such comparison?

A. Well, let me say these are the ones that I thought of when I was doing the situation. I have not thought of any others since.

Q. Now, just trying to draw your

recollection to the New Jersey --

A. Yeah.

Q. -- law, do you recall whether there's a requirement that an interest arbitrator consider specific factors set out --

A. Yes, there is.

Q. -- actually in the statute? Do you recall what those factors are?

A. Oh, I think there's eight or ten of them and I can't remember what they are, but they are -- there's a set of factors written into the law 30 years ago because the law was threatened with being unconstitutional, as an unconstitutional delegation of power, so they wrote these into the statute so as to provide a statutory standard which would make the arbitration constitutional.

Q. And that occurred about 30 years ago?

A. I think it was in the mid-1960s. As a matter of fact, I think I, I think I cited

the case.

The case is long ago in that it was 1949, on Page 9, the case in which -- the case which gave rise to these provisions in the statute.

Q. Do you recall when these provisions were actually added to the statute?

A. No, I don't.

Q. Would it surprise you if I told you it was not until 1996?

A. That those provisions were put in the statute? I think you'd be wrong.

Q. Okay. Professor, how many police interest arbitrations occurred in New Jersey in 1996?

A. I have no idea.

Q. Did your process of rendering this opinion include interviewing any New Jersey Public Sector Police Arbitrator?

A. No.

Q. Do you know how many police interest arbitrations occurred in Pennsylvania in 1996?

A. I don't know how many.
Q. Did your process include an attempt to obtain --
A. No.
Q. -- that number?
A. No.
Q. Professor, what in your judgment happens when an employer of New Jersey public sector police refuse to arbitrate a particular matter? What happens? What recourse is available to the union and how do they proceed?
A. I'm not sure.
MR. GOLD: Off the record for a second.
(Discussion is held off the record.)
BY MR. GOLD:
Q. Professor --
A. Yes.
Q. -- one of the documents which you testified that you examined in connection with preparing the certification which you provided a something called,

"Brief on behalf of plaintiffs in Fraternal Order Of Police, Penn-Jersey Lodge 30 and Joseph Vena in opposition to Defendant Delaware River Port Authority's Motion for Summary Judgment Return Date Of December 20th, 1996.

Is that correct that you examined this brief?

A. Yes. If I put it in the statement, it's accurate.

Q. Yes, you did, Professor.

This brief contains reference to maybe 50 cases cited for authority or other reasons by plaintiff. Did you read each of these cases?

A. No.

Q. So, for instance, did you read Bonk versus Port Authority of New York and New Jersey?

A. No, I didn't.

Not -- I don't remember that I read that -- those cases.

Q. You don't remember reading any of these case?

A. No, only --
Q. But it's possible you did not?
A. For what point were they cited?
Q. I'll be very happy to share this with you, Professor, but sitting here right now it is not the intent of my questioning to --
A. I rather object to your asking me whether I read cases which had no point in what I was asked to do.
Q. Well, I assume they had a point since they were part of your --
A. There were lots of points, lots of issues involved as I remember in that brief other than the question of whether the laws were similar.
Q. Okay. But sitting here today you don't recall reading that case?
A. No, I never heard of that.
Q. And how about Eastern Paralyzed Veterans Association versus City of Camden, do you recall reading that case?
A. I have no particular recollection.
Q. So sitting here today you

cannot testify that you did read those cases?

A. No.

I just want to make it perfectly clear.

Q. Yes.

A. It was not my intent to read material which was not necessary to my opinion and so masses of material and cases cited there were on other points other than the very narrow question I was asked, that is the similarity, dissimilarities of the two statutes, of the two bodies of law and their working function.

Q. Thank you. I understand your testimony.

Do you teach a course in police interest arbitration currently?

A. I never heard of such a course. I taught police and fire interest arbitration while I taught an arbitration course.

Q. Professor, in Pennsylvania, in police interest arbitration, if the police union wants to arbitrate an issue and the

police employer does not want that issue arbitrated, can the police employer file any sort of administrative determination with the state governing board to have it determined whether or not that issue should be subject to interest arbitration?

A. I don't know of any such proceeding. In advance of the arbitration?

Q. Yes.

A. I know of no such proceeding.

Q. Now, Professor, I had asked you about what was the fundamental elements. Part of your testimony, as I recall it, was these were the common elements.

Is that your testimony?

A. And fundamental.

Q. But these are common and fundamental?

A. Yes.

Q. So there could be fundamental elements that are not common?

A. I don't think of any.

Q. But there could be. That's my question.

MR. EISNER: Object to the form.

THE WITNESS: I don't know. I don't know what, I don't know what that means, there could be.

BY MR. GOLD:

Q. Well, you're sitting here as a --

A. You mean could I cook up something imaginary that I would call --

Q. Sitting here as an expert --

A. Well, I'm not --

Q. -- that you would call fundamental.

A. -- I'm not used to engaging in fancifulness and at the moment I can't think of any.

Q. But if pressed to think about this, there may come a time when you could think of some elements which are fundamental --

A. My mind is always open.

Q. -- which are fundamental and not listed here; is that correct?

A. My mind is always open.

Q. But in your judgment the elements which were presented here under A, B, C, D, E, and F were common elements between the two state statutes?

A. There -- there's -- I think that's right. I can't think of any statute in which these aren't present.

Q. But there could be statutes that there may be other things present --

A. Always --

Q. -- as well?

A. There may always be some other things, but they might not be fundamental.

Q. And they may be fundamental depending what they are?

A. Well, I want to know what they are before I say whether they're fundamental or not.

Q. Sure. Professor, you have studied the New Jersey statute and the Pennsylvania interest arbitration statute as you've indicated in your certification and in your testimony today and your

testimony's been offered as an expert witness testimony.

What would be a difference between, in your judgment, in your opinion, what would be a difference between two state public sector interest arbitration laws?

MR. EISNER: Let me just ask, when you say "a difference," you mean a difference sufficient to render them not substantially similar?

MR. GOLD: Correct.

THE WITNESS: One of --

BY MR. GOLD:

Q. Do you understand, Professor?

A. If they didn't have a provision for impasse arbitration, then I would say they were not the same.

Q. And is that it? Is that the only circumstance that they would be not substantially the same?

MR. EISNER: I'll object to the form. Are you asking him to

think of every situation in which there might be a difference that would render them not substantially similar?

MR. GOLD: Well, perhaps not every situation, just those which he's prepared to tell us about.

THE WITNESS: Well, you see, I can't, I can't conceive of a statute that provided for police fire labor relations, collective labor relations without the right of police officers joining the union, without exclusive representation, without a duty to bargain, without a definition of the subject or some indication of the subject matters of bargaining and for a procedure for resolving disputes. I just can't conceive of a statute which didn't have those.

BY MR. GOLD:

Q. Now, did you accept your

charge, Professor, as to compare the similarities in the public sector police and firefighter bargaining laws or to compare whether the statutes on police and firefighter interest arbitration were substantially the same? What did you view as your charge?

A. Generally, generally whether they were similar in their totality.

Q. So which starts from the right to organize --

A. Yes.

Q. -- and bargain to whatever the final conclusion is of what --

A. Resolution of the impasse.

Q. -- ever, in fact, happens if you don't reach agreement?

A. Yes.

Q. Now, Professor, now, the issue you have raised as a fundamental element is availability of review of the arbitration award.

Why is that a fundamental element in your judgment?

A. Well, in the nature of interest arbitration and in view of the fact that you have tax money involved, I think it's of fundamental importance that at least the arbitrator not have the absolute final word, that there be some supervision that sees that he stays within bounds.

Q. Okay. And in Pennsylvania what is that availability of review?

A. Well, there is a procedure for -- on the basis of -- that challenge the award on the basis that the arbitrator has exceeded the scope of his powers.

Q. And where, if someone was upset with an arbitration award, where would one challenge that award in Pennsylvania?

A. I think they would bring the suit in court. I think that is the procedure.

Q. Okay. And what is the procedure for review of an arbitration award in New Jersey, Professor?

A. My recollection is the review there is with the, with the Public Employment Commission.

Q. That is the administrative agency?
A. The administrative agency.
Q. And, Professor, have you reviewed cases decided by the New Jersey Public Employee Relations Commission on particularly those issues, what factors, for instance, they've used in determining whether or not an arbitrator properly -- whether an arbitrator's award was subject to challenge successfully?
A. No.
Q. Professor, now, you described this procedure in --
(Mr. Joyce is not present.)
(Pause.)
BY MR. GOLD:
Q. Do you want a break, Professor?
A. No, but I wouldn't mind having a coke. The process is a little dry.
MR. GOLD: Okay. Let's get you a coke.
MR. EISNER: Sure.
MR. GOLD: Let's go off the

record.

(Discussion is held off the record.)

(Recess is held.)

BY MR. GOLD:

Q. Professor, you had testified a moment ago before we took this very short break that in your opinion in Pennsylvania the Appellate review was to the courts from an interest arbitration award?

A. I think that's right.

Q. Is that accurate?

A. I think that's right.

Q. And is that in the statute, Professor, the Pennsylvania statute?

A. I don't remember.

Q. Would it surprise you to learn that it's not in the statute?

A. No.

Q. Does it refresh your memory if I told you it was not in the statute?

A. No.

Q. Professor, going to the issue of fact finding --

A. Yes.
Q. -- is fact finding available in public sector police interest arbitration in New Jersey?
A. Yes.
Q. Is it in the statute?
A. My recollection is it is.
Q. Is it in the statute in Pennsylvania?
A. No.
Q. How many times in 1996 was fact finding employed by the state agency and/or the parties in New Jersey in public sector police interest arbitrations?
A. I don't know.
Q. Did you inquire?
A. No.
Q. Now, let's just talk --
A. Let me say my experience with fact finding is that in these cases where there's ultimately arbitration, arbitration ultimately available is purely a ritual.
Q. And that's your experience based on your Pennsylvania police interest

arbitration?
A. No, that's my experience based in Connecticut and Rhode Island and Massachusetts.
Q. But that could not be your experience based in New Jersey; is that correct?
A. No, that's right, but every time I've seen fact finding as a preclude to interest arbitration, the fact finding is purely ritual.
Q. But you have no firsthand knowledge that that is the fact in New Jersey?
A. I assume people in New Jersey, police in New Jersey are no different than anywhere else.
Q. You assume that?
A. I assume that.
Q. Right. Now, going to mediation, Professor, is mediation available under the New Jersey Public Sector Police Arbitration --
A. Yes.

Q. -- statute?
A. Yes.
Q. Is it specified in the Pennsylvania police statute?
A. No.
Q. How many --
A. But it's available.
Q. But is it in the statute, Professor?
A. No, it's not in the statute.
Q. And how many mediations occurred in New Jersey?
A. I don't know.
Q. Did you inquire?
A. No.
Q. Professor, did you speak to any New Jersey public sector mediator who has experience in police mediation in rendering your report?
A. In police mediation?
Q. Yes.
A. No, I was a mediator in New Jersey in one case, a school case once.
Q. Yes, but I'm confining my

question --
A. Okay. Yeah. No, no.
Q. In New Jersey, Professor, how many public sector police interest arbitrators are certified to be public sector police arbitrators, do you know?
A. I don't know.
Q. Does the number 22 strike a cord of any familiarity?
A. Doesn't strike anything.
Q. In Pennsylvania, do you know how many public sector police arbitrators --
A. No, I don't.
Q. Five, would you say? Just try to get a number.
A. The process in Pennsylvania --
Q. Yes.
A. -- is that they request an arbitrator from the American Arbitration Association and I have no idea how many people are on the American Arbitration Association's list for this purpose or even generally, so I have no idea how many there are. There may

be hundreds.

Q. Okay. But you didn't specifically inquire for purposes of this project which you were retained for?

A. No, because I was appointed by the American Arbitration Association in these arbitrations so I knew how they worked from, from experience.

Q. But then, again, you didn't know how they worked in New Jersey --

A. No.

Q. -- from experience?

Professor, do you recall whether in the New Jersey statutes there are specific qualifications set out to be a Public Sector Interest Arbitrator?

A. I'm not sure. There -- my recollection of the statute is that the Public Service Commission I mean the Public Employee Division, the Commission, maintains a list of people that they have approved; but I don't know -- I don't remember whether there's statutory qualifications or not.

Q. And does the Pennsylvania -- I'm sorry. Are you going to respond further?

A. My recollection is that there are some qualifications, but I'm not sure exactly what they are, that there's some general qualifications as to they must be neutral or some -- I don't remember. I think there is something about them.

Q. But it is a list maintained by the state agency, is it not?

A. That's right.

Q. And in Pennsylvania is it a list maintained by the state agency?

A. No, it's by the American Arbitration Association.

Q. And what is the American Arbitration Association? That is a private, not-for-profit --

A. Yes.

Q. -- organization?

A. But it's, it's the one that, shall we say, it's regularly recognized as an appropriate source for arbitrators.

Q. But it is not a state agency?
A. No, it's not a state agency.
Well, let me -- my recollection is that Pennsylvania statute provides that they shall be appointed by the American Arbitration Association if the parties cannot agree, that the American Arbitration Association will appoint them, so in that respect, it is a state agency.
Q. In your judgment that would make the American Arbitration Association a state agency?
A. Well, it's the state-authorized agency.
Q. So in your judgment that would make it a state agency?
A. Makes it a state-authorized agency.
Q. Professor, in your judgment is there any difference in the subjects which one in New Jersey could seek interest arbitration on and the subjects that one could seek interest arbitration of in Pennsylvania, any difference at all?
MR. EISNER: I don't know

whether you --

THE WITNESS: I'm not sure.

BY MR. GOLD:

Q. Well, let me ask you a question then.

In the review of that issue, if an arbitrator either refuses to consider a subject or considers a subject improperly in New Jersey, what is the standard of review used to determine whether the arbitrator acted properly, the legal standard of review?

A. Legal standard of review is whether he stayed within the authority of the statute and the authority of the -- whether he's exceeded his authority. That's the basic standard.

Q. Right. That's what I'm asking, what is the legal standard for whether he has, in fact, stayed within his authority, that is what his job was under the statute.

MR. EISNER: Mr. Gold, let me just make clear that you don't

object if Professor Summers looks at his certification in answering your question. You haven't been asked him to, but you don't object if he looks at it.

MR. GOLD: I don't object if he looks at his certification, but I'm also asking him what he presently recalls sitting here.

MR. EISNER: Fine.

THE WITNESS: The most I can recall, I don't think there's any substantial difference. I -- my recollection is that there may be minor differences, but I don't remember any substantial difference. The New Jersey statute is much more detailed than the Pennsylvania statute.

BY MR. GOLD:

Q. It is. In what way is it more detailed?

A. Well, in terms of describing the procedures, in terms of more elaborate in

that regard and then because it's attached to the Public Employee Bargaining Statute, which is in a sense much of it incorporated, it becomes, it becomes much more detailed.

But -- and then the Pennsylvania statute is a very, is a very abbreviated statute.

Q. Well, does the New Jersey statute specify which topics are subject to interest arbitration and which are not?

A. I -- in terms of the subjects of bargaining the descriptions are somewhat different words, but they're substantially the same.

Q. But the subjects of bargaining are not necessarily what is the subject of interest arbitration, are they, Professor?

A. Not necessarily, no.

Q. That's right.

A. Do you want me to look at the statute and see whether --

Q. No, I'm just checking something, Professor. Please bear with

me. Thank you for your patience.

Professor, in Pennsylvania, is promotion of an employee subject to arbitration?

A. In Pennsylvania?

Q. Uh-huh.

A. I'm not sure.

Q. How about in New Jersey?

A. I'm not sure about that either.

Q. How about layoff?

A. I don't think -- I'm not -- are you talking about order of layoff or number of layoff?

Q. Both. You answer the question how you feel comfortable answering it.

A. Certainly in terms of number of layoff, I don't think that's subject to arbitration. In terms of order of layoff, I think it is subject to arbitration.

Q. In New Jersey?

A. I think so.

Q. How about demotion?

A. I don't know.

Q. Transfer?

A. I don't know.

Q. Subcontracting?

A. I don't know.

Q. If, in fact, I told you, Professor, that promotion, layoff, demotion, transfer, subcontracting, shift and work schedules were not subject to binding interest arbitration of police officers in New Jersey, would you consider that to be a difference in subjects that are subject to arbitration that occurred in Pennsylvania?

A. Does it occur in Pennsylvania.

Q. Yes.

A. All I can say is I never saw those issues raises in a case in arbitration in Pennsylvania.

Q. Are they precluded from being raised in Pennsylvania, Professor?

A. I think not by the statute, not by this statute, but whether it would be barred otherwise --

Q. When you say "this statute," I'm sorry?

A. I mean the 111.

Q. Act 111?

A. Act 111.

Q. Would that be a difference to you, Professor, if those issues could not be arbitrated in New Jersey but could be arbitrated in Pennsylvania?

Would that be a difference in the statutes.

MR. EISNER: When you say difference, you mean just a difference or a difference sufficient to --

MR. GOLD: Well, let's just say difference first and then we'll get to what types of differences.

THE WITNESS: Of course it's a difference.

BY MR. GOLD:

Q. Now, let's go on to the next question that Mr. Eisner so capably points out. Would it be a difference in your judgment on the issue only, the factor only

of what issues are within the scope of interest arbitration if in New Jersey there could be no interest arbitration on promotion, layoff, demotion, subcontracting out, transfer, shifts of work and schedule and there could be interest arbitration of those issues in Pennsylvania?

Would you say there is a substantial difference on what is subject to interest arbitration.

MR. EISNER: You want him to repeat the question?

THE WITNESS: It would not make a substantial difference in the statutes as a whole.

BY MR. GOLD:

Q. I understand that, but what about on this one point, scope of what is subject to interest arbitration, there is a difference. That's why I didn't ask you the question about the statute as a whole, Professor. We're going to get to that.

A. I wouldn't consider it a major difference.

Q. But it's a difference?
A. It's a difference.
Q. It's not a substantial difference?
A. Not really a substantial difference.
Q. What would be a substantial difference then, Professor, in just the one sub-element that you considered fundamental the scope?
A. Wages.
Q. The scope of?
A. Wages, salaries.
Q. Okay. What else?
A. Holidays, vacations.
Q. Those are the only issues that you would consider then core --
A. There might be other issues.
Q. Let me finish. But as long as an interest arbitration statute provided that wages, vacations --
A. Yeah.
Q. -- were subject to interest arbitration, that's the end of the analysis from your perspective?

A. I think you have to look at the statute as a whole and, in fact, in most circumstances you don't have bargaining concerning transfers or demotions in police departments. That in practice doesn't happen very often and in shift things --

Q. So in practice --

MR. EISNER: Are you going to let him finish? He was still continuing.

MR. GOLD: Okay.

THE WITNESS: So that if one looks in terms of how these -- how important these are in terms of the practice that goes on, they are not all that important. They're not as important as they may be in an automobile plant or some other places.

Plus the fact that I'm not sure how much these can be arbitrated in Pennsylvania in terms of -- because what you have is limitations on what are

considered management functions under the Pennsylvania law.

BY MR. GOLD:

Q. But the statute in Pennsylvania doesn't preclude those topics, does it, Professor, and, in fact, arbitrations occur regularly on those topics, don't they Professor?

A. I don't say regularly. I've never seen one in which those were involved.

MR. JOYCE: Are you talking about interest arbitrations.

MR. GOLD: Yes, yes.

Bear with me a second, please.

(Pause.)

MR. GOLD: Back on the record.

BY MR. GOLD:

Q. Professor, does Act 111 mandate an interest arbitrator to consider any particular fact or factors in rendering an award?

A. I can't remember exactly -- I can't remember exactly whether there is anything

in there that mandates it or not. Certainly not detailed like the New Jersey statute.

Q. Now, on each of those factors, Professor, isn't it true that in New Jersey if, in fact, an arbitrator didn't set out and consider each of those factors listed in the New Jersey statute that that is a cause for overturning the award?

A. That's right.

Q. So an arbitrator would have to set out and consider each and every single one of those factors, would he not or she?

A. That's right.

Q. Is it your testimony that in Pennsylvania the Act, Act 111, sets out any standards for an arbitrator in rendering an award, any considerations?

A. It's my recollection that there are none.

Q. So if in Pennsylvania an arbitrator did not consider similar services provided by private employment in rendering his or her award, that would not

necessarily be a reason to overturn the award; is that correct?

A. Not of itself.

Q. In fact, is it your judgment that in any circumstance that would be a reason for overturning the award?

A. Standing alone?

Q. Yes.

A. No. That doesn't mean it isn't taken into account. One of the -- there is not the effort to go down the list and be sure you punch all the buttons in Pennsylvania like there is in -- like there must be in New Jersey because you have to say something about all of them in New Jersey. In Pennsylvania you just do it. But, of course, in arbitration in Pennsylvania you take into account comparable wages, you take into account the ability of the municipality to pay, you take into account all of the considerations that are present in New Jersey.

Q. You do as an arbitrator?

A. Sure.

Q. And you have firsthand knowledge that every arbitrator in Pennsylvania does that?
A. I have no firsthand knowledge.
Q. Right.
A. I don't sit in -- I haven't questioned all of them. All I know is what a responsible arbitrator does.
And let me say in New Jersey I suspect that what's stated in the opinion doesn't accurately represent what goes through their mind, of all arbitrators.
Q. You suspect that?
A. Yes, I suspect that.
Q. How many of the arbitrators did you contact and ask that question?
A. I didn't. But I know arbitrators.
Q. But that was important to you, wasn't it, Professor?
A. No, no, no, it wasn't important because this matter of what one states in the opinion is not in my judgment a fundamental concern.
Q. Why isn't it a fundamental

concern, Professor?
A. Because what's fundamental is what the process is, not what arbitrators say in their opinions.
Q. Who pays the arbitrator in New Jersey, Professor?
A. I think the commission pays them.
Q. But you're not sure?
A. I'm not sure.
Q. Who pays the arbitrator in Pennsylvania?
A. The parties pay him.
Q. Have you seen police contracts that have subcontracting clauses in them in Pennsylvania, Professor?
A. No.
Q. Have you seen police contracts in Pennsylvania that have layoff provisions, seniority provisions, transfer provisions, any of those?
MR. EISNER: That's the question, any of those?
MR. GOLD: Yes.
THE WITNESS: I don't

remember.

MR. GOLD: We're getting there.

BY MR. GOLD:

Q. Professor, in New Jersey how many impasses are resolved by fact finding in 1996 or in any one year?

A. I don't know. I don't know.

Q. How many are resolved by mediation?

A. I don't know. I thought you asked me that twice before.

Q. No, I didn't ask you that question.

In your judgment, Professor, what percent of police interest arbitration in Pennsylvania is final offer interest arbitration?

Do you know what I'm referring to when I use the words "final offer arbitration"?

A. Yes, obviously I do.

MR. EISNER: You say in his judgment.

MR. GOLD: I assume you do. Yes, in his judgment.

THE WITNESS: I have never seen it.

BY MR. GOLD:

Q. You've never seen it?

A. Never seen. Personally I've never seen it so I don't know beyond that.

Q. Do you know in New Jersey what percent of impasses are resolved by final offer arbitration?

A. Under the new statute?

Q. Under the new statute.

A. No, I don't know.

Q. Did you inquire?

A. No.

MR. GOLD: Okay. Can we go off the record for a second.

(Discussion is held off the record.)

MR. GOLD: Mr. First and I are leaving the conference room. Professor, just as a courtesy to you, I want you to understand that

you have a very narrow scope of topics which you can discuss either with Mr. Joyce --

THE WITNESS: I don't intend to talk to him at all.

MR. GOLD: Okay. Great.

(A short recess is held.)

BY MR. GOLD:

Q. Professor, I'm now going to ask you specific questions regarding your certification which you have before you which has been marked as D-7 in this case.

Just for a second, turn to your paragraph number eight. Would you mind taking a read of that, please.

A. Yes.

(The Witness complies with the request of Counsel.)

Q. I'm going to hand you back now D-6 which was your draft expert --

A. Yes.

Q. -- opinion report.

A. Yes.

Q. Why don't you take that and

look at that. Is there a similar paragraph in that report? Is there a similar paragraph --

A. I think --

Q. Let me finish my question please.

A. I think not.

Q. Let me finish my question, then you can --

A. What.

Q. -- answer it.

A. No.

Q. Is there a paragraph similar or identical, similar to Paragraph 8 in your certification which appears in the draft certification which you provided to Mr. Joyce?

A. No.

Q. Okay. Where did Paragraph 8 come from?

A. It was suggested by Mr. Joyce.

Q. Was the specific language suggested by him?

A. Yes.

Q. Was that done in writing?
A. What?
Q. Was that done in writing? Was the suggestion made in writing?
A. Yes.
Q. Do you have that writing?
A. You have it.
Q. I do?
A. What?
MR. EISNER: I think he means -- it's the certification you mean?
MR. JOYCE: Yes.
THE WITNESS: It's in the certification.
BY MR. GOLD:
Q. Oh, I'm sorry. I just perhaps misunderstood the process by which you and Mr. Joyce modified your certification.
A. I drew, I drew --
Q. Please, please.
A. -- the opinion --
Q. Correct.
A. -- which you have.

Q. Yes.
A. Mr. Joyce then -- I think, I think he added Paragraph 7 --
Q. We have a listing of them.
A. -- and Paragraph 8. Then he gave that to me and he told me, "I have made these additions." And I said, "Fine, I -- I'm completely in accord. It's simply that I just didn't think about putting them in."
Q. Now, okay, and that I guess would be -- would that also be true for the other changes which appear in the final certification which was submitted to the Court, that he had made these?
A. Well, were there any other changes?
Q. Yeah, there's Paragraphs 5, 6, 6h, 7, 8, 9, 10. We have a listing.
A. Tell me what they were.
MR. JOYCE: Why don't you go through them if you want to go through them.
BY MR. GOLD:
Q. Okay. Well, let's take some of the more obvious ones so as not to waste

totally your time and ours.

In the final certification there's a Paragraph 6h. It says that you've considered the Amended Complaint and Amended Answer of the Parties in Fraternal Order Of Police Penn-Jersey Lodge 30 --

A. Yes.

Q. -- and Joseph Vena versus the Delaware River Port Authority, Docket L-7547096.

A. Yeah.

Q. That does not appear as one of the things you considered in your expert opinion. So the question comes then, Professor, did you consider that in rendering your opinion?

A. As far as I know I did. Because I -- my recollection is I had that document and as far as I know I did.

Q. But where did this language h comes from? That's what I'm trying to figure out right now.

What was the process by which what appears as h in your

certification got into the final certification since it was not --

A. That would, that would have been --

Q. Let me finish my question, please, Professor, because we both can't talk at the same time and not drive the Court reporter absolutely crazy.

Let me just state this for the record. Is it not true, Professor, that h does not appear in the expert opinion which you forwarded to Mr. Joyce for his review --

A. That's right.

Q. -- and comment?

A. That's right.

MR. EISNER: D-6. D-6. I'm just saying that's Exhibit D-6.

MR. GOLD: Yes.

MR. EISNER: That's all. Sorry.

BY MR. GOLD:

Q. Defendant Exhibit 6, does not appear --

A. Yes.

Q. -- in Defendant Exhibit 6 --
A. Yes.
Q. -- but it does appear --
A. That's right.
Q. -- in Defendant Exhibit 7.
Now I'm asking you the process, Professor, by which this paragraph got into D-7?
A. I've stated three times already.
Q. Okay.
A. The process was I drew the draft opinion. Mr. Joyce then prepared this certification. He showed it to me. He told me -- showed me what the changes were and I looked them over and I said that's all right. So the answer, that's the way they got in because after -- after he gave me the certification -- this certification, so far as I know those are the only two documents concerning my opinion that ever existed.
Q. So, Professor, sitting here today, do you have any personal knowledge that you actually considered the Amended

Complaint and Amended Answer?

MR. EISNER: Object to the form. I think he's answered that question already.

THE WITNESS: Do I -- at the at the moment --

BY MR. GOLD:

Q. Yes.

A. -- do I have a direct recollection?

Q. Yes.

A. The answer is no. I don't remember a lot of the things --

Q. So it's possible --

A. -- a lot of these things are listed I don't remember at the moment.

Q. So it is very possible that this was not considered by you?

A. This it was not what?

MR. EISNER: Objection.

BY MR. GOLD:

Q. It was not considered by you.

MR. EISNER: Object to the question.

THE WITNESS: That it was not considered by me?

MR. GOLD: Yes.

BY MR. GOLD:

Q. You don't recall, Professor, as your testimony indicates, you testified that you don't recall whether you did or didn't consider it?

A. Yeah. I don't recall at the moment.

Q. Right. So I'm saying to you, it is possible you did not consider it?

A. Very unlikely because I wouldn't certify it if I hadn't seen it --

Q. Your response is on the record, Professor.

A. -- at that time.

Q. Let's turn to Paragraph 8. That's also new. When I say new, I mean it does not appear --

A. That was new.

Q. -- in the -- well, let me just for the record say it's new. When I say the word "new," it means it does not appear in D-6, but it does appear in D-8. Now,

where did that -- D-7. Where did that come from?

MR. JOYCE: Are you talking about Paragraph 8?

MR. GOLD: Yes.

MR. JOYCE: He's already addressed that.

THE WITNESS: It came from Mr. Joyce.

BY MR. GOLD:

Q. Okay. Now, I'm looking at Exhibit D-4 which is your statement to Mr. Joyce and there's a category in here's that says, Research of New Jersey and Pennsylvania law, there's a category that says, Reading the pleadings and other documents, and then there's a category for preparation of report.

Is there also a category that you left out, Professor, for research, just research?

A. Entirely possible.

Q. It's entirely possible but sitting here today you would say what, that

you're not billing them for research?
A. What I can say is that I don't make my living on these things and when I bill things I frequently don't bill for the full time I spend or for all the work I do partly because I consider part of it my education.
Q. Well, let me ask you this question then, Professor, and maybe we can focus in on this specifically and then refresh your memory as to whether you researched certain specific issues that you've certified to in this document.
Did you research personally Alaska law?
A. No, not that I remember.
Q. Did you research personally Connecticut law?
A. No. Well, Connecticut law, yes.
Q. Did you research personally Hawaii law?
A. No.
Q. Illinois law?
(Mr. Joyce is not present.)

A. Yes.

Q. The issue is: Did you research personally the following jurisdictions to make sure that you were personally satisfied that these jurisdictions did, in fact, provide for interest arbitration to resolve impasses.

Alaska, did you personally research that?

A. Let me answer it so that it is very clear.

Q. Yes.

A. If I asked a student to do research for me and asked what states have statutes such as this and they came back with this list, I would certify that as a fact.

Q. You would?

A. Now, Mr. Joyce so far as I was concerned was a research assistant for this purpose and I took and relied on him as having -- as this being, so far as these things are concerned, as it being accurate.

Q. Okay.

A. I am personally familiar with some of

these laws; that is the Connecticut law, the Illinois law, the Maine law, the Massachusetts law, the Minnesota law, the New Jersey law, the New York law, Pennsylvania law, Rhode Island law. I'm familiar -- I'm personally familiar with those from years past.

Q. So you note on -- I'm sorry, Professor. You didn't know then on -- I'm looking for the date of this certification.

MR. FIRST: There's no date on this.

BY MR. GOLD:

Q. Well, it had to be sometime before July 11th, 1997, that you didn't personally research the Alaska law to determine whether interest arbitration existed at that point in time that you made this certification to resolve --

A. No.

Q. -- impasse?

MR. EISNER: Objection. He's already answered the

question.

BY MR. GOLD:

Q. And that would be true for many of these other states listed.

Now, Professor, Paragraph 10 is also new. Would you mind looking at Paragraph 10 in your certification, D-7. And again, when I say new, it did not appear in your --

A. That's right.

Q. -- Expert Opinion.

Was that also provided by Mr. Joyce?

A. He added it.

Q. How did you independently determine that the Court had already found that New Jersey and Pennsylvania law have enacted substantially similar laws respecting the bargaining rights of police officers generally?

A. I believe, I believe I had, I believe I had a decision on a summary judgment that went to that affect.

Q. Only that affect; is that

correct, Professor?

(Mr. Spear entered the room.)

A. Well, at least that's my recollection, that that's the basis on which this was stated.

Q. And, Professor, just for the record I need to close these few other points. Paragraph 13 is also new, that is, it appears in your certification submitted to the Court but was not in your certification reviewed and modified by Mr. Joyce; is that correct?

MR. EISNER: Object to the characterization of the process, but you can answer the question.

THE WITNESS: I think that's the same as section -- as Paragraph 10 in my statement.

BY MR. GOLD:

Q. May I borrow that back. You have the only copy.

A. Don't you have this?

Q. No, this was just provided to us by you, Professor --

A. I thought you had a copy.

Q. -- at two o'clock this afternoon.

No, we had requested a copy but were not provided with it.

(Mr. Joyce entered the room.)

Q. No, it is as paragraph what, Professor?

A. 10.

MR. FIRST: No, no.

MR. GOLD: Right, his Paragraph 10 is Paragraph 13.

MR. EISNER: You're asking about his Paragraph 13?

MR. GOLD: His Paragraph 13.

MR. EISNER: And this Paragraph 10. They're about the same.

MR. GOLD: They're about the same, but they're not the same.

MR. EISNER: I'm trying to help.

MR. GOLD: The documents speak for themselves.

MR. JOYCE: Yeah, they do. That's true.

BY MR. GOLD:

Q. Okay. Now --

A. What do you mean it's about the same? The words are exactly the same.

Q. Professor, between 13, that 13 and my 10.

Directing your attention to Paragraph 8 in the certification which is D-7 --

A. Yes.

Q. -- did you ascertain or conduct any investigation into whether, for instance, any of those states -- whether in any of those states any bi-state entity functioned in any of those states --

A. No.

Q. Let me ask the question, Professor. Then you can --

A. I thought you were finished.

Q. -- answer it.

A. Your questions go on for a long time.

Q. Yes, I apologize about that,

Professor, but it's part of the process.

In Alaska, for instance, did you ascertain whether Alaska has any bi-state entities?

A. No, I did not. I did not inquire into whether any of these had a bi-state entity.

Q. So you wouldn't know, Professor, whether binding interest arbitration is used to resolve impasses in police officers of Alaska's bi-state entities, would you?

A. It's not said -- that is not what I said.

Q. I'm not saying what you said and what you didn't say.

A. Are you asking me what I would add to this?

Q. No, I'm not asking you what you would add to this. I asked the question and you answered it.

MR. GOLD: Bear with me, please. I apologize for the delay.

(Pause.)

BY MR. GOLD:

Q. Professor; did you do any investigation into the legislative history of New Jersey's Public Sector Arbitration Act?

A. The most recent amendments?

Q. Any investigation into the legislative history of New Jersey's --

A. No.

Q. Professor, are nonpolice firefighters, nonpolice officers and firefighters public employees in Pennsylvania permitted to strike?

A. No, they're not permitted to strike, no.

MR. GOLD: We're almost there.

BY MR. GOLD:

Q. Professor, are you licensed to practice law in New Jersey?

A. No.

Q. Are you licensed to practice in Pennsylvania?

A. No.

Q. Have you ever been?
A. No.
MR. GOLD: Let's go off the record for a moment.
(Discussion is held off the record.)
(Mr. Joyce is not present.)
BY MR. GOLD:
Q. Professor, D-7 which is your certification, when did you execute this document?
A. I don't know. I don't remember the exact date. It's on it.
Q. It is? Would you look at it, please, and tell me. I'm sorry. I must have missed it if it is on it.
A. Well, to the best of my recollection it would be about the 1st of June.
Q. When did you provide Mr. Joyce with D-6?
A. With what?
Q. D-6 which is your document which is your expert opinion.
A. It was -- I think it was within two

weeks before that, but I can't -- I don't remember.

Q. Do you maintain a personal calendar?

A. No.

Q. Was there a letter which you sent to Mr. Joyce which enclosed this?

A. My recollection is I sent it fax with no letter.

Q. Was there a fax transmittal sheet that you would use?

A. There may have been. If there was, I don't have it.

(Mr. Joyce is present.)

BY MR. GOLD:

Q. Where did you usually fax from?

A. The law school.

Q. And would this have been faxed from the law school to Mr. Joyce?

A. I assume so.

Q. What type of fax machine do you have?

A. It would have to be. It's the only fax machine I have access to.

Q. Okay. And what type of fax machine is it?
A. I don't know. I just give it to the secretary and I say "Fax it."
Q. Nice life.
A. Do you know what kind of fax machine you have?
Q. Yes.
A. Good.
MR. EISNER: I'm sorry to hear that, Peter.
MR. GOLD: Yes. In each of our offices.
BY MR. GOLD:
Q. Now --
A. I -- you know, I, I really don't -- let me see the correspondence.
Q. Exactly my point.
A. The correspondence --
Q. Exactly. Where is the correspondence?
MR. JOYCE: Where's what correspondence?
MR. EISNER: He's asked to

look at the correspondence that's marked.

MR. GOLD: Well, from the Professor to you, Mr. Joyce.

MR. EISNER: He's asking --

THE WITNESS: I want to see this correspondence.

MR. GOLD: What he's asking for is the correspondence with the documents so he can set the time frame for it and we have not been provided with any correspondence.

MR. JOYCE: I don't think I have it. I can tell you I don't have Professor Summers's initial draft that he sent to me anymore. I'm sure I tossed it a long time ago.

MR. GOLD: I'm sure you did.

THE WITNESS: Is there any correspondence back in May?

MR. JOYCE: I have nothing to hide.

THE WITNESS: Well, then I

don't know. All I know is it had to be before the 3rd of June.

BY MR. GOLD:

Q. Why did it have to be before the 3rd of June?

A. Because the 3rd of June I went to Vermont and I was there all summer.

Q. And then when did you become available for this deposition, Professor?

A. For this deposition?

Q. Yes.

A. I was back about the 25th of August.

Q. Okay. And did you notify Mr. Joyce of that fact?

A. I think you have a copy of the letter which indicates when I was available.

Q. So, in fact, you would have been available prior to Labor Day in this case?

A. Yes.

MR. GOLD: Off the record.

(Discussion is held off the record.)

MR. GOLD: Okay. Back on

the record.

We have nothing further at this time.

MR. EISNER: Okay.

(The deposition is concluded at 4:35 p.m.)

C E R T I F I C A T I O N

STATE OF NEW JERSEY)
SS
COUNTY OF CAMDEN)

I, DEBRA SAPIO LYONS, a Certified Shorthand Reporter and Notary Public of the State of New Jersey do hereby certify that I reported the deposition of CLYDE SUMMERS in the foregoing matter; that the said witness was duly sworn by me; that the reading and signing of the deposition was waived by said witness and by counsel for the respective parties; that the foregoing is a true and correct computer-aided transcript of the stenographic notes of testimony taken by me in the foregoing matter. I further certify that I am not an attorney or counsel of the party, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

Debra Sapio Lyons, CSR
License No. XI00881

DATE: November 20, 1997

LAW OFFICES

SPEAR, WILDERMAN, BORISH, ENDY, SPEAR & RUNCKEL

A Professional Corporation

SUITE 1400, 230 SOUTH BROAD STREET, PHILADELPHIA, PA 19102
TEL: (215) 732-0101 FAX: (215) 732-7790

LEONARD SPEAR
WARREN J. BORISH*
BRUCE E. ENDY
SAMUEL L. SPEAR
JAMES F. RUNCKEL
CHARLES T. JOYCE
BENJAMIN M. EISNER*
MARK A. MARLEY
KATHERINE L. SCHREIBER*
WENDY CHEREC*
MARK FEATHERMAN*

PA BAR EXCEPT:
* PA & NJ BAR
* PA, NJ & DC BAR
† CALIF BAR

NJ OFFICE:
36 TANNER STREET
SECOND FLOOR
HADDONFIELD, NJ 08033
(609) 428-3220

LOUIS H. WILDERMAN
1909-1993

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To: **Professor Clyde Summers**

Company:

Fax No.: **573-2025**

From: **Charles T. Joyce, Esquire**

Number of Pages Transmitted (including this page):

Case Ref.: **Fraternal Order of Police, Penn-Jersey Lodge 30 and Joseph Vena v. The Delaware River Port Authority**
Docket Number: L-7547-96

Comments: **Please see attached letter.**

Date: **August 29, 1997** Time:

IF THERE ARE ANY PROBLEMS IN RECEIVING THIS TRANSMISSION, PLEASE CALL SPEAR, WILDERMAN, BORISH, ENDY, SPEAR & RUNCKEL AT (215) 732-0101

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SPEAR, WILDERMAN, BORISH, ENDY, SPEAR & RUNCKEL

A Professional Corporation

SUITE 1400, 230 SOUTH BROAD STREET, PHILADELPHIA, PA 19102
TEL: (215) 732-0101 FAX: (215) 732-7790

LEONARD SPEAR
WARREN J. BORISH*
BRUCE E. ENDY
SAMUEL L. SPEAR
JAMES P. RUNCKEL
CHARLES T. JOYCE
BENJAMIN M. EISNER*
MARK A. MASLEY
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NJ OFFICE:
36 TANNER STREET
SECOND FLOOR
HADDONFIELD, NJ 08033
(609) 428-5255

LOUIS H. WILDERMAN
1909-1993

PA BAR EXCEPT:
* PA & NJ BAR
* PA, NJ & DC BAR
♦ CALIF BAR

August 29, 1997

Via: Telefax and U.S First Class Mail
Professor Clyde Summers
University of Pennsylvania Law School
3400 Chestnut Street, Room L-152
Philadelphia, PA 19104

Re: Fraternal Order of Police, Penn-Jersey Lodge 30
and Joseph Vena v. The Delaware River Port Authority
Docket Number: L-7547-96

Dear Professor Summers:

I am in receipt of your correspondence of August 17, 1997 and I trust that you had a pleasant vacation in the "more liveable Vermont". To bring you up to speed on the status of our case, although we had a return date for our Motion for Summary Judgment of July 25, 1997, the judge that was handling the case, Samuel L. Supnick, unfortunately indicated to us in court that day that he was being transferred to Gloucester County effective September 1, 1997, and hence had decided to return the case to the presiding judge for reassignment. That necessitated a further delay in hearing the Motion, to allow another judge to read the briefs and get up to speed on the matter. This, in combination with the usual round of vacations that occur during this period of time, meant that the hearing on our Motion is now not returnable until September 26, 1997.

In the meantime, the DRPA has decided to notice your deposition. That, of course, is why I have been trying to call you for the past few days. Unfortunately, as you know, we ended up getting involved in the inevitable game of "phone tag". Hence, I thought it best to write you this short note then try to touch base with you after the Labor Day holidays.

If you could provide me with your availability to attend a deposition during the weeks of September 15 to 19, 1997 and September 22 to 25, 1997, I would be most appreciative. Ideally, as far as I am concerned, the dates of September 16 and 17, 1997, and September 23, 24 and 25, 1997 would work. At this juncture, I have no idea of the availability of defendant's counsel.

Regarding your fee, my recollection is that we never discussed a specific monetary figure; I merely asked you to do what you could to let your rate reflect the fact that the Union involved is composed of only 75 members, with a rather small treasury. However, in light of the yeoman's work you have done for us thus far, and your amenability to being deposed, I believe your rate of $200.00 per hour is certainly reasonable, and I will see to it that you get reimbursed fully.

Very truly yours,

SPEAR, WILDERMAN, BORISH, ENDY
SPEAR AND RUNCKEL

BY: CHARLES T. JOYCE

CTJ:maa

LAW OFFICES
SPEAR, WILDERMAN, BORISH, ENDY, SPEAR & RUNCKEL
A Professional Corporation
SUITE 1400, 230 SOUTH BROAD STREET, PHILADELPHIA, PA 19102
TEL: (215) 732-0101 FAX: (215) 732-7790

LEONARD SPEAR
WARREN J. BORISH*
BRUCE E. ENDY
SAMUEL L. SPEAR
JAMES P. RUNCKEL
CHARLES T. JOYCE
BENJAMIN M. EISNER*
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KATHLEEN M. TANA
STEVEN J. BUSHINSKY*

PA BAR EXCEPT:
* PA & NJ BAR
* PA, NJ & DC BAR
◊ PA, NJ & CA BAR

NJ OFFICE:
34 TANNER STREET
SECOND FLOOR
HADDONFIELD, NJ 08033
(609) 428-0520 FAX: (609)354-0132

LOUIS M. WILDERMAN
1909-1993

November 6, 1997

EXHIBIT D-2 11/7/97

Professor Clyde Summers
University of Pennsylvania Law School
3400 Chestnut Street, Room L-152
Philadelphia, PA 19104

Re: Fraternal Order of Police, Penn-Jersey Lodge 30
and Joseph Vena v. The Delaware River Port Authority
Docket Number: L-7547-96

Dear Professor Summers:

I am very pleased to inform you that the New Jersey Superior Court granted our motion for Summary Judgment on Monday November 3, 1997 (after many Court-created delays) and ordered the DRPA and the FOP to select a mediator from the American Arbitration Association to assist the parties to resolve the impasse in their collective negotiations and, if that fails, to submit the dispute to interest arbitration. The Judge ruled that your Certification was admissible as an expert opinion and, in the Judge's words, "a highly qualified one." The Judge then proceeded to read into the record your entire Certification. I am enclosing a copy of an article on the case published in the Camden *Courier-Post* which, although it contains some errors, may be of interest.

On a related note, I am embarrassed to say that I had mislaid your letter of August 17, 1997 regarding your fee. I finally uncovered it again only recently. As I told you in my letter to you of August 29, 1997, we never did discuss an actual hourly figure for your work, but your quoted rate of $200.00 per hour is certainly reasonable for the time and effort you put into your Certification, and I am forwarding your letter along with a copy of this correspondence to my client, from whom you can expect prompt payment.

Thank you again for assisting me. For your "reading pleasure," I will forward you a copy of the transcript of the bench opinion when I receive it.

Very truly yours,

SPEAR, WILDERMAN, BORISH, ENDY
SPEAR AND RUNCKEL

BY: CHARLES T. JOYCE

TJ:maa

cc. James Stewart, President (w/enclosure)

COURIER-POST
Thursday
Nov. 6, 1997
BUSINESS NEWS
486-2404

MONEY &

MARKET REPORT

HIGH	7765.75
LOW	7664.57
CLOSE	7692.57
%CHANGE	0.04

NYSE	+1.71 at 495.77
AMEX	+1.98 at 690.35
NASDAQ	+6.18 at 1637.33
S&P 500	+2.00 at 942.76

A late pullback left stocks barely higher Wednesday. Some of the stocks that moved substantially or traded heavily:

NYSE: Consolidated Stores, up 4⅝, at 45⅛, and MacFrugal's Bargains Close-Outs, up 3¼ at 40⅜. Consolidated, the nation's largest close-out retailer, agreed to buy MacFrugal's, a Los Angeles-based discount chain, for about $995 million in stock. Consolidated is to swap between 0.88 and 1.00 share of its stock for each MacFrugal's share.
Columbia/HCA, up 1⅛ at 29¾. Bear Stearns upgraded Columbia/HCA to "buy" from "attractive," Dow Jones Newswires reported.

NASDAQ: Cisco Systems, up 2⅝ at 85⅞. The biggest maker of computer networking equipment reported an 86 percent jump in profits for its first quarter ended Oct. 25, edging Wall Street forecasts. Cisco also said late Tuesday its board has authorized a 4-for-2 stock split to take effect Dec. 8. Oxford Health Plans, down 1⅝ at 2⅞. The health maintenance

Export: Agustin Lopez unloads avocados Wednesday from

Avocados? Holy gu

83-year-old trade prohibition falls

By MARK STEVENSON
Associated Press

MEXICO CITY — The last time Americans ate imported Mexican avocados, it was 1914 and they were known as "alligator pears." But the shiny green fruit rolled north again Wednesday as an 83-year-old trade ban fell.

Growers and farm officials gathered in Uruapan, southwestern Mexico, to see off the first symbolic shipment of what will be a total of 5,000 tons of avocados during winter season. That will partially lift the prohibition U.S farmers contend was needed to prevent pest infestation.

Mexican farmers charged however, that the ban was aimed at keeping prices high in the U.S. market, not controlling fruit flies.

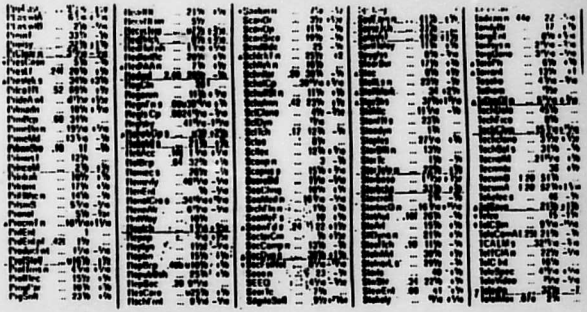
"Fruit flies don't even like avocados," laughed Joaquin Barragan Ortega, whose 2(tons of "Alejandrina" brand avocados were packed in white cardboard boxes aboard big rig trucks headed for the United States.

"The growers up there

Da307

craft, and that, too, appears to be a female-only market. Most of his customers who are florists, designers and fabric store own-

suppose to have a mail-order ship of 500,000. Then, of course, there's Martha, who has worked miracles on the craft industry."



Police/Court voids contract

Continued from Page 10D

would serve no purpose. "It won't benefit the DRPA, which we believe has already paid out hundreds of thousands of dollars in legal fees in a failed attempt to beat off its patrol officers' request for arbitration," he said.

"It won't benefit the public," he added. "And it won't benefit the officers, who have not had a raise in their pay since December 1994, and who currently make $11,000 less a year than a DRPA legal secretary, and over $14,000 a year less than a toll taker."

Highlights of the three-year contract that triggered the suit:

- Elimination of a no-layoff clause.
- Reduction of the starting salary for officers hired with no experience from $38,000 to $30,000.
- In lieu of raises, officers would receive 1, 2 and 3 percent bonuses over the next three years. Unlike wage increases, bonuses do not improve retirement benefits.

Police negotiations began after a consulting firm recommended the number of patrolmen be downsized. The study did not address some 50 supervisory posts within the department that frequently have been doled out to political favorites.

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COURIER-P

CLYDE W. SUMMERS
753 N. 26TH STREET
PHILADELPHIA, PA. 19130
(215) 235-0476

August 17,1997

AUG 25 1997

Charles Joyce, Esq.
Spear, Wilderman, Borish, Endy
Spear and Runkel
230 South Broad Street, Suite 1400
Philadelphia, PA 19102

Re: FOP Lodge 30 and DRPA Docket No. L-7547-96

Dear Mr. Joyce:

Because of the disorganization which comes with being away from Philadelphia in the summer and enjoying the liveable Vermont climate, I have not responded to your letter of June 26.

The time I have spent on the case is as follows:

Reading the pleadings and other documents	2	hours
Research of New Jersey and Pennsylvania law	1/2	"
Preparation of report	2 1/2	"
Total	5 1/2	

I do not remember with certainty what hourly rate I quoted you, and I do not have my correspondence with me here in Vermont. I think it was $200. but I am not sure. It could have been less. I will leave it to your records.

Sincerely,

Clyde W. Summers

LAW OFFICES
SPEAR, WILDERMAN, BORISH, ENDY, SPEAR & RUNCKEL
A Professional Corporation
SUITE 1400, 230 SOUTH BROAD STREET, PHILADELPHIA, PA 19102
TEL: (215) 732-0101 FAX: (215) 732-7790

LEONARD SPEAR
WARREN J. BORISH*
BRUCE E. ENDY
SAMUEL L. SPEAR
JAMES F. RUNCKEL
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STEVEN J. BURMINSKY*

PA BAR EXCEPT:
* PA & NJ BAR
* PA, NJ & DC BAR
† PA, NJ & CA BAR

NJ OFFICE:
36 TANNER STREET
SECOND FLOOR
HADDONFIELD, NJ 08033
(609) 428-2828 FAX: (609)354-0132

LOUIS M. WILDERMAN
1909-1995

November 13, 1997

EXHIBIT
SD-3

Professor Clyde Summers
University of Pennsylvania Law School
3400 Chestnut Street, Room L-152
Philadelphia, PA 19104

HAND DELIVERY

Re: Fraternal Order of Police, Penn-Jersey Lodge 30
and Joseph Vena v. The Delaware River Port Authority
Docket Number: L-7547-96

Dear Mr. Summers:

Also, this will confirm that your deposition is scheduled for Thursday, November 18, 1997 at 1:30 p.m. in Philadelphia. I will promptly notify you of the location once it has been arranged.

Please call me once you have had time to review this and your other materials, so that we can discuss briefly the questions that you may be asked by counsel for the DRPA.

Very truly yours,

SPEAR, WILDERMAN, BORISH, ENDY
SPEAR AND RUNCKEL

BY: CHARLES T. JOYCE

CTJ:maa

CLYDE W. SUMMERS
753 N. 26TH STREET
PHILADELPHIA, PA. 19130
(215) 235-0476

August 17,1997

AUG 25 1997

Charles Joyce, Esq.
Spear, Wilderman, Borish, Endy
Spear and Runkel
230 South Broad Street, Suite 1400
Philadelphia, PA 19102

Re: FOP Lodge 30 and DRPA Docket No. L-7547-96

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Sincerely,

Clyde W. Summers

LAW OFFICES
SPEAR, WILDERMAN, BORISH, ENDY, SPEAR & RUNCKEL
A Professional Corporation
SUITE 1400, 230 SOUTH BROAD STREET, PHILADELPHIA, PA 19102
TEL: (215) 732-0101 FAX: (215) 732-7790

LEONARD SPEAR
WARREN J. BORISH*
BRUCE E. ENDY
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JAMES F. RUNCKEL
CHARLES T. JOYCE
BENJAMIN M. EISNER*
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PA BAR EXCEPT:
* PA & NJ BAR
* PA, NJ & DC BAR
♦ PA, NJ & CA BAR

NJ OFFICE:
36 TANNER STREET
SECOND FLOOR
HADDONFIELD, NJ 08033
(609) 428-8288 FAX: (609)854-5132

LOUIS H. WILDERMAN
1909-1993

November 13, 1997

EXHIBIT
D-5
C.A. 97-7547

Professor Clyde Summers
University of Pennsylvania Law School
3400 Chestnut Street, Room L-152
Philadelphia, PA 19104

HAND DELIVERY

Re: Fraternal Order of Police, Penn-Jersey Lodge 30
and Joseph Vena v. The Delaware River Port Authority
Docket Number: L-7547-96

Dear Mr. Summers:

Enclosed please find a copy of the decision of the Supreme Court of New Jersey in *Local 68 v. DRBA*, 147 N.J. 433, *cert denied*, ____ U.S. ____, 66 USLW 3107 (1997). As you can see, the Court found that the labor laws of New Jersey and Delaware were applicable to the bi-state agency of those two entities, not because the laws were identical (indeed, as Justice Garabaldi rightly notes in her dissent, there are clear differences in the respective statutory schemes), but because the two legislatures "have adopted a substantially similar *policy* concerning collective negotiations by public employees." 147 N.J. at 447 (emphasis added).

Also, this will confirm that your deposition is scheduled for Thursday, November 18, 1997 at 1:30 p.m. in Philadelphia. I will promptly notify you of the location once it has been arranged.

Please call me once you have had time to review this and your other materials, so that we can discuss briefly the questions that you may be asked by counsel for the DRPA.

Very truly yours,

SPEAR, WILDERMAN, BORISH, ENDY
SPEAR AND RUNCKEL

CHARLES T. JOYCE

CTJ:maa
Enclosure

Expert Opinion

1. My name is Clyde W. Summers. I am Jefferson B. Fordham Professor Emeritus at the Law School of the University of Pennsylvania.

2. I have been teaching Labor Law for more than 50 years in the law school at the University of Toledo, University of Buffalo, Yale University and the University of Pennsylvania. I have been teaching courses and seminars in public employee bargaining from time to time during the last twenty-five years.

3. I was an alternate member of the Connecticut Labor Relations Board for four years and on the panel of arbitrators for the Connecticut State Mediation Board for six years.

4. I have been engaged in grievance arbitration for more than 45 years, and in public employee fact-finding and interest arbitration for approximately 30 years. I have served as arbitrator in police and fire interest arbitration disputes in Connecticut, Rhode Island, Massachusetts, and Pennsylvania.

5. I have been asked by Charles T. Joyce, attorney for the Plaintiff in the Fraternal Order of Police, Penn-Jersey Lodge 30 v. The Delaware River Port Authority, to give my expert opinion on the extent to which the New Jersey and Pennsylvania laws relating to collective bargaining by police and settlement of disputes between unions of police officers and public agencies are parallel or substantially similar.

6. I have been provided the following documents by Mr. Joyce and have studied them. My opinion is based on those documents, what I know about public employee bargaining generally and about unionization and collective bargaining of police in particular.

a. 43 P. S. Sec. 217.1-7, the Pennsylvania Act on Collective Bargaining by Policemen or Firemen, commonly known as Pennsylvania Act 111..

b. New Jersey Public Employment Relations Commission, Mediation, Fact Finding and Arbitration Rules, as revised February 3, 1997.

c. N. J. 34:13A-13B, the New Jersey Employer-Employee Relations Act.

d. Opinion of Superior Court of New Jersey, Appellate Division in International Union of Operating Engineers, Local 68, AFL-CIO et al. v. Delaware River And Bay Authority, August 2, 1995.

e. Opinion of Supreme Court of New Jersey in International Union of Operating Engineers, Local 68, AFL-CIO, et al. V. The Delaware River And Bay Authority, February 11, 1997.

f. Transcript of Hearing in FOP Lodge 30, et al. v. Delaware River Port Authority, in the Superior Court of New Jersey Law Division, Camden County, December 20, 1996.

g. Brief on Behalf of Plaintiffs in Fraternal Order of Police, Penn-Jersey Lodge 30 and Joseph Vera v. The Delaware River Port Authority, and attached Exhibits, December 10, 1996.

7. In my opinion, the fundamental elements to be examined in the measuring the similarity of the laws of two states concerning collective bargaining by police are the following:

a. The right of police officers to form and join unions.

b. Exclusive representation for purposes of collective bargaining by the majority union.

c. The duty of the union and employer to bargain in good faith concerning terms and conditions of employment.

d. The scope of subjects on which the parties are required to bargain.

e. The method of resolving impasses reached in bargaining; the choice between giving the employer final authority, allowing the union to strike, or requiring the parties to submit the dispute to arbitration.

f. The availability of review of the arbitration award.

These are the basic issues faced by the legislature in drafting a statute or by the court in cases which come before it. If the law in two states are parallel on these issues, the operation and impact of the law will be substantially the same.

8. Both New Jersey and Pennsylvania recognize the right of police officers to join unions and bargain collectively.

In New Jersey, under the Employer-Employee Relations Act, public employees, police are included in the definition of "employee" (34:13A-3(d)) and public employees are expressly guaranteed the "right, freely and without fear of penalty or reprisal to form; join and assist any employee organization "with the only limitation on police being that they cannot join an employee organization which admits employees other than police. (34:13A-5.3)

In Pennsylvania, Act 111, labor organizations representing policemen and firemen are given the right to bargain collectively. This, by implication, guarantees them the same right to form and join unions enjoyed by other public employees.

9. In both states, the organization selected by the majority of employees is the exclusive representative of all employees in the bargaining unit. N.J. 34:13A-5.3, 43 P.S. Section 217.1.

10. In both states, the statute expressly imposes a duty to bargain in good faith and to enter into written agreements. N.J. 34:13A-5.3, 43 P.S. Section 217.1. In both states, the scope of bargaining is stated in broad terms. In New Jersey the scope is described as

"with respect to grievances, disciplinary disputes and other terms and conditions of employment N.J. 34:13A-5.3. In Pennsylvania the statutory words are "terms and conditions of employment, including compensation, hours, working conditions, retirement, pensions and other benefits". The legal effect of the two provisions is substantially the same.

11. Both states have chosen the policy of prohibiting strikes and requiring the parties to submit to binding arbitration by a neutral arbitrator.

The New Jersey statute provides that whenever the parties reach an impasse, the Public Employment Relations Commission may, upon request of either party on its own motion assign a mediator. If this fails, the Commission may, upon the request of either party invoke fact finding with non-binding recommendations. If the impasse continues beyond a time prescribed by the Commission, the parties are to mutually agree on a terminal procedure to provide finality. The parties may choose conventional arbitration or one of various forms of last offer arbitration. If the parties fail to agree on a form of terminal arbitration, then the dispute shall be submitted to conventional arbitration. Arbitrators are drawn from a panel of arbitrators named by the Commission. If the parties cannot agree on a selection from the panel, the Commission selects one by lot. N.J. 34:13A-16.

The Pennsylvania statute has no express provisions in the statute for mediation or fact finding. Mediation by the state agency, however, is in fact available. The statute does not expressly provide for the parties choosing some form of last offer arbitration, but there is nothing in the statute limiting the parties in how they can resolve their dispute

and they can, by mutual agreement, use last offer arbitration. The ultimate resort in Pennsylvania, as in New Jersey, is by conventional arbitration. In Pennsylvania, the board of arbitration is composed of three persons, one chosen by the employer, one by the union, and the third chosen by those two. If they cannot agree on a third, then the neutral arbitration is chosen by striking from list provided by the American Arbitration Association. 43 P.S. 217-4. In practice, the arbitrators chosen by the parties are not in fact neutral, but are chosen by the parties to speak for their interests. They become the ultimate advocates and the neutral arbitrator must make the ultimate decision.

The two states provide for certain time limits within which the various steps of beginning negotiations and arbitration. The time limits are not exactly the same, but both are keyed to the parties reaching a final settlement in time for adoption of the budget. These differences are details of no substantial consequence, and in any case the true limits are commonly waived by the parties.

The crucial element of the settlement process in both states is the same. The ultimate resort is to conventional arbitration by a neutral arbitrator.

12. The New Jersey statute requires the arbitrator to give "due weight" to eight listed factors. N.J. 34-13!-16(g) The Pennsylvania statute has no such provision. This difference is insignificant. The factors listed in the New Jersey statute are those which any competent arbitrator will weigh without any statutory direction. One of the purposes of an arbitration statute listing the factors to be weighed is to provide an express standard which will shield the arbitration from being invalidated as an unconstitutional delegation of power without any legislative standard. See State v. Traffic Telephone Workers

Federation of new Jersey, c 2 N.J. 335, 66A. 2d 616(1949) at 2 N.J. 352-6, 66A 2d 616-26.

13. New Jersey provides that the arbitrator's orders are subject to review by the Commission on the grounds the arbitrator failed to apply the criteria referred to above, but the statute provides no standard of review. The Pennsylvania statute provides no provision for judicial review, but judicial review is clearly available as to the jurisdiction of the arbitrator, the regularity of proceedings, excess of the arbitrators powers, and deprivation of constitutional rights. Fraternal Order of Police, Haas Memorial Lodge No 7 v. City of Erie, 668 A.2d 241 (1995).

14. In my opinion the New Jersey statute on collective bargaining by police and arbitration of disputes, is substantially the same as the Pennsylvania statute on that subject. Both articulate the same basic policy and proceed from the basic premise of providing collective bargaining for police with ultimate resort for resolving impasses to binding arbitration by neutral arbitrators. Both empower the majority organization as exclusive representative for the bargaining unit and define the bargainable subjects in equivalent broad terms. The procedures for resolving impasses are substantially parallel, with both culminating in conventional arbitration. The standards applied by the arbitrator in deciding disputed issues are operationally the same, and the arbitrator's award is subject to limited review. In terms of the responsibilities of the parties, the actual process of reaching agreement or settlement, and the substantive terms of the settlement, both will have the same practical impact. In substantive terms, it will be a matter of indifference

which procedure is followed, or if the inconsequential procedural differences are prescribed by the court, if that become necessary.

SPEAR, WILDERMAN, BORISH,
ENDY, SPEAR AND RUNCKEL
BY: BENJAMIN EISNER, ESQUIRE
CHARLES T. JOYCE, ESQUIRE
36 Tanner Streets, Second Floor
Haddonfield, New Jersey, 08033
(609) 428-5255
Attorneys for Plaintiffs, Fraternal Order of Police, Penn-Jersey, Lodge 30 and Joseph Vena

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30, and JOSEPH VENA Plaintiffs, v. **THE DELAWARE RIVER PORT AUTHORITY** Defendant.	SUPERIOR COURT OF NEW JERSEY CAMDEN COUNTY LAW DIVISION DOCKET NO. L-7547-96 CIVIL ACTION **RETURN DATE: JULY 11, 1997; 9:00 A.M.**

CERTIFICATION OF CLYDE W. SUMMERS

1. I am Clyde W. Summers. I am Jefferson B. Fordham Professor Emeritus at the Law School of the University of Pennsylvania.

2. I have been teaching Labor Law for more than 50 years in the law schools at the University of Toledo, University of Buffalo, Yale University and the University of Pennsylvania. I have been teaching courses and seminars in public employee bargaining from time to time during the last twenty-five years.

3. I was an alternate member of the Connecticut Labor Relations Board for four years and on the panel of arbitrators for the Connecticut State Mediation board for six years.

4. I have been engaged in grievance arbitration for more than 45 years, and in public employee fact-finding and interest arbitration for approximately 30 years. I have served as arbitrator in police and fire interest arbitration disputes in Connecticut, Rhode Island, Massachusetts, and Pennsylvania.

5. I have been asked by Charles T. Joyce, attorney for the Plaintiff in the *Fraternal Order of Police, Penn-Jersey Lodge 30 v. The Delaware River Port Authority*, to provide my expert opinion, based on my experience as an arbitrator, and as an academic in the field of labor law, on the prevalence and desirability of interest arbitration as a method for the resolution of impasses in collective bargaining between police officers and their employers, and upon the extent to which the New Jersey and Pennsylvania laws relating to collective bargaining by police and settlement of disputes between union of police officers and public agencies are parallel or substantially similar. The purpose of this certification is to assist the Court in understanding the evidence before it, the issues raised and potential resolution of those issues.

6. I have been provided the following documents by Mr. Joyce, and I have studied them. The opinions set forth in this certification are based on those documents, my experience and knowledge concerning public employee bargaining generally, and about unionization and collective bargaining respecting police in particular:

a. 43 P.S. § 217.1 *et. seq.*, the Pennsylvania Act on Collective Bargaining by Policemen or Firemen, commonly known as Pennsylvania "Act 111".

b. New Jersey Public Employment Relations Commission, Mediation, Fact Finding and Arbitration Rules, as revised February 3, 1997.

c. *N.J.S.A.* § 34:13A-13B, 1 *et seq*, the New Jersey Employer-Employee Relations act, including the New Jersey Police and Fire Interest Arbitration Reform Act, as amended in 1996, *N.J.S.A.* § 34:13A-14a.

d. Opinion of Superior Court of New Jersey, Appellate Division, in *International Union of Operating Engineers, Local 68, AFL-CIO, et al. v. The Delaware River and Bay Authority* (decided August 2, 1995).

e. Opinion of Supreme Court of New Jersey in *International Union of Operating Engineers, Local 68, AFL-CIO, et al. v. The Delaware River and Bay Authority*, 147 N.J. 433 (1997).

f. Transcript of Hearing in *FOP Lodge 30, et al. v. Delaware River Port Authority*, in the Superior Court of New Jersey, Law Division, Camden County, December 20, 1996.

g. Brief on Behalf of Plaintiffs in *Fraternal Order of Police, Penn-Jersey Lodge 30 and Joseph Vena v. The Delaware River Port Authority*, and attached Exhibits, filed December 10, 1996, and the Brief on Behalf of the Defendant, and attached Exhibits, filed October 7, 1996.

h. The Amended Complaint and Amended Answer of the Parties in *Fraternal Order of Police, Penn-Jersey Lodge 30 and Joseph Vena v. The Delaware River Port Authority*, Docket No. L-7547-96.

7. In my opinion and in my experience, interest arbitration is an appropriate and indeed desirable process by which to resolve impasses that may occur in collective bargaining between police officers and public employers. Interest arbitration provides for a peaceful, orderly process by which the parties may seek impartial review and adjudication of their positions, without the threat to public order that may result from a strike, or the potential damage to officer morale that may occur when officers have no right to strike or other means of redress after impasse is reached.

8. Thus, it is hardly surprising that many jurisdictions, including Pennsylvania and New Jersey, provide interest arbitration, rather than permitting police officer strikes, as the method to resolve impasses. Jurisdictions that provide for interest arbitration to resolve such impasses include: Alaska, Connecticut, Hawaii, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Washington, Wisconsin, Wyoming, the Virgin Islands, and the District of Columbia.

9. Turning to the question of whether New Jersey and Pennsylvania feature complementary policies regarding interest arbitration for police collective bargaining impasses, the fundamental elements to be examined in the measuring the similarity of the laws of two states concerning collective bargaining by police are, in my opinion, the following:

a. The right of police officers to form and join unions.

b. Exclusive representation for purposes of collective bargaining by the majority union.

c. The duty of the union and employer to bargain in good faith concerning terms and conditions of employment.

d. The scope of subjects on which the parties are required to bargain.

e. The method of resolving impasses reached in bargaining; the choice between giving the employer final authority, allowing the union to strike, or requiring the parties to submit the dispute to arbitration.

f. The availability of review of the arbitration award.

These are the basic issues faced by the legislature in drafting a statute or by the court in cases which come before it. If the law in two states are parallel on these issues, the operation and impact of the law will be substantially the same.

10. As this Court has already found, New Jersey and Pennsylvania have enacted substantially similar laws respecting the bargaining rights of police officers generally.

11. In New Jersey, under the Employer-Employee Relations Act, police are included in the definition of "employee" (*N.J.S.A.* § (34:13A-3(d)) and public employees are expressly guaranteed the "right, freely and without fear of penalty or reprisal to form; join and assist any employee organization" with the only limitation on police being that they cannot join any

employee organization which admits employees other than police. *N.J.S.A.* (34:13A-5.3).

In Pennsylvania, under Act 111 labor organizations representing policemen and firemen are given the right to bargain collectiveiy. This, by implication, guarantees them the same right to form and join unions enjoyed by other public employees.

12. In both states, the organization selected by the majority of employees is the exclusive representative of all employees in the bargaining union. *N.J.S.A.* 34:13A-5.3, 43 P.S. § 217.1.

13. In both states, the statute expressly imposes a duty to bargain or negotiate in good faith and to enter into written agreements. *N.J.S.A.* 34:13A-5.3, 43 P.S. § 217.1.

14. In both states, the scope of bargaining is stated in broad terms. In New Jersey the scope is described as "with respect to grievances, disciplinary disputes and other terms and conditions of employment. *N.J.S.A.* 34:13A-5.3. In Pennsylvania, the statutory words are "terms and conditions of employment, including compensation, hours, working conditions, retirement, pension and other benefits." the legal effect of the two provisions is substantially the same.

15. Thus, it is logically consistent that both states also have chosen what are in my opinion parallel and substantially similar policies of prohibiting police strikes and requiring the parties to submit to binding arbitration by a neutral arbitrator. The New Jersey statute provides

that whenever the parties reach an impasse, the Public Employment Relations Commission ("PERC") may, upon request of either party or on its own motion, assign a mediator. If this fails, the Commission may, upon the request of either party, invoke fact finding with non-binding recommendations. If the impasse continues beyond a time prescribed by the Commission, the parties are bound to mutually agree on a terminal procedure to provide finality. The parties may choose conventional arbitration or one of various forms of last offer arbitration. If the parties fail to agree on a form of terminal arbitration, then the dispute shall be submitted to conventional arbitration. Arbitrators are drawn from a panel of arbitrators named by the Commission. If the parties cannot agree on a selection from the panel, the Commission selects one by lot. *See N.J.S.A.* 34:13A-16.

16. Although the Pennsylvania Statute has no express provisions for mediation or fact finding, mediation by the state agency is in fact available. The statute does not expressly provide for the parties choosing some form of last offer arbitration, but there is nothing in the statute limiting the parties in how they can resolve their dispute and they can, by mutual agreement, use last offer arbitration. The ultimate resort in Pennsylvania, as in New Jersey, is by conventional arbitration.

17. The actual of process of interest arbitration in the two states is likewise parallel. In Pennsylvania, the board of arbitration is composed of three persons, one chosen by the employer, one by the union, and the third chosen by those two. If they cannot agree on a third, then the neutral arbitrator is chosen by striking from list provided by the American Arbitration

Association. 43 P.S. § 217-4. In New Jersey, the statute and the enabling regulations provide that the parties may opt for a triparte panel of arbitrators, and if they cannot agree on the identity of the neutral, he or she is selected by PERC. In practice, the arbitrators chosen by the parties are not in fact neutral, but are chosen by the parties to speak for their interests. They become the ultimate advocates and the neutral arbitrator must make the ultimate decision.

18. The two states provide for certain time limits within which the various steps of beginning negotiations and arbitration must take place. The time limits are not exactly the same, but both are keyed to the parties reaching a final settlement in time for adoption of the budget by the involved public agency. These differences are details of no substantial consequence, and in any case the true limits are commonly waived by the parties. What is of importance is that the crucial element of the settlement process in both states is the same: the ultimate resort is to conventional arbitration by a neutral arbitrator.

19. The New Jersey statute requires the arbitrator to give "due weight" to eight listed factors. *N.J.S.A.* 34-13A-16(g). The Pennsylvania statute has no such provision. This difference is insignificant. The factors listed in the New Jersey statute are those which any competent arbitrator will weigh without any statutory direction. One of the purposes of an arbitration statute listing the factors to be weighed is to provide an express standard which will shield the arbitration from being invalidated as an unconstitutional delegation of power without any legislative standard. See *State v. Traffic Telephone Workers Federation of New Jersey* 2 N.J. 335, 352-6, 66A.2d 616, 626 (1949).

20. New Jersey provides that the arbitrator's orders are subject to review by the Commission on the grounds that the arbitrator failed to apply the criteria referred to above, but the statute provides no standard of review. The Pennsylvania statue provides no provision for judicial review, but judicial review is clearly available as to the jurisdiction of the arbitrator, the regularity of proceedings, excess of the arbitrator's powers, and deprivation of constitutional rights. *Fraternal Order of Police, Haas Memorial Lodge No. 7 v. City of Erie*, 668 A.2d 241 (1995).

21. Thus, my opinion is that the New Jersey statute on collective bargaining by police and arbitration of disputes is substantially the same as the Pennsylvania statue on that subject. Both articulate the same basic policy and proceed from the basic premise of providing collective bargaining for police with ultimate resort for resolving impasses to binding arbitration by neutral arbitrators. Both empower the majority organization as exclusive representative for the bargaining unit and define the bargainable subjects in equivalent board terms. The procedures for resolving impasses are substantially parallel, with both culminating in conventional arbitration. The standards applied by the arbitrator in deciding disputed issues are operationally the same, and the arbitrator's award is subject to limited review. In terms of the responsibilities of the parties, the actual process of reaching agreement or settlement, and the substantive terms of the settlement, both will have the same practical impact of resolving the impasse peacefully, finally and fairly. In substantive terms, it will be a matter of indifference which procedure is followed, or if the inconsequential procedural differences are prescribed by the court, if that becomes necessary.

I certify that the statements made by me are true. I am aware that if any of the statements made by me are willfully false, I am subject to punishment.

CLYDE W. SUMMERS

Deborah A. Jozwiak

Notarial Seal
Deborah A. Jozwiak, Notary Public
Philadelphia, Philadelphia County
My Commission Expires May 9, 1998
Member, Pennsylvania Association of Notaries

CURRICULUM VITAE

CLYDE W. SUMMERS
Fordham Professor of Law
University of Pennsylvania

Address

Office: University of Pennsylvania
3400 Chestnut Street
Philadelphia, PA 19104
(215) 898-6867

Home: 753 N. 26th Street
Philadelphia, PA 19130
(215) 235-0476

Education

University of Illinois - B.S., 1939; J.D., 1942
Columbia University - L.L.M., 1946; J.S.D., 1952

Employment

University of Pennsylvania Law School, Fordham Professor of Law, 1975 -
Yale University Law School
Visiting Professor, 1956-57; Professor, 1957-65; Garver Professor 1965-1975
University of Minnesota, Visiting Professor 1974
University of Utah, Visiting Professor, Summer 1986
University of Puerto Rico, Visiting Professor, Summer, 1965; Spring 1990
University of Buffalo, College of Law, Assoc. Prof. 1949-54; Prof., 1954-56
N.Y.S.S. Industrial & Labor Relations School, Visiting Lecturer, 1953
University of Toledo, College of Law
Instr., 1942-44; Assist. Prof., 1944-45; Assoc. Prof. 1946-49

Honors and Awards

University Fellow, Columbia University, 1945-46
Guggenheim Fellow, 1955-56
Ford Faculty Fellow, 1963-64
German Marshall Fellowship, 1977-78, 1981
National Endowment of Humanities Fellowship, 1977-78
Fulbright Fellowship, 1984-85
Honorary Doctor of Laws, University of Leuven, Belgium, 1966
Honorary Doctor of Laws, University of Stockholm, 1978
Employee Advocate of the Year, National Employment Lawyers Association, 1991

Lectureships

Fifteenth Cleveland - Marshall Fund Scholar Lecture, 1979
James McCormick Mitchell Lecture, University of Buffalo, 1982
Hugo Sinzheimer Lecture, Frankfurt, Germany, 1983
David C. Baum Memorial Lecture, University of Illinois 1985
Roy Ray Lecture, Southern Methodist University (1987)
Kenneth M. Piper Lecture, Chicago-Kent College of Law (1990)

Teaching and Lectures Abroad

Faculty, Salzburg Seminar (Austria), Summer 1978
Faculty, Institute of Comparative Labor Law, University of Trieste, Italy, Summer, 1969 (American and British Labor Law)
Faculty, University of Witswatersrand, Johannesburg, South Africa, Summer, 1992
Lectures and Seminars, Frankfurt University (Germany), 1977, 1978, 1980, 1985 (American Labor and Comparative Labor Law)
Lectures and Seminars, University of Stockholm (Sweden), 1956, 1964, 1977, 1982, 1985 (American Labor Law, Comparative Labor Law, Seminar on Comparative Individual Rights)
Lectures and Seminars, University of Leuven (Belgium), 1963, 1966, 1977, 1985 (American Labor Law, Comparative Labor Law, Seminar on Comparative Legal Methods)
Other Lectures
University of Cologne (Germany), 1977;
University of Warsaw (Poland), 1978, and 1990
Uppsala University 1978, 1982, Lund University 1982, (Sweden)
Tokyo University, Sendai and Kobe Universities (Japan) 1984
University of Bologne (Italy) 1988
University of Witwatersrand, University of Natal, University of Capetown, (South Africa) 1989 and 1992
University of Lodz, University of Wroclaw, Jagiellonian University in Kracow, Warsaw University, (Poland) 1990
University of Western Cape and Stellenbosch University, 1992
University of Seoul (Korea) 1993

Professional and Scholarly Organizations and Positions

International Society of Comparative Labor Law and Social Legislation (Executive Committee, 1963-77, Chairman, United States Branch (1988)
American Bar Association (Secretary, Section on Labor Relations Law, 1961-63)
American Law Institute, 1980-1985
National Academy of Arbitrators, 1964

American Arbitration Association, Panel of Arbitrators, 1947-
American Association of University Professors (various local and national committees)

Public Positions

New York Governor's Commission on Improper Unions and Management Practices, Chairman, 1957-59
Connecticut Advisory Council on Employment Insurance, Chairman, 1961-67
Connecticut Board of Mediation and Arbitration, Alternate Member, 1965-68
Connecticut State Labor Relations Board, Alternate Member, 1968-71
Consultant to Department of Labor, Department of Housing Urban Development, Equal Employment Opportunities Commission, National Science Foundation, and various other governmental agencies or commissions

Other

Board of Directors, Association for Union Democracy, New York, NY
Board of Directors, Workers Defense League, New York, NY
Co-Editor, Comparative Labor Law Journal

BIBLIOGRAPHY

Clyde W. Summers
University of Pennsylvania Law School

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Public Policy and Collective Bargaining (Co-editor), Harper & Row, 1962.

The Employment Relation and the Law (Co-editor), Little, Brown, 1957.

Labor Relations and the Law (Co-editor), Little, Brown, 1953. Supplement, 1957.

Readings on Labor Law (Co-editor), Little, Brown, 1953.

Democracy in Labor Unions, American Civil Liberties Union, 1952.

Selected Recent Articles

"A Comparison of Collective Bargaining Systems--Shaping Plant Relations and the National Economy," 16 Comparative Labor Law Journal 467 (1995)

"Worker Dislocation: Who Bears the Burden? A Comparative Study of Social Values in Five Countries," 70 Notre Dame Law Review, 1033 (995)

Review: "Freedom of Association: A Study in Labour Law and Political Theory" by Sheldon Leader, 16 Comparative Labor Law Journal 263 (1995)

"The Trilogy And Its Offspring Revisited: It's A Contract, Stupid," 71 Wash. U.L.Q. 129 (1993)

"Employee Voice and Employer Choice: A Structured Exception to Section 8 (A)(2)," 69 Chi.Kent.L.Rev. 129 (1993)

"Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals," 141 U. of Pa. L.Rev. 457 (1992)

"The Adversarial Character of American Labor Relations--Its Causes and Consequences," in Memorial Volume for Ture Sigeman, University of Stockholm, 1993

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"Patterns of Dispute Resolution in Four Countries," 12 Comp.Lab. Law J. 165 (1991)

"Individual Rights in Arbitration," in Labor Arbitration: A Practical Guide for Advocates (M. Zimny, W. Dolson, C. Barreca, Eds. 1990)

"The Supreme Court and Industrial Democracy," in German and American Constitutional Law, (H. Wellenreuther, Ed. 1990)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAMDEN COUNTY
DOCKET NO. L-7547-96
A.D. # A-003344-9771

FRATERNAL ORDER OF POLICE OF NEW JERSEY, et al,

Plaintiff

vs.

DELAWARE RIVER PORT AUTHORITY,

Defendant

TRANSCRIPT
OF
MOTION

Place: Camden County Superior Court
Hall of Justice
101 South Fifth Street
Camden, New Jersey 08103

Date: October 20, 1997

BEFORE:

HON. M. ALLAN VOGELSON, J.S.C.

TRANSCRIPT REQUESTED BY:

JENNIFER J. PLATZKERE, ESQ. (Blank, Rome, Comisky & McCauley)

APPEARANCES:

BENJAMIN M. EISNER, ESQ., CHARLES JOYCE, ESQ.,
(Spear, Wilderman, Borish, Endy, Spear & Runckel)
Attorneys for the Plaintiffs

PETER A. GOLD, ESQ., SAMUEL M. FIRST, ESQ.,
(Blank, Rome, Comisky & McCauley)
Attorneys for the Defendants

Transcriber Janice Ladik
DIANA DOMAN TRANSCRIBING
P.O. Box 129
Gibbsboro, New Jersey 08026-0129
(609) 435-7172
(FAX) 435-7124

Audio Recorded
Recording Operator,

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THE COURT: All right, historically the record should reflect that this matter was filed by way of motion -- cross-motions for summary judgment. The matter was originally scheduled before Judge Supnick who did enter some previous, I want to say orders, but at least one order in the latter part of 1996. Judge Supnick is no longer assigned to this vicinage and prior to his departing in late August he referred the matter to me as the presiding Judge for reassignment and I had advised Counsel at that time that I would undertake the management of the matter pretrial. And that's what we're doing here today to deal with these motions. Gentlemen, may I have your appearances, please.

MR. EISNER: Your Honor, Benjamin Eisner for the plaintiffs, of Spear, Wilderman in Haddonfield, and I have with me Charles Joyce, my partner, a member of the bar of the Commonwealth of Pennsylvania whom the Court has admitted pro hac in this matter.

THE COURT: Thank you.

MR. JOYCE: Good afternoon, Your Honor.

THE COURT: Good afternoon, sir, welcome.

MR. GOLD: Your Honor, Peter Gold, Blank, Rome, Comisky & McCauley, Cherry Hill, and I have with me Sam First, also of my firm representing defendants, DRPA.

THE COURT: Thank you. Be seated please. Mr. Eisner, I think we'll hear from you first. Let me say

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parenthetically, gentlemen, that I appreciate the detail and the preparation that you both put -- obviously put into these motions. I won't say it was fast reading but it was clear reading.

MR. GOLD: Thank you, Your Honor.

MR. EISNER: Thank you, Your Honor. Mr. Joyce will speak on behalf of the plaintiffs.

THE COURT: All right.

MR. JOYCE: Thank you, Your Honor. Your Honor, ten months ago on this very date Judge Supnick ruled in this case that the labor law policies of New Jersey and Pennsylvania provided parallel and similar rights to public police officers to negotiate in good faith with their employers and that therefore these rights were applicable to the DRPA police officers, our clients.

Today we come before you to ask you to effectuate and implement those rights as the New Jersey Supreme Court has recently confirmed you're empowered to do. By ordering the parties to develop and utilize a procedure to resolve the impasse in their collective bargaining negotiations, a procedure that contains as a final terminal step binding interest arbitration.

We base our motion, Your Honor, on two grounds, neither of which I believe the DRPA can seriously dispute. First, as a matter of fact the parties are at an impasse in

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their negotiations, they have been at an impasse at least since August 21, 1996. On that day the DRPA's own commissioners passed a formal resolution in a meeting which stated, and I quote, "The DRPA and the FOP are now at impasse." Additionally, Your Honor --

THE COURT: Mr. Gold -- excuse me, Mr. Joyce, Mr. Gold, is there any dispute as to that statement?

MR. GOLD: Your Honor, there is no dispute as to the statement a resolution was, in fact, passed by the commissioners indicating that the parties are at impasse.

THE COURT: All right, thank you. Continue, Mr. Joyce.

MR. JOYCE: So, Your Honor, I don't think there can be any dispute here that the parties are deadlocked, as Professor Lester of Princeton University defines impasse, the parties are at impasse. Secondly, as a matter of law, Your Honor, once police officer bargain representatives and public employers are at impasse, both New Jersey and Pennsylvania the two creator States that created the DRPA, have a clear articulated public policy expressed in mutual legislation to resolve such impasses by requiring the parties to proceed to binding interest arbitration.

Thus, for police officers on both sides of the Delaware River, Your Honor, interest arbitration is nothing more nor less than the continuation and culmination of the duty

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and the right to bargain and to negotiate, a right that this Court, per Judge Supnick ten months ago, ruled the plaintiffs are already -- already entitled to. It is the final stage, the final step in the negotiation process and we ask Your Honor to order it at this time.

THE COURT: Mr. Joyce, what is it that police officers can't do as a part of the collective negotiating process?

MR. JOYCE: Well, Your Honor, by statute in both States police officers are prohibited from striking to protect the public health and safety. At the same time the Legislature has made clear that to prevent the creation of a despondent and dispirited police force, employers, like the DRPA, are prohibited from unilaterally imposing employment terms. Instead the parties have to proceed to interest arbitration where a neutral entity, selected by both parties, will decide what the terms and conditions of the disputed issues will be.

THE COURT: So your clients then take -- are before the Court requesting that, I think in your words, go to the logical next step?

MR. JOYCE: That's correct, Your Honor.

THE COURT: You simply want, if I understand you, and please correct me if I misstate, you're not asking at this juncture for this Court to create some type of negotiating configuration but rather to order that the parties go back and

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attempt to do it themselves in the first instance?

MR. JOYCE: That's correct, Your Honor. What I believe the Court should do at this stage is to order the parties to go back and develop a terminal procedure on their own. I remain somewhat of an optimist, even after all my years of battling the DRPA, and I think that the parties, if the Court orders, will go back and develop a procedure, or can go back and develop a procedure but the procedure has to include as a terminal step interest arbitration. And that's what we ask Your Honor to do.

THE COURT: Last offer, convention, either or both?

MR. JOYCE: Either or both, Your Honor, it's -- it's important to recognize that since 1996 both statutes in both States provide for conventional arbitration if the parties cannot agree on a -- on another means. So I think that the Court and the parties would be well served in just agreeing on conventional arbitration and we'd be perfectly willing to do that.

THE COURT: Very well. Mr. Gold?

MR. GOLD: Thank you, Your Honor. Just if I may respond to a few points that Mr. Joyce has raised and then I'd be very happy to answer Your Honor's questions as --

THE COURT: Please do.

MR. GOLD: -- presented them to me. First of all, I think it's important for us to express our view that there is

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no relevant law in this case on this particular issue. Nowhere before Judge Supnick, either in the pleadings or in any papers filed before His Honor, was there even a mention of binding interest arbitration being imposed on the DRPA or negotiations leading to as a condition that binding interest arbitration be imposed on the DRPA.

THE COURT: Well, let me -- let me for the moment interrupt and ask you this question. Assuming that that is correct --

MR. GOLD: Yes, Your Honor.

THE COURT: -- and I don't, I'm just saying for the purpose of my question, isn't the simple expedient simply an amendment to a pleading and we're right back to where we are?

MR. GOLD: Technically, Your Honor, Your Honor is correct, I believe Your Honor is correct. However, I just wanted to make absolutely certain that there's no mischaracterization of what was before Judge Supnick and what was before Just Supnick was not the issue of binding interest arbitration.

THE COURT: We agree, do we not, that he did find similar and parallel laws dealing with the question in New Jersey and Pennsylvania?

MR. GOLD: Only on -- only a very, very narrow issue, Your Honor, the issue which he found similar and parallel also was the issue of recognition of public sector employee unions

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and bargaining obligation, that is does -- does public sector -- does the DRPA have an obligation to recognize and bargain with FOP Lodge 30, that was a different and narrow issue.

THE COURT: And it was -- excuse me, for interrupting. It was from, and I'll use your characterization for the purpose of my comment, for that narrow issue that he so found and it was on that basis that you filed for an interlocutory appeal which was denied?

MR. GOLD: Correct, Your Honor.

THE COURT: All right, let's proceed from there.

MR. GOLD: In order -- in order to impose any law or any procedure or any protocol on the DRPA, we believe the law clearly establishes that the laws in both Pennsylvania and New Jersey have to be parallel and complimentary, that is the laws have to be parallel and complimentary. Not the policies, not the practices but the actual legislation has to be parallel and complimentary.

THE COURT: Do they have to be identical?

MR. GOLD: In the best of all worlds I'd say but I do not read the cases that way, Your Honor.

THE COURT: Neither do I so we agree on that point.

MR. GOLD: And when we look at these laws, Your Honor, they are not parallel and complimentary for the reasons which we set out in our briefs and I will not take the Court's

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time and reiterate them other than our conclusion is that they are vastly different for those reasons set out in the brief.

It's true, Your Honor, as Mr. Joyce indicates, that under certain circumstances public sector police employees in New Jersey and Pennsylvania do, in fact, have a right to binding arbitration, but, Your Honor, getting there is half the process. New Jersey takes a much more limited view of what that binding interest arbitration process is than does Pennsylvania.

THE COURT: How so?

MR. GOLD: Well, Your Honor, New Jersey, in our judgment, has much closer supervision as recognized in their polices and actual statutory enactments of requiring or permitting fact finding mediation if the parties so choose.

New Jersey has a list of arbitrators which it maintains, there's currently, I believe, only 22 arbitrators on that list that New Jersey believes are qualified to handle interest arbitrations.

New Jersey has set forth, I believe it's eight factors, Your Honor, that an arbitrator must consider by statute -- this is all by statute and regulation that an arbitrator must consider in rendering an opinion.

New Jersey has virtually a right of appeal to a public sector agency and then to the Courts, Pennsylvania has no right to appeal. In Pennsylvania, the issues presented

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to -- in Pennsylvania the arbitrator has to really review and decide any issue presented to him or her, in Pennsylvania that's not the case, in Pennsylvania an arbitrator may only decide issues of what we would call mandatory subjects of bargaining as determined by the standards of New Jersey which are standards which conclude that those issues do not interfere with the inherent managerial rights.

And there's a body of agency law, Your Honor, which has been created to determine which issues are arbitrable and which issues are not arbitrable. Those are just some of the differences between the New Jersey and Pennsylvania laws which we believe really makes it di -- a tremendous difference in the statutes.

THE COURT: Let me, if I may for a moment, Mr. Gold, go off on a different tack and --

MR. GOLD: Please, Your Honor.

THE COURT: -- kind of make a mental bookmark, if you will, and we'll come back. Historically, going back over 20 years the FO -- well, I don't know if it was the FOP at that time, let me correct myself, the police requested that they have an NLRB election. The commissioners at that time essentially said no because we're not subject to NLRB nor are we subject to PERC nor are we subject to 111.

However, notwithstanding that, and for a variety of reasons that we need not go into, they said, "Let's hold an

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election and if you have a unit and we've determined what that unit is and if the FOP is selected by the majority, they will be your bargaining agent," and in point of fact that's what occurred. And then over a succession of, oh, five, six, a succession of 20 years, contracts were negotiated and contracts were entered into.

Now, as I understand the document itself, the contract, the most recent one did not have by its terms, and I don't recall whether the earlier ones did or not, and certainly I'm sure it's in the papers, but it didn't have the standard language that said this contract will remain in full force until a new one is negotiated.

So, when it expired there was a request that negotiations be entered into and in point of fact that occurred. And that occurred until about a year ago, August of 1996, at which time the commissioners adopted, and I'm sure the FOP all concurred, that it was an impasse and I've been given lengthy recitations of points of request, demands, if you will, that were first agreed to and then not agreed to. But, in any event, in August of last year we're at an impasse.

I recite all of this without reading it, although it's been very precisely set forth in your certification of propo -- of the facts. Doesn't that -- let's -- let me take your thesis and then ask a question.

As I understand it it's simply this, we never had,

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we, the Port Authority, never had an obligation to negotiate, there's no law that requires us to do so, however, and I'll characterize it if you'll permit me, in the interests of employee relations and to keep our employees feel as if they had some control over their destiny, for want of a better term, we did, in fact, voluntarily enter into first a recognition of their representative and then secondly over a period of some 20 years various contracts which were negotiated and agreed upon and executed by the parties.

But that was all voluntary and we have now decided that we can't agree any further, and clearly we can't agree on the items that have been presented to us for purposes of bargaining, negotiating, as the case may be. So, therefore, legally we did something we didn't have to do, therefore, we're not obligated to do it further and finally so that there will be work conditions in place we did adopt, subsequent to August of 1996, a variety of terms and conditions of employment which remains in place to the current date. Is that a 25 word or less synopsis of the Authority's position?

MR. GOLD: Excellent synopsis, Your Honor --

THE COURT: Okay. My question, sir, is this, aside from the similar and parallel, is there not some degree of, and for want of a judicial tag or a legal tag, estoppel, that, and by analogy I seem to recall some cases under the local public contracts law of New Jersey where our Courts have held even if

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items aren't required to be bid, once you undertake to use a formal procedure to do so you're required to comply just in an element of fairness.

And I don't mean to imply anything more than the question itself, Mr. Gold, but once you undertake a proceeding that is 20 years in duration, isn't there some usual and customary reliance that the party can rely upon that this is the manner in which it's going to be treated henceforth notwithstanding similar and parallel?

MR. GOLD: May I respond, Your Honor?

THE COURT: Please.

MR. GOLD: Your Honor, these negotiations -- I was not at the bargaining table so I cannot --

THE COURT: No, I Understand that and your --

MR. GOLD: -- represent --

THE COURT: -- both your briefs make it clear.

MR. JOYCE: I was there, Your Honor.

THE COURT: Okay, we won't hold that against you, Mr. Joyce.

MR. JOYCE: Thank you.

THE COURT: It is my understanding, Your Honor, this was not a situation where the DRPA threw up its hands and said, "Oh, we're not negotiating with you guys any more notwithstanding all our history," there was a lot of give and take. There are a lot of agreements on both sides to this

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deal, just that there are various issues, principally economic, which continue to separate the parties.

THE COURT: Thank you, because that's precisely my point.

MR. GOLD: And there was negotiation on those -- if I may continue, Your Honor --

THE COURT: Please, I'm sorry.

MR. GOLD: -- there was negotiation on those issues and there was back and forth on those issues, it just got to a point, however, where I guess in the decision of the commissioners, and they have charge of the Authority under its compact --

THE COURT: Sure.

MR. GOLD: -- they decided that they could not agree to the bargaining demands and wishes of the FOP and its employees. And, Your Honor, if I might further add, in our judgment -- in our judgment there is a vast difference between conditioning further negotiations on a mandatory requirement that it include interest arbitration as final outcome and further negotiations. The --

THE COURT: Well, that's -- that's an interesting dichotomy but let me just ask you one or two questions in that regard. And, again, gentlemen, I know what I read so that's the foundation of my question.

If there is a difference between further negotiations

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and interest arbitration, and clearly there is, the Authority adopts what the FOP already knows and that is that there is an impasse. But it doesn't stop there, it simply says, "Okay, we have -- now not only is there an impasse, now not only don't we think we can't meet your demands, but here's what you're going to live by," period.

Now, it occurs to me that, let's put aside the parallels and all of that good stuff for a minute, what do I draw from that if I'm the other side? What I draw from that is not only are we at an impasse but that the Authority has no intention of doing anything beyond that because they didn't say, "Let's sit down again, let's try and resolve this, let's go for a little give and take." They did two things, they declared an impasse and they imposed, is the only word that comes to mind, this is what it is.

Now, they colloquially referred to it as a contract but clearly it was not, what does the Court have to consider that there was anything further to do, and, number two, where do the -- where does the other party go now other than to quit, and I don't think anybody wants to do that.

MR. GOLD: Your Honor, if I may treat those in inverse --

THE COURT: Of course.

MR. GOLD: -- order if you'll permit me to do that. The DRPA has to comply with the legislative requirements of

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both Pennsylvania and New Jersey when they enact parallel legislation just as the Port of New York and New Jersey Authority has experienced, Your Honor, that Authority enacted with the support of the Legislatures of both New Jersey and New York what they call labor instruction, to handle a situation where there are disputes between any of its unions and itself.

And what that actually took, Your Honor, was the Authority itself, as well as the unions and management, actually went to the Legislatures of both New York and New Jersey and the Legislatures actually promulgated and enacted legislation which was signed into law to handle this kind of situation.

The other response, Your Honor, is that I could assume that there is nothing that would preclude the FOP from today, this minute, going to the DRPA commissioners or their labor committee, or however they negotiate, and saying, "DRPA, we can't live with this but we can live with this item."

THE COURT: Mr. Gold, let me, at the risk of presumptively interfering with you, I think they've already done that, it's under docket 74 -- 7547-96, that's what we're here about. If that's not an invitation to sit down and talk I can't think of a more express means of doing it.

MR. GOLD: The -- my response, Your Honor, is that heretofore their invitation to have formal discussions on this issue included the pre-condition of any discussion must have as

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a condition binding interest arbitration as a terminal position bef -- any discussions we have have to have that as included n the discussions, and they will not discuss, or have discussions with us on a formal basis unless we agree to that. And that's not acceptable, Your Honor, so --

THE COURT: Understood. All right. Anything further you want to add?

MR. GOLD: Your Honor, just one or two further points I would -- I would like to address. There's also a very serious question, just -- just putting aside the substantial and parallel complimentary issue, because we're very competent Your Honor's fully versed in that, there is a very substantial separation of powers and supremacy clause view of this case which we hold and actually presents itself very clearly in our judgment.

The compact, which is federal law which creates the DRPA, has certain charges to its commissioners and to itself and certain restrictions on the rights of New Jersey and Pennsylvania to diminish or interfere with the operations of the DRPA. It also has similarly stated in each legislation other limitations and requirements both on itself and on the two respective governments. It's a carefully crafted compact. One of the items in the compact is that the New Jersey Governor has veto power over the commissioner action, that --

THE COURT: I'm very familiar with that.

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MR. GOLD: -- and, as such, Your Honor, by imposing interest arbitration or even the obligation to sit and discuss interest arbitration, a person can assume that you're raising the ambi -- the outside third-party entering a judgment or order, imposing terms and conditions on the DRPA and, therefore, bypassing the commissioners and the New Jersey Governor's veto power under its compact, under its federally sanctioned compact.

THE COURT: Well, let's talk hypothetically for a moment, the -- let's assume in the worst of all worlds from your standpoint that that occurred, at some point once the commi -- once the arbitrator's decision was received it would be in the nature of an award. The award would then have to -- some action would have to be taken by the commissioners with respect to the award just as a matter of formality. And that would be reflected on the minutes of the Authority, and it's those minutes that the Governor would either veto or approve. Is my recollection of how they work across the street correct?

MR. GOLD: It is, Your Honor.

THE COURT: Okay.

MR. GOLD: Those minutes would be either approved or they would be vetoed but those minutes, to the extent that an arbitrator ordered a, for instance, increase in wage rates or imposed additional financial obligations on the DRPA, would ultimately have, or could have, an effect of increasing the

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DRPA's financial commitment in those areas.

THE COURT: Well, I have scrupulously avoided getting into any question on the merits, although they were the various terms of the different classifications of employees, the Hay -- Hay or Hay's report that was commissioned by the commissioner made certain recommendations and so forth. That's premature at this point, if at all, something that I wish to address, but I understand the comment and obviously anything that costs money is something that is going to have an effect on the purse strings of the employer, be it the DRPA or any other employer public or private. Anything else that you wish to comment on, Mr. Gold?

MR. GOLD: May I take a second to reflect on my notes, Your Honor?

THE COURT: Absolutely, take the time you need.

MR. JOYCE: Your Honor, while Mr. Gold is reflecting may I respond to some of the things he said?

THE COURT: No, let's give him a moment of solitude so he can -- and that's not tongue in cheek --

MR. GOLD: Thank you, Your Honor.

THE COURT: -- let's not interrupt him.

MR. GOLD: No, thank you, Your Honor, I do appreciate that. Nothing further at this time, Your Honor.

THE COURT: Thank you. Mr. Joyce.

MR. JOYCE: Thank you, Your Honor. Just very

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briefly, Your Honor, thank you for your indulgence. I just wanted to make one point about the argument Mr. Gold just made and then correct a mistake of fact that he I'm sure inadvertently made.

Your Honor, Mr. Gold's arguments with regard to the separation of powers issue and the fact that if you order us to go back and try to develop a procedure for interest arbitration it will violate the DRPA compact, those arguments were made already, Your Honor, in a New Jersey Supreme Court in the Bay Authority case, that is Justice Garibaldi's dissent, hook, line and sinker.

And unfortunately for the DRPA that only garnered one vote, six other Justices of the New Jersey Supreme Court roundly rejected that view and DRPA, as you know, Your Honor, has recently been before the United State Supreme Court and the United State Supreme Court has said, "We don't wish to review it or disturb it," so it's the law of the case here, it's the law that guides you and Mr. Gold's arguments cannot be made in light of what the Court said in DRPA.

Similarly what Mr. Gold says about the DRPA having to comply with legislative requirements, what's in legislation not what's in policies, that again is contrary to what DRPA says. DRPA specifically says you don't look to the words of the statutes themselves, you don't look to the mechanical application of the statutes, you look to see if there is a

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mutual public policy because the Delaware/New Jersey statutes on labor law are -- are much more different, I would say, than on the Pennsylvania/New Jersey statutes on labor law. But the Court had no problem in that case saying that they expressed a similar public policy.

And that's all we're saying to you today, Your Honor, we're not asking you to set the terms of employment for these police officers, we're not asking -- we're not asking you to guarantee what they're going to be, we're just asking for the right to put our contract proposals next to the DRPA's before a neutral entity selected by the parties, a right that every other New Jersey and Pennsylvania police officer has, that's all we're asking.

THE COURT: All right, thank you, gentlemen. It is this Court's firm belief that particularly in a situation such as this it is always in opposing parties' interests, best interests, if they can agree. And on the other hand while I -- the Court believes that judicial conservatism is the best road to follow at all times and that if there is changes to be made, those changes -- in the law, I mean, those changes are best undertaken by the appropriate legislative body.

However, having said that, neither does this Court shrink from a perceived omission in the statutory scheme. If there is a right there is a remedy and I believe in that just as firmly as well. I could recount for the record

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historically, and let's see, paragraphs six through 15 of the Authority's statement of facts which provides the Court and the reader with all of that which has gone before for the past 20 years.

I could make reference to the affidavit of Joseph Vena, I hope I'm pronouncing that correct, V-E-N-A, which beginning with paragraph 15 describes a litany of, according to him, seven or eight items of negotiation that were first agreed to and then withdraw, agreed to by the Authority and then withdrawn.

I could, as Mr. Joyce has, make specific and express reference to the local 68 decision, that's Butabear (phonetic), six -- seven or eights month old and is the prevailing law in the State of New Jersey and all of those things which certainly have a bearing on the Court's decision.

I'm going to, however, refrain from that and I'm going to tell you gentlemen that I am prepared to rule but I am not going to rule. But rather I am going to continue the matter to Monday, November 3rd at 1:30 and in the intervening two weeks I would encourage the parties to do two things voluntarily, if you can, and if you can't then on November 3rd at 1:30 I will rule on the record in open court.

And the two things that I would encourage you to do in the meantime is to sit down, have your respective negotiating teams see if you can come to an agreement, if you

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cannot then the second thing I would encourage you to do is to see if voluntarily, since you both know what it is the employees wish, to see if some manner of resolving the conflict between your positions can be accomplished. Understanding that either or both of these actions are voluntary, provide, and I'll characterize it, no precedent, other than it accomplishes, no more and no less.

There is a dispute, I am simply and plainly asking the parties to make one additional attempt to resolve your dispute voluntarily. If you cannot then I'll be here, I will rule and you can take it from there.

Now that's not a lot of time, in fact it's a little time, but I think it's enough time. Neither party needs to revisit or restudy, you all know, or you both know exactly where you are and you know in your own client's positions where you want to be.

I think a give and take would be a lot healthier than the Court imposing what it believes is the appropriate avenue to proceed down, but if I have to I certainly won't hesitate to do that.

So, without saying more, and I can appreciate that that's not what you wanted to hear today, but, once again, I will put a period at the end of the sentence by saying I am prepared to rule this minute and will do so on November 3rd if you don't report to me either before then or by then that the

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matter has been resolved one way or another, all right? We'll see you then and hopefully you'll have something encouraging to report. Thank you.

MR. GOLD: Thank you, Your Honor.

MR. JOYCE: Thank you very much, Your Honor.

* * * * *

CERTIFICATION

I, Janice Ladik, the assigned transcriber, do hereby certify that the foregoing transcript of proceedings in the Camden County Superior Court on October 20, 1997, Tape No. 16343L, Index No. from 308, to 1773, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate record of the proceedings.

Signature: Janice Ladik
JANICE LADIK/AOC#425
DIANA DOMAN TRANSCRIBING

Date: 11/14/97

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IN-3344-97T1

FILED
APPELLATE DIVISION

MAY 18 1998

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30, and JOSEPH VENA,	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003344-97T1 CIVIL ACTION
Respondents/Plaintiffs,	
v.	**ON APPEAL FROM A FINAL JUDGMENT ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, CAMDEN COUNTY GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**
DELAWARE RIVER PORT AUTHORITY,	
Appellant/Defendant.	SAT BELOW: HONORABLE M. ALLAN VOGELSON, P.J.S.C.

APPELLANT/DEFENDANT DELAWARE RIVER PORT AUTHORITY'S APPENDIX - VOLUME 3 OF 3

BLANK ROME COMISKY & McCAULEY LLP
A Pennsylvania LLP
PETER A. GOLD, ESQUIRE
Resident Partner
SAMUEL M. FIRST, ESQUIRE
Woodland Falls Corporate Park
210 Lake Drive East, Suite 200
Cherry Hill, New Jersey 08002
(609) 779-3600

Attorneys for Defendant/Appellant
Delaware River Port Authority

Dated: May 8, 1998

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CAMDEN COUNTY
DOCKET NO.: L-7547-96
A.D. # A-003344-97T1

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30 and JOSEPH VENA,

Plaintiffs,

vs.

THE DELAWARE RIVER PORT AUTHORITY,

Defendant.

TRANSCRIPT
OF
JUDGE'S RULING

Place: Camden County Superior Court
101 S. 5th Street
Camden, New Jersey 08103

Date: November 3, 1997

BEFORE:

HON. M. ALLAN VOGELSON, J.S.C.

TRANSCRIPT ORDERED BY:

JENNIFER PLATZKERE, ESQ. (Blank, Rome, Comisky & McCauley)

APPEARANCE:

BENJAMIN M. EISNER, ESQ., CHARLES T. JOYCE, ESQ.
(Spear, Wilderman, Borish, Endy, Spear & Runckel)
Attorneys for the Plaintiffs

PETER GOLD, ESQ., SAMUEL M. FIRST, ESQ.
(Blank, Rome, Comisky & McCauley)
Attorneys for the Defendants

Transcriber Janet Barbieri
DIANA DOMAN TRANSCRIBING
P.O. Box 129
Gibbsboro, New Jersey 08026-0129
(609) 435-7172
(FAX) 435-7124
Audio Recorded
Recording Operator: DiBartolomeo

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THE COURT

Ruling 3

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THE COURT: Good morning, folks. Be seated. Good morning. It's been a long day. Be seated, please.

MR. EISNER: Thank you, Your Honor.

MR. GOLD: Thank you, Your Honor.

THE COURT: All right. Counsel, for the record? They stole the table.

MR. GOLD: Your Honor, Peter Gold, for defendant Delaware River Port Authority, along with Mr. First, who's to my left.

THE COURT: All right.

MR. EISNER: Your Honor, Benjamin Eisner, for FOP Lodge 30, with Charles Joyce.

THE COURT: All right. Be seated, please. Gentlemen, when we were last here as we concluded for the day, I asked you -- or I told you that I was going to continue the matter to give the parties the opportunity to speak further and hopefully attempt to resolve it between themselves. I gather by virtue of your appearance here today that that was not successful, is that correct, Mr. Gold?

MR. JOYCE: Your Honor, if I might speak to that just briefly. We did on -- the day after Your Honor made that suggestion I did contact Mr. Gold. I sent Mr. Gold a letter suggesting we meet. Mr. Gold responded back to me several days later saying, okay, agreeing to meet. We did meet last Wednesday. We did have discussions, however as far as the

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plaintiff is concerned, Your Honor, we believe that we need a ruling from the Court to show us where we're going.

THE COURT: Mr. Gold?

MR. GOLD: I think, Your Honor, Mr. properly characterizes the comment that he -- he and his clients are seeking a ruling from the Court.

THE COURT: Very well. That's what you're going to get. In reviewing these papers, both the moving and the opposing papers, the Court notes that we are here on cross-motion, and I think inasmuch as this has already been visited by an Appellate tribunal the odds are it may again be visited by an Appellate tribunal, and far be it for me to provide them with less than what I perceive to be a complete record. So, I'm going to take some time to do that, and I want to assure you that it's not the charm of my voice that leads me to -- to do some reading.

The plaintiff, Fraternal Order of Police, Penn-Jersey Lodge 30, for short FOP Lodge 30 and Joseph Vena, have moved to enter an order for certain relief. And, in short, and I'll amplify in a moment, to negotiate an impasse resolution procedure featuring binding interests, arbitration and, if necessary, under Court supervision.

The respondent or defendant, Delaware River Port Authority, opposes that motion, and, likewise, files a cross-motion for summary judgment to dismiss the amended complaint.

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In the alternative, the Port Authority moves to strike the plaintiff's alleged expert testimony that has been introduced in support of the plaintiff's motion for summary judgment or in the alternative, and I'm quoting as I'm reading, "Continue the plaintiff's motion in order that the DRPA may submit additional affidavits, take discovery or submit its own expert testimony if required." Those -- or that is the relative relief sought by the parties.

In support of the motion the plaintiff submits the following Statement of Material Facts -- I should say Statement of Material Facts as it perceives the statement of parnicular -- I'm a little tongue-tied today, gentlemen. Forgive me -- the statement of its material facts which it perceives is without genuine issue. The Delaware River -- number one, the Delaware River Port Authority, here and after DRPA and FOP Lodge 30 are currently at impasse in negotiations over the terms and conditions of employment for DRPA police officers represented by FOP Lodge 30.

Under the terms of the DRPA compact, DRPA police officers are vested "with all the powers and all the immunities conferred by law and police officer or municipal police officers in the State of New Jersey and the Commonwealth of Pennsylvania." Citing NJSA:32 -- excuse me -- NJSA 32:4-6, 36 PA statutes annotated sections 3604.1 and .1A -- excuse me -- 3404.1A.

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In the United States 22 jurisdictions provide for interest arbitration to resolve impasses and negotiations between public employers and their police employees. The Court notes parenthetically that these positions were submitted back in either late June or early July. I don't know whether there's been any change in any of this, but the Court is quoting from the assertions of the parties, and in this case FOP Lodge 30.

Going on, if the parties -- excuse me -- those jurisdictions include Alaska, Connecticut, Hawaii, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Washington, Wisconsin, Wyoming, the Virgin Island, the District of Columbia -- excuse me -- and Columbia. Citing the certification of I believed it's Dr. Summers. Is it Doctor, Gentlemen?

MR. GOLD: Professor Summers, Your Honor.

THE COURT: Yes. Also, the motion Exhibit Three. Number four, both Pennsylvania and New Jersey have enacted statutes that provide for interest arbitration between public employers and municipal police officers when there is an impasse in negotiations over the terms and conditions of employment for such police officers. Citing New Jersey Statutes annotated 3:13A-14a et seq. Is that three or 34? I think there's a typographical.

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MR. GOLD: Your Honor, it should be 34:.

THE COURT: I thought so. 34:13A-14a et seq and 43 Pennsylvania statutes 217.1 et seq, colloquially referred to as Act 111 and the Summers certification. That's the basis for the assertion.

"In both Pennsylvania and New Jersey" -- this is paragraph five -- "Unless the parties can agree otherwise, a dispute resolution mechanism to resolve impasses and collective negotiations between police and public employers is conventional interest arbitration." Citing Summers' cert at paragraph 16.

Number six, the actual process of interest arbitration in the two states is as follows: "In Pennsylvania a Board of Arbitration is selected, composed of three persons, one chosen by the employer, one by the union and a third by the two parties. If the parties cannot agree on a third then the neutral arbitrator is chosen by striking from a list provided by the American Arbitration Association. In New Jersey the parties may opt for a tri-parte panel of arbitrators, and if they cannot agree on the identity of the neutral, he or she is selected by the Public Employment Relations Commission, otherwise known as PERC," Summers' certification at paragraph 17.

Paragraph seven: "Once selected, the arbitration panels in both New Jersey and Pennsylvania possess identical

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authority to conduct hearing, administer oaths, require attendance of witnesses, production of documents and to resolve the impasse by conventual arbitration." Citing 43 Pennsylvania 217.6 New Jersey NJAC 19:6-5.7d, referencing the Administrative Code.

Paragraph eight: "The New Jersey Interest Arbitration Statute requires the arbitrator to give 'due weight' to eight listed factors. Pennsylvania's Act 111 contains no such expressed provision, but as a practical matter this difference is insignificant as the factors listed in New Jersey are those which any competent arbitrator will weigh without any statutory direction." Citing Summers' certification of paragraph 19.

And, paragraph nine, which is the last paragraph, "Both states requires arbitrators to render written awards. In New Jersey judicial review of such rewards is -- awards is limited to determining only whether the arbitration panel failed to apply statutory criteria set out in the act, exceeded its powers committed and 'evident miscalculation of figures or mistake' or engage in arbitral misconduct or corruption." Citing NJSA 34:13A-16a and 2A:24-8 and 9.

"Pennsylvania similarly applies a 'narrow certiora ri' standard of judicial review to Act 111 arbitration awards, assessing only whether the arbitrator succeeded their jurisdiction or powers, whether the proceedings were contacted with 'due regularity' or whether the award constitutes a

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deprivation of Constitutional rights." Citing Washington arbitration case 46 PA 163 259 A Second at 437 a 1969 case and Summers' certification at paragraph 20.

Now, move onto the defendant, Delaware River Port Authority's responding Statement of Material Facts. And, the DRPA contends that there is a genuine issue of material fact with respect to the plaintiff's motion.

Paragraph one, as the Court -- and I'm reading, and each of these are in response or let's put it this way, meet the numerical equivalent of the paragraph referred to one through nine of plaintiff's statement. Number one is denied. The current status of the DRPA Lodge 30 negotiations presently is in dispute. Number two is denied. Paragraph two of plaintiff's statement of facts set forth a legal conclusion which is not a statement of fact for purposes of Rule 4:46-2B.

Number three is admitted. Only that -- or the admission goes only to that other jurisdictions have various forms of terminal proceedings to resolve impasses in certain public sector labor matters. It is specifically denied, however, that the procedures in these states apply to the employees of bi-state instrumentalities such as the DRPA.

Number four, it is admitted only that Pennsylvania and New Jersey have enacted statutes that in certain circumstances and under certain conditions provide for interest arbitration of certain disputes between domestic public

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employers and municipal police officers. It is denied that both these states have such statute applicable to police officers of bi-state instrumentality such as the DRPA. Moreover, there are substantial differences between the interest arbitration laws and polices of New Jersey and Pennsylvania as are set forth in the DRPA's brief. The statutes are law and speak for themselves.

In addition, it is specifically denied that Professor Summers is an expert in the area -- areas of New Jersey and Pennsylvania public sector labor laws.

Paragraph five is denied as stated. It is admitted only that in Pennsylvania and New Jersey a dispute resolution procedure includes statutory interest arbitration as a method of resolving certain disputes only.

Further, no Pennsylvania statute is applicable to bi-state instrumentality such as the DRPA and only one New Jersey, New York instrumentality was made expressly subject to New Jersey's statute. Moreover, there are substantial differences between the interest arbitration laws and policies of New Jersey and Pennsylvania as are set forth in the DRPA's brief.

In addition, it is specifically denied that Professor Summers is an expert in the areas of New Jersey and Pennsylvania public sector labor laws.

Number six denied as stated. Paragraph six of the Plaintiff's Statement of Material Facts set forth a legal

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conclusion which is not a statement of facts for purpose of 4:46-2b.

Moreover, the statement is a gross oversimplification of a complicated statutory mechanism. There are substantial differences between the interest arbitration laws and polices of New Jersey and Pennsylvania as are set forth in the DRPA's brief.

In addition, it is specifically denied, once again, that Summers is an expert in the areas of New Jersey and Pennsylvania public sector labor laws.

Number seven denied as stated, paragraph seven of the Plaintiff's Statement of Material Facts sets forth a legal conclusion which is not a statement of fact for purposes of Rule 4:46-2B. Arbitrators in New Jersey and Pennsylvania do not have additional authority -- identical -- excuse me -- authority to resolve an impasse. There are other substantial differences in the authority possessed by arbitrators in New Jersey and Pennsylvania as are set forth in detail in the DRPA's brief.

In addition, it is specifically denied that the Professor Summers is an expert in the area of New Jersey and Pennsylvania Public sector labor laws.

Number eight denied as stated. Paragraph eight of the Plaintiff's Statement of Material Facts sets forth a conclusion with respect to a legal process which is not a

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statement of fact for purposes of Rule 4:46-2b. There are no legal restrictions placed on an arbitrator in Pennsylvania to consider any factors specified in the New Jersey statute.

In addition, New Jersey limits the issues that may be submitted to arbitration, and the qualifications and selection of arbitrators is also materially different.

Moreover, there are substantial differences between the dispute resolution processes of New Jersey and Pennsylvania as are set forth in the DRPA's brief.

In addition, it is specifically denied that Professor Summers is an expert in the areas of New Jersey, Pennsylvania public sector labor laws.

Lastly, paragraph nine is denied as stated. Paragraph nine -- excuse me -- of Plaintiff's Statement of Material Facts sets forth a conclusion with respect to a legal process which is not a statement of fact for purposes of Rule 4:46-2b.

It is admitted that Plaintiff's Statement sets out some of the material differences on the issue of review of arbitration awards in New Jersey. The award is appealed to the PERC then to the Courts in Pennsylvania. There is no appeal to any agency or Courts permitted by the statute. Moreover, there are substantial differences between the dispute resolution processes of New Jersey and Pennsylvania and review of awards as are set forth in the DRPA's brief.

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In addition, it is specifically denied that Professor Summers is an expert in the areas of New Jersey, Pennsylvania sector labor laws.

Lastly, before I get into some findings is the response, and I'll characterize it as a response, by the plaintiff FOP Lodge 30, "Does hereby submit the following responding statement to defendant's Statement of Material Facts as to which the Delaware River Port Authority contends there's no genuine issue." One through 21, as these allegations merely -- are merely -- strike it again -- as these allegations are merely repeated verbatim from DRPA's previously filed Statement of Material Facts in support of its original motion for summary judgment filed October 7, 1996 and denied by this Court on December 20, 1996, plaintiffs rely upon and resubmit their responding statement to defendant DRPA's Statement of Material Facts filed December 10, 1996 and additionally state the following. And, I note for the record that this document that I'm reading from is in reply to the cross-motion.

As to paragraph 16, "Defendant DRPA's statement that it was under no legal duty or obligation to negotiate with FOP Lodge 30 for a successor CBA is denied as expressly found otherwise by this Court on December 20, 1996."

Paragraph 22, "It is admitted that plaintiff's amended complaint seeks court ordered mediation and/or a court order mandating that the parties return to the bargaining

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table.

Additionally, plaintiff's amended complaint seeks the Court to appoint a neutral entity to assist the parties in the negotiation process and to order any further relief as the Court deems necessary or as justice requires implicitly including the submission of a dispute to an impasse resolutely procedure that features interest arbitration as a terminal point."

Number 23 of the cross-motion is admitted. Number 24 is admitted in part and denied in part. It is admitted that plaintiffs have filed a motion for summary judgment seeking an order that parties develop an impasse resolution procedure containing interest arbitration as a terminal point.

It is denied that this requested relief has not been set forth in any pleading filed by the plaintiffs with the Court today.

I'm going to stop and just put this aside for a moment, and if I deem it necessary I will come back to it. I first turn to the issue of whether -- and, again, for the purpose of this motion Clyde W. Summers should be considered as an -- as an expert. Counsel and the Court are aware of the fact that not that long ago the New Jersey Supreme Court clarified, I'll use that word, as to the -- what are the standards of proof that this Court should consider in determining the admissibility of proofs submitted at the time

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of a motion for summary judgment.

The Brill case is one that's known to counsel and the Court, and at this juncture has clarified if not extended a many year -- many year old case in Judson versus People's Bank, also a case speaking to the desirability, if you will, of granting motions for summary judgment in appropriate cases.

The measure of what should or should not be received is, I am instructed by the Brill case, to be that which is similar to the standard of admissibility in a trial of the merits of the case in court.

So, in determining whether I should consider Professor Summers as an expert, it is appropriate in this Court's opinion to see what it is he had to say, and I've done that.

I note that his certification is 11 pages long. I note further that it has not been opposed on its merits. And notwithstanding the fact that the motions were filed in either late June or early July of this year, it appears that the original motion -- well, I'm going to say July of 1997, after Judge Supnick ruled in December of 1996 that notwithstanding that, there has been no opposing "expert" certification filed on behalf of the Delaware River Port Authority.

Professor Summers' expertise has been challenged by denial that he is not an expert, but there is no expert saying that Professor Summers is not an expert. And, while I have

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the greatest of respect for the parties and their counsel, I don't think that any of them qualify as an expert to make that statement. That is a conclusion that has no factual basis.

I could stop there, but I choose not to. I find that Professor Summers is an expert and a highly qualified expert, and I will read his certification. "I am, Clyde W. Summers. I am a Jefferson B. Fordham professor Emeritus at the law school of the University of Pennsylvania. I have been teaching labor law for more than 50 years in the law schools at the University of Toledo, University of Buffalo, Yale University and the University of Pennsylvania. I have been teaching courses and seminars and public employee bargaining from time to time during the last 25 years. I am an alternate member of the Connecticut Labor Relations Board for four years and on the panel of arbitrators for the Connecticut State Mediation Board for six years. I have been engaged in grievance arbitration for more than 45 years and in public employee fact finding and interest arbitration for approximately 30 years. I have served as an arbitrator in police and fire interest arbitration disputes in Connecticut, Rhode Island, Massachusetts and Pennsylvania.

I have been asked by Charles T. Joyce, attorney for the plaintiff, in the Fraternal Order of Police Penn-Jersey Lodge 30 versus the Delaware River Port Authority to provide my

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expert opinion based upon my experience as an arbitrator and as an academic in the field of labor law on the prevalence and desirability of interest arbitration as a method for the resolution of impasses and collective bargaining between police officers and their employers and upon the extent to which the New Jersey and Pennsylvania law is relating to collective bargaining by police and settlement of disputes between union of police officers and public agencies are parallel or substantially similar.

The purpose of this certification is to assist the Court in understanding the evidence before it, the issues raised and potential resolution of those issues.

I have been provided the following documents by Mr. Joyce. I have studied them. The opinions set forth in this certification are based on those documents, my experience and knowledge concerning public employee bargaining in general -- generally and about unitization and collective bargaining respecting police in particular."

Forty-three Pennsylvania Statute Section 217.1 et seq. the Pennsylvania Act on Collective Bargaining by Police or Firemen commonly known as Pennsylvania "Act 111," (b) the New Jersey Public Employee's Relations Commission Mediation, Fact Finding and Arbitration Rules as revised February 3rd, 1997; (c) New Jersey Statutes annotated 34:13A-13B 1 et seq the New Jersey Employer/Employees Relations Act, including the New

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Jersey Police and Fire Interest Arbitration Reform Act as amended in 1996, NJSA 34:13A-14a, opinion of the Superior Court of New Jersey Appellate Division titled -- my word -- International Union of Operating Engineers Local 60a -- 68 AFLCIO, et al versus the Delaware River and Bay Authority decided August 2, 1995, opinion of the Supreme Court of New Jersey in that same case reported at 147 New Jersey 433 1997 -- excuse me -- transcript of hearing in FOP Lodge 30, et al versus the DRPA in the Superior Court of New Jersey Law Division Camden County, December 20, 1996." Parenthetically for the record, that's the hearing which gave rise to Judge Supnick's order.

Brief on -- next document "Brief on behalf of Plaintiffs in Fraternal Order of Police, et cetera" -- this case -- "and attached exhibits filed December 10, 1996 and the brief on behalf of the defendant and attached exhibits filed October 7, 1996. Lastly, the amended complaint and amend answer of the parties in the case before the Court that we're here about today.

In my opinion and in my experience interest arbitration is an appropriate and, in deed, desirable process by which to resolve impasses that may occur in collective bargaining between police officers and public employee. Interest arbitration provides for a peaceful orderly process by which the parties may seek impartial review and adjudication of

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their position without the threat to public order that may result from a strike or the potential damage to officer morale that may occur when officers have no right to strike or other means of redress after impasse is reached.

Thus, it is hardly surprising that many jurisdictions including Pennsylvania and Judge provide interest arbitration rather than permitting police officer strikes as the method to resolve impasses. Jurisdictions that provide for interest arbitration to resolve such impasses include Alaska, Connecticut, Hawaii, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Washington, Wisconsin, Wyoming, the Virgin Islands and the District of Columbia.

Turning to the question of whether New Jersey and Pennsylvania feature complimentary policies regarding interest arbitration for police collective bargaining impasses the fundamental elements to be examined in the measure -- in measuring the similarity of the laws of two states concerning collective bargaining by police are in my opinion the following: (a) the right of police officers to form and join unions, (b) exclusive representation for purposes of collective bargaining by the majority union, (c) the duty of the union and the employer to bargain in good faith concerning terms and conditions of employments, (d) the scope of subjects on which

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the parties are required to bargain, (e) the method of resolving impasses reached in bargaining, the choice between giving the employer full authority, allowing the employ -- allowing the union to strike, requiring the parties to submit the dispute to arbitration, and, lastly, (f) the availability of review of the arbitration award.

These are the basic issues faced by the Legislature in drafting a statute or by the Court in cases which come before it. If the law in two states are parallel on these issues, the opinion and impact -- excuse me -- the operation and impact of the law will be substantially the same.

As this Court has already found, New Jersey and Pennsylvania have enacted substantially similar laws respecting the bargaining rights of police officers generally. The Court notes parenthetically that that was the finding in the order of Judge Supnick arising from the December 1966 motion hearing.

Going on, New Jersey under the Employer/Employee Relations Act police are included in the definition of employee. New Jersey Statutes annotated 34:13A-3d. And, public employees are expressly guaranteed the "right freely and without fear of penalty or reprisal to form, join and assist any employee organization" with the only limitation on police being that they cannot join in any employee organization which admits employees other than police. Citing 34:13A-5.3.

In Pennsylvania under Act 111 labor organizations

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representing policemen and firemen are given the right to bargain collectively. Thus, by implication -- this, by implication, guarantees them the same right to form and join unions enjoyed by other public employees.

In both states the statute expressly imposes a duty to bargain or negotiate in good faith and to enter into written agreements. Citing 34:13A-5.3 New Jersey 43 Pennsylvania at 217.1.

In both states the scope of bargaining is stated in both in broad terms. In New Jersey the scope is described as "with respect to grievances, disciplinary, disputes and other conditions of employment." Citing 34:13- -- A-5.3. In Pennsylvania statutory words are "terms and conditions of employment, including compensation, hours, working conditions, retirement pension and other benefits." The legal effect of the two provisions is substantially the same.

Thus, it is logically consistent that both states also have chosen what are in my opinion parallel and substantially similar policies of pr nibiting police strikes and requiring the parties to submit to binding arbitration by a neutral arbitrator.

The New Jersey Statute provides that whenever the parties reach an impasse Public Employ -- Employment Relations Commission or PERC may upon request of either party or on its own motion assign a mediator. If this fails the

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Commission may upon the request of either party invoke fact finding with non-binding recommendation. If the impasse continues beyond the time prescribed by the Commission, the parties are bound to mutually agree on a terminal procedure to provide finality.

The parties may chose conventional arbitration or one of various forms of last offer arbitration. If the parties fail to agree on a form of terminal arbitration then the dispute shall be submitted to conventional arbitration.

Arbitrators are drawn from a panel of arbitrator's named by the Commission. If the parties cannot agree on a selection from the panel, the Commission selects one by lot. C34:13A-16.

Under the Pennsylvania Statute -- strike that -- although the Pennsylvania Statute has no expressed provision for mediation or fact finding, mediation by the state agency is, in fact, available. The statute does not expressly provide for the parties choosing one form of last offer arbitration, but there is nothing in the statute limiting the state -- the parties in how they can resolve their dispute, and they can by mutual agreement use last offer arbitration, though ultimate resort in Pennsylvania as in New Jersey is by conventional arbitration.

The actual process of interest arbitration in the two states is likewise parallel. In Pennsylvania the Board of

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Arbitration is composed of three persons, one chosen by the employer, one by the union and the third chosen by those two. If they cannot agree on a third then a neutral arbitrator is chosen by striking from the list provided by the American Arbitration Association. Citing 43PS:217-4.

In New Jersey the statute and enabling regulations provide that the parties may opt for a tri-parte panel of arbitrators, and if they cannot agree on the identify of the neutral, he or she is selected by PERC.

In practice, the arbitrations chosen by the parties are not, in fact, neutral, but are chosen by the parties to speak for their interest. They become the ultimate advocates and the neutral arbitrator must make the ultimate decision.

Two states provide for certain time limits within which the various steps of beginning negotiations and arbitration must take place. The time limits are not exactly the same, but both are key to the parties reaching a final settlement in time for adoption of the budget by the involved state agent -- excuse me -- public agency. These differences are details of no substantial consequence. And in any case the true limits are commonly waived by the party.

What is of importance is that the crucial element of the settlement process in both states is the same. The ultimate resort is to the conventional -- is two conventional arbitrations by a neutral arbitrator. Excuse me.

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The New Jersey Statute requires the arbitrator to quote -- to give "due weight" to eight listed factors, 34:13A-16g. Pennsylvania Statute has no such provision. This difference is insignificant. The factors listed in New Jersey -- in the New Jersey Statute are those which any competent arbitrator will weigh without any statutory direction.

One of the purposes of an arbitration statute listing factors to be weighed is to provide an express standard which would shield the arbitration from being invalidated as an unconstitutional delegation of power without any legislative standard. See State versus Traffic Telephone Worker's Federation of New Jersey to New Jersey at 335, a 1949 case.

New Jersey provides that arbitrator's orders are subject to review by the Commission on the grounds that the arbitrator failed to apply the criteria referred to above, but the statute provides no standard of review.

The Pennsylvania Statute provides no provision for judicial review, but judicial review is clearly available as to the jurisdiction of the arbitrator, the regularity of proceedings, excess of the arbitrator's powers and depravation of constitutional rights. Citing Fraternal Order of Police Haas Memorial Lodge Seven versus the City of Erie 668 A.2d, 241, a 1995 case (sic).

Thus, in my opinion -- thus, my opinion is that the

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New Jersey Statute on collective bargaining by police and arbitration of disputes is substantially the same as the Pennsylvania Statute on that subject. Both articulate the same policy and proceed from the basic premise of providing collective bargaining for police with ultimate resort for resolving impasses to binding arbitration by neutral arbitrators. Both empower the majority organization as exclusive representative for the bargaining unit and define the bargaining -- bargainable subjects as in equiv -- equivalent broad terms. The procedures for resolving impasse are substantially parallel with both culminating in conventional arbitration.

The standards applied by the arbitrator in deciding disputed issues are operationally the same, and the arbitrator's award is subject to limited review. In terms of the responsibilities of the parties, the actual process of reaching agreement or settlement and the substantive terms of the settlement both will have the same practical impact of resolving the impasse peacefully, finally and fairly. In substantive terms, it will be a matter of indifference which procedure is followed or if the inconsequential procedural differences are prescribed by the Court, if that becomes necessary.

I certify that the statements made by me are true. I am aware that if any of the statements made by me are willfully

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false I am subject to punishment." It is signed by Clyde W. Summers.

The Court is then presented with the finding of Judge Supnick that the laws of New Jersey and Pennsylvania are parallel and complementary. That's the law of the case. But, even without that ruling, Professor Summers has set forth with great specificity and particularity, uncontradicted other than by a bare denial, that that same conclusion should be reached by the Court in his opinion for the reasons stated. I accept that opinion as having credibility and substance as if I were listening to the Professor in court from the stand. That then is a non-issue as we proceed, that is whether or not these laws exist and they are complementary and parallel.

The Port Authority argues that their position heretofore been gratuitous. I characterize it that way. It is not their statement. But they, in effect, say that historically Lodge -- strike that -- the officers sought a representative election. They asked to proceed to the NORB. That was rejected with the Authority citing the compact and saying that there was no jurisdiction in that agency, however they did agree -- they or it more accurately -- the Authority did agree that if a majority of the officers indicated a representative that that representative would be recognized, and they did and it did recognize the existing plaintiff.

I don't think, and I -- or more accurately I do find

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that the parties are at an impasse. Clearly, the FOP, plaintiff here, makes it abundantly clear that it's -- that that is their position. That's why they're here.

The DRPA in no less than a formally adopted resolution has heretofore declared an impasse. That is a matter of record and was conceded and admitted to by counsel when we last met before -- when we last met before. I don't recall the exact date. I believe it was three weeks ago.

(Pause)

THE COURT: Counsel, just bear with me for a moment, please.

(Pause)

THE COURT: I go back to a statement that is submitted in support of the defendant, Authority's, cross-motion, because I think that it very nicely, for want of a better word, puts the -- or creates the framework within which the Court is asked to consider this set of circumstances. And, rather than to provide broad generalities, I will once again read. Number one, "The DRPA is a United States congressionally approved bi-state public corporate instrumentality of New Jersey and Pennsylvania, two, pursuant to their grant of authority from congress, New Jersey and Pennsylvania each enacted legislation creating the DRPA and authorizing the DRPA to build bridges, establish connecting roads and regular the flow of ship and barge traffic in the Delaware River Port."

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The statutes cited are New Jersey 32:3-1 et seq and 36 Pennsylvania Statutes 3505 et seq. I won't refer to the specific sections. Those are the enabling statutes.

In 1957 both New Jersey and Pennsylvania enacted separate legislation which expressly authorized the DRPA to establish and maintain an independent police force to protect the DRPA property. Citing 32:4-6 36 PA 3504-1.

The DRPA continues to operate this independent police force to patrol its property, and currently employs approximately 75 officers.

On or about September 30, 1975 a representative of plaintiff FOP Lodge 30 sent a letter to the DRPA indicating that it had requested the National Labor Relations Board, NLRB, to conduct a representative election -- representation election in order to determine a majority representative for the DRPA police officers.

On October 3, 1975 DRPA responded to this letter advising the FOP Lodge 30 representative that the DRPA is "not subject to the jurisdiction of the NLRB or any state labor relations board or commission," but indicated it would voluntarily hold a representation election if an issue of representation was deemed to exist by the DRPA Board of Commissioners.

On or about October 16, 1975 the DRPA voluntarily chose to hold a representation election for its police officer.

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Citing an affidavit of Joy Fabre, Esquire, which is attached as Exhibit F to the defendant's brief in support of a cross-motion.

Two groups, FOP Lodge 30 and the Transport Worker's Union Local 234 sought to represent the interests of the DRPA police officers. By a vote of 45 to 39 the majority of DRPA police officers voted to have FOP Lodge 30 represent their interests.

The election was not conducted by nor substantially certified -- excuse me -- nor subsequently certified by the NLRB, the New Jersey Public Employment Relations Commission or the Pennsylvania Labor Relations Board.

Since the election of 1975, the DRPA has voluntarily entered into a series of successive contracts with FOP Lodge 30 setting terms and conditions of employment for the DRPA police officers who are otherwise at will employees.

None of the contracts every obligated the parties to adhere to the requirements of the National Labor Relations Act, the New Jersey Public Employer/Employees Relations Act, the Pennsylvania Public Employee Relations Act or the Pennsylvania Labor Relations Act.

The most recent agreement between the parties was effected from -- effective from December 11, 1992 through December 10, 1995. The parties mutually agreed to extend the terms of the 1992 agreement until August 20, 1996.

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On November 4, 1995, prior to the expiration of a 1992 agreement, the DRPA voluntarily opened negotiations with FOP Lodge 30 to discuss changes the DRPA intended to make to the terms and conditions of employment. The DRPA also received the positions of its employees through their FOP Lodge 30 representatives.

I might add parenthetically as to all of these statements citations to various affidavits are recited, and the Court notes that they have a basis for that citation and, therefore, it is accepted as being admissible statements -- excuse me -- having examined the various exhibits that are cited. Even though the DRPA was under no legal duty or obligation to negotiate with FOP Lodge 30 for a successor agreement, it continued to solicit proposals from and discuss those proposals with FOP Lodge 30 through August of 1966.

On August 20, 1966 the extension to the 1992 agreement expired without the parties having reached a successor agreement. The Court notes that this is November 3rd, 1997 as I read this.

On August 21, 1996 the DRPA submitted a resolution to its Board of Commissioners, its governing body, seeking authorization to implement certain changes to the terms and conditions of employment for the DRPA policy.

At the August 21, 1996 Board meeting the DRPA Board

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of Commissioners approved the resolution authorizing the implementation of changes to the terms and conditions of employment for the DRPA police officers and forwarded the meeting minutes to the Governor of New Jersey for approval.

On September 11, 1996 Governor Whitman's veto period for the DRPA August 21, 1996 meeting minutes expired at the end of the day without her taking action to veto the minutes.

As of the expiration of the veto period, the resolution authorizing implementation of changes to the terms and conditions of employment for the DRPA police officers went into effect.

Plaintiffs FOP Lodge 30 and Joseph Vena -- I hope I'm pronouncing that correctly -- V-E-N-A -- filed the present suit on August 20, 1996, one day before the DRPA Board of Commissioners even voted on the resolution authorizing implementation of changes to the terms and conditions of employment and 22 days before the expiration of Governor Whitman's veto period for the meeting minutes.

The plaintiff's amended complaint seeks court ordered mediation and/or a court order maintaining that the parties return to the bargaining table.

I think it's perhaps illuminating that I conclude the reading of this for purposes of the record. "Going on, there has been no discovery in this matter, and the discovery deadline does not close until September 27, 1997." The Court

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notes that the discovery deadline closed when we were last here and remains closed. Plaintiffs have filed a motion for summary judgment, seeking a court order terminal procedure including interest arbitration. This requested relief is not set forth in any pleading filed by the plaintiffs with the order to date. The Court finds that the pleadings are sufficient to raise the issue and request the prayer as made.

Going on. Summary judgment in favor of the DRPA on Count One of the plaintiff's amended complaint is appropriate for the reasons set forth in its brief including without limitation of prejudice that the labor laws of New Jersey and Pennsylvania are not substantially similar so as to be applicable to the DRPA. The DRPA's never consented to arbitration over its labor affairs. Such relief would violate the DRPA's federally approved enabling compact. Such relief would violate the separation of powers within both New Jersey and Pennsylvania, and such relief would be contrary to the legislative history of both labor statute.

That's an argument. It's a conclusion. The Court disagrees. I have already held as did Judge Supnick, and as based on the opinion of Professor Summers, uncontradicted, that there is similarity and complementary nature of the laws. I concur that the DRPA has not consented to arbitration per se. That's why we're here.

I disagree that it would violate the DRPA's federally

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approved enabling compact for reasons that I will state shortly. And, it's certainly not contrary to the legislative history of certain unspecified labor statutes.

Twenty-six paragraph, summary judgment in favor of the DRPA on Count Two of the plaintiff's amended complaint is appropriate for the reasons set forth in its brief, including without limitation that the DRPA is under no legal obligation to reach a successor agreement with the plaintiffs.

Moreover, the legal basis for Count Two as cited by plaintiffs arises exclusively out of federal and state labor law concepts which are not applicable to the DRPA.

Twenty-seven, summary judgment is similarly appropriate in Count Two, because the plaintiffs have not submitted any facts to the Court to demonstrate, only assuming such a legal theory applies that the DRPA violated its now expired contact.

Going forward. Discovery doesn't close until September 27th. Plaintiffs have offered Professor Clyde Summers as an expert. Professor Summers has offered a certification which is a legal not factual analysis of the laws of New Jersey and Pennsylvania as he interprets them.

Plaintiff's proffered expert is not an employee of a bi-state instrumentality, nor does have he -- nor does he have firsthand knowledge of the DRPA labor relations with the plaintiffs.

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Summers' certification does not comport with the requirements of Rule 1:6-6. The Court's response is that discovery is long since closed. Professor Summers has, as indicated previously, been accepted as an expert and his opinion considered without contradiction.

Additionally, DRPA says plaintiffs have relied substantially on the material of Summers in support of their motion for summary judgment that the DRPA has not had an opportunity consistent with due process under 4:10-2d or 4:446-5a to take permitted discovery of Summers. I will rely on my earlier responses and not go further in responding.

Finally, the DRPA has not had a full fair opportunity consistent with 4:46-5a to submit its own expert report to assist the Court. The DRPA learned that plaintiff's proffered expert report for the first time upon service of plaintiff's motion for summary judgment utilizing an expert report in the instant motion for summary judgment deprives the DRPA of its right to submit its own expert report, because it is impossible to identify an expert, obtain a studied report and permit plaintiffs to discovery to which they are entitled in the short 18-day period allowed by the rules to respond to a motion of -- for summary judgment.

And, lastly, the fact affidavit of Samuel M. First which attached as Exhibit A to the defendant's brief is fully incorporated here.

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Very briefly, gentlemen, in response to the last paragraph, there has been more than ample time to respond to Professor Summers. I've not seen anything. There is nothing. Discovery is ended, has been over. I know of no request to extend that discovery period. Mr. Gold, you rise.

MR. GOLD: Yes, Your Honor. Thank you, Your Honor, for recognizing me. Your Honor, just as a matter of fact, it's our understanding to cut -- discovery is not cut off until November 27th, 1997 in this matter. There has been discovery to date of so many experts, Your Honor. And, further, we have sought, continually sought to depose Professor Summers, specifically for some of the reasons which you are stating to us, Your Honor. And, we just wanted to make that correction on the record if you would permit us to do so.

THE COURT: It's not necessary. I appreciate your comments. They are obviously incorporated into the record. My reply is that -- and I won't disagree that it's extended to November 27. I, frankly, am not aware of that, but I'll certainly accept your representation that it is.

I note, however, that today's November 3rd, that the motion has been pending since July, that if there has been difficulty in obtaining Professor Summers for deposition the Court is always available for a request and, if necessary, an order to compel a witness, particularly one relied upon so significantly as here in the form of Professor Summers, to

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appear and be deposed. I'll proceed.

Joseph Vena has provided a certification. It too is lengthy. And, as I indicated earlier, I don't know that all of it is necessary for the disposition, but I think some of it is.

(Pause)

THE COURT: In November -- and I'm quoting from his certification -- "In November 1995 the FOP presented the DRPA with a comprehensive bargaining proposal to among other things attempt to recognize and reward DRPA patrol officer's years of service in the calculation of their wage rates and to address the disparity between the respective duties of patrol officers and toll-takers and their respective rates of pay. To do this the union proposed a five-level salary structure whereby newly hired officers would receive 25 percent less than the wage rate -- base wage rate of pay, and officers with the greatest seniority would receive pay increments that over the life of the collective bargaining agreement will culminate in an annual salary of $49,300.

Further, the FOP proposed an increase in the annual clothing and shoe allowance allotted to patrol officers from 500 to $800 a year.

The DRPA refused to respond to the unions proposal and made no wage proposal at all until the party's last bargaining session on July 1, 1996 when it announced that it would grant no percentage wage increases in the first two years

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of the contract and would provide only a three percent increase in that in the last year, raising the patrol officer's salary to only $39,000 a year by the end of the collective bargaining agreement.

DRPA also told the union that it would impose a multi-tiered wage system of its own, cutting the pay of newly employed officers to $30,140 a year.

Further, it refused to increase the existing clothing and shoe allowance provided to by patrol officers. Between November 9, nineteen ninety" -- this has to be a typographical error. It says '97. I presume it's '96 or '95.

MR. GOLD: It's '95, Your Honor.

THE COURT: It's '95. "Between November 9, 1995" -- noting it says here '97 -- "the first day of negotiations with the DRPA and July 1, 1996 when the" --

(Tape change)

THE COURT: -- "when the DRPA refused to negotiate further with the FOP I witnessed many occasions in which the DRPA engaged in conduct that indicated a lack of good faith on its part with its negotiations with an FO -- with the FOP. This conduct included the following: on November 9, 1995 DRPA submitted to FOP a list of demands that included among other things the elimination of an existing contract provision entitling patrol officers indicated -- injured in the line of duty to receive payments by the DRPA for up to 26 weeks of

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their disability to compensate them for the difference between worker's compensation and their actual wages.

At that same session, however, DRPA withdrew this proposal. And, through the course of numerous subsequent bargaining meetings repeatedly reiterated it was not seeking to eliminate the worker's compensation make whole payments. However, on July 1, 1996 the DRPA reinstated this demand without explanation and announced that it would eliminate such make whole payments from any new labor contract.

January 4, 1996 the DRPA agreed to an FOP proposal that would allow authorized FOP representative to visit any DRPA facility for the purposes of processing, or investigating patrol officer grievance and to administer the collective bargaining agreement.

On or about July 1, 1996, however, the DRPA, without explanation, reneged on this agreement. January 19th, 1996 the DRPA agreed that it would not -- not subcontract certain jobs performed by the bargaining unit, mainly the radio dispatcher position and the building man position during the life of the collective bargaining agreement.

On April 29, 1996, however, the DRPA, without explanation, reneged on this agreement. On April 19, ninety -- 1996 the DRPA agreed to an FOP proposal that provided that patrol officers would receive time and one half for all work performed on the sixth day of a work week, and further set

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forth how overtime payments would be calculated.

On or about July 1, '96, however, the DRPA reneged on this agreement again without explanation. On April 19, ninety-nine -- 1996 the DRPA agreed to an FOP proposal that would allow police officers access to all personnel files maintained by the DRPA. On or about July 1, 1996, however, the DRPA, without explanation, reneged on this contract -- on this agreement -- excuse me.

On April 19th, 1996 the DRPA agreed to an FOP proposal that would guarantee patrol officers a minimum of four year's pay if they were ordered to appear in court on DRPA work-related business. On or about July 1, however, DRPA, without explanation, reneged on this agreement.

On July 24, 1996 the DRPA agreed to an FOP proposal which provided that selection for an F -- for a DRPA approved training programs or seminars be made on the basis of seniority if more than one patrol officer applied for such training. On June 28th, 1996 the DRPA, without explanation, reneged on this agreement.

Moving on, and selectively, on July 1, 1996 the DRPA announced that it would not negotiate further with the FOP, would seek authority from the DRPA Board of Commissioners at their August 19, 1996 meeting to impose a "labor agreement" -- quote/unquote "labor agreement", upon the FOP represented patrol officers that included among other things no wage

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increase until December 1997. No increase in the clothing and the shoe allowance, elimination of the worker's compensation make whole payments, elimination of the no layoff clause and creation of a new right to subcontract out bargaining unit work and transfer patrol officers.

Although the parties reached agreement on some terms and conditions of employment in their negotiations between November 1995 and July 1996, they remained deadlocked on the above-described terms, those that I read previously ending with the allegation that the authority reneged on certain agreements, as well as on a DRPA proposed elimination of an existing contract provision and protected -- that protected patrol officers from layoff, a DRPA proposed procedure to transfer police -- patrol officers from shift to shift and bridge to bridge and union proposals to regulate promotional opportunities and establish investigatory and disciplinary procedures.

September 1996 the DRPA retained Hay management consultants to review the Port Authority's pay rates for its employees. According to a letter from the DRPA that I received," meaning Mr. Vena, " relating to the Hay study, its purpose was to enable the DRPA to "develop a formal compensation program" which -- "ensures fairness and equity in salary compensation programs." In January 1997, along with all other DRPA employees, received a copy of the Hay studies

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findings.

(Pause)

THE COURT: I won't go through what the report said should be the results and its recommendations, but the authority did, if not in whole, certainly in part, adopt significant portions of the Hay study.

The record should be clear that it's not this Court's function to determine which of the positions of the parties as to the wages, hours, working conditions, et cetera, is appropriate and I specifically do not. The Court is asked, however, to decide and determine where we go from here. Are the police officers represented by the plaintiff essentially left with a determination by the Authority heretofore made by virtue of the Hay report and adoption of certain provisions of it and others without negotiation, essentially, take it or leave it or should this port -- should this Court direct that there be further negotiation that there be an individual or panel appointed to effectuate those negotiations? Again, does this Court have the power to do that in the face of existing law or is this Court left powerless because this is a congressionally bi-created or authorized bi-state compact that is not subject to anybody other than its own devices? I think not.

It is clear, and it is for that reason that I have taken the time to read for essentially the last 40 minutes the

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respective assertions of the parties.

Whether or not the Delaware River Port Authority, going back 20 -- almost 23 years could have taken the position then that it was under no obligation to recognize a representative for the officers, whether or -- whether the authority needed or could have rejected a proposal of terms or could have refused to enter into a contract is really a moot issue at this point, because by its own statement, and I certainly do accept it, it authorized an election. It agreed to and did recognize the winner of that election, the current plaintiff, as the representative of the union of the officers, and it did thereafter for over 20 years negotiate and execute contract after contract specifying wages, hours and working conditions.

Why did it do that? I, without any tongue in cheek or any -- even the remotest effort at sarcasm, state that it did that for very obvious reasons, at least obvious to this Court, that it wished to do what the statutes, as referred to by Professor Summers and known to this Court, have as their goal to maintain and continue good employer/employee regulations with its employees, in this case it's police officers as opposed to mandating an imposing without negotiation, without bargaining what it believed to be what those wages, working conditions and hours of employment were to be.

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So, it proceeded in good faith. It proceeded to continue a peaceful and harmonious and productive relationship with its employees. That's what it was all about, and that's what it was all about for over 20 years for multiple contracts for whatever reason, and it is not this Court's attempt or desire to look behind its position, it has now decided in its wisdom that it would no longer do that.

It has taken a firm position, and it pleads before this Court that it went as far as it could go. It's not willing to go any further. It's actions in retaining the Hay consultancy (sic) and adopting its recommendations and then not entering into a contract, but by resolution imposing those terms without negotiation or representation upon its police employees has broken what has been over a two-decade experience and apparently a rather harmonious experience.

Counsel, it's this court's opinion that this very purpose for the statutes in both states, clearly, the police officers of the Delaware River Port Authority have no right to strike. They come before the Court and basically ask this Court to direct their employer to sit down and talk to them in good faith.

I don't know what an Appellate panel is going to do if, in fact, this goes there, but the concept is very simple to me. Fair is fair. You don't play the rules of the game by 20 some years and then decide unilaterally and arbitrarily to say

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I'm not going to play the game anymore.

Now, you might be able to do that if I were to accept the defendant's position that there was nothing existing that required it or directed it to do so, but happily the Supreme Court of New Jersey has provided me with a vehicle. And, I'm not simply referring to Judge Supnick's order. That would be easy.

The International Union of Operating Engineers Local 68 AFL-CIO versus the Delaware River Bay and Authority (sic) argued in the Supreme Court of New Jersey September 10, 1996 and decided on February 11th, 1997 which held in part for purposes of determining whether a bi-state agency may be subject to complementary or parallel state legislation separate legislative acts are complementary or parallel if they are substantially similar in nature, and acts are substantially similar in nature if the creator states evidence some showing of agreement and laws involving and regulating bi-state agency.

I am not going to suggest that this case is on all fours with the matter before the Court, but it is sufficiently similar to convince me that it controls in this instance. There the Delaware River and Bay Authority was an agency or is an agency created by congressionally sanctioned interstate compact between New Jersey and Delaware, and is, therefore, subject to New Jersey labor laws regarding collective

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bargaining for public employees as labor laws of New Jersey and Delaware are complementary and parallel with regard to collective negotiations for public employees. That's the rule of law, and I believe it's obtains here.

Professor Summers has convinced me. Judge Supnick has ruled. That is nothing to the contrary and I so find. There are no facts that are in dispute. The only fact "that's in dispute" -- and it's not a fact, but rather a determination of law, is whether given the historical background of the labor relations between these parties and given in a setting of parallel and similar or complementary does the Delaware River Port Authority in its wisdom have the right to refuse to sit and negotiate and if an impasse exists where -- which I do find exists as we speak, as claimed by the plaintiff and as formally resolved by the Authority Board of Commissioners, can this Court order interest arbitration? I find that it can and it will.

Now, having said that -- and, gentlemen, I could go through your briefs and cited all of each of you, but you've been most patient. I might add that the briefs are very well written. They provide the Court with citations and arguments, but if you'll permit me, I think that what I've said puts it in a very finite and focused point, and that's the basis upon which I've made the decision.

I'm sure that if the matter goes up you'll use all of

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your argumentative powers to persuade them why and all of the reasons set forth in the briefs. I've read them. They're well-drawn. They're articulate. They cite a number of authorities, but I think that what I've just stated, at least in my mind, is where we are.

The laws of Pennsylvania and New Jersey provide for a procedure in just this type of case. I see no reason given that why Delaware River Port Authority should not do the same.

The police are the police. They can go into Pennsylvania. They can go into New Jersey and, in fact, do in patrolling and enforcing the laws of not only the authority in its regulations, but the laws of the respective states. They have been witnesses and continue to be witnesses in the municipal courts in Gloucester City, in the City of Camden and in any of the other municipalities where the bridges are as well as the Superior Court of New Jersey Law Division, Criminal in this very building, and I am sure the same holds true in the City of Philadelphia or whatever the jur -- appropriate jurisdiction is there.

They are subject to no different dangers. They enjoy none less the powers as the officers of Pennsylvania and New Jersey in their respective -- in their respective carrying out of those officer's duties.

Having said all of that, where do we go from here? The request has been made to have a mechanism set in place

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ultimately for interest arbitration if -- and directed and supervised by the Court if one cannot be agreed to or shall I say negotiated and arrived at by the parties.

It is always my hope, whether you want to call it judicial restraint or however you wish to characterize it, that the net result of what happens in a situation like this is always better if it can be determined by the parties without the Court's intervention, but I hasten to add that I will not hesitate to do that on short notice if I am convinced that what I'm about to say doesn't occur. And, the Court remains open to either side to return in such circumstance.

The Court's order will be that an interest or a mediator shall be selected by the parties from a list to be provided by the American Arbitration Association in accordance with that Agency's rules and regulations. And that individual will meet with the parties for the hoped for purpose of selecting a procedure and mechanism by which they can resume good faith negotiations and arrive at a mutually acceptable agreement.

I will extend this matter for 30 days until Wednesday, December 3rd at 1:30 p.m. with the hope that in the mean -- in those intervening 30 days that selection can be made, that individual selected, and the parties at least set up their initial meeting. I will ask counsel to mutually or jointly apprise the Court on or before December 30 as to the

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progress they're making and see what, if anything, this Court has to do further to implement its findings and ruling. Thank you, gentlemen.

(Tape off/tape on)

MR. GOLD: If I might, Your Honor? May we ask Your Honor to certify this aspect of Your Honor's ruling as a final ruling?

THE COURT: You may and I do.

MR. GOLD: Thank you, Your Honor Also, Your Honor, may we request the Court stay Your Honor's order?

THE COURT: I will not do that, Mr. Gold. If you wish a stay you can make application to the Appellate Division for that. I think that what I have directed and the reason for my refusal to do that is that I have merely directed that the parties meet with a neutral individual to try and agree.

I recognize, and I'll put the words in your mouth, that your purpose for asking for the stay is because the Court has taken -- or made a ruling that says to the authority that you have to proceed, the authority thinks it does not have to proceed unless it wishes to do so. I disagree, and that's my ruling.

Accordingly, if you wish a stay then you apply to the Appellate Division for that.

MR. GOLD: Thank you, Your Honor

MR. FIRST: Thank you, Your Honor.

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THE COURT: You may submit an order accordingly.

MR. GOLD: Your Honor?

THE COURT: Yes.

MR. GOLD: If I might, just one more -- may I impose upon the Court's time just two more moment?

THE COURT: Certainly.

MR. GOLD: Thank you, Your Honor. I assume just for the record, again, Your Honor, that since we had filed a motion to continue plaintiff's motion to permit us to identify an expert witness and to take --

THE COURT: That motion is denied, obviously, by the import of my ruling.

MR. GOLD: Thank you.

THE COURT: I don't think I need say any more. That's -- that's the end result. You properly point that out, and I did not voice that in my ruling.

MR. GOLD: And, just one or two other final points for purposes of the record, --

THE COURT: Certainly.

MR. GOLD: -- Your Honor. There has been discovery specifically on the issues raised in Mr. Vena's deposition.

THE COURT: Uh-huh.

MR. GOLD: And, again, the discovery cutoff date in this case is not and will not expire until November 27th, 1997, --

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THE COURT: All right.

MR. GOLD: -- and we have sougnt to obtain the -- as Your Honor has now found, the expert witness for purposes of our deposing that expert as we would be entitled to a trial expert, however that expert has not been provided to us for purposes of doing that and for purposes of incorporating that into the record before this Court.

THE COURT: All right.

MR. GOLD: Further, --

THE COURT: There presumably is a follow-up to that statement. That's not just for my edification.

MR. GOLD: No, Your Honor.

THE COURT: Do you seek some particular relief with respect to that in the interim?

MR. GOLD: Yes, Your Honor. What we particularly sought, Your Honor, was permission to -- was to obtain the expert witness, to depose the expert witness, to provide our own expert witness exactly for the purposes which the Court stated in the Court's opinion today, and then our motion for summary judgment where you only have 18 days to respond.

THE COURT: Well, but, Mr. Gold, without being argumentative, you had 18 days to respond back in July. Today is November 3rd. That's almost -- well, not almost -- it's almost six months ago.

Let me be brief. If you wish to depose the Professor

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and Counsel has not provided him voluntarily then you certainly know how to compel his attendance. Without directing you, I invite you to do that should you feel it appropriate. That doesn't change my ruling. With respect to a stay, if you make that application and it's granted then obviously unless and until the Appellate Court acts then it does just that. It stays everything. Although, a motion filed to be held perhaps in abeyance until the upper Court rules certainly would not be out of order either.

So, there are mechanics and means by which you can proceed to go forward with the case whether or not you appeal and whether or not my ruling is stayed. I certainly won't tell you how to practice law. You're very capable of doing that. I'll leave it with that.

MR. JOYCE: Your Honor, if I could just for the record respond to what Mr. Gold --

THE COURT: Certainly.

MR. JOYCE: -- said, because we are doing this for the record? The plaintiffs did give the defendants several dates in September when Mr. -- Professor Summers was available. Those dates were not acceptable to the defendants, and then we told the defendants Professor Summers would be available generally through the month of October. We invited the defendants to give us dates at which time they would be available. We never heard from the defendants --

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THE COURT: All right.

MR. JOYCE: -- on that application.

THE COURT: I'll just make a blanket statement without cross-replies, gentlemen. Where parties legitimately can't agree on a point that one or the other or both feel that there's an entitlement to bring the matter before the Court, and there's a disposition made. Somebody generally wins and somebody generally loses. But, this is a simple one.

A gentleman's affidavit has been provided that runs some 11 pages, which I have read verbatim, and it says a whole bunch of things. So that if the defendant believes that this individual should be placed under oath deposed, questioned at length about his qualifications, about his opinion, his conclusions, the factual basis for those conclusions that's very easy for me to understand. And, in the appropriate setting -- I haven't heard Mr. Joyce make any indication that that has -- excuse me -- or would be refused, and I frankly don't know how he could. So, I don't think I should say anything further.

If the premise here, as I understood it from the papers that I reviewed in your arguments earlier, was that this matter -- a determination here is premature because discovery is still outstanding, I disagree. It's clear before me.

I'm not -- please understand, Mr. Gold, I'm not being critical at all. I'm simply stating what I perceive to be the

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fact that there has been a number of months. There has been a vehicle by which an expert could have been provided, none have been, and I'm not questioning the wisdom or the competence behind that, not in the slightest, but -- and if there was a lack of cooperation, intentional or inadvertent, to provide the ability to take to task, if you will, and by cross-examine test Professor Summers' opinions then there was equally a vehicle to do that.

And, again, no criticism of any manner. It just didn't happen. And, therefore, I am confronted with a pair of motions that I can chose to continue and continue the process where I can say I don't see any reason to do that. It doesn't prejudice the defendant. It just says sit down and talk with somebody else.

I understand that the defendant's position is, Vogelson, your ruling is incorrect because we have no obligation to do that, and thus far we've chosen not to, and you don't have the authority to tell us to do that. I'm characterizing, but I think that's the nub of it. And, for all of the reasons you shouldn't in any event.

Well, I spent a lot of time, got a hoarse voice and board you to tears listening to everything I'm said, I'm sure, but that's the ruling, and I'll leave you with it till I'm told otherwise.

MR. GOLD: Your Honor, may I continue for just one

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more moment, --

THE COURT: Sure. Go ahead.

MR. GOLD: -- please? Thank you, Your Honor. The rule for summary judgment, Your Honor, is very specifically tailored to what is permitted to be filed and what is not permitted to be filed in support of that motion, as I understand that rule, Your Honor, and that that is why when this case was returnable on July 25th, 1997 we had requested by way of our papers and filed a motion to continue the matter to permit us precisely what is contemplated by that rule to take a deposition of Mr. Summers as well as to identify and locate our own expert witness, Your Honor, so as we may present that affidavit or certification to the Court for purposes of the Court's consideration. And that is why the period of time which elapsed from July 25th, 1997 I don't believe should be considered by the Court, respectfully so.

And, further, Your Honor, the discovery cutoff date has not yet occurred, and that is why -- one of the reasons why, Your Honor, I ask Your Honor if you would permit us if you would stay His order, the Court's order, permit us to perhaps even in this period of time to obtain, identify which we done. We have no identified an expert witness to -- we believe to contradict Mr. Summers' affidavit and to present that to the Court.

THE COURT: Are you finished, Mr. Gold?

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MR. GOLD: I am, Your Honor. I thank you.

THE COURT: Thank you. The discovery period ends a little over three weeks from today. This is the first that I've heard which you've just now said about an expert, and I have no reason to doubt you. I just think it's too little, too late. I ruled based upon what was before me. We were here three weeks ago. The only thing that was before me in writing is what I've alluded to and responded to today. I may be wrong, but I don't have any recollection of anything other than a request to continue so that an expert could be obtained.

You tell me today that one has been identified, and that may very well be, but we're here, we're now, and I've ruled. I see my role as deciding motions -- deciding matters based upon what's before me at a given time, and that's what I think I've done. Now, the Appellate Division judges may agree with you and they may say that it was premature. They may say that I should have extended the time to permit you now to do what the defendant has not done since July. Once again, this being early November.

And, again, I'm not being critical, and I'm not questioning motivation or result. I'm just stating what is and what has been. It just hasn't happened.

There is no issue of fact that I have found, and, therefore, there was no reason for me then or now, then being three weeks ago when I continued the matter and told the

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parties that I was prepared to be -- I was prepared then to rule, and I was, to sit down, try and resolve this, do whatever it is you had to do, but talk and see if you can go forward.

I'm not questioning anybody's motive. That's not my function here. What I've done is rule on a procedure and process to be undertaken and I'll not burden you any further, Mr. Gold. I thank you for your comments. They're received, spread upon the record. I know they're set forth with good intention and all integrity, but I've ruled, and I feel no reason to change my ruling. That will be the Court's order.

If the Appellate Division thinks otherwise, they will stay the ruling and you'll make your application to them. Thank you, gentlemen.

MR. GOLD: Just one question, Your Honor. Will you be preparing the order for the --

THE COURT: No. You will be preparing the order.

MR. GOLD: I assume under the five-day rule, Your Honor.

THE COURT: Absolutely.

MR. FIRST: Thank you, Your Honor.

MR. GOLD: Thank you, Your Honor.

THE COURT: All right.

MR. GOLD: Your Honor, --

THE COURT: Yes.

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MR. GOLD: -- may I just detain you one -- one more moment?

THE COURT: Certainly, Mr. Gold.

MR. GOLD: I apologize. Just for the purposes of the record, I assume and would have the Court now so state, that you're denying our cross-motion for --

THE COURT: That's correct.

MR. GOLD: -- summary judgment?

THE COURT: That's correct.

MR. GOLD: And, that is -- I just wanted to clarify that --

THE COURT: Okay.

MR. GOLD: -- for purposes of the record.

THE COURT: Is it okay, fellows? Can I go now?

MR. FIRST: Thank you, Your Honor, very much.

THE COURT: You're welcome.

MR. JOYCE: Thank you, Judge.

MR. GOLD: Thank you, Judge. Thank you very much.

(Tape off/tape on)

THE COURT: -- a copy to Mr. Joyce that simply states that I have denied your motion for summary judgment. I think that fixes the framework within which you can go to the Appellate Division. If that's of some assistance to you, feel free to present that --

MR. GOLD: Thank you.

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THE COURT: -- without waiting for Mr. Joyce to take action.

MR. GOLD: Thank you, Your Honor.

THE COURT: All right.

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CERTIFICATION

I, Janet Barbieri, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on 16481, index number from 0371 to end and tape number 16482, index number from 0001 to 1346, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.

Nov. 14, 1997
DATE

JANET BARBIERI AOC #131

LASER STOCK FORM FASINN
THE CORBY GROUP 1-800-256-6040

FRATERNAL ORDER OF POLICE,

PENN-JERSEY, LODGE 30 and
JOSEPH VENA

Plaintiffs

v.

DELAWARE RIVER PORT AUTHORITY

Defendant

SUPERIOR COURT OF NEW JERSEY
CAMDEN COUNTY
LAW DIVISION

DOCKET NO. L-7547-96

CIVIL ACTION

EXPERT OPINION
of
DAVID WEINSTEIN

BACKGROUND

This is the expert opinion of David Weinstein. My full resume is attached. At present, I am Professor of Law, Emeritus at Temple University School of Law. I began teaching there in September, 1977 and took early retirement effective December 31, 1995. While at Temple Law School, I taught courses in Labor Law, Public Employee Labor Relations and Collective Bargaining/Labor Arbitration. The latter courses covered public sector collective bargaining and interest arbitration and focused on Pennsylvania's Collective Bargaining by Policemen and Firemen Act (Act 111) and the state's Public Employe Relations Act (PERA).

Prior to coming to Temple, I practiced law in Connecticut and, then, worked for the State of Connecticut as Director of the Law Enforcement Assistance Program. From 1971 to 1975, I worked as a fact finder for the Connecticut State Board of Mediation and Arbitration. With the adoption of binding interest arbitration in Connecticut in 1975 and until the early 1990's, I worked as an interest arbitrator in municipal contract formation disputes. Police officers were included in the general municipal employee arbitration act and given my background in the law enforcement field, I served as interest arbitrator in many police interest arbitrations. Connecticut used issue-by-issue, final offer system.

After moving to Pennsylvania, I was selected to serve as arbitrator in a number of interest disputes under both Act 111 and the PERA (which provides for binding interest arbitration for certain correctional and court-related employees). Included, were arbitrations of the Philadelphia Police Department and the Pennsylvania State Police contracts.

INTRODUCTION

In preparing this expert report, I have reviewed the following: the pleadings and briefs of the parties; pronouncements of the court in this case; the current Pennsylvania and the current and prior New Jersey police arbitration and public employee collective bargaining statutes and applicable regulations; relevant New Jersey Public Employment Relations Commission (PERC), Pennsylvania Labor Relations Board (PLRB) and judicial decisions; some relevant literature; and the deposition and certification of Clyde Summers. After analyzing these materials, I conclude both that the police arbitration systems in Pennsylvania and New Jersey are substantially dissimilar and that there is no rational basis for constructing an arbitration system which would effectuate the disparate policies of the two states.

In reaching these conclusions, I began with an assessment of the problem presented in this case. Unlike some reported cases, what is at issue here is not the substantive rights of employees but rather the procedures to be followed in resolving contract formation disputes between the DRPA and the representative of its police employees. In fact, the applicable statutes and regulations (and supporting administrative and judicial decisions) do not in any respect establish wage, benefits or other terms and conditions of employment. Rather, they address process, and only process. Differences in process are, therefore, pivotal.

Further, in reaching my conclusions, I acted on the belief that the legislatures of Pennsylvania and New Jersey, when they adopted the processes embodied in their police arbitration acts, had in mind the attainment of specific objectives. That is to say, the procedures set forth in the statutes were intentionally enacted to carry out specific legislative policies. I conclude that these policies went beyond simply resolving police bargaining disputes through the

use of interest arbitration. Rather, each state adopted in own unique system of dispute resolution to attain its broader objectives and both the statutorily prescribed preliminary steps and arbitration methods adopted are essential to attainment of these goals.

More specifically, Pennsylvania adopted a system which evidenced little concern with either promoting collective bargaining to resolve police contract formation disputes or controlling the arbitration process to protect the public interest. New Jersey, by way of contrast, designed a system both to promote collective bargaining as the preferred method for resolving such disputes and to control tightly the arbitration process in the public interest. As a result, the two states have pursued incompatible objectives through incompatible means. In terms germane to this matter, the statutory schemes for police bargaining and arbitration are substantially dissimilar and neither complementary nor parallel.

COLLECTIVE BARGAINING AND ARBITRATION

To pinpoint their differences, it would be useful to consider, first, the collective bargaining aspects of the Pennsylvania and New Jersey statutes and then their arbitration systems.

Collective Bargaining

Act 111, the Pennsylvania Collective Bargaining by Policemen and Firemen Act, 43 P.S. Sec.217.1 et. seq. is neither a labor relations nor, despite its title, a traditional collective bargaining statute. Although it grants policemen the right to organize and bargain collectively and imposes a duty to try to settle disputes through good faith bargaining, it does not include the representation and unfair labor practice provisions typically found in labor statutes to effectuate those rights. This was not an oversight but rather an intentional omission.

Rather than attempting to actually require negotiations and, hence, to have to monitor the bargaining process through traditional unfair practice proceedings, the Pennsylvania legislature eliminated not only the duty to bargain in good faith but also the duty to bargain at all. In Section 217.4, it decreed that an impasse is deemed to occur if no settlement is reached within 30 days of commencement of bargaining. As a result, if a party chooses simply to wait out the 30 days they may do so with impunity and then proceed directly to arbitration, thereby eliminating any duty to bargain.

This unusual statutory arrangement coupled with the absence of any machinery to enforce the duty to bargain in good faith demonstrate that the legislature was unconcerned with collective bargaining being the preferred method of resolving contract formation disputes. In fact, a few years after the adoption of Act 111, the Pennsylvania General Assembly enacted the Public Employee Relations Act (PERA). 43 P.S. Sec. 1101.101 et. seq. which contained the usual representation and unfair practice provisions. Not only did it not grant these protections to police officers and fire fighters, it excluded them from coverage under the PERA. Thus, it left intact what is today simply an arbitration statute.

Indeed, to encourage arbitration, the Pennsylvania legislature imposed the requirement that the public employer alone bear the cost of transcripts and other expenses of the arbitration panel as well as the fees of the neutral arbitrator. Removal of these cost barriers eliminates a significant disincentive to arbitrate and reinforces the conclusion that it was more important to have public safety bargaining disputes definitively resolved than to promote their resolution through collective bargaining. Nor, as will be discussed later, was there any requirement or incentive to consider the public interest in the arbitration process except to the extent that final

and binding resolution of police bargaining disputes would promote it.

New Jersey, on the other hand, has gone down a different road. In addition to the customary representation and unfair practice sections protecting the duty and right to bargain, with respect to police officers, the legislature has gone further. It mandated, in the 1996 Police and Fire Public Interest Arbitration Reform Act, N.J. Stat Ann. Sec. 34:13A-14a et. seq., (referred to here after by section number) that the parties must actually meet at least three times. Sec 34:13A-16. While it may be argued that simply meeting is a meaningless gesture, there are two answers to that. First, the duty to bargain in good faith applies and getting the parties to the table may produce some results. After all, it is easy to avoid, legally, any serious attempt to negotiate a new contract but nonetheless considerable effort is exerted to define and enforce good faith bargaining obligations with the hope that sitting down and talking might do some good.

The recent amendments evidence a strong legislative policy in favor of negotiated settlements of police contract formation disputes. Unlike Pennsylvania which pays only lip service to actual collective bargaining, New Jersey has adopted the unique legislative requirement that the parties must sit down at least three times before they can invoke arbitration. This policy indicates that of legislative goals and procedures of the two states are at opposite poles.

The New Jersey statute differs from the one in Pennsylvania in another respect. The latter is silent on the use of mediation and fact finding while the former offers these options to the parties. Again, the differences in the legislation highlight the differences in the underlying legislative intent of the two states with respect to non-arbitrated solutions to police contract formation disputes.

Finally, the two jurisdictions also differ in another important respect. Because

Pennsylvania purposely omitted representation and unfair practice provisions from Act 111. representation disputes ended up in the courts. This the Pennsylvania Supreme Court found to be unworkable and in a remarkable decision decided that, to the extent it was compatible, the Pennsylvania Labor Relations Act (PLRA), 43 P.S. Sec 211.1 et seq., should be invoked to provide representation and unfair labor practice machinery. Notwithstanding the fact that this 1930's "little Wagner Act" by its terms excluded public employers from its reach, the state Supreme Court directed that it should be read, "in para materia" with Act 111. The net result was the PLRB assume jurisdiction over representation proceedings and proceeded to make police bargaining unit determinations.

Since the Act 111 covered "policemen" and contained no exclusions for high ranking officers and the PLRA was read to exclude only managers, the PLRB included all non-managers in a single unit. Attempts to establish separate units for higher ranking officers were rejected by it. City of Philadelphia Fire Department, 477 A.2d 47, 83 Pa. Cmwlth 274(1984). New Jersey, by statute, reached the same result that Pennsylvania reached more circuitously. It permits all but, "managerial executives," (and few other excluded groups not relevant here) to enjoy the fruits of collective bargaining. Sec.34:13A-3. The PERC, however, permits, in appropriate circumstances, higher ranking officers to bargain in separate units of their own choosing. Woodbridge Township, 23 NJPER par 28071. The FOP presently represents, here, and is seeking arbitration only on behalf of the 74 or so rank and file police officers of the DRPA.

The 40 or so corporals and above are not represented and might well be able, under New Jersey law, to remain outside the FOP's bargaining unit. In Pennsylvania, such officers are not entitled to separate representation even if they want it. Indeed, they, being "policemen", would be

subject to representation even if they voted against it. The two states have again pursued different objectives and adopted incompatible solutions to the problem of representation and bargaining by higher ranking police officers.

Two other differences are worthy of mention. First, the timetables for negotiation and arbitration are not the same. Under Act 111, negotiations and arbitration are tied to the budget cycle. Bargaining must begin at least six months before the start of the employer's fiscal year and the request for arbitration must be made at least 110 days before the start of the fiscal year. 43 P.S. Sec. 217.3. The statutory arbitration timetable (subject to modification only by mutual agreement) contemplates commencement of arbitration within 10 days of the selection of the neutral arbitrator and a final determination with 30 days after such selection. 43 P.S. Sec. 217.4. This tight timetable is intended to secure a final resolution prior to the beginning of the new fiscal year.

In New Jersey, the timetable is tied to the expiration of the parties' agreement. Negotiations must commence at least 120 prior to the expiration of such collective bargaining agreement and the statutorily mandated three meetings must take place during that period. Sec. 34:13A-16. The request for arbitration is conditioned on impasse or expiration of the collective bargaining agreement. Sec. 34:13A-16. Again, the statutory preferences for final on the one hand and collective bargaining on the other are revealed.

The final major statutory difference is in the determination of the negotiability of particular subjects of bargaining. Putting aside the differences in characterization of various subjects, the procedures are significantly different. In Pennsylvania, parties must test negotiability through traditional, cumbersome unfair labor practice proceedings. In New Jersey, the legislature has

established special scope of negotiation procedures administered by PERC designed to remove doubts about which subjects may be negotiated, thereby expediting the negotiating process. Sec. 34:13A-5.4d. These statutory differences are consistent with the contrasting philosophy, policy and procedures of the two states.

Arbitration

The arbitration provisions of the laws of the affected states also embody conflicting objectives and, consequently, quite different paths to the ultimate step. Plainly stated, Pennsylvania has adopted an almost entirely unregulated system which is, at heart, unconcerned in the arbitration process with protecting of the public interest. New Jersey , on the other hand, has entitled its recently amended statute, the Police and Fire Public Interest Arbitration Reform Act. Sec. 34:13A-14a. (Emphasis added.)

Lest there be any doubt about its intent, the New Jersey legislature substantially amended the introductory statement of public policy. Sec. 34:13A-14. Previously, it referred to realization, through arbitration, of the high morale of employees and the efficient operation of police departments. Now, it also announced an explicit public policy of ensuring that the dispute resolution procedures fairly and adequately recognize and give due consideration to the interests and welfare of the, "taxpaying public." Moreover, the legislature mandated that it is now public policy to ensure authority delegated to arbitrators be , "infused with strident safeguards," while still affording enough decision-making authority to, "protect the public good." Additionally, stated public policy is that in exercising their delegated authority arbitrators, "fully recognize and consider the public interest and the impact that their decisions have on the public welfare," as well

as pursuing labor peace and the general public interest and welfare.

The Pennsylvania General Assembly has never articulated any similar public policy. In fact, it seems once again to prefer finality to effectuation of any over-riding policy of protecting taxpayers, in particular, or the public interest, in general. Specifically, it failed to empower any administrative body to oversee the arbitration process and expressly stated that the determination of a majority of the board of arbitration shall be final and binding. To ensure finality, the General Assembly added that, "[N]o appeal shall be allowed to any court." Despite this strong language, the courts have reviewed arbitration decisions but have used a very limited, narrow "certiorari" review standard. International Association of Firefighters, Local v. City of Reading, 587 A.2d 873, 138 Pa. Cmwlth. 244 (1991). This review is limited questions concerning jurisdiction of the arbitrator, regularity of proceedings, excesses in the exercise of arbitral authority and constitutional issues. Under this standard, even errors of law afford no basis for overturning an award. FOP, Lodge 5 v. City of Philadelphia, 549 A.2d 1014, 120 Pa. Cmwlth. 610 (1988).

Further, there are no statutory criteria in Pennsylvania that an arbitrator must satisfy in fashioning of an award and given the limited judicial review which is available, relying or failing to rely on any criteria would not a recognized ground for judicial reversal. This, perhaps, accounts for, what in my experience, is the general absence of well articulated and reasoned opinions accompanying Act 111 arbitration awards. Generally, there is a brief introductory statement about the process followed in arriving at the award followed by the awarded language on each issue without any attempt to provide a meaningful rationale for the decisions reached. Without an opinion, judicial review is even more difficult and finality more assured.

In New Jersey, the statutes establish quite another regime. As the statutory statement of

policy indicates, there are to be, "stringent safeguards," on the exercise of delegated arbitral authority. These safeguards include: establishment by PERC of a Special Panel whose members alone may serve as arbitrators in police interest disputes, Sec. 34:13A-16e; mandatory continuing education of the panel members, Sec. 34:13A-16.1; a requirement that the decision of the arbitrator include an opinion as well as an award, Sec, 34:13A-16(e)(5); mandated adherence to statutory criteria, Sec.34:13A-16(g) ; and administrative as well as judicial review of the application of those criteria, Sec.34:13A-16f:5(a).

The statutory factors are:

- interests and welfare of he public
- comparison of wages, hours and conditions of employment
- overall compensation of the affected employees
- stipulations of the parties
- lawful authority of the employer
- financial impact on the governing unit, its residents and taxpayers
- cost of living
- continuity and stability of employment including seniority and other factors ordinarily considered in the determination of wages hours and conditions of employment

In addition to these legislative mandates, PERC under its delegated rule-making authority has:

- elaborated standards for the appointment, retention and removal of arbitrators from the Special Panel;
- required compliance by arbitrators with the objectives and principles of the generally accepted code of professional responsibility for arbitrators;

- mandated that the opinions accompanying the arbitrators award indicate which criteria are deemed relevant, an explanation why the others are not relevant, analysis of the evidence on each relevant factor and the reasons for the result reached;

- promulgated extensive guidelines on the application of the legislatively mandated comparability factor.

See, N.J.A.C. Sec. 19:16-5.6 through Sec. 19:16-5.14.

This comprehensive set of administrative regulations not only focuses the parties' and arbitrators' attention on what is germane but also provides the basis for administrative and judicial review of the arbitrator's decision. Unlike Pennsylvania which no administrative and only minimal judicial review, the highly regulated New Jersey system of police interest arbitration, permits PERC to modify, correct or vacate an arbitration decision for failure to apply the required criteria. The net result is a highly structured and administratively controlled arbitration system in one state where the emphasis is on achieving a correct result and a virtually unregulated system in the other where the emphasis is on finality.

CONCLUSION

Without belaboring the point, the police arbitration scheme in New Jersey is designed to promote collective bargaining and where that fails to control rigorously, in the public interest, the ensuing arbitration process. The Pennsylvania General Assembly, by way of sharp contrast, has pursued other objectives and constructed a system which is designed to achieve finality and which evidences scant interest in either negotiated settlements of collective bargaining disputes or protection of the public interest in the arbitration process.

In the leading case, International Union of Operating Engineers, Local 68 v. The Delaware River and Bay Authority, 147 N.J. 433, 688 A.2d 969 (1997), the Court set forth the test to be used in deciding whether or not states which are parties to an interstate compact could be deemed to have modified the compact without explicitly having done so. Such de facto amendment would be found only if the legislative enactments of the affected states were found to be complementary and parallel. The terms, "complementary" and "parallel" were not specifically defined but the Court did refer to substantial similarity as a key test.

In the context of that case, it probably could be said that the public employee collective bargaining statutes of New Jersey and Delaware met the test since they were pursuing a common goal through the same basic procedures. There was a common recognition of the fundamental rights to organize, freely select representatives for bargaining purposes and to bargain in good faith. Representation and unfair practice machinery for vindication of those rights is not likely to differ in significant ways. It was not inappropriate to find that the Delaware and New Jersey statutes, neither of which bound the employer to more that the obligation to bargain, were in major respects complementary and parallel. Further, the court was not like to have to make major policy choices in setting up a system for the DRBA's employees.

Here the situation is entirely different. Contrary to Professor's Summers conclusion that differences in matters such as timetables, arbitrator selection, statutory factors and the like are immaterial, perhaps because the parties can jointly waiver some of them, I conclude that all the differences discussed above are critical to the resolution of the real issue here.

The Court in the DRBA case focused its attention on the statutes of the two states and found they were not dissimilar. It did not attempt to determine if the parties in the two states

might informally be acting similarly. Not only is there no authoritative source of such information, it also is not germane to the question of whether or not neighboring state legislatures modified an interstate compact, de facto, by adopting complementary and parallel, not dissimilar, legislation.

Here, the legislation of New Jersey and Pennsylvania is neither parallel nor substantially similar. If parallel means moving along separate tracks with the substantially the same stops along the way then the police arbitration statutes, as indicated above, fail this test. If complementary means pursuing the same fundamental objectives, which go beyond arbitration of police contract formation disputes, then the states' policies and procedures are not complementary but as demonstrated above are quite dissimilar in their intent.

For all these reasons, it is my expert opinion that Pennsylvania's Act 111 and the New Jersey's Police and Fire Public Interest Arbitration Reform Act are neither complementary, parallel nor similar.

Respectfully submitted,

David Weinstein

Professor of Law, Emeritus

David Weinstein	4109 Apalogen Road 215/842-3909	Philadelphia, PA
Occupation	Arbitrator/Mediator in public and private sector labor and employment disputes.	
Experience	Professor Emeritus, Temple University School of Law as of 1/1/96. Professor of Law 1976-1995 teaching courses in collective bargaining and labor arbitration, labor law, public sector labor relations and employment law. Arbitrator/mediator since 1971. Volunteer mediator with the EEOC's Philadelphia office.	
Work History	Professor of Law, Temple Law School 1976-1995; Self-employed arbitrator and consultant, 1971-76; Deputy and Executive Director, State of Connecticut Law Enforcement Assistance Program, 1967-1971; Private practice of law 1962-67.	
Education	Yale University (B.A., 1959); Harvard Law School (J.D., 1962); University of Hartford (M.P.A., 1972).	
Professional Associations	National Acad. of Arbitrators; American Bar Assn.; IRRA; Int'l Foundation for Employee Benefit Plans.	
Professional Licenses	Admitted to Connecticut Bar (1962) and U.S. District Court (1967)	
Alternative Dispute Resolution Training	AAA 5-hour Advanced Arbitrator Training (Phi 8/93); AAA 2-day Basic Mediator Training (Phi 9/92); NYSE 1-day Training (5/95); EEOC Mediator Training (2/97); Enrolled in CEBS(Certified Employee Benefit Specialist Program; Instructor in AAA training programs.	
Publications	Co-authored books on legalized gambling and prepaid legal services and articles on labor law reform and other topics.	

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
CAMDEN COUNTY
DOCKET NO. L-7547-96
A.D. # A-003344-97T1

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30 AND JOSEPH VENA,

Plaintiffs,

vs.

DELAWARE RIVER PORT AUTHORITY,

Defendant.

TRANSCRIPT OF MOTION

Place: Camden County Hall of Justice
5th and Mickle Boulevard
Camden, New Jersey 08103

Date: January 23, 1998

BEFORE:

HON. M. ALLAN VOGELSON, J.S.C.

TRANSCRIPT ORDERED BY:

SAMUEL M. FIRST, ESQUIRE (Blank, Rome, Comisky & McCauley)

APPEARANCES:

CHARLES JOYCE, ESQUIRE
BENJAMIN EISNER, ESQUIRE
(Spear, Wildeman, Borish, Endy, Spear & Runckel)
Attorneys for the Plaintiff.

SAMUEL M. FIRST, ESQUIRE
PETER A. GOLD, ESQUIRE
(Blank, Rome, Comisky & McCauley)
Attorneys for the Defendant.

LASER STOCK FORM FMSRN
THE CORBY GROUP 1-800-555-5040

Transcribers - Rita F. Carelli
and Janet Barbieri
DIANA DOMAN TRANSCRIBING
P. O. Box 129
Gibbsboro, New Jersey 08026-129
(609) 435-7172
(609) 435-7124 (FAX)

Audio Recorded
Recording Operator, D. Bartolomeo

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THE COURT: All right. Gentlemen, without further ado, FOP verses DRPA. It's a motion for reconsideration. Counsel, your appearances, right to left -- to my right.

MR. FIRST: To your right, Your Honor. Sam First, from Blank, Rome, Comisky & McCauley, for defendant, DRPA.

THE COURT: Okay.

MR. GOLD: Peter Gold, Blank, Rome, Comisky & McCauley, DRPA.

THE COURT: Okay.

MR. JOYCE: Charles Joyce, Spear, Wildeman, Borish, Endy, Spear & Runckel, FOP Lodge 30.

MR. EISNER: Benjamin Eisner, also Spear, Wildeman, Your Honor.

THE COURT: All right. The motion is that of the DRPA. Who's going to speak, Mr. Gold?

MR. GOLD: I am, Your Honor.

THE COURT: Very well.

MR. GOLD: Thank you, Your Honor.

Your Honor, we're here today on the DRPA's motion pursuant to court rules for reconsideration of the Court's judgment of November 21st, 1997 and/or to alter or amend the judgment.

We come before the Court, seeking the reconsideration, principally based on three or four grounds, which I'll succinctly attempt to summarize. We also rely,

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Your Honor, on the papers which we submitted to the Court.

First, Your Honor, we interpret Your Honor's ruling in this case and the transcript of the proceedings of this case of November 3rd, 1997, as Your Honor making a determination that there was a prior law of this case as found by Judge Supnick.

We respectfully disagree with Your Honor's conclusion and urge the Court to reconsider that. It is, indeed, true that Judge Supnick did make a finding and conclusion in this matter which we have cited in our papers and have submitted the transcript to the Court as a certified transcript.

However, Your Honor, that was, as we understand it, he found that issue to be giving public employees a right to organize and designate representatives and also to negotiate in good faith. There was --

THE COURT: Excuse me one second, Mr. --

MR. GOLD: Yes, Your Honor.

(Brief interruption)

THE COURT: Thank you. Go ahead, Mr. Gold.

MR. GOLD: Thank you, Your Honor. There was nothing before Judge Supnick, Your Honor, on the issue of interest arbitration. As a matter of fact, it -- there was no papers before His Honor, Judge Supnick, at that time that he made that finding as well.

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Second, Your Honor, the defendants read the Court's opinion as relying also on an affidavit submitted by Professor Summers, who the Court deemed to be an expert witness in this case. And we urge the Court to re-examine the admission of that certification and reliance upon that certification as a basis for the Court's order for the following reasons.

First, Your Honor, we continue to believe that the issue of whether the laws of New Jersey and Pennsylvania are substantially similar on binding interest arbitration for police officers is a question of law.

Second, Your Honor, that --

THE COURT: Which leads to what conclusion?

MR. GOLD: That it is a Court determination as to whether, in fact, the laws of Pennsylvania and New Jersey are substantially similar and parallel. And in that circumstance, the courts of New Jersey, as I understand the rulings, have said that expert opinion is not admissible.

THE COURT: Well, then let me ask you a question, sir. If that is so, then why did you ask me for a continuance in order to obtain an expert, number one, before I ruled, not after I ruled?

And, number two, obviously, the coordinating question is, after I ruled utilizing that, I gather, you're now seeking to submit an expert opinion because I did rule the way I did. So, I won't ask a rhetorical question.

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But on page 54 of the November 3rd transcript:

"MR. GOLD: Please, thank you, Your Honor. The rules for summary judgment, Your Honor, are very specifically tailored to what is permitted to be filed and what is not permitted to be filed in support of the motion.

As I understand that rule, Your Honor, and that is why when this case was returnable on July 25th, 1997, we had requested, by way of our papers and filed a motion to continue the matter to permit us precisely what is contemplated by that rule, take the deposition of Mr. Summers, as well as to identify and locate our own expert witness, Your Honor, so as we may present that affidavit of certification to the Court for purposes of the Court's consideration."

MR. GOLD: Your Honor, the response to Your Honor's question about why we did that is, we have moved in the alternative, Your Honor. We had moved, as part of our papers on July 15th which we filed, basically several grounds.

One of the grounds was we did -- we did seek a judicial determination that it was an expert witness and an expert witness was not appropriate, based on the case law of New Jersey, as we understood it.

And we said, Your Honor, in those papers, as I recall them, that if, however, the Court determined that an expert witness was appropriate and the Court would rely on that expert in making a determination, that we were requesting

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leave of the Court; that is, relief from the summary judgment rules which says we had to file everything by July 15th, to go ahead, identify an expert, to get our expert report filed, depose their expert, use what we learned in the deposition of that expert to assist the Court in determining the value of that expert's opinion because at that point, the Court would have already ruled that expert opinion as appropriate.

We clearly ruled in the alternative, Your Honor, because we did not --

THE COURT: Okay. You've answered my question. Go ahead, please.

MR. GOLD: Thank you, Your Honor. So, Your Honor, I think that makes the next point that I was going to address that, at the time, we already had a motion pending on July 15th to do exactly that which we sought to do.

That is, to have a Court determination of whether an expert was appropriate and then if Your Honor found that an expert's testimony was appropriate, since the discovery period had not lapsed in this case during this entire period, we then wanted to offer up the expert's opinion for Your Honor's consideration.

THE COURT: Okay.

MR. GOLD: Also, Your Honor, in our papers which you filed as part of our response to plaintiff's motion for summary judgment and our cross motion for summary judgment, we

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included 30 pages of statutory differences between the Pennsylvania and New Jersey laws. And we set them out with a great deal of specificity.

And there was nothing, in our review of this Court's determination, findings of fact and conclusions of law which addressed any of those. We believe it was error for the Court not to have done that.

Your Honor also determined, for the most part, that the decision of the New Jersey Supreme Court in the DRPA case was somewhat persuasive in this case, although Your Honor recognized, in the transcript of the proceedings, that it was not on all fours with this case.

Principally, I assume, Your Honor, because that case dealt with the laws of Delaware and New Jersey. And also, Your Honor, that Court dealt with, again, the issue of whether employees had a right to be recognized and bargain. It had nothing to do with the issue of the -- of binding interest arbitration.

But to the extent Your Honor did view that case as controlling, and I think the transcript reflects that you did, Your Honor. I -- the transcript is also silent on an analysis of the standards set out in that case. And that case incorporated the standards set out in Eastern Paralyzed Veterans as I read that case, Your Honor.

And there were no findings by the Court whether

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factual or conclusions of law, Your Honor, as we read your determination, on what we believed was required by the Court on Eastern Paralyzed -- under Eastern Paralyzed Veterans Association, and that was a error of law not to have done so.

On that point, Your Honor, we also felt that you did not, and I think the record will confirm this, that Your Honor did not address or consider the arguments we presented on the issues of --

(Tape changed)

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MR. GOLD: -- because of the United State's Constit --

(Tape off/tape on).

CLERK: Okay. Thank you.

THE COURT: Let me understand the point that you're leading to, Mr. Gold. If I understand your argument then and now, because the Court's ruling might lead or require the Authority to expend additional funds, ultimately, that it does not now choose to expend, hypothetically if interest arbitration resulted in an award, that the Court is without power because the Authority is a bi-state agency created by act of congress and the legislatures of New Jersey and Pennsylvania, number one.

And, number two, further, that because the Governor of New Jersey has veto power over the minutes of the Authority, that that would create a direct conflict by virtue of me entering an order which the Governor could prima facie nullify or -- not nullify, but stop by virtue of that -- her, in this instance, Governor Whitman vetoing the minutes. Is that, essentially, your argument?

MR. GOLD: Well, our separation of powers argument, Your Honor, is principally as follows: it's twofold. Number one, Your Honor, that the Delaware River Port Authority Commissioners already voted I believe it was back in 1995 on the terms and conditions that would apply to certain of its

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police officers. That was taken at a meeting. I don't recall the exact date, Your Honor. I'm sure it's in the papers somewhere. That decision, Your Honor, the minutes were reflected. They were sent to the Executive Branch of Government, and the Executive made a conscious decision after reviewing those minutes not to veto that. That was an Executive Branch determination.

Second, Your Honor, if, in fact, Your Honor finds it necessary and does not reconsider his -- the Court's motion on this point and interest arbitration actually occurs, and interest arbitration results in the additional costs being incurred by the Delaware River Port Authority that is to have final and binding interest arbitration would mean I guess what it says, final and binding interest arbitration, not subject to anyone's review.

We have, in my judgment, Your Honor, set a situation up where the Governor's veto prerogative to review the activities has been nullified.

THE COURT: Let me ask you a hypothetical question, Mr. Gold. The Supreme Court of New Jersey -- I don't know exactly when -- six months ago, perhaps, perhaps more -- directed that a significant amount of money be expended by the Department of Education, be appropriated by the State Legislature and be expended by the Department of Education, Legislative and Executive. And that -- and then subsequently

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appointed an Appellate Division presiding judge to conduct hearings as to the application of those funds. Isn't that precisely the situation we have here? Mechanics may be a little different, but hasn't the Court ordered the Legislature and the Governor -- excuse me -- the Executive Branch to comply with that order?

MR. GOLD: There are two differences, as I understand it, at least two differences as I understand it, and I would respectfully urge the Court to consider. Number one: that -- as I understand that case, that was either the Robertson case or a subsidiary case to the Robinson case, a case which was started I believe eight years --

THE COURT: I'm very familiar with the facts of it, sir. Just tell me the answer to my question, please.

MR. GOLD: The answer, Your Honor, is it's a different situation. It's a different situation, because there the Court went through I believe a proper judicial restraint and three times asked the Legislature to -- this is a wrong the Court found. The Court said something is wrong here. We find as a Court a coequal branch of government, there is a wrong here, but it is not for the Court as I read that opinion.

Primarily, principally and first without allowing the Executive and the Legislature to consider a Court determination that there was a wrong, the Court said there, yes, there is a Constitution wrong. Now, you guys go remedy that. You

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guys go --

THE COURT: Let me ask you --

MR. GOLD: -- remedy that, the Executive and the Legislature.

THE COURT: I'll accept -- I'll accept your -- I don't know that I agree with your conclusion, but I certainly agree with the mechanics that you're describing. Something here is different.

First of all, what's the same is that this Court on two occasions before it ruled requested that -- I'm sorry -- one before and one after asked the parties to sit down and try to resolve their differences or at least to negotiate. That has not happened. I don't know why it hasn't happened. It has not happened. But, I think what is instructive to the Court is that there is a declared impasse, number one. Number two, not in a vacuum.

The Authority said there's an impasse. It then went out and hired an organization to come up, come in, make a study, make recommendations, and it in whole or in part adopted those recommendations and imposed, "imposed", its determination on the employees represented by the plaintiff.

It has not given any indication that I have seen that it wishes to do other than what has already been done, and is its right come here and said not we are willing to sit down and negotiate, bargain, whatever words you'd like to use. In point

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of fact, we have determined we're not going to do that, and as vigorously, as is its right, opposed further negotiation, and you stand here today proposing it, saying we don't have to do that.

The whole fear -- the whole thesis of your position, sir, is that the fact that you did it for 20 years and the fact that there were multiple contracts over that 23-year period doesn't require you to do again ever if you choose not to. That's why we're here, because apparently the Authority in its wisdom has determined that it's not going to do that.

Now, I read in the papers that there was an attempt to sit down, and the FOP placed some type of condition on that negotiation. I don't know, and I'm candid that I don't recall what that was as I sit here now and speak to you, but there was never a comeback to the Court before the ruling, Your Honor, if perhaps we can -- this is a point.

If we can deal with this point perhaps we can go on, and if that's taken out of the mix we'll sit down and attempt to negotiate a contract. There was some illusion to that, but as I understand the Authority's position, what's done is done. We don't want to do that anymore. We don't want to negotiate anymore. In fact, there's no reason to negotiate anymore, because we had our consultantcy (sic). They provided us with certain information, and we adopted that, and that's it. We're done. There's nothing to talk about. That's why we're

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here.

MR. GOLD: Your Honor, if I might respond just on this point so the Court has a full understanding of the facts as set forth in the certifications filed. There were 14 bargaining sessions. I believe at a minimum 14 bargaining sessions.

THE COURT: Before the complaint was filed?

MR. GOLD: Yes, Your Honor, before -- before the complaint was filed. And, there was bargaining in those 14 sessions and movement of the parties.

THE COURT: Well, I don't mean to interrupt, but I must, Mr. Gold. Let me ask you a very direct question. Can you stand here today as the attorney for Delaware River Port Authority and tell me that the Port Authority is ready, willing and able to sit down and negotiate with its police employees?

MR. GOLD: Your Honor, I do not know the negotiating history, because I was not counsel to it.

THE COURT: Not terms, not wages, hours or working conditions, simple concept. Can you tell me that the Authority is ready, willing and able to sit down and discuss, negotiate, bargain, use whatever word you want to use, the various incidents of employment with the police employed by the Authority?

MR. GOLD: Your Honor, I will tell you un-categorically that this very agreement, contract or however it

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is to be styled, is coming to expiration, and the DRPA will be sitting down and negotiating with the FOP very shortly over new terms and conditions of employment.

THE COURT: Mr. Gold, and I say this with -- without any -- I don't even know how to characterize it. I have spent a great deal of time, because you have spent a great deal of time, and Mr. Joyce and Mr. Eisner have spent a great deal of time preparing, presenting, writing and arguing this case. Maybe I'm just not too bright. I hope I'm -- I hope I am, but maybe I'm not. But as I understand it, putting the law aside, these people simply want to sit down and negotiate a contract.

MR. GOLD: Your Honor, --

THE COURT: Please.

MR. GOLD: I'm sorry. I'm sorry, Your Honor.

THE COURT: And, if the two parties can't agree on certain terms, which is their right to not agree, in the abstract as two parties negotiating as in any negotiation, then they're simply saying provide -- we want a vehicle by which we can address our position and the Authority can address its position. We don't want to do this unilaterally. And then whatever happens happens.

Maybe they will adopt the Authority's position. And, if they do then in the vernacular we lose, but we want somebody who is not the judge, the jury and the treasurer to make that

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decision. And, we'll take our best shot and let the chips fall where they may. And, that's what they're asking for.

I have to compliment you, Mr. Gold, and I really mean this, that your presentation and your paperwork and its organization, whether I agree or disagree, is wonderful. And, any judge receiving these documents appreciates the preparation that has gone into the presentation. And, and I extend that to Mr. First, Mr. -- excuse me -- Mr. Joyce and Mr. Eisner also.

COUNSEL: Thank you, Your Honor.

THE COURT: But we get down to it. What we're getting down to is they want a shot. I respect the Authority's position to say we don't have to give them a shot. We can sit down. We are happy to sit down. We'll talk to them as long as they want to talk, but in the final analysis the decision we make is the only decision that will be binding.

And, again, I respect the Authority's right to take that position. What is before me is legally can they maintain that position. I'm not here to say the Authority is a bad guy. They're doing their job as they see it. Fine.

The police, they want better things than they have now. Certainly nothing wrong with that. We all do. It's how we get there that brings the matter before the Court, and it's that simple.

If the Authority is willing to sit down and negotiate wonderful. I am sure that the police will be happy to do that.

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There have been 14 -- I know from the previous papers that there is a multitude of sessions referred to by the movant so that's not in dispute.

One simple little narrow issue: what happens if we can't agree? That's all this is all about. They say interest arbitration, you say, no, can't make me do that, and that's what this is all about.

So, what I would like you to do, Mr. Gold, to the extent that it's not overly lengthy, because, as I said, you certainly leave nothing open to doubt as to what your position is, move on with our arguments. Mr. Joyce or Mr. Eisner will have their opportunity, and we'll take it in that context with the caveat at any time that the Authority says I'm -- we are ready to sit down and negotiate this matter will be held in abeyance until that negotiation takes place, but the Court has already ruled on what happens in the event that that resolves or results in an impasse then or the one that continues to exist. Because the impasse hasn't changed. It's just been supplanted by a unilateral decision.

MR. GOLD: Your Honor, may I respond to that?

THE COURT: Absolutely.

MR. GOLD: Thank you, Your Honor. Your Honor, being a labor law practitioner for some 19 years now, practically -- and I will return to my legal arguments --

THE COURT: Sure.

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MR. GOLD: -- in a moment, but practically to have negotiations where a Court has already determined and is holding over both party's heads that if you guys don't reach agreement by yourselves we're going to have some third party come in and do it for you does not foster free and fair and proper negotiations, because --

THE COURT: What alternative would you recommend, sir? And, I ask you that, because one of the points of your brief says, "By directing that this be held by -- that the interest arbitration, if --" and I might add, "IF, underlined, big letters, IF such becomes necessary shouldn't be AAA." So, I guess I ask you two questions: one, what is the alternative in the event that an impasse occurs and parties cannot agree?" I use impasse in its lay term -- and that occurs -- "and if not to AAA, who?"

The Court selected the AAA because it is nationally known. Its procedures are well known by parties who arbitrate. It has a panel of individuals who are qualified to conduct mediation and arbitration, negotiation in a variety of different subjects. So, those are my two questions. What results if you can't agree, and (b) assuming that it goes somewhere else, if it's not to AAA, who should it be?

MR. GOLD: Your Honor, standing here today without consulting with my client I cannot represent to the Court what --

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THE COURT: Okay.

MR. GOLD: -- the -- outcome should be. I obviously will certainly discuss it with my client, and if Your Honor wishes I will report back to the Court, because this is a new aspect, as I see it, of this proceeding.

THE COURT: Well, at the risk of interrupting and then I'm going to ask you to move onto your argument, let me ask Mr. Joyce.

MR. JOYCE: Yes, Your Honor.

THE COURT: Mr. Joyce, has there been any -- am I -- have I been incorrect in my presumption throughout the proceedings and over its period of time since August or October when I first got the papers from Judge Supnick that the representative organization was ready to sit down and negotiate?

MR. JOYCE: Not at all, Your Honor. Exactly. You've hit the nail exactly on the head. That's the reason we filed this lawsuit, --

THE COURT: Right.

MR. JOYCE: -- because the DRPA imposed a contract on us.

THE COURT: And, without suggesting that I would change it, but just asking the question, if the Authority said that in the event that the parties could not agree that they -- that the Authority would be willing to submit this to binding

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arbitration, but they don't want to utilize the services of AAA would you reject that?

MR. JOYCE: Not at all, Your Honor. We would --

THE COURT: All right.

MR. JOYCE: -- we would be happy with whatever procedure either the parties could jointly agree to or the Court itself ruled on. Our goal here as you succinctly put it is once we go into negotiations and once we get to a point where we can no longer agree on a certain issue or issues, we have to have an impasse procedure in place.

THE COURT: But certainly either or the other doesn't -- isn't willing to waive that particular --

MR. JOYCE: Your Honor, we've had this case before the Court since August of 1996. We've been wanting to reach an agreement since then. My client does not like the fact that --

MR. GOLD: Sorry.

MR. JOYCE: My client does not like the fact that it's been laboring under an imposed contract all this time. If the Port Authority tomorrow would say to us, we'll give you what you want, we would take it, Your Honor.

THE COURT: All right. Let's stop there. I want to make a very brief statement, Mr. Gold, and then I'm going to insist that you move on. It is not my -- has not been my intention, if I had a choice, to tell either side what they had

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to do. It is clear to me that you, Mr. First, Mr. Joyce and Mr. Eisner are most experienced and qualified to do what you're doing. The Authority is an employer of many, many, many people.

Quite candidly, the police are a small segment of that employment. The Authority has existed in its present and previous form. I remember it when it was the Delaware River Bridge Commission or words to that effect. In fact, I have in my collection of memorabilia an invitation to the opening of the bridge. And, obviously, as a resident, born in the City of Camden, I'm very familiar with the bridge, and I count among friends past and present, acquaintances past and present, people who have been intimately involved in the operations of the bridge. So the record will be clear, no conflicts.

It's not my desire to tell the police to tell the Authority what they should agree or not agree to. It's not my desire to do that at all, but a legal question has been squarely presented. It's -- and it's, again, I don't know how to characterize it any simpler than does the Authority have to -- has -- is -- does there have to be an end to the resolution that applies to both parties? That's the whole issue here. The Authority says no. The FOP says yes.

And, I'll say this and then stop: if the Authority and the FOP want to sit down and try and arrive at a mutually acceptable agreement at any time this Court not only will agree

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to it but be pleased to have that happen. But, if that can't happen, and there can't be a similar agreement between the parties as to what happens if they can't agree then the issue is left to me to decide, and that's what it is. So, let me hear the balance of your legal argument, please.

MR. GOLD: Okay. Your Honor, the Authority did make an effort to sit down after this Court's intervention in this matter. The FOP conditioned -- referring again to Your Honor's earlier comment -- the FOP conditioned those negotiations on, in fact, it resulting in binding interest arbitration. There has been no proposal, as I understand it, Your Honor, by the FOP as to a procedure to determine if the parties can jointly work. There's been nothing over the table, as I understand it, from the FOP as to whether the FOP can propose something that the Authority could live with in terms of working something out.

THE COURT: All right. Let's stop there. I'm not suggesting bad faith either way. I have a legal issue to decide, and I'd like you to proceed.

MR. GOLD: Your Honor, I just have in addition to the materials which we presented in our papers, which we have submitted and my comments earlier this morning, the -- if the court -- we believe the separation of powers issue is so extremely important and the governance issues of the Delaware River Port Authority are so extremely important that if the

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Court believes and has ruled that there has been a legal wrong here, we believe you asked me for an alternative.

We believe the Court should -- if the Court is inclined to do this, and in no way am I admitting there has been a legal wrong for encouraging the Court to impose a remedy, but we believe that at least prior cases in this kind of situation seem to indicate the Court says to the Legislature and Executive and the interested parties, I find the Court finds there is a wrong. Go work it out, the Executive Branch. Go work it out, the Legislature. Go work it out, the DRPA. Go work it out Pennsylvania. Go work it out. And, if you can't work it out then the court is certainly going to be receptive to motions having -- the parties having exhausted their ability to work it out, and the Legislature having exhausted their ability to work it out. Just like in the Robinson case and others, if the parties can't do it, the Court will. And, Your Honor, that -- I think that concludes my legal presentation.

THE COURT: Okay. Thank you. Mr. Joyce.

MR. JOYCE: Thank you, Your Honor. Your Honor, before I begin with my legal presentation, I think it's incumbent upon me to make the record clear exactly what the plaintiffs have sought from the beginning in this litigation and what we seek today. I think Your Honor knows, but just so we don't leave what Mr. Gold says dangling I think it's incumbent upon me to

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make just a brief statement about that.

Back in April of 1997, nearly a year ago, Your Honor, we did have discussions with counsel from the DRPA about trying to resolve this case, and at that time all he was asking, Your Honor, was that the DRPA sit down and negotiate with us a procedure that may include interest arbitration as a terminal point. And, all we've ever wanted in this litigation, Your Honor, and all we want today, and all we will ever want is for the -- is to have a procedure in place whereby if the parties cannot agree in collective bargaining over terms and conditions of employment there is a place for us to go.

And, we're not asking that out of thin air, because we think it's a nice idea. We're asking that, because the policy of both New Jersey and Pennsylvania on this issue is substantially similar. The policy of both states is if police and their employers can't reach an agreement police can't strike, but employers can't impose, rather they go to an impasse resolution procedure that ends at the same exact spot in both states, binding conventional interest arbitration. And, by virtue of the case law that you're very familiar with, Your Honor, we felt and we still feel that we have a right to that.

And, it's not a question of whether there's been a legal wrong committed here, Your Honor. The question is what are my client's rights as police officers of a bi-state agency,

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and that's exactly what was before the Court, not police officers, but public employees, what was before the Supreme Court in the Bay Authority case. And, I think Your Honor succinctly summarized that case on November 3rd, and I don't think there's any need for us to go into that now.

But turning to why we're here, --

THE COURT: Go ahead.

MR. JOYCE: Turning to why we're here, Your Honor, this is let us not forget a motion for reconsideration, and there are certain standards. There's certain requirements for a moving party in a procedure -- in a posture of the DRPA's to meet to be successful, and they don't meet those standards, Your Honor.

First of all, they attempt to rely on evidence that could have with very easy effort been submitted to this Court prior to this Court's ruling in November. And, they admit that it's their burden to show that they exercised due diligence and still couldn't get that evidence to Your Honor's attention. And they admit or they don't deny that that burden is substantial, and they don't come close to meeting it in this case, Your Honor.

With regard to Professor Summers' deposition transcript that they want to present to Your Honor now, they admit that they made no effort to depose Mr. -- Professor Summers or even inquire into his availability at any time until

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after Judge Supnick initially continued this case on July 25th, 1997. They were will to just go to the Court and let the Court do what it's going to do with Professor Summers and then they would think about deposing him.

That kind of wait and see attitude, Your Honor, does not square with any kind of definition of due diligence that I've seen in the cases, and going beyond July and August. They'll say, Your Honor, that, well, Professor Summers wasn't available. He was up in Vermont. They didn't even inquire as to his availability during that period of time so they weren't prejudiced by that.

They could have subpoenaed Professor Summers if they really wanted him. They could have had a telephonic deposition in Vermont if they really wanted to do that, but they had no intent and no desire to depose Professor Summers at that time.

The record is also clear. They do admit that at the very least there were two dates in September prior to the original return date set by this Court in which they could have deposed Professor Summers. Why didn't they depose Professor Summers on those two dates? They tell you in their papers, because it was inconvenient to them. That's not due diligence, Your Honor.

Going on, in October the DRPA admits that they had at least 13 business days prior to this Court's second return date

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scheduled October 20 to depose Professor Summers. They failed to do so. They didn't even attempt to contact us to set a deposition date, because they -- according to their papers, there wasn't enough time. That didn't give them enough time to depose Professor Summers.

Clearly, Your Honor, they could have deposed Professor Summers and presented the transcript to you well before you ruled on November 3rd. They consciously chose not to do so. They deliberately chose not to do so, and now they can't come before you and get a second bite at the apple with evidence that could have been presented to you earlier.

The same holds true for their attempt to introduce their expert report. The DRPA says to you on page 13 of their reply brief that you erred because you refused to permit them to obtain an expert prior to deciding our motion. That's what they say in their reply brief. But they also now admit that at least two months prior to this Court's ruling they had their expert. They had identified an expert, and they had conversations with myself and conversations with my colleague, Mr. Eisner, where they said, yes, we have an expert, but we're not going to present him. We're going to wait and see what the Court does. We'll wait and see if it's necessary. Once again, Your Honor, that is not due diligence, not by any stretch of the imagination is that due diligence.

So, they can't present him now. They can't -- if

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their tactic would be allowed to succeed then we might as well throw dispositive motion practice out the window. There's no need for it, because a party can always husband its evidence and wait and see what a Court's going to do, and then if a Court rules against it then they can say, oh, well, we have all this evidence, Your Honor, look at this.

We might as well not have summary judgment and we might as well not have dispositive motions if that sort of trial tactic is allowed to proceed. And, I don't use tactic in a --

THE COURT: I understand.

MR. JOYCE: -- pejorative term. But, Your Honor, and this is a point that I really want to try to make. I think I made it last time, and I think you understood it. This Court if it chooses, can cut short this whole phantom debate over whose expert is more qualified than the next. Frankly, we're very comfortable with Professor Summers. We think he holds up very well to Professor Weinstein for reasons I don't need to belabor you with.

But you can cut short that whole debate by acknowledging, as you already implicitly have, that you didn't on November 3rd and you don't now remotely rely on what Professor Summers' opinions are to find that the New Jersey and Pennsylvania Interest Arbitration Statutes are substantially similar.

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This Court has and it can read the statutes itself. This Court has and it can find that both statutes spring from the same historical roots, and that both statutes have the same fundamental features and reach the same exact terminal point: binding conventional interest arbitrations.

You can apply those facts to the rule of law that's been set forth in the Baboarded (phonetic) case, and you can rule in our favor as you did on November 3rd without reference or regard to anything Professor Summers ever wrote or ever said about this case or anything Professor Weinstein ever wrote about this case.

I'm not suggesting you have to do that, Your Honor, but I'm suggesting that's available to you. And, if, as I believe this case will end up in the Appellate Division some day, maybe that would be a good thing to do.

But, anyway, once you -- once you clear away their new evidence they try to present -- and I'm not even going to address their attempt to present Ms. Faber's certification. It's very clear she was always available to them, because she's their client. But once you clear away this new evidence, you're left with two arguments by the DRPA as to why you should reconsider this case, really.

First of all, they say you erred in ruling that Judge Supnick created a law of the case for you to follow. Well, with all due respect, Your Honor, ever since November --

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December 20th, 1996 the DRPA's had a hard time beliving they lost before Judge Supnick. They've had their head in the sand over what Judge Supnick said or didn't say and it continues to this day.

Clearly, what was before Judge Supnick in December, what was in our amended complaint and in our motion -- in our opposition to -- brief to their motion for summary judgment, and in both documents we claim that the entire corpus of New Jersey and Pennsylvania Labor Law including Act 111 and including the New Jersey Interest Arbitration Statute were when it came to public police officers complementary and parallel. And, if -- you read Judge Supnick's transcript, and DRPA invites you to do so and so do we, he flatly rejected their contention that these laws were not complementary and parallel. He --

THE COURT: He certainly did.

MR. JOYCE: He said that they -- that New Jersey and Pennsylvania has set forth parallel and -- or complementary legislation which "clearly gives public employees the right to freely organize and designate representatives and negotiate in good faith."

So, as you indicated, Your Honor, the question before you was now that Judge Supnick has ruled that generally speaking the laws concerning collective negotiation are parallel where do we go from here? And, you, without trying to

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put words in your mouth, Your Honor, I think what you did properly is you used Judge Supnick's rulings as a springboard, as a building block to determine that question. And, how did you answer that question on November 30th? You said they go where both states go. Binding interest arbitration.

Now, as far as the DRPA case goes, and the Port Authority's continued argument that it doesn't apply, all I can say about that, Your Honor, is this is the third time they've made that argument. They made it once before Judge Supnick. They made it before you on November 3rd, and they're making it before you now. And, they present no new legal theory or argument to advance that argument.

So, once again, on a motion for reconsideration that is just not allowed. That is not the second bite at the apple, that's the third bite at the apple. And, I think there's been a lot case law about what a motion for reconsideration should and should not present, and they do not present it. And, that's all I have to say, Your Honor, unless you have some more questions for me.

THE COURT: Let me correct -- be seated, Mr. Gold. I'll give you a chance. Sit down, Mr. Joyce. Let me correct some statements. I reread my opinion, the transcript. I reread Judge Supnick's opinion, the transcript. It may have been a slight reference I believe -- let me get the page.

(Pause)

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THE COURT: Page 42 of my opinion stated that it did that for obvious reasons at line 15. "At least obvious to this Court, that it wished to do what the statutes, as referred to by Professor Summers and known to this Court, have as their goal to maintain and continue good employer/employee regulations with its employees."

That perhaps was a shorthand way, and I won't interpret or set forth other places in the transcript, of indicating something that apparently may be confusing. Did I say that I looked or I read Professor Summers' interpretation; I did. Did I find him as an expert; I did.

Let me make it very clear for the record that I read the Statute of New Jersey, that I read the Statute of the State of Pennsylvania, and I compared the two, and I came to a conclusion. And, by reading those statutes and the sections, I came to the conclusion that they were parallel laws, that there were some differences between them, clearly, but that they were substantially parallel in the context of this case.

Second, that was my determination by virtue of my reading. If I am wrong, and the Authority deems that I'm wrong, and the Appellate Division deems that I'm wrong then we'll revisit it again, but I read them. I compared them. I concluded that they are substantially parallel in the context of this case.

Counsel has indicated that there are a number of pages

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of differences. Conceded. The purpose of the two statutes are to provide for, and it is the stated policy of both states as a result of those statutes that when the covered employees of each are unable to reach agreement with their employer that there is a means by which that impasse is resolved. Even Professor Summers acknowledges that and tells us what happens both in law and in practice in both states.

Now, let's get to Professor Summers. Is this Court prohibited from considering his opinion? It's pointed out that under the New Jersey Rules of Evidence experts are to assist triers of fact, and since there are no facts by definition since the motion for summary judgment is granted, then this Court is precluded from considering that. I've already addressed that 30 seconds ago. But, did I look and read; of course I did. Because not being omniscient, it's always nice to know whether or not somebody who does something frequently, who studies and practices and for want of -- and the lay parlance is a professional and an expert, has an idea of what you have concluded, and it is in that context that I read Professor Summers' certification.

I'll characterize the appropriateness in a moment, but I will also tell counsel that I have read Mr. Weinstein's opinion as well. He comes to an opposite conclusion. What he does not -- what he does agree with that there are similarities. He just says he thinks that the dissimilarities

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are greater than the similarities, and, therefore, comes to an opposite result. And, I'm not going to put into the record each and everything he said.

What I didn't see in there was any reference by him that Summers was not expert or wasn't competent to give the opinion that he did. That's nowhere in Weinstein's statement. And, quite candidly, I would have been amazed had it been there.

So, what we have is a determination by the Court based on the Court's own reading and interpretation which reached a conclusion. Professor Summers concurs and says what he says and the reasons why he says it and alludes to opinions that are based upon his own practice and things that he has encountered as an interest arbitrator as well as a professor.

Mr. Weinstein disagrees, because his reading is different. I'll characterize it as narrower, more technical and precise, not necessarily correct, just more technical, tighter, if you will.

I think that what is a disagreement is that one speaks to the police of the two statutes and then talks to the terms of implementation while the other, Mr. Weinstein, emphasizes the terms of implementation primarily. But they both agree on the purpose of the legislation. There's no dispute as to that, as I understand it.

Judge Supnick and the Court's illusion to that ruling:

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I think Mr. Joyce has accurately characterized what Judge Supnick ruled upon, that -- and we've read that, and it's there for anybody to read. Page 23, "Gentlemen, the Court recognizes the problem and the basic argument, of course, in connection with the fact that there is no parallel or complementary law as it exists between the two states, that this Delaware River Port Authority -- it can be applied to the Delaware River Port Authority, a bi-state agency. In the Court's opinion that is not so. I think that Pennsylvania law and New Jersey law, even though New Jersey makes reference to the right of Governmental employees, of course, to organize and so forth as set forth in the constitution, I do think that Pennsylvania has set forth parallel or complementary legislation of a different nature, but which is nonetheless -- which nonetheless recognizes those same rights and clearly gives public employees a right to freely organize and designate representatives and also to negotiate in good faith. And, the fact that there might be some problem which might exist, as has been argued by the Delaware River Port Authority in connection with no agencies exiting whereby of a nature that would be able to deal with the problems that might be ultimately encountered and resolve them, I think the Court has the power, the inherent power to deal with matters of that nature. Court's of the opinion that the motion, parenthetically of the Delaware River Port Authority, should be denied for the reasons I stated. I find that there

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is a basis for this cause of action proceeding, and I do not find that there is a lack of mutual law that exists between the two states to permit it to proceed."

Did he address the issue of interest arbitration. He addressed what I just read, and in the context of that proceeding.

I could have stopped -- strike that. Let's go back a step. When I said that's the law of the case, it is the law of the case to the extent that it was ruled upon. There was no interlocutory appeal -- or perhaps I stand correct at this point. I think I am incorrect. There was an attempt at an interlocutory appeal that was denied. So, we're back here.

Now, that obviously is not a ruling on the merits. It was a rejection of a request for an interlocutory appeal. So, it presents this Court with a case. And, had Judge Supnick not been transferred to a different vicinage, undoubtedly, he would have kept the case and ultimately ruled.

I'm not going to conjecture what he would rule in the context of this motion, but I ruled in the context of this motion. Mr. Joyce said I used that as a building block. That's a nice euphemism, but, once again, I can't disregard what has taken place up to now. I don't think either party would want me to do that, and clearly I wouldn't do that.

And to the extent that it's different from what's before me, it's not considered. And, to the extent that it is

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similar to what's before me, it is considered and was considered. But, the judge ruled that there were similar parallel laws. Again, for policy reasons what was the intent of the Legislature in passing these laws? He made a determination. I just read it.

We go one step further. Now, the FOP says not going to negotiate any more. There's an impasse. The initial argument there's an argument, oh, well, there's not -- I'm not sure there is an impasse. See, I read a resolution that said there's an impasse. What's that mean? Well, I have a little personal experience with Title 34. The law -- I believe if my memory serves me correct, Chapter 303 of the laws of 1968, it created the Public Employment Relation's Act and the Public Employment Relation's Commission. And, there have been subsequent enactments that deals with interest arbitration and so forth after that.

I have personal professional familiarity, but that's then and this is now. So, what did I do; what I said a moment ago. A read both of the statutes, and I read the Delaware River Bay Authority case, and I said in my opinion that in addition to and supplementing Judge Supnick's determination at that time in that context I determined that the laws were parallel and similar and I determined that the Bay Authority case applies here.

I also said that it is in a different factual setting

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there. DRPA argues, well, it's distinguishable and, therefore, you should not consider it controlling. I disagree. Because once again, it says what Supnick said it says. And, I'm -- please, strike that from the record.

Looking at the case, it talks about the similarity of the laws of the State of Pennsylvania and New Jersey for the purpose of fostering a resolution of a dispute between the employer and the employee and provides the mechanics by which that has -- can be done.

Are they identical in respect to the mechanics, of course not. Is there a way that to the extent that the similarity, dissimilarities exist that they can be addressed, yes. In one there's an agency, in other there's a Court. But that's a choice of dispute resolution, an ultimate dispute resolution, and that's what we're here about, ultimate dispute resolution. Because if there is none then we go back in New Jersey to 1967 and before when people sat down and they came in and they talked to the public employer, and the public employer listened, and, depending on who peopled the public employer, sometimes they talked and reasoned better, sometimes they didn't, but ultimately the public employer said here it is, and that was the end of it. And, what happened then? People went out on strike.

There is absolutely no question in my mind that that was illegal then and it continues to be illegal without any

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interruption from then to now.

To close this portion, yes, I looked at Judge Supnick's determination. I read it in the context that it existed of what was before him at that time. The DRPA's position very simply then as now is that there is no legal basis -- strike that -- no legal means by which absent its own agreement it can be forced -- harsh word -- forced to have a dispute that the parties can't resolve resoled by another person or entity. That position has never changed from the date it adopted its resolution through the matters before Judge Supnick and right down to this very moment. I disagree. Are they parallel; yes. Who decided that; me. Does the vaca supply; yes. Who's determination is that; mine. If I'm wrong somebody's going to tell me that.

Now, let's deal with procedure. There is nothing that has been presented to the Court by Ms. Faber's certification that should properly be considered by the Court, because it could have been presented before and it wasn't. But, again, what she says in her certification, in my opinion, has no significant, if any, bearing on what we're here about.

We're here about two things: everybody agreeing there's an impasse, and everybody -- strike that -- and whether or not the DRPA can be ordered to participate in a binding proceeding which will resolve an impasse. That's what we're here about.

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Ms. Faber's certification provides nothing with respect to that, and -- but even if it did it would be properly not considered, because it was available and not, and it's inappropriate under either 49 or 50.

Number two, Professor Summers: I've seen nothing presented directly or in reply that suggests anything other than what plaintiff states. And, what I said originally; the gentleman's identity, his availability and his opinion were available for a long time. No effort, for whatever reason. Maybe tactically the Authority felt that its strong point was the legal question of whether as a bi-state agency it could be ordered to do something whether the laws of the respective states were not parallel and complementary, and, therefore, taking the two things together, it was a slam dunk, in the vernacular.

So why go to the expense of incurring an expert now? Hey, that's strategy and tactic and dete -- decision of the party, and I'm not here to even comment on it. What I am here to comment on is that that opportunity existed from December of 1996 through October of 1997, from the initial ruling by a Court saying they were parallel in that context. Authority knew at that point it had a problem. Did nothing.

FOP files a motion. Not only files the motion that is now the subject of our discussions, but in support of it throws in Summers' report and his opinion.

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Mr. Gold says, well, we argued in the alternative. We shouldn't even consider that, 'cause it's a question of law, but if you do we want to be ready to back it up. Nothing wrong with alternative advocacy. Happens all the time. But the backup wasn't there and could have been, because several months ago that individual -- several months from -- back from November, July, the need became evident. And I'm told very forthrightly that the person was identified then, Mr. Weinstein. Just a tactical decision not to secure a report and submit it.

Again, not critically. A decision's made. It's not there. But then the presentation comes to the Court and says, Judge, continue this matter and give us an opportunity to present the report. Why? Well, discovery's not over for three weeks. Where have you been for three months, four months, five months, ten months?

But let's get beyond that. I read the reports. I read Summers then. I read Weinstein's now and Summers again, assuming that I have a right to do that for my own edification, if not my own decision. They disagree in detail not in what the objective or the policy of the legislation is. I decide then and now that the laws are parallel. They are complementary. They are substantially similar for the purpose of this determination and in the context of the facts, the positions of the parties in this case.

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What facts are in dispute? Is it disputed that there's an impasse; no? Is it disputed that the Authority -- strike -- is it disputed that there were a number of negotiating sessions, give and take between the parties; no. Is it disputed that there were some agreements, but many disagreements; no. Is it disputed that the Authority ultimately adopted a resolution declaring an impasse; no. Were there any negotiations, negotiations in the commonly accepted and understood meaning of that word; no. Is it disputed that the Authority went out and hired the Hay Organization to review what existed, bring its expertise from other areas and other information to the table and make recommendations; no. Is it disputed that the Authority adopted a resolution determining what would and would not be extended to the police; no. It's a matter of record.

And, is it further disputed that the police have operated under that imposed set of wages, hours and working conditions, benefits; no. Is it disputed that the police accept that -- those wages, hours and working conditions and are in agreement with it; emphatically, no. Is it disputed that the FOP was recognized over 20 years ago, what, by acclamation; no. They came -- the FOP came to the Authority and said at that time we want to represent your police. Let's go and hold an election pursuant -- a certification pursuant to NLRB. Is that disputed; no. Is it disputed -- pardon?

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MR. GOLD: Yes, it is, Your Honor. I'm sorry, Your Honor. Yes, that is disputed. There was no NLRB election. The NLRB --

THE COURT: Oh, I -- you misunderstood me, Mr. Gold.

MR. GOLD: Oh, I'm sorry, Your Honor.

THE COURT: I -- it is not disputed that no NLRB election took place.

MR. GOLD: I did misunderstand you, Your Honor.

THE COURT: Fine. Thank you. To the contrary, the Authority said we won't do that. However, if you hold an election, Police, and by virtue of your own election -- I don't recall the mechanics right now as I speak, FOP is the winner we'll recognize them, and that's precisely what happened. Is that disputed; no. Is it disputed that on four or five successive contract expirations that there were negotiations and those negotiations, except for the very last one that we're here about, resulted in agreement to negotiated terms of wages, hours and working conditions that resulted in signed binding contracts? Is that in dispute; no.

Is it in dispute, therefore, that a designated and recognized negotiating agent negotiated and represented the police for over 20 years and obtained as a result of its negotiations contracts with the Delaware River Port Authority for its police employees; absolutely not in dispute.

The only thing, we keep coming back to it, is whether

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or not having done that, there is any obligation to continue to do it and if in doing it it results in an impasse can the Authority be ordered to enter into some type of interest arbitration conducted by a person or agency and be bound by that determination after presenting its position and the FOP presenting its position. That is the only item in dispute. There are no facts in dispute other than -- and that's not a fact.

Whether there were 14 sessions, whether there were items submitted and withdrawn, whether the police did it or the Authority did it, those aren't facts in dispute with respect to this issue. They may be in dispute in a factual circumstance: yes, you did, no, I didn't, I said you did it, no, I did it. That's just not germane and relevant in any respect as I see it.

All that we're here about again there's an impasse, how do we resolve it, and if we can't resolve it, is there a vehicle by which it can be resolved. That's the whole thing as my intellect perceives it.

Delaware River Port Authority cross-moved at the time and asked for a continuance one of the items. That was denied for the reasons I stated then and I stated now. It moved that the complaint be dismissed because of, again, as Mr. Gold has phrase it, perhaps, a bit more eloquently and articulately than I, the question of sovereignty question of separation of powers

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and so forth, street corner determination, because the boss said no. And, there's nothing in place that says that the order -- and we disagree that either the laws are parallel and complementary, because I think that even the DRPA concedes that if that was the case, which it strenuously denies, that at that point it does have the obligation to proceed as a resolution with interest arbitration, and that's a rhetorical question. I don't ask counsel to respond.

So, once again, dissimilar laws and by virtue of the compact, therefore, Mr. Gold says, since there are dissimilar laws go to the respective Legislatures. Well, I won't comment on that in any manner, shape or form, because I don't have to, because I find that there are parallel law.

That's my conclusion of law. And, I could go down and compare each and everything that has been submitted by Weinstein, by Summers, the multiple pages submitted by defendant showing the distinctions and so forth, but, again, simplistically the policy is dispute resolution without strike, providing a vehicle by which that can be done. That's the stated policy and I so find, and I find that they are substantially similar for that purpose.

While acknowledging that there are specific, but -- I hesitate to use the word unimportant -- recognizing that they are -- there are differences that don't change the policy -- do not change the policy.

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I am urged that, as has been stated earlier, that the Court's direction usurps the policy of the Legislature and the Executive. And, I smile because I never really in reading it initially contemplated that I was doing that. And, I'm not saying that that couldn't occur, but I don't think it occurs in this instance, and it's not this Judge's function to usurp anybody's authority, least of all the Executive, and certainly not the Legislature.

I recognize though, and I believe that there is not a wrong without a remedy, and I use wrong in the sense, in its classic sense, not an intentional wrong. I don't believe, and it's certainly not my intention to create a confrontation between coordinate branches of Government, but I recognize that the Judiciary occupies a very unique position. Whether it's Marberry and Matison (phonetic) or Winberry versus Salisbury, somebody's got to make a decision, to put it in the vernacular, and in this instance that's me.

(Tape change)

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And if I've made -- and it is determined that I made the wrong decision and my decision is appealed, I am sure the Judges of the Appellate Division and the Justices of the Supreme Court will not be any more reticent in telling me that then in my making my decision here.

Finally, the DRPA argues that I should not decide this case on an inadequate record where the judgment will have broad reaching social and legal effect, especially applying to the close of discovery. I don't think I did that.

And to the extent that I didn't consider an expert's report by the defendant initially, for the reasons I stated then and the reasons I state now. So that there's no mistake, for the clarity of a reviewing Court, I read it and I've considered it.

How be it procedurally perhaps improper under our rules, and I acknowledge the arguments of Mr. Joyce to be correct, but notwithstanding having said that, I read it and I come to the same conclusion that I did initially.

And I've already commented on requiring the parties to utilize AAA in the unresolved issues. I guess the reaction that I have is suppose the governor vetoes the entity. How do we spend money if that's one of the items on the agenda? Does that create a constitutional confrontation? Gee, I hope not. That certainly wasn't the Court's intention. I can think of a variety of ways that that can be dealt with.

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Number one, I selected AAA for the reasons I've already indicated. If the parties wish to arrive and use a different entity, or person, presuming that that entity, a person's qualified, I certainly have no objection. There's a way by which that individual or entity would serve without compensation, that's perfectly acceptable.

I'm not going to go into who should pay for what, but at this juncture, we don't even know whether there will be interest arbitration. That's what I find as the irony. And I understand, gentlemen, that you're here presenting your case, and once again, it's not meant to be critical or tongue-in-cheek, or sarcastic, but what hasn't happened is the first step.

And the parties both have skilled negotiators. The parties both have competent Counsel. There's nothing to prevent them from sitting down attempting to do it on their own. If they can't, then what? Well, then there might have to be a third party brought in to assist them. Maybe that will or maybe that won't require an expenditure of funds.

I am not going to presume that somebody is going to step up and volunteer, unilaterally, to pay the whole bill. To the contrary, I'll presume that each party doesn't want to pay more than what its fair share, if it has to pay anything.

So, I'm not going to change that or make suggestions, but I am going to deny the motion for

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reconsideration for all of the reasons that I've stated.

If the issue comes up where the DRPA is prohibited from spending funds, then the next procedure will have to take place, whether it be in this court or an Appellate Court. I hope that won't be necessary. It's not my intent. My intent is to make a decision on the basis of the information provided to me.

That decision, obviously, is going to have consequences and I am not going to prejudge or predetermine what either party will do. If and when that happens, or something else happens as a consequence of this decision, that will be presented to the Court and another decision will be made. And I think that's about as simple as I can make it.

Mr. Gold, your offer, or your brief states that I didn't compare, for instance, each and every section. As it goes down, I did not make findings of fact. There are no findings of fact. I did not make determination and conclusions of law predicated on those dissimilarities that you say existed.

I think that I have made that sufficiently. The documents exist. I have stated that there are dissimilarities. Those dissimilarities, however, do not go to the intent and the policy of what the legislatures of the Commonwealth of Pennsylvania and the State of New Jersey intended or desired to achieve by virtue of the legislation,

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which I've stated now two or three times in my opinion.

And while the mechanics of achieving that may be different, there is a manner and means by which that ultimate determination is achieved in the presence and in the face of an impasse and an -- an inability of the parties to agree. And; that is, as I see it, as I've stated before, the crux of it.

So, to that extent, notwithstanding dissimilarities, the overriding themes of the legislation, its purposes, its intent and what it seeks to achieve and to avoid, are very parallel.

And, therefore, I find it and have found it and so find it again, me, a Judge of the Superior Court, that they are parallel and complimentary.

Gentlemen, I thank you for your attention, I thank you for your presentation and that will be the ruling of the Court.

MR. GOLD: Your Honor?

THE COURT: Sir?

MR. GOLD: To make absolutely clear, for the record, that we understand Your Honor's ruling, is it Your Honor's intent to deprive the DRPA of a right, should it choose so, to negotiate an impasse procedure?

THE COURT: Absolutely not. I think I stated that when I asked both you and Mr. Joyce your positions. Mr. Joyce

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-- you responded. Mr. Joyce said, I'll put it in my direct discussion, I don't care. I don't care what procedure we use, but if we can sit down and agree on a procedure to be used, we'll use it.

All I care about, and interrupt me anywhere along the way, Mr. Joyce, all I care about is that at the end of the tunnel, there's the light and there's a final determination. However we get there, as long as both parties agree, I agree.

MR. JOYCE: That's correct. Your Honor, a final determination by a neutral entity that both parties would select.

THE COURT: Exactly. So, your question, Mr. Gold, is, am I prohibiting, or am I restricting the parties right to enter into and negotiate a -- a -- an impasse procedure, no. Would -- does my ruling change as to if that impasse procedure doesn't result in agreement, that the parties then have to present their respective positions to a disinterested party for an ultimate determination, again, no.

However you get to done is of no consequence to me as long as the parties agree. But done only occurs one of two ways. Either by agreement or by binding arbitration. Preferably the first, but if necessary, ultimately the last.

Now, anything in between, and I'll say it again so there's misunderstanding, it is not the Court's desire, unless it has to happen, which I have so decided, to tell the parties

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how to negotiate, to tell the parties what terms and conditions should be agreed upon, or how they ultimately resolve their differences, coequally, bipartisan, use whatever word you want to use.

But if you're asking me, can I -- does my opinion mean that if the clients negotiate a procedure and it doesn't contain a -- a procedure by which, in the face of impasse, somebody makes a decision that's binding on both parties, the answer to that is no. That has to be there. Whether it's initially or ultimately, I don't care.

MR. GOLD: And the Court's determination is premised on the fact that there is an impasse. So, in that situation, there would be binding interest arbitration.

THE COURT: Exactly. How do I reach that conclusion, so there's no misunderstanding, because the Delaware River Port Authority adopted a resolution that said there was. I believe them.

MR. GOLD: I understand Your Honor's ruling.

THE COURT: And is there an impasse from the police, you bet. It's called Fraternal Order of Police, Penn-Jersey Lodge 30 and Joseph Vena verses the Delaware River Port Authority, docket 7547-96, the Superior Court of New Jersey, Camden County, Law Division. That's how I know they think there's an impasse.

So, if both parties decide, hey, we don't want an

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impasse, we want a -- there is an impasse, but we want to sit down and resolve it so that we can go on, I think that's wonderful. I applaud it. I -- I encourage it.

But if all -- after all is said and done and Vogelson stops talking, at the end there continues to be an impasse, then there has to be, in my legal judgment and it is my decision, there has to be a means by which to resolve that impasse. Not unilaterally, but by a third party who will listen to both sides and make a decision.

Now, however you want to fashion that, that's up to you. And if you can, I think that would be wonderful. End of comment. Thank you, gentlemen.

MR. JOYCE: Thank you, Your Honor.

MR. EISNER: Thank you, Your Honor.

MR. GOLD: Thank you.

MR. FIRST: Thank you, Your Honor.

* * * * *

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CERTIFICATION

We, Rita F. Carelli and Janet Barbieri, the assigned transcribers, do hereby certify that the foregoing is a transcript of proceedings in the Superior Court of Camden County on January 23, 1998, Tape No. 1, Index No. from 2712 to end, Tape No. 2, Index No. from 0001 to 2749 and Tape No. 3, Index No. from 0001 to 0434, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate record of the proceedings.

Rita F. Carelli (AOC #319)

Janet Barbieri (AOC #131)

January 29, 1998

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FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30, and JOSEPH VENA,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003344-97T1
Respondents/Plaintiffs,	:	Civil Action
v.	:	
DELAWARE RIVER PORT AUTHORITY,	:	Camden County
Appellant/Defendant.	:	SAT BELOW: HONORABLE M. ALLAN VOGELSON

TRANSCRIPT DELIVERY CERTIFICATION

I, Samuel M. First, Esquire, hereby certify that on March 3, 1998, I caused to be delivered to Appellate Division Case Manager Velda C. Steele, via Federal Express, four (4) copies of the following complete set of trial court transcripts with regard to the above referenced appeal:

Transcript of January 23, 1998 Hearing and Decision of the Court
Transcript of November 3, 1997 Decision of the Court
Transcript of October 20, 1997 Hearing
Transcript of December 20, 1996 Hearing and Decision of the Court

In addition, on that same date, I caused a complete set of the above-referenced transcripts to be delivered to Plaintiffs' counsel of record, via first class mail, at the following address:

Benjamin M. Eisner, Esquire
Charles T. Joyce, Esquire
Spear, Wilderman, Borish, Endy,
Spear & Runckel
36 Tanner Street
2nd Floor
Haddonfield, NJ 08033

Samuel M. First, Esquire
Counsel for Defendant
Delaware River Port Authority

Dated: April 14, 1998

(N)-3344-97T1

REC'D
APPELLATE DIVISION
JUN 30

FILED
APPELLATE DIVISION
JUN 30 1998

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30, and JOSEPH VENA, Respondents/Plaintiffs, v. DELAWARE RIVER PORT AUTHORITY, Appellant/Defendant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003344-97T1 CIVIL ACTION **ON APPEAL FROM A FINAL JUDGMENT ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, CAMDEN COUNTY GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** SAT BELOW: HONORABLE M. ALLAN VOGELSON, P.J.S.C.

FILED
APPELLATE DIVISION
MAY 15 1998

APPELLANT/DEFENDANT DELAWARE RIVER PORT AUTHORITY'S SUPPLEMENTAL APPENDIX

BLANK ROME COMISKY & McCAULEY LLP
A Pennsylvania LLP
PETER A. GOLD, ESQUIRE
Resident Partner
SAMUEL M. FIRST, ESQUIRE
Woodland Falls Corporate Park
210 Lake Drive East, Suite 200
Cherry Hill, New Jersey 08002
(609) 779-3600

Attorneys for Defendant/Appellant
Delaware River Port Authority

Dated: June 30, 1998

SUPPLEMENTAL APPENDIX

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Notice of Defendant's Motion for Reconsideration of the Court's Judgment, and/or to Alter or Amend Judgment, and Stay All Proceedings, dated December 5, 1997 ..... SDa5

SPEAR, WILDERMAN, BORISH,
ENDY, SPEAR AND RUNCKEL
BY: BENJAMIN EISNER, ESQUIRE
CHARLES T. JOYCE, ESQUIRE
36 Tanner Streets, Second Floor
Haddonfield, New Jersey, 08033
(609) 428-5255
Attorneys for Plaintiffs, Fraternal Order of Police, Penn-Jersey, Lodge 30 and Joseph Vena

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30, and JOSEPH VENA Plaintiffs, v. **THE DELAWARE RIVER PORT AUTHORITY** Defendant.	SUPERIOR COURT OF NEW JERSEY CAMDEN COUNTY LAW DIVISION DOCKET NO. L-7547-96 CIVIL ACTION NOTICE OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT RETURN DATE: JULY 11, 1997; 9:00 A.M. BEFORE: THE HONORABLE SAMUEL L. SUPNICK, J.S.C.

TO: Peter A. Gold, Esquire
Samuel M. First, Esquire
BLANK, ROME, COMISKY & McCAULEY
210 Lake Drive East, Suite 200
Woodland Falls Corporate Park
Cherry Hill, NJ 08002
(609) 779-3600

PLEASE TAKE NOTICE that counsel for Plaintiffs, the Fraternal Order of Police Penn-Jersey Lodge 30 ("FOP Lodge 30") and Joseph Vena ("Vena"), shall appear before the Honorable Samuel L. Supnick, J.S.C., Superior Court of New Jersey, Hall of Justice, 101 South Fifth Street, Camden, New Jersey 08103, on Friday, July 11, 1997, at 9:00 a.m., or as soon thereafter as counsel may be heard, to move this Court to enter an order granting Plaintiffs' Motion for Summary Judgment respecting

Count I of the Amended Complaint, and ordering the parties to negotiate an impasse-resolution procedure featuring binding interest arbitration under Court supervision.

Plaintiffs shall rely on the attached Brief and accompanying Certifications, Exhibits and separate Material Statement of Facts in Support of their Motion. Plaintiffs respectfully requests leave to present oral argument in support of its Motion for Summary Judgment.

Respectfully submitted,

SPEAR, WILDERMAN, BORISH, ENDY SPEAR AND RUNCKEL, P.C.

BY: _____
BENJAMIN EISNER

BY: _____
CHARLES T. JOYCE
Attorneys for Plaintiffs, Fraternal Order of Police, Penn-Jersey, Lodge 30 and Joseph Vena

DATED: June 13, 1997

BLANK ROME COMISKY & McCAULEY
PETER A. GOLD, ESQUIRE
Resident Partner
SAMUEL M. FIRST, ESQUIRE
SCOTT F. COOPER, ESQUIRE
210 Lake Drive East
Suite 200
Woodland Falls Corporate Park
Cherry Hill, NJ 08002
(609) 779-3600

Attorneys for Defendant,
Delaware River Port Authority

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30, and JOSEPH VENA, Plaintiffs, v. DELAWARE RIVER PORT AUTHORITY, Defendant.	SUPERIOR COURT OF NEW JERSEY CAMDEN COUNTY LAW DIVISION DOCKET NO. L-7547-96 CIVIL ACTION NOTICE OF CROSS MOTION AND ALTERNATIVELY NOTICE OF MOTION TO STRIKE EXPERT TESTIMONY; OR TO CONTINUE PLAINTIFFS' MOTION PURSUANT TO RULE 4:46-5(a) RETURN DATE July 25, 1997 9:00 A.M.

TO: Benjamin Eisner, Esquire
Charles Joyce, Esquire
SPEAR, WILDERMAN, BORISH,
ENDY, SPEAR AND RUNKEL
36 Tanner Street
Second Floor
Haddonfield, NJ 08033
(609) 547-6199

PLEASE TAKE NOTICE that counsel for Defendant, the Delaware River Port Authority ("DRPA"), shall appear before the Superior Court of New Jersey, located at the Hall of Justice, 101 South Fifth Street, Camden, New Jersey 08103, on Friday, July 25, 1997, at 9:00 a.m., or as soon thereafter as counsel may be heard, to move this Court to enter an order granting Defendant DRPA's

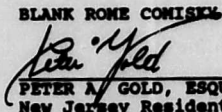
Cross-Motion for Summary Judgment dismissing Plaintiffs FOP Lodge 30 and Joseph Vena's Amended Complaint. In the alternative, the DRPA will move this Court to strike Plaintiffs' alleged expert testimony introduced in support of Plaintiffs' Motion for Summary Judgment or in the alternative, continue the Plaintiffs' Motion in Order that the DRPA may submit additional affidavits, take discovery or submit its own expert testimony, if required.

Defendant DRPA shall rely on the attached Brief, Statement of Material Facts and Exhibits in Support of its Cross-Motion for Summary Judgment and Motion to Strike alleged expert testimony. The attached Brief is also submitted in response to Plaintiffs' Motion for Summary Judgment which is also to be heard by this Court on July 25, 1997.

Defendant DRPA respectfully requests leave to present oral argument in support of its Cross-Motion For Summary Judgment and Motion to Strike alleged expert testimony.

Respectfully submitted,

BLANK ROME COMISKY & McCAULEY

BY: 

PETER A. GOLD, ESQUIRE
New Jersey Resident Partner
SAMUEL M. FIRST, ESQUIRE
SCOTT F. COOPER, ESQUIRE
210 Lake Drive East, Suite 200
Woodland Falls Corporate Park
Cherry Hill, NJ 08002
Attorneys for Defendant
Delaware River Port Authority

Dated: July 15, 1997

BLANK, ROME, COMISKY & McCAULEY
PETER A. GOLD, ESQUIRE
Resident Partner
SAMUEL M. FIRST, ESQUIRE
JENNIFER J. PLATZKERE
210 Lake Drive East
Suite 200
Woodland Falls Corporate Park
Cherry Hill, NJ 08002
(609) 779-3600

Attorneys for Defendant,
Delaware River Port Authority

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30, and JOSEPH VENA, Plaintiffs, v. DELAWARE RIVER PORT AUTHORITY, Defendant.	SUPERIOR COURT OF NEW JERSEY CAMDEN COUNTY LAW DIVISION DOCKET NO. L-7547-96 CIVIL ACTION **NOTICE OF MOTION FOR RECONSIDERATION OF THE COURT'S JUDGMENT, AND/OR TO ALTER OR AMEND JUDGMENT, AND STAY ALL PROCEEDINGS** RETURN DATE: JANUARY 9, 1998

TO: Benjamin Eisner, Esquire
Charles Joyce, Esquire
SPEAR, WILDERMAN, BORISH,
ENDY, SPEAR AND RUNKEL
36 Tanner Street, 2nd Floor
Haddonfield, New Jersey 08033
(609) 428-5225

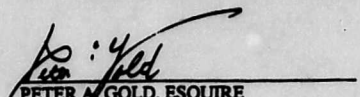
PLEASE TAKE NOTICE that counsel for Defendant, the Delaware River Port Authority ("DRPA"), shall appear before the Superior Court of New Jersey, located at the Hall of Justice, 101 South Fifth Street, Camden, New Jersey 08103, on Friday, January 9, 1998, at 9:00 a.m., or as soon thereafter as counsel may be heard, to move this Court, for good cause shown, to enter an

Order granting Defendant DRPA's Motion for Reconsideration of the Court's November 21, 1997 Judgment and/or to Alter or Amend Judgment, vacating its November 21, 1997 Judgement Order and staying all proceedings, and denying the Plaintiffs' Motion for Summary Judgment on Count I of the Amended Complaint.

Defendant DRPA shall rely on the Brief in support of its Motion for Reconsideration of the Court's Judgment, and/or to Alter or Amend Judgment and to Stay All Proceedings, attached hereto, in support of its Motion. Defendant DRPA respectfully requests leave to present oral argument.

Respectfully submitted,

BLANK ROME COMISKY & McCAULEY

BY: 

PETER A. GOLD, ESQUIRE
Resident Partner
SAMUEL M. FIRST, ESQUIRE
JENNIFER J. PLATZKERE
210 Lake Drive East, Suite 200
Woodland Falls Corporate Park
Cherry Hill, NJ 08002
(609) 779-3600

Attorneys for Defendant
Delaware River Port Authority

Dated: December 5, 1997

BLANK ROME COMISKY & McCAULEY LLP
A Pennsylvania LLP
PETER A. GOLD, ESQUIRE
Resident Partner
SAMUEL M. FIRST, ESQUIRE
210 Lake Drive East, Suite 200
Woodland Falls Corporate Park
Cherry Hill, NJ 08002
(609) 779-3600

Attorneys for Defendant,
Delaware River Port Authority

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30, and JOSEPH VENA, Respondents/Plaintiffs, v. DELAWARE RIVER PORT AUTHORITY, Appellant/Defendant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003344-97T1 CIVIL ACTION **CERTIFICATE OF SERVICE**

I, Samuel M. First, Esquire, a member of the Bar of the State of New Jersey, hereby certify that on this date I caused two (2) true and correct copies of Appellant/Defendant Delaware River Port Authority's Supplemental Appendix and Certificate of Service, in the above-captioned case to be served via First Class Mail, upon Plaintiffs' Counsel of Record as follows per Plaintiffs' Counsel's request:

One (1) copy of the Supplemental Appendix to:

Benjamin Eisner, Esquire
Charles Joyce, Esquire
SPEAR, WILDERMAN, BORISH,
ENDY, SPEAR AND RUNKEL
89 North Haddon Avenue
Suite C
Haddonfield, New Jersey 08033

One (1) copy of the Supplemental Appendix:

Benjamin Eisner, Esquire
Charles Joyce, Esquire
SPEAR, WILDERMAN, BORISH,
ENDY, SPEAR AND RUNKEL
230 South Broad Street
Suite 1400
Philadelphia, Pennsylvania 19102

I also caused two (2) true and correct copies of Appellant/Defendant Delaware River Port Authority's Supplemental Appendix and Certificate of Service, in the above-captioned case to be served via First Class Mail, upon Amicus Curiae, New Jersey State as follows:

Karen L. Jordan, Esquire
Deputy Attorney General
Division of Law
Richard J. Hughes Justice Complex
CN 093
Trenton, N.J. 08625

Samuel M. First, Esquire

Dated: June 30, 1998

[illegible]-3344-97T1

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JUL 02 1998

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE, 30, and JOSEPH VENA,
Respondents-Plaintiffs,

v.

THE DELAWARE RIVER PORT AUTHORITY
Appellant-Defendant.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-003344-97T1
Civil Action

On Appeal From:
SUPERIOR COURT OF NEW JERSEY
CAMDEN COUNTY - LAW DIVISION

Sat Below:
HONORABLE M. ALLAN VOGELSON, P.J.S.C.

REC'D
APPELLATE DIVISION
JUL 02 1998

BRIEF AND APPENDIX OF RESPONDENTS-PLAINTIFFS, FRATERNAL ORDER OF POLICE PENN-JERSEY LODGE 30 AND JOSEPH VENA

BENJAMIN EISNER, ESQUIRE
SPEAR, WILDERMAN, BORISH ENDY, SPEAR AND RUNCKEL
A Pennsylvania Professional Corporation
89 North Haddon Avenue, Suite C
Haddonfield, NJ 08033
609-428-5255

CHARLES T. JOYCE, ESQUIRE
SPEAR, WILDERMAN, BORISH ENDY, SPEAR AND RUNCKEL
A Pennsylvania Professional Corporation
230 South Broad Street, Suite 1400
Philadelphia, PA 19102
215-732-0101

Attorneys for Respondents-Plaintiffs Fraternal Order Police, Penn-Jersey Lodge 30 and Joseph Vena

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I. INTRODUCTION

This case concerns judicial recognition of a simple concept: police officers employed by a bi-state agency of New Jersey and Pennsylvania, who share the same day-to-day dangers and responsibilities as their brethren serving municipalities in either State, are entitled to the same basic employment rights established by law in each state to protect both police officers and the communities that depend upon them. This appeal assails a bedrock principle of New Jersey law undergirding this concept -- the idea that legislation of the creator states of a bi-state agency which evinces a shared and central tenet of public policy should be applied to regulate the conduct of the agency. The Appellant urges reversal of the Law Division's faithful application of this principle, and seeks to overturn rulings that have mandated a peaceful resolution to a long-festering dispute between some seventy-five police officers represented by the Fraternal Order of Police Lodge 30 ("Lodge 30"), and their employer, the Delaware River Port Authority ("DRPA" or "Authority"), over the terms and conditions of the officers' employment.

The Law Division has held that by virtue of the parallel labor laws in Pennsylvania and New Jersey, the DRPA's police officers are entitled to organize into a labor organization and negotiate in good faith with the DRPA. The court below similarly found that when the DRPA and its police officers cannot agree voluntarily on a contract governing wages and working conditions they must, like their counterparts in every municipality in either state, submit their dispute to an impasse resolution procedure culminating, if necessary, in binding interest arbitration.

These rulings follow clearly and unavoidably from our Supreme Court's recent decision in *I.U.O.E. Local 68 v. DRBA*, 147 N.J. 443, *cert. den.* 118 S.Ct. 165 (1997), a decision the United States Supreme Court has seen fit not to disturb. All of the arguments advanced by the DRPA and the *Amicus* in this appeal run swiftly aground on the well-delineated shoals of *DRBA*. The rulings of the Law Division should therefore be affirmed.

This brief is submitted by the Plaintiff, Lodge 30, in opposition to the appeal filed by Defendant, DRPA, and in response to the brief of the *Amicus Curiae*, the State of New Jersey.

II. COUNTERSTATEMENT OF FACTUAL AND PROCEDURAL BACKGROUND

A. THE STRUCTURE OF THE DRPA AND THE ROLE AND RESPONSIBILITIES OF THE DRPA POLICE

The DRPA was born of enabling legislation enacted by the State of New Jersey and the Commonwealth of Pennsylvania. *N.J.S.A.* § 32:3-2 *et seq*; 36 P.S. § 3503 *et seq*. Together, this legislation comprises what is popularly termed the "DRPA Compact," and sets out in general terms the mission of the DRPA, and its powers, duties and responsibilities. According to the Compact, the Port Authority exists as a "public corporate instrumentality of the Commonwealth of Pennsylvania and the State of New Jersey... exercising an essential governmental function." *N.J.S.A.* § 32:3-2; 36 P.S. § 3503.

Among the many powers and obligations vested to the DRPA is the right to enter into contracts, *N.J.S.A.* § 32:3-5(f); 36 P.S. § 3503, Article IV(f), and to "sue and be sued" in the courts of the State of New Jersey and the Commonwealth of Pennsylvania. *Id.*, subsection (b). Additionally, the Compact provides that the Port Authority "shall have such additional powers as may hereafter be delegated to or *imposed upon it* from time to time by the action of either State concurred in by legislation of the other." *N.J.S.A.* 32:3-5; 36 P.S. § 3503, Article IV (emphasis added). The "imposition" of such additional powers or responsibilities can be effected either by the states agreeing to amend the Compact itself, or by one creator state passing legislation that becomes applicable to the DRPA when the other creator state enacts "legislation having a substantially similar effect" as the previously enacted law. *See, e.g., N.J.S.A.* §§ 32:3-3; 32:4-6, "Historical and Statutory Notes."

In 1957, the DRPA Compact was amended to provide the DRPA with the power to establish a Bureau of Police to maintain the safety and order of the DRPA's property. The Bureau currently employs approximately seventy-five police officers, exclusive of corporals, sergeants, lieutenants and captains. (Pa1, ¶16). Of this number, 57 have served the Port Authority for five years or more, 23 officers have at least ten years on the job, and 12 have been employed by the DRPA for over fifteen years. (Pa16, ¶3)

DRPA police officers are sworn to uphold the laws of both the State of New Jersey and the Commonwealth of Pennsylvania. (Pa2, ¶5). They are provided with a manual on the rules, regulations and operating procedures of the DRPA Bureau of Police, which states

that they are "public servants" whose cardinal duty and responsibility is to "[a]t all times, within the boundaries of the Delaware River Port Authority, preserve the public peace, prevent crime, arrest violators of the law, and enforce all the criminal laws of the Commonwealth of Pennsylvania [and] the State of New Jersey..." (Pa10, ¶1). DRPA police officers further have full authority to make arrests for violations of New Jersey and Pennsylvania law committed within the eight counties in New Jersey and five counties of Pennsylvania that comprise the "Port District", and, if in "hot pursuit" of offenders, may apprehend them anywhere in the State of New Jersey or Commonwealth of Pennsylvania (Pa16, ¶¶4-5).[1]

To fulfill these grave responsibilities, DRPA police officers are accorded, under the terms of the DRPA Compact, "with all the powers ... and all the immunities conferred by law on police officers or municipal police officers in ... the State of New Jersey and the Commonwealth of Pennsylvania." *N.J.S.A.* § 32:4-6; 36 P.S. §§ 3504.1. In 1993, DRPA police officers made over 700 arrests for driving while intoxicated, hundreds of arrests for possession of narcotics and deadly weapons, and issued thousands of citations and summonses for miscellaneous traffic offenses. (Pa2, ¶7).

[1] The DRPA Compact defines the "Port District" as encompassing the Counties of Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Ocean and Salem in New Jersey, and Bucks, Chester, Delaware, Montgomery and Philadelphia in Pennsylvania. *N.J.S.A.* § 32:3-13.23.

B. THE HISTORY OF COLLECTIVE NEGOTIATIONS BETWEEN THE DRPA AND THE DRPA POLICE OFFICERS, 1975-1995

In 1975, a group of DRPA police officers decided to affiliate with the Fraternal Order of Police ("FOP"), and the FOP contacted the DRPA to demand a union representation election. (Pa3, ¶9). The DRPA agreed to a secret ballot vote among the DRPA patrol officers, and after the FOP prevailed in the balloting, the Port Authority pledged to negotiate with the newly designated "Fraternal Order of Police Lodge 30," as the exclusive majority representative of the DRPA police officers. (*Id,* ¶10).

Consequently, on November 1, 1975, the DRPA and Lodge 30 executed their first labor agreement to govern the terms and conditions of employment of the DRPA police officers. (Pa3, ¶11). The 1975 Agreement ushered in a nearly two decade history of successive collective bargaining agreements between the Lodge 30 and the DRPA. Six times between 1978 and 1992, the parties engaged in collective negotiations that eventually culminated in an Agreement approved by the police officer rank-and-file and by the DRPA's Board of Commissioners. (*Id*).

C. NEGOTIATIONS BETWEEN THE DRPA AND THE FOP OVER A SUCCESSOR TO THE 1992-1995 COLLECTIVE BARGAINING AGREEMENT

In the fall of 1995, Lodge 30 and the DRPA commenced negotiations over a successor to the 1992-1995 Collective Bargaining Agreement. At the time, FOP-represented patrol officers, regardless of their length of service with the DRPA, earned a salary of $18.31 an hour. (Pa16, ¶6). By comparison, toll collectors employed by the DRPA to receive the

money and tokens paid by motorists who pass over the DRPA's bridges earned just one penny less per hour, and because they, unlike their counterparts on the DRPA police force, received time and one-half pay when they worked a scheduled sixth day in a work week, a DRPA toll taker's annual salary was actually $1,012.88 more than that of a DRPA patrol officer represented by Lodge 30. (Pa17, ¶9).[2]

Thus, when Lodge 30 and the DRPA met to commence collective bargaining negotiations, the Union sought to redress the lack of consideration for patrol officers' years of service in the wage calculation, and the disparity between the respective duties of police and toll takers and their respective rates of compensation. (Da397). Lodge 30 proposed a five level salary structure, whereby newly hired officers would receive 25% less than the base rate of pay, and officers with greater seniority would receive pay increments that, over the life of the Collective Bargaining Agreement, would culminate in a maximum annual salary of $49,300.00. (*Id*).

Although the Union offered its wage proposal at the first negotiation session on November 9, 1995, the DRPA refused to respond to it, and made no comment on wages at all until the parties' last bargaining session, some eight months later, on July 1, 1996.

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[2] Both DRPA patrol officers and DRPA toll collectors work 2192 scheduled hours a year, exclusive of any unscheduled overtime. In 1995, a DRPA patrol officer earned $38,084.00 per year as a base salary; a toll taker earned, with guaranteed overtime, $41,138.00. (Pa17, ¶¶7,9). DRPA highway mechanics and maintenance workers also earned more annually than DRPA police officers, even though they worked fewer hours. A maintenance worker earned $42,619.00 per year, and a highway mechanic made $39,083.00, both for working only 2080 hours annually. (Pa17, ¶10).

(Da397). Then, the DRPA announced that it would grant no wage increases in the first two years of the contract, and would provide only a 3% increase in the last year, raising the police officers' salary to just $39,000.00 a year. (Da397-98). The DRPA also indicated that it would impose a multi-tiered wage system of its own, cutting the pay of newly employed officers to $30,140.00 a year. (*Id*).

Furthermore, between November, 1995 and July 1, 1996, the DRPA repeatedly agreed to a number of FOP contract proposals involving, among other things, a restriction on subcontracting of certain police officer jobs, overtime compensation, selection for training programs by seniority, and enhanced access to personnel files, only to later renege on these agreements. (Da398-400). Additionally, the DRPA demanded the elimination of an existing contract provision entitling patrol officers injured in the line of duty to receive payments by the DRPA to compensate them for the difference between workers' compensation and their actual wages. At the start of bargaining, the DRPA withdrew this proposal, and thereafter reiterated repeatedly that it was not seeking to eliminate these workers' compensation "make whole" payments. (Da398-99). Without explanation, however, the DRPA eventually reinstated this demand, and announced that it intended to excise such make whole payments from the new labor contract. (*Id.*)

D. THE DRPA'S UNILATERAL IMPOSITION OF NEW TERMS AND CONDITIONS OF EMPLOYMENT

Throughout the winter of 1995-1996 and into the summer of 1996, the parties remained deadlocked on the above described items, as well as on several other issues.

(Da401). On July 1, 1996, the DRPA announced that it would negotiate no further with the FOP, and would seek authority from its Board of Commissioners to impose a "labor agreement" upon the FOP police officers that featured, *inter alia*, no wage increases until December, 1997, the elimination of workers' compensation make whole payments, elimination of a preexisting "no layoff" clause, and the creation of a new managerial right to subcontract bargaining unit work and to transfer patrol officers. (Da400-401).

On July 29, 1996, the Union unanimously voted to reject the DRPA's demands. (Pa6, ¶20). The next day, Fraternal Order of Police President James Stewart issued a letter to all sixteen DRPA Commissioners, explaining the reasons behind the unanimous rejection of the Defendant's terms, and requesting that the parties bargain in good faith to reach agreement on a new labor contract. (Da71-76).

On August 21, 1996 the DRPA Commissioners adopted a resolution that provided that "the DRPA and the FOP are now at impasse." (Da79). Thereafter, the Commissioners authorized the DRPA to unilaterally impose its terms and conditions upon the FOP-represented patrol officers. (Pa22, ¶17).

E. THE DRPA-COMMISSIONED "HAY STUDY" ON COMPENSATION OF DRPA POLICE OFFICERS

In September, 1996, the DRPA retained Hay Management Consultants ("Hay") to review the Port Authority's pay rates to "ensure[ ] fairness and equity in the salary compensation program." (Da401; Pa26). Hay surveyed the duties and responsibilities of all

Defendant's employees, including DRPA police officers, and assigned a numerical grading system to each job position "that reflected the know-how, problem solving and accountability" of each job. Patrol Officers were assigned a salary grade of "8", which, according to Hay, entitled them to receive a base salary of $40,080 at the "midpoint" of their employment, and a maximum salary of $48,096. (Pa23, ¶19).[3]

In the weeks and months following the publication of the Hay Study in January, 1997, the DRPA used its findings to justify increasing the compensation of several executive level positions at the DRPA. (Pa24, ¶25). No attempt was ever made, however, to bring patrol officers' base wages in line with the Hay Study's recommendations. (*Id*, ¶26).[4] Some thirteen other job classifications were ranked by the Hay Study as Grade "8"; of these, virtually every one was compensated several thousand dollars above the "midpoint", and 11

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[3] The "base salary" used by Hay was based upon an annual work schedule of only 2080 hours. (Pa23, ¶19). DRPA toll collectors received under the Hay Study a salary grade of "4", which set a midpoint salary of $26,340.00, and a maximum salary of $31,608.00. (*Id*, ¶20). DRPA highway mechanics received a salary grade of "5" which called for a midpoint salary of $28,664.00 and a maximum salary of $34,398.00. (*Id.*, ¶21).

[4] Although the Hay study did not explicitly define the number of years an employee should work to be considered at the "mid-point" or "maximum" of their salary range, it did state that the midpoint represented "where the DRPA ... intends to pay competent performers", while the maximum "exist[ed] to accommodate both high performers *and* competently performing incumbents who remain the same job for a long period of time." (Pa31, emphasis added). Typically, municipal police departments in New Jersey and Pennsylvania pay patrol officers who have between five and seven years' experience in their respective departments the maximum base salary under their collective bargaining agreements. (Pa23-24, ¶22).

of the 13 classifications were compensated above the "maximum" pay level recommended by the Hay study. (Pa24).[5]

Lodge 30 and the DRPA remained at impasse on wages and other working conditions, and the patrol officers continued to perform their duties under the terms of a unilaterally imposed "agreement." Despite numerous entreaties from the FOP, the DRPA refused to negotiate further with the Union. (Pa6, ¶21; Pa24, ¶27).

F. THE INITIATION OF THE FOP'S LAWSUIT

On August 20, 1996, Plaintiffs filed a Complaint in the Chancery Division of the Superior Court of New Jersey, Camden County, contending, *inter alia*, that the DRPA's actions at the bargaining table and its unilateral implementation of employment conditions violated the complementary labor policies of New Jersey and Pennsylvania. The Complaint sought declaratory and injunctive relief, an order that the parties resume negotiations, submission of the dispute to a court-appointed mediator, and all other relief deemed necessary by the court to effectuate Plaintiffs' labor rights.[6] On August 21, 1996, the Chancery Court, *sua sponte*, ordered the case transferred to the Law Division. On October 7, 1996, the

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[5] For example, an "executive legal secretary" at the DRPA received a salary of $51,000.00, and the "Manager of Community Relations" received a salary of $67,496.00. (Pa24, ¶24). Although both job titles were ranked a "Grade 8" by the Hay Study, the DRPA paid these employees $2,904.00 and $19,400 respectively, over the *maximum* recommended salary. (*Id.*).

[6] On October 30, 1996, Plaintiffs amended their Complaint to include, as a basis for jurisdiction under the theory of complementary and parallel legislation, the New Jersey Employer-Employee Relations Act, *N.J.S.A.* § 34:13A-1 *et seq.*

DRPA filed a Motion for Summary Judgment, arguing that no labor law of New Jersey or Pennsylvania, either singly or in combination, applied to the DRPA.

G. THE LAW DIVISION'S DENIAL OF THE DRPA'S MOTION FOR SUMMARY JUDGMENT

On December 20, 1996, Judge Samuel Supnick of the Law Division issued a Bench Opinion denying the DRPA's Motion for Summary Judgment. (Da166). Explaining his ruling, Judge Supnick held that New Jersey and Pennsylvania had "set forth parallel or complementary legislation of a different nature but which ... nevertheless recognizes" that public police officers employed by the Port Authority should enjoy the same core labor law rights accorded to every municipal police officer employed in the two states. (Da 165-166). The court also ruled that in the absence of any administrative agency to effectuate and enforce these rights, the court possessed "the inherent power to deal with matters of that nature." (*Id.*).

H. THE FOP'S MOTION FOR SUMMARY JUDGMENT

After this Court denied the DRPA's application for a Stay and for Leave to file an Interlocutory Appeal, the parties met with Judge Supnick in April, 1997, to explore the possibility of resolving the case without further court action. This effort, however, proved unsuccessful. (Pa36, ¶2).

Shortly after this abortive settlement conference, counsel for the DRPA suggested to counsel for the Plaintiffs the possibility that expert testimony might be appropriate on the

issue of the relative similarity of Pennsylvania and New Jersey labor law. (Pa36, ¶3). Plaintiffs therefore asked Clyde W. Summers, Fordham Professor of Law at the University of Pennsylvania Law School, to prepare an opinion on the question. (Pa36-37, ¶5). Professor Summers researched New Jersey and Pennsylvania law on interest arbitration, and placed it "against the background of [his] knowing how these processes work and the experience of both police arbitration and the general process of arbitration". (Da220). He concluded that the interest arbitration statutes of New Jersey and Pennsylvania were substantially similar and parallel, and evinced a shared public policy to settle contract disputes between public police officers and their employers through an impasse resolution procedure that culminates in binding interest arbitration.

On June 13, 1997, Plaintiffs hand-delivered a copy of Professor Summers' Certification to the office of counsel to the DRPA, along with Plaintiffs' Motion for Summary Judgment, which sought court-ordered interest arbitration. (Pa37, ¶7). The Motion was filed June 16, 1997, with a return date of July 25, 1997.

Although Defendant had at least 32 days from its receipt of Professor Summers' Certification to either seek discovery of him, or to retain its own expert to attempt to oppose Summers' views, it did neither. (Pa37, ¶9). Instead, the DRPA cross-moved for summary judgment, and simply maintained that Professor Summers was not an expert, and that the court should therefore disregard his Certification. Alternatively, it argued that the Law

Division should grant an adjournment to allow the DRPA additional time to obtain Professor Summers' deposition and to secure its own expert.

Before argument or disposition of these motions, the matter was transferred from Judge Supnick to President Judge M. Allan Vogelson, and the return date on the motions was extended several times, eventually to October 20, 1997. During the interim, the parties discussed discovery scheduling, and the DRPA indicated, for the first time, that it wished to depose Professor Summers. (Pa38, ¶11). Plaintiffs' counsel contacted Professor Summers' office and was informed that by this time he was away on summer vacation. This information was promptly relayed to Defendant's counsel, and the parties agreed that Professor Summers would be deposed "on a date to be determined after Labor Day." (Pa45).

After Labor Day, Plaintiffs informed Defendant that Professor Summers was available on September 16, 17, 18 and 19, and then generally after October 1. Although the parties were already scheduled to meet on September 18 and 19 to allow the DRPA to depose other potential FOP Witnesses, the DRPA did not attempt to rearrange the depositions to allow for Summers' deposition on either of those two days. (Pa38, ¶13). Concerning September 16 or 17, Plaintiffs were told that these dates were not "convenient" for the DRPA's counsel. And, although aware of Professor Summers' general availability throughout the month of October, the DRPA declined to take Professor Summers' deposition that month because, according to its counsel, "[t]he thirteen business days from October 1, 1997 through October 20, 1997 ... did not provide the DRPA with sufficient opportunity" to depose him. (Pa39,

¶14). In September, at least one month before the October 20 return date on the Motions, the DRPA also advised Plaintiffs that it had identified its own expert, but had decided not to have him prepare or submit a report until the court ruled on the pending Cross-Motions for Summary Judgment. (Pa39, ¶15).

On October 20, 1997, Judge Vogelson heard argument on the Cross-Motions, but deferred a ruling for two additional weeks, suggesting the parties meet and try to work out a mutually agreeable resolution of the lawsuit. (Da 359-60). During this two-week period of time, the DRPA made no effort to take Professor Summers' deposition, and continued to refrain from submitting its own expert report to the court. (Pa39, ¶14).

I. THE LAW DIVISION'S GRANT OF THE FOP'S MOTION FOR SUMMARY JUDGMENT

On November 3, 1997, the Law Division issued its ruling. It first observed that Professor Summers' Certification was not opposed or challenged by the DRPA "by anything other than a bare denial" of his expert status, notwithstanding the fact that his Certification had been filed in mid-June. (Da387, 376). The court then found Summers to be "a highly qualified expert," and proceeded to incorporate his Certification into the record. (Da377). Noting that Judge Supnick's earlier ruling that the labor law policies of New Jersey and Pennsylvania that accorded collective negotiation rights to public police officers were complementary and parallel had provided a bedrock "law of the case" for the court to build upon, Judge Vogelson went on to hold that the subsequent decision of the New Jersey Supreme Court in *I.U.O.E. Local 68, AFL-CIO v. Delaware River and Bay Authority*, 147

N.J. 443, *cert. den.*, 118 S.Ct. 165 (1997) ("*DRBA*") supported Supnick's earlier finding, and was controlling in this matter. (Da387; 405).[7] Observing further that the parties remained at "impasse" in their collective negotiations, the court framed its decision succinctly:

> There are no facts that are in dispute. The only [question] . . . is whether... given in a setting of parallel and similar or complementary [laws] does the Delaware River Port Authority in its wisdom have the right to refuse to sit and negotiate and if an impasse exists... can this Court order interest arbitration? I find that it can and it will.

(Da406). In so holding, Judge Vogelson specifically rejected the DRPA's claims that court-ordered interest arbitration would somehow violate the DRPA Compact, the doctrine of Separation of Powers, or would in any way be contrary to the legislative history of the New Jersey or Pennsylvania labor statutes. (Da393-94). The court also disagreed with the DRPA's contention that it should have more time to take discovery of Summers, or obtain its own expert report, finding that the Defendant had had ample time to pursue either. As the court put it, "there has been a number of months. There has been a vehicle by which an expert could have been provided, none have been." (Da414). "There was equally a vehicle," the court observed, to "test Professor Summers' opinions" by deposition. "It just didn't happen." (*Id*).

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[7] In *DRBA*, the New Jersey Supreme Court affirmed the holding of this Court, that the labor laws of Delaware and New Jersey were "substantially similar" in that they expressed a mutual public policy of according public employees the right to organize into labor organizations and negotiate collectively with their employers. Therefore, the Supreme Court ruled, these rights should also be provided to employees of the Delaware River and Bay Authority, a bi-state agency created by Delaware and New Jersey.

Judge Vogelson proceeded to order the parties to obtain a mediator through the American Arbitration Association ("AAA") to "develop a procedure and mechanism to resume good faith negotiations and arrive at an agreement over the terms and conditions of employment for DRPA police officers", and if this process failed, and the parties remained at impasse, the court indicated that it then would order binding interest arbitration. (Da408).

K. THE DRPA'S MOTION FOR RECONSIDERATION

On November 18, 1997, at the DRPA's request, Plaintiffs made Professor Summers available for deposition. On November 26, 1997, the last day of discovery, Defendants delivered a copy of its purported expert report to Plaintiffs. (Pa40, ¶17).

On December 5, 1997, Defendant filed a Motion for Reconsideration, Alteration or Amendment of Judgment, and Stay of All Proceedings, arguing that the court had erred in ruling that Professor Summers was an expert, in relying on Judge Supnick's prior ruling as the "law of the case", in holding that the Supreme Court's *DRBA* decision was controlling in this matter, and in not allowing the Port Authority additional time to submit its own expert report and to depose Summers.

On December 12, 1997, the Law Division denied the DRPA's application for a Stay of its Order, and ordered the DRPA Commissioners to appropriate funds to equally share with the FOP the cost of the mediator's fees for three (3) mediation sessions. (Da5). On December 18, 1997, the parties notified the AAA that they had selected Andrew S. Price, Esquire, to serve as mediator pursuant to the court's Order.

L. THE LAW DIVISION'S DENIAL OF THE DRPA'S MOTION FOR RECONSIDERATION

On January 23, 1998, Judge Vogelson issued a Bench Opinion denying the DRPA's Motion for Reconsideration and Alteration or Amendment of Judgment. In so ruling, the court took careful pains to address and dispatch all of DRPA's criticisms of its earlier bench opinion. First, Judge Vogelson put to rest the DRPA's suggestion that the court had simply adopted Professor Summers' conclusion that the interest arbitration laws of New Jersey and Pennsylvania were "substantially similar", and therefore applicable to the DRPA and its patrol officers. While admitting that he had read Professor Summers' interpretation of the statutes, Judge Vogelson stated:

> Let me make it very clear for the record that I read the Statute of New Jersey, that I read the Statute of the State of Pennsylvania, and I compared the two, and I came to a conclusion. ... that they were parallel laws, that there were some differences between them, clearly, but that they were substantially parallel in the context of this case. ... *That was my determination by virtue of my reading*.

(Da468, emphasis added).

The court explained again the basis for its reasoning that the interest arbitration laws were substantially similar, holding that, while there existed differences in their mechanics, "the purpose of the two statutes" was identical: "that when the covered employees of each [state] are unable to reach agreement with their employer" over the terms and conditions of their employment, "there is a means by which that impasse is resolved." (Da469). Thus, the court concluded, the dissimilarities between the two statutory schemes "do not go to the intent and the policy of what the legislatures of the Commonwealth of Pennsylvania and the

State of New Jersey intend or desired to achieve by virtue of the legislation", which the court characterized as "providing a vehicle by which ... dispute resolution without strike," could be accomplished between public police officers and their employers. (Da485; 481).

Judge Vogelson also dispensed with the DRPA's renewed complaint that it needed additional time to procure and submit its own expert report. He noted that well before the court had ruled on the Motions for Summary Judgment, the DRPA had identified and retained its own expert, but had made "a tactical decision not to secure a report and submit it," prior to the court's initial ruling. (Da477). However, the court revealed that in passing upon the DRPA's Motion for Reconsideration, it had nonetheless read and evaluated the DRPA's expert report, but found it insufficient to alter the determination that the interest arbitration laws of New Jersey and Pennsylvania expressed a shared public policy to resolve impasses in police collective negotiations via a binding dispute resolution process. (Da483).[8]

The court then addressed the DRPA's claim that it had erred in previously holding that the New Jersey Supreme Court's decision in *DRBA* was controlling in this case. Judge Vogelson explained that while *DRBA* arose in a "different factual setting" from the matter at hand, it nonetheless "talk[ed] about the similarity of the laws" of a bi-state agency's creator

[8] Indeed, Judge Vogelson acknowledged that it was "procedurally perhaps improper" under the rules governing motions for reconsideration for him even to have read the DRPA's expert report, as it could have been presented to the court prior to its ruling on the Cross-Motions for Summary Judgment, "but notwithstanding having said that, I read it and I came to the same conclusion that I did initially" -- that the interest arbitration statutes of New Jersey and Pennsylvania were "substantially similar", and thus applicable to the DRPA. (Da483).

states "for the purpose of fostering a resolution of a dispute between the employer and the employee and provide[d] the mechanics by which that ... can be done." (Da474). Further, while acknowledging that the "mechanics" of the labor laws of Delaware and New Jersey were "not identical," Judge Vogelson observed that the Supreme Court in that case had discerned that the *policy* underlying the laws -- the intent to provide public employees with collective negotiation rights -- was shared by the creator states. (*Id.*) So too, here, Judge Vogelson concluded, the interest arbitration laws of New Jersey and Pennsylvania, while not identical, both aimed to channel disputes between public police officers and their employees into the peaceful forum of binding dispute resolution before a neutral entity selected by the parties. (Da486).

Finally, in response to the DRPA's query as to whether it could still voluntarily negotiate an impasse resolution procedure with Plaintiffs, Judge Vogelson responded:

> However you get it done is of no consequence to me as long as the parties agree. But done only occurs one of two ways. Either by agreement or by binding arbitration. Preferably the first, but if necessary, ultimately the last. ... So, if both parties decide ... we want to sit down and resolve it so that we can go on, I think that's wonderful. I applaud it. I encourage it. But if ... at the end there continues to be an impasse, then there has to be, in my legal judgment ... a means by which to resolve that impasse. Not unilaterally, but by a third party who will listen to both sides and make a decision.

(Da486-87; 489).

On February 17, 1998, the court entered a formal order denying the DRPA's Motion for Reconsideration for the reasons set forth in its January 23, 1998 Bench Opinion. (Da7).

Pursuant to Judge Vogelson's earlier ruling, the parties met with Mediator Price on April 29, 1998 for their first mediation session, to begin the attempt to craft a process to resolve the impasse in negotiations between the DRPA and the FOP. (Pa52).

III. LEGAL ARGUMENT

A. THE STANDARD OF REVIEW

The DRPA appeals from the trial court's Grant of Plaintiffs' Motion for Summary Judgment on November 21, 1997, the court's December 19, 1997 Order further effectuating its prior Order, and from the court's Denial, on February 17, 1998, of the DRPA's Motion for Reconsideration and/or to Alter or Amend Judgment. As the Law Division noted below, summary judgment is appropriate where, as here, there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. (Da406); *Brill v. Guardian Life Ins. Co. of America*, 142 N.J. 520 (1995).

A Motion for Reconsideration or Alteration of Judgment under Rule 4:49-2 and 4:50-1 "is addressed to the sound discretion of the trial court", and "[t]he decision granting or denying an application to open a judgment will be left undisturbed unless it represents a clear abuse of discretion." *Housing Authority of the Town of Morristown v. Little*, 135 N.J. 274, 283 (1994).

As the DRPA cannot point to a single material fact in dispute in this case, and as the Law Division was well within the considerable bounds of its discretion in denying the

Defendant's Motion for Reconsideration, the rulings appealed from should be affirmed by this Court.[9]

B. THE LAW DIVISION CORRECTLY APPLIED THE DOCTRINE OF COMPLEMENTARY LEGISLATION TO THIS CASE

(i) The DRPA is an agency of the State of New Jersey and the Commonwealth of Pennsylvania

Despite its apparent protestations to the contrary, it cannot be gainsaid that the DRPA is an "agency" of the State of New Jersey and the Commonwealth of Pennsylvania, and a political subdivision of both. Over three decades of jurisprudence by state and federal courts have firmly established the DRPA's status vis-a-vis its creator states. In *In Re Delaware Bridge*, 408 Pa. 179, 182 A.2d 514 (1962), for example, the Pennsylvania Supreme Court observed that the DRPA was "not a mere corporation, but, rather, was intended to be and has always been an agency of the Commonwealth of Pennsylvania." 182 A.2d at 515. And, in *Stinson v. DRPA*, 935 F.Supp. 531, 538 (D.N.J. 1996), the United States District Court for the District of New Jersey held that the DRPA is "a department or administrative arm of the government," and a "political subdivision" of New Jersey and Pennsylvania.

Thus, contrary to the DRPA's assumed view of itself as being wholly detached from the rights and obligations of state law, the New Jersey Supreme Court in *State v. Murphy*,

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[9] Plaintiffs note that the DRPA has also requested that this Court reverse the Law Division's denial of its cross-motion for Summary Judgment, and grant that Motion. (Db68). However, the Defendant has adduced no arguments whatever to support its request, and thus its appeal must be denied and any argument it might have made in support of that appeal must be deemed waived. *See State v. Lefante*, 14 N.J. 584, 590-591 (1954).

36 N.J. 172, 186 (1961) long ago made plain that a bi-state agency "is not a separate level of government somewhere between the federal government and the contracting states. It is part of the government of each of the states." "As the agent of each state," the court in *Murphy* concluded, the DRPA "*is subject to all of its laws, whether of statutory or common law origin*, except insofar as the states agreed *expressly or by fair implication to place it beyond them*." *Id.*, at 186 (emphasis added).

(ii) Complementary and Parallel legislation enacted by New Jersey and Pennsylvania applies to the DRPA.

Thus, while it is a truism that neither creator state can *unilaterally* impose additional duties, powers or responsibilities upon a bi-state agency, *Eastern Paralyzed Veterans Association, Inc. v. City of Camden*, 111 N.J. 389 (1988); *Nardi v. DRPA*, 88 Pa.Cmwlth. 558, 490 A.2d 949 (1985), it is now well-settled that the corollary of this proposition is likewise true: a bi-state agency may be made subject to any single creator state's legislation or regulation if the other creator state enacts laws or pursues policies that are "substantially similar." *IUOE Local 68 v. Delaware River and Bay Authority*, 147 N.J. 433, 445, *cert. den.*, 118 S.Ct. 165 (1997); *Eastern Paralyzed Veterans*, *Supra*, 545 A.2d at 133.

This doctrine, variously referred to as "parallelism", or the principle of "complementary legislation", forms the linchpin for the Law Division's decisions that are the subject of this appeal. As both Judge Supnick and President Judge Vogelson ruled, the DRPA must negotiate and, if necessary, submit to interest arbitration the terms and conditions

of employment for its police officers, because the labor laws of New Jersey and Pennsylvania express a clear, common, public policy: to allow public police officers, such as Plaintiffs, the right to organize and bargain collectively with their employers, who must meet with them and negotiate in good faith; to prevent public police from engaging in strikes and walkouts and to forbid unilateral implementation of employment terms by employers when an impasse in negotiations arises, and to instead provide for binding interest arbitration when the parties cannot reach agreement on a collectively-bargained labor contract.

a) The Development of the Doctrine of Parallelism in New Jersey and Pennsylvania

As a review of the development of parallelism in the courts of New Jersey and Pennsylvania demonstrates, there is no requirement that the laws at issue be "identical" in order for them to apply to a bi-state agency. Further, as the Supreme Court of New Jersey has made abundantly clear, there is no need for the legislation to explicitly provide that it extends to the DRPA for the courts to hold that it modifies the bi-state compact, and thus regulates the conduct of the bi-state agency.

Perhaps fittingly, the first case to apply parallelism arose out of a labor dispute. In *Delaware River and Bay Authority v. International Association of Masters, Mates, and Pilots*, 45 N.J. 138 (1965), the New Jersey Supreme Court ruled that employees of the Delaware River and Bay Authority ("DRBA"), a bi-state agency of New Jersey and Delaware, were prohibited from engaging in a work stoppage because they were "public employees", who, under New Jersey law, were forbidden from striking. Upholding the DRBA's right to

petition the Chancery Court for an injunction to end the work stoppage, the Supreme Court held, "[t]he fact that the Authority is designated as a bi-state agency, rather than an agency of New Jersey alone, has no materiality," because there was "no indication that the historic and widely prevailing policy against strikes by public employees is not equally applicable in both states." 45 N.J. 147.[10]

Masters, Mates and Pilots proved significant for at least two reasons: First, the court found that an aspect of labor regulation was applicable to a bi-state agency because of the creator states' parallel *public policy* prohibiting strikes by public employees, and despite the fact that the creator states did not have "identical" legislation or common law precedent on the subject. Second, the court conferred a right upon a bi-state agency -- the authorization to seek injunctive relief to combat a strike by its employees -- that was not specifically provided for in the bi-state compact that created the DRBA. [11]

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[10] As the court noted, strikes by public employees were prohibited in New Jersey by virtue of the Attorney General's memorandum opinion regarding the rights of public employees under the New Jersey Constitution, Article I, Paragraph 19, and the New Jersey Superior Court's decision in *New Jersey Turnpike Auth. v. AFSCME Local 1511*, 83 N.J. Super. 389, 200 A.2d 134 (Ch. Div. 1964) which held that public employees have the right to organize and engage in collective negotiations with their employers, (who have the concomitant duty to consider their proposals in "good faith"), but do not possess the power to strike over their demands or proposals. See *Masters, Mates*, 45 N.J.at 142-145. At the time of this decision, Delaware possessed a similar prohibition, featured as part of a legislative enactment, not a creature of its common law. *See* Right of Public Employees to Organize Act, *Del. Code Ann.* title 19 §§ 1301-1312, *repealed*, Public Employment Relations Act, *Del. Code Ann.* title 19, §§1301-1318 (Supp. 1994).

[11] The DRBA compact, like the DRPA Compact, provides that "no additional duties or obligations shall be undertaken by the Authority under the law of either state ... without authorization by the law of both states." *N.J.S.A.* § 32:11E-1, Article VIII.

In *Nardi v. DRPA*, 88 Pa.Cmwlth. 558, 490 A.2d 949 (1985), the Pennsylvania Commonwealth Court adopted the principles of parallelism previously applied in *Masters, Mates & Pilots*. *Nardi* involved a DRPA police officer injured while on duty, who sought compensation from the DRPA under the terms of the Pennsylvania Benefits Law, 53 P.S. §§ 637, 638, which provided that DRPA police officers injured at work "shall" receive their full salary from the Port Authority until their disability ceased. Because New Jersey did not feature similar legislation -- among other things, the allegedly applicable New Jersey Act gave the DRPA the discretion to decline paying any additional compensation to its injured employees, and allowed such payments only up to *one year's* salary -- the court in *Nardi* ruled that the provisions of the Pennsylvania law were not applicable to the DRPA because the Pennsylvania statute constituted "a *unilateral* legislative act *imposing* an *additional burden* on the Authority." 490 A.2d at 952 (emphasis added). The *Nardi* court took careful pains to emphasize, however, that "identical legislation" was not required of New Jersey and Pennsylvania to effectively cover the DRPA, as long as the legislation was "substantially similar", and "confer[ed] a benefit upon the employees of the Authority." *Id.*, at n. 10.

Three years after *Nardi*, the New Jersey Supreme Court formally endorsed the concept of complementary legislation in *Eastern Paralyzed Veteran Assn. v. Camden*, 111 N.J. 389 (1988) ("*EPVA*"). The issue in *EPVA* was whether the DRPA was subject to requirements contained in the New Jersey State Uniform Construction Code Act, *N.J.S.A.* 52:27D-119-141, ("the Code"), and the New Jersey Law Against Discrimination, *N.J.S.A.* §§10:5-1 *et seq.* ("LAD"), so as to mandate a handicapped access elevator at a DRPA facility. The

Chancery Court and the Appellate Division both found that the DRPA was bound by these statutes, each on differing theories but neither on the ground that there existed substantially similar legislation in Pennsylvania. The Supreme Court found neither theory relied upon below to be persuasive, but pointedly noted that "the trial court's approach ... *did not consider* whether the New Jersey legislation could be sustained on the basis that there were substantially similar legislative acts in both New Jersey and Pennsylvania." 111 N.J. at 401 (emphasis added).

The Supreme Court then went on to explain that a bi-state agency "may be made subject to complementary or parallel state legislation," where there is "[s]ome showing of agreement by both states" regarding the enforcement of their respective regulatory laws. *Id.*, at 401-402. Significantly, the court did *not* state that the legislation had to explicitly specify that it embraced a particular bi-state agency. *Id.* Instead, holding that the issue of whether New Jersey's handicapped access construction regulatory system was parallel to Pennsylvania's scheme constituted a "fact-sensitive" question of law, the court remanded the matter to the trial court to "consider whether there is complementary legislation in New Jersey and Pennsylvania that would make equivalent the DRPA's obligation to each state to provide barrier-free access to handicapped persons." *Id.*, at 402; 407.

The New Jersey Supreme Court's embrace of the concept of complementary regulation in *EPVA* set the stage for two more recent decisions of the New Jersey high court that the Law Division rightly found to effectively control this case, and to mandate that the parties

to this litigation submit their contract dispute to a neutral impasse resolution procedure. In the first case, *Bunk v. Port Authority of New York and New Jersey*, 144 N.J. 176 (1996), the Supreme Court considered whether an employee of the Port Authority of New York and New Jersey, a bi-state agency of New Jersey and New York, was covered under a provision of New Jersey Worker's Compensation law that limited benefits of public employees receiving a disability pension for the same injury. This question required the court to apply the "principles of parallelism," and consider New York's provisions for simultaneous receipt of worker's compensation and disability benefits. 144 N.J. at 185. While "not profess[ing] to decide the exact contours of New York law" on this issue, the court found that there was "evidence in the record...that the provisions are *somewhat similar*." *Id.* (Emphasis added).

Indeed, the *Bunk* court discerned a plain difference in the laws: whereas New Jersey provided that employees who received any disability pension had their benefit reduced by the amount of a concurrent worker's compensation award, New York only applied such a set off where the worker received an "accidental disability pension", and not where the employee merely received an "ordinary disability pension." *Id.* at 185. "However," the court reasoned, "these provisions of New York law, like New Jersey's, reflect a plan to coordinate disability benefits under public employee retirement and worker's compensation systems." *Id.* Noting further that "[o]ne of the central themes of recent legislatures is that there should not be double recovery from two sources for the same injury," the court held that New Jersey's limitation on benefits was fully consonant with the "dominant policy" of both New Jersey and New York law, and therefore applicable to the Port Authority. *Id.* at 189.

As in *Masters, Mates and Pilots*, neither the New Jersey nor the New York Acts specifically provided that they were applicable to the Port Authority. And, that the *Bunk* court required to satisfy itself that "some showing" existed to extend these laws to the bi-state agency was its finding that the respective statutes expressed a common, "dominant policy" of the creator states. 144 N.J. at 189.

b) *DRBA*: The New Jersey Supreme Court's Latest Word on Parallelism

A year after deciding *Bunk*, the New Jersey Supreme Court weighed in with a case that not only set forth the court's most expansive exposition of the principle of parallelism, but that also arose in a factual context close to the case at hand. In *IUOE Local 68 v. Delaware River and Bay Authority, supra*, ("*DRBA*"), a labor union representing the Cape May - Lewes Ferry workers sought recognition and the right to negotiate collectively with the DRBA. The agency refused, and the union brought an action in Chancery Court, contending that New Jersey and Delaware labor law exhibited a parallel and complementary intent on the part of the DRBA's creator states to supply DRBA workers with these labor rights. The trial court dismissed the complaint, holding that the right to collectively negotiate could be applicable to employees of a bi-state agency only if the right was "deliberately expressed" in the respective states' legislation.

This Court, however, reversed the trial court. (A copy of this Court's opinion is attached hereto as Exhibit "A"). "To be sure," this Court conceded, "the two state acts are not identical":

> However, both clearly give public employees the right to freely organize, to designate a representative to 'negotiate in good faith' with the employer with respect to 'terms and conditions' of employment, and to execute resulting written agreements ... both schemes also prohibit strikes by public employees."

See Plaintiffs Ex. "A", at 8. "We think," this Court concluded, "that through the enactment of such legislation, New Jersey and Delaware have expressed their agreement that public employees, including the DRBA's, may organize and designate a representative to engage in collective negotiation on their behalf." *Id.* at 10. This Court therefore remanded the case "to the trial judge to determine how the complementary labor policies of New Jersey and Delaware, as expressed in their parallel labor legislation, are to be effectuated." (Ex "A" at 11).

In a 6-1 decision, the New Jersey Supreme Court resoundingly affirmed the opinion of this Court. It concluded that a bi-state agency such as the Defendant could be found subject to its creator states' labor laws in any one of three ways. First, "when the agency's compact expressly provides for unilateral action," 147 N.J. at 446; second, if "both states have adopted complementary or parallel legislation," *Id.*; and finally, if "the agency has impliedly consented to the exercise of single state jurisdiction." *Id.* In her lone dissent, Justice Garibaldi correctly noted that neither the first nor the third prongs of this test applied to the Delaware River and Bay Authority: its compact did "not expressly give the compacting states the power to impose their labor laws on the DRBA, and the DRBA did not consent to the exercise of single state jurisdiction in the area of collective negotiations with its employees." *Id.* at 452, (Garibaldi, J., dissenting).

Therefore, the remaining issue for the *DRBA* court was "whether the laws of New Jersey and Delaware are complementary and parallel with regard to collective negotiations for public employees." *Id.* at 446-447. The majority, after broadly canvassing the respective state labor codes, ruled that "[t]he labor laws of New Jersey, and Delaware, although not identical, are complementary and parallel. As a matter of public policy, the legislatures of both states have concluded that public employees should have the right of collective negotiation and that employers should not interfere with that right." *Id.*, at 447. "In effect", the court thus concluded, "the legislatures have modified the Compact." *Id.* Explaining its reasoning further, the *DRBA* court stated:

> The dissent would deny DRBA employees the right of collective negotiation *that the New Jersey and Delaware legislatures have conferred on all public employees.* . . . Contrary to the dissent, we merely recognize that the New Jersey and Delaware legislatures have adopted a *substantially similar policy* concerning collective negotiations by public employees. *Anomalous indeed would be the failure to apply so important a policy to an entity created by both states for their mutual benefit.*

Id. (Emphasis added).[12]

In *DRBA*, the Supreme Court confirmed that the labor laws of two creator states which are "not identical", but which nevertheless are "complementary and parallel", in that they

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[12] After the *DRBA*'s Petition for Certiorari was denied by the United States Supreme Court, the Chancery Judge proceeded to issue an order in that case, appointing a special master, the former Regional Director of the National Labor Relations Board, to "administer all matters that arise with respect to the Union's petition for representation of the Bay Authority employees. The court further ordered that the special master's fees and expenses he shared equally by the parties. (A copy of the Chancery Court's Order in the *DRBA* case is attached hereto as Exhibit "B".)

express, "[a]s a matter of public policy", a shared legislative intent that certain classes of public employees should have certain labor rights and protections, must be applied to employees of a bi-state agency. 147 N.J. at 447. The *DRBA* court further strongly reiterated the historic readiness of New Jersey courts to use their equitable powers to apply and administer such labor rights in the absence of an administrative agency with jurisdiction over such classes of workers; or, as the Law Division in this case put it, to "step in and fill the vacuum", and fashion appropriate relief to effectuate such rights by the exercise of a trial judge's "inherent powers." 147 N.J. at 448; (Da154; 166).

Although over 30 years separate the New Jersey Supreme Court's first articulation of the concept of parallelism in *Masters, Mates and Pilots* from the court's full fledged apotheosis of the principle in *DRBA*, the weave of reasoning linking these decisions is consistent, entirely straightforward, and, as the court below correctly determined, controlling here. While a single state may not unilaterally impose its will on a bi-state agency, the creator states together may subject the agency to complementary or parallel state legislation. *DRBA*, 147 N.J. at 447; *Bunk*, 144 N.J. at 185; *EPVA*, 111 N.J. 401; *Nardi, supra*, 490 A.2d at 952. Such legislative enactments need not be "identical" in each creator state to be given parallel effect; all that is necessary is that the laws be "substantially similar," *EPVA, supra, Nardi, supra,* or even "somewhat similar", if they espouse a "central" or "dominant theme" in the respective public policies of the states. *Bunk, supra.* Finally, there is no need for the laws to specifically provide that they are to apply to a bi-state agency; all that is required by courts is "some showing of agreement in the laws involving and regulating a bi-

state agency." *DRBA* 147 N.J. at 445; *Masters, Mates and Pilots, supra; EPVA; supra, Bunk, supra,* 144 N.J. at 189.

Indeed, the applicability of the principle of parallelism in this case is mandated not only by the decisional law, but by the DRPA Compact itself. The Compact repeatedly provides that legislation passed in one creator state shall become effective upon the enactment of a "substantially similar act," "similar legislation," "legislation substantially similar," or "legislation having a substantially similar effect," by the other creator state. *See N.J.S.A.* §§ 32:3-3, 32:4-6 "Historical and Statutory Notes".

On this appeal, the DRPA and its *Amicus* display outright disdain for this now well-established principle of law. A good deal of both of their briefs is devoted to pronouncements that the court's order that the parties develop a procedure to resolve the current contractual impasse violates the DRPA Compact, (and hence federal law), impinging upon the Defendant's right to fix and determine its employees' compensation, operate and control its facilities, and to remain in "charge" of its own property and affairs. It also insists that the rulings below will impermissibly intrude upon the Governor's veto power over the actions of the DRPA's New Jersey Commissioners. (Db22-28; 32-33). In this same vein, the Defendant argues that the court's determination to "impose interest arbitration" if necessary upon the DRPA represents judicial "policy making," an exercise, it asserts, more properly left to the legislatures of the creator states. (*Id.*, 32)

These arguments, which constitute nothing less than an attack upon the very principle of complementary legislation, were previously articulated in virtually identical fashion by Justice Garibaldi in her dissent in *DRBA*. There, she criticized the majority's ruling as "directly contraven[ing]" the DRBA compact, which, akin to the DRPA compact, stated that the bi-state agency possessed the power to "fix and determine ... the terms and conditions of employment" of its workers. 147 N.J. at 449. (Garibaldi, J., dissenting). Justice Garibaldi further complained that the ruling violated the compact by imposing additional duties and obligations" upon the bi-state agency. *Id.* Such "amendments" to the DRBA Compact, Justice Garibaldi insisted, could only be accomplished expressly, by the legislatures of the creator states, and only with congressional approval: as she put it, "something more than mere complementary or parallel statutes is needed to repeal specific language in the compact, or stated differently to act as an implied repeal of the compact's language." *Id.* at 453.

Unfortunately for the Defendant, Justice Garibaldi's views garnered only one vote -- her own. The other six justices of the New Jersey Supreme Court, in holding that the labor policies of New Jersey and Delaware were substantially similar and applicable to the DRBA, squarely disagreed with her analysis, reasoning that by adopting complementary labor policies that provide the same basic rights to organize and negotiate in good faith, the legislatures of New Jersey and Delaware had "effective[ly] modified" the compact in a manner that "should not interfere with the DRBA's mission of advancing the economic development of the two states and improving the flow of traffic between them." 147 N.J. at 447.

As the Law Division found, the same reasoning obtains in this case. Applying the rationale articulated by the New Jersey Supreme Court in *DRBA*, the court below held that the development of similar policies in New Jersey and Pennsylvania that accord all public police officers in those two states the right to negotiate with their employers and to resolve impasses in negotiations via interest arbitration has effectively modified the DRPA Compact, in a manner that does no violence to either the mission of the DRPA, or to the Separation of Powers.

DRBA and its predecessors, therefore, provided the Law Division with a precise road map to guide its rulings. As Plaintiffs demonstrated below, the labor laws of New Jersey and Pennsylvania that provide for interest arbitration as the terminal resolution procedure in collective negotiations between public police officers and their employers, "although not identical, are complementary and parallel," in that they mutually express, "[a]s a matter of public policy," the intent of both states to avoid workplace disruption and low police officer morale by developing an orderly dispute resolution mechanism to address contract impasses. This is a right that the creator states of the DRPA have bestowed upon *all* their police employees, for their benefit and also to insure uninterrupted protection of the public peace and order. "Anomalous indeed would be the failure to apply so important a policy to an entity crafted by both states for their mutual benefit." *DRBA*, 147 N.J. at 447.

C. NEW JERSEY AND PENNSYLVANIA POSSESS COMPLEMENTARY AND PARALLEL LEGISLATION REQUIRING COLLECTIVE NEGOTIATION AND INTEREST ARBITRATION OF IMPASSES BETWEEN MUNICIPAL POLICE OFFICERS AND THEIR EMPLOYERS

On December 20, 1996, Judge Supnick held that New Jersey and Pennsylvania possessed parallel and complementary legislation that "clearly give public employees a right to freely organize and designate representatives and also negotiate in good faith." (Da165-166). On November 3, 1997, President Judge Vogelson, amplifying Judge Supnick's earlier opinion, ruled that because the FOP and the DRPA remained at impasse in their collective negotiations, and because the creator states had parallel legislation providing that such impasses be resolved by resort to a dispute resolution procedure culminating in binding interest arbitration, the parties should proceed to mediation to attempt to resolve the dispute and, if need be, submit to interest arbitration before a neutral entity selected by the parties. (Da406; 408).

Recognition of the substantial duties and rights of the DRPA police, combined with a review of the historical development of Pennsylvania and New Jersey interest arbitration legislation, and a survey of the signal features of each state's statutory scheme, demonstrates convincingly that the Law Division was correct.

(i) *The DRPA Police Officers are Entitled to all the Powers, Immunities and Rights Accorded to Every Municipal Police Officer in New Jersey and Pennsylvania*

As the DRPA has admitted, the responsibility for protecting public safety and enforcing the laws of the State of New Jersey and the Commonwealth of Pennsylvania on DRPA property rests solely upon the shoulders of the DRPA police. Neither the Philadelphia Police Department, nor the police departments of any municipality in New Jersey or Pennsylvania, exercise general jurisdiction to maintain public peace and order within the DRPA's jurisdiction. (Pa59;68).

In 1986 and 1994, respectively, the legislatures of New Jersey and Pennsylvania recognized the gravity of this responsibility by expanding the powers and rights of DRPA patrol officers. DRPA police officers were provided "*all the powers*, including the right to carry firearms while on duty, *and all the immunities conferred by law on police officers or municipal police officers in* the enforcement of the laws of *the State of New Jersey and the Commonwealth of Pennsylvania*." *N.J.S.A.* 32:4-6; 36 P.S. § 3504.1 (emphasis added)

As the court below observed, DRPA police officers as a matter of law thus share the same duties, responsibilities, and rights as their brethren who work for municipalities in either New Jersey or Pennsylvania. (Da 407). Therefore, the court ruled, to the extent these two states have established substantially similar policies and procedures to regulate the labor relations between their municipalities and their municipal police officers, such policies and

procedures should, consistent with the principle of complementary legislation, be applied to govern the labor relations between the DRPA and the FOP.

As the Law Division found, and as the DRPA does not dispute, the exclusive resolution mechanism under New Jersey and Pennsylvania law for bargaining impasses between municipal police officers and their employers is interest arbitration, evincing a mutual public policy to maintain public safety and labor relations stability by prohibiting police strikes and the unilateral imposition of employment terms, and requiring binding arbitration of all unresolved issues that directly affect the work and welfare of police officers. (Da386). This Court should therefore affirm the trial judge's ruling that this policy, and the procedures employed to effectuate it, be applied to resolve the current contract dispute between Lodge 30 and the DRPA.

(ii) New Jersey and Pennsylvania Have Adopted Substantially Similar Legislation Providing for Interest Arbitration When Municipal Police Officers and Their Public Employers Reach Impasse in Collective Negotiations

The New Jersey Supreme Court made clear in *Bunk* and *DRBA* that it is not necessary to plumb the "exact contours" of the particular laws of creator states to find that they comprise complementary legislation that modifies a bi-state compact and refines the particular rights and responsibilities that a bi-state agency possesses with regard to its employees. *Bunk*, 144 N.J. at 185; *DRBA*, 147 N.J. at 445-46. All that is required is that the key features of the laws be similar, and that the legislation, taken together, constitute statutory

expression of a "central theme" or "dominant policy" shared by both states. *Bunk*, 144 N.J. at 189. Such a central theme and dominant policy clearly exists here.

a) The Historical Development of Interest Arbitration in New Jersey and Pennsylvania

Although some nine years separate the passage of Act 111 in Pennsylvania in 1968, 43 P.S. § 217.1 *et seq*, from the enactment of the New Jersey Police and Firefighters Interest Arbitration Act in 1977, *N.J.S.A.* § 34:13A-14, *as amended N.J.S.A.* § 34:13A-14a (1996 Supp.), the paths taken by both states to fashion these statutes were strikingly similar, and the policy considerations that activated the legislative action were identical. After World War II, an outbreak of strikes in both private and public sector employment drove both New Jersey and Pennsylvania to pass bills barring work stoppages in public employment, and creating legal mechanisms to resolve deadlocked negotiations through compulsory interest arbitration by tripartite panels of arbitrators. Richard A. Lester, *Labor Arbitration in State and Local Government* (Industrial Relations Section: Princeton University 1984), at 11, 173. These early efforts at interest arbitration, however were initially derailed by the courts.[13]

[13] The New Jersey Act was rendered inoperative when the United States Supreme Court invalidated a similar Wisconsin statute in *Motor Coach Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383 (1951). *See* Lester, *Supra*, 173; Homer C. LaRue, "An Historical Overview of Interest Arbitration in the United States," 42 *Arbitration Journal* 13, 16 (December, 1987). Pennsylvania's interest arbitration statute was ruled unconstitutional by the Pennsylvania Supreme Court because it delegated legislative authority to fix municipal salaries to individuals outside of municipal government, in violation of the Pennsylvania Constitution. *Erie Firefighters Local No. 293 v. Gardner*, 406 Pa. 395, 178 A.2d 691 (1952).

Although ostensibly still barred from striking, Pennsylvania's police and firefighters engaged in numerous and nettlesome work slowdowns and stoppages throughout the early and mid-1960's when they were unable to negotiate satisfactory collective bargaining agreements with their employers. *See Philadelphia Fire Officers Assoc. v. PLRB*, 369 A.2d 259, 260 (Pa. 1977). By the winter of 1967, these actions, and a sustained lobbying campaign by Pennsylvania's police and firefighters' unions, led the Commonwealth to amend the state Constitution to allow for compulsory interest arbitration for police and firefighters. Lester, *supra*, at 11. Six months later, Act 111 was signed into law. J. Joseph Lowenberg, "The Pennsylvania Arbitration Experience" in Lowenberg, et al., *Final-Offer Arbitration: The Effects on Public Safety Employee Bargaining* (Lexington, Mass: Lexington Books, 1975) at 6; *Lester, Supra.*, at 11-12.

In New Jersey, interest arbitration for police and firefighters arrived in the form of a 1977 amendment, known as "Chapter 85," to the Public Employer-Employee Relations Act, *N.J.S.A.*, § 34:13A-1, that had previously been passed in 1968. Chapter 85 was crafted from recommendations of an ad-hoc Study Commission on Public Employer-Employee Relations created by the New Jersey legislature, and appointed by Governor Brendon T. Byrne. *See* Public Employer-Employee Relations Study Commission, *Report to the Governor and the Legislature* (Pursuant to P.L. 1974 c. 124) (New Jersey: Trenton 1976), at 1. (hereinafter, *Report to the Governor*). The Study Commission held over a dozen hearings between December 1974 and January 1976, and the subject of binding impasse procedures to resolve bargaining disputes was a "main topic of discussions". *Report to the Governor*, at 1-2; 20

After reviewing the laws of other jurisdictions, the Study Commission noted in its *Report to the Governor* that "[i]n states with compulsory arbitration as a terminal step for interest disputes, the categories of public employees so covered usually include police and firefighters. In recent years there has been a notable move by states to apply compulsory arbitration to impasse situations involving such personnel." *Id.*, at 20. The Study Commission also quoted, with favor, this analysis of Pennsylvania's interest arbitration experience:

> Today, in the public sector, interest arbitration is emerging as a politically acceptable means of resolving impasses, endorsed by those unions with the greatest power to disrupt the health and safety of the community. It has not had an adverse economic effect so far as can be determined, nor has it damaged the bargaining process.

Report to the Governor, at 29, *quoting* Lowenberg, et al., *supra*, at 196.

Thus, when the Study Commission submitted its findings to Governor Byrne, it recommended that the existing statute providing for public sector labor rights be amended to "provide for some kind of finality for negotiating impasses, ... and that some form of forced ... arbitration should be employed for achieving finality where other means of resolving a persistent negotiating impasse either are not promising or have been exhausted." *Report to the Governor*, at 3. Explaining this conclusion, three members of the Study Commission issued a separate statement, opining that "[t]he history of the present Act over the past seven years demonstrates clearly that the only practical solution of concluding interminable negotiations concerning terms and conditions of employment is to seek the assistance of an outside arbitrator." *Id.* at 72.

Although the Study Commission initially recommended that interest arbitration be accorded to *all* public employees in New Jersey, the Senate Bill incorporating the Study Commission's recommendations limited this impasse resolution procedure to disputes "involving the employees of any 'public fire department' or 'public police department' of the state, county or park system, municipality, fire district, or any agency thereof." *See* New Jersey Senate County and Municipal Government Committee, Statement to Senate, No. 482 (dated June 24, 1976). As sponsoring Senator Joseph A. Maressa reasoned,

> In the best interests of the citizens of this State, it is essential that the State establish a means of resolving conflict between public employers and their employees affecting the welfare of its citizens. Compulsory arbitration is the only final resolve to these conflicts that would eliminate any and all slow downs, job actions or outright strikes by employees providing these vital services.

Sponsoring Statement to Senate, No. 482 (dated June 24, 1976). Plainly, the legislative concern in New Jersey was not simply to provide an expeditious end to "interminable" impasses in negotiations between public employees and their employers, but was also to foreclose the possibility of public disorder that might attend a work disruption by employees "providing vital services", *i.e.*, firefighters and police.

Thus, When Chapter 85 was signed into law, the articulated public policy underlying the Act was that:

> in public fire and police departments, where public employees do not enjoy the right to strike, it is requisite to the high morale of such employees and the efficient operation of such departments to afford an alternate, expeditious, effective and binding procedure for the resolution of disputes.

N.J.S.A. § 34:13A-14. This procedure, the legislature declared, was compulsory interest arbitration, and the provisions set forth in the Act to accord it to public police officers were to be "liberally construed" by the courts. *Id.*

In 1996, when Chapter 85 was amended by the "Police and Firefighters Public Interest Arbitration Reform Act" 34 *N.J.S.A.* § 34:13A-14a, *et seq.*, (hereinafter, the "New Jersey Interest Arbitration Reform Act"), this public policy was reiterated in even stronger terms:

> 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 and 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 resolutions of disputes.

N.J.S.A. § 34:13A-14a.

As can be seen, both Pennsylvania and New Jersey's road to interest arbitration for municipal police officers was similarly paved with the threshold realization that work stoppages or slowdowns by public employees with "unique and essential duties" could not be tolerated, and that the threat of strikes by such classes of workers, combined with the felt sense that maintaining "the high morale" of police was conducive to "the general well-being and benefit" of the public, impelled the need for an orderly response to resolving impasses in contract negotiations when bargaining broke down. As Homer LaRue put it in his

historical analysis of the subject, interest arbitration was, and is, viewed as "a civilized method of dispute resolution," one that protects the public, prevents interruption of essential civic services and, at the same time, provides fair and final resolution of unsettled contract terms. LaRue, "An Historical Overview of Interest Arbitration in the United States," *supra* at 21. The Law Division below, quoting with favor Professor Summers, thus held that New Jersey and Pennsylvania had each concluded that:

> [I]nterest arbitration is an appropriate and indeed desirable process by which to resolve impasses that may occur in collective bargaining between police officers and public employers. Interest arbitration provides for a peaceful, orderly process by which the parties may seek impartial review and adjudication of their positions, without the threat to public order that may result from a strike, or the potential damage to officer morale that may occur when officers have no right to strike or other means of redress after impasse is reached.

(Da379-80).

b) The Key Features of New Jersey's and Pennsylvania's Interest Arbitration Systems are "Substantially Similar"

Stemming from identical doctrinal roots, it is hardly surprising that New Jersey's and Pennsylvania's arbitration statutes fully share the same salient features. As the Law Division noted, both Act 111 and the New Jersey Interest Arbitration Reform Act provide that after a certain point in negotiations is reached without agreement on new contract terms, the police officers' bargaining representative and the public employer are considered to be at "impasse", and either party may then request that the dispute be submitted to binding interest arbitration. (Da382-383); *N.J.S.A.* §§ 34:13A-16(a)(2);(b)(2); 43 P.S. § 217.4(c). In both jurisdictions,

the impasse may be referred to a tripartite panel of arbitration, whereby each party selects its own representative, and then mutually decide upon a third individual, who acts as the neutral and chairman of the arbitration board. (Da383-84). *N.J.S.A.* 34:13A-16(c); (3)(1); Public Employment Relations Commission, "Mediation, Fact-Finding and Arbitration Rules", *New Jersey Administrative Code*, § 19:16-5-6(c); 43 P.S. § 217.4(b).

Once selected, interest arbitration panels in both New Jersey and Pennsylvania possess identical authority to conduct hearings, administer oaths, require attendance of witnesses and the production of documents, and resolve the impasse by "conventional arbitration", *i.e.*, a decision "on all issues in dispute as [they] see fit, subject to any legal limits or statutory standards." Lester, *supra*, at 3; 43 P.S. § 217.6; *N.J. Admin. Code* § 19:16-5.7(d). As Judge Vogelson found, "[t]he crucial element of the settlement process in both states is the same. The ultimate resort is to conventional arbitration by a neutral arbitrator." (Da 384). [14]

Both states also have substantial legal limits that cabin the scope of issues subject to interest arbitration. These limitations are found in each jurisdiction in statutory enactments and in judicial decisions interpreting the reach of compulsory interest arbitration.

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[14] Prior to the 1996 Amendment to the New Jersey Interest Arbitration Reform Act, New Jersey arbitrators were constrained to consider and select only the "last offer" of each party, unless the parties mutually agreed to conventional arbitration. However, since 1996, arbitrators in New Jersey are now statutorily mandated to decide disputes by use of conventional arbitration, unless the parties agree to have the arbitrator employ a different procedure to terminate the impasse. *N.J.S.A.* 34:13A-16(d)(2). Thus, as the court below found, the New Jersey scheme is now even *closer* to Pennsylvania's, which under Act 111 has always featured conventional arbitration as the preferred method of interest arbitration. (Da383; 386); Lester, *supra*, at 13.

In New Jersey, the Act itself contains a list of eight statutory criteria for arbitrators to consider in framing an award, including, *inter alia*, "the interests and welfare of the public"; comparison of the economic and non-economic terms and conditions of employment of the employees with those that obtain for workers performing the same or similar services in private and public employment; the lawful authority of the employer; and the financial impact of the award. *N.J.S.A.* § 34:13A-16g(1)-(8). In Pennsylvania, at least two separate state statutes, the Financially Distressed Municipalities Act ("Act 47"), 53 P.S. §§ 11701.101 *et seq.*, and the Pennsylvania Intergovernmental Cooperation Authority Act for Cities of the First Class ("PICA Act"), 53 P.S. § 12720.209(k), similarly require that Act 111 arbitration panels assess the public employers' financial ability to pay any increase in wages or benefits contemplated by the interest arbitration award. *See e.g.*, *FOP Lodge 34 v. City of Farrell*, 590 A.2d 1327 (Pa. Cmwlth. 1991) (Act 47); *City of Philadelphia v. FOP Lodge 5*, 677 A.2d 1319 (Pa. Cmwlth. 1996) (PICA Act).

The DRPA argues that because Act 111, unlike the New Jersey Interest Arbitration Act, contains no built-in statutory criteria to guide interest arbitration panels in fashioning an award, the two states' systems cannot be considered "substantially similar." Such a contention, upon close inspection, is entirely without merit, as the Law Division correctly discerned. First, as mentioned above, it is not necessary for the two legislative schemes to be "identical" in order to be construed as evincing a parallel "central theme" or "dominant policy". *DRBA*. Second, as noted above, Pennsylvania does feature significant statutory constraints on arbitration awards under both Act 47 and the PICA Act, consistent with the

limitations featured in New Jersey's Interest Arbitration law. Finally, and perhaps most importantly, the empirical evidence demonstrates that the presence or absence of explicit statutory criteria in an interest arbitration statute has no practical bearing on the norms employed by arbitrators in fashioning an interest arbitration award.

In Professor Gregory Dell'Omo's survey of interest arbitrators on this issue, he found that an overwhelming majority indicated that their decision-making process would not change if an arbitration statute contained no statutory criteria to guide them. Dell'Omo, "Wage Disputes in Interest Arbitration: Arbitrators Weigh the Criteria." 44 *Arbitration Journal*, 4,11-13 (June 1989). As one arbitrator observed, "a common law has developed in interest arbitration, and the same criteria would be used with or without having them stated in a statute." *Id.* at 11. And, in a paper on interest arbitration read before the National Academy of Arbitrators, Arbitrator Scott E. Buchheit, who has practiced his trade under both New Jersey and Pennsylvania systems, agreed: "When working in a state with no statutory criteria for guiding the arbitrator, is there a problem in making an award? I think not. Statutory criteria typically contain the same factors that experienced arbitrators are normally guided by. This is my experience..." Buchheit, "Interest Arbitration", . *Arbitration 1990-New Perspectives on Old Issues*, in *Proceedings of the Forty-Third Annual Meeting of the National Academy of Arbitrators*, 171, 175 (BNA: Washington, D.C. 1991).

Indeed, Richard Lester found that in New Jersey parties make little use or mention of the statutory criteria in arguing for their respective positions on non-economic issues, and

arbitrators pay little actual attention to them. "Instead," writes Lester, "arbitrators have tended to rely on their knowledge of industrial relation practices and their judgment concerning the desirability of a proposed change." Lester, *Labor Arbitration in State and Local Government*, *supra*, at 193. The Law Division agreed, terming the difference between Pennsylvania and New Jersey's systems in this regard to be "insignificant", as "[t]he factors listed in the New Jersey statute are those which any competent arbitrator will weigh without any statutory direction." (Da385).

New Jersey and Pennsylvania courts also circumscribe the authority of interest arbitration panels, in strikingly similar fashion. Both states forbid interest arbitrators from compelling a public employer to perform an illegal act, or fashioning an award that is in contravention to or preempted by a specific state statute or administrative regulation. *Bethlehem Twp. Bldg. Ed. v. Bethlehem Twp. Ed. Assoc.*, 91 N.J. 38 (1982); *Paterson Police PBA Local No. 1 v. City of Paterson*, 87 N.J. 78 (1981); *Fraternal Order of Police E.B. Jermyn Lodge #2 v. Hickey*, 499 Pa. 194, 452 A.2d 1005, 1008 (1982); *Appeal of Upper Providence Police Delaware County Lodge 27*, 514 Pa. 501, 526 A.2d 315 (1987). And, interest arbitration in both states can take place only over subjects that are considered either mandatory or permissible topics of negotiation, similarly and broadly defined by the courts of both jurisdictions as items that "intimately and directly affect [ ] the work and welfare of police ... and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives," *Paterson PBA Local No. 1*, *supra*; or management decisions which "bear a rational relationship to employee's duties", but do

not infringe upon "matters of inherent managerial policy." *Police Bargaining Unit Borough of Montoursville Police Dept. v. Montoursville*, 634 A.2d 830 (Pa. Cmwlth. 1993). As the Law Division, quoting Professor Summers, observed, "the legal effect of the two provisions [limiting arbitral authority] is substantially the same." (Da382).

At the same time, courts in New Jersey and Pennsylvania both pay considerable deference to the specifics of a given interest arbitration award, in keeping with the shared legislative intent that such decisions be "binding" upon the parties. (Da385). Both states require arbitrators to render written awards, and in New Jersey, judicial review of such awards is limited to determining only whether the arbitration panel failed to apply the statutory criteria set out in the Act, exceeded its powers, committed an "evident miscalculation of figures or mistake," or engaged in arbitral misconduct or corruption. *N.J.S.A.* § 34:13A-16(a); *N.J.S.A.* §§ 2A:24-8,9. Pennsylvania similarly applies a "narrow certiorari" standard of judicial review to Act 111 arbitration awards, assessing only whether the arbitrators exceeded their jurisdiction or powers, whether the proceedings were conducted with due "regularity", or whether the award constituted a deprivation of constitutional rights. *Washington Arbitration Case*, 436 Pa. 163, 259 A.2d 437 (1969).

Thus, as the Law Division in this case correctly found, the key components of New Jersey and Pennsylvania's interest arbitration laws for public police officers -- the submission to conventional arbitration of unresolved issues upon impasse, the use of a tripartite board with considerable administrative and adjudicative powers, the limitation on the scope of

the arbitrators can decide, and the execution of a final and binding written award that is subject to narrow judicial scrutiny -- are all substantially similar and parallel. Judge Vogelson's conclusion about the similarity of the two interest arbitration systems, a determination bolstered by Professor Summers' own study of the statutes and his venerable experience on the subject of interest arbitration, merits extended quotation:

> The New Jersey statute on collective bargaining by police and arbitration of disputes is substantially the same as the Pennsylvania statute on that subject. Both articulate the same basic policy and proceed from the basic premise of providing collective bargaining for police with ultimate resort for resolving impasses to binding arbitration by neutral arbitrators. ... The procedures for resolving impasses are substantially parallel, with both culminating in conventional arbitration. The standards applied by the arbitrator in deciding disputed issues are operationally the same, and the arbitrator's award is subject to limited review. In terms of the responsibilities of the parties, the actual process of reaching agreement or settlement, and the substantive terms of the settlement, both will have the same practical impact of resolving the impasse peacefully, finally and fairly.

(Da385-386).

c) The "Differences" Between the New Jersey and Pennsylvania Interest Arbitration Systems Claimed by the DRPA are Either Non-Existent, Immaterial or Irrelevant

In the face of this overwhelming evidence of statutory similarity, the DRPA fixates upon the precise verbiage of certain components of the legislative enactments, arguing that mechanistic differences in the two systems render them "dissimilar", and inapplicable to the bi-state agency. The DRPA's approach, however, is fundamentally flawed on at least two grounds. First, it ignores the firmly established principle that parallelism in creator states'

legislation is present when a comparison of the enactments reveals that they are simply "somewhat similar," and articulate a shared "dominant" or "central theme" of *public policy*; there is no need to find that the statues themselves are "identical" in either language or form. *Bunk*, 144 N.J.at 185; *DRBA*, 147 N.J. at 447. Indeed, as Justice Garibaldi noted in her *DRBA* dissent, there exists significant differences in the respective labor statues of New Jersey and Delaware: among other things, the laws contain different procedures for determining appropriate bargaining units and for deciding unfair labor practices, and feature different limitations on the subjects of bargaining; Delaware, unlike New Jersey, even prohibits negotiation over *wages* for certain classes of employees. 147 N.J. at 454; *See* 19 Del. C. § 1302(q) and 1313(e); 29 Del. C. § 5916; 5938. Yet, the Supreme Court found that these differences did not disturb its determination that the "dominant policy" of both labor statutes was substantially similar, and thus applicable to the bi-state agency.

Second, by an obsessive focus on the wording of the statutes alone, the DRPA overlooks how the two legislative schemes actually work in practice, thus permitting the Defendant to sidestep the question of the materiality or relevance of the subtle distinctions in the two systems. Thus, a review of the DRPA's selective comparison between New Jersey's Interest Arbitration Reform Act and Pennsylvania's Act 111 demonstrates that the differences in the two Acts unearthed by the Defendant are all either misstated, immaterial, or completely irrelevant to this proceeding.

For example, the DRPA and the *Amicus* devote pages in their briefs to an assertion that a "key difference" in the statutory schemes is that New Jersey provides for a "formal mediation process" and for fact-finding, while Pennsylvania does not. In reality, however, as the Law Division noted, in Pennsylvania "mediation by the State Agency is in fact available." (Da383). As far as fact finding is concerned, Professor Summers rightly concluded that in any state system, such as New Jersey's, which features fact finding as a prelude to interest arbitration, such a process is "purely ritual." (Da254). Indeed, in his 1984 survey of New Jersey interest arbitration practice, Richard Lester observed that "[t]he use of fact-finding with recommendations ... has virtually ceased." Lester *Supra*, at 185. And, PERC's Director of Arbitration recently stated flatly, "The parties in New Jersey do not utilize fact-finding prior to going to interest arbitration." (Pa51).

The DRPA goes on to allege that New Jersey and Pennsylvania "have substantially different policies as to scope and range of issues that may be subject to interest arbitration," asserting that while New Jersey contains limits of what can be submitted to and decided by an interest arbitrator, Pennsylvania arbitrators are allowed to "decide any issue that is raised by the party requesting arbitration." Db47, 50. This is a gross overstatement of the reach of interest arbitration in the respective state systems; indeed, insofar as it purports to describe the Pennsylvania experience, it is plain wrong. As Plaintiffs have pointed out, Pb *supra*, at 47-48, *both* states limit an interest arbitrator's authority, prohibiting awards that contravene state statutes or administrative regulations, or that improperly impinge upon managerial prerogative. Indeed, on the issue of "managerial prerogatives" that are not subject to

arbitration, it is revealing that virtually every example trotted out by the DRPA as a matter that is non-arbitrable in New Jersey *see* Db50, n.17, is *also* non-arbitrable in Pennsylvania. *See, e.g., Borough of Montoursville,* 634 A.2d 830 (Pa. Cmwlth. 1993) (interest arbitrator cannot determine manning levels of police unit); *Brookville Borough*, 27 PPER ¶ 27005 (H. Ex. 1995) (elimination of jobs and layoffs not arbitrable); *Womelsdorf Borough*, 28 PPER ¶28098 (H. Ex. 1997) (demotions not arbitrable); *City of Philadelphia*, 27 PPER ¶27208 (H. Ex. 1996) (involuntary transfers not arbitrable). Finally, and most importantly, both interest arbitration systems clearly provide for arbitration over the core, "bread and butter" issues of wages, benefits and working conditions that matter most to all municipal police officers, and particularly to the Plaintiffs. And, it is indeed ironic that the DRPA, an entity that has negotiated with the FOP over *all* such subjects for nearly a quarter century -- and, until the recent past, negotiated in good faith -- now raises a concern over the scope of issues it might be required to address with the Union.[15]

The DRPA also observes that New Jersey provides six (6) separate statutory terminal arbitration procedures that are available to New Jersey police and their employers, while Act 111 only mentions "conventional arbitration" as a means to resolve contract impasses. Again,

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[15] In any event, the Defendant's fears over being "forced" to arbitrate over "non-arbitrable" issues may be readily assuaged. The Law Division has only ordered the parties to meet to attempt to voluntarily develop an impasse resolution procedure that should feature, among other things, a list of the issues that are to be subject to interest arbitration. Only if they cannot agree with the DRPA on the composition of such a list would Plaintiffs contemplate a return to the trial court, which would then be faced with the relatively simple task of ascertaining whether a disputed issue is or is not deemed arbitrable under *both* states' laws. If it is, the parties should be required to include it in the range of topics slated for arbitration. If it is not, it should not be so included.

this alleged "difference" simply does not exist. As Judge Vogelson noted, there is nothing in Act 111 "limiting the parties in how they can resolve their dispute and they can, by mutual agreement, use last offer arbitration." (Da383). More importantly, the DRPA fails to mention that since 1996, both New Jersey and Pennsylvania provide for the *exact same terminal procedure* if the parties cannot agree on an alternative: conventional interest arbitration. *Id.*

The Defendant notes that in New Jersey, unlike Pennsylvania, the neutral arbitrator must be selected from a special list maintained by PERC, a list that is ever growing but that currently includes some 22 names. What the DRPA fails to mention is that the trial court, in the process of "determining how the complementary labor policies" of New Jersey and Pennsylvania "are to be effectuated," *DRBA*, Plaintiffs' Ex. "A", at 11, has broad power to address such issues, and surely possesses the ability to appoint any individual it deems competent to act as the neutral arbitrator, should the DRPA and the FOP themselves be unable to agree upon an appropriate designee.[16] Further, the DRPA loses sight of the signal fact that, whoever is selected to compose the panel, they would possess *identical* authority under New Jersey and Pennsylvania law to "conduct hearings, administer oaths, require attendance of witnesses and the production of documents, and resolve the impasse by conventional arbitration." *See* Pb *supra*, 42.

[16] It is worth noting in this regard that the parties have thus far had no trouble selecting an individual to act as a *mediator* in this case without further court involvement. (*See* Pa52).

Finally, the DRPA complains that in New Jersey an appeal from an interest arbitrator's award is first referred to PERC and then to the courts for review, whereas in Pennsylvania resort is to the judiciary in the first instance. It also bemoans the fact that New Jersey "requires" the parties to meet three times in 120 days prior to the expiration of a collective bargaining agreement before an impasse can be declared, whereas Pennsylvania only "requires" the parties to wait 30 days after bargaining before announcing that they are at impasse.

As far as judicial review is concerned, it is of no material moment that New Jersey contains a layer of administrative involvement prior to submission of an appeal to the courts. What *is* significant is that both states provide a similarly limited scope of review. *See* Pb *Supra*, 48; (Da385). Further, the DRPA's talk of differing time limits and number of bargaining sessions necessary to reach impasse is both immaterial statutory minutia and, in the context of this case, clearly irrelevant. First, as Judge Vogelson noted, the statutory time limits contained in the respective Acts,

> [a]re not exactly the same, but both are keyed to the parties reaching a final settlement in time for adoption of the budget by the involved public agency. *These differences are details of no substantial consequence, and in any case the true limits are commonly waived by the parties.* What is of importance is that the crucial element of the settlement process in both states is the same: the ultimate resort is to conventional arbitration by a neutral arbitrator.

(Da384, emphasis added). Further, the DRPA's obsession with these details has little bearing on the facts of this case: here, there were 14 bargaining sessions over a period of some 8 months, and the parties, by Defendant's own admission, have been at impasse since at least

August 1996. Db11. Clearly, no one can make a straight-faced claim that it was "premature" for the trial court to order the parties to now advance to the next stage in the negotiation process: the impasse resolution procedure.

In like vein, the DRPA and the *Amicus*' belabored efforts to employ the recent consolidated decision of this Court in *Ballinger v. DRPA*, A-5584-95T2 and *Ruggerio v. DRPA*, A-5622-95T2 (App. Div. May 8, 1998), to attempt to breath life into its argument that the interest arbitration laws of New Jersey and Pennsylvania are not substantially similar, fails completely. In *Ballinger\Ruggerio*, unlike here, this Court was not faced principally with a claim that New Jersey and Pennsylvania law was complementary, and should be applied coterminously by the court using its inherent equitable powers to craft a remedy congruent with the two states' shared policies. Rather, the "primary issue", as articulated by this Court itself in its opinion, was "whether the ... DRPA ... is subject to the provisions of the New Jersey Conscientious Employee Protection Act (CEPA)." *See* Defendant's Exhibit "A" at p.2. Thus, this Court looked primarily at the question of whether *one* state's statutory enactment, New Jersey's CEPA, should be applied *unilaterally* to a bi-state entity. And, to the extent that this Court discussed the theory of parallel legislation as a potential alternative to preserve the plaintiffs' claims, it rightly discerned a key difference in the two states' statutory systems, also not present there, that rendered it impossible to find them substantially similar: the respective acts featured different limitation periods for bringing suit and, in fact, the plaintiffs would be time-barred from advancing their claims under Pennsylvania's whistleblower law. "This discrepancy," noted this Court, "clearly demonstrates that the two

states have not reached an agreement about the application of the whistleblower laws." *Id.* at 12. Similarly, Defendant's reference to *DRPA v. State Ethics Commission*, 585 A.2d 587 (Pa. Cmwlth. 1991) as standing for the proposition that the creator states' ethics laws do not apply to the DRPA is simply a misstatement of that case. In *State Ethics Commission*, it was not even "contended that Pennsylvania and New Jersey have passed similar legislation" on the subject. 585 A.2d at 588. Rather, Pennsylvania argued, unsuccessfully, that its Ethics Law should be *unilaterally* applied to the DRPA. *Id.*

Here, unlike in *Ballinger* or *State Ethics Commission*, there has been no attempt to foist one *particular* state's cause of action upon the DRPA. Rather, all the Law Division has done is to recognize that the parallel labor laws of New Jersey and Pennsylvania necessitate that a procedure be established to effectuate the policy of dispute resolution that both statutes promote, a procedure that the parties *themselves* may devise and participate in, with minimal supervision by the court. [17]

Thus, much more apposite to the case *sub judice* is a decision the DRPA and the *Amicus* neglect to mention, *Textar Painting Corp. v. DRPA*, 296 N.J. Super. 251, 686 A.2d 795 (Law Div. 1996). In *Textar*, the court ruled that the DRPA must engage in public bidding for contract purposes because, although their legislation on the subject was hardly

[17] Parenthetically, it is also noteworthy that the New Jersey Law Division judge who ruled in *Ruggerio* that New Jersey and Pennsylvania's whistleblower statutes were not comparable was Judge Supnick, who later would rule that these states' labor laws, at issue here, *are* substantially similar and parallel. (Da165-166).

identical -- *compare, e.g. N.J.S.A.* 40A:11-2 *et. seq.* with 53 P.S. § 36901 *et seq.* -- "[b]oth New Jersey and Pennsylvania have a strong public policy of awarding public contracts through open public bidding." 296 N.J. Super at 257.

In sum, despite the DRPA's dogged attempts to show otherwise, there can be little doubt that under the standards set forth in *Bunk* and *DRBA*, the respective legislative enactments in New Jersey and Pennsylvania to provide interest arbitration rights to public police officers are "substantially similar," reflecting a shared "central theme" and "dominant policy." This realization is what compelled the Law Division to conclude that a procedure similar to that which resolves contract impasses between municipal officers and their employers in both states should be applied to the current dispute between the FOP and the DRPA. This conclusion deserves affirmance by this Court.

D. THE APPLICATION OF PARALLELISM BY THE LAW DIVISION VIOLATES NEITHER THE DRPA COMPACT NOR THE DOCTRINE OF SEPARATION OF POWERS, AND DOES NOT INTRUDE UPON THE LEGISLATIVE ABILITY TO EFFECTUATE POLICY

Perhaps cognizant of its inability to show that the interest arbitration laws of New Jersey and Pennsylvania are not "substantially similar", the DRPA and the *Amicus* attack the application of the principle of parallelism itself in this case, arguing that any court intervention in the labor relations between the parties violates the DRPA Compact, in that it compromises the Defendant's "complete and unrestricted control over ... all aspects of DRPA

operations." Db27. This argument is both notable for its arrogance and completely unavailing, for several reasons.

First, it squarely conflicts with the New Jersey Supreme Court's decision in *DRBA*. There, the Delaware River and Bay Authority similarly attempted to evade application of parallel labor enactments of its creator states by seeking refuge in the grant of powers enumerated in its federal compact which, *exactly* like the DRPA Compact, provided the agency with the general ability to "fix and determine" the compensation and terms and conditions of employment of its employees. *See* 147 N.J. at 438. Although Justice Garibaldi was persuaded by this reasoning, *Id.*, at 449, 453 (Garibaldi, J., dissenting), the rest of her brethren were not. They noted that by enacting legislation that expressed "a public policy ... that public employees should have the right of collective negotiation," the legislatures had "[i]n effect ... modified the Compact." *Id* at 447. "That modification", the *DRBA* majority insisted, "should not interfere with the DRBA's mission of advancing the economic development of the two states and improving the flow of traffic between them." *Id.*

The same analysis obtains equally here. All that the Law Division has done is to recognize that New Jersey and Pennsylvania have enacted legislation which expresses a shared public policy of peaceably defusing contract formation disputes between public police officers and public employers, by channeling such disputes to an impasse resolution system that culminates with both parties' selection of a neutral entity -- an interest arbitration panel -- to pass upon the respective merits of their proposals for terms and conditions of police officers' employment. By erecting such systems, the DRPA's creator states' legislatures have

effectively "modified the [DRPA] Compact" in a manner that does no violence to, and arguably *promotes*, what the DRPA itself terms to be its "purpose and essential governmental function": "advancing the economic development of the two states and improving the flow of traffic between them." Db21; *DRBA*, 147 N.J. at 447. Indeed, there is no reason (and the Defendant has not even attempted to articulate one) that the DRPA, like every public employer in both New Jersey and Pennsylvania, will not benefit from a policy that simultaneously avoids strikes and unrest while maintaining high police officer morale. Without doubt, the public -- which depends upon the DRPA police to maintain peace and order upon the vital arteries of commerce and transportation that span the Delaware River -- will gain by application of such a policy in this case.

Second, by selectively culling passages from its Compact, the DRPA portrays that instrument as prohibiting any application of parallelism that would in any way affect its ability to "have 'charge'" over its "property and affairs." Db21. Such a depiction of the Compact is entirely erroneous. It ignores that the Compact also *explicitly* provides that the DRPA remains at all times subject to additional powers or duties "as may hereafter be delegated to or *imposed upon it from time to time by the action of either state concurred in by legislation of the other.*" *N.J.S.A.* 32:3-5; 36 Pa. Stat. Ann. § 3503, Article IV. (emphasis added). Thus the Compact, clearly and expressly, embraces the concept of parallel legislation, and is replete with references to the DRPA becoming bound by legislation of one creator state

when the other "enacts legislation having a substantially similar effect." *See e.g., N.J.S.A.* §§ 32:3-3; 32:4-6, "Historical and Statutory Notes." [18]

Indeed, one of the laws to which the DRPA became subject by the act of Pennsylvania passing "substantially similar" legislation was the "Police Powers Bill," which provided DRPA police officers with "all the powers ... and all the immunities conferred by law on police officers or municipal police officers ... [by] the State of New Jersey and the Commonwealth of Pennsylvania." *N.J.S.A.* 32:4-6; 36 P.S. § 3504.1. As Lodge 30 has amply demonstrated, one of the principal powers enjoyed by every municipal police officer in the DRPA's creator states is the ability to have any impasse in negotiations over the core terms and conditions of their employment resolved fairly and peacefully, through binding conventional interest arbitration. Thus, the DRPA Compact itself provides firm support for the very remedy the Law Division has accorded Plaintiffs in this litigation.

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[18] Similarly, the DRPA's "parade of horribles" argument, that to find it subject to the parallel labor laws of New Jersey and Pennsylvania would potentially saddle it to a host of bi-state regulation, *see* Db38-39, falls apart in the face of the established principle of complementary legislation. Necessarily, as the New Jersey Supreme Court noted in *EPVA*, any claim that any species of legislation in New Jersey is "substantially similar" to Pennsylvania's constitutes a "fact-sensitive question of law," requiring a court to review the respective state codes and ascertain whether they, taken together, express a mutual and ascertainable public policy. Thus, it is no valid criticism of the legal doctrine of parallelism, or of its specific application here, to complain that it potentially injects a measure of uncertainty into an analysis of whether *other* state laws may some day, by some court, be held applicable to the DRPA. What is relevant here is that the key features of New Jersey's and Pennsylvania's interest arbitration statutes are entirely congruent, and indicate a mutual public policy to forbid strikes and unrest engendered by public police officer contract formation disputes and to resolve such disputes in the peaceful forum of interest arbitration.

Similarly, the DRPA's strained contention that the Law Division's determination that it can order interest arbitration to resolve the current contract impasse violates the principle of the Separation of Powers, by *potentially* infringing upon the Governor of New Jersey's power to veto the actions of the DRPA's New Jersey-appointed Commissioners, sinks of its own ponderous weight. At this stage of the litigation, the argument is decidedly conjectural and hypothetical. It assumes: 1) that the trial court will be compelled to order interest arbitration; 2) that the FOP will prevail, or substantially prevail, in the arbitration process and any appeal therefrom and, perhaps most importantly, 3) that the Governor of New Jersey would be sufficiently dissatisfied with the result of the arbitration that she would wish to exercise a veto power to forbid the DRPA Commissioners from complying with the interest arbitration award.

At a minimum, there is no warrant for the last assumption; indeed, at this stage the Governor has not vetoed the court's order that the DRPA participate in, and pay one-half the expenses of, the mediation process.[19] It is axiomatic that New Jersey courts should refrain from reaching questions of constitutional dimension unless or until resolution of such questions are "absolutely imperative in the disposition of the litigation." *Donadio v. Cunningham*, 58 N.J. 309, 325-26 (1971); *O'Keefe v. Passaic Valley Water Comm'n*, 132

[19] On February 17, 1998, the Law Division ordered the DRPA Commissioners to appropriate funds at their February meeting or at their next regularly scheduled meeting to pay for half of the expenses of three (3) mediation sessions. (Da5-6). Under the DRPA Compact, the Governor had ten (10) days from the date of the receipt of the minutes of the DRPA Commissioners' meeting to veto any action of the DRPA. *N.J.S.A.* §§ 32:3-4a-4c. No such veto occurred, and the parties met with Mediator Andrew Price on April 29, 1998 to commence the mediation process. (Pa52).

N.J. 234, 240 (1993). On the record thus far, there is no basis for concluding that the Orders of the Law Division have set up a constitutional confrontation with the Chief Executive of the State of New Jersey, and there is no need for this Court to even address the issue.

However, even were the Court compelled to consider the Separation of Powers arguments advanced by the DRPA and the *Amicus*, it need do no more than review *DRBA* to conclude that they lack merit. In *DRBA*, the governors of both New Jersey and Delaware possessed veto power over the actions of their respective state commissioners of the Bay Authority. *See N.J.S.A.* 32: 11E-1, Art. VI. Nonetheless, the New Jersey Supreme Court affirmed that the Bay Authority was obligated to recognize and negotiate with a labor organization representing its employees, with or without the governors' approval, because the respective state legislatures, in enacting parallel labor legislation codifying such employee rights, had "in effect .. modified the Compact", including the extent of the governors' ability to veto any actions undertaken by their respective commissioners. 147 N.J. at 447.

So too here, by enacting parallel legislation according interest arbitration rights to all municipal police officers, New Jersey and Pennsylvania have effectively modified the DRPA Compact: just as all municipal chief executives in each state are bound by lawfully executed awards of interest arbitration panels duly selected by the parties, the DRPA Commissioners, and the Governor, would be bound by an interest arbitration award issued in accordance with

the parallel law of both creator states that sets the terms and conditions of DRPA police officers' employment.[20]

In like fashion, the DRPA's and *Amicus*' claim that the Law Division's rulings usurp "the ability of the legislatures of New Jersey and Pennsylvania to effectuate policy," Db31, is a classic case of begging the question. The entire premise of the trial court's ruling emanated from the central holding of *DRBA*, that the *legislatures* of the DRPA creator states *had already* effectuated public policy, by passing parallel legislation to forbid public police officers from striking over disputes regarding terms and conditions of their employment, and to instead channel such disputes into the peaceful and orderly arena of interest arbitration. As in *DRBA*, the rulings of Judges Supnick and Vogelson below merely constituted "judicial recognition of the legislative enactments in both New Jersey and [Pennsylvania]." *DRBA*, 147 N.J. at 447.

Finally, the Defendant's protest that the judiciary cannot compel the DRPA to expend funds to aid in the effectuation of the parallel public policy of the bi-state agency's creator

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[20] Indeed, the DRPA's argument that the Governor's veto power is sacrosanct, and not subject to the curb of positive legislation, proves far too much. If carried to its logical end, it would potentially render the DRPA immune from the operation of any state or federal law that required the DRPA Commissioners to take any type of formal action that came within the scrutiny of New Jersey's Chief Executive. For example, if the DRPA was found to have violated Title VII of the Civil Rights Act, and ordered to pay money damages, the Governor surely could not veto the appropriation of funds by the DRPA Commissioners made to satisfy such a judgment. Clearly, the governor's power is best understood as a check on the actions of the New Jersey DRPA Commissioners, and not as an affirmative grant to either shape or thwart public policy.

states, and that courts should in any event defer first to coordinate branches of government to correct any "perceived wrong", both ignores the long settled principle that a New Jersey court may "exercis[e] its equitable powers to require political subdivisions of the state to raise revenues for statutorily ... mandated purposes," *Robinson v. Cahill*, 70 N.J. 155, 175 (N.J. 1976) (citations omitted), and misperceives judicial recognition of the Plaintiffs' right to interest arbitration as a punishment meted out to the DRPA because of some "legal wrong" that it committed. In reality, interest arbitration in both states is nothing more than the *culmination* of the collective negotiation process for police officers -- a right Judge Supnick found Plaintiffs were entitled to in December, 1996. The Law Division's embrace of the remedy requested by the FOP in this case again thus merely recognizes that DRPA police are entitled to the same rights and privileges enjoyed by every other municipal police officer who labors in the state of New Jersey and the Commonwealth of Pennsylvania -- including the right to invoke interest arbitration -- both because these states have passed parallel laws on the subject, and because the DRPA Compact permits and provides for it.[21]

E) THE LAW DIVISION MAY PROPERLY REQUIRE THE PARTIES TO DEVELOP AN IMPASSE RESOLUTION PROCEDURE THAT CONTAINS BINDING INTEREST ARBITRATION

In the Law Division, the DRPA repeatedly insisted that the court could not or should not "get involved to implement the kind of procedures" necessary to effectuate Plaintiffs'

[21] The DRPA does not even attempt to appeal from Judge Supnick's determination that the labor laws of New Jersey and Pennsylvania provide, at a minimum, the right of DRPA police officers to engage in collective negotiations with the Authority. *See* Db1.

labor rights, reminding the court that no administrative agency exercised jurisdiction over the DRPA, and that the court would be forced to "create" such procedures on its own as the litigation proceeded. (Da158; 156). Judge Supnick first dealt with this concern by holding "the fact that there might be some problem ... in connection with no agencies existing ... that would be able to deal with the problems that might be ultimately encountered and resolve them, I think that the Court has ... the inherent power to deal with matters of that nature." (Da166). Nearly a year later, Judge Vogelson forthrightly echoed this sentiment, declaring that, in the face of a continuing impasse in contact negotiations between the parties, the Court "can and will ... order interest arbitration." (Da406).

On this appeal, the DRPA and the *Amicus* resurrect their claim that New Jersey courts lack the "expertise of an administrative agency" to develop and administer procedures to effectuate the parallel labor policies of the DRPA's creator states. Amicus Brief, at 26. The Law Division's articulation in this case of its "inherent power" to craft remedies and procedures to resolve the impasse in negotiations, however, springs directly from the decision of the New Jersey Supreme Court in *DRBA*. There, the court affirmed that New Jersey trial courts possess jurisdiction to effectuate and oversee a claim by an employee organization representing a bi-state agency's workforce that it should be entitled to formal recognition as the employees' collective bargaining representative under the parallel labor policies of the creator states. Justice Garibaldi, again the lone dissenter to this ruling, complained that the court's decision would "[i]nevitably ... create uncertainty as to which state's law and administrative procedures apply to a given situation." "Rather than acting as a court," Justice

Garibaldi worried, "the Chancery Division will be acting as an administrative agency interpreting labor law; a role for which the Chancery Court was not intended and for which it is not well suited." *DRBA*, 147 N.J. at 454 (Garibaldi, J., dissenting).

In response to these concerns, the *DRBA* majority replied that it did not "share the dissent's lack of confidence in the ability of the Chancery Division to interpret labor law. ... Historically, courts have excised equitable power to resolve labor disputes." *Id.*, at 448 (citations omitted). Therefore, the court ruled, in the absence of legislation empowering an administrative agency to "resolve 'the myriad of issues that will arise during the course of collective negotiations'" between a bi-state agency and its employees, the trial courts retain the ability to hear and decide such issues, and to employ their "inherent powers" to fashion appropriate relief. *Id.*[22]

The New Jersey Supreme Court thus gave the Law Division full and final authority to provide Plaintiffs with the relief requested in this case. As the parties' past experience in negotiations demonstrates, it is apparent that they currently cannot voluntarily reach agreement on new contract terms: the history of the 1995-1996 contract negotiations, as set forth by Judge Vogelson below, is a long and dreary tale of broken promises and intransigence on the part of the DRPA. (Da398-401). And, as far as the Union is concerned,

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[22] Indeed, on remand, the Chancery Division in *DRBA* addressed the problem of New Jersey and Delaware possessing complex and somewhat divergent administrative procedures for union representation elections by appointing a special master to "administer all matters that arise with respect to the ... petition seeking an election for union representation of employees of the Delaware and Bay Authority". *See* Pb Ex. "B", at 2.

its belief that its members are entitled to higher pay than they currently receive, and to substantially greater compensation than, for example, DRPA toll takers, was vindicated by the DRPA's own internal wage analysis, which was used to *increase* compensation for virtually all individuals and groups *except* the Union-represented police officers. (Pa24, ¶25-26). Clearly, as the Court below recognized, neutral interest arbitration may be required to break this impasse.

Having said this, Lodge 30 stresses that at this stage, it has only requested that the Law Division order the parties to attempt to fashion, on their own, an impasse resolution procedure that includes compulsory interest arbitration as its terminus. And, at this point, all the court has done is to require the parties to engage in mediation, and has indicated that it will order interest arbitration *only* if the parties remain unable voluntarily to resolve their contractual dispute. (Da386-489). Thus, only if the FOP and the DRPA cannot voluntarily develop an acceptable process after a reasonable period of time, would Plaintiffs ask the Law Division to further exercise its inherent equitable power to create an impasse resolution system to provide finality to the parties' collective bargaining impasses. And, if it becomes necessary for the court to fashion such a procedure, the respective mechanisms of the New Jersey and Pennsylvania interest arbitration schemes are so similar that the task will hardly be daunting. Therefore, the trial court's further involvement to resolve the labor dispute and this litigation is contemplated to be minimal indeed, and fully encompassed within the broad grant of authority bestowed upon trial courts by the New Jersey Supreme Court.

F) THE LAW DIVISION PROPERLY UTILIZED THE PLAINTIFFS' EXPERT REPORT TO HELP CONFIRM THE COURT'S VIEW THAT THE INTEREST ARBITRATION STATUTES OF NEW JERSEY AND PENNSYLVANIA ARE COMPLEMENTARY AND PARALLEL

In attacking the trial court's acceptance of Professor Summers' Certification, the DRPA completely mischaracterizes the basis of the Law Division's decision, arguing that the court "improperly *relied*" upon the Plaintiffs' expert report. Db67, (emphasis added). To be sure, the court did consider Professor Summers' opinions regarding the similarity of New Jersey and Pennsylvania Interest Arbitration policy, and the general desirability of interest arbitration as a suitable remedy to resolve contract impasse disputes. Indeed, as the New Jersey Supreme Court expressly noted in *EPVA,* the question of whether any particular set of New Jersey and Pennsylvania statutes are "substantially similar" constitutes a "fact sensitive question of law", and one thus particularly suited to the utilization of outside experts to aid in its resolution. 111 N.J. at 402. However, the Law Division also made it abundantly clear that it premised its decision upon *its* reading of New Jersey and Pennsylvania interest arbitration law. As Judge Vogelson put it:

> I read the Statute of New Jersey [and] the Statute of the State of Pennsylvania, and I compared the two, and I came to a conclusion ... that they were substantially parallel in the context of this case. ...[T]hat was my determination by virtue of my reading. ... Are [the laws] parallel; yes. Who decided that; me.

(Da486; 475).

As far a Professor Summers' opinions were concerned, Judge Vogelson explained that he read his Certification "[b]ecause not being omniscient, it's always nice to know whether or not somebody who does something frequently, who studies and practices and is a professional ... has an idea of what [the court] concluded." (Da469). "[I]t is in that context," explained the court, "that I read Professor Summers' Certification." *(Id.)* Thus, the Law Division's consideration of Professor Summers' views was in no way improper, and indeed was precisely what is contemplated for experts: the Certification was used by Judge Vogelson as an interpretative aid to understand the matter before the court, and to help it reach its own resolution of the question.

G) ALTHOUGH NOT REQUIRED, THE COURT BELOW READ AND PROPERLY CONSIDERED THE DEFENDANT'S EXPERT REPORT

The DRPA finally complains that the Law Division erred in not staying Plaintiffs' Motion for Summary Judgment to allow the Defendant additional time to secure and present its own expert report on the similarity of New Jersey and Pennsylvania's arbitration schemes. This argument can only be classified as a "red herring."

First, it is clear from the record that well before the Law Division ruled on Lodge 30's Motion for Summary Judgment, the DRPA had retained an expert, but made a " tactical decision not to secure a report and submit it" before the long-delayed final return date on the Motion. (Da477). Thus, the Defendant can hardly be heard now to complain on appeal that the trial court abused its discretion by not considering evidence that could have, but was not, presented by the DRPA prior to the court's ruling.

Second, and perhaps more to the point, the DRPA concedes that despite the procedural deficiency in its tardy submission of its expert's report, the Law Division nonetheless read and considered it, but simply found it unavailing to alter the court's view that the interest arbitration laws of New Jersey and Pennsylvania are substantially similar. Db59; (Da483; 469-70). Once again, in appealing from a denial of a motion for reconsideration, the DRPA has no legitimate ground to take issue with the court's treatment of its expert's report or the Law Division's disposition of the Defendant's discovery requests.[23]

Turning to the relative "merit" of the DRPA's expert, a perusal of his credentials, experience, and statements reveals that he clearly is no more, and arguably less qualified to render an opinion on the similarity of New Jersey and Pennsylvania interest arbitration law than Professor Summers, and that the Law Division was correct in giving his opinions no decisive weight. Unlike Summers, whose experience as an interest arbitrator included service not only in Pennsylvania, but also in Connecticut, Rhode Island and Massachusetts, Defendant's expert's arbitration experience was confined only to Pennsylvania and Connecticut. While Summers authored a plethora of books and articles on public sector labor law and arbitration (Da335-336), the DRPA's expert's scholarship focused on "legalized gambling and prepaid legal service." (Da434).

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[23] To the extent the DRPA argues that the Law Division erred in not allowing it to submit *another* expert report, *See* Db66, cognizance should be taken of the court's observation that the FOP's Motion was pending since June of 1997, and the DRPA's request to file an additional expert report was not made until December 12, 1997, some six months later, after the Court had already ruled on Plaintiffs' Motion *and* after the twice-extended discovery period had finally closed.

When one reviews the substance of the comments of Defendant's expert, which the DRPA and the *Amicus* now attempt to trumpet, it is clear that he did nothing more than read the two statutes, highlight the technical and mechanical differences between them, and *subjectively extrapolate*, simply on the basis of his own assumptions, certain policy differences *perceived by him* in the two systems. Unlike Plaintiffs, he never reviewed or consulted the legislative history of either law, or traced the evolution of the doctrine of complementary legislation. (Da422). Nor did he consult with any advocates, practitioners, or legislators of either state before attempting to divine the "intent" inhering in either statute. (*Id.*) [24]

Being nothing but the product of his own beliefs and biases, the DRPA's expert's opinions were no more convincing or credible than Summers' and, as the Defendant's expert report was unabashedly a pure "legal" opinion -- unlike Summers, he could draw little upon his personal experience to explain how the procedures actually work in practical terms -- it held much less value than the Summers Certification. Therefore, the Law Division did not

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[24] Indeed, the central thesis of its expert that the DRPA and the *Amicus* attempt to advance -- that New Jersey and Pennsylvania have allegedly made divergent policy choices, with New Jersey favoring collective negotiation settlements over submission to arbitration, and Pennsylvania only paying "lip service" to collective bargaining, and encouraging parties to rely more heavily on arbitration, (Da425), is *disproven* by the available statistical evidence. In the period 1978 to 1982, the percentage of negotiations in which parties applied for arbitration in Pennsylvania was only 26 percent. In New Jersey, for the same period, an arbitrator was appointed in about 35% of all negotiations, a slightly *higher* frequency rate than in Pennsylvania. *See* Lowenberg and Kleintop, "The Second Decade of Interest Arbitration in Pennsylvania," 21 *Journal of Collective Negotiations*, 353, 358, Table 3 (1992); Lester, *Labor Arbitration in State and Local Government* (Princeton N.J.: Industrial Relations Section 1984) at 185.

abuse its discretion in refusing to give it dispositive credence when finally presented with it on the DRPA's Motion for Reconsideration.

IV. CONCLUSION

The Law Division's November 21, 1997 Judgment Order, and its respective Orders of December 19, 1997 and February 17, 1998, should be affirmed.

Respectfully Submitted,

SPEAR, WILDERMAN, BORISH, ENDY SPEAR AND RUNCKEL, P.C.

BY _____
CHARLES T. JOYCE

BY _____
BENJAMIN EISNER
Attorneys for Plaintiffs, Fraternal Order of Police Penn-Jersey, Lodge 30 and Joseph Vena

DATED: July 2, 1998

A-2228-93T1

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2228-93T1

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 68, AFL-CIO, D.R.B.A. EMPLOYEES ASSOCIATION a/w INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 68, AFL-CIO, and OLIVER TWIST, JUDITH TWIST, KEVIN BAILEY, MARK P. DeSORBO, DAVID R. OAT, DAVID A. CUSICK, JOHN M. BUNTING, A.R. SIMMONS, J. DAVID JOHNSON, ROY S. MacCULLOCH, DANIEL A. SLATER, SR., GERALD H. FOSTER, SR., and DAVID E. BARNETT on behalf of themselves and all other persons similarly situated,

Plaintiffs-Appellants,

v.

THE DELAWARE RIVER AND BAY AUTHORITY,

Defendant-Respondent.

FILED
APPELLATE DIVISION
AUG 2 1995

Argued February 22, 1995 - Decided AUG 0 2 1995

Before Judges Long, A.M. Stein and P.G. Levy.

On appeal from Superior Court, Chancery Division, Cape May County.

Raymond G. Heineman argued the cause for appellants (Kroll & Gaechter, attorneys).

Carl D. Poplar argued the cause for respondent (Poplar & Eastlack, attorneys for respondent; O. Francis Biondi and John E. Abramczyk of Morris, Nichols, Arsht & Tunnel, of counsel).

PER CURIAM

Defendant Delaware River and Bay Authority (DRBA), which operates the Delaware Memorial Bridge and the Cape May-Lewes Ferry, was established in 1962 by the Delaware-New Jersey Compact which was approved by Congress. Pub. L. No. 87-678, 76 Stat. 560 (Supp. 1990); N.J.S.A. 32:11E-1 to -12, Del. Code Ann. tit. 17, § 1701 (1985 & Supp. 1994).

Plaintiff DRBA Employees Association (Association) is an organization of employees of DRBA's Marine Division, affiliated with plaintiff International Union of Operating Engineers, Local 68. The individual plaintiffs are all members and employees of DRBA. On August 30, 1993, plaintiffs requested recognition of Local 68 as the representative of the employees who had so designated it and advised that the local would seek to schedule meetings to discuss "grievances and proposals concerning terms and conditions of its members' employment."

DRBA's executive director responded, noting that only "36 of the Authority's 121 permanent employees at the Cape May-Lewes Ferry have designated the Association as their representative." While reiterating DRBA's "commitment to the right of its employees to join a labor union of their own choosing," he declined to recognize any "collective bargaining" agent on behalf of the employees. He concluded that the affiliation process, which was for purposes of collective bargaining, "has no relevance to the employment relationships which currently exist at the Delaware River and Bay Authority."

In October 1993, plaintiffs again wrote to DRBA requesting recognition:

> [A] majority of the marine employees, service and maintenance employees, and office clerical employees employed by the Delaware River and Bay Authority at the Cape May-Lewes Ferry have signed authorization cards authorizing International Union of Operating Engineers, Local 68, AFL-CIO to act as their exclusive representative for purposes of collective negotiations with respect to terms and conditions of employment.

When DRBA did not respond, plaintiffs filed a complaint in the Superior Court, Chancery Division alleging that DRBA's refusal to recognize the local "has interfered with the rights of its employees . . . to organize and present grievances and proposals through representatives of their own choosing" as guaranteed by Article I, Section 19 of the New Jersey State Constitution; the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 to -29; and the Right of Public Employees to Organize Act, Del. Code Ann. tit. 19, §§ 1301 to 1312 (1985 & Supp. 1992), repealed by Public Employment Relations Act, 69 Del. Laws c. 466 (1994).

Plaintiffs demanded that DRBA recognize the affiliation and the designation of Local 68; acknowledge the right of its employees to organize for purposes of collective negotiations; hold a secret-ballot election to determine whether Local 68 represented a majority of DRBA's employees within the appropriate bargaining unit, and announce the results of the election. If the majority of DRBA's employees selected Local 68 as their representative, plaintiffs asked that DRBA be required to negotiate in good faith

"over terms and conditions of employment, and embody any agreement reached in a written agreement."

On October 18, 1993, the trial judge ordered DRBA to show cause why plaintiffs should not be granted the relief they requested. DRBA answered the complaint, denying its material allegations and moved to dismiss, asserting, among other reasons, a lack of subject matter jurisdiction insofar as neither the statutes of the compact states nor the New Jersey Constitution are applicable to DRBA "without the consent of the other state."

In support of the motion to dismiss, DRBA submitted affidavits from its executive director and an executive assistant explaining that its largest facilities and two-thirds of its 500 employees are located in Delaware. DRBA also argued that Local 68 is not a collective bargaining agent and has never been recognized as such by plaintiffs. (By October 1993, ninety-two employees had designated the Association as their representative, with nine of them also designating Local 68).

The trial judge dismissed the complaint, citing Eastern Paralyzed Veterans Ass'n v. City of Camden, 111 N.J. 389 (1988) for the proposition that "New Jersey . . . lacks the sovereign authority to direct the DR[B]A to cede jurisdiction to New Jersey . . . . [A] single state cannot dictate the policy of a bi-state agency." The judge further determined that, even if there was jurisdiction, "I would have to dismiss this matter for lack of relief." A grant to public employees of the right to bargain or negotiate collectively "must be deliberately expressed and is not

to be implied." The judge explained that it is not the court, but the "political process" that created the agency and "drives" its day-to-day decision-making, that should "drive the agency to recognize the realities of public employment as it applies in both states." We reverse.

The principles of federal constitutional law that mandate joint control and limit the jurisdiction of state courts over matters involving bi-state agencies like the DRBA are well established. Because each state relinquishes a portion of its sovereignty to enter into an interstate compact, the resulting bi-state agency is established with precisely limited powers over which the states may only exercise joint control. See United States v. Hokins, 304 U.S. 27, 58 S.Ct. 811, 82 L.Ed. 1137 (1938); Delaware River & Bay Auth. v. New Jersey Pub. Employment Relations Comm'n, 112 N.J. Super. 160 (App. Div. 1970), aff'd, 58 N.J. 388 (1971). "It follows that neither creator state can unilaterally impose additional duties, powers or responsibilities upon the Authority." Eastern Paralyzed Veterans, supra, 111 N.J. at 398 (quoting Nardi v. Delaware River Port Auth., 490 A.2d 949, 950 (Pa. Commw. Ct. 1985)). It was this principle that the trial judge had in mind in declaring that he lacked jurisdiction over the DRBA. What he overlooked was the DRBA compact itself, which expressly sets forth the contours of state court jurisdiction. Article XV of the DRBA compact provides:

> Judicial proceedings to review any bylaw, rule, regulation, order or other action of the authority or to determine the meaning or effect thereof, may be brought in such court

> of each state, and pursuant to such law or rules thereof, as a similar proceeding with respect to any agency of such state might be brought.

By this provision, the DRBA compact ceded concurrent jurisdiction to the courts of New Jersey and Delaware. Either state may exercise such jurisdiction. See Gauntt Constr. Co. v. Delaware River & Bay Auth., 241 N.J. Super. 310, 314 (App. Div. 1990). It is this language which eliminated the initial jurisdictional issue over which the trial judge stumbled and which distinguishes this case from Eastern Paralyzed Veterans, supra, which he cited. There, no similar compact provision existed. In sum, there is no question but that the trial judge had jurisdiction to determine the viability of plaintiffs' claimed entitlement to representation and collective negotiations arising out of the Delaware and New Jersey statutes.

He also erred in concluding that he lacked the power to grant plaintiffs the right to collectively negotiate because that right was not "deliberately expressed," presumably in the DRBA compact. The compact is not the only source of authority over a bi-state agency. Indeed, the DRBA compact itself recognizes that the DRBA may be subject to obligations beyond its four corners. Article VIII provides: "no additional duties or obligations shall be undertaken by the Authority under the law of either State or of Congress without authorization by the law of both States." This language recognizes that a corollary of the proposition that neither state may individually impose its will on a bi-state agency

is that the agency may be made subject to complementary or parallel state legislation. Eastern Paralyzed Veterans, supra, 111 N.J. at 398; Nardi, supra, 490 A.2d at 951-52. Plaintiffs contend that complementary labor policies, as expressed in parallel legislation in New Jersey and Delaware, require DRBA to recognize the individual plaintiffs' affiliation with a labor organization and to collectively negotiate over the terms and conditions of employment.

This is not the first time this argument has been advanced. In Delaware River & Bay Authority v. Carello, 222 A.2d 794 (Del Ch. 1966), defendant union petitioned the Delaware Department of Labor for certification. In enjoining these proceedings at DRBA's behest, the court pointed out that Article VII(e) of the DRBA compact (which is identical to that Article today) grants defendant "the power to fix and determine the qualifications, duties, compensation, terms of office, pensions, and all other conditions and terms of employment of its employees." Carello, supra, 222 A.2d at 797. Because, at the time of this decision in 1966, the Right of Public Employees to Organize Act, Del. Code Ann. tit. 19, §§ 1301 to 1312, (now, the Public Employment Relations Act, Del. Code. Ann. tit. 19 §§ 1301 to 1318 (Supp. 1994)) was "not supported by companion legislation in New Jersey," the court held that Delaware could not "unilaterally legislate so as to place burdens on the compact." Id. at 798-99. The court concluded that the Delaware statute "must remain ineffective until concurrent legislative action of a similar nature is taken by the State of New

Jersey." Id. at 799. In 1968, the New Jersey Legislature enacted its version of the Delaware law, the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 to -29.

To be sure, the two state acts are not identical. However, both clearly give public employees the right to freely organize, to designate a representative to "negotiate in good faith" with the employer with respect to "terms and conditions of employment," and to execute resulting written agreements. N.J.S.A. 34:13A-5.3; Del. Code Ann. tit. 19, §§ 1301, 1302. Both schemes also prohibit strikes by public employees. N.J.S.A. 34:13A-14; Del. Code Ann. tit. 19, § 1316; see also Board of Educ. v. New Jersey Educ. Ass'n, 53 N.J. 29, 36 (1968); Franklin Township Bd. of Educ. v. Quakertown Educ. Ass'n, 274 N.J. Super. 47, 54 (App. Div. 1994). DRBA argues that the differences between the acts eliminates their potential characterization as parallel legislation or complementary policies. Plainly, however, the legislation enacted in each compact state need not be identical in order to find that both have the same policy. Complementary and parallel legislation of a "similar" nature will do. Carello, supra, 222 A.2d at 799. Nor is there any requirement that in order to be applicable to a bi-state agency, the compact states must explicitly agree that the policy will so apply. In Delaware River & Bay Auth. v. International Org. of Masters, Mates & Pilots, 45 N.J. 138, 147 (1965), for example, our Supreme Court restrained a union from striking based on "the historic and widely prevailing policy against strikes by public employees," which was "equally applicable in both states." The

Court did not cite any provision or expression of this policy in either or both states that made it specifically applicable to the DRBA.

Nothing in Eastern Paralyzed Veterans, cited by DRBA, supports a contrary conclusion. There the Supreme Court addressed an effort by New Jersey to apply its substantive law to a bi-state agency project. Eastern Paralyzed Veterans, supra, 111 N.J. at 391. The Camden Housing Authority had agreed to construct a mass transit terminal for train service to be operated by the Port Authority Transportation Corporation, a subsidiary of the Delaware River Port Authority (DRPA), a bi-state agency of New Jersey and Pennsylvania. Ibid. The New Jersey Department of Community Affairs, which had to approve the construction plans, requested an elevator for the handicapped to satisfy state regulations. Id. at 394. Plaintiff, an association of handicapped persons, contended that the elevator was required under the New Jersey Uniform Construction Code Act, N.J.S.A. 52:27D-119 to -141, the Handicapped Access Law, N.J.S.A. 52:32-4 to -16, the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -42, and by N.J.S.A. 52:27D-129b, which states that the Code applies to bi-state agencies. Id. at 395. The Supreme Court ultimately determined that New Jersey could not unilaterally impose duties or responsibilities on a bi-state agency unauthorized by the compact without "[s]ome showing of agreement by both states to the enforcement of the Uniform Construction Code at DRPA's New Jersey facilities." Id. at 402. DRBA reads this language too broadly and argues that it mandates an express agreement by the compact states

as to the applicability of a particular law or policy. Not so. Read in context, it is nothing more than a rejection of the suggestion that by enacting N.J.S.A. 52:27D-129b, which purports to apply the construction code to bi-state agencies, New Jersey could take unilateral action toward the DRPA. Certainly, particular state laws and policies apply only by agreement. But that agreement can be either express or implied from "substantially similar legislative acts" in the compact states. Eastern Paralyzed Veterans, supra, 111 N.J. at 401.

We think that through the enactment of such legislation, New Jersey and Delaware have expressed their agreement that public employees, including DRBA's, may organize and designate a representative to engage in collective negotiations on their behalf, excluding the right to strike. Indeed, the enactment of a parallel law by New Jersey was all the Delaware Court said was necessary, as long ago as 1966, to set the labor process urged by plaintiffs in motion. Carello, supra, 222 A.2d at 799.

DRBA argues that "jurisdictional collisions . . . would result from the inconsistent policies arising out of the implementation of different statutes and regulations by the Delaware Department of Labor and the New Jersey Public Employment Relations Commission (PERC)," citing various differences between the two statutes. However, plaintiffs are not seeking to actually implement either state's regulatory scheme; they acknowledge correctly that neither the New Jersey PERC nor the Delaware Department of Labor has jurisdiction. Delaware River & Bay Auth. v. New Jersey Pub.

Employment Relations Comm'n, 112 N.J. Super. 160, 165-66 (App. Div. 1970); Carello, supra, 222 A.2d at 798. Plaintiffs are seeking only to exercise their right to collective negotiations in accordance with the policy of both states, under the jurisdiction of the Chancery Division, which will supervise labor relations when government agencies that normally do so, have no jurisdiction. Johnson v. Christ Hosp., 45 N.J. 108, 112 (1965); Comite Organizador de Trabajadores Agricolas v. Molinelli, 114 N.J. 87, 89-90 (1989).

We reverse and remand the case to the trial judge to determine how the complementary labor policies of New Jersey and Delaware, as expressed in their parallel labor legislation, are to be effectuated.

Reversed and remanded.

DEC 16 1997
FILED
Office of the Superior Court Clerk
by Deputy Clerk of the Superior Court
CHARLES E. McCRAY
Cape May County

Lum, Danzis, Drasco, Positan & Kleinberg, LLC
103 Eisenhower Parkway
Roseland, New Jersey 07068
Telephone (973) 403-9000
Telefax (973) 403-9021
Attorney for Defendant/Petitioner

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 68, AFL-CIO, D.R.B.A. EMPLOYEES ASSOCIATION a/w INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 68, AFL-CIO, and OLIVER TWIST, JUDITH TWIST, KEVIN BAILEY, MARK P. DeSORBO, DAVID R. OAT, DAVID A. CUSICK, JOHN M. BUNTING, A.R. SIMMONS, J. DAVID JOHNSON, ROY S. MacCULLOCH, DANIEL A. SLATER, SR., GERALD M. FOSTER, SR., and DAVID E. BARNETT on behalf of themselves and all other persons similarly situated,	SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION CAPE MAY COUNTY DOCKET NO.: CPM-C-97-93
Plaintiffs/Respondents,	
v.	
THE DELAWARE RIVER AND BAY AUTHORITY,	CASE MANAGEMENT ORDER
Defendant/Petitioner.	

This matter having been opened to the Court by Wayne J. Positan, Esq. of Lum, Danzis, Drasco, Positan & Kleinberg, LLC, with O. Francis Biondi, Esq., of Morris, Nichols, Araht & Tunnell, Alfred J. D'Angelo, Jr., Esq., of Klett, Lieber, Rooney & Schorling, and Raymond G. Heineman, Jr., Esq. of Kroll & Heineman, appearing at the Court's Case Management Conference on Thursday,

November 20, 1997, and for good cause having been shown;

It is on this 16 day of December, 1997;

ORDERED as follows:

The parties have agreed to the appointment of a special master by the Court. The Special Master will be responsible to hold hearings on any factual or legal disputes that arise between the parties and make recommendations to this Court based upon the evidence submitted to him; and it is further

ORDERED that the Special Master will administer all matters that arise with respect to the plaintiffs'/respondents' petition seeking an election for union representation of employees of the Delaware River Bay Authority and will make such recommendations to the Court as necessary to effectuate the decision of the Supreme Court of New Jersey; and it is further

ORDERED that all parties shall have the right to take exception and file objections to this Court with respect to any recommendation issued by the Special Master within 20 days of said recommendation; and it is further

ORDERED that the parties hereby agree that the Special Master in the above-referenced matter shall be Peter Hirsch, former Regional Director for the National Labor Relations Board; and it is further

ORDERED that Mr. Hirsch's fees and expenses shall be split evenly between the parties; and it is further

ORDERED that all rights of the parties as to Appellate review are fully preserved; and it is further

ORDERED that a copy of this Order shall be served upon all parties within 7 days of counsel for defendant/petitioner's receipt of same.

John F. Callahan

JOHN F. CALLAHAN, J.S.C.

I hereby consent to the entry of this Order.

[redacted]

[redacted]

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ALL STATE™ LEGAL 800-222-0510 E0BP11S RECYCLED

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA :
: SS
COUNTY OF PHILADELPHIA :

James Stewart being duly sworn hereby deposes and says:

1. I am President of Fraternal Order of Police, Penn-Jersey Lodge 30. ("FOP Lodge 30"). FOP Lodge 30 represents 78 police officers employed by the Delaware River Port Authority ("DRPA"), exclusive of corporals, sergeants, lieutenants and captains.

2. Most of the police officers employed by the DRPA are citizens of the State of New Jersey.

3. Before they are hired by the DRPA, DRPA police officers must be certified by successfully completing a course of instruction approved by the Attorneys General of the State of New Jersey and the Commonwealth of Pennsylvania. Most DRPA police officers have been certified by graduating from the Camden County or Burlington County police academies, or a police academy situated in the Commonwealth of Pennsylvania.

4. At the New Jersey police academies, cadets are trained in the criminal law of the State of New Jersey. Once they are hired by the DRPA, they receive in-service training in Pennsylvania criminal law.

5. Once hired, DRPA police officers are sworn to uphold the laws of the State of New Jersey and the Commonwealth of Pennsylvania. They are provided with a manual on the rules, regulations and operating procedures of the DRPA Bureau of Police. This manual states that the DRPA police officers are "public servants", whose primary duty and responsibility is to preserve the public peace, prevent crime, arrest violators of the law and enforce all the criminal laws of the Commonwealth of Pennsylvania and the State of New Jersey within the boundaries of the Delaware River Port Authority.

6. The responsibility for protecting public safety and enforcing the laws of the State of New Jersey and the Commonwealth of Pennsylvania on DRPA property is vested exclusively with the DRPA police. Neither the Philadelphia Police Department, nor the Police Departments of any municipality of the State of New Jersey, exercise general jurisdiction to maintain public peace and safety on DRPA property.

7. In 1993, while patrolling DRPA property, which includes the four bridges spanning the Delaware River owned and operated by the DRPA, i.e., the Betsy Ross Bridge, the Benjamin Franklin Bridge, the Walt Whitman Bridge and the Commodore Barry Bridge, DRPA police officers made over 700 arrests for driving while intoxicated, hundreds of arrests for possession of narcotics, drugs, and deadly weapons, and thousands of citations and summons for miscellaneous traffic offenses.

8. For a number of years prior to 1975, the DRPA police officers were represented for collective bargaining purposes by the Transport Workers Union, ("TRW"), the same labor organization that also represented the DRPA employees who operate the toll booths on the bridges, and the DRPA maintenance and highway workers. In the fall of 1975, a group of police officers, dissatisfied with the representation they were receiving from this union, decided to affiliate with the Fraternal Order of Police.

9. The FOP contacted the DRPA to demand a union representation election to determine which entity the majority of the DRPA police officers wish to have represent them. The DRPA agreed to have the American Arbitration Association, an independent, non-profit organization that specializes in conducting union representation elections, hold a secret ballot vote among the DRPA police officers in October, 1975.

10. The FOP won the election and the DRPA agreed to be bound by the results of the election, and to negotiate with the "Fraternal Order of Police, Penn-Jersey Lodge 30" as the exclusive majority representative of the DRPA police officers.

11. On November 1, 1975 the DRPA and the Fraternal Order of Police Lodge 30 executed their first labor agreement to govern the terms and conditions of employment of the DRPA police officers. The term of the 1975 agreement extended to December 15, 1978. In 1978, the parties negotiated a successor collective bargaining agreement to the 1975 agreement,

and continued to negotiate a series of successor Collective Bargaining Agreements, the last one being for a term of December 11, 1992 to December 10, 1995.

12. In each of the agreements since 1975, the language contained in the 1975 agreement on union recognition, dues check-off, grievance and arbitration procedure, and the termination and renewal of the agreement remained unchanged, except that the word "patrolman" was replaced by the words "police officers", and except as follows:

13. Sometime prior to 1990, the dues check-off provisions of the Collective Bargaining Agreements were amended to provide that non-members of the FOP employed as police officers by the DRPA would be required to pay a "representation fee", in lieu of police officer dues paid to the FOP for collective bargaining and contract administration services rendered by the FOP on behalf of all police officers covered by the Collective Bargaining Agreement.

14. Also, Sometime prior to 1990, the language in the termination and renewal clause of the Collective Bargaining Agreement was altered slightly. The phrase "shall continue in force and effect from year to year thereafter" was for some reason deleted from the 1975 contract language. I do not know whether the deletion was inadvertent or intentional.

15. In the fall of 1995, pursuant to the termination and renewal clause, counsel for FOP Lodge 30 and the DRPA contacted each other and expressed a mutual desire to negotiate an

agreement to replace the 1992-1995 Collective Bargaining Agreement. Since this notice meant, under the termination and renewal clause, that the agreement would now expire by December 10, 1995, the parties consequently agreed to a series of extensions of the terms of the 1992 agreement, up to and including August 20, 1996.

16. During the period of time from November, 1995 to July 1, 1996 the parties met on fourteen separate occasions for extremely brief negotiation sessions.

17. During the course of these sessions, the DRPA negotiating team engaged in the following conduct: it withdrew a contract proposal and then, at the last moment, reasserted it; it agreed to numerous FOP contract proposals and then, at a later date, reneged on this agreement; it refused to bargain over the particulars of health care coverage for police officers or wages; it consistently delayed meeting with the FOP, and for one six (6) week stretch of time, cancelled all previously scheduled negotiation sessions and refused to meet with the Union.

18. On July 1, 1996 the parties met for the last time in face to face negotiations. At this meeting, the DRPA abruptly presented the FOP with a new set of terms and conditions of employment, refused to meet further with them, and demanded that the Union schedule a vote on those terms and conditions.

19. On or about July 24, 1996, even before the Union had an opportunity to vote on the DPRA's demands, the Executive Director of the DRPA ordered that the agenda for the next

DRPA Board of Commissioners meeting, set for August 21, 1996, include a proposal to unilaterally implement these terms and conditions upon DRPA police officers.

20. On July 29, 1996 the Union, voting by secret ballot, elected to reject the DRPA's terms by a vote of 76 to 0.

21. On July 30, 1996 I issued a letter to all sixteen DRPA commissioners, explaining the reasons behind the unanimous rejection of the DRPA terms, and requesting that the DRPA bargain with the Union in an attempt to reach an agreement on a new labor contract.

22. Despite this letter and several other attempts by myself to get the DRPA to continue to negotiate, the Board of Commissioners voted on August 20, 1996 to impose the DRPA's terms and conditions of employment upon the DRPA police officers.

23. Under the terms of the DRPA's imposed terms and conditions of employment, DRPA police officers are currently subject to lay-off without adequate regard to their seniority; are subject to transfer from shift to shift on short notice; have no idea what, if any health insurance coverage they will be entitled to as of January 1, 1997; and are forced to work in a highly dangerous environment knowing that, if they are injured in the line of duty, they will no longer be made whole in wages and benefits if they are disabled.

I verify that the statements contained in this Affidavit are true and correct to the best of my knowledge, information and belief. I understand that if any of the foregoing statements made by me are wilfully false, I am subject to appropriate sanctions.

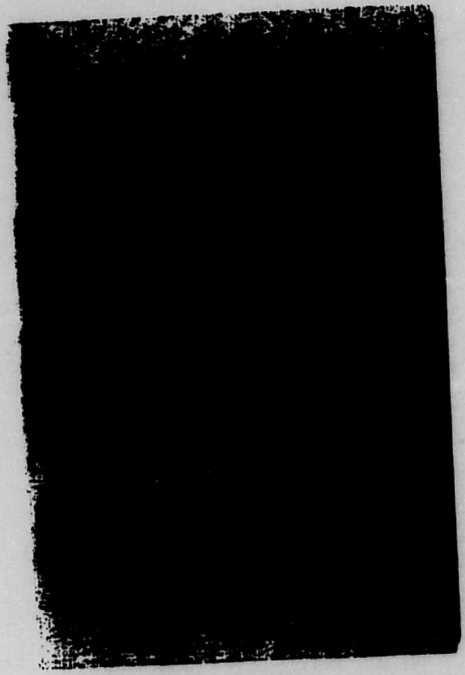
James Stewart
JAMES STEWART

Sworn to and Subscribed
before me this 9TH day
of December, 1996.

Theresa E. Snock
Notary Public

NOTARIAL SEAL
THERESA E. SNOCK, Notary Public
City of Philadelphia, Phila. County
My Commission Expires Nov. 13, 1999

T-3



This manual applies to all members of the Police Department, regardless of rank, and it is the duty of every member to become familiar with and follow to the fullest extent the rules and regulations set forth below.

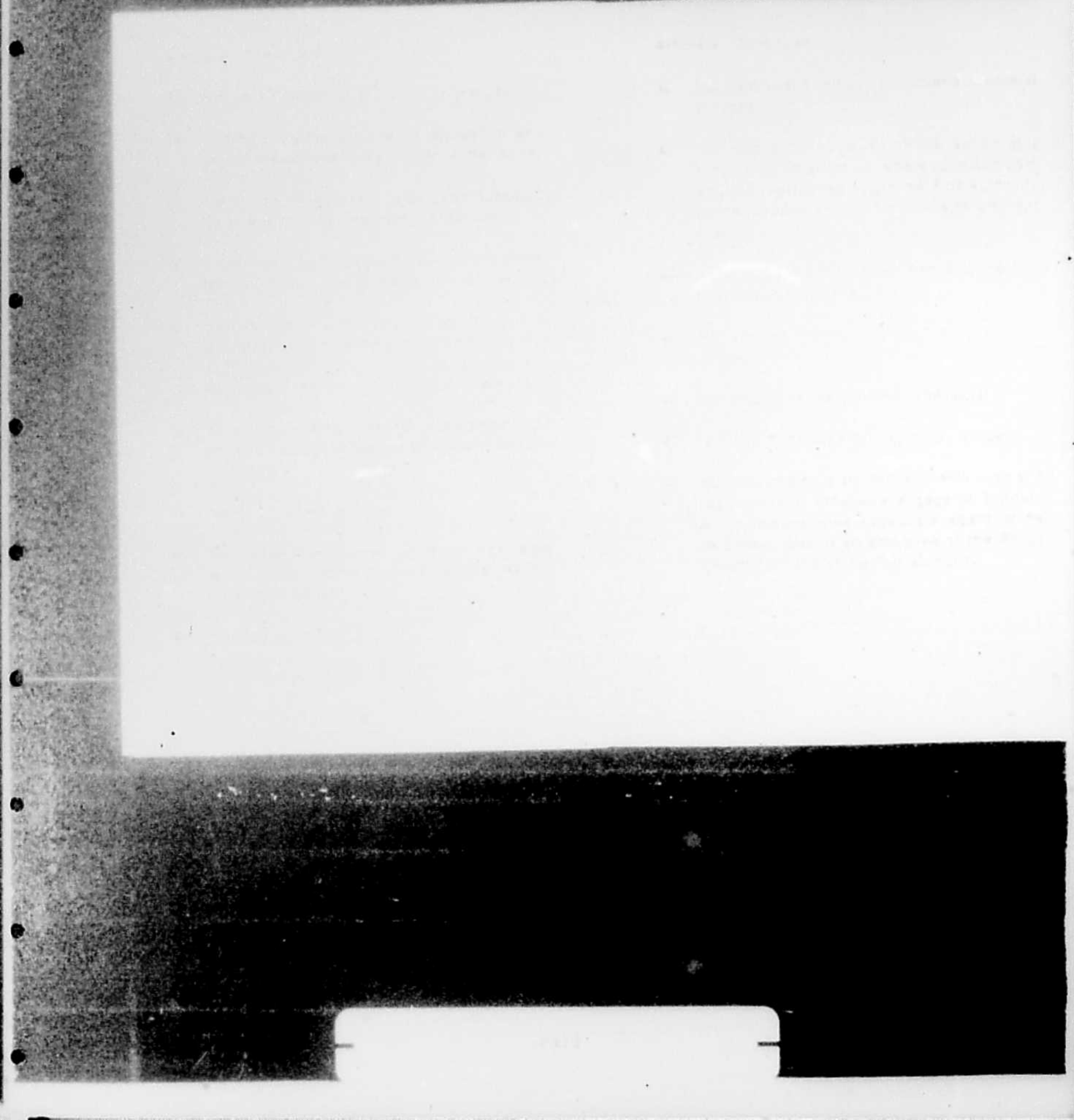
All members of the Police Department are expected to use good judgment on-and-off the job. We are all public servants and so, must be above reproach in our professional and personal dealings.

ARTICLE A.

DUTIES AND RESPONSIBILITIES

Members of the Department shall:

1. At all times within the boundaries of the Delaware River Port Authority, preserve the public peace, prevent crime, arrest violators of the law, and enforce all the criminal laws of the Commonwealth of Pennsylvania, the State of New Jersey, and the Federal Government, as well as the Rules and Regulations of the Delaware River Port Authority.



ARTICLE B

NOTES

CONSEQUENCES OF VIOLATING RULES AND REGULATIONS

1. Any officer or member of the Police Department who violates a rule or regulation under Article A may be subject to corrective suspension or dismissal according to the nature and severity of his or her offense.

2. The list of rules and responsibilities in Article A is not all-inclusive and members of the Department may be disciplined for other reasons not specifically listed in this Manual.

THE POST AUTHORITY RESERVES THE RIGHT TO AMEND OR REVOKE EXISTING RULES AND REGULATIONS AND CREATE NEW ONES FOR THE GOOD OF THE POLICE DEPARTMENT

SPEAR, WILDERMAN, BORISH,
ENDY, SPEAR AND RUNCKEL
BY: BENJAMIN EISNER, ESQUIRE
CHARLES T. JOYCE, ESQUIRE
36 Tanner Streets, Second Floor
Haddonfield, New Jersey, 08033
(609) 428-5255
Attorneys for Plaintiffs, Fraternal Order of Police, Penn-Jersey, Lodge 30 and Joseph Vena

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30, and JOSEPH VENA Plaintiffs, v. **THE DELAWARE RIVER PORT AUTHORITY** Defendant.	SUPERIOR COURT OF NEW JERSEY CAMDEN COUNTY LAW DIVISION DOCKET NO. L-7547-96 CIVIL ACTION **RETURN DATE: JULY 11, 1997; 9:00 A.M.**

CERTIFICATION OF JOSEPH VENA

1. I am Joseph Vena. I am a plaintiff in this action and am employed as a patrol officer with the Delaware River Port Authority ("DRPA").

2. I have been employed as a DRPA patrol officer since October, 1990. I have also served as First Vice-President of the Fraternal Order of Police Penn-Jersey Lodge 30, ("FOP Lodge 30"), the co-plaintiff in this action, since April, 1995.

3. The Fraternal Order of Police currently represents 76 patrol officers employed by the DRPA. Of this number, 57 have served the Port Authority for five years or more, 23 patrol officers have at least ten years service on the job, and 12 patrol officers have been employed by the DRPA for over 15 years.

4. All DRPA police officers are sworn to uphold the laws of the State of New Jersey and the Commonwealth of Pennsylvania, and are trained in the criminal and vehicular traffic laws in both states: DRPA police officers have the sole responsibility to maintain public peace and safety on DRPA property, and have full authority to make arrests for violations of the New Jersey and Pennsylvania law committed within the eight counties in New Jersey and the five counties of Pennsylvania that comprise the "Port district" under the terms of the Interstate Compact that created the DRPA.

5. Further, if a DRPA police officer is engaged in the hot pursuit of an individual or individuals who have violated the criminal or vehicular traffic laws of either state within the Port district, that officer possesses the power to apprehend such offenders anywhere in the State of New Jersey or the Commonwealth of Pennsylvania.

6. After the completion of their probationary period, patrol officers represented by FOP Lodge 30 receive a salary of $18.31 an hour, regardless of their length of service with the DRPA.

7. A DRPA patrol officer thus earns $38,084.00 per year as a base salary.

8. In addition to any unscheduled overtime, virtually all DRPA patrol officers work a sixth day in a work week once every three weeks, thus working a total of 2,192 scheduled hours a year. Patrol officers receive pay for this scheduled overtime at straight-time rates, raising our total yearly salary to $40,125.12.

9. Toll collectors employed by the DRPA to receive the money and tokens paid by motorists who pass over the DRPA's bridges earn $18.30 per hour, and also work a scheduled sixth day in a three week cycle. However, unlike the DRPA patrol officers, toll collectors receive time and one-half when they work scheduled sixth day overtime. Thus, their annual salary, exclusive of unscheduled overtime, is $41,138.00 a year, $1,012.88 more than that of a DRPA patrol officer represented by FOP Lodge 30.

10. In addition, DRPA highway mechanics and maintenance workers also earn more annually than a DRPA patrol officer, even though they work fewer hours. For example, a maintenance worker earns $42,619.00 per year, and a highway mechanic earns $39,083.00 per year for working only 2,080 hours per year.

11. As First Vice-President of FOP Lodge 30, I attended and participated in all of the collective bargaining negotiation sessions between the FOP Lodge 30 and the DRPA, and was primarily responsible for drafting the Union's collective bargaining proposals.

12. In November, 1995, the FOP presented the DRPA with a comprehensive bargaining proposal to, among other things, attempt to recognize and reward DRPA patrol officers' years of service in the calculation of their wage rates, and to address the disparity between the respective duties of patrol officers and toll takers and their respective rates of pay.

13. To do this, the Union proposed a five level salary structure, whereby newly hired officers would receive 25% less than the base wage rate of pay, and officers with the greatest seniority would receive pay increments that, over the life of the Collective Bargaining Agreement, would culminate in an annual salary of $49,300.00. Further, the FOP proposed an increase in the annual clothing and shoe allowance allotted to patrol officers, from $500.00 to $800.00 a year.

14. The DRPA refused to respond to the Union's wage proposal and made no wage proposal at all until the parties last bargaining session, on July 1, 1996, when it announced that it would grant no percentage wage increases in the first two years of the contract, and would provide only a 3% increase in the last year, raising the patrol officers' salary to only $39,000.00 a year by the end of the Collective Bargaining Agreement., The DRPA also told the Union that it would impose a multi-tiered wage system of its own, cutting the pay of newly employed officers to $30,140.00 a year. Further, it refused to increase the existing clothing and shoe allowance provided to patrol officers.

15. Between November 9, 1997, the first day of negotiations with the DRPA, and July 1, 1996 when the DRPA refused to negotiate further with the FOP, I witnessed many occasions in which the DRPA engaged in conduct that indicated a lack of good faith on its part with its negotiations with the FOP. This conduct included the following:

a. On November 9, 1995, the DRPA submitted to the FOP a list of demands that included, among other things, the elimination of an existing contract provision entitling patrol officers injured in the line of duty to receive payments by the DRPA for up to 26 weeks of their disability to compensate them for the difference between workers' compensation and their actual wages. At that same session, however, DRPA withdrew this proposal, and through the course of numerous subsequent bargaining meetings repeatedly reiterated that it was not seeking to eliminate the workers' compensation make-whole payments. However, on July 1, 1996 the DRPA reinstated this demand without explanation, and announced that it would eliminate such make-whole payments from any new labor contract.

b. On January 4, 1996, the DRPA agreed to an FOP proposal that would allow authorized FOP representatives to visit any DRPA facility for the purposes of processing or investigating patrol officer grievances and to administer the Collective Bargaining Agreement. On or about July 1, 1996, however, the DRPA, without explanation, reneged on this agreement.

c. On January 19, 1996, the DRPA agreed that it would not subcontract certain jobs performed by the bargaining unit, namely the radio dispatcher position and the "building man" position, during the life of the Collective Bargaining Agreement. On April 29, 1996, however, the DRPA, without explanation, reneged on this agreement.

d. On April 19, 1996, the DRPA agreed to an FOP proposal that provided that patrol officers would receive time and one-half for all work performed on the sixth day of a work week, and further set forth how overtime payments would be calculated. On or

about July 1, 1996, however, the DRPA reneged on this agreement, again without explanation.

e. On April 19, 1996, the DRPA agreed to an FOP proposal that would allow patrol officers access to all personnel files maintained by the DRPA. On or about July 1, 1996, however, the DRPA, without explanation, reneged on this agreement.

f. On April 19, 1996, the DRPA agreed to an FOP proposal that would guarantee patrol officers a minimum of four hours pay if they were ordered to appear in court on DRPA work-related business. On or about July 1, 1996, however, the DRPA, without explanation, reneged on this agreement.

g. On June 24, 1996, the DRPA agreed to an FOP proposal which provided that selection for DRPA-approved training programs or seminars be made on the basis of seniority, if more than one patrol officer applied for such training. On June 28, 1996, however, the DRPA, without explanation,

reneged on this agreement.

16. Although the parties reached agreement on some terms and conditions of employment in their negotiations between November, 1995 and July, 1996, they remained deadlocked on the above described items, as well as on a DRPA-proposed elimination of an existing contract provision that protected patrol officers from lay-off, a DRPA-proposed procedure to transfer patrol officers from shift to shift and bridge to bridge, and Union proposals to regulate promotional opportunities, and establish investigatory and disciplinary procedures.

17. On July 1, 1996, the DRPA announced that it would not negotiate further with FOP, and would seek authority from the DRPA Board of Commissioners at their August, 1996 meeting to impose a "labor agreement" upon the FOP-represented patrol officers, that included, among other things, no wage increases until December 1997, no increase in the clothing and the shoe allowance, elimination of the workers' compensation make-whole payments, elimination of the no lay-off clause, and creation of a new right to subcontract out bargaining unit work and transfer patrol officers.

18. In September, 1996 the DRPA retained Hay Management Consultants ("Hay") to review the Port Authority's pay rates for its employees.. According to a letter from the DRPA that I received relating to the Hay study, its purpose was to enable the DRPA to "develop a formal compensation program" which "ensures fairness and equity in the salary compensation

program." In January, 1997, I along with all other DRPA employees received a copy of the Hay study's findings.

19. The Hay study assigned a numerical grading system to each job position, including my own, "that reflected the know-how, problem solving and accountability, of each job." (Attached to this Certification is a copy of the Hay Compensation Analysis Report that I received.) Along with all my other fellow patrol officers, I was assigned a salary grade of "eight" (8), which, according to the Hay study, entitled me to receive a "base salary" of $40,080.00 at the "mid-point" of my employment, and a maximum salary of $48,096.00. The "base salary" developed by the Hay study was based upon annual work schedule of 2,080 hours.

20. DRPA toll collectors, by contrast, received under the Hay study a salary grade of "four" (4), which set forth a "mid-point" salary of $26,340.00 and a maximum salary of $31,608.00.

21. DRPA highway mechanics similarly received under the Hay study a salary grade of "five" (5), which called for a "mid-point" salary of $28,664.00 and a maximum salary of $34,398.00.

22. In my investigation of municipal police departments in New Jersey and Pennsylvania, I have learned that patrol officers who have between five and seven years experience in their respective departments are paid the maximum base salary under their

respective collective bargaining agreements.

23. In addition to the patrol officers, thirteen other job classifications at the DRPA were ranked by the Hay study as grade "eight" (8). Of these, every one was compensated several thousand dollars above the "mid-point" developed by Hay, and eleven of the thirteen classifications were compensated above the "maximum" pay level recommended by the Hay study.

24. For example, an "executive legal secretary" at the DRPA received a salary of $51,000.00, and the "Manager of Community Relations", similarly so graded, received a salary of $67,496.00 per year.

25. In the weeks and months following the publication of the Hay study in January, 1997, it is my understanding that the DRPA used its findings to justify increasing the compensation of several executive level positions at the DRPA.

26. Since January, 1997, no attempt has been made by the DRPA to bring patrol officers' base wages in line with the Hay study's recommendations.

27. The FOP and the DRPA remain at impasse on wages and other working conditions, and the patrol officers continue to perform their duties under the terms of the "Labor Agreement", unilaterally imposed by the DRPA.

MEMORANDUM

DELAWARE RIVER PORT AUTHORITY
of Pennsylvania & New Jersey

To: VENA, JR., JOSEPH A.,POLICE OFFICER
POLICE - WWB

FROM: HUMAN RESOURCES

SUBJECT: SALARY GRADE INFORMATION

DATE: JANUARY 15, 1997

CURRENT BASE SALARY	$38,084.80
YOUR NEW SALARY GRADE (SG) IS	8
YOUR NEW SALARY GRADE RANGE IS	$32,064 *TO* $48,096

SALARY GRADES FOR THE DRPA / PATCO
EFFECTIVE JANUARY 1, 1997

SG	MINIMUM	MIDPOINT	MAXIMUM
1	$17,190	$21,487	$25,785
2	$18,241	$22,802	$27,362
3	$19,535	$24,419	$29,303
4	$21,072	$26,340	$31,608
5	$22,932	$28,665	$34,398
6	$25,035	$31,293	$37,552
7	$27,299	$34,124	$40,948
8	$32,064	$40,080	$48,096
9	$35,388	$44,235	$53,082
10	$39,579	$49,474	$59,369
11	$44,349	$55,436	$66,523
12	$50,419	$63,024	$75,628
E1	$56,531	$70,664	$84,797
E2	$63,432	$79,290	$95,148
E3	$71,772	$89,715	$107,658
E4	$83,353	$104,191	$125,029
E5	$97,574	$121,967	$146,361

MEMORANDUM

DELAWARE RIVER PORT AUTHORITY
of Pennsylvania & New Jersey

To: All DRPA/ PATCO Employees

From: Paul Drayton, Executive Director/President

Subject: HAY COMPENSATION ANALYSIS

Date: January 15, 1997

As you know, Hay Management Consultants (Hay) was retained by DRPA and PATCO to review our salary compensation program to ensure that our pay practices are consistent with the current operating environment.

The main objectives of Hay's efforts were to develop a formal compensation program which:

- ensures fairness and equity in the salary compensation program
- maintains internal equity and marketplace competitiveness
- brings DRPA's and PATCO's compensation management processes in line with those of private industry

Hay implemented a compensation analysis process that included five major steps:

1. Evaluation of all positions at DRPA and PATCO

Hay guided DRPA and PATCO managers and supervisors, working in Job Evaluation Committees (JECs), through a review of all pertinent information about all positions (represented and non-represented) at DRPA and PATCO. That information came from several sources, including the Position Analysis Questionnaires (PAQs) which were distributed to all employees, the knowledge of JEC members about specific positions, and, when required, interviews with key personnel who could give the JECs information about a specific position. No JEC member participated in the evaluation of his/her own position and the JECs did not evaluate the positions that represented direct reporting relationships to the Executive Director or the General Manager of PATCO. Those positions were evaluated by Hay.

The result of this step in the process was the "pointing" of positions. Each position was given a set of points that reflected the know-how, problem solving and accountability

specific to that position. Positions were "pointed" solely on the basis of job content. Incumbents and performance were not considered when pointing a position.

The Strategic Management Committee (SMC) reviewed the results of the JECs' efforts, and made adjustments as necessary to insure consistency within DRPA and PATCO and between the two agencies.

2. Internal equity analysis

Hay examined the relationship between position points and existing pay levels at DRPA and PATCO to determine whether there was a pattern of increasing pay for increasing job complexity. Their analysis showed that there should be a stronger correlation between pay and job complexity.

3. Compensation philosophy

The SMC developed a compensation philosophy to guide Hay in the construction of a salary grade structure for DRPA and PATCO. The SMC determined that DRPA and PATCO should offer competitive compensation for all positions at dollar levels that are comparable to average compensation levels for similarly pointed positions.

4. Marketplace competitiveness analysis

Given the compensation philosophy developed by the SMC, Hay evaluated how competitive the salaries for positions at DRPA and PATCO were relative to the salaries for similarly pointed positions at other organizations in the marketplace. Hay selected a blend of data from a number of their data bases representative of general industry, utilities and the Philadelphia area as a comparison. Hay also evaluated the data from custom surveys of agencies similar to DRPA and PATCO.

The end product of this task was a determination that, in general, salaries at DRPA and PATCO are above the 75th percentile of the markets to which they were compared. The exception to this was that the highest executive positions are compensated below the 50th percentile of the markets to which they were compared. Simply stated, the majority of positions at DRPA and PATCO are paid at higher levels than similarly pointed positions in other markets.

5. Creation of final grade ranges

Based on input from the SMC and the marketplace competitiveness analysis, Hay developed a seventeen (17) grade salary structure that assigned a salary range to a range of position points. Every position at DRPA and PATCO was assigned to a grade

and a salary range. A copy of the salary grade structure is attached for your information.

A comparison of existing salaries to the new salary grades highlights two significant points: no incumbent at either DRPA or PATCO is paid below the minimum of the proposed ranges and, many incumbents in both organizations are paid over the maximum of the proposed ranges.

At their regular meetings on January 15, 1997, the DRPA Board of Commissioners and the PATCO Board of Directors voted to adopt the Hay Management Consultants' recommendations for a new salary grade and compensation structure for all positions at DRPA and PATCO, except that of Executive Director/President. The new grade and salary structure will become effective immediately.

Each employee at DRPA and PATCO will receive his/her new salary grade and salary range with this letter. It is the grade level that determines an individual's salary range, therefore, point levels for specific jobs will not be communicated.

Since there are no employees whose current salaries are below the minimums of the new salary ranges, no one will have his/her salary increased. Those employees whose current salaries are above the maximum of a range will not have their salaries reduced. Although the new compensation program was undertaken with the intent that it would encompass all employees, compensation for represented employees is still subject to the terms of collective bargaining.

If the Board approves a merit increase or bonus, and if your performance is satisfactory, your potential salary increase may be impacted by how your current salary fits within the new salary ranges. If your current salary is over the maximum of your new salary range, you will not be eligible for any increase to base wage until such time as your salary grade range is adjusted and your salary fits within the new range. It is anticipated that salary ranges will be adjusted on a periodic basis to reflect changes in the markets on which the salary ranges are based.

Lack of eligibility for a base wage increase does not mean that you will not be recognized for good job performance. In a year when the Board has authorized a base wage increase, you will be eligible for a merit-based cash bonus rather than a base wage increase if your salary is over the maximum of your salary grade range. If the Board has authorized a cash bonus payment, you will be eligible to receive a merit-based cash bonus, regardless of where your salary falls within the new salary grade range.

There is no appeal process for employees who disagree with the salary grade into

which their position has been placed. Adjustments to "points", and therefore to grades, will only be considered when the content of the work of a particular position has changed substantially. Major changes in job function or changes to the educational requirements of a position may trigger a reevaluation process. Such changes as minor functional additions/deletions or the increase in the number of people reporting to a specific position probably would not.

The DRPA/PATCO JECs will meet quarterly if necessary (or as requested by the Executive Director/President) to evaluate any new positions or re-evaluate existing positions that have substantially changed. The final determination about changes in grades or the assignment of a grade to a new position will be made by the Board upon the recommendation of the appropriate JEC, the SMC and the Executive Director/President.

The implementation of the new salary grade structure represents another step in our efforts to implement the recommendations of the KPMG Peat Marwick management study and to manage the business of DRPA and PATCO in the most efficient and effective way possible.

I believe that this letter, the salary grade and range information and the attached set of Questions and Answers provide a comprehensive level of information about the new compensation program. If you should have any additional questions, please direct them to your Division Director/PATCO Asst. General Manager, Operations & Planning or the Manager of Human Resources.

MEMORANDUM

DELAWARE RIVER PORT AUTHORITY
of Pennsylvania & New Jersey

To: ALL DRPA & PATCO EMPLOYEES

From: PAUL DRAYTON, EXECUTIVE DIRECTOR/PRESIDENT

Subject: DRPA/PATCO COMPENSATION PROGRAM Q&A

Date: JANUARY 15, 1997

Q: How are represented/union employees affected by this new program?

A: The new compensation program was undertaken with the intent that it would encompass all employees. However, compensation for represented employees is still subject to the terms of collective bargaining.

Q: What is the appeal process if I disagree with how my job was graded?

A: There is no process to appeal how your job was graded. What is in place, however, are DRPA/PATCO Job Evaluation Committees (JECs) which are responsible for evaluating new positions and current jobs that have changed significantly. Your Division Director/PATCO Assistant General Manager for Operations & Planning or the Manager of Human Resources can tell you more about the function of the JECs.

Q: Will I be told what the points are for my job?

A: No. Points are merely a tool used to place positions in salary grades. Since it is the grade level that determines an individual's salary range, point levels for specific jobs will not be communicated.

Q: Were all PAQs for multi-incumbent positions used, or was just one selected as representative of the position?

A: All of the questionnaires received for multi-incumbent positions were reviewed.

Q: What kind of salary increases can I expect to receive under this new system?

A: Merit increases, as approved by the Board, will continue to be based on individual performance and the extent to which your salary is within the range for your grade. Salary ranges will be reviewed no less than every two years.

Q: *What happens if my salary is over the maximum of the salary range?*

A: If your salary is over the maximum of the range for your grade, then any merit increase money you are eligible for will be distributed as a bonus. Your base salary will not increase as long as you are above the range maximum.

Example 1: a supervisor makes a salary of $50,000. The maximum for his grade is $47,000. Based on his performance, he is eligible for a 3% merit increase. Because he is over the range maximum, however, his salary will remain at $50,000 and he will be paid $1500 (pre-tax) as a merit bonus. The following year, if the supervisor is eligible for merit money, it will be calculated as a percentage of his still current $50,000 salary.

Eventually, as salary ranges are adjusted for inflation and other factors, the supervisor's salary will "fall" below the range maximum and he will be eligible for his salary to increase by his merit percentage (e.g., 3%).

Example 2: an accountant makes a salary of $39,500. The maximum for her grade is $40,000. Based on her performance, she is eligible for a 3% merit increase. Because she is so high in the range, her salary will be increased only to the maximum of $40,000, and the balance of her merit pay ($685 pre-tax) will be distributed as a bonus. The following year, if the accountant is eligible for merit money, it will be calculated as a percentage of her $40,000 salary.

Q: *What happens if my salary is under the minimum of the salary range?*

A: The DRPA's/PATCO's policy is to pay employees no less than the minimum for their job's salary range. If an employee is under the salary range then, within a reasonable period of time, the salary will be increased to the range minimum. This adjustment in pay will be in addition to any merit increase the employee has earned.

Q: *What is the significance of the minimum, midpoint and maximum of each grade?*

A: The salary minimum is merely 80% of the midpoint, while the maximum is 120% of the midpoint. The midpoint represents the market value of a job at the middle of a grade; this is where the DRPA/PATCO intends to pay competent performers. The maximum exists to accommodate both high performers and competently performing incumbents who remain in the same job for a long period of time.

Q: What happens if my job changes significantly?

A: The DRPA/PATCO Job Evaluation Committees (JECs) will meet quarterly if necessary (or as requested by the Executive Director/President) to re-evaluate new and changed jobs. If your job changes, you and your manager should complete a new Position Analysis Questionnaire (PAQ). Once the PAQ is approved by your Division Director (Assistant General Manager for Operations & Planning at PATCO) and Human Resources, your position will be considered for re-evaluation at the next scheduled JEC meeting.

For any salary action to occur, the change in points has to be significant enough to move the job to a higher (or lower) grade. Ultimately, all changes in grade must be approved by the SMC, the Executive Director/President and the Board.

Q: If my merit increase is paid as a bonus, does it count in my pension calculation?

A: By Pennsylvania State Employee Retirement System (PSERS) regulations, we cannot include bonuses in pension calculations.

Q: If my merit increase is paid as a bonus, will it be included for purposes of calculating overtime?

A: According to the Fair Labor Standards Act, discretionary bonuses such as the DRPA's/PATCO's merit bonus program for non-represented employees are not included in an employee's regular rate for purposes of overtime calculation. Non-discretionary bonuses, such as those specified in union contracts, must be included for the purposes of calculating overtime.

Q: Did Hay evaluate other segments of our compensation program, such as health benefits, holidays, vacations, etc.?

A: Hay only evaluated DRPA's/PATCO's salary compensation practices and assisted in developing our compensation philosophy and salary grade structure.

Q: Will anyone be laid off as a result of the Hay study?

A: No, Hay did not consider staffing levels. Staffing levels were addressed through the Peat Marwick study which continues to be implemented.

Q: Who can I talk to if I have questions about the new compensation program?

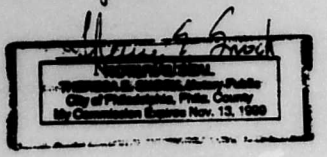
A: You should direct your questions to your Division Director/PATCO Assistant General Manager for Operations & Planning or the Manager of Human Resources. Shortly, we will be publishing a manual of policies and procedures

governing the administration of the compensation program.

I certify that the statements made by me are true to the best of my knowledge and belief. I am aware that if any of the statements made by me are willfully false, I am subject to punishment.

JOSEPH A. VENA, JR.

Sworn to and Subscribed
before me this 10TH day
of JUNE, 1997.



SPEAR, WILDERMAN, BORISH,
ENDY, SPEAR AND RUNCKEL
BY: BENJAMIN EISNER, ESQUIRE
CHARLES T. JOYCE, ESQUIRE
36 Tanner Street, Second Floor
Haddonfield, New Jersey, 08033
(609) 428-5255
Attorneys for Plaintiffs, Fraternal Order of Police, Penn-Jersey, Lodge 30 and Joseph Vena

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30, and JOSEPH VENA Plaintiffs, v. **THE DELAWARE RIVER PORT AUTHORITY** Defendant.	SUPERIOR COURT OF NEW JERSEY CAMDEN COUNTY LAW DIVISION DOCKET NO. L-7547-96 CIVIL ACTION RETURN DATE: January 23, 1998

CERTIFICATION OF BENJAMIN EISNER

I, Benjamin Eisner, hereby certify as follows:

1. I am an attorney with the law firm of Spear, Wilderman, Borish, Endy, Spear and Runckel, counsel for Plaintiffs Fraternal Order of Police Penn-Jersey Lodge 30 and Joseph Vena in the above-captioned matter. I am a member of the Bar of the State of New Jersey in good standing, and I am counsel in this case along with my partner, Charles T. Joyce, a member of the Bar of Commonwealth of Pennsylvania, in good standing, who has been admitted *Pro Hac Vice* in this matter by the Court. I have full knowledge of the matters set forth in this Certification.

2. On April 4, 1997, Mr. Joyce and I attended a settlement conference in this case in Judge Samuel L. Supnick's chambers, with, among others, Peter A. Gold, Esquire, counsel for the Defendant, Delaware River Port Authority (hereinafter "DRPA"). The discussions between the parties regarding the possible settlement of the case broke down because the DRPA refused to enter into settlement discussions unless the Plaintiffs withdrew their Amended Complaint, and the Plaintiffs were unwilling to withdraw their Amended Complaint unless the DRPA agreed that the settlement discussions would include negotiation respecting an impasse resolution procedure that included binding interest arbitration as its terminal point.

3. In the same period Mr. Joyce and I discussed what discovery might be necessary should the litigation proceed. He told me that Peter Gold, Defendant's counsel, had mentioned to him the possibility that an expert might be appropriate on the subject of the complementary nature of Pennsylvania and New Jersey's law concerning collective bargaining by police officers.

4. I also recall that Sam First, Mr. Gold's colleague, also mentioned to me that an expert might be appropriate on the question of complementary nature of the two states' collective bargaining regimes.

5. Thus, we recommended to our client that we retain an expert on this subject. In late April Mr. Joyce contacted Clyde W. Summers and asked him to prepare an expert report on the subject. The purpose of Professor Summers' report was to aid the Court in, among other things, deciding whether the interest arbitration laws of New Jersey and Pennsylvania expressed

a substantially similar policy of resolving impasses in collective negotiations through the vehicle of binding interest arbitration.

6. By the end of May, 1997, Professor Summers had delivered a draft opinion to Plaintiffs, which Mr. Joyce and I reviewed. Mr. Joyce contacted Professor Summers to suggest some minor additions to the draft Certification, including a list of all jurisdictions in the United States which provided for interest arbitration. Thereafter, we incorporated his expert opinion (including the suggested changes) into a formal certification format, and we returned the document to Professor Summers for his signature.

7. On June 13, 1997, the Plaintiffs hand-delivered a copy of Professor Summers' Certification to Defendant's counsel, along with Plaintiff's Motion for Summary Judgment on Count I of its Amended Complaint.

8. These documents were filed with the Clerk of Court June 16, 1997, with a motion return date of July 25, 1997.

9. I am aware of no request, from June 13, 1997 to July 25, 1997, made by Defendants, to depose Professor Summers.

10. On July 25, 1997, Judge Supnick continued the Return Date on Plaintiff's Motion until August 22, 1997. He explained he was being transferred from Camden County to another

vicinage. This return date was then continued by the Court, pursuant to the parties' request, to September 26, 1997, and then on the Court's own motion, first to October 17, 1997 and then to October 20, 1997.

11. During August, 1997 the parties discussed scheduling of discovery. Both sides sought to depose witnesses to the parties' collective bargaining negotiations. *See* Tab 1, letter, Eisner to First, 8/21/97; Tab 2, letter, First to Eisner, 8/29/97. During this period Defendant indicated its interest in deposing Clyde Summers. See Tab 3, Letter, Gold to the Court, 8/1/97. As a result, Mr. Joyce contacted Professor Summers' office, and learned that he was in Vermont, on vacation. After Professor Summers' returned to Philadelphia, Mr. Joyce telephoned him and wrote to him, asking into his availability for a deposition.

12. Mr. First and I agreed on September 18 and 19 as dates on which the Defendant would take certain depositions. Mr. First and I also agreed that the deposition of Professor Summers would be conducted after Labor Day. *See* Tabs 1 and 2.

13. Professor Summers informed us that he was available all or part of September 16, 17, 18 and 19, as well as in October with the exception of parts of Tuesday, Thursday and Friday mornings. *See* Tab D. to Defendant's Motion, at 2. Mr. Joyce promptly informed Defendant's counsel of this orally. The depositions of four officers of the Plaintiff were conducted by Mr. First on September 18 and 19. Professor Summers' deposition was not taken at that time.

14. Nor was it, or any other discovery, taken during October, 1997, although the parties agreed to extend discovery, first to October 27, and then to November 27, 1997. Mr. First later explained in a letter to Mr. Joyce, a copy of which Mr. First sent to me, that "[t]he thirteen (13) days from October 1, 1997 through October 20, 1997 when Summers allegedly was available for deposition, ... did not provide the DRPA with sufficient opportunity to depose Mr. Summers, access [sic] his credibility, and obtain its own expert report to contradict Mr. Summers' statements." *See* Tab 4, letter, First to Joyce, 11/12/97.

15. Mr. First and I also discussed the possibility that the Defendant would offer an expert's report of its own. He told me orally that the DRPA was in the process of securing an expert witness, *See* Tab 1. He also indicated some doubt that the DRPA would go forward with the expert, stating that "if the DRPA decides to utilize an expert witness in this matter," the expert would be provided for a deposition. *See* Tab 2. Mr. First also mentioned orally that the DRPA would wait, before deciding on whether to go forward with the expert's report, for the Court to dispose of Plaintiff's Motion for Summary Judgment and the Defendant's Cross-Motion, to see whether an expert might prove unnecessary. Mr. Joyce reported to me conversations he had with Mr. First in September in which Mr. First similarly stated that the DRPA had identified an expert, but that it intended to wait until disposition of the pending motions before choosing whether or not to secure that expert's report.

16. After this Court's grant of Plaintiffs' Motion for Summary Judgment on November 3, 1997, Mr. First contacted Mr. Joyce and requested that Plaintiffs present Professor

Summers to be deposed on November 17 or 18, 1997. Professor Summers was deposed by the Defendant on November 18, 1997 in Plaintiff counsel's Philadelphia offices.

17. The Defendant's purported expert report was finally delivered to the Plaintiffs' New Jersey and Pennsylvania offices by telecopy at 4:02 PM on November 26, 1997, the last day of discovery.

I certify that the foregoing statements made by me are true and correct to the best of my knowledge, information and belief. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to appropriate sanctions.

B.E. 1/12/98

BENJAMIN EISNER

LAW OFFICES

SPEAR, WILDERMAN, BORISH, ENDY, SPEAR & RUNCKEL

A Pennsylvania Professional Corporation

36 TANNER STREET, 2ND FLOOR, HADDONFIELD, NJ 08033

TEL: (609) 428-5255 FAX: (609) 354-5132

LEONARD SPEAR
WARREN J. BORISH*
BRUCE E. ENDY
SAMUEL L. SPEAR
JAMES P. RUNCKEL
CHARLES T. JOYCE
BENJAMIN M. ESHNER*
MARK A. MARLEY
KATHERINE L. SCHREIBER*
WENDY CHERICO*
MARK FRATHERMAN*

PA BAR EXCEPT:
* PA & NJ BAR
* PA, NJ & DC BAR
† CALIF BAR

PA OFFICE:
SUITE 1400
220 S. BROAD STREET
PHILADELPHIA, PA 19102
(215) 735-0101

LOUIS H. WILDERMAN
1909-1995

August 21, 1997

Samuel M. First, Esquire
Blank, Rome, Comisky & McCauley
210 Lake Drive East, Suite 200
Woodland Falls Corporate Park
Cherry Hill, NJ 08002
Telefax: 609-779-7647
Via: Telefax and U.S. First Class Mail

Samuel M. First, Esquire
Blank, Rome, Comisky & McCauley
1200 Four Penn Center Plaza
Philadelphia, PA 19103-2599
Telefax: 215-569-5555
Via: Telefax and Hand-Delivery

Re: Fraternal Order of Police, Penn-Jersey Lodge 30
and Joseph Vena v. The Delaware River Port Authority
Docket Number: L-7547-96

Dear Sam:

Confirming our conversation Monday, you have indicated the intention to notice the depositions of seven fact witnesses, Messrs. Stewart, Vena, Harnett, Bollendorf, DeSimone and Grecco, as well as lead counsel for the plaintiffs, Charles Joyce.

The plaintiffs certainly have no objection to the depositions of Messrs. Stewart and Vena. Both were involved in negotiations, and we believe that Vena attended every negotiation session. However, given our agreement that the factual issue in Count Two of the Complaint is the D.R.P.A.'s good faith in negotiations, and that none of the three -- Messrs. Harnett, Grecco and DeSimone -- was present for all of the negotiations (and that Mr. DeSimone was present for none of the negotiations after April 1, 1996) the plaintiffs believe that deposing all three along with Messrs. Stewart, Vena and Bollendorf would be duplicative and uneconomical, and thus unduly burdensome and expensive. We propose instead that the D.R.P.A. choose one from among the three and Mr. Bollendorf, who we believe was present for all of the negotiations, bringing to three the total number of fact depositions. You will consider this proposal in order to expedite discovery and in the spirit of Rule 4:10. Please let me know the D.R.P.A.'s position on this as soon as possible.

As I mentioned, we intend at this point to depose two fact witnesses, notices respecting which are enclosed. We propose that all fact depositions be held on September 18, 19 and/or September 22, 1997, at your office in Cherry Hill or our office in Haddonfield. As you know the notices for our depositions propose our office as the location, but on this we can certainly be flexible. We would also be willing to hold these depositions in our Philadelphia office, which may be more convenient for Mr. Nason. I have assumed that Mr. Nason will appear and produce documents voluntarily; let me know promptly if my assumption is incorrect.

As to your proposed deposition of Charles Joyce, we discussed that the litigation has proceeded entirely on the statements made in Peter Gold's September 18, 1996 letter to the Clerk of the Court, a copy of which I enclose for your reference. In that letter, Peter notes specifically Mr. Joyce's communication that he "had no intent to appear as a witness in this matter." Peter goes on to state that the D.R.P.A.'s lack of opposition to the Pro Hac Vice motion was predicated on Mr. Joyce's non-participation "in this case as a fact or rebuttal witness, or in any other manner [to] attempt to offer testimony to the court." Accordingly, both sides have proceeded on the assumption that Mr. Joyce would not be a fact witness, and on that basis we believe his deposition is clearly inappropriate. Again, we reiterate and warrant that we will not depose or introduce Mr. Joyce's testimony in any way. We therefore request that the DRPA withdraw its request to depose Mr. Joyce.

Finally, you told me that the D.R.P.A. is in the process of securing an expert witness. You stated that this has not been completed, but you agreed to let me know promptly the identity of this witness, and you stated that the D.R.P.A. will produce the expert for deposition even if the timing involved requires that that deposition be taken after the close of the discovery. As we have agreed, the DRPA will take Clyde Summers' deposition after Labor Day at a date and time to be determined.

Please let me know immediately if you believe I have misstated anything material from our conversation, and I look forward to hearing from you promptly concerning the open discovery issues. Please also send to me acknowledgments of the enclosed deposition notices.

Sincerely yours,

Benjamin Eisner

BE:maa
Enclosure

cc. Charles T. Joyce, Esquire
Peter A. Gold, Esquire

BLANK ROME COMISKY & McCAULEY
COUNSELORS AT LAW

WOODLANDS FALLS CORPORATE PARK
SUITE 200
210 LAKE DRIVE EAST
CHERRY HILL, NEW JERSEY 08002-1168
609-775-3600
FAX 609-775-7640

DIRECT DIAL NUMBER:

September 18, 1996

HAND DELIVERED

Clerk
Superior Court of New Jersey
Camden County, Law Division
Civil Processing Office
1st Floor, Hall of Justice
101 South 5th Street
Camden, New Jersey 08103

Re: FOP Lodge 30 and Vena v.
Delaware River Port Authority
Docket No.: L-7347-96

Dear Sir or Madam:

The undersigned at this Firm represents the Defendant Delaware River Port Authority ("DRPA") in the above-referenced matter. We have been advised by your Office that a response to Plaintiffs' Motion for Admission Pro Hac Vice of Charles T. Joyce, Esquire, in letter form, is acceptable. Therefore, please accept this response.

The underlying action partially involves claims allegedly arising out of discussions between the parties. We understand that Mr. Joyce participated in some of these discussions, and as such, could be a potential witness. I communicated this to Mr. Joyce in a telephone conference. Mr. Joyce indicated that he had no intent to appear as a witness in this matter. To the extent that Mr. Joyce does not participate in this case as a fact or rebuttal witness, or in any other manner attempt to offer testimony to the Court, Defendant does not oppose this Motion.

Respectfully submitted,

Peter A. Gold

PAG/ers
cc: Benjamin Eisner, Esquire-Telecopied
Charles Joyce, Esquire-Telecopied

BLANK ROME COMISKY & McCAULEY
COUNSELORS AT LAW

FOUR PENN CENTER PLAZA
PHILADELPHIA, PA 19103-2599
215-569-5500

1828 PONO ROAD, SUITE 200
ALLENTOWN, PA 18104-6225
610-395-1010

1400 N. PROVIDENCE RD., SUITE 301
MEDIA, PA 19063-2051
610-891-7800

1220 MARKET STREET, 6TH FLOOR
WILMINGTON, DE 19801-2538
302-425-6400

WOODLAND FALLS CORPORATE PARK
SUITE 200
210 LAKE DRIVE EAST
CHERRY HILL, NEW JERSEY 08002-1164
609-779-3600
FAX 609-779-7647

1150 18TH STREET, NW, SUITE 800
WASHINGTON, DC 20036-1704
202-728-1100

1401 FORUM WAY
WEST PALM BEACH, FL 33401-2303
407-650-0100

NEW JERSEY RESIDENT PARTNERS
PETER J. BOYER
RICHARD L. GANEL, JR.
BRUCE A. EISENGERG
PETER A. GOLD
DAVID ARMSTRONG NORCROSS
A. FRED RUTTENBERG
STEVEN B. WEINSTEIN
FRANK H. WISNIEWSKI
DAVID N. ZEEHANDELAAR

DIRECT DIAL NUMBER:

August 27, 1997

Via Facsimile and Regular Mail

Benjamin M. Eisner, Esquire
Spear, Wilderman, Borish, Endy,
Spear & Runckel
36 Tanner Street
2nd Floor
Haddonfield, NJ 08033

Via Facsimile and Hand-Delivery

Benjamin M. Eisner, Esquire
Spear, Wilderman, Borish, Endy,
Spear & Runckel
Suite 1400
230 South Broad Street
Philadelphia, PA 19102

Re: FOP Lodge 30 and Vena v. Delaware River Port Authority
Docket No.: L-7547-96

Dear Mr. Eisner:

Enclosed you will find Notices of Deposition in the above-captioned matter scheduling the oral depositions of the following present and past Officers of Plaintiff Fraternal Order of Police, Penn-Jersey Lodge 30 ("FOP Lodge 30") for Thursday, September 18, 1997 and Friday, September 19, 1997:

Plaintiff Joseph Vena, Jr. - First Vice President
James Stewart - President
Michael Grecco - Second Vice President
James Hartnett - Third Vice President
George Bollendorf, Jr. - Financial Secretary
Karl DeSimone - Former President

The dates selected are consistent with those you previously proposed.

Contrary to the position expressed in your August 21, 1997 correspondence, pursuant to the New Jersey Rules of Court, the Delaware River Port Authority ("DRPA") is entitled to conduct discovery in this matter, which includes taking the oral depositions of each of the above-referenced Officers of Plaintiff FOP Lodge 30 who have information directly relevant to allegations contained in Plaintiff's Amended Complaint. The right to conduct discovery similarly includes the right to inspect and copy documents that each individual is required to

produce. Taking these depositions is not "duplicative," "uneconomical" or "unduly burdensome" but, instead, is essential for the DRPA to develop all facts that may be relevant to the disposition of this case. I expect that you will cooperate with the enclosed Notices of Deposition for the aforementioned Officers of Plaintiff FOP Lodge 30. If you do not intend to make these individuals available for deposition and produce the documents requested, please let me know as soon as possible so that we can prepare the appropriate motion to compel and/or subpoenas. Please remember, as Officers of Plaintiff, these individuals, are themselves parties to this matter in their official capacity, and are subject to the power of the New Jersey Courts.

We acknowledge receipt of the Notices of Deposition you served last week scheduling the depositions of Paul Drayton and Jack Nason for Monday, September 22, 1997. We are currently in the process of checking on the availability of Mr. Drayton for that date. Please be advised that we do not represent Mr. Nason in this matter. As he is not a party to this matter, and he resides in Pennsylvania, Mr. Nason is not bound by your Notice of Deposition to us. We will, however, attempt to coordinate your request to take the deposition of Mr. Nason without any need for further filings with the Courts of New Jersey or Pennsylvania.

Your August 21, 1997 correspondence accurately reflects the agreement between the parties that Plaintiffs will produce Clyde Summers for deposition on a date to be determined after Labor Day. Once you have spoken with Mr. Summers, please contact me to arrange a mutually convenient time and place for his deposition. As I previously advised you, if the DRPA decides to utilize an expert witness in this matter, such expert will be made available to Plaintiffs for oral deposition.

Please give me a call if you have any problem with the dates, times and location for the depositions noticed herein. I will advise you of Mr. Drayton's availability for deposition on September 22, 1997, upon his return from vacation in early September.

Very truly yours,

Samuel M. First

Samuel M. First

SMF:cl
enclosures
cc: Peter A. Gold, Esquire (w/enclosure)
Charles T. Joyce, Esquire (w/enclosure)

BLANK ROME COMISKY & McCAULEY
COUNSELORS AT LAW

WOODLAND FALLS CORPORATE PARK
SUITE 200
210 LAKE DRIVE EAST
CHERRY HILL, NEW JERSEY 08002-1164
609-779-2600
FAX 609-779-7647

August 1, 1997

VIA HAND DELIVERY

The Honorable M. Allan Vogelson, J.S.C.
Superior Court of New Jersey
Camden County, Law Division
Hall of Justice
101 South 5th Street
Camden, New Jersey 08103-4001

Re: FOP Lodge 30 and Vena v. Delaware River Port Authority
Docket No.: L-7547-96

Dear Judge Vogelson:

The undersigned represents Defendant Delaware River Port Authority in the above-captioned case. On July 25, 1997, just prior to oral argument before Judge Supnick on Plaintiffs' Motion for Summary Judgment on Count I of the Amended Complaint and Defendant's Cross-Motion for Summary Judgment in the above matter, his Honor advised counsel that he will be leaving Camden County as of September 1, 1997, and as a result, the case has been returned to Your Honor for reassignment. We understood Judge Supnick to have also informed counsel that the return date would be set for August 22, 1997.

I am respectfully requesting an adjournment of the August 22, 1997 return date until the next scheduled return date, September 12, 1997. The reasons for my request are two-fold:

1) I will be away on a pre-planned family vacation from August 18, 1997 through September 3, 1997. This trip has been planned for many months; and

2) Defendants are actively seeking to take the deposition of Plaintiffs' alleged expert witness (Clyde W. Summers) during the first week of September, 1997. Further, the discovery cut-off date in this matter is not until September 27, 1997.

Counsel for Plaintiffs are opposed to this request for adjournment having expressed this position to Judge Supnick on July 25, 1997 notwithstanding the fact that a period of approximately six (6) months has elapsed without any activity on Plaintiffs' part in this case.

I thank Your Honor for your consideration of this request.

Respectfully submitted,

Peter A. Gold

PAG:sf
cc: Charles Joyce, Esquire
Benjamin Eisner, Esquire

BLANK ROME COMISKY & McCAULEY
COUNSELORS AT LAW

FOUR PENN CENTER PLAZA
PHILADELPHIA, PA 19103-2500
215-569-5500

1200 FORD ROAD, SUITE 200
ALLENTOWN, PA 18104-5500
610-366-1010

1400 N. PROVIDENCE RD., SUITE 301
MEDIA, PA 19063-2001
610-601-7600

1200 MARKET STREET, 6TH FLOOR
WILMINGTON, DE 19801-1835
302-425-6400

WOODLAND FALLS CORPORATE PARK
SUITE 200
210 LAKE DRIVE EAST
CHERRY HILL, NEW JERSEY 08002-1164
609-779-3600
FAX 609-779-7647

1150 18TH STREET, NW, SUITE 800
WASHINGTON, DC 20036-3704
202-700-1100

1601 FORUM WAY
WEST PALM BEACH, FL 33401-2303
407-640-6100

NEW JERSEY RESIDENT PARTNERS
PETER J. DEVER
RICHARD L. GANEL, JR.
BRUCE A. HOCHBERG
PETER A. GOLD
DAVID ARMSTRONG HODGSON
A. FRED RUTTENBERG
STEVEN D. WEINSTEIN
FRANK H. WISNIEWSKI
DAVID H. ZEEMANSCLAAR

DIRECT DIAL NUMBER:

November 12, 1997

Via Facsimile and Regular Mail

Charles T. Joyce, Esquire
Spear, Wilderman, Borish, Endy,
Spear & Runckel
36 Tanner Street
2nd Floor
Haddonfield, NJ 08033

Via Facsimile and Hand-Delivery

Charles T. Joyce, Esquire
Spear, Wilderman, Borish, Endy,
Spear & Runckel
Suite 1400
230 South Broad Street
Philadelphia, PA 19102

Re: FOP Lodge 30 and Vena v. Delaware River Port Authority
Docket No.: L-7547-96

Dear Mr. Joyce:

I am in receipt of your November 7, 1997 letter which apparently was intended to advise the Delaware River Port Authority ("DRPA") that Plaintiffs' would not agree to an extension of the discovery deadline in the above-matter. Instead of simply rejecting the DRPA's request, you chose to launch into a diatribe of mis-characterization, innuendo and misstatement of facts. As a result, I am forced to respond to the more glaring errors in your letter.

First, you suggest that Plaintiffs sought out an expert opinion because the "DRPA was obviously pursuing the idea of obtaining an expert opinion." In reality, you have no idea what the DRPA was, or was not, pursuing, and therefore have no basis for making such a statement. At no time did the DRPA or any of its representatives state that it would utilize or rely on an expert opinion. In fact, it is our position that this is purely a legal issue, and therefore, an expert is not appropriate. We have no doubt that subsequent legal proceedings in this case will confirm our view.

In the first full paragraph of page 2, you state that the DRPA had over one (1) month from June 13, 1997 until July 25, 1997 to seek to depose Mr. Summers. As you are well aware, the submission of an expert opinion for the first time in a Motion for Summary Judgment is not

appropriate in any court, nor is it contemplated by the New Jersey Rules of Court ("Rules of Court"). There was no need to conduct Mr. Summers' deposition during this period of time because the Court was to determine on July 25, 1997 whether Mr. Summers' Certification was appropriate. Additionally, the DRPA's response papers to Plaintiffs' Motion were properly filed with the Court on July 15, 1997. As I am sure you know, pursuant to the Rules of Court the DRPA was not permitted to supplement its response papers after July 15, 1997. The DRPA's papers also sought that Plaintiffs' Motion be continued if the Court determined that expert testimony was appropriate.

At the end of the first full paragraph on page 2 of your letter, you suggest that the parties agreed that the DRPA would depose Mr. Summers sometime after the Labor Day weekend. The parties did agree that "Plaintiffs' will produce Clyde Summers for deposition on a date to be determined after Labor Day." That agreement, however, was based only on the fact that your colleague Mr. Eisner indicated that Mr. Summers would not be available throughout the month of August and into the month of September. The fact remains that, notwithstanding our requests, Mr. Summers was not available for deposition from late July through early September, 1997. The DRPA could not have deposed Mr. Summers because, based on counsel's representation, he was not available and would not be produced.

Next, you state that you provided me with four (4) dates, September 16, 17, 18 and 19, 1997, for Summers' deposition, but that none of those dates were acceptable to the DRPA. This is a blatant misstatement of fact. By letter dated August 21, 1997 to me from Mr. Eisner, your office proposed September 18 and 19, 1997 for fact depositions of persons other than Summers. As you well know based on your and/or Mr. Eisner's presence in our Cherry Hill, N.J., office the entire day on both September 18 and 19, 1997, the DRPA conducted four (4) depositions of other witnesses in this matter. These dates were proposed and accepted long before Mr. Summers returned from his lengthy summer vacation. To suggest that those dates were not acceptable to the DRPA, with the full knowledge that other depositions were previously scheduled and held in this matter on those days, is nothing short of reprehensible. The fact remains that for the 3 ½ month period from June 13, 1997 to October 1, 1997, you only made Mr. Summers available for deposition on two (2) days - - September 16 and 17, 1997 - - days that were convenient for your schedule only.

Judge Vogelson set the return date in this matter for September 26, 1997. Plaintiffs' failure to make Mr. Summers available for deposition on a mutually agreeable time and date prior to the original September 26, 1997 return date prevented the DRPA from evaluating Summers' deposition testimony and making a determination whether an expert was even necessary to counter Mr. Summers' statements. As you will recall, only a few days before September 26, 1997, this matter was administratively delayed by the Court until October 17,

1997 and then to October 20, 1997. The thirteen (13) business days from October 1, 1997 through October 20, 1997 when Summers allegedly was available for deposition, similarly did not provide the DRPA with sufficient opportunity to depose Mr. Summers, access his credibility, and obtain its own expert report to contradict Mr. Summers' statements. As you know, shortly before October 20, 1997 the Court administratively adjourned the Motion until November 3, 1997. Your letter is especially egregious in light of your repeated representations that the DRPA would be given every opportunity to depose Mr. Summers.

The misrepresentations contained in your letter continue in paragraph 3 of page 2 where you indicate that "at the DRPA's request, the return date on the Motion for Summary Judgment was continued from August 22 ultimately to September 26, 1997." By letter dated August 1, 1997 from Peter A. Gold, Esquire, to Judge Vogelson, Mr. Gold only requested "an adjournment of the August 22, 1997 return date until the next scheduled return date, September 12, 1997." You were on vacation on September 12, 1997, which caused the further delay until September 26, 1997.

In closing, your letter states on more than one occasion, that Plaintiffs will "make Professor Summers' available [for deposition] at any time before the close of discovery on November 26, 1997." (e.g., page 2, paragraph 4) Therefore, I request that within twenty-four (24) hours you confirm in writing Professor Summers' deposition for either 9:00 a.m. on November 17, 1997 and/or 1:00 p.m. on November 18, 1997, which ever date and time will accommodate your busy schedule.

In the future, if you choose to engage in an unnecessary, lengthy diatribe, please check the accuracy of your facts before you put them to paper. While nothing herein should be construed as a departure from the DRPA's position that consideration of Summers' certification was not correct, we do suspect that subsequent proceedings in this matter will reveal an intent to deny Defendant of an opportunity to depose Mr. Summers and to provide its own "expert" certification.

Very truly yours,

Samuel M. First

Samuel M. First

SMF:sf
cc: Benjamin Eisner, Esquire
Peter A. Gold, Esquire

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
CN 429
TRENTON, NEW JERSEY 08625-0429

ADMINISTRATION/LEGAL
(609) 292-9830
CONCILIATION/ARBITRATION
(609) 292-9898
UNFAIR PRACTICE/REPRESENTATION
(609) 292-6780

For Courier Delivery
495 WEST STATE STREET
TRENTON, NEW JERSEY 08625
FAX: (609) 777-0089

December 15, 1997

Charles Joyce, Esq.
230 South Broad St., 14th Flr.
Philadelphia, PA 19102

Dear Mr. Joyce:

As I discussed in our phone conversation, PERC now compiles statistical data by calendar year for interest arbitration. The number of awards issued since calendar 1991 are:

1997	29 (to date)
1996	21
1995	37
1994	35
1993	46
1992	79
1991	73

The parties in New Jersey do not utilize fact-finding prior to going to interest arbitration. They either go directly to interest arbitration or utilize mediation prior to interest arbitration.

Should you need any other information do not hesitate to contact me.

Very truly yours,

Timothy A. Hundley

Timothy A. Hundley
Director of Arbitration

TAH:bp

New Jersey Is An Equal Opportunity Employer

ANDREW S. PRICE ASSOCIATES
Alternative Dispute Resolution Services

APA

25 West Second Street, Media, Pennsylvania 19063
121 South Broad Street, Philadelphia, Pennsylvania 19107
Telephone 610.566.4500 Fax 610.566.3380

April 21, 1998

Charles T. Joyce, Esquire
Spear, Wilderman, Borish, Endy,
Spear & Runckel
230 S. Broad Street, 14th Floor
Philadelphia, PA 19102

Peter A. Gold, Esquire
Blank, Rome, Comisky & McCauley
Woodland Falls Corporate Park, Suite 200
210 Lake Drive East
Cherry Hill, NJ 08002

Re: FOP Lodge No. 30 and Delaware River Port Authority

Gentlemen:

I am writing to confirm the joint mediation conference will take place on Wednesday, April 29, 1998 at 1:30 p.m. in the Main Offices of the Delaware River Port Authority in Camden, New Jersey. It is my understanding you and your client representatives will be present at this meeting.

I look forward to assisting the parties in reaching a consensual resolution to this controversy.

Sincerely,

Andrew S. Price

ASP:dmc
enclosure

SPEAR, WILDERMAN, BORISH,
ENDY, SPEAR AND RUNCKEL
BY: BENJAMIN EISNER, ESQUIRE
CHARLES T. JOYCE, ESQUIRE
36 Tanner Streets, Second Floor
Haddonfield, New Jersey, 08033
(609) 428-5255
Attorneys for Plaintiffs, Fraternal Order of Police, Penn-Jersey, Lodge 30 and Joseph Vena

BLANK, ROME, COMISKY & McCAULEY
BY: PETER A. GOLD
New Jersey Resident Partner
SAMUEL M. FIRST
Woodland Falls Corporate Park
210 Lake Drive East, Suite 200
Cherry Hill, NJ 08002
(609) 779-3600
Attorneys for Defendant, Delaware River Port Authority

FRATERNAL ORDER OF POLICE,
PENN-JERSEY LODGE 30,
and
JOSEPH VENA
Plaintiffs,

v.

THE DELAWARE RIVER
PORT AUTHORITY
Defendant.

SUPERIOR COURT OF NEW JERSEY
CAMDEN COUNTY
LAW DIVISION

CIVIL ACTION

DOCKET NO. L-7547-96

ORDER

RECEIVED
98 MAR 24 P1:13
SUPERIOR COURT LAW DIVISION

This matter having been opened to the Court by the Parties by Oral Motion pursuant to Rule 1:6-2(a) of the Rules of General Application of the New Jersey Rules of Court, and Rule 2:5-5 of the Rules Governing Appellate Practice, and the Court having been apprised by the Parties that the transcription of the Court's January 23, 1998 ruling on Defendant Delaware River Port Authority's Motion for Reconsideration contains an error, and the Parties having requested that the Court correct the record,

It is this 24th day of March, 1998, **HEREBY ORDERED THAT:** Page 41, lines 12 through 13 of the transcript is corrected as follows:

the sentence, "Does the vaca supply; yes." is corrected to read, "Does the Bay case apply; yes."

Consent is hereby given to the form & entry of this order
Peter Gold

M. ALLAN VOGELSON, P.J.S.C.

SPEAR, WILDERMAN, BORISH,
ENDY, SPEAR AND RUNCKEL
BY: BENJAMIN EISNER, ESQUIRE
CHARLES T. JOYCE, ESQUIRE
126 White Horse Pike
Haddon Heights, New Jersey 08035
(609) 547-6199
Attorneys for Plaintiffs, Fraternal Order of Police, Penn-Jersey Lodge 30 and Joseph Vena

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30, and JOSEPH VENA Plaintiffs, v. **THE DELAWARE RIVER PORT AUTHORITY** Defendant.	SUPERIOR COURT OF NEW JERSEY CAMDEN COUNTY LAW DIVISION DOCKET NO. L-7547-96 CIVIL ACTION **RETURN DATE: DECEMBER 20, 1996, 9:00 A.M.**

RESPONDING STATEMENT OF PLAINTIFFS FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30 AND JOSEPH VENA TO STATEMENT OF MATERIAL FACT AS TO WHICH DEFENDANT DELAWARE RIVER PORT AUTHORITY CONTENDS THERE IS NO GENUINE ISSUES

Pursuant to New Jersey Rule of Court 4:46-2(b), and in opposition to Defendant Delaware River Port Authority's ("DRPA") Motion for Summary Judgment, Plaintiffs, Fraternal Order of Police, Penn-Jersey Lodge 30 and Joseph Vena ("FOP Lodge 30") hereby submit the following Responding Statement to Defendant's Statement of Material Fact as to which Defendant Delaware River Port Authority contends there is no genuine issues.

1. Admitted.

2. Admitted.

3. Admitted in part; disputed in part. It is admitted that in 1957, New Jersey and Pennsylvania each enacted separate legislation to provide the DRPA with the power and authority to appoint police officers to maintain the safety and order of the property of the DRPA; it is disputed that this police force is "independent" of the authority or control of the State of New Jersey and the Commonwealth of Pennsylvania. Rather, the enabling legislation provides that the DRPA may appoint police officers "functioning under the legislation enacted by the Commonwealth of Pennsylvania and the State of New Jersey." N.J.S.A. § 32:4-6; 36 Pa. Con. Stat. Ann. § 3504.1. Further, amendments to this enabling legislation enacted in 1989 and 1994 provided that such police officers appointed by the DRPA "shall have the power and authority to make arrests for any crimes, misdemeanors, and offenses committed under the laws of the State of New Jersey or the Commonwealth of Pennsylvania..." and that such police officers "shall have all the powers, including the right to carry firearms while on duty, and all of the immunities conferred by law on police officers or municipal police officers in the enforcement of law of the State of New Jersey and the Commonwealth of Pennsylvania," as long as such police officers "successfully complete a training course jointly approved and authorized by the Attorneys General of the State of New Jersey and the Commonwealth of Pennsylvania," and comply with annual firearms qualifications standards established by the State of New Jersey and the Commonwealth of Pennsylvania. N.J.S.A. §§ 32:4-6;6.1; 36 Pa. Con.Stat. Ann. 3504 §.d.

3504.1a. When hired, DRPA police officers are sworn to uphold the laws of the State of New Jersey and the Commonwealth of Pennsylvania. (James Stewart Affidavit at ¶ 5.). They are also provided with a manual on the rules, regulations and operating procedures of the DRPA Bureau of Police. (Id.) This manual states that the DRPA police officers are "public servants", whose cardinal duty and responsibility is to "[a]t all times, within the boundaries of the Delaware River Port Authority, preserve the public peace, prevent crime, arrest violators of the law, and enforce all the criminal laws of the Commonwealth of Pennsylvania [and] the State of New Jersey ... " (DRPA Bureau of Police Manual, Exhibit "B" to Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment).

4. Admitted in part; disputed in part. It is specifically disputed that the DRPA operates an "independent" police force, for the reasons articulated in paragraph 3, above.

5. Admitted.

6. Admitted.

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted.

11. Admitted in part; disputed in part. It is disputed that the DRPA has "voluntarily" entered into a series of successive contracts with FOP Lodge 30, setting terms and conditions of employment for the DRPA police officers "who are otherwise at-will employees." In 1975, after the DRPA determined that a "question of representation" existed as to whether Plaintiff FOP Lodge 30 or another labor organization was the majority bargaining representative of the DRPA police officers, a union representation election was held under the auspices and pursuant to the rules of the American Arbitration Association, an independent, non-profit organization that, inter alia, conducts union representation elections. (See Affidavit of James Stewart at ¶ 9.). At this American Arbitration Association - conducted and supervised election, the FOP was selected by the DRPA patrol officers as their majority bargaining representative. Pursuant to this selection, the DRPA agreed to negotiate a Collective Bargaining Agreement with the FOP. After the first contract between the DRPA and the FOP was entered into on November 1, 1975, the DRPA entered into successive Collective Bargaining Agreements with FOP Lodge 30 by virtue of its contractual obligation to recognize FOP Lodge 30 as the majority bargaining representative for its police officers, and the concomitant obligation to bargain with FOP Lodge 30 in good faith over the terms of all successive Collective Bargaining Agreements. (See Agreement, Article I, Article II, Section 1, and Article XXIII.).

12. Admitted.

13. Admitted.

14. Admitted.

15. It is disputed that the DRPA "voluntarily" opened negotiations with FOP Lodge 30 on November 4, 1995 prior to the expiration of the 1992 Agreement. Rather, as explained and set forth in paragraph 11 above, the DRPA was obligated to negotiate in good faith with FOP Lodge 30 under the applicable complementary and parallel labor laws of New Jersey and Pennsylvania, by virtue of the results of the 1975 representation election, and by virtue of the DRPA's contractual obligation to recognize FOP Lodge 30 as the majority bargaining representative of its police officers, and its consequential duty to engage in good faith collective bargaining.

16. It is disputed that DRPA was under no legal duty or obligation to negotiate with FOP Lodge 30 for a successor Collective Bargaining Agreement. See paragraphs 11 and 15, above.

17. Admitted.

18. Admitted.

19. Admitted.

20. Admitted.

21. Admitted. Plaintiffs filed their lawsuit on August 20, 1996 because it was founded, in part, upon the 1992-1995 Collective Bargaining Agreement, the terms of which, since the parties had previously indicated an intent to terminate it and renegotiate a successor contract, expired on that date without the parties reaching an agreement on a successor contract. Additionally, the lawsuit was filed prior to the commissioners' vote because the FOP was notified by the DRPA that it would refuse to meet further with the Union to attempt to negotiate a new agreement.

* * *

Additionally, pursuant to the New Jersey Rule of Court 4:46-2(b), FOP Lodge 30 submits the following facts which it deems material and as to which there may or may not exist a genuine issue:

1.) The responsibility for protecting public safety and enforcing the laws of the State of New Jersey and the Commonwealth of Pennsylvania on DRPA property is vested solely with the DRPA Department of Public Safety, which employs the DRPA police officers. Neither the Philadelphia Police Department, nor the police departments of any municipality of the State of New Jersey, exercise general jurisdiction to maintain public peace and safety on DRPA property. (Affidavit of James Stewart ¶ 6.).

2.) The DRPA employs 78 police officers, exclusive of corporals, sergeants, lieutenants, and captains. (Affidavit of James Stewart ¶ 1.). Applicants for employment with the DRPA police force must be certified by successfully completing a training course jointly approved and authorized by the Attorneys General of the creator states, or a course of police instruction that is deemed by such officials to be "substantially equivalent" of a states' approved training program. N.J.S.A. § 32:4-6.1; 36 Pa. Stat. Ann. § 3604.1(a). Most of the DRPA police officers, like Plaintiff Police Officer Joseph Vena, are residents of New Jersey, and received their police training at either the Camden or Burlington County Police Academy. (Affidavit of James Stewart ¶¶ 2-4.).

3.) Once on the force, DRPA police officers must comply with annual firearms qualification standards established by New Jersey and Pennsylvania. N.J.S.A. § 32:4-6.1; 36 Pa. Stat. Ann. § 3604.1(a).

4.) As a bi-state public corporate instrumentality of New Jersey and Pennsylvania, the DRPA is a "political subdivision" of these two states, and a "state agency" of each of them. Stinson v. DRPA, Civ. No. 94-5572 (D.N.J.); State v. Murphy, 36 NJ 172 (1961) In re Delaware River Bridge, 408 Pa 179, 182 A.2d 14 (1962); City of Gloucester v. State of New Jersey Administrative Office of the Courts, Sup. Ct. App. Div. A-1750-94T2 (filed September 11, 1996).

5.) As the agent of each state, the DRPA is subject to all of the laws of each state, whether of statutory or common law origin, except insofar as the states have expressly or implicitly agreed to exempt the DRPA from the application of any such law. State v. Murphy 36 N.J. (1961).

6.) Under the terms of the Bi-State Compact creating the DRPA, additional powers or duties may be delegated to or imposed upon the DRPA by the action of either State concurred in by legislation of the other", N.J.S.A. § 32:3-5; 36 P.S. § 3503(p), or if either creator state passes legislation that is "substantially similar" or has "a substantially similar effect." to previously enacted law. N.J.S.A. § 32-3:3.

7.) Both New Jersey and Pennsylvania have established the right of public police officers to form, join or organize into labor unions. N.J. Const. Article 19, Section 1; New Jersey Public Employer-Employee Relations Act, as amended, New Jersey Police and Fire Public Interest Arbitration Reform Act, N.J.S.A. § 43:13A-14a (1996 Suppl.); Act 111, 43 P.S. § 217.1 et seq.; 211.1 Pennsylvania Labor Relations Act, 43 P.S. § et seq.

8.) Both New Jersey and Pennsylvania have established the right of public police officer labor unions to engage in collective negotiations with the public employers of their members, and have recognized that such public employers have the concomitant duty to negotiate in good faith with the majority representative of their employees over wages and terms and conditions of employment. New Jersey Employer-Employee Relations Act, N.J.S.A. §§

34:13A-1; A-5.3; A-5.4(a)(5); Pennsylvania Labor Relations Act, 43 P.S. § 211; "Act 111", 43 P.S. § 217.1 et seq.

9.) Both New Jersey and Pennsylvania prohibit public police officers from engaging in strikes or work stoppages, and provide for binding arbitration of disputes that arise between public employers and police officers over terms and conditions of employment. New Jersey Employer-Employee Relations Act, as amended, Police and Fire Public Interest Arbitration Reform Act, 34 N.J.S.A. § 34:13A-14 et seq.; Act 111, 43 P.S. § 217.1 et seq.

10.) Both New Jersey and Pennsylvania make it unlawful for public employers to refuse or fail to negotiate in good faith with public police officers over the police officers' terms and conditions of employer. New Jersey Employer-Employe Relations Act, N.J.S.A. § 34:13A-5.4(a)(5); Pennsylvania Labor Relations Act, 43 P.S. § 211.6(e).

11.) Under the terms of the Bi-State Compact creating the DRPA, the DRPA may sue or be sued in the courts of either New Jersey or Pennsylvania. N.J.S.A. § 32:3-5(b); 36 P.S. § 3503, Article IV(b)

12.) Under the terms of the Bi-State Compact creating the DRPA, the DRPA has the authority to enter into contracts. N.J.S.A., § 32:3-5(f); 36 P.S. § 3503, Article IV(f).

13.) Between 1975 and 1992, the DRPA and the FOP have executed a series of consecutive Collective Bargaining Agreements. (Affidavit of James Stewart ¶ 11.).

14.) Since 1975, the Collective Bargaining Agreements between DRPA and the FOP have provided that the DRPA recognizes the FOP as the majority bargaining representative for all hourly paid employees classified as police officers. (Id; See Ex. "C" Plaintiffs' Brief in Opposition of Motion for Summary Judgment at Article II, Section 1;).

15.) Since 1975, the Collective Bargaining Agreements between the DRPA and the FOP have provided that the Agreement "replace[d] or supersede[d] any previous agreement between the DRPA and bargaining representatives for police classified as police officers." (Id. Article I.).

16.) Since at least 1990, the Collective Bargaining Agreements between the DRPA and the FOP have provided for the DRPA to deduct from the wages of its police officers an initiation fee and weekly dues from all police officers who are members of the FOP, or a "representation fee" from all police officers who elect not to join the FOP, "for collective bargaining and contract administration services rendered by the FOP on behalf of all police officers covered by" the Collective Bargaining Agreement between the DRPA and the FOP. (Id.; Ex "B" to Defendant's Brief in Support of Motion for Summary Judgment, at Article IV, Section 1; Section 9(A). Affidavit of James Stewart, ¶ 13.).

17.) Since 1975, the Collective Bargaining Agreement between the DRPA and the FOP has contained a termination and renewal clause, providing that the terms of the Collective Bargaining Agreement extend up to and through the last day of the Agreement, unless and until either party give sixty days written notice prior to the end of the term of the contract or a subsequent year of an intent to terminate the Agreement. (Id.; Ex. "C" to Defendant's Brief, at Article XX).

18.) Since 1978, pursuant to this clause, representatives of the DRPA and/or the FOP have always contacted each other at least sixty days prior to the end of the original term of the Collective Bargaining Agreement and indicated a desire to terminate the contract and negotiate a successor Collective Bargaining Agreement. (See Affidavit of James Stewart, ¶ 11, 15.).

19.) In the fall of 1995, pursuant to the termination and renewal clause, counsel for Fraternal Order of Police Lodge 30 and the Delaware River Port Authority contacted each other and expressed a mutual desire to negotiate an agreement to replace the 1992-1995 Collective Bargaining Agreement. (Affidavit of James Stewart, ¶ 15.).

20.) Since by the provisions of the termination and renewal clause, this action meant that the agreement would expire by December 10, 1995, the parties consequently mutually agreed to a series of extensions of the terms of the 1992 agreement, the last one extending the agreement to August 20, 1996. (Stewart Affidavit, ¶ 15.).

21.) During the period from November, 1995 to July 1, 1996 the parties met sporadically for extremely brief negotiation sessions. (Affidavit of James Stewart, ¶ 16.).

22.) These sessions were marked by a pattern of conduct on behalf of the DRPA negotiating team that consisted of: 1) withdrawing its own contract proposals and then reasserting them; 2) agreeing to FOP proposals and then reneging on this agreement; 3) refusing to bargain over the particulars of health care insurance coverage or wages; 4) delaying meetings with FOP negotiators and, for a period of six weeks, cancelling all previously scheduled negotiation sessions. (Affidavit of James Stewart, ¶ 17.).

23.) On July 1, 1996 the parties met for the last time in negotiations. At this July 1, 1996 meeting, the DRPA summarily presented the FOP with a new set of terms and conditions of employment, and demanded that the Union schedule a vote on these terms and conditions. (Affidavit of James Stewart, ¶ 18.).

24.) On July 29, 1996 the Union unanimously voted by secret ballot to reject the DRPA's terms. (Affidavit of James Stewart, ¶ 20.).

25.) On July 30, 1996 Fraternal Order of Police Lodge 30 President James Stewart issued a letter to all sixteen DRPA commissioners, explaining the reasons behind the unanimous rejection of the DRPA's terms, and requesting the parties bargain in a good faith attempt to

reach agreement on a new labor contract. (Affidavit of James Stewart, ¶ 21; Complaint Exhibit "C").

26.) Despite this and several other entreaties by the Union to continue to negotiate, the DRPA Board of Commissioners voted on August 20, 1996 to impose the DRPA's terms and conditions of employment upon the DRPA police officers. (Affidavit of James Stewart, ¶ 22.).

Respectfully submitted,

SPEAR, WILDERMAN, BORISH, ENDY, SPEAR AND RUNCKEL

BY: _____

CHARLES T. JOYCE
230 South Broad Street
Suite 1400
Philadelphia, PA 19102
(215) 732-0101

BY: _____

BENJAMIN EISNER
CHARLES T. JOYCE
126 White Horse Pike
Haddon Heights, NJ 08035
(609) 547-6199

Attorneys for Plaintiffs

DATED: December 10, 1996

BLANK, ROME, COMISKY & McCAULEY
PETER A. GOLD, ESQUIRE
SCOTT F. COOPER, ESQUIRE
SAMUEL M. FIRST, ESQUIRE
210 Lake Drive East, Suite 200
Woodland Falls Corporate Park
Cherry Hill, NJ 08002
(609) 779-3600

Attorneys for Defendant,
Delaware River Port Authority

FRATERNAL ORDER OF POLICE, PE[illegible]-JERSEY LODGE 30, and JOSEPH VENA,	:	SUPERIOR COURT OF NEW JERSEY CAMDEN COUNTY LAW DIVISION
Plaintiffs,	:	
v.	:	DOCKET NO. L-7547-96 CIVIL ACTION
DELAWARE RIVER PORT AUTHORITY,	:	
Defendant.	:	**RETURN DATE:** **DECEMBER 20, 1996, 9:00 a.m.**

RESPONDING STATEMENT OF MATERIAL FACT AS TO WHICH DEFENDANT DRPA CONTENDS THERE IS A GENUINE ISSUE

Pursuant to Rule 4:46-2(b), the Defendant Delaware River Port Authority ("DRPA") hereby submits this Response to Plaintiffs' ("Lodge 30") Additional Facts Dated December 10, 1996.

I. **GENERAL RESPONSE**

Rule 4:46-2(b) provides that a responding party (to a Motion for Summary Judgment) may "also include in the responding statement additional facts that the party contends are material and as to which there exists a genuine issue." Id. FOP Lodge 30, in its Responding Statement, included 26 additional paragraphs of facts which it deemed to be material. However, Lodge 30 further stated that as to the material facts there "may or may not exist a genuine issue." In view of this equivocal

statement, the DRPA submits that under Rule 4:46-2(b) a further response may not be required. However, without waiving this, or any other defense, as to the right to challenge Lodge 30's statements, the DRPA provides the following specific responses.

II. **SPECIFIC RESPONSES**

1. Admitted.

2. Admitted except to the extent that the Attorney General of Pennsylvania does not participate in nor approve the training course.

3. Admitted.

4. Denied. Paragraph 4 states a legal conclusion to which no response is required under Rule 4:46-2(b).

5. Denied. Paragraph 5 states a legal conclusion to which no response is required under Rule 4:46-2(b).

6. Denied. Paragraph 6 states a legal conclusion to which no response is required under Rule 4:46-2(b).

7. Denied. Paragraph 7 states a legal conclusion to which no response is required under Rule 4:46-2(b).

8. Denied. Paragraph 8 states a legal conclusion to which no response is required under Rule 4:46-2(b).

9. Denied. Paragraph 9 states a legal conclusion to which no response is required under Rule 4:46-2(b).

10. Denied. Paragraph 10 states a legal conclusion to which no response is required under Rule 4:46-2(b).

11. Denied. Paragraph 11 states a legal conclusion to which no response is required under Rule 4:46-2(b).

12. Denied. Paragraph 12 states a legal conclusion to which no response is required under Rule 4:46-2(b).

13. Admitted to the extent that the DRPA and Lodge 30 have executed a series of agreements. It is expressly denied that these agreements are "Collective Bargaining Agreements" as that term of art may be applied under state or federal labor law.

14. Admitted except that DRPA denies that the Agreements referred to in paragraph 14 are "Collective Bargaining Agreements" as that term of art may be applied under state or federal labor law.

15. Admitted except that DRPA denies that the Agreements referred to in paragraph 15 are "Collective Bargaining Agreements" as that term of art may be applied under state or federal labor law.

16. Admitted except that DRPA denies that the Agreements referred to in paragraph 16 are "Collective Bargaining Agreements" as that term of art may be applied under state or federal labor law.

17. Admitted except that DRPA denies that the Agreement referred to in paragraph 17 is a "Collective Bargaining Agreement" as that term of art may be applied under state or federal labor law.

18. Admitted except that DRPA denies that the Agreement referred to in paragraph 18 is a "Collective Bargaining

Agreement" as that term of art may be applied under state or federal labor law.

19. Admitted except that DRPA denies that the Agreement referred to in paragraph 19 is a "Collective Bargaining Agreement" as that term of art may be applied under state or federal labor law.

20. Admitted.

21. Admitted only to the extent that the Parties met during November 1995 to July 1, 1996 to negotiate. The remaining statements in Paragraph 21 are denied.

22. Denied. By way of further answer, the DRPA negotiated in full compliance with the law.

23. Admitted to the extent that the Parties met for the last scheduled negotiation session on July 1, 1996. The remaining statements in Paragraph 23 are expressly denied. By way of further answer, the DRPA provided Lodge 30 with a proposal in substantially the form Lodge 30 requested.

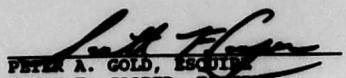
24. Admitted.

25. Admitted.

26. Admitted.

Respectfully submitted,

BLANK ROME COMISKY & McCAULEY

BY: 

PETER A. GOLD, ESQUIRE
SCOTT F. COOPER, ESQUIRE
SAMUEL M. FIRST, ESQUIRE
210 Lake Drive East, Suite 200
Woodland Falls Corporate Park
Cherry Hill, NJ 08002
(609) 779-3600

Attorneys for Defendant
Delaware River Port Authority

Dated: December 16, 1996

A-3344-97T1

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3344-97T1

FILED
APPELLATE DIVISION
MAY 13 1998

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30 and JOSEPH VENA,

Plaintiffs-Respondents,

v.

DELAWARE RIVER PORT AUTHORITY,

Defendant-Appellant.

Civil Action

On Appeal from the November 21, 1997, December 19, 1997 and February 17, 1998 Orders of the Superior Court, Law Division

Sat Below:
M. Allan Vogelson, P.J.S.C.

SUPERIOR COURT OF NEW JERSEY
MAY 18 4 3 59 PM '98
RECEIVED
APPELLATE DIVISION

BRIEF ON BEHALF OF AMICUS CURIAE, STATE OF NEW JERSEY

PETER VERNIERO
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Amicus Curiae State Of New Jersey
R.J. Hughes Justice Complex
PO Box 093
Trenton, New Jersey 08625
(609)984-6640

JOSEPH L. YANNOTTI
Assistant Attorney General
Of Counsel and
On the Brief

KAREN L. JORDAN
Deputy Attorney General
On the Brief

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A. The imposition of some provisions of the participating states' laws is contrary to the terms of the Compact granting powers and imposing duties on the DRPA. 10

B. There is no state or federal Constitutional right to resolution of a labor impasse involving public employees, nor do federal labor statutes apply to the litigants in this case. 18

C. The New Jersey and Pennsylvania statutory schemes are based on distinct policy decisions and impose differing procedures intended to achieve different policy goals. 19

D. The management of labor relations by the trial court will nullify the judgment of each state Legislature to delegate the implementation of its labor statutes to an administrative agency to ensure a consistent policy in keeping with the Legislative goals. 26

POINT II

THE ORDERS ENTERED IN THE TRIAL COURT VIOLATE THE CONSTITUTIONAL DOCTRINE OF THE SEPARATION OF POWERS BECAUSE THE DETERMINATION OF POLICY FOR THE RESOLUTION OF LABOR DISPUTES IS A LEGISLATIVE AND EXECUTIVE FUNCTION AND THERE IS NO CONSTITUTIONAL RIGHT THAT REQUIRES THE EXTRAORDINARY INTERVENTION OF THE COURT 31

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PRELIMINARY STATEMENT

The New Jersey trial court has ordered the Delaware River Port Authority (DRPA), a bi-state agency of Pennsylvania and New Jersey, to submit to binding arbitration to resolve an impasse in labor negotiations with its police personnel. The rights and obligations of this interstate agency are established in a Compact that was enacted by the Legislatures of the participating states. N.J.S.A. 32:3-1, et seq., 36 P.S. §3503. Since the Compact was an agreement between states, it had to be approved by the United States Congress under the Compact Clause of the Constitution. U.S.Const. Art. I, §10, cl. 3. Other laws of participating states are generally not applicable to an interstate agency, unless the two states have complementary and parallel statutes or the interstate agency consents to the application of state law. The DRPA Compact vests control over the terms and conditions of employment in the DRPA Board of Commissioners. The trial court concluded that the labor statutes of Pennsylvania and New Jersey are complementary and parallel in authorizing compulsory binding arbitration as a solution to a negotiation impasse.

The trial court decision impermissibly intrudes on the powers of the legislative and executive branches of New Jersey's state government. The orders imposing an impasse resolution procedure, requiring binding arbitration, and requiring an appropriation by the DRPA to pay for a mediator nullify the complex statutory and administrative scheme each state legislature has independently established to address the problem of labor disputes in public employment. The order for arbitration is contrary to New

Jersey's rigorous qualification requirements for public employment arbitrators and does not require the consideration of detailed factors listed in the New Jersey law. The court has determined that it will assume the functions of the respective state administrative agencies to implement labor policy, dispensing with the expertise and consistency available from those agencies. Binding arbitration would nullify the veto power of the Governor of New Jersey over DRPA decisions regarding the terms and conditions of employment. N.J.S.A. 32:3-4a to 4c.

The parties have remedies within the system of checks and balances. They may seek a change in legislation that provides them with procedures for negotiating and resolving labor disputes, or, DRPA has the authority to establish such a procedure. Either of these solutions would encourage a reasoned policy that fairly accounts for the public interest as well as the interests of the employees.

The orders entered by the court below are unconstitutional and should be vacated. The judiciary has assumed powers reserved to the executive and legislative branches of New Jersey state government under the New Jersey Constitution. N.J.Const. Art. 3, §1. The trial court orders violate the Compact Clause of the United States Constitution because the State Legislatures have not modified the Compact, and Congress has not approved the changes the trial court imposed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY*

The Delaware River Port Authority (DRPA) is an agency created by a Compact between New Jersey and Pennsylvania and approved by the United States Congress. It operates and maintains four bridges over the Delaware River, and, through its subsidiary, the Port Authority Transportation Corporation, a system of rail transportation between southern New Jersey and Philadelphia. See, N.J.S.A. 32:3-1, et seq.; 36 P.S. §3503. The plaintiffs are the Fraternal Order of Police, Penn-Jersey Lodge 30, a union that represents the 76 bridge police employed by the Authority, and one of its members, Joseph Vena.

The DRPA has voluntarily recognized the plaintiff union as the representative of the bridge police and has engaged in collective negotiations with the union since 1975. Da138. The most recent negotiated contract covered the period from December 11, 1993 to December 19, 1995. Da138-139. The contract term was extended by agreement until August 21, 1996. The parties opened negotiations for a new contract in November 1995 and discussed various proposals by each side to change the existing terms and conditions of employment. They were unable to agree on all the terms and conditions for a new contract before the extension of the 1992-1995 contract expired in August 1996. Da139.

The DRPA Board of Commissioners approved a resolution authorizing the terms and conditions of employment for bridge

*The statement of facts and procedural history are intertwined and have been combined to avoid repetition and for the convenience of the Court.

police on August 21, 1998. The Compact enabling the DRPA permits each state to enact legislation giving its Governor the right to veto actions taken by commissioners appointed for that state. New Jersey enacted legislation giving its Governor the veto power. N.J.S.A. 32:3-4a.* The minutes of the meeting adopting the resolution were forwarded to Governor Whitman and she did not veto them within the statutory period. Da139-140. Her decision not to veto the minutes signifies her approval of the terms and conditions of employment established by the DRPA.

The union objected to the terms and conditions in the resolution and initiated this action. In Count I of its Amended Complaint, the union and Mr. Vena allege that the actions of the DRPA violated the New Jersey Constitution, and Pennsylvania and New Jersey statutes governing labor relations with police personnel. The plaintiffs sought a declaratory judgment that the respective state statutes were applicable to the DRPA, and injunctive relief to prevent the imposition of the terms and conditions established in the DRPA resolution and to resolve the contract issues upon which the parties could not agree. Da82-101. In a second count, the plaintiffs alleged breach of the collective bargaining agreement that expired in August, 1996.

DRPA filed a motion to dismiss in lieu of an Answer, which the court treated as a motion for summary judgment pursuant to R. 4:6-2, because the parties submitted matters outside the

*Pennsylvania chose not to enact a similar provision. See, Senate Transportation and Public Utilities Committee Statement, Senate No. 3785, L.1991, c.516.

pleadings for consideration on the motion. The Honorable Samuel L. Supnick, J.S.C. denied the DRPA's motion on December 20, 1996. It was his opinion that the policy of the New Jersey and Pennsylvania laws is complementary and parallel in granting public employees the right to organize and bargain in good faith even though the statutory provisions are not the same. He believed that the court would have the inherent power to resolve problems arising from differences in the statutes, and allowed the action to proceed. Da166.

The plaintiffs filed a motion for summary judgment on Count I of their Amended Complaint on or about June 13, 1997. They relied on the certification of Clyde W. Summers, who offered an expert opinion on the use of interest arbitration and the extent to which the laws of New Jersey and Pennsylvania are complementary and parallel. Da169-179. The DRPA filed a cross-motion for summary judgment. The DRPA moved, in the alternative, to strike the expert opinion of Mr. Summers, or for more time to take his deposition and obtain an expert of its own.

The case was transferred to the Honorable Allan Vogelson, P.J.S.C., who, on October 20, 1997, conducted a conference and considered but did not decide the still-pending cross-motions by the parties for summary judgment. He directed the parties to attempt to voluntarily resolve their differences and to return on November 3, 1997. Da383-386.

On November 3, 1997, the parties reported to the court that they had not been able to resolve the matter, and Judge

Vogelson ruled on the pending motions. He denied the DRPA's motion for summary judgment and granted the plaintiffs' motion, ordering the parties to:

> select a mediator from a list supplied by the American Arbitration Association to develop a procedure and mechanism to resume good faith negotiations and arrive at an agreement over the terms and conditions of employment for DRPA police officers. [Da4]

The parties were to report to the court on December 3, 1997 on the progress of the mediation, and the order provided that the court would require binding impasse arbitration if the parties remained at impasse. Da4.

The court also denied the DRPA's motion to strike the testimony of plaintiffs' expert, or to continue the motion to allow DRPA to submit expert testimony. DRPA's motion for a stay was denied and the order was certified as final for purposes of appeal. Da4

DRPA filed a motion for reconsideration on December 5, 1997. On December 19, 1997, the court ordered that:

> At their next regularly scheduled meeting, the Commissioners of the Defendant Delaware River Port Authority ("DRPA") shall appropriate funds to equally share the American Arbitration Association ("AAA") mediator's fees with the Plaintiffs for the first three (3) mediation sessions, as set out in the Grievance Mediation Rules of the AAA, in order to carry out the Court's Order of November 21, 1997, directing the parties to proceed to Mediation before the AAA. [Da5-6]

The DRPA's renewed motion for a stay was denied, Count II of the amended complaint was withdrawn with prejudice, and DRPA's motion to file an expert report was denied. Da5-6.

DRPA's motion for reconsideration was denied in an order dated February 17, 1998. Da7-8.

The DRPA appeals the orders entered on November 21, 1997, December 19, 1997 and February 17, 1998.

The State of New Jersey has filed a motion for leave to participate in this appeal as amicus curiae, to challenge the orders for mediation, compulsory binding arbitration, and appropriation of funds by the DRPA to pay the arbitrator. These orders are contrary to New Jersey statutes and violate the policy for resolving public employee disputes established by the New Jersey Legislature. The trial court orders incorrectly conclude that New Jersey and Pennsylvania statutes are sufficiently similar to allow the court to create a third system and impose it on a bi-state agency such as the DRPA. Each state Legislature has enacted a complex statutory and administrative scheme based on different policy goals and vesting authority over labor issues in different state agencies. The court of one state lacks the authority under the separation of powers doctrine to remake the policy decisions of the respective Legislatures into a hybrid that satisfies neither state's goals and procedures to achieve those goals. The order for binding arbitration nullifies the veto power of the New Jersey Governor over the actions of the New Jersey members of the DRPA Board of Commissioners. The orders entered in the trial court violate the Compact Clause of the United States Constitution by modifying the Compact without the participation of the state

Legislatures or the approval of Congress. The trial court orders should be vacated.

ARGUMENT

POINT I

THE JUDICIAL ORDERS REQUIRING IMPASSE RESOLUTION SHOULD BE VACATED BECAUSE THE DISPARATE POLICY DECISIONS BY THE NEW JERSEY AND PENNSYLVANIA LEGISLATURES FOR THE RESOLUTION OF LABOR DISPUTES MAY NOT BE JUDICIALLY MOLDED AND UNILATERALLY IMPOSED ON A BI-STATE AGENCY

The court below concluded that, since both New Jersey and Pennsylvania statutes provide for binding arbitration of labor disputes with police and fire fighters, there was evidence of a common policy in both states that could be imposed on the Delaware River Port Authority, a bi-state agency. A closer look at the statutes in the respective states reveals substantive and procedural differences that cannot be reconciled. The New Jersey court, in entering an order for binding arbitration by the American Arbitration Association, disregarded important provisions of New Jersey's Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., and amendments enacted as the Police and Fire Public Interest Arbitration Reform Act, L.1995, c.425. The order for binding arbitration also does not comport with the Pennsylvania statute authorizing collective bargaining for police and firemen, 43 P.S. §§217.1 et seq.

The judiciary of one state does not have the constitutional authority to select portions of the respective state statutes and impose them on a bi-state agency. In attempting to fashion a process for resolving the negotiating impasse between the parties in this case, the court below violated the constitutional

separation of powers, intruding on the legislative and executive authority of the DRPA, the legislative powers of the New Jersey and Pennsylvania Legislatures, and the executive powers of New Jersey's Governor. The Legislatures and the DRPA are vested with the authority to develop a policy for resolving labor disputes. The United States Congress has consented to the Compact as enacted by the state Legislatures under the Compact Clause of the United States Constitution. To allow a judge in one state to modify the Compact violates the requirement of Congressional approval. The constitutional system of checks and balances requires that legislative and executive bodies, rather than the judiciary, make the policy decisions implicated in a system for resolving labor disputes with the public employees of a bi-state agency.

A. The imposition of some provisions of the participating states' laws is contrary to the terms of the Compact granting powers and imposing duties on the DRPA.

The Delaware River Port Authority was created by a Compact between the State of New Jersey and the Commonwealth of Pennsylvania to develop and maintain bridges and port facilities between the two states, and to provide a rail transportation service operated by its subsidiary, the Port Authority Transportation Corporation (PATCO). N.J.S.A. 32:3-2(a) and (b); 36 P.S. §3503; Eastern Paralyzed Veterans Association, Inc. v. City of Camden, 111 N.J. 389, 397, 545 A.2d 127, 131 (1988). Generally interstate compacts are formed to address interests that do not coincide with state boundaries, or that may be poorly served by ordinary channels of political action. Hess v. Port Authority

Trans-Hudson Corp., 513 U.S. 30, 115 S.Ct. 394, 130 L.Ed 2d 245 (1994); International Union of Operating Engineers, Local, 68 v. DRBA, 147 N.J. 433, 440, 688 A.2d 569, 572 (1997), cert. den. ___ U.S. ___, 118 S.Ct. 165, 139 L.Ed.2d 108 (1997). There are ten other multi-state compacts in which New Jersey is a participant. See, Title 32 of the New Jersey Statutes Annotated.

A bi-state agency is a creature of both the creator states and the federal government. Hess, supra; Local, 68 v. DRBA. An interstate compact is an agreement between two or more states that must be approved by Congress under the Compact Clause of the United States Constitution, Art. I, §10, cl.3, which provides:

> No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

The Compact, upon approval by Congress, is federal law. Cuyler v. Adams, 449 U.S. 433, 101 S.Ct. 703, 66 L.Ed.2d 641 (1981); Delaware River Joint Toll Bridge Commission v. Colburn, 310 U.S. 419, 60 S.Ct. 1039, 84 L.Ed. 1287 (1940); Eastern Paralyzed Veterans, supra.

Both state and federal courts have jurisdiction to construe interstate compacts but the federal interpretation governs. Cuyler. No court may interpret a compact contrary to its express terms. Texas v. New Mexico, 462 U.S. 554, 103 S.Ct. 2558, 77 L.Ed.2d 1 (1983). Pennsylvania and New Jersey state courts have exercised jurisdiction to construe interstate compacts and the

effect of the creator states' laws on the activities of bi-state agencies. See, Local. 68 v. DRBA; Bunk v. Port Authority of New York and New Jersey, 144 N.J. 176, 676 A.2d 118 (1996); Eastern Paralyzed Veterans, supra; Nardi v. Delaware River Port Authority, 88 Pa.Cmwlth. 558, 490 A.2d 949 (Pa.Cmwlth. 1985).

The provisions of the compact form the authority and obligations of the bi-state agency. The DRPA Compact empowers the Authority to:

> appoint, hire, or employ counsel and such other officers and such agents and employees as it may require for the performance of its duties, by contract or otherwise, and fix and determine their qualifications, duties and compensation. [N.J.S.A. 32:3-5(e); 36 P.S. §3503]

There are no provisions in the Compact for collective negotiations or resolution of labor disputes. The DRPA is authorized to:

> exercise all other powers not inconsistent with the constitutions of the two States or of the United States, which may be reasonably necessary or incidental to the effectuation of its authorized purposes or to the exercise of any of the foregoing powers, except the power to levy taxes or assessments, and generally to exercise in connection with its property and affairs, and in connection with property within its control, any and all powers which might be exercised by a natural person or a private corporation in connection with similar property and affairs. [N.J.S.A. 32:3-5(p); 36 P.S. §3503]

In order for the courts of one of the participating states to review the actions of the bi-state agency or impose additional requirements, there must be an express or implied consent to that state's jurisdiction and the application of state law. The bi-state agency may consent to such jurisdiction by (1)

an express provision in the Compact, (2) complementary and parallel legislation in each of the respective states that does not intrude on the mission of the bi-state agency, or (3) implied consent by the bi-state agency. Eastern Paralyzed Veterans, supra; Local. 68 v. DRBA, supra; Ampro Fisheries, Inc. v. Yaskin, 127 N.J. 602, 606 A.2d 1099 (1992), cert. den. 506 U.S. 954, 113 S.Ct. 409, 121 L.Ed.2d 333 (1992). Here, there is no provision in the DRPA Compact that cedes jurisdiction to either state. See, Eastern Paralyzed Veterans, 111 N.J. at 399-400, 545 A.2d at 132. The DRPA has consistently objected to the imposition of either New Jersey or Pennsylvania labor statutes, or any judicially created hybrid of the two, so there is no implied or actual consent to the ad hoc management of labor relations by the New Jersey trial courts. The determinative standard here is whether New Jersey and Pennsylvania statutory provisions for resolving labor disputes are complementary and parallel, "in effect . . . modifying the Compact" by state legislative action. Local. 68 v. DRBA, 147 N.J. at 447, 688 A.2d at 576.

Since the DRPA is a public corporate instrumentality of both states, neither creator state can unilaterally impose additional duties, powers or responsibilities on the Authority. Nardi 88 Pa.Cmwlth at 560, 490 A.2d at 950; Local. 68 v. DRBA, 147 N.J. at 444-445, 688 A.2d at 574; Eastern Paralyzed Veterans, 111 N.J. at 398, 545 A.2d at 131. The statutes in each state must be "substantially similar in nature" in order to satisfy the complementary and parallel standard. Local. 68 v. DRBA, 147 N.J.

at 445, 688 A.2d at 575, citing Eastern Paralyzed Veterans. The statutes must demonstrate that the Legislatures of both states have concluded, as a matter of "substantially similar" public policy, that additional statutory requirements be imposed on the intrastate agency. Local. 68 v. DRBA, 147 N.J. at 447, 688 A.2d at 576.

Both New Jersey and Pennsylvania courts have required more than a generalized policy common to both states in determining whether the states have consented to a modification of a bi-state compact. In Nardi, the plaintiff, a member of the DRPA police force, sought additional benefits for a work related injury after exhausting his entitlement to payments for six months of disability under a voluntary collective bargaining agreement. A New Jersey statute limited such benefits payable by the DRPA to a period of one year, while the Pennsylvania statute required compensation of police employees for the entire period of disability. The plaintiff urged integration of the two statutes, and asked the court to order payments for one year rather than the six months provided in the collective bargaining agreement.

The court held that the New Jersey statute unilaterally limited authority otherwise held by the Authority, and the Pennsylvania statute unilaterally imposed a burden to pay unlimited benefits on the Authority, so neither applied. As the court said, "the Authority has the power but not the duty to confer special compensation on its employees who have been injured in the course of their employment." 88 Pa.Comwlth. at 565, 490 A.2d at 952. In Nardi, even though the respective state statutes arguably

demonstrated a policy to extend benefits for at least a year, the court declined to integrate them to impose an additional burden on the DRPA.

In Bunk v. Port Authority of New York & New Jersey, supra, the New Jersey Supreme Court held that a New Jersey statutory offset of worker's compensation benefits against a disability pension applied to an employee of the Port Authority of New York and New Jersey. The Port Authority had elected to provide disability and worker's compensation benefits to its employees according to New York law. Though the Port Authority was already paying the plaintiff employee a disability pension, he sought to require the Port Authority to pay him worker's compensation benefits under New Jersey law. The Court found a common Legislative intent in the two states' laws to integrate benefits so that an employee would not receive double payments. The Court cited the common interest of both founder states in preserving the fiscal well-being of the Port Authority in support of its conclusion that the New Jersey set-off provision was applicable. The application of the New Jersey statute protected against the imposition of an additional duty or obligation on the Port Authority.

The New Jersey Appellate Division has held that binding arbitration cannot be imposed on a bi-state agency in the absence of some statutory or contractual authority. Brown v. Port Authority Police Superior Officers Ass'n, 283 N.J.Super. 122, 137-138, 661 A.2d 312, 319 (App. Div. 1995). There was no statutory

duty to arbitrate applicable to the Port Authority, according the Court in Brown. Although there was a voluntary agreement by the Authority to arbitrate under certain circumstances, the plaintiffs had not satisfied the procedural prerequisites to arbitration in the contract and therefore were not entitled to an order requiring the Authority to participate in binding arbitration. Ibid. The trial court in this matter entered an order for binding arbitration without any contractual or statutory authority applicable to the DRPA. Notably, the order in this case dispensed with important procedural prerequisites of the state statutes.

The New Jersey Supreme Court in Local. 68 v. DRBA, supra, held that Delaware River and Bay Authority employees have the right to collectively negotiate through a labor union and that employers may not interfere with the right of collective negotiations, based on the "substantially similar policy concerning collective negotiations in Delaware and New Jersey statutes." 147 N.J. at 446-448, 688 A.2d at 575-576. The statutory provisions were similar in authorizing collective negotiation for public employees. Here, the issue is not whether collective negotiations may take place, but the more complex process of resolving an impasse; and, the statutes in the two states are materially different. This appeal goes beyond the right of collective negotiations since the DRPA did voluntarily negotiate with the union selected by the bridge police.

The New Jersey Appellate Division has very recently issued an opinion discussing the complementary and parallel

standard and comprehensively reviewing the prior case law. Ballinger v. DRPA, ___ N.J.Super. ___, 1998 WL226313 (App. Div., May 8, 1998). This Court rejected the arguments of the plaintiffs in that case that a generalized public policy to protect whistle blowers common to both states satisfied the "substantially similar" standard in Local. 68 v. DRBA. The Court held in Ballinger that whistle blower protection statutes in New Jersey and Pennsylvania were not sufficiently similar to make them applicable to the DRPA and dismissed the employees' statutory claims. The statutes differed in their limitations period, and under the Pennsylvania statute, the claims were barred. One state permitted the recovery of punitive damages while the other did not, and one statute provided for a right of trial by jury while the other did not. Just as in Ballinger, there are material differences in the New Jersey and Pennsylvania statutes authorizing interest arbitration, and a generalized policy to afford police employees binding arbitration is inadequate to satisfy the complementary and parallel standard.

The imposition of labor impasse procedures by the New Jersey trial court is contrary to the express terms of the Compact, which give control over the terms and conditions of employment to the DRPA, as a matter of federal law. Additional obligations based on the participating states' laws may not be unilaterally imposed on a bi-state entity. A person seeking to apply state law to a bi-state entity must demonstrate that the two state Legislatures had in mind substantially similar goals and selected substantially

similar means to achieve them. For the reasons stated below, the state laws upon which the trial court relied are not complementary and parallel and may not be applied to the DRPA.

B. There is no state or federal Constitutional right to resolution of a labor impasse involving public employees, nor do federal labor statutes apply to the litigants in this case.

The labor rights of public employees are limited compared to the rights of private employees. The federal Labor Management Relations Act, 29 U.S.C. §§141 et seq. and the National Labor Relations Act, 29 U.S.C. §§151 et seq., do not apply to employers that are political subdivisions of a state. 29 U.S.C. §142(3); 29 U.S.C. §152(2). The DRPA and other bi-state entities are political subdivisions within the meaning of those federal laws. Stinson v. Delaware River Port Authority, 935 F.Supp. 531 (D.N.J.1996), affirmed 124 F.3d 188 (3rd Cir. 1997).

The New Jersey Constitution grants to private employees broader rights to "organize and bargain collectively," but limits "persons in public employment . . [to] the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing." N.J. Const. (1947), Art. 1, ¶19. Public employees traditionally have not had the right to strike or engage in other coercive activities available to private employees. Delaware River & Bay Authority v. International Organization of Masters, Mates, and Pilots, 45 N.J. 138, 211 A.2d 789 (1965). The fact that the plaintiff in that case was a bi-

state agency was not material as there was "no indication that the historic and widely prevailing policy against strikes by public employees is not equally applicable." 45 N.J. at 147, 211 A.2d at 794.

Some public employees in Pennsylvania were given a limited right to strike in 1970 in the Public Employment Relations Act, 43 P.S. §1101.1003. See Philadelphia Housing Authority v. Pennsylvania Labor Relations Board, 153 Pa.Cmwlth. 20, 620 A.2d 594 (Pa. Cmwlth. 1992), for a discussion of the limited right to strike for public employees due to concerns for public health, safety and welfare. A separate Pennsylvania statute governing police and fire personnel does not afford the same right to strike to police and firemen. 43 P.S. §§215.1, et seq.

There is no federal constitutional or statutory provision that guarantees public employees the right to resolution of their labor disputes. Neither of the compact states gives the resolution of public employee labor disputes constitutional protection. The plaintiffs' claim for relief necessarily rests on New Jersey and Pennsylvania statutory law.

C. The New Jersey and Pennsylvania statutory schemes are based on distinct policy decisions and impose differing procedures intended to achieve different policy goals.

The respective Legislatures made differing policy decisions which are reflected in the manner in which public employee labor disputes are to be resolved, who may arbitrate such disputes, and the matters which are to be considered by the arbitrator. The decision of the trial court to impose compulsory

binding arbitration, while ignoring the rest of the statutes, is contrary to the policies of both states.

New Jersey has delegated responsibility for administering and implementing the provisions of its public employment legislation to an executive agency known as the Public Employment Relations Commission (PERC), in the Division of Public Employment Relations. The commission is vested with broad authority to make policy, establish rules and regulations and enforce the act. N.J.S.A. 34:13A-5.2.

The Division of Public Relations and PERC are intimately involved in the process of resolving public employee negotiation disputes. Whenever negotiations reach an impasse, the Division "shall, upon the request of either party or its own motion take such steps, including the assignment of a mediator, as it may deem expedient to effect a voluntary resolution of the impasse." N.J.S.A. 34:13A-16(a)(2)(police and fire personnel); and see N.J.S.A. 34:13A-6(b), applicable to other public employees. Failing resolution by mediation, the Division of Public Relations is responsible for initiating fact finding. N.J.S.A. 34:13A-16(b)(1); N.J.S.A. 34:13A-6(b). Fact finding is limited to issues in the required scope of negotiations. Ibid. PERC has the responsibility to determine the issues that are within the required scope of negotiations. Plainfield Ass'n of School Administrators v. Plainfield Board of Education, 187 N.J.Super. 11, 15, 453 A.2d 549, 551 (App. Div. 1982), certif. den. 91 N.J. 550, 453 A.2d 867 (1982).

New Jersey's statutory scheme does not give most public employees the right to compulsory binding interest arbitration, though the parties can agree to voluntary arbitration. N.J.S.A. 34:13A-7. For most New Jersey public employees, the statutory right to labor dispute resolution ends after fact finding, whether there is a resolution of the impasse or not. There is no prohibition against the employer's unilateral imposition of the last best offer.

Compulsory binding interest arbitration is available to police and fire personnel, but it is closely supervised by PERC and the standards and procedures specified under N.J.S.A. 34:13A-16. The required preliminary methods of resolving an impasse reflect a legislative judgment that arbitration, where available, is a last resort only after other efforts have failed.

Where fact finding does not resolve the matter in a police or fire personnel dispute, the parties are to notify the Commission whether they have agreed on a terminal procedure for arbitration. Either party may also petition the Commission for arbitration on or after the date when their collective negotiation agreement expires. N.J.S.A. 34:13A-16(b)(2). The statute provides a non-inclusive list of acceptable terminal arbitration procedures to which the parties can agree subject to the approval of the Commission. N.J.S.A. 34:13A-16(c). If the parties cannot agree, the terminal procedure will be binding arbitration. N.J.S.A. 34:13A-16(d). The Commission oversees the selection of an impartial arbitrator from "its special panel of arbitrators" and

has the authority to select the arbitrator if the parties cannot agree. N.J.S.A. 34:13A-16(e).

The arbitrator must "give due weight" to express statutory factors and indicate, in the award, which factors he or she deemed relevant, why other factors were not relevant, and analyze each factor that was deemed relevant. N.J.S.A. 34:13A-16(g). Among the factors are the interests and welfare of the public, and the financial impact of the decision on the government unit, its residents, and taxpayers. N.J.S.A. 34:13A-16(g)(1) and (6). Amendments in 1995 expressly required consideration of New Jersey's "cap law" and the effect of the award on local property taxes.

These standards directly respond to the concerns raised in Van Riper v. Traffic Tel. Workers' Federation of N.J., 2 N.J. 335, 352-355, 66 A.2d 616, 625-626 (1949). There, the New Jersey Supreme Court found unconstitutional a compulsory arbitration provision in a statute dealing with labor disputes in public utilities. The Court said that the Legislature could not constitutionally delegate the authority for compulsory arbitration to a board of arbitration without adequate standards. The Court was concerned that the personnel of the board of arbitration would vary, necessitating a greater need for specific standards. The Court feared that arbitrators would act based on their personal views of justice or expedience, to the detriment of the public, noting that:

> Anyone who has had experience with arbitration realizes that this is the inherent weakness of

> arbitration as a remedy. Unless standards are set up in any submission to arbitration the tendency to compromise and be guided in part by expediency as distinguished from objective considerations and real right is inevitable. This is especially dangerous in the case of an arbitration where the rights of third parties, here the public, are concerned. Any increase in operating costs which may result from the arbitration will inevitably be charged to the public in increased rates. But the board of arbitration is nowhere directed to consider the rights of the public, which will ultimately be called upon to foot the bill. In these circumstances the need of legislative standards is particularly apparent. [2 N.J. at 353; emphasis added]

The provisions of New Jersey's compulsory interest arbitration statute for police and fire personnel carefully meet this recognized constitutional infirmity. The arbitrators are limited to members of a special panel selected by the Public Employment Relations Commission according to rigorous criteria qualifying them to perform arbitration involving public employees and employers. N.J.S.A. 34:13A-16(e); N.J.A.C. 19:16-5.6, -5.15, and -5.16. The parties must engage in less costly methods of dispute resolution before they can be required to participate in compulsory arbitration. Notably, the Legislature prescribed specific factors for the arbitrator to weigh, expressly directing him or her to take into account the effect of the decision on the public interest. The Division of Public Employment Relations and the Public Employment Relations Commission are intimately involved with every step of the dispute resolution process.

The Pennsylvania statutory scheme does not provide the safeguards the New Jersey Supreme Court and the New Jersey

Legislature have determined to be necessary to protect the public interest. Public employers and their policemen and firemen have a duty to "exert every reasonable effort to settle all disputes," 43 P.S. §217.2, but need not engage in mediation or report to a supervisory agency like the New Jersey Division of Public Employment Relations. If the collective bargaining process reaches an impasse, either party may initiate arbitration by providing notice to the other party, 43 P.S. §217.4. The parties then each appoint an arbitrator, and a third arbitrator is selected upon the agreement of the parties. The members of the board of arbitration need not have any training or experience in arbitration of public employee-employer disputes, or even as arbitrators. Ibid. The statute prescribes no factors to be considered by the board of arbitration. The Pennsylvania scheme would permit a decision based on the individual arbitrators' personal opinions and views of what would be expedient, and would allow a decision that does not take into account the public interest, contrary to the concerns expressed by the New Jersey Supreme Court in Van Riper.

The plaintiff union submitted the expert report of law professor Clyde Summers that the statutory schemes of Pennsylvania and New Jersey were sufficiently similar to impose compulsory impasse arbitration on the DRPA. Mr. Summers noted the difference between the New Jersey detailed list of factors and the absence of standards in the Pennsylvania statute. Da177. He casually dismissed this important legislative policy decision, saying that

the factors in the New Jersey statute "are those which any competent arbitrator will weigh without any statutory direction."

Mr. Summers' "opinion" ignores the well-settled principle that statutes may not be construed to "render any part inoperative, superfluous or meaningless." Strasenburgh v. Straubmuller, 146 N.J. 527, 539, 683 A.2d 818, 824 (1996), quoting State v. Reynolds, 124 N.J. 559, 564, 592 A.2d 194, 196 (1991). The New Jersey Legislature enacted standards for a reason, which the New Jersey Supreme Court forcefully explained in the opinion in Van Riper. Mr. Summers implicitly recognizes the inconsistency between his opinion and the New Jersey judicial determination that a compulsory arbitration statute without standards was unconstitutional, by citing the Van Riper opinion in his certification. The trial court below was in error in relying on Mr. Summers' opinion to conclude that the New Jersey statutory factors are immaterial to the determination whether the New Jersey and Pennsylvania statutes are sufficiently similar to impose a duty of binding compulsory arbitration without standards on the DRPA. Da386-387, Da406.

The New Jersey statutory scheme demonstrates a policy to closely supervise public employee labor relations, and to give due consideration to the financial impact of an arbitration award on the public, where binding arbitration is available. In contrast, the Pennsylvania system gives considerably more freedom to the parties to shape the parameters of the arbitration. The public interest may or may not be a factor. The statutory schemes are too

different to conclude that complementary and parallel legislation has, in effect, modified the DRPA Compact.

D. The management of labor relations by the trial court will nullify the judgment of each state Legislature to delegate the implementation of its labor statutes to an administrative agency to ensure a consistent policy in keeping with the Legislative goals.

Both Pennsylvania and New Jersey have delegated authority to administer their respective labor statutes to administrative agencies, the Pennsylvania Labor Relations Board, and the New Jersey Public Employment Relations Commission. The two state agencies have the authority to decide unfair labor practice claims. Borough of Nazareth v. PLRB, 534 Pa. 11, 626 A.2d 493 (1993); Borough of Geistown v. PLRB, 679 A.2d 1330 (Pa. Cmwlth. 1996), alloc. den. 547 Pa. 759, 692 A.2d 568 (1997); N.J.S.A. 34A-5.4(c). The Legislatures appropriately recognized that labor relations in government employment are a complicated subject that calls for the expertise of an administrative agency. See, In re Adoption of N.J.A.C. 7:26B, 128 N.J. 442, 451-452, 608 A.2d 288, 292-293 (1992) and cases cited there. Courts customarily defer to an administrative agency charged with the implementation of a statute, because of the decision of the Legislature to delegate authority to implement the statutory scheme to the agency. New Jersey Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 561-563, 384 A.2d 795, 803-804 (1978).

The respective state agencies have the responsibility to make the often pivotal decision of what issues are within the required scope of negotiations and which issues are managerial

prerogative and therefore not negotiable. Plainfield Ass'n of School Administrators v. Plainfield Board of Education, supra; Indiana Borough v. PLRB, 695 A.2d 470, 474 (Pa. Cmwlth. 1997; Township of Upper Saucon v. PLRB, 152 Pa.Cmwlth. 530, 535-538, 620 A.2d 71, 73-74 (Pa. Cmwlth. 1993). In New Jersey arbitration is limited to issues within the required scope of negotiations. Plainfield, 187 N.J.Super. at 16, 453 A.2d at 551. Here, the trial court will have to decide which issues are within the required scope of negotiations rather than the respective state agencies, without the benefit of their administrative experience or an understanding of the policy objectives set by each agency. The court's task will be complicated by the fact that the standard for determining issues required to be negotiated and arbitrated is significantly different in the two states.

In New Jersey, "what may be submitted to binding arbitration in the public sector is circumscribed. Unlike the private sector, prerogatives of management, particularly those involving governmental policy making, cannot be bargained away to be determined by an arbitrator." Kearny PBA Local #21 v. Town of Kearny, 81 N.J. 208, 215, 405 A.2d 393, 396 (1979). The concern is the delegation of the power to determine the public interest to a private person. Such a delegation should be narrowly limited and governed by standards and criteria that consider the public interest and the impact of the arbitrator's decision on the public welfare. Kearny PBA, 81 N.J. at 215-216, 405 A.2d at 396-397. New Jersey applies a balancing test to determine whether an issue is

arbitrable, weighing the effect of the issue on the work and welfare of public employees against any interference with governmental policy making. The government's managerial prerogative to determine policy may preclude bargaining and arbitration of an issue even though the issue intimately affects employee working conditions. Plainfield, 187 N.J.Super. at 16, 453 A.2d at 551.

Pennsylvania has rejected a similar balancing test for police and fire personnel. Instead, the standard is whether the issue bears a rational relationship to the employees' duties, focusing the analysis on the employee interests at stake, and de-emphasizing any governmental interests. Township of Upper Saucon 152 Pa.Cmwlth. at 536, 620 A.2d at 74. In Pennsylvania, the statute governing employment disputes of public employees other than police and fire personnel does require balancing between governmental interests and employee interests. The statute governing police and fire personnel, which was applied by the trial court in this case, has no similar provisions. Pennsylvania courts have logically construed 43 P.S. 217.1 et seq. (Act 111) to mean that the same balancing of governmental interests does not apply in the context of bargaining and arbitration with police and fire personnel. Township of Upper Saucon, 152 Pa.Cmwlth. at 535-536, 620 A.2d at 74.

The material differences in the two state statutory schemes are the source of the disparity between the standards for defining the required scope of negotiations and arbitration. In New

Jersey, the legislative emphasis on the public interest has led to a standard that gives deference to the interests of the government employer, and, by extension, the public. In Pennsylvania, the absence of a statutory requirement to balance the public interest in labor matters involving police and fire personnel has led to a standard that defers to the interests of the employees. The two standards can not be reconciled in a judicially-created hybrid of the laws governing labor disputes in New Jersey and Pennsylvania.

The Legislature of each state recognized the benefit of delegating the implementation of its public employee labor laws to administrative agencies, which would develop an expertise in the field, and would formulate policy to consistently apply the statutes. But, the courts of New Jersey have already held that the New Jersey Public Employment Relations Commission has no jurisdiction over another bi-state agency, the Delaware River and Bay Authority. Delaware River & Bay Authority v. New Jersey Public Employment Relations Commission, 112 N.J.Super. 160, 270 A.2d 704 (App. Div. 1970). The Court there said that whether a bi-state agency should be subject to PERC authority over labor relations was an important policy question that lay in the legislative domain. 112 N.J.Super. at 165, 270 A.2d at 707, quoting from Evergreen Park Mental Hospital v. Cooper, 56 N.J. 579, 586-590, 267 A.2d 533 (1970). Based on the same reasoning, and consistent with the analysis in Nardi, the PLRB lacks jurisdiction over labor disputes involving the DRPA.

If the expert administrative agencies in this field lack jurisdiction over the sensitive and public policy laden issues arising in the field of labor negotiation and impasse resolution then it is illogical to assume that a court in one of the states can step in and fashion a procedure for compelled use by this bi-state agency. The "remedy" fashioned by the court in this case is essentially legislative action and is therefore beyond the powers of the court. In straining to find the legislative schemes of Pennsylvania and New Jersey complementary and parallel, the court's remedy violates the principles of both States' statutory programs and the public policy of each State's case law.

The statutory systems for resolving labor disputes with public employees in Pennsylvania and New Jersey are not complementary and parallel. The court orders are contrary to the express terms of the Compact that place full authority over the terms and conditions of employment in the DRPA. The trial court orders should be vacated.

POINT II

THE ORDERS ENTERED IN THE TRIAL COURT VIOLATE THE CONSTITUTIONAL DOCTRINE OF THE SEPARATION OF POWERS BECAUSE THE DETERMINATION OF POLICY FOR THE RESOLUTION OF LABOR DISPUTES IS A LEGISLATIVE AND EXECUTIVE FUNCTION AND THERE IS NO CONSTITUTIONAL RIGHT THAT REQUIRES THE EXTRAORDINARY INTERVENTION OF THE COURT

The order of the court below mandating that the Delaware River Port Authority submit to binding arbitration by an arbitrator selected from the American Arbitration Association violates the doctrine of separation of powers, a fundamental principle of our federal and state governments.

The New Jersey Constitution provides, at Art. 3, ¶1:

> The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.

The separation of government powers into three coordinate branches is "a fundamental principle of our State government." Communications Workers v. Florio, 130 N.J. 439, 449, 617 A.2d 223, 228 (1992). It was designed to create a balance among the three branches, prevent concentration of unchecked power in any one branch, and preserve the integrity and independence of each branch. Ibid. "Each branch of government is distinct and is the repository of the powers which are unique to it; the members or representatives of one branch cannot arrogate powers of another branch." Knight v. Margate, 86 N.J. 374, 388, 431 A.2d 833, 840 (1981). The doctrine of separation of powers does not require an

absolute division of power, but instead, "a cooperative accommodation among the three branches of government." Communications Workers v. Florio, supra. The objective is not to insulate each branch from the others, but to prevent a single branch from claiming or receiving inordinate power. Brown v. Heymann, 62 N.J. 1, 11, 297 A.2d 572, 578 (1972).

The essence of the legislative function is to determine policy. A & B Auto Stores of Jones St., Inc. v. Newark, 59 N.J. 5, 279 A.2d 693 (1971); Reingold v. Harper, 6 N.J. 182, 78 A.2d 54 (1951). The Legislature is best equipped to gather information and formulate a solution to complex, politically sensitive problems. Southern Burlington County N.A.A.C.P. v. Mount Laurel Township, 92 N.J. 158, 212-14, 456 A.2d 390, 417-418 (1983)(Mount Laurel II).

The separation of powers limits the judicial power to override legislative decisions. Generally, the judicial role is to determine whether the provisions of a statute or other legislative action violate a constitutional provision. Legislative acts are presumptively valid and must be upheld if there is any rational relationship between the statute and the public interest to be served. The court may not substitute its judgment even though reasonable minds may differ on the need and propriety of the means devised by the Legislature. Reingold, 6 N.J. at 193-194, 78 A.2d at 59. Later, the New Jersey Supreme Court said "it is not for the judiciary to override legislative decisions because their policy may be unappealing. The only question before us is whether the statute is so devoid of arguable merit as to exceed the

constitutional restraints upon the Legislature." A & B Auto Stores, 59 N.J. at 19, 279 A.2d at 700.

New Jersey courts have, in rare instances and reluctantly, stepped in to perform a quasi-legislative function only where an important constitutional right was at stake. Abbott v. Burke, 149 N.J. 145, 693 A.2d 417 (1997); Robinson v. Cahill, 69 N.J. 133, 351 A.2d 713 (1975); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973)(three in a series of decisions in which the New Jersey Supreme Court has attempted to delineate the funding requirements necessary to satisfy the New Jersey Constitutional guarantee of a thorough and efficient education); and Mount Laurel II, supra; Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975)(two in a series of opinions holding that the constitutional requirements of equal protection and substantive due process were violated by municipal zoning that effectively excluded low and moderate income housing).

In these school and zoning cases, the New Jersey Supreme Court repeatedly called for a Legislative solution, saying, for example, in Mount Laurel II, that "powerful reasons suggest, and we agree, that the matter is best left to the Legislature." Mount Laurel II, 92 N.J. at 212, 456 A.2d at 417. The Court hailed the enactment of the Fair Housing Act, N.J.S.A. 52:27D-301 to 329, and establishment of an administrative agency, the Council on Affordable Housing, as a comprehensive solution on a statewide basis that was appropriately addressed by the other branches of government, and preferable to case-by-case determinations by the

judiciary. Hills Development Co. v. Bernards Township in Somerset County, 103 N.J. 1, 21, 510 A.2d 621, 63 (1986).

Here, there is no constitutional requirement at stake that demands the same extraordinary action by the courts. The decisions surrounding the method of impasse resolution for public employee labor disputes are policy decisions, which are inherently legislative. The process of resolving public employee labor disputes, including the manner in which a negotiating impasse should be resolved is complex and sensitive. The fact that a bi-state agency is involved only adds to the complexity and political sensitivity of these labor issues. The Legislatures of Pennsylvania and New Jersey are best equipped to decide which goals best serve their constituents, the DRPA, and the personnel employed by the DRPA, and how those goals should be implemented. The Legislatures of the two states have made a judgment in the Compact to give the DRPA control over employment matters in the following provision:

> For the effectuation of its authorized purposes the commission is hereby granted the following powers:
>
> (c) to appoint, hire, or employ counsel and such other officers and such agents and employees as it may require for the performance of its duties, by contract or otherwise, and fix and determine their qualifications, duties and compensation.
>
> [N.J.S.A. 32:3-5(c); 36 P.S. §3503]

The broad powers granted to the DRPA in that provision authorize the DRPA to establish its own procedures for managing labor disputes if it chooses to do so. In the absence of a

Legislative provision or DRPA established procedure for impasse arbitration, there is no authority for a court to order it.

The plaintiffs' remedy is to seek legislation in the two states, or convince the DRPA to institute impasse procedures. The New Jersey and United States Constitutions have vested responsibility for this decision in both state Legislatures and not the courts of one state. The legislative process is purposefully deliberate to facilitate a reasoned policy that fairly addresses the public interests at stake.

Legislatures have a duty to consider the sometimes disparate interests of their constituents, in contrast to a court, which is responsible to decide the particular controversy between the litigants before it based on precedent. Legislatures are "fully accountable" to their electorate acting at the polls and the judiciary may not simply nullify statutory enactments in whole or in part because the judiciary thinks the statutes unwise. State v. Monahan, 15 N.J. 34, 45-46, 104 A.2d 21, 27 (1954), cert. den. 348 U.S. 889, 75 S.Ct. 210, 99 L.Ed.2d 698 (1954). The court below violated the separation of powers when it assumed the legislative function of setting labor policy for the DRPA and its employees. The trial court exceeded the power of the judiciary when it selected some provisions of the state statutes, but ignored others. It is likely that the trial court will continue to be faced with legislative decisions as the dispute between these parties progresses, such as the identification of the issues that are arbitrable and adjudication of alleged unfair labor practices.

Courts "should pause before extending judicial doctrines that might dislocate" a comprehensive legislative scheme that defines rights and remedies in a particular area. Spring Motors Distributors, Inc. v. Ford Motor Company, 98 N.J. 555, 577, 489 A.2d 660, 671 (1985) (tort principles should not be applied where Uniform Commercial Code governs the right to sue for economic loss arising from defective product, based on separation of powers). Similarly, in Sutton Warehousing v. Director, 290 N.J.Super. 686, 676 A.2d 615 (App. Div. 1996), this Court refused to apply the entire controversy doctrine when it would interfere with the statutory scheme for administration of the tax laws and the executive authority of the Director of the Division of Taxation to implement the tax laws. Here, the two state procedures and standards for impasse resolution are dissimilar. The judiciary of one state lacks the power to attempt to harmonize them by picking and choosing parts of one or the other statute. That selection process would disturb each of the state statutory schemes governing the rights of parties to public employee labor disputes.

The imposition of compulsory binding arbitration further impinges on the executive power of the Governor of New Jersey by nullifying her right to veto or approve the minutes of the meetings of the DRPA. The Compact permits each participating state to enact a veto power by its Governor. N.J.S.A. 32:3-4. An action of the commission is effective only if a majority of the commissioners from each state vote in favor of an it. Ibid. New Jersey passed provisions authorizing the Governor to veto any action of any New

Jersey commissioner recited in the minutes of the Delaware Port Authority. N.J.S.A. 32:3-4a to 4c. The Governor has, through the veto power, a supervisory role over the actions of the DRPA. The DRPA passed a resolution approving a contract of employment with the plaintiff employees. The minutes reflecting the passage of that resolution were submitted to the Governor, and she did not veto the action of New Jersey Commissioners who voted in favor of the resolution, signifying her approval. The court order for compulsory binding arbitration, without legislative authority, places the ability to nullify the Governor's decision in the hands of an arbitrator who is neither elected nor appointed by a government body with no standards to decide the disputed issues. The trial court order is an unconstitutional intrusion on the Governor's executive power.

The order of the court below should be reversed because the statutory provisions of New Jersey and Pennsylvania for compulsory binding arbitration of labor issues affecting police personnel are not complementary and parallel, but demonstrate divergent policy decisions by the Legislatures of the two states. In an attempt to harmonize the two statutory schemes, the court has nullified important provisions of both laws. The judicial branch does not have the power to usurp the Legislative function to set policy relative to labor disputes. New Jersey courts have reluctantly and on few occasions assumed Legislative power and only then where a constitutional right is at stake. Here, there is no similar constitutional protection that is in jeopardy. The remedy

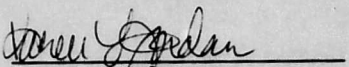
for the plaintiff union is to seek legislative action in New Jersey and Pennsylvania, or to persuade the Delaware River Port Authority to establish procedures fo impasse resolution. Even though such efforts may be time consuming or even unsuccessful, the fundamental principle of the separation of powers precludes the courts of New Jersey from assuming the role of the Legislatures of New Jersey and Pennsylvania.

CONCLUSION

For the reasons stated, the orders entered by the trial court on November 21, 1997, December 19, 1997, and February 17, 1998 should be vacated.

Respectfully submitted,

PETER VERNIERO
ATTORNEY GENERAL OF NEW JERSEY

By: 
Karen L. Jordan
Deputy Attorney General

Dated: May 18, 1998

A-3344-97T1

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30, and JOSEPH VENA, Respondents/Plaintiffs, v. DELAWARE RIVER PORT AUTHORITY, Appellant/Defendant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003344-97T1 CIVIL ACTION **ON APPEAL FROM A FINAL JUDGMENT ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, CAMDEN COUNTY GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** SAT BELOW: HONORABLE M. ALLAN VOGELSON,

FILED
APPELLATE DIVISION
JUL 13 1998
Clerk

REPLY BRIEF AND APPENDIX OF APPELLANT/DEFENDANT DELAWARE RIVER PORT AUTHORITY

BLANK ROME COMISKY & McCAULEY LLP
A Pennsylvania LLP
PETER A. GOLD, ESQUIRE
Resident Partner
SAMUEL M. FIRST, ESQUIRE
Woodland Falls Corporate Park
210 Lake Drive East, Suite 200
Cherry Hill, New Jersey 08002
(609) 779-3600

Attorneys for Defendant/Appellant
Delaware River Port Authority

RECEIVED
APPELLATE DIVISION
JUL 18 1998
Clerk

Dated: July 12, 1998

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MISCELLANEOUS

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I. INTRODUCTION

Appellant/Defendant Delaware River Port Authority ("DRPA"), by and through its Counsel, submits this Reply Brief in further support of the authorities and arguments set out in its Initial Brief filed on May 18, 1998 ("Initial Brief"), and in response to Respondents/Plaintiffs Fraternal Order of Police, Penn-Jersey Lodge 30 and Joseph Vena ("Plaintiffs") Brief served on July 2, 1998. ("Plaintiffs' Brief").

II. PROCEDURAL HISTORY AND STATEMENT OF FACTS

The DRPA will principally rely on the Procedural History and Statement of Facts contained in its Initial Brief.

A. Correcting Plaintiffs' Misstatements And Mischaracterizations.

Despite the fact that the issues before this Court are purely questions of law, Plaintiffs mischaracterize the facts of the 1995 negotiations in an attempt to improperly bias the Court's view of those lengthy and good faith negotiations.

1. The Parties Mutually Agreed To Withhold Discussion On Economic Issues Until All Non-Economic Issues Were Discussed.

Plaintiffs Brief erroneously states that "[a]lthough the Union offered its wage proposal at the first negotiation session on November 9, 1995, the DRPA refused to respond to it, and made no comment on wages at all until the parties' last bargaining session, some eight months later, on July 1, 1996." (Pb6). **This was by agreement between the parties.** Plaintiff FOP Lodge 30's President James Stewart stated in deposition testimony that in November of 1995 he was advised by FOP Lodge 30 lead negotiator Charles Joyce, Esquire, that the parties had agreed to defer discussion of economic issues, including wages, until after all non-economic issues had been

discussed and resolved. (Dra4).

2. **Both Parties Expressly Reserved The Right To Add, Modify Or Delete Contract Proposals.**

Plaintiffs allege that the DRPA reneged on certain agreements. (Pb7). This assertion is also directly contradicted by Plaintiff FOP Lodge 30's President Stewart whose deposition testimony was that both parties expressly reserved the right to "add, modify or delete" any proposals. (Dra2-3). Thus, all proposals remained open to addition, modification or even deletion until a final agreement was approved by both the rank and file of FOP Lodge 30 and the DRPA's Board of Commissioners, subject to the Governor's veto. Further, the DRPA did not agree to, and then renege on FOP contract proposals on subcontracting, overtime compensation, selection for training programs and enhanced access to personnel files. To the contrary, the DRPA never agreed to any FOP contract proposals regarding subcontracting, overtime compensation and selection for training programs, and in fact, did implement the FOP's contract proposal regarding access to personnel files. (Dra12-14).

3. **The Hay Study Is Not Relevant To This Lawsuit.**

Plaintiffs devote multiple pages of their Brief to a salary study conducted for the DRPA by Hay Management Consultants ("Hay"). However, Hay is not relevant to this proceeding. Even according to Plaintiffs' Brief the DRPA did not even retain Hay until **September of 1996**, more than one (1) month after Plaintiffs filed this lawsuit. (Pb8). Furthermore, the "Hay Study", which was not completed until December of 1996, was not implemented until **January 1, 1997**, four and one-half (4½) months after negotiations with the FOP concluded and this lawsuit was

filed. (Pa25)(Da9-81).[1]

4. The Record Is Devoid Of Notice To Defendants That Plaintiffs Would Use An Expert Opinion In Connection With Its Motion For Summary Judgment.

Plaintiffs incorrectly state that "counsel for the DRPA suggested to counsel for the Plaintiffs the possibility that expert testimony might be appropriate on the issue of the relative similarity of Pennsylvania and New Jersey labor law." (Pb11-12). At no time did the DRPA's counsel suggest that expert testimony on the similarity of laws "might be appropriate" in a motion for Summary Judgment on the similarity of Pennsylvania and New Jersey law. (Dra16). It has been the DRPA's consistent position that expert testimony on this issue is entirely inappropriate as any determination on the issue of the similarity between the interest arbitration laws of Pennsylvania and New Jersey was purely a legal issue to be decided by the Court. Thus, the DRPA was completely surprised by the inclusion of Professor Summers' so-called expert Certification in support of Plaintiffs' Motion for Summary Judgment. (Dra16).[2]

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[1]Assuming the Hay Study was in some way relevant to negotiations, Plaintiffs complain that "no attempt was ever made, . . . to bring patrol officers' base wages in line with the Hay Study's recommendations." (Pb9). This assertion is a gross mischaracterization of the truth. DRPA patrol officers, who participated extensively in the Hay process, were placed at Grade 8 on the Hay scale which provided for a minimum salary of $32,064, a midpoint salary of $40,080 and a maximum salary of $48,096. (Pa25-33). Contrary to Plaintiffs protestation of not being paid in line with Hay, in 1997, police officers represented by Plaintiffs FOP Lodge 30 were compensated at $38,084.80, very close to the midpoint, and directly in line with the Hay Salary Study. (Pa25). The gravamen of this case is that Plaintiffs now want to be paid more.

[2]Further, Plaintiffs' claim that "Professor Summers researched New Jersey and Pennsylvania law on interest arbitration" in order to reach his conclusion is false. (Pb12). According to his deposition testimony, Professor Summers spent a total of only thirty (30) minutes researching New Jersey and Pennsylvania law. (Da216). Studying the laws of both states would be of vital importance to a so-called "expert" who is not licensed to practice law in either Pennsylvania or New Jersey, has no personal knowledge with respect to the laws and/or

III. LEGAL ARGUMENT

The DRPA will principally rely on its legal argument set forth in its Initial Brief. The following addresses the arguments raised in Plaintiffs' Brief.

A. EVEN ASSUMING THE SIMILARITY OF A SINGLE GENERAL POLICY, SUCH A SIMILARITY ALONE IS NOT ENOUGH TO IMPOSE BINDING INTEREST ARBITRATION ON THE DRPA.

It is clear from the Trial Court transcripts that the only basis for its decision that the statutes of both creator states are "complementary and parallel" was its conclusion that the statutes reflected **a single** similarity in policy -- utilization of binding interest arbitration to resolve disputes between police and their employers. For the Trial Court, this was the beginning and end of the analysis. Even though the Trial Court conceded that there were multiple pages of differences between the New Jersey Police and Firefighters Interest Arbitration Reform Act, N.J. Stat. Ann. § 34:13A-14a, *et seq.*, as amended (1997 Supp.) ("NJIARA"), and Act 111 in Pennsylvania, 43 Pa. Stat. Ann. § 217.1, *et seq.* ("Act 111"), it ignored the specific language of the statutes and found that these laws were "substantially similar" only because:

> . . . simplistically **the policy** is dispute resolution without a strike, providing a vehicle by which that can be done. That's the stated policy and I so find, and I find that they are substantially similar for that purpose.
>
> While acknowledging that there are specific, but -- I hesitate to use the word unimportant -- recognizing that they are --

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practices of the State of New Jersey, has no ascertainable experience, practical or otherwise, with any aspect of New Jersey law, nor specifically with the NJIARA, has never heard a case as a police interest arbitrator in New Jersey, has no personal knowledge of the legislative policies behind the NJIARA, and has absolutely no experience with the DRPA, any other bi-state entity, or the police officers of any bi-state entity. (Da169-179)(Da180-336). Professor Summers was neither competent nor qualified to be an expert in this case.

there are differences that don't change **the policy** -- do not change the policy.

(Da468-469, 481)(emphasis added). **For purposes of this argument only, even assuming arguendo that a single common policy does exit between the NJIARA and Act 111, as a matter of law that is not enough to support the Trial Court's decision, particulary where the laws express numerous other dramatically different policy choices, the language of these complex statutory schemes are dramatically different, it would violate many specific terms of the DRPA's Federal Compact and it violates the doctrine of Separation of Powers contained in the New Jersey Constitution. The Trial Court did not apply the correct legal standard.**[3]

1. The Trial Court Ignored The Dramatically Different Policy Choices Expressed In The NJIARA And Act 111.

In relying only on **a single** similarity in policy as the keystone of its decision, the Trial Court failed to properly apply and analyze the numerous other dramatic differences in policy between Act 111 and the NJIARA. These significant policy differences appear on the face of the statutes and are confirmed and described in detail in an expert report of record in the Trial Court

[3] *Ballinger v. DRPA/Ruggiero v. DRPA*, 311 N.J. Super. 317, 1998 WL 226313, (App. Div. 1998)(single policy in common preventing employer retaliation for whistleblowing was not enough to apply laws to DRPA); *Eastern Paralyzed Veterans*, 111 N.J. 389, 545 A.2d 127 (1988) (single policy in common to protect employees from discrimination and/or single policy providing for safety in Construction Codes were not enough to apply laws to DRPA); *Nardi v. Delaware River Port Authority*, 88 Pa. Commw. 558, 490 A.2d 949 (1985) (single policy in common to provide employees disability benefits is not enough to apply laws to DRPA); *Clark v. DRPA* (D.N.J. Civil Action No. 93-5162, 1996) (Db, Exhibit "B") & *Eick v. DRPA* (D.N.J. Civil Action No. 91-2707, 1992)(Db, Exhibit "C") (single policy in common to protect employees from discrimination is not enough to apply laws to DRPA). Further, none of these courts constructed a common law to meet claims based on a single common policy.

by Professor David Weinstein. (Da420-434) (See argument at Db59-62).[4] As discussed in detail in the DRPA's Initial Brief pp. 59-62, Professor Weinstein concluded that Act 111 and the NJIARA are "neither complementary, parallel nor similar," and "that there is no rational basis for constructing an arbitration system which would effectuate the **disparate policies** of the two states." (Da422, Da433).

> Pennsylvania adopted a system which evidenced little concern with either promoting collective bargaining to resolve police contract formation disputes or controlling the arbitration process to protect the public interest. New Jersey, by way of contrast, designed a system both to promote collective bargaining as the preferred method for resolving such disputes and to control tightly the arbitration process in the public interest. ***As a result, the two states have pursued incompatible objectives through incompatible means. In terms germane to this matter, the statutory schemes for police bargaining and arbitration are substantially dissimilar and neither complementary nor parallel.***

(Da423) (emphasis added).

Professor Weinstein contrasts the "highly structured and administratively controlled arbitration system" in New Jersey "where the emphasis is on achieving a correct result" with a system in Pennsylvania that is "virtually unregulated . . . [and] where the emphasis is on finality." (Da431)(Db59-62). Unlike Act 111 which is concerned only with finality between the parties, the New Jersey Legislature, through the 1996 amendments to the New Jersey Police and Fire **Public Interest** Arbitration Act, has expressed a clear policy decision to provide "stringent safeguards" to ensure protection of the "public interest" and "the interest and welfare of the tax

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[4]The DRPA does not admit that expert opinions should be permitted in this case. But if they are, Professor Weinstein's report is of record. (Da420-434). The DRPA sought a ruling from the Trial Court on the admissibility of expert testimony which was not forthcoming until after the Court ruled on the merits in which it relied on Plaintiffs' so-called expert.

paying public." N.J. Stat. Ann. § 34:13A-14(b) & (c) (Da428-429)(Db59-62). On the other hand, the Pennsylvania General Assembly has never articulated a similar public policy and, indeed, has elevated the policy of finality over protecting its taxpayers or the public interest. (Da429)(Db59-62). These, and other, dramatic differences in public policy were completely ignored by the Trial Court in rendering its decision, and were never countered by Plaintiffs.

2. Reference Material Cited By Plaintiffs' Further Supports The Proposition That Act 111 And The NJIARA Are Materially Different In Policy And Practice.

Although most of the reference materials cited by Plaintiffs in their Brief are either irrelevant, or are out-dated,[5] the article by Scott E. Buchheit, "Interest Arbitration", *Arbitration 1990-New Perspectives on Old Issues, In Proceedings of the Forty-Third Annual Meeting of the National Academy of Arbitrators*, 171 (BNA: Washington D.C. 1991) **supports the proposition that the policies behind Act 111 and the NJIARA are substantially different.** Arbitrator Buchheit opines that New Jersey's policy decision to heavily involve an administrative agency, the New Jersey Public Employment Relations Commission ("PERC"), as part of the interest arbitration process under the NJIARA is essential for proper coordination and operation of the process. Pennsylvania has no such administrative agency involvement under Act 111.

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[5]Gregory Dell'Omo, "Wage Disputes In Interest Arbitration: Arbitrators Weigh the Criteria," 44 Arbitration Journal 4 (June 1989) **(reporting results of interviews with Wisconsin Interest Arbitrators)**; Homer C. La Rue, "An Historical Overview of Interest Arbitration in the United States," 42 Arbitration Journal 13 (December 1987)(general overview of Interest Arbitration that **does not discuss New Jersey at all, and devotes a total of only nine (9) lines to a single 1969 Pennsylvania Court decision**; Richard A. Lester, Labor Arbitration in State and Local Government (Princeton University, **1984)(published 12 years before the amendments to the NJIARA)**; J. Joseph Lowenberg, "The Pennsylvania Arbitration Experience," (Lexington, Mass: Lexington Books, **1975)(Published prior to the passage of the NJIARA in 1977, and published 23 years ago).**

Specifically, Arbitrator Buchheit states:

> **Involvement of the administrative agency or lack thereof is a very significant issue to the practicing interest arbitrator.** For example, there is a ***sharp contrast between Pennsylvania and New Jersey.*** In Pennsylvania there is no agency to provide coordination of the process or give feedback to the arbitrators. In New Jersey there is. Advantage — New Jersey. When I practice as an interest arbitrator in New Jersey, I am aware through PERC of what is expected of me with regard to the process. The parties understand how PERC wants interest arbitrators to conduct the process, and they are not inclined to pressure the arbitrator to operate in a contrary fashion. **This creates a better climate for the interest arbitrator in New Jersey than in Pennsylvania. There are problems in a system where arbitrators do not get information as to what is occurring throughout the state.** In New Jersey PERC provides arbitrators with data on other settlements and awards. In Pennsylvania there is no system for getting such information to arbitrators.

Id. at 175 (emphasis added).

With regard to the expectations of the parties and participating arbitrator under the NJIARA, Arbitrator Buchheit finds them to be **completely different in practice** from the expectations under Act 111 stating:

> Concerning actual practice in Pennsylvania, the parties have very little, if any, expectations of mediation prior to or during the course of the arbitration hearing. Rather, their expectation is that the arbitrator conduct a hearing and then close the record. There is very little feedback between the parties and the arbitrator during the course of the hearing.

Id. at 172-173. Buchheit finds the New Jersey experience to be very different.

> As to expectations in New Jersey, **the experience is quite different from that in Pennsylvania.** The parties and PERC expect the arbitrator to engage in frequent, continuous, and persistent mediation during the arbitration hearing. Extensive feedback takes place between the arbitrator and the parties. Arbitrators are generally not shy in sharing with parties a belief.

Id. at 173 (emphasis added).[6] Thus, even the materials relied on by Plaintiffs support the DRPA's position and Weinstein's conclusions that there are significant policy differences between the NJIARA and Act 111.

3. Plaintiffs Failed To Address The Uncontradicted Legal Authority That Neither Act 111 Nor The NJIARA Were Ever Intended To Apply To The DRPA.

For a statute to apply to the DRPA, New Jersey's jurisprudence of bi-state entities requires that there be a showing of "intent" of the legislatures to have it do so.[7] Plaintiffs have not, nor could they, address this very important requirement. **On the face of each statute, neither Act 111 nor the NJIARA was ever intended by the legislatures of each State to apply to the DRPA.** The DRPA cannot be covered by Act 111 as that statute has been interpreted by the Pennsylvania Supreme Court in *Philadelphia Housing Auth. v. PLRB*, 508 Pa. 576, 499 A.2d 294 (1985), because it is neither the "Commonwealth of Pennsylvania" nor a "political subdivision of the Commonwealth of Pennsylvania." *Id.* (Db42-43). Therefore, Act 111 cannot be applied to the DRPA.

Additionally, the plain language of the 1977 NJIARA and its 1996 amendments reveal

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[6]This article cited and relied on by Plaintiffs was published six (6) years prior to the 1996 amendments to the NJIARA. In addition to a review of the NJIARA and Act 111, Arbitrator Buchheit's overall analysis included a discussion of Delaware's police and fire interest arbitration law and the process under the private contractual agreement between Major League Baseball and the Player's Association.

[7]*Eastern Paralyzed Veterans Ass'n v. City of Camden*, 111 N.J. 389, 402, 545 A.2d 127 (1988); *Ballinger v. DRPA/Ruggiero v. DRPA*, 311 N.J. Super. 317, 1998 WL 226313, (App. Div. 1998); *International Union of Op. Engineers, Local 68 v. The Delaware River and Bay Authority*, 147 N.J. 443, 445, 688 A.2d 569, 575 (1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 165, 139 L.Ed.2d 108 (1997) ("DRBA").

no intent to include the DRPA police officers in the NJIARA's coverage. In fact, an intent to **exclude** them is evident. In fashioning the NJIARA the New Jersey legislature made a conscious decision to specifically include police officers of **only one** bi-state Congressionally approved interstate Compact between New Jersey and New York known as the Palisades Interstate Park Commission ("PIPC").[8] The PIPC was specifically included in the NJIARA's definition of "Public Police Department." N.J. Stat. Ann. § 34:13A-15. The DRPA was not included.

As a matter of law, these authorities are conclusive that there was **never any intent expressed by the legislatures of either New Jersey or Pennsylvania to apply either the NJIARA or Act 111 to the DRPA.** A finding of this intent is critical. In this Court's recent decision in *Ballinger v. DRPA/Ruggiero v. DRPA*, 311 N.J. Super. 317, 1998 WL 226313, (App. Div. 1998), the Court once again confirmed the jurisprudence of bi-state entities -- that there must be a showing of agreement by both state legislatures that the laws are "intended" to apply to the DRPA. *Id.* at *3; *see also, Eastern Paralyzed Veterans Ass'n v. City of Camden,* 111 N.J. 389, 402, 545 A.2d 127 (1988). In rejecting the applicability of New Jersey's and Pennsylvania's whistleblower laws to the DRPA, the Appellate Division in *Ballinger/Ruggiero* determined that it "is not clear that either state's legislature intended to confer this benefit upon DRPA employees." *Id.* at *5. The Court further noted, there is no evidence showing a concurrence between New Jersey and Pennsylvania that CEPA applies to the DRPA. *Id.* at *6.

Simply, there is no evidence or showing in the record below of any "intent" on the part of the New Jersey and Pennsylvania legislatures to apply binding interest arbitration to the DRPA.

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[8]See, N.J. Stat. Ann. § 32:14-1.1, et seq.. The Palisades Interstate Park Commission Compact received Congressional consent on June 2, 1937. See, N.J. Stat. Ann. § 32:17-1, et seq.

Just the opposite. Based on the statutory language and legal authority interpreting that language, the DRPA is **excluded** from the definitions of covered entities.

B. Plaintiffs Fail To Properly Analyze And Apply This Court's Most Recent Authority Of Bi-State Jurisprudence: Ballinger and Ruggiero v. DRPA

Plaintiffs brush aside this Court's recent decision in *Ballinger v. DRPA/Ruggiero v. DRPA*, 311 N.J. Super. 317, 1998 WL 226313, (App. Div. 1998) by asserting that *Ballinger/Ruggiero* is distinguishable from the case at bar because the primary issue was whether the laws of Pennsylvania and New Jersey were complementary and parallel so that "one state's statutory enactment, . . . should be applied unilaterally to a bi-state entity." (Pb55). Respectfully, however, the *Ballinger/Ruggiero* analysis is precisely the type of analysis that must be undertaken by the Court in this case (i.e., whether the Trial Court erred in determining that the interest arbitration laws of New Jersey and Pennsylvania are "complementary and parallel"). The Trial Court's conclusion that the interest arbitration laws of Pennsylvania and New Jersey are substantially similar and therefore, "complementary and parallel," was the basis for its Order that it "can and will" order binding interest arbitration.

Ballinger/Ruggiero is directly relevant to this matter and provides this Court with a summary of bi-state jurisprudence articulating standards that have developed with regard to "complementary and parallel" legislation and bi-state entities.[9] In *Ballinger/Ruggiero*, this Court

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[9]Plaintiffs rely on the 37 year old decision of *State v. Murphy*, 36 N.J. 172 (1961) for the proposition that "the DRPA 'is subject to all of [PA and NJ] laws, whether of statutory or common law origin, except insofar as the states agreed expressly or by fair implication to place it beyond them.'" *Id.* At 186. Even Plaintiffs recognize and admit that this language in *Murphy* has been completely abandoned by all New Jersey Courts, including the New Jersey Supreme, and that the exact opposite standard has been applied. *See, e.g., Union of Op. Engineers, Local 68 v. The Delaware River and Bay Authority*, 147 N.J. 443, 688 A.2d 569 (1997), *cert. denied*, ___

rejected Plaintiffs' claims that the whistleblower statutes in Pennsylvania and New Jersey were "substantially similar" because the **general policy** behind each statute was "to prohibit employees from being discharged for whistleblowing; the intent of both laws is to confer a benefit on public employees; and the remedies available are similar." 1998 WL 226313 at *5 (N.J. Super. App. Div. 1998). The *Ballinger/Ruggiero* Court recognized that this did not satisfy the requirements of *DRBA* and its predecessors, and as a result, conducted a **"painstaking comparison" of the language of the two statutes.** *Id.* at *5-7. Based on its "painstaking comparison" of the statutory language the Court concluded that there were significant differences in language between the two (2) Whistleblower statutes with regard to their limitations periods, scope and recovery of punitive damages, and therefore, found that the statutes were not "substantially similar", and not applicable to the DRPA. *Id.* With regard to the common law claims asserted, the Court further stated: "**[n]aturally, *a painstaking comparison of the common law of New Jersey and Pennsylvania, like the one we engaged in as to CEPA and the Whistleblower Law*,** will have to be undertaken if DRPA contends that it is immune from such claims." *Id* at *7.

The Trial Court in this case completely failed to conduct the **"painstaking comparison"** of Act 111 and the NJIARA as this Court did with the Whistleblower laws in *Ballinger/Ruggiero*. All it did was find that **a single policy** of both states was substantially similar, and on that basis alone, imposed binding interest arbitration on the DRPA. As presented

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U.S. ___, 118 S.Ct. 165, 139 L.Ed.2d 108 (1997); *Eastern Paralyzed Veterans*, 111 N.J. 389, 545 A.2d 127 (1988); *Ballinger v. DRPA/Ruggiero v. DRPA*, 311 N.J. Super. 317, 1998 WL 226313, (App. Div. 1998).

in the DRPA's Motion for Summary Judgment below and in response to Plaintiffs' Motion below, a "painstaking comparison"of the NJIARA and Act 111 unquestionably reveals there are many more significant differences in the laws than were even present in *Ballinger/Ruggiero*.

The Trial Court concluded that there were significant differences between Act 111 and the NJIARA, but chose to ignore those differences, and the policies they express, and simply relied on the fact that both states do require binding interest arbitration. **In doing so, the Trial Court disregarded the complex statutory schemes and procedures of which binding interest arbitration is but one element.** This Court cannot permit the Trial Court's holding to stand where it was based solely on a finding of **a single** similar policy in the context of many different polices and statutory provisions.

Plaintiffs' Brief concedes that *Ballinger/Ruggiero* correctly sets out bi-state jurisprudence: "to the extent that [the *Ballinger/Ruggiero*] Court discussed the theory of parallel legislation . . . it rightly discerned a key difference in the two states' statutory systems." (Pb55). Further, virtually all of the cases cited by Plaintiffs in their 15 page discussion of the history of the application of "complementary and parallel" legislation to the bi-state entities were cited and properly applied by the Appellate Division in *Ballinger/Ruggiero*. The Appellate Division's analysis in *Ballinger/Ruggiero* is the most recent expression of bi-state jurisprudence and should be followed.[10]

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[10]Presiding Judge Long, who authored the opinion in *Ballinger/Ruggiero* also participated in the Appellate Division's prior *per curiam* decision in *International Union of Op. Engineers, Local 68 v. The Delaware River and Bay Authority*, A-2228-93T1, (App. Div. 1995), *affirmed*, 147 N.J. 443, 688 A.2d 569 (1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 165, 139 L.Ed.2d 108 (1997) (Pb, exhibit "A").

C. The NJIARA And Act 111 Are Very Different In Both Language And Policy.

Plaintiffs erroneously assert that the "key features" of Act 111 and the NJIARA are substantially similar, or that the **admitted** differences are not relevant. Plaintiffs wholly ignore the extremely complicated and dramatically different language and designs of the NJIARA and Act 111 which express vastly different policy choices made by each state.

First, Plaintiffs erroneously assert that interest arbitrators in New Jersey and Pennsylvania have "identical authority" with regard to conduct of hearings and deciding cases. (Pb44). To the contrary, interest arbitrators in New Jersey have dramatically different authority, duties and obligations with regard to deciding cases. In the NJIARA, the New Jersey legislature statutorily provides parties with the **choice of six different terminal procedures** which may be utilized by an arbitrator. N.J. Stat. Ann. § 34:13A-16(c)(1) - (6). (Db51-52). However, **only** conventional arbitration may be utilized under Act 111. By providing the parties with the ability to select from six (6) statutory terminal procedures, the New Jersey legislature has clearly expressed an important policy decision different from Pennsylvania's.

In addition, in New Jersey, unlike Pennsylvania, a PERC qualified special panel interest arbitrator[11] ***is required by law to consider*** **eight (8) detailed statutory factors** in making a determination and fashioning an award, **and is required in his/her award** ***"to indicate which of the factors are deemed relevant, satisfactorily explain why the others are not relevant, and***

[11]Plaintiffs brush aside the importance of the special panel of arbitrators maintained by PERC. (See argument at Db52-54). These 22 specially selected and trained arbitrators represent a clear policy choice made by New Jersey to assure that highly skilled and qualified arbitrators decide important matters of "public interest and welfare." Pennsylvania has no qualifications for an Act 111 arbitrator.

provide an analysis of the evidence on each relevant factor." N.J. Stat. Ann. § 34:13A-16(g)(1)-(8). (See argument at Db54-56). These decisional **requirements** were implemented as part of the 1996 amendments to the NJIARA, and serve to effectuate New Jersey's policy to safeguard to public interest and welfare. **Act 111 contains no such statutory requirement that a Pennsylvania interest arbitrator consider any specific criteria, or address any specific criteria in his/her award.**[12]

In a desperate attempt to reconstruct reality, Plaintiffs suggest that Pennsylvania does provide "significant statutory constraints" on Act 111 awards through the Pennsylvania Intergovernmental Cooperation Authority Act for Cities of the First Class, 53 P.S. § 12720.209(k) ("PICA Act") and the Municipal Financial Recovery Act, 53 P.S. §§ 11701.101, et. seq. ("Act 47"). Even a cursory review of these statutes demonstrate Plaintiffs' argument is simply wrong. The PICA Act is an extremely narrow Act that only applies to one city in Pennsylvania -- the City of Philadelphia.[13] Thus, the PICA Act is not, for purposes of bi-state jurisprudence, an Act of the Commonwealth of Pennsylvania, and does not begin to consider or compel addressing any of the factors that must be addressed by an interest arbitrator under the NJIARA scheme. Similarly, Act 47 is an extremely narrow law only applying to municipalities that are determined by the Commonwealth of Pennsylvania Department of Community Affairs as being "financially distressed." Act 47 does not provide any tangible restrictions on an Act 111

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[12]Plaintiffs cite to three publications to argue that the statutory criteria are not important. (Pb46-47). Each of these publications is completely irrelevant to this analysis as they were written long before the 1996 Amendments to the NJIARA which now **statutorily require** arbitrators to address each of the eight (8) statutory factors in their written award.

[13]The City of Philadelphia is the only "City of the First Class" in Pennsylvania.

interest arbitrator as it only applies in very narrow circumstances. Plaintiffs misguided reliance on these limited acts confirms the differences in language and policy between Act 111 and the NJIARA.

Plaintiffs next erroneously assert that the Courts of New Jersey and Pennsylvania limit the authority of interest arbitrators in a "strikingly similar fashion." (Pb47). This completely mischaracterizes the appeals procedures. The NJIARA specifically provides for a **statutory right of appeal** of the decision and award of the arbitrator **to New Jersey's expert administrative agency PERC if the arbitrator**: (1) ***fails to apply the statutory criteria*** contained in N.J. Stat. Ann. § 34:13A-16(g)(1)-(8), or (2) violated the standards set forth in N.J. Stat. Ann. §§ 2A:24-8 or 9. *See* N.J. Stat. Ann. § 34:13A-16(f)(5)(a). PERC decides whether to affirm, modify, correct or vacate the arbitrator's award and in its sole discretion, may even remand the award to the same arbitrator, or another arbitrator, for reconsideration. *Id.* PERC's decision may be appealed to this Court if a party believes that it has been aggrieved. *Id.* Plaintiffs attempt to down play PERC's involvement by suggesting that "it is of no material moment that New Jersey contains a layer of administrative involvement prior to submission of an appeal to the courts." (Pb54). Not only is PERC's involvement an extremely important procedural component to the NJIARA, but it expresses an important policy decision made by New Jersey legislature to have its expert administrative agency try to resolve matters prior to judicial review.

On the other hand, Act 111 specifically states that "***[n]o appeal [from the arbitrators' determination] shall be allowed to any court.***" 43 Pa. Stat. Ann. § 217.7(a)(emphasis added). **There is no statutory right to appeal the decision of an Act 111 arbitration panel, nor is**

there any administrative agency involved under Act 111. Parties do have a very limited right of judicial review of an interest arbitration award, but this right is markedly different from that under the NJIARA. (See Db57). Unlike Pennsylvania, the New Jersey legislature made a conscious policy decision to provide for specific relief through an expert administrative agency, and then to this Court, where an arbitrator fails to follow or properly address the eight (8) specific statutory criteria.

Plaintiffs next argue that this Court should ignore the "precise verbiage" of the laws. (Pb49). Ignoring the language of these statutes is only way that Plaintiffs can avoid the fact that the NJIARA specifically provides for Mediation and Fact-finding, while Act 111 does not. Plaintiffs admit that these dispute resolution processes **do not** exist as part of Act 111, but argue that there existence in the NJIARA is not relevant because they are not utilized. The frequency of use is not the issue in this case. What is relevant and important is that by including Mediation and Fact-finding as options under the NJIARA the New Jersey legislature has expressed a clear policy choice, vastly different from Act 111, favoring voluntary dispute resolution by the parties -- giving them the option.

Plaintiffs next assert that there is "virtually" no difference in scope of issues that are non-arbitrable in New Jersey as compared to Pennsylvania. (Pb51-52). Plaintiffs, however, ignore the most significant example of this difference in scope of arbitrability — subcontracting. Subcontracting, by Plaintiffs own admission, was a contested issue during negotiations. (Pb7). **Under Act 111, subcontracting issues are arbitrable, while under the NJIARA, subcontracting is a managerial prerogative and not subject to arbitration.** *State of New Jersey*, 88 N.J. 393, 443 A.2d 187 (1992). This is a significant difference in policy that is

directly relevant to the facts of this case.

Finally, Plaintiffs ignore the significance of the NJIARA's "differing time limits and number of bargaining sessions necessary to reach impasse [as] both immaterial statutory minutia and, in the context of this case, clearly irrelevant." (Pb54). However, these so-called "immaterial" provisions of the NJIARA again demonstrate that New Jersey has made a policy decision to emphasis collective bargaining and dispute resolution through negotiations. As discussed above, and in the DRPA's Initial Brief (Db59-62), Act 111 is intended to provide finality. Contrary to Plaintiffs' position, the differing time limits and number of bargaining sessions under the NJIARA expresses a vastly different policy choice than Act 111.

These differences were not addressed and analyzed by the Trial Court and, therefore, as a matter of law, the decision of the Trial Court must be reversed.

D. The *DRBA* Decision Is Distinguishable From The Case At Bar.

Plaintiffs rely almost exclusively on the New Jersey Supreme Court's decision in *DRBA*, 147 N.J. 443, 688 A.2d 569 (1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 165, 139 L.Ed.2d 108 (1997) ("*DRBA*"). The *DRBA* decision, most recently interpreted and applied in *Ballinger/Ruggiero*, is on its facts entirely distinguishable from the case at bar.[14]

1. The Context Of The *DRBA* Case Is Different

Plaintiffs assert that the New Jersey Supreme Court decision in *DRBA*, "arose in a factual context close to the case at hand." (Pb27). Contrary to Plaintiffs' assertion, the only similarity

[14]The *DRBA* case required an analysis of Delaware law and New Jersey law. This case involves a completely different bi-state Compact between Pennsylvania and New Jersey which requires a "painstaking comparison" of Pennsylvania law and New Jersey law.

between the *DRBA* case and this case is that both deal with a labor issue affecting employees of a bi-state entity. That is where the similarities end.

The sole issue presented and resolved in the *DRBA* case was whether **non-police** employees of the Delaware River and Bay Authority ("Bay Authority"), a bi-state entity between **Delaware** and New Jersey, had the right under those states' laws to designate a representative, and through that representative, engage in collective negotiations. *Id.* The New Jersey Supreme Court in *DRBA* found **only** that the Bay Authority employees should have the right to engage in collective negotiation with their employer because the laws of New Jersey and **Delaware** were complementary and parallel. *Id.* at 446-448, 688 A.2d at 575-576.

The issue in this case is not the **basic** right of employees of a bi-state entity to designate a representative and engage in collective negotiations, but whether **police officers** can bi-pass specific Federal Compact requirements, the Governor's veto power, and the dramatic differences in statutory policies and language, and have a Court impose binding interest arbitration on the DRPA, a bi-state entity between **Pennsylvania** and New Jersey.[15] This case requires, at the very least, a **"painstaking comparison"** of two (2) dramatically different, highly complex and intricate State statutory schemes -- the NJIARA and Act 111. In *DRBA* the issue was well defined and limited. It is a far different and more intrusive to **impose** the will of a third party arbitrator to set wages and terms and conditions of employment for DRPA police officers, **where the laws are so dramatically different in language and policy, there is no demonstrated**

[15]Consistent with its Compact scheme, more than twenty-two (22) years ago the DRPA voluntarily agreed to recognize the Fraternal Order of Police, Penn-Jersey Lodge 30 ("FOP Lodge 30"), as the representative of certain of its employees, and engage in negotiations.

intent of the legislatures to apply such laws to the DRPA, it violates specific provisions of the DRPA Compact, and it violates the doctrine of Separation of Powers of the New Jersey Constitution.

2. The Relief Ordered By The Trial Court In This Case Is Dramatically Different And Far More Intrusive On The Creator States And On The Bi-State Entity Than The Relief In The *DRBA* Case

The relief ordered in the *DRBA* case is dramatically different from the case at bar. The *DRBA* case arose out of the Bay Authority's refusal to recognize a union as the representative of its employees. On remand from the New Jersey Supreme Court the Chancery Division issued a Case Management Order indicating that the parties consented to the appointment of a Special Master:

> to administer all matters that arise with respect to plaintiffs'/respondents' petition seeking an election for union representation of employees of the Delaware River Bay Authority and will make such recommendations to the Court as necessary to effectuate the decision of the Supreme Court of New Jersey.

(Pb, Exhibit "B"). In essence, the parties consented that the Special Master would only be empowered to **oversee a representation election conducted by the parties**, and make recommendations to the Court. (Pb, Exhibit "B"). Thus, the relief in *DRBA* did not infringe upon the Bay Authority's right to operate, set wages and working conditions for its employees or set its own labor policies. Even if the union in *DRBA* were to win the representation election the Bay Authority would only be required to negotiate with the union. **No terms and conditions of a contract will be imposed on the Bay Authority by a third party arbitrator.**

The Trial Court in this case erroneously ordered extraordinary relief illegally removing from the DRPA its Federal right to control its operations, set wages and working conditions for

its employees and establish its own labor policy. If the parties do not reach an agreement, the Trial Court has ordered that a third party will be given **binding** authority to decide issues relating to terms and conditions of employment, including wages, for DRPA police officers. Furthermore, the Trial Court has illegally and unconstitutionally nullified the Governor of New Jersey's supervisory veto power over actions of the DRPA. By contrast with the Order in the *DRBA* case -- simply requiring a vote amongst employees -- the Trial Court has in essence held that it will ignore the dramatically different policies and statutory language contained in Act 111 and NJIARA, pick and chose amongst the differing policies and language, construct some kind of interest arbitration system to cover DRPA police officers, and nullify the language of the Compact. This is the equivalent of legislation by the Trial Court in violation of the doctrine of Separation of Powers. The Order in this case goes way beyond the *DRBA* decision and is entirely distinguishable on its facts from the *DRBA* decision.

E. **The Trial Court Did Not Find The *Bunk* Decision Controlled This Case.**

Contrary to the assertion on page 26 of Plaintiffs' Brief, the Trial Court never found that the New Jersey Supreme Court decision in *Bunk v. Port Authority of New York and New Jersey*, 144 N.J. 176, 676 A.2d 118 (N.J. 1996), was controlling, nor that *Bunk* mandated "that the p rties to this litigation submit their contract dispute to a neutral impasse resolution procedure." (Pb26-27). No where in the transcripts of the decisions of the Trial Court will this Court find any reference to *Bunk* for this proposition. Plaintiffs may have referenced *Bunk*, but there is no evidence that the Court found it controlling or in any way relied on it.

In any event, reliance on *Bunk* is erroneous. In *Bunk* the bi-state entity had previously **consented** to application of the underlying statute at issue. In *Bunk* the New Jersey Supreme

Court held that an employee of the bi-state Port Authority of New York and New Jersey ("PANY&NJ"), was entitled to receive workers compensation benefits on the same terms and limitations as would other public employees in New Jersey even though New York had a more restrictive statute. *Id.* A major distinction between ***Bunk*** and the instant case is that the PANY&NJ had **already expressly agreed to provide the benefits at issue in the suit.**[16] The New Jersey Supreme Court noted:

> New York could not compel the Port Authority to provide a pension for its employees. Indeed, it probably could not compel the Port Authority to provide workers' compensation benefits. ***The Port Authority, however, has agreed to provide these benefits and it has permitted its employees, to some extent, to pick and choose among those benefits.*** The question in this case is whether the provisions in each state for picking and choosing the benefits are parallel and complementary.

Id at 185, 676 A.2d at 122. (emphasis added). The issue in ***Bunk*** was not whether the laws were applicable to the PANY&NJ, but how its employees could "pick and choose" between the differing state benefits schemes. The instant case is completely different in that the ***DRPA has never agreed or consented to the application of any part of either Act 111 nor the NJIARA.*** If the Trial Court did rely on ***Bunk***, it was in error.

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[16]Similar to ***Bunk***, Plaintiffs reliance on ***Textar Painting Corp. v. DRPA***, 296 N.J. Super. 251, 686 A.2d 795 (Law Div. 1996) is equally misplaced. Plaintiffs' erroneously assert that the Court in ***Textar*** held that the DRPA must engage in public bidding for contract purposes because there is a similar policy in both states to award public contracts through open bidding. (Pb56). Plaintiffs reading of this decision is flawed. The Court in ***Textar*** never ruled that the DRPA was required to engage in open bidding because of a similarity of policy. In ***Textar***, the DRPA had, similar to ***Bunk***, already voluntarily agreed to utilize the process of public bidding for a painting contract. ***Textar***, 296 N.J. Super. at 256, 686 A.2d at 798. At issue was simply whether it was "arbitrary or unreasonable" for the DRPA to require certain certifications from contractors bidding through the public bidding process. *Id.*

F. The Trial Court's Orders Have Already Violated The Doctrine Of Separation Of Powers.

Plaintiffs' erroneously assert that this Court should ignore the separation of powers arguments raised by both the DRPA and the Attorney General because they are "decidedly conjectural and hypothetical." Pb61. Contrary to Plaintiffs' assertion, the Trial Court's violation of the Doctrine of Separation of Powers has already occurred. This fact is evidenced by the State of New Jersey's interest and involvement in this case *Amicus Curiae*.

As discussed in detail in the DRPA's Initial Brief at pages 11, 12, 27, 28, 32 & 33, and in the State of New Jersey's *Amicus Curiae* Brief at pages 3, 4, 36-38, all which are incorporated herein by reference, the Trial Court's Orders have **already** stripped the Governor of New Jersey of the power to oversee, supervise and exercise final discretion over such actions taken by the DRPA. Despite the fact that the Governor had exercised her Federal right in September of 1996, and approved of the wages and terms and conditions of employment imposed on Plaintiffs by the DRPA Board of Commissioners, the Trial Court interfered with that decision by ordering the parties to return to negotiations and reach an agreement that was satisfactory to the Plaintiffs, or it "will" order binding interest arbitration. This action by the Trial Court directly countermands the Federal right exercised by the Governor not to veto the DRPA's action with regard to terms and conditions of employment, including wages, for certain of its police officers. As expressed in the Attorney General's *Amicus* Brief:

> The court order for compulsory binding arbitration, without legislative authority, places the ability to nullify the Governor's decision in the hands of an arbitrator who is neither elected nor appointed by a government body with no standards to decide the disputed issues. The trial court order is an unconstitutional intrusion on the Governor's executive power. (*Amicus Brief, p. 37).*

More significantly, the **Court has already ruled, as a matter of law,** that it has the authority to order Plaintiffs and the DRPA to engage in binding interest arbitration. (Da3-4). This decision by the Trial Court illegally and unconstitutionally places ultimate decision making authority on certain DRPA affairs in the hands of a third party arbitrator, thereby stripping the Governor of her exclusive right and ability to exercise discretion over all actions taken by the DRPA's Board of Commissioners. N.J. Stat. Ann. §§ 32:3-4a-4c. Contrary to Plaintiffs' assertion, the Separation of Powers arguments asserted by Defendant DRPA and Amicus Curiae State of New Jersey are a reality, based purely in fact.

G. The Commonwealth Of Pennsylvania And The State Of New Jersey Have Always Acted Through Specific Identical Legislation With Respect To DRPA Police Officers.

History conclusively demonstrates that when Pennsylvania and New Jersey decide to affect the authority, duties and rights of DRPA police officers, they do so with **specific, virtually identical, bi-state legislative action**. The first example of such specific, identical, bi-state legislative action occurred in 1957 when Pennsylvania and New Jersey each enacted separate, but **identical** legislation which expressly authorized the DRPA to establish and maintain an independent police force. *See*, N.J. Stat. Ann. § 32:4-6 and Pa. Stat. Ann. § 3504.1. The States required specific legislation to create the DRPA police force despite the fact that both states already had laws regarding creation and maintenance of police forces.

The second and most recent example of the requirement for **specific, virtually identical** bi-state legislative action regarding DRPA police is the statutory scheme which currently governs the power, authority and training requirements of the DRPA's police officers. N.J. Stat. Ann. § 32:4-6, *et seq.*, 36 Pa. Stat. § 3504.1 *et seq.* In 1986, the New Jersey legislature enacted

legislation enhancing the DRPA Police Powers. N.J. Stat. Ann. § 32:4-6, *et seq.* ("Police Powers"). This legislation was intended to provided DRPA police officers with certain specific authority to arrest for offenses committed on property owned or operated by the DRPA and its subsidiaries, and provided them with all powers and immunities of police officers or municipal police officers in enforcing the law -- "including the right to carry firearms on duty," -- provided the officers held the necessary qualifications. N.J. Stat. Ann. § 32:4-6. The 1986 New Jersey amendment would have also permitted DRPA officers to legally carry a firearm away from DRPA property and expanded training and qualifications requirements for DRPA officers. N.J. Stat. Ann. § 32:4-6.1. Consistent with the bi-state status of the DRPA, **none of New Jersey's 1986 Police Powers Amendments could take legal effect until Pennsylvania adopted "legislation having a substantially similar effect as [New Jersey's] act . . ."** N.J. Stat. Ann. § 32:4-9.

Eight (8) years later, in 1994, the **Pennsylvania legislature finally passed almost identical legislation effectuating the Police Powers legislation passed in New Jersey in 1986.** 36 Pa. Stat. Ann. §§ 3504.1, 3504.1a. Although New Jersey sought to give DRPA police officers certain Police Powers in 1986, it was not until 1994 that DRPA police officers gained the legal authority to carry a firearm while off DRPA property. It took **specific, virtually identical** legislation passed in each state to change the authority, duties and rights of DRPA police officers. This was so despite the fact that, for example, all other police officers in Pennsylvania and New Jersey had the statutorily qualified right to carry a fire-arm.

Plaintiffs erroneously suggest that the above described "Police Powers" legislation, which provides DRPA police officers with "powers . . . and all immunities" of police officers in New Jersey and Pennsylvania, grants Plaintiffs the right to interest arbitration. (Pb60). This assertion

is ludicrous. The "powers" granted to DRPA police officers under this legislation relate only to "police powers" such as carrying a gun, making arrests away from DRPA property and enforcing the laws of New Jersey and Pennsylvania. Interest arbitration is not a "power" of a police officer. In the same vein, the "immunities" described in this legislation relates to immunities from prosecution for performing duties and a shield from certain types of lawsuits. Interest arbitration is not an "immunity" of police officers. This legislation does not in any way provide DRPA police officers with any right to interest arbitration.

The legislation does confirm that when DRPA police are to be affected, each state enacts specific and identical laws.

H. There Is No Common Law Of Interest Arbitration In Either Creator State And Interest Arbitration Can Only Be Imposed By Statute.

There is **no** interest arbitration for police officers under the common law of either Pennsylvania or New Jersey. Interest arbitration for police officers in Pennsylvania and New Jersey exists only in accordance with, and as only one element of, the complex, dramatically different, statutory schemes existing in each state, and only for parties specifically covered by those statutes. Interest arbitration required the enactment of specific authorizing statutes because there is no common law interest arbitration at all.

Neither Act 111 nor the NJIARA, on their face, apply to, or were ever intended to apply to, the DRPA. What the Trial Court did is tantamount to legislating a right to interest arbitration. Legislating must be left to the legislatures.

IV. CONCLUSION

This Court is now presented with the issue of whether a New Jersey Trial Court's conclusion of law that **a single policy** in common is enough to **impose** substantial obligations

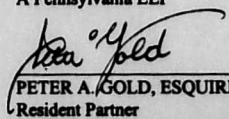
and duties on a bi-state entity where, as here:

- the relevant laws of each creator state, on their face, do not evidence an "intent" to include the DRPA from coverage;
- there are numerous and material differences in policy and language between the Pennsylvania and New Jersey police interest arbitration laws;
- the remedy imposed, binding interest arbitration, is contrary to the language of the DRPA's Federal Compact;
- the remedy imposed, binding interest arbitration, defeats the Governor's Veto unconstitutionally violating the doctrine of Separation of Powers;
- the States historically have changed the duties, authority, obligations and rights of DRPA police officers only through near identical legislation specifically intended to apply to DRPA police officers; and
- there is no common law binding interest arbitration for police officers.

For the foregoing reasons, and the reasons stated in the DRPA's Initial Brief, Appellant/Defendant Delaware River Port Authority, respectfully requests that this Court **REVERSE** the Trial Court's November 21, 1997 Judgment Order, December 19, 1997 Order and February 17, 1998 Order, and **GRANT** Defendant DRPA's Motion for Summary Judgment.

Respectfully submitted,

BLANK ROME COMISKY & McCAULEY LLP
A Pennsylvania LLP



PETER A. GOLD, ESQUIRE
Resident Partner
SAMUEL M. FIRST, ESQUIRE
210 Lake Drive East, Suite 200
Woodland Falls Corporate Park
Cherry Hill, NJ 08002
(609) 779-3600
Attorneys for Defendant,
Delaware River Port Authority

Dated: July 12, 1998

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CAMDEN COUNTY
DOCKET NO. L-7547-96

FRATERNAL ORDER OF POLICE,
PENN-JERSEY LODGE 30, and
JOSEPH VENA,

Plaintiffs,

vs.

DELAWARE RIVER PORT AUTHORITY,

Defendant.

ORAL DEPOSITION OF

JAMES STEWART

ORIGINAL

* * * * *

Friday, September 19, 1997

* * * * *

Transcript in the above matter taken at the offices of Blank, ROme, Comisky & McCauley, Esquires, Woodland Falls Corporate Park, 210 Lake Drive East, Suite 200, Cherry Hill, New Jersey, commencing at 9:00 a.m.

A P P E A R A N C E S:

SPEAR, WILDERMAN, BORISH, ENDY, SPEAR & RUNCKEL, ESQUIRES
BY: CHARLES T. JOYCE, ESQUIRE
- AND -
BENJAMIN EISNER, ESQUIRE
ATTORNEYS FOR THE PLAINTIFFS

BLANK, ROME, COMISKY & McCAULEY, ESQUIRES
BY: SAMUEL M. FIRST, ESQUIRE
ATTORNEYS FOR THE DEFENDANT

A. I don't know if it was omitted or revised.

Q. Did you submit a new proposal?

(OBJECTION) MR. JOYCE: Objection to form. When you say proposal, are we talking about written proposals or are we talking about oral proposals that are advanced against the table or both?

MR. FIRST: We're talking about a written proposal at this point, the radio and building position.

THE WITNESS: I don't believe we gave another written proposal. It was an oral one. We had amended them so many times, I don't believe we did another one.

BY MR. FIRST:

Q. Do you know when you gave the DRPA the new oral proposal with regard to the radio and building?

A. I don't recall if it was the first session or the second one, which would have been April 19th. I had a whole lot of information I was going over, trying to catch up.

Q. Any other proposals that you made adjustments to?

A. I don't recall, not of significance.

Q. Are you aware that the FOP reserved the

right to add, modify or delete any of its proposals at the beginning of the negotiations?
A. Am I aware that the FOP did?
Q. The FOP.
A. Say that again.
Q. They reserved the right to add, modify or delete any other proposals?
A. Yes.
Q. Are you also aware that the DRPA reserved the same right, to add and modify its proposals?
A. Yes, I am aware.
Q. Now, is it accurate to say the parties mutually agreed to extend the expiration date of the 1992 agreement?
A. Yes.

MR. JOYCE: To when?

MR. FIRST: I am not there yet. They extended it.

THE WITNESS: Yes, it was mutually agreed upon.

BY MR. FIRST:

Q. How many times did they agree to extend it?
A. I don't know how many times. I can tell you how far it was extended to.
Q. How far?

A. August 20th, I believe, of '96.
Q. And that was by mutual agreement between the parties?
A. That's correct.
Q. Do you recall approximately how many times it was extended, one, two, five?
A. I know it was more than once, but I don't recall how many. As long as it was extended, we were still talking, I wasn't concerned.
Q. It's fair to say it was multiple times?
A. I would say more than once, but again, I don't know the number.
Q. Are you aware that in November of 1995 or along the negotiations the lead negotiator for the DRPA, Mr. Nason and Mr. Joyce, the FOP lead negotiator agreed to defer any discussion of economic issues until after all noneconomic issues had been discussed?
A. Yes, I'm aware.
Q. How are you aware of that information?
A. Through my conversation with the lodge attorney.
Q. Mr. Joyce confirmed that information?
A. That's correct.
Q. You don't know how many sessions were held

were canceled.

BY MR. FIRST:

Q. You don't know whose fault it was, do you?

A. No, I don't.

Q. Officer Stewart, do you recall a July 1st, 1996 negotiating session?

A. Yes, I do.

Q. Now, is it true at that session the DRPA presented its economic package to the FOP?

A. That's correct.

Q. Isn't it true that you and Mr. Joyce told the DRPA lead negotiator, Mr. Nason, that you wanted Mr. Nason to be direct with his full economic authority?

A. To be --

(OBJECTION) MR. JOYCE: Object to the form of the question. Are you asking him if -- are you asking him if myself and he used those exact words with Mr. Nason or are you asking him whether we asked Mr. Nason to give us his final offer.

MR. FIRST: That's what I'm asking.

BY MR. FIRST:

Q. Isn't it true that you and Mr. Joyce asked Mr. Nason to give -- that he give you the DRPA's

final -- his full economic authority that he was given by the DRPA?

A. That would be correct.

Q. Now, when you requested the full economic authority, what did you understand that to mean?

A. Like everything else, it was negotiable, but we didn't want to banter back and forth. Let's see what you have and we would talk. Everything is based on salary and economics in a contract in our opinion. We knew that the picture was painted bleak, but we didn't want to -- let's not beat around the bush. Let's have it. Not meaning it was a final offer, but we could deal with it at that time.

Q. When it says full authority, what does that mean?

A. I don't think that as final.

(OBJECTION) MR. JOYCE: Object to the form of the question. You keep using this phrase full authority, and there's been nothing on the record to establish he said full authority.

MR. FIRST: He agreed earlier that's what was said.

MR. JOYCE: I clarified the question, do you mean -- that's why I asked that question

to clarify. Do you mean as a direct quote did we say to Mr. Nason give us your full authority or final authority.

BY MR. FIRST:

Q. What did you say to Mr. Nason?

A. We want to know what was there, the final thing.

Q. Did you say full authority?

A. I don't recall that language.

Q. Do you remember Mr. Joyce saying full authority?

A. No, I don't.

Q. Did you ask for a final economic position?

A. We never asked for a final, because we wanted to negotiate it as everything else.

Q. Tell me specifically what you believe you asked Mr. Nason for.

A. I don't recall the exact words, but we told him we wanted him to be direct so we could sit down and get to the issues.

Q. So not to extend over many negotiations sessions, you wanted it all right then and there?

A. Not thinking it was going to happen in 15 minutes.

Q. So it's true, they presented their final

economic package at that meeting?

A. That's not what we asked, but that's what they did.

(Exhibit S-1, Affidavit of James Stewart, is marked for identification.)

BY MR. FIRST:

Q. Could you review this document, please, which I've given you and it's been marked as S-1.

MR. JOYCE: Take your time.

BY MR. FIRST:

Q. Officer Stewart, have you had a chance to review S-1?

A. Yes.

Q. What is S-1?

A. This is an affidavit.

Q. Whose affidavit is it?

A. My affidavit.

Q. And what is it dated? There's something on the last page, I believe.

A. 9th day of December, 1996.

Q. Do you recall ever seeing this document before?

A. Yes, I do.

Q. Is that your signature at the end of the

C E R T I F I C A T E

I, Theresa DiStephano, a Notary Public and Certified Shorthand Reporter of the State of New Jersey and a Commissioner of Deeds of the State of Pennsylvania, do hereby certify that prior to the commencement of the examination,

JAMES R. STEWART

was duly sworn by me to testify to the truth, the whole truth and nothing but the truth.

I do further certify that the foregoing is a true and accurate transcript of the testimony as taken stenographically by and before me at the time, place and on the date hereinbefore set forth.

I do further certify that I am neither a relative nor employee nor attorney nor counsel of any of the parties to this action, and that I am neither a relative nor employee of such attorney or counsel and that I am not financially interested in this action.

Theresa DiStephano

THERESA DISTEPHANO, C.S.R.
NOTARY PUBLIC, STATE OF NEW JERSEY
MY COMMISSION EXPIRES JANUARY, 2002
CERTIFICATE NO. X101115
Date: October 13, 1997

BLANK ROME COMISKY & McCAULEY
PETER A. GOLD, ESQUIRE
SAMUEL M. FIRST, ESQUIRE
SCOTT F. COOPER, ESQUIRE
210 Lake Drive East, Suite 200
Woodland Falls Corporate Park
Cherry Hill, NJ 08002
(609) 779-3600

Attorneys for Defendant,
Delaware River Port Authority

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30, and JOSEPH VENA, Plaintiffs,	:	SUPERIOR COURT OF NEW JERSEY CAMDEN COUNTY LAW DIVISION
v.	:	DOCKET NO. L-7547-96
DELAWARE RIVER PORT AUTHORITY	:	CIVIL ACTION
Defendant.	:	CERTIFICATION OF JOY FABER, ESQUIRE

1. I am Joy Faber, an attorney at law admitted to practice in the State of New Jersey and the Commonwealth of Pennsylvania. I am employed by the Defendant, Delaware River Port Authority (DRPA), as an Assistant General Counsel in the Legal Department. I have been employed in this capacity since January, 1990.

2. As a member of the DRPA's collective bargaining committee, I attended and participated in many of the collective bargaining negotiation sessions between the F.O.P. Lodge 30 and the DRPA in 1995 and 1996, and was primarily responsible for drafting the implemented contract.

3. I have reviewed the Certification of Joseph Vena, Plaintiff in this matter, dated

June 10, 1997. That Certification contains several misstatements and mischaracterizations of fact, and other inaccuracies, which prompt this responding Certification.

4. During negotiations in 1995 and 1996, the parties deferred all discussion of economic issues for the end of negotiations. The DRPA had advised the FOP that we were awaiting Board authorization before we could meaningfully discuss economics, when the topic had been raised. The DRPA did respond to the Union's wage proposal on July 1, 1996, by advising the Union that the DRPA was authorized to offer bonuses of 1% and 2% in the first two years of the contract, respectively, and a 3% wage increase in the third year of the contract. The DRPA countered the Union's multi-tiered wage system with its own, which provided for a starting pay of $30,140.00, which was higher than the starting salary proposed by the F.O.P. ($28,563.00), and provided that new recuits would reach the maximum pay more quickly than under the F.O.P.'s proposal.

5. The DRPA initially proposed the elimination of the 1992-1995 contract clause which entitled patrol officers injured on duty to receive their full salary for up to 26 weeks of disability, in lieu of and in excess of the statutory workers' compensation total temporary disability rate. The DRPA then advised the F.O.P. that this proposal was to be "held open," as the subject was under review by the DRPA's new Chairman, as part of his comprehensive review of all DRPA insurance matters. At the final bargaining session on July 1, 1996, the DRPA advised the F.O.P. that the DRPA's position was as initially stated: the clause was to be eliminated.

6. The F.O.P. proposals submitted to the DRPA during negotiations were contained in an 88 page long document. Proposals which contained new or different language from the

1992-1995 contract were presented in bold typeface and underlined print. Those proposals which were not in bold typeface or underlined, were ostensibly the same language contained in the 1992-1995 contract. At the negotiations table, such language was generally indicated by the DRPA to be "OK if no changes." However, when I was in the process of preparing the actual implemented contract, it became apparent that in numerous instances, language in the F.O.P. proposals which was not delineated as being changed from the 1992-1995 contract, and which as "OK'd" at the bargaining table, was in fact different from the 1992-1995 contract. In those instances, I used the 1992-1995 contract language for the implemented contract. In a meeting on or about February 28, 1997, I advised F.O.P. attorney Charles T. Joyce of the existence of this problem concerning new or added language in the F.O.P. proposals, which did not mirror the 1992-1995 contract, and which was not represented to DRPA as having been changed.

7. One such instance of revised or new language in the F.O.P. proposals which was not called to DRPA's attention concerns the F.O.P.'s proposal to authorize its representatives to visit any DRPA facility for the purposes of processing or investigating grievances, and to administer the collective bargaining agreement. This language was agreed at the bargaining table on the premise that it was not changed from the 1992-1995 contract, as it was not underlined or printed in bold typeface to indicate any such change. Therefore, when I was preparing the implemented contract, and noted that this piece of language did not even exist in the 1992-1995, I did not include it in the implemented contract.

8. In several discussions at the bargaining table concerning the subject of subcontracting, the F.O.P. repeatedly asked for contract language which forbade DRPA from subcontracting certain jobs performed by the bargaining unit, namely the radio dispatcher position

and the "building man." DRPA repeatedly advised the F.O.P. that, although it was not the DRPA's intent to subcontract out said positions, the bargaining committee had no authorization to agree in writing, whether in the contract itself or by side letter, to any limits on the DRPA's ability to subcontract.

9. Also among the F.O.P. proposals was one providing that patrol officers would receive time-and-one-half pay for all work performed on the sixth day of a workweek, and setting forth a proposed method for calculation of overtime payments. This "hours of work and overtime" proposal language was presented by the F.O.P. without bold typeface print or underlining to indicate it differed from the 1992-1995 contract. As such, the "hours of work and overtime" proposal was "Ok'd" at the bargaining table on the premise that it was the same as the prior contract language, which does provide for time-and-a-half overtime for the sixth day of work (as well as double time for the seventh day) and a method for calculation of overtime payments. The implemented contract therefore contains language which remains the same as that in the 1992-1995 contract on this topic.

10. On April 19, 1996, the DRPA did agree to an F.O.P. proposal to allow patrol officers access to their own personnel files maintained by the DRPA's Human Resources Division. (and not to all personnel files, as stated in Officer Vena's certification). Contrary to Officer Vena's assertion that the DRPA reneged on this agreement, this provision does appear in the implemented contract at Article XVI, Section 1(L).

11. On April 19, 1996, the DRPA did agree to an F.O.P. proposal that guarantees patrol officers a minimum of four hours pay if they are required to appear in Court on DRPA work-related business on a day off. Contrary to Officer Vena's assertion that the DRPA reneged

on this agreement, the language does appear in the implemented contract at Article XV, Section 4.

12. The basis for selection for DRPA-approved training programs or seminars was the topic of numerous discussions at the bargaining table, and the subject of several proposals and counter proposals by the F.O.P. and the DRPA. The F.O.P. had proposed that selection be based on seniority, if more than one patrol officer applied for the same training. The DRPA's proposal was that the DRPA shall determine in its sole discretion who shall be selected for the training. This is the version that appears in the implemented contract, since this was one of the issues on which the parties were at impasse.

I certify that the statements made by me are true to the best of my knowledge and belief. I am aware that if any of the statements made by me are wilfully false, I am subject to punishment.

Joy Faber
JOY FABER, ESQUIRE

Sworn to and subscribed:
before me this 4th day:
of December, 1997.

Diana Valenti Morgan
Notary Public

DIANA VALENTI MORGAN
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES JUNE 25, 2002

BLANK ROME COMISKY & McCAULEY LLP
A Pennsylvania LLP
PETER A. GOLD, ESQUIRE
Resident Partner
SAMUEL M. FIRST, ESQUIRE
210 Lake Drive East, Suite 200
Woodland Falls Corporate Park
Cherry Hill, NJ 08002
(609) 779-3600

Attorneys for Defendant,
Delaware River Port Authority

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30, and JOSEPH VENA, Plaintiffs, v. DELAWARE RIVER PORT AUTHORITY, Defendant.	SUPERIOR COURT OF NEW JERSEY CAMDEN COUNTY LAW DIVISION DOCKET NO. L-7547-96 CIVIL ACTION **CERTIFICATION OF SAMUEL M. FIRST, ESQUIRE**

I, Samuel M. First, Esquire, hereby certify as follows:

1. I am an attorney with the law firm of Blank Rome Comisky and McCauley, counsel for Defendant, Delaware River Port Authority ("DRPA") in the above-captioned matter. I am a member of the Bar of the State of New Jersey in good standing, and have full knowledge of all facts asserted in this Certification.

2. This Certification is prepared in order to respond to certain erroneous statements contained in the January 12, 1998 Certification of Plaintiffs' counsel Benjamin Eisner, Esquire (Eisner Certification).

3. At no time did DRPA counsel Mr. Gold or myself ever suggest or mention to either Mr. Eisner or Mr. Joyce that "an expert might be appropriate" in this case on the question of the complementary nature of Pennsylvania and New Jersey's law concerning collective bargaining by police officers, in the context of a motion for summary judgment or on the issue of binding interest arbitration.

4. Plaintiffs' first attempted to file their Motion for Summary Judgment on Friday, June 13, 1997, but apparently failed to properly include a check to cover the filing fee. As a result, Plaintiffs' Motion for Summary Judgment was not accepted by the Court until Monday, June 16, 1997.

5. The DRPA and its counsel were completely surprised by Plaintiffs' inclusion of the so-called expert Certification of Professor Clyde Summers to support their Motion. Plaintiffs never gave Defendant any advance notice of the existence of Professor Summers' Certification, despite the fact that it was in Plaintiffs' counsel's possession for two (2) weeks prior to their filing, nor did they give the DRPA or its counsel notice that it would be submitting an expert certification on any topic.

6. In Paragraph 13 of his Certification, Mr. Eisner erroneously suggests that Mr. Joyce orally informed Defendant's counsel that Professor Summers was available on September 16, 17, 18 and 19, 1997 for deposition. To the contrary, Mr. Joyce only advised me that Professor Summers was available on September 16 and 17. From June 13, 1997, the date that Plaintiffs served their Motion for Summary Judgment, until October 1, 1997, Professor Summers was made available on only two (2) days - - September 16 and 17.

7. In paragraph 15 of Mr. Eisner's Certification, he asserts that I mentioned orally to he and Mr. Joyce that "the DRPA would wait, before deciding on whether to go forward with the

expert's report, for the Court to dispose of Plaintiff's Motion for Summary Judgment and the Defendant's Cross-Motion, to see whether an expert might prove unnecessary." What Mr. Eisner fails to state is that these comments were made within two (2) weeks of the scheduled September 26, 1997 Court return date for the motions.

8. By letter dated November 25, 1997, prior to the close of discovery, Mr. Gold advised Plaintiffs' counsel that the DRPA would be serving Defendant's expert report on Plaintiffs the following day. This letter was served via hand-delivery and fax to Plaintiffs' counsel's offices.

9. In paragraph 17 of Mr. Eisner's Certification, he states that on November 26, 1997, Defendant's expert report was delivered to Plaintiffs' counsel's New Jersey and Pennsylvania offices via telecopy. It was also hand-delivered to Plaintiffs' counsel's office in Philadelphia that same day, prior to the close of discovery.

10. On more than one occasion prior to the close of discovery on November 26, 1997, Defendant offered Plaintiffs' counsel the opportunity to extend the discovery deadline in this case. On each occasion, Plaintiffs' counsel flatly refused. Plaintiffs' counsel was fully aware of Defendant's expert report prior to the close of discovery, but still did not attempt to extend the discovery period or depose Defendant's expert.

I certify that the foregoing statements made by me are true and correct to the best of my knowledge, information and belief. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to appropriate sanctions.

Samuel M. First

SAMUEL M. FIRST, ESQUIRE

Dated: January 21, 1998 ~~1997~~

A-003344-97T1

RECD
APPELLATE DIVISION
OCT 30 1998

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30, and JOSEPH VENA, Respondents/Plaintiffs, v. DELAWARE RIVER PORT AUTHORITY, Appellant/Defendant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003344-97T1 CIVIL ACTION **ON APPEAL FROM A FINAL JUDGMENT ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, CAMDEN COUNTY GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** SAT BELOW: HONORABLE M. ALLAN VOGELSON, P.J.S.C.

APPELLANT/DEFENDANT DELAWARE RIVER PORT AUTHORITY'S SECOND SUPPLEMENTAL APPENDIX

FILED
APPELLATE DIVISION
OCT 29 1998
Clerk

BLANK ROME COMISKY & McCAULEY LLP
A Pennsylvania LLP
PETER A. GOLD, ESQUIRE
Resident Partner
SAMUEL M. FIRST, ESQUIRE
Woodland Falls Corporate Park
210 Lake Drive East, Suite 200
Cherry Hill, New Jersey 08002
(609) 779-3600

Attorneys for Defendant/Appellant
Delaware River Port Authority

FILED
APPELLATE DIVISION
OCT 29 1998
Clerk

Dated: October 28, 1998

BLANK ROME COMISKY & McCAULEY LLP
A Pennsylvania LLP
PETER A. GOLD, ESQUIRE
Resident Partner
SAMUEL M. FIRST, ESQUIRE
210 Lake Drive East, Suite 200
Woodland Falls Corporate Park
Cherry Hill, NJ 08002
(609) 779-3600

Attorneys for Defendant,
Delaware River Port Authority

REC'D
APPELLATE DIVISION
OCT 29 1998

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30, and JOSEPH VENA, Respondents/Plaintiffs, v. DELAWARE RIVER PORT AUTHORITY, Appellant/Defendant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003344-97T1 CIVIL ACTION **CERTIFICATE OF SERVICE**

I, Samuel M. First, Esquire, a member of the Bar of the State of New Jersey, hereby certify that on this date I caused two (2) true and correct copies of Appellant/Defendant Delaware River Port Authority's Second Supplemental Appendix and Certificate of Service, in the above-captioned case to be served via First Class Mail, upon Plaintiffs' Counsel of Record as follows per Plaintiffs' Counsel's request:

One (1) copy of the Second Supplemental Appendix to:

Benjamin Eisner, Esquire
Charles Joyce, Esquire
SPEAR, WILDERMAN, BORISH,
ENDY, SPEAR AND RUNKEL
89 North Haddon Avenue
Suite C
Haddonfield, New Jersey 08033

One (1) copy of the Second Supplemental Appendix:

Benjamin Eisner, Esquire
Charles Joyce, Esquire
SPEAR, WILDERMAN, BORISH,
ENDY, SPEAR AND RUNKEL
230 South Broad Street
Suite 1400
Philadelphia, Pennsylvania 19102

I also caused two (2) true and correct copies of Appellant/Defendant Delaware River Port Authority's Second Supplemental Appendix and Certificate of Service, in the above-captioned case to be served via First Class Mail, upon Amicus Curiae, New Jersey State as follows:

Karen L. Jordan, Esquire
Deputy Attorney General
Division of Law
Richard J. Hughes Justice Complex
CN 093
Trenton, N.J. 08625

Samuel M. First

Samuel M. First, Esquire

Dated: October 28, 1998

SECOND SUPPLEMENTAL APPENDIX

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Port Authority of New York and New Jersey Labor Relations Instruction SSDa10

f:/work/ctj/fop/contimp/sum-j.odr
SPEAR, WILDERMAN, BORISH,
ENDY, SPEAR AND RUNCKEL
BY: WARREN J. BORISH, ESQUIRE
BENJAMIN EISNER, ESQUIRE
126 White Horse Pike
Haddon Heights, New Jersey 08035
(609) 547-6199
Attorneys for Plaintiffs, Fraternal Order of Police, Penn-Jersey, Lodge 30 and Joseph Vena

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30, and JOSEPH VENA Plaintiffs, v. **THE DELAWARE RIVER PORT AUTHORITY** Defendant.	**SUPERIOR COURT OF NEW JERSEY** **CAMDEN COUNTY LAW DIVISION** **DOCKET NO. L-7547-96 CIVIL ACTION** **ORDER**

This matter having come before the Court on a motion by Defendant, Delaware River Port Authority for Summary Judgment, and the Court having considered the submissions of the parties, it is hereby Ordered this 24 day of December, 1996, that the Defendant's Motion for Summary Judgment is **DENIED**.

Supnick, J.S.C

SSDa1

AM-648-96T1

ORDER ON MOTION

FRATERNAL ORDER OF POLICE ET AL
VS
DELAWARE RIVER PORT AUTHORITY

FILED
APPELLATE DIVISION
FEB 3 1997

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. AM-000648-96T1
MOTION NO. M -003111-96
BEFORE PART: C
JUDGE(S): LANDAU
KIMMELMAN

MOTION FILED: JANUARY 07, 1997 BY: DELAWARE RIVER PORT AUTHORITY
ANSWER(S) FILED: JANUARY 21, 1997 BY: FRATERNAL ORDER OF POLICE ETC

SUBMITTED TO COURT: JANUARY 29, 1997

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS

29th DAY OF January, 1997, HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
MOTION BY APPELLANT - FOR LEAVE TO APPEAL	( )	(X)	( )
SUPPLEMENTAL:			

I hereby certify that the foregoing is a true copy of the original on file in my office.

Clerk

FOR THE COURT:

DAVID LANDAU J.A.D.

UVCS

SSDa2

BLANK ROME COMISKY & McCAULEY
PETER A. GOLD, ESQUIRE
SAMUEL M. FIRST, ESQUIRE
SCOTT F. COOPER, ESQUIRE
210 Lake Drive East, Suite 200
Woodland Falls Corporate Park
Cherry Hill, NJ 08002
(609) 779-3600

Attorneys for Defendant,
Delaware River Port Authority

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30, and JOSEPH VENA, Plaintiffs, v. DELAWARE RIVER PORT AUTHORITY, Defendant.	SUPERIOR COURT OF NEW JERSEY CAMDEN COUNTY LAW DIVISION DOCKET NO. L-7547-96 CIVIL ACTION **AFFIDAVIT OF SAMUEL M. FIRST, ESQUIRE**

I, Samuel M. First, Esquire, being duly sworn according to law, depose and say:

1. I am an attorney employed by the law firm of Blank Rome Comisky and McCauley, counsel for Defendant, Delaware River Port Authority ("DRPA") in the above-captioned matter. I am a member of the Bar of the State of New Jersey in good standing, and have full knowledge of all facts asserted in this affidavit pertaining to above legal action.

2. On June 13, 1997, the DRPA was served with Plaintiffs' Motion for Summary Judgment on Count I of their Amended Complaint.

3. In support of their Motion, Plaintiffs' attached a Certification from Professor Clyde Summers of the University of

Pennsylvania. Plaintiffs' suggest that Professor Summers is an "expert," and have substantially based their Brief in support of their Motion on Professor Summers' statements.

4. The DRPA first learned of Plaintiffs' alleged expert on the date of service, June 13, 1997.

5. The DRPA contends that Professor Summers' testimony is irrelevant, his competency to testify as an "expert" has not been established, and the DRPA contests his "expert" status. Nevertheless, the DRPA has not had sufficient opportunity in the short time to respond to Plaintiffs' Motion permitted by the Rules to take any discovery of Plaintiffs' alleged expert.

6. In addition, the DRPA has not had sufficient opportunity to identify its own expert to counter Professor Summers Certification, have that expert write a report and permit Plaintiffs' to take discovery with regard to the expert report.

7. Since the introduction of Professor Summers Certification into this case, the DRPA has made significant efforts to locate its own expert. This process continues.

I certify that the foregoing statements made by me are true and correct to the best of my knowledge, information and belief. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to appropriate sanctions.

SAMUEL M. FIRST, ESQUIRE

Dated: July 15, 1997

SSDm4

BLANK ROME COMISKY & McCAULEY LLP
A Pennsylvania LLP
PETER A. GOLD, ESQUIRE
Resident Partner
SAMUEL M. FIRST, ESQUIRE
210 Lake Drive East, Suite 200
Woodland Falls Corporate Park
Cherry Hill, NJ 08002
(609) 779-3600

Attorneys for Defendant,
Delaware River Port Authority

FRATERNAL ORDER OF POLICE, PENN-JERSEY LODGE 30, and JOSEPH VENA,	:	SUPERIOR COURT OF NEW JERSEY CAMDEN COUNTY LAW DIVISION
Plaintiffs,	:	DOCKET NO. L-7547-96
v.	:	CIVIL ACTION
DELAWARE RIVER PORT AUTHORITY, Defendant.	:	**CERTIFICATION OF SAMUEL M. FIRST, ESQUIRE**

I, Samuel M. First, Esquire, hereby certify as follows:

1. I am an attorney with the law firm of Blank Rome Comisky and McCauley, counsel for Defendant, Delaware River Port Authority ("DRPA") in the above-captioned matter. I am a member of the Bar of the State of New Jersey in good standing, and have full knowledge of all facts asserted in this Certification.

2. This Certification is prepared in order to respond to certain erroneous statements contained in the January 12, 1998 Certification of Plaintiffs' counsel Benjamin Eisner, Esquire (Eisner Certification).

3. At no time did DRPA counsel Mr. Gold or myself ever suggest or mention to either Mr. Eisner or Mr. Joyce that "an expert might be appropriate" in this case on the question of the complementary nature of Pennsylvania and New Jersey's law concerning collective bargaining by police officers, in the context of a motion for summary judgment or on the issue of binding interest arbitration.

4. Plaintiffs' first attempted to file their Motion for Summary Judgment on Friday, June 13, 1997, but apparently failed to properly include a check to cover the filing fee. As a result, Plaintiffs' Motion for Summary Judgment was not accepted by the Court until Monday, June 16, 1997.

5. The DRPA and its counsel were completely surprised by Plaintiffs' inclusion of the so-called expert Certification of Professor Clyde Summers to support their Motion. Plaintiffs never gave Defendant any advance notice of the existence of Professor Summers' Certification, despite the fact that it was in Plaintiffs' counsel's possession for two (2) weeks prior to their filing, nor did they give the DRPA or its counsel notice that it would be submitting an expert certification on any topic.

6. In Paragraph 13 of his Certification, Mr. Eisner erroneously suggests that Mr. Joyce orally informed Defendant's counsel that Professor Summers was available on September 16, 17, 18 and 19, 1997 for deposition. To the contrary, Mr. Joyce only advised me that Professor Summers was available on September 16 and 17. From June 13, 1997, the date that Plaintiffs served their Motion for Summary Judgment, until October 1, 1997, Professor Summers was made available on only two (2) days - - September 16 and 17.

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expert's report, for the Court to dispose of Plaintiff's Motion for Summary Judgment and the Defendant's Cross-Motion, to see whether an expert might prove unnecessary." What Mr. Eisner fails to state is that these comments were made within two (2) weeks of the scheduled September 26, 1997 Court return date for the motions.

8. By letter dated November 25, 1997, prior to the close of discovery, Mr. Gold advised Plaintiffs' counsel that the DRPA would be serving Defendant's expert report on Plaintiffs the following day. This letter was served via hand-delivery and fax to Plaintiffs' counsel's offices.

9. In paragraph 17 of Mr. Eisner's Certification, he states that on November 26, 1997, Defendant's expert report was delivered to Plaintiffs' counsel's New Jersey and Pennsylvania offices via telecopy. It was also hand-delivered to Plaintiffs' counsel's office in Philadelphia that same day, prior to the close of discovery.

10. On more than one occasion prior to the close of discovery on November 26, 1997, Defendant offered Plaintiffs' counsel the opportunity to extend the discovery deadline in this case. On each occasion, Plaintiffs' counsel flatly refused. Plaintiffs' counsel was fully aware of Defendant's expert report prior to the close of discovery, but still did not attempt to extend the discovery period or depose Defendant's expert.

I certify that the foregoing statements made by me are true and correct to the best of my knowledge, information and belief. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to appropriate sanctions.

Samuel M. First

SAMUEL M. FIRST, ESQUIRE

Dated: January 21, 1998

SSDa8

BL K ROME COMISKY & MC AULEY
COUNSELORS AT LAW

WOODLAND FALLS CORPORATE P...
SUITE 200
210 LAKE DRIVE EAST
CHERRY HILL, NEW JERSEY 08002
(609) 779-3600
FAX: (609) 779-7647

EMAIL ADDRESS:

DIRECT DIAL NUMBER:

NEW JERSEY RESIDENT PARTNERS
PETER J. BOYER
RICHARD L. CAPPEL, JR.
DOUGLAS A. EDELDORG
PETER A. GOLD
MICHAEL L. KRANCER
A. FRED SETTEMBRINO
STEVEN D. WEINSTEIN
FRANK H. WISNIOWSKI
DAVID N. ZELMANOWITZ

November 25, 1997

Via Facsimile and Regular Mail

Benjamin M. Eisner, Esquire
Spear, Wilderman, Borish, Endy,
Spear & Runckel
36 Tanner Street
2nd Floor
Haddonfield, NJ 08033

Via Facsimile and Hand-Delivery

Benjamin M. Eisner, Esquire
Spear, Wilderman, Borish, Endy,
Spear & Runckel
Suite 1400
230 South Broad Street
Philadelphia, PA 19102

Re: FOP Lodge 30 and Vena v. Delaware River Port Authority
Docket No.: L-7547-96

Dear Mr. Eisner:

Please be advised that on Wednesday, November 26, 1997, prior to the close of discovery, the Delaware River Port Authority ("DRPA") will be serving Plaintiffs with an expert report in the above-referenced case.

Very truly yours,

Peter A. Gold

PAG:sf

cc: Samuel M. First, Esquire

SSDa9

THE PORT AUTHORITY
OF NEW YORK AND NEW JERSEY
LABOR RELATIONS INSTRUCTION

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THE PORT AUTHORITY
OF NEW YORK AND NEW JERSEY
LABOR RELATIONS INSTRUCTION

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THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

LABOR RELATIONS INSTRUCTION

I. DEFINITIONS

A. The term "Authority" shall mean The Port Authority of New York and New Jersey.

B. The term "Chairman" shall mean the Chairman of the Authority Employment Relations Panel.

C. The term "employee" shall mean an employee of the Authority (1) whose position has not been designated as managerial or confidential or (2) whose employment is not subject to the provisions of the Railway Labor Act, or (3) who is not a supervisor, provided that no member of the Port Authority Police Force shall be excluded from the definition of "employee" solely because he is a supervisor.

D. The term "employee organization" shall mean an organization having as a purpose the representation of employees of the Authority concerning terms and conditions of employment.

E. The term "Panel" shall mean the Authority Employment Relations Panel created by this Instruction.

F. The term "managerial" shall mean personnel who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices.

G. The term "confidential" shall mean personnel whose functional responsibilities or knowledge in connection with

issues involved in the collective negotiation process would make their membership in any appropriate negotiating unit incompatible with their official duties.

H. The term "supervisors" shall mean personnel having the power to hire, discharge, evaluate, discipline, or to effectively recommend the same.

I. The term "recognized" shall mean an employee organization designated as the negotiating representative of employees in an appropriate unit by the Authority.

J. The term "certified" shall mean an employee organization designated as the negotiating representative of employees in an appropriate unit by the Panel.

K. The term "working days" shall mean calendar days exclusive of Saturdays, Sundays and public holidays.

II. EMPLOYEE RIGHTS

A. Employees of the Authority shall, in accordance with the provisions of this Instruction, have the right, free from coercion, interference or restraint, to form, join or participate in, or to refrain from forming, joining or participating in, any employee organization of their own choosing, except as provided in Sections VII and VIII of this Instruction.

B. Employees of the Authority shall, in accordance with the provisions of this Instruction, have the right to be represented by employee organizations to negotiate collectively with the Authority in the determination of their terms and

conditions of employment, and the administration of grievances arising thereunder.

III. EMPLOYMENT RELATIONS PANEL

A. A Panel is hereby created, to be known as the Port Authority Employment Relations Panel, which shall consist of three members appointed by the Authority as hereinafter provided. One such member (hereinafter called the New Jersey member) and each of his successors shall be appointed subject to the written recommendation, after consultation with the employee organizations, of the Chairman of the New Jersey Public Employment Relations Commission; another such member (hereinafter called the New York member) and each of his successors shall be appointed subject to the written recommendation, after consultation with the employee organizations, of the Chairman of the New York Public Employment Relations Board; and the third such member and each of his successors, who shall be Chairman of the Panel, shall be appointed subject to the joint written recommendation, after consultation with the employee organizations, of the Chairmen of the New Jersey Public Employment Relations Commission and of the New York Public Employment Relations Board. Each member of the Panel shall be appointed for a term of three years, except that of the members first appointed, the New Jersey member shall be appointed for a term to expire on December 31, 1977, the New York member shall be appointed for a term to expire on December 31, 1978, and the

Chairman shall be appointed for a term to expire on December 31, 1979. A member appointed to fill a vacancy shall be appointed for the unexpired term of the member whom he is to succeed. A member whose term has expired shall continue to serve on the Panel until his successor is appointed; but no period during which any such member shall hold over shall be deemed to be an extension of his term for the purpose of computing the date on which his successor's term expires. No person shall serve on the panel who has not been recommended as provided in this Paragraph. No member of the Panel shall be subject to removal or dismissal except upon charges and after a hearing before a hearing officer appointed jointly by the Chairman of the New York Public Employment Relations Board and the New Jersey Public Employment Relations Commission.

B. The members of the Panel shall be compensated by the Authority at the rate of $150 for each day spent in attendance at meetings or consultations or in the preparation of reports or determinations, and shall be reimbursed for expenses actually incurred by them in the performance of their duties.

C. The Panel may appoint such persons, including any hearing officer, mediator, factfinder or attorney as it may from time to time deem necessary for the performance of its functions, prescribe their duties, and fix their responsibilities, and provide for reimbursement of their expenses within amounts made available therefor, but no such person may be retained at a rate

of compensation in excess of $150 per diem without the approval in writing of the Authority. The services of the New Jersey Public Employment Relations Commission and the New York Public Employment Relations Board should be utilized whenever feasible.

D. In addition to the authority provided in other sections of this Instruction, the Panel may adopt rules of procedure consistent with this Instruction which are necessary to carry out its functions efficiently. In all matters relating to this Instruction, including determinations as to mandatory and non-mandatory subjects of negotiation, Panel members and other persons appointed by the Panel shall be guided but not bound by administrative and judicial interpretations of the public sector labor law of the States of New York and New Jersey. Notwithstanding the foregoing, the mission and management responsibilities of the Authority, including its organization, staffing, planning, operating and financial policies, shall not be subjects of negotiation with employee organizations.

E. The Panel shall submit a report to the Governor of New Jersey and the Governor of New York on the 15th day of December each year beginning in 1977. Such annual report shall be submitted to the Authority and to recognized or certified employee organizations by the preceding November 15th, and any reactions and comments received from the Authority and recognized or certified employee organizations by December 5th shall be appended to the Panel's report to the Governors.

IV. MANAGERIAL AND CONFIDENTIAL AND SUPERVISORY PERSONNEL

Personnel holding managerial and confidential positions shall not be members of any employee organization, and such personnel and non-police supervisory personnel shall not be included in any negotiating unit and shall not be covered by agreements with employee organizations.

Employees shall not have the right to be represented for any purpose under this Instruction by an employee organization or representative thereof providing representation for persons they supervise or by whom they are supervised. Furthermore, employees who are members of the Investigative Unit of the Police Force of the Authority shall not have the right to be represented for any purpose under this Instruction by an employee organization or representative thereof providing representation for any other employees of the Authority.

V. PROCEEDINGS WITH RESPECT TO DESIGNATION OF MANAGERIAL AND CONFIDENTIAL AND SUPERVISORY PERSONNEL

A. Managerial and confidential and supervisory positions shall be initially designated on a list prepared by the Authority within forty-five days from the effective date of this Instruction. Thereafter, supplementary lists of such designations shall be prepared from time to time by the Authority. Any such list shall be posted on bulletin boards throughout the Authority's facilities for at least fifteen working days and filed with the Secretary of the Authority.

B. A notice of objection from any designation of managerial and confidential and supervisory positions may be filed with the Panel by any affected member of the Authority staff, or by an employee organization that claims to represent such affected staff. Any such notice of objection shall be filed in writing on a form prescribed by the Panel, and shall fully set forth the nature of the objection and any recommendation of the party filing the notice. A copy of any such notice shall simultaneously be served on the Authority, which shall be a party to the proceeding. Upon receipt of any such notice, the Chairman shall schedule an informal conference of the parties. If the matters raised in a notice of objection are not resolved at such conference, the Chairman shall appoint a hearing officer, who may or may not be any one of the three Panel members, to conduct a hearing.

C. A hearing conducted pursuant to this Section shall be open to all parties having a direct interest in the matter before the hearing officer. It shall be the duty of the hearing officer to inquire fully into all matters in issue and the hearing officer shall obtain a full and complete record of the proceedings. A designated recorder shall make the only official transcript of such proceedings. A copy of the official transcript may be obtained by each party upon payment of the cost of preparation thereof.

D. A party shall have the right to appear at such

hearing in person, by counsel or by other representatives, to call and examine witnesses, and to introduce into the record relevant documentary or other evidence. The technical rules of evidence shall not apply. Stipulations of fact may be introduced into evidence with respect to any issue. After completion of the hearing, the hearing officer shall submit his report and recommendations together with the record of the proceedings, to the Panel. The Panel shall cause the report and recommendations of the hearing officer, if any, to be promptly served on all parties to the proceeding. Written comments on the report and recommendations of the hearing officer, if any, may be submitted to the Panel by any party within ten days after receipt of the report and recommendations of the hearing officer, provided that the Panel may extend the time during which comments may be submitted because of extraordinary circumstances.

E. Upon receipt of the comments of the parties, if any, the Panel shall issue its decision, either upon the record of the proceedings and the comments of the parties, or, if it so determines, upon such record and comments and after oral argument or further hearings before the Panel.

F. Any material submitted to the Panel pursuant to this Section shall be in the form of an original and four copies.

VI. NEGOTIATING UNITS

A negotiating unit shall consist of classes of employees of the Authority which comprise an appropriate group for the purpose of collective negotiations with the Authority. Determinations as to the appropriate composition of negotiating units in representation proceedings instituted pursuant to Section XII of this Instruction shall, if the parties to the proceeding do not agree on the composition of a unit, be made by the Panel. Any such determination by the Panel shall be made with due regard for the community of interest among the employees concerned, the promotion of effective negotiations and efficiency of Authority operations, the avoidance of undue unit fragmentation and the joint responsibilities of the Authority and the employees to serve the public.

VII. DUES CHECKOFF AND REPRESENTATION FEE

A. Except as provided otherwise in this Section, (i) an employee may request the Authority to make payroll deductions for membership dues payable to a duly recognized or certified employee organization and (ii) no employee shall be required to pay money to any employee organization except pursuant to a voluntarily executed authorization for the payment of membership dues through payroll deductions. Nothing in this Instruction shall be deemed to require an employee to become a member of any employee organization.

B. Notwithstanding any other provision of this

Instruction, the Authority and any duly recognized or certified employee organization will, where requested by such employee organization, negotiate in connection with any contract or agreement entered into pursuant to this Instruction concerning the subject of requiring payment (i) by all persons holding positions within the class or group of classes of employees in the negotiating unit represented by such employee organization who are members of such employee organization, of membership dues payable to such employee organization; and (ii) by all such persons who are not members of such employee organization, of a representation fee in lieu of membership dues.

If and as so agreed to and made a part of such contract or agreement in accordance with the requirements of this Instruction, the Authority will deduct such membership dues or such representation fee, as appropriate, from the salary or wage of each such employee and transmit the sum so deducted to the employee organization.

Any such representation fee may not exceed an amount equivalent to 85% of the amount of regular membership dues, initiation fees and assessments charged by the employee organization to its own members, and in no event shall it include the cost of any benefits financed through the dues, fees and assessments and available to or benefitting only its members and the cost of any expenditures by the employee organization that may be in aid of activities or causes of a partisan political or

ideological nature only incidentally related to the terms and conditions of employment of such employee.

A representation fee payroll deduction system may be effectuated by the Authority only in the case of an employee organization which has established and maintains a procedure providing for the refund to an employee demanding the return of any part of the representation fee which represents the employee's pro rata share of expenditures by the employee organization that is either in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment of employees in the negotiating unit or applied toward the cost of any benefits available only to members of the employee organization; provided, that such procedure (i) is filed with the Panel prior to the commencement of the deduction by the Authority of any representation fee to be transmitted to the employee organization, and (ii) is in accordance with the demand and appeal provisions of Paragraph C of this Section.

C. 1. An employee who is subject to payment of a representation fee may demand of the employee organization receiving such fee, in writing, a return of all or any part of the representation fee on the grounds that such representation fee or part thereof represents the employee's pro rata share of expenditures by the employee organization that is either in aid of activities or causes of a partisan political or ideological

nature only incidentally related to the terms and conditions of employment, or applied toward the cost of benefits available only to members of the employee organization.

2. Upon receipt of a demand for return of all or any part of a representation fee by an employee subject to such fee, an employee organization shall review the amount of the representation fee and substantiate the amount charged in accordance with the procedure established by the employee organization and filed with the Panel for this purpose. The employee organization shall issue its written determination of such demand, and serve the employee with a copy thereof, within sixty (60) days of its receipt of the demand. The employee may, within thirty (30) days of his receipt of the employee organization's determination, object to such determination by filing written notice of objection with the Panel.

3. Upon receipt of any such notice, the Chairman of the Panel shall review the demand and the determination and make such investigation as is necessary to resolve the matter, including the appointment of a hearing officer to conduct a hearing.

4. A hearing conducted pursuant to this Section shall be open to all parties having a direct interest in the matter before the hearing officer, which shall not include the Authority. It shall be the duty of the hearing officer to inquire fully into all matters in issue and the hearing officer

-shall obtain a full and complete record of the proceedings. A copy of the official transcript may be obtained by each party upon payment of the cost of preparation thereof.

5. A party shall have the right to appear at such hearing in person, by counsel or by other representatives, to call and examine witnesses, and to introduce into the record relevant documentary or other evidence. The technical rules of evidence shall not apply. Stipulations of fact may be introduced into evidence with respect to any issue. After completion of the hearing, the hearing officer shall submit his report and recommendations together with the record of the proceedings, to the Panel. The Panel shall cause the report and recommendations of the hearing officer, if any, to be promptly served on all parties to the proceeding. Written comments on the report and recommendations of the hearing officer, if any, may be submitted to the Panel by any party within ten days after receipt of the report and recommendations of the hearing officer, provided that the Panel may extend the time during which comments may be submitted because of extraordinary circumstances.

6. Upon receipt of the comments of the parties, if any, the Panel shall issue its decision, either upon the record of the proceedings and the comments of the parties, or, if it so determines, upon such record and comments and after oral argument or further hearings before the Panel.

7. Any material submitted to the Panel pursuant to

this Section shall be in the form of an original and four copies.

D. Except as provided otherwise in this Section, the Authority will make such membership dues or representation fee deductions and will pay the proceeds over to the applicable employee organization until, in the case of voluntarily authorized membership dues deductions, (i) the employee withdraws such request or (ii) the Authority recognizes a new representative for employees in a negotiating unit other than the representative for which such dues are being withheld; or, in the case of both membership dues and representation fee deductions, such dues and representation fee deductions are terminated or suspended pursuant to the provisions of this Instruction.

E. No more than one deduction for membership dues or representation fees for an employee organization will be honored for any employee at any one time.

VIII. AGREEMENTS WITH EMPLOYEE ORGANIZATIONS

A. The Authority and duly recognized and certified employee organizations will meet at reasonable times and negotiate in good faith agreements concerning salaries, wages, hours, and other terms and conditions of employment, the payment of membership dues and representation fee deductions and questions arising thereunder and will execute written contracts incorporating any agreements reached if requested by the other party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. All such

contracts or agreements shall be subject to the approval of the Board of Commissioners of the Authority or a duly authorized Committee thereof, and to ratification by the membership of any affected employee organization as may be required by its constitution or by-laws.

B. An approved agreement covers all persons holding positions within the class or group of classes of employees which have been included in the negotiating unit to which the agreement is applicable.

C. Each such agreement shall recite that it is entered into pursuant to and subject to the provisions of the Port Authority Labor Relations Instruction.

IX. RESOLUTION OF DISPUTES IN THE COURSE OF NEGOTIATIONS

A. The Authority and employee organizations may enter into written agreements setting forth procedures to be invoked in the event of disputes which reach an impasse during the course of collective negotiations. In the absence or upon the failure of such procedures, the Authority or the employee organization may request the Panel to render assistance as provided herein.

B. Upon receipt of such request, the Chairman shall designate a mediator who shall attempt to resolve the differences between the parties and who shall continue to serve until agreement is reached or the Chairman is notified in writing by the designated mediator or by the parties jointly that mediation assistance is no longer warranted.

C. If mediation of the dispute between the parties is discontinued without agreement being reached, and if factfinding has not been jointly requested pursuant to Paragraph A hereof, either party may submit to the Panel a request in writing that the dispute be submitted to factfinding. A copy of such request shall simultaneously be served upon the other party. The other party shall file any objections to such request for factfinding with the Panel within three working days of the receipt of such request. The Panel shall thereupon in its discretion determine whether factfinding shall be invoked, and, if it determines the factfinding to be warranted, the Chairman shall proceed with the appointment of a factfinder as provided herein.

D. Upon the invocation of factfinding, the Chairman shall submit simultaneously to each party to the dispute an identical list of names of at least five (5) factfinders. Each party to the dispute shall have five (5) working days from the date of transmission of the list in which to examine said list, cross off any two names to which it objects, number the remaining names indicating the order of its preference and return the list to the Chairman. When any party fails to return the list within the specified time, all persons named therein shall be deemed acceptable to that party. The Chairman shall appoint a single factfinder giving recognition to the designated orders of preference, if any. If the appointed factfinder declines or is unable to serve, or if for any other reason the appointment

cannot be made from the submitted list, the Chairman shall be authorized to appoint a factfinder not previously rejected by either party without submission of any additional list. The roster of factfinders submitted by the Chairman shall not include the mediator appointed pursuant to this Section unless the parties mutually agree in writing requesting such mediator to serve as the factfinder.

E. Unless all parties agree, the factfinder shall not consider demands involving other than mandatory subjects of negotiations.

F. The factfinder shall, as soon as practicable after appointment, meet with the parties or their representatives, hold hearings and take such other steps as may be deemed appropriate. If the dispute between the parties is not settled during the course of factfinding, the factfinder shall make findings of fact and recommend the terms of settlement as soon as practicable after the completion of the factfinding procedures. Any findings of fact and recommended terms of settlement shall be submitted in writing to the parties privately and to the Chairman. Findings and recommendations of the factfinder may be made public by the Chairman if the impasse is not resolved within five (5) working days after the receipt of the recommendations of the factfinder by the parties. If the parties are able to reach agreement on the matters in dispute during such five-day period, the findings of fact and recommendations for such settlement shall not be made

public unless the parties mutually agree to do so.

G. In the event that the findings of fact and recommendations are made public and the impasse between the parties continues, the Panel shall take whatever steps it deems expedient to effect a voluntary settlement of the impasse by the parties.

H. Unless the parties agree otherwise, mediators and factfinders shall be sought from either the New Jersey Public Employment Relations Commission or the New York Public Employment Relations Board.

X. STRIKES, WORK STOPPAGES, SLOWDOWNS, OR INTERFERENCE WITH FACILITY OPERATIONS

A. Any employee organization which, acting itself or through its agents, employees, members or designees, engages in or causes, supports, encourages or condones a strike, work stoppage, work slowdown, or disruption of or interference with the operation of any Authority facility, shall be subject to termination or suspension of dues checkoff and representation fee deductions.

B. If the Authority determines that an employee organization may have violated the provisions of Paragraph A hereof, it shall institute proceedings before the Panel pursuant to this Section.

C. Proceedings against an employee organization under this Section shall be commenced by service upon it and on the

Panel of a written notice, together with a copy of the charges. The employee organization shall have six (6) working days within which to serve its written answer to such charges. The Panel shall hold a hearing promptly thereafter and at such hearing the parties shall be permitted to be represented by counsel and to summon witnesses on their behalf. Compliance with the technical rules of evidence shall not be required.

D. In determining whether an employee organization has violated the provisions of Paragraph A of this Section, the Panel shall consider whether the employee organization called a strike, work stoppage, work slowdown, or disruption of or interference with the operation of any Authority facility, or tried to prevent it, and whether the employee organization made or was making good faith efforts to terminate the strike, work stoppage or work slowdown or any disruption of or interference with the operation of any Authority facility.

E. If the Panel determines that an employee organization has violated the provisions of Paragraph A hereof, it may order termination or suspension of dues checkoff and representation fee deductions, to be effective upon service of written notice of such action to the employee organization. In fixing the duration of such termination or suspension of dues checkoff deductions, the Panel shall consider all the relevant facts and circumstances including but not limited to: (i) the extent of any willful defiance of the provisions of Paragraph A

hereof; (ii) the impact of any strike, work stoppage or work slowdown on the public health, safety and welfare of the community; and (iii) the financial resources and liabilities of the employee organization; and the Panel may consider (i) the willingness of the employee organization or the Authority or the representatives thereof to submit to the mediation and factfinding procedures provided in Section IX of this Instruction, and (ii) whether if so alleged by the employee organization, the Authority or its representatives engaged in such acts of extreme provocation as to detract from the responsibility of the employee organization for any strike, work stoppage or work slowdown.

F. No compensation shall be paid by the Authority to any employee with respect to any day or part thereof during which such employee participated in a strike, work stoppage, or work slowdown.

G. Nothing in this Instruction shall in any way preclude the Authority from taking disciplinary action pursuant to its rules and regulations against any employee who has engaged in or who has caused, supported, encouraged or condoned a strike, work stoppage, work slowdown, or disruption of or interference with the operation of any Authority facility; nor shall anything in this Instruction preclude the Authority from invoking any other legal, judicial or administrative remedy with respect to any employee or employee organization in connection with any

strike, work stoppage, work slowdown or disruption of or interference with the operation of any Authority facility which the Authority shall, in its discretion, pursue.

XI. IMPROPER PRACTICES

A. Practices by or on Behalf of Empl yer

It shall be an improper practice for the Authority or its agents or designees deliberately (a) to interfere with, restrain or coerce employees of the Authority in the exercise of the rights granted in Paragraph A of Section II of this Instruction for the purposes of depriving them of such rights; (b) to dominate or interfere with the formation, existence or administration of any employee organization for the purpose of depriving employees of such rights; (c) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of any employee organization; (d) to refuse to negotiate salaries, wages, hours, and other terms and conditions of employment, and payment of dues and representation fee deductions in good faith with the duly recognized representatives of its employees; or (e) to refuse to produce in any proceeding instituted under this Instruction information in its or their possession properly deemed material and relevant by the person or persons presiding at such proceeding.

B. Practices by or on Behalf of Employee Organization

It shall be an improper practice for an employee organization or its agents or designees deliberately (a) to interfere with, restrain or coerce employees of the Authority in the exercise of the rights granted in Paragraph A of Section II of this Instruction, or to cause or attempt to cause the Authority to do so, (b) to refuse to negotiate salaries, wages, hours and other terms and conditions of employment, and payment of dues and representation fee deductions, in good faith with the Authority or its agents or designees, or (c) to refuse to produce in any proceeding instituted under this Instruction information in its or their possession properly deemed material and relevant by the person or persons presiding at such proceeding.

C. Charge

(1) A charge that the Authority or its agents or designees, or any employee organization or its agents or designees, has engaged in an improper practice may be filed with the Panel within three months from the commencement of the alleged improper practice by one or more Authority employees or by any employee organization acting in his or their behalf, or by the Authority. Any such charge timely filed with the Secretary of the Authority under the Labor Relations Instruction adopted by the Authority on October 14, 1971 which has not been finally determined may be filed with the Panel for determination within thirty days after the Panel first convenes.

(2) The charge shall be in writing and shall be signed and sworn to before any person authorized to administer oaths, and a copy thereof shall be served on every other party. It shall include the following: (a) the name, address and affiliation, if any, of the charging party, and the title of the representative filing the charge; (b) the name and address of the respondent or respondents and any other party named therein; (c) a clear and concise statement of the facts constituting the alleged improper practice, including the names of the individuals involved in the alleged improper practice, the time and place of the occurrence of each particular act alleged, and the subsections of Paragraphs A and B of this Section alleged to have been violated; and (d) a statement that the charging party is available to participate in a pre-hearing conference and a formal hearing immediately.

(3) The Chairman or hearing officer designated by the Chairman may permit a charging party to amend the charge before, during or after the conclusion of the hearing upon such terms as may be deemed just and reasonable. The charge may be withdrawn by the charging party before the issuance of a final order based thereon upon approval by the Chairman. Whenever the Chairman approves the withdrawal of a charge, the case will be closed.

D. Administrative Processing by Chairman

(1) After a charge is filed, the Chairman shall review the charge to determine whether the facts as alleged may constitute an improper practice as set forth in Paragraphs A or B of this Section. If he determines that the facts as alleged do not constitute a violation within the meaning of said Paragraphs, the charge shall be dismissed by the Chairman.

(2) Not later than ten (10) working days after the Chairman renders any such decision, the charging party may file a written notice of appeal with the Panel. Such notice shall set forth the reasons for the appeal, and a copy thereof shall be served upon each respondent. Not later than five (5) working days after receipt of such notice of appeal, each respondent may submit a response thereto to the Panel, and to the charging party. The Panel shall thereupon either affirm the dismissal of the charge by the Chairman or order the charge processed pursuant to the provisions of this Section.

(3) If the charge is not dismissed pursuant to subparagraphs (1) and (2) of this Paragraph, the Chairman shall appoint a hearing officer to conduct a hearing.

E. Disputes Relating to Scope of Negotiations

(1) If, upon review of the charge, the Chairman determines that it involves primarily a dispute between the parties as to the scope of negotiations under this Instruction, he shall forthwith schedule a conference for the purpose of

inquiring further into the matter. Immediately subsequent to the conference, and if one or more of the parties have made a request that a dispute involving primarily a disagreement as to the scope of negotiations under the Instruction be processed expeditiously, the Chairman shall so notify the Panel and transmit the papers to the Panel. The Panel shall then inform the parties as to whether it will accord expedited treatment to the matter. If the Panel determines that the matter will be expedited, it will also notify the respondent of the due date for its answer, and the parties of the due date for submission of additional material. The Panel may also direct that oral argument be held before it, or that a hearing be held before the full Panel, one of its members, or a hearing officer. If the Panel determines that expedited treatment will not be accorded, the matter will be handled in regular course.

(2) If an expedited hearing is held, there shall be no intermediate report from a Panel member or a hearing officer who may be assigned to hold the hearing unless the Panel orders that there be one. Upon the completion of the hearing, such Panel member or hearing officer shall transmit the record, including any material submitted by the parties, to the full Panel for a determination without making any recommendations.

F. Answer

(1) Unless the charging party or the Panel shall agree to a later date, the respondent shall file an answer with the Panel within ten (10) working days after receipt of notice of the appointment of a hearing officer and a copy thereof shall be served upon all other parties. The original shall be signed and sworn to before any person authorized to administer oaths.

(2) If the charge is believed by a respondent to be so vague and indefinite that it cannot reasonably be required to frame an answer, the respondent may, within ten (10) working days after receipt of notice of the appointment of a hearing officer, file a request with the hearing officer for an order directing the charging party to file a statement supplying specified information. The filing of such request will extend the time during which the respondent must file and serve his answer until ten (10) working days from the ruling of the hearing officer on the request, or until such later date as the hearing officer may set. Such a request must be served upon the charging party simultaneously with its filing with the hearing officer.

(3) The answer shall include a specific admission, denial or explanation of each allegation of the charge or, if the respondent is without knowledge thereof, he shall so state and such statement shall operate as a denial. Admission or denials may be made to all or part of an allegation, but shall fairly meet the circumstances of the allegation. The answer shall also

include a specific detailed statement of any affirmative defense. The hearing officer may permit the respondent to amend the answer for reasonable cause at any time before or during the hearing, or at any time prior to the issuance of the hearing officer's report and recommendations.

G. Hearing

(1) The hearing officer designated by the Chairman shall schedule a hearing for the purpose of taking evidence upon the charge within a reasonable time after receipt of the answer of the respondent.

(2) At least five (5) working days prior to the scheduled date for the hearing, the hearing officer shall hold a pre-hearing conference for the purpose of clarification of issues.

(3) Any party shall have the right to appear at the scheduled hearing in person, by counsel, or by other representative, and any party and the hearing officer shall have the power to call and examine witnesses and to introduce into the record documentary and other evidence. It shall be the duty of the hearing officer to inquire fully into all matters at issue to obtain a full and complete record. The technical rules of evidence shall not apply. Stipulations of fact may be introduced into evidence with respect to any issue.

(4) Any party shall be entitled upon request made before the close of the hearing, to file a brief within such time

as fixed by the hearing officer, who may himself direct the filing of briefs when he deems their submission warranted. A copy of such brief filed with the hearing officer shall be served upon all other parties.

(5) After completion of the hearing, the hearing officer shall issue a report and recommendations and submit the record of the proceedings including any briefs filed by the parties, to the Panel. The Panel shall cause the report and recommendations of the hearing officer to be promptly served on all parties to the proceeding. A designated recorder shall make the only official transcript of the proceedings. A copy of the official transcript may be obtained by each party upon the payment of the cost of preparation thereof.

H. Exceptions and Briefs

(1) Not later than fifteen (15) working days after service of the report and recommendations, a party may file with the Panel written exceptions thereto or to any other part of the record or proceedings, and a supporting brief may be filed with the Panel simultaneously; at the same time, copies of such exceptions and brief shall be served upon all other parties.

(2) Not later than seven (7) working days after service of exceptions, any party may file a response thereto. A copy of such response shall be served upon each party to the proceeding.

(3) A request for extension of time within which to

file exceptions and briefs shall be in writing and filed with the Panel at least two (2) working days before the expiration of the required time for filing. Copies of such request shall be served on each party to the proceeding.

(4) If a party desires to argue orally before the Panel, a written request with reasons therefor shall accompany the exceptions filed or the response thereto. The Panel may grant such a request; it may also direct oral argument on its own motion.

I. Decision and Order of Panel

After receipt of the report and recommendations of the hearing officer and the record of proceedings, the Panel shall render its decision with respect to the charge and prepare a tentative order. If any party is found to have committed an improper practice, such order may, as appropriate, require such party to cease and desist from such improper practice, and to take such reasonable affirmative action as will effectuate the policies of this Instruction. Said decision and tentative order shall be served upon all parties to the proceeding who may submit comments with respect thereto not later than five (5) working days after receipt thereof. Upon receipt of such comments, if any, the Panel shall issue a final binding order.

J. Form of Submission

Material submitted to the Panel pursuant to this Section shall be in the form of an original and four copies.

XII. REPRESENTATION PROCEDURES

A. Retention of Recognized Status

Any employee organization which prior to the effective date of this Instruction has been granted recognition as the exclusive representative of a group of employees shall retain its recognized status until a different employee organization is granted exclusive recognition, or exclusive recognition has been withdrawn, in accordance with these Representation Procedures.

B. Recognition as Exclusive Representative Without Election

Upon receipt of a request for exclusive recognition by an employee organization, the Authority may grant recognition without an election, provided:

(a) It is satisfied that the employee representative is the freely chosen representative of a majority of the employees in an appropriate negotiating unit;

(b) A Notice has been posted conspicuously in places where notices are normally posted affecting employees in the negotiating unit involved, for a period of at least ten (10) consecutive days, advising all persons that it intends to grant such exclusive recognition for the specified negotiating unit without an election to a named employee organization;

(c. Written notification is served upon any employee organization that has filed a petition for exclusive recognition within the year preceding the request for recognition to represent any of the employees in the negotiating unit involved. Such notification shall be made at least ten (10) days prior to the grant of recognition and shall contain the information set forth in the preceding subparagraph;

(d) Another employee organization has not within the ten-day period notified the Panel of a claim to represent any of the employees in the negotiating unit and has not within such period filed a valid petition for exclusive recognition with the Panel.

(e) Such recognition shall be in writing.

C. Who May File Petitions for Certification or Decertification

(1) A petition to determine whether an employee organization should be certified as the exclusive representative of employees of the Authority in a negotiating unit, or should replace another employee organization as the exclusive representative of employees in a negotiating unit, may be filed with the Panel by any employee organization seeking certification, or by the Authority.

(2) A petition to determine if an employee organization should be decertified as an exclusive representative because it does not represent a majority of employees in a negotiating unit or because the negotiating unit is inappropriate

may be filed with the Panel by any employee or employees or an individual acting on his or their behalf, or by the Authority.

D. Petition for Certification

(1) A petition by an employee organization for certification shall contain the following:

(a) A description of the negotiating unit for which the petitioner seeks exclusive representation.

(b) Name, address and telephone number of the recognized representative, if any, and the date of such recognition and the expiration date of any applicable agreement, if known to the petitioner.

(c) Names, addresses and telephone numbers of any other interested employee organizations, if known to the petitioner.

(d) Name and affiliation, if any, of the petitioner and its address and telephone number.

(e) A statement that the petitioner has submitted to the Panel a current roster of its officers and representatives, a copy of its constitution and by-laws, and a statement of its objectives.

(f) A clear and concise statement of any other relevant facts.

(g) A declaration by the person signing the petition that its contents are true and correct to the best of his knowledge and belief.

(h) The signature of the petitioner's representative, including his title and telephone number.

(i) The petition shall be accompanied by a showing of interest in the form of dues deduction authorization cards which have not been revoked, designation cards or petitions, signed and dated within the previous six months by not less than thirty percent (30%) of the employees in the negotiating unit, and an alphabetical list of names constituting such showing. Such showing of interest shall be maintained in a confidential status by the Panel.

(2) A petition by the Authority to determine whether an employee organization should be recognized as the exclusive representative of employees in a negotiating unit shall contain the information set forth in this Paragraph except for subparagraphs (e) and (i).

E. Petition for Decertification

A petition to determine if an employee organization should be decertified as the exclusive representative of employees in a negotiating unit shall contain the following:

(1) A petition by the Authority shall contain the information set forth in Paragraph D of this Section except for subparagraphs (e) and (i), and a statement that the negotiating unit is inappropriate or that the Authority has a good faith doubt that the currently recognized employee organization represents a majority of the employees in the negotiating unit.

Attached to the petition shall be a detailed explanation of the reasons supporting such good faith doubt.

(2) A petition by an employee or employees or an individual acting on his or their behalf shall contain the information set forth in Paragraph D of this Section, except for subparagraphs (e) and (i), and it shall be accompanied by a showing of interest in the form of a petition or petitions signed within the previous six months by not less than thirty percent (30%) of the employees in the negotiating unit indicating that the employees no longer desire to be represented for the purposes of collective negotiations by the currently recognized employee organization and an alphabetical list of names constituting such showing. Said petition or petitions shall be maintained in a confidential status by the Panel.

F. Showing of Interest

Where a showing of interest is required pursuant to any paragraph of these Representation Procedures, the person submitting such showing of interest shall simultaneously file with the Panel a declaration of authenticity of such showing of interest, signed and sworn to by any person authorized to administer oaths, containing the following:

(1) The name of the person executing the declaration and, if such showing of interest is submitted on behalf of an employee organization, his position with the employee organization and a statement of his authority to execute

the declaration on its behalf; and

(2) A declaration that upon his personal knowledge or inquiries that he has made, the persons whose names appear upon the evidences submitted have themselves signed such evidences on the dates specified thereon.

G. Filing and Service of Petitions

An original and four copies of a petition (including any supplementary data) for certification or for decertification shall be filed pursuant to Paragraphs D or E respectively, with the Panel, and copies thereof, excluding any showing of interest, shall be served by the petitioner on all known interested parties. A statement of such service shall be filed with the Panel.

H. Timeliness of Petitions

(1) When no employee organization is recognized or certified as the exclusive representative of employees in a negotiating unit, a petition will be considered timely filed provided (a) there has been no valid election within the preceding twelve-month period in the requested negotiating unit or any part thereof, and (b) the petition is filed (i) within thirty (30) days after a request for exclusive recognition has been refused by the Authority, or (ii) between thirty (30) and sixty (60) days after a request for exclusive recognition has been made and has not been denied by the Authority.

(2) When an employee organization is recognized or

certified as the exclusive representative of employees in a negotiating unit, a petition will not be considered timely if filed within twelve (12) months after such recognition or certification is granted, provided, however, that if an agreement covering employees in such unit has been entered into by the Authority and an employee organization, said petition will not be considered timely unless filed between 90 and 120 days prior to the expiration of such agreement, or between 90 and 120 days prior to the expiration of three years from the effective date of such agreement, whichever is the shorter period.

(3) The extension of an agreement prior to its terminal date shall not serve as a basis for the denial of a petition submitted in accordance with the time limitations provided in subparagraph 2 hereof.

(4) A petitioner who withdraws a petition shall be barred from filing another petition for the same negotiating unit for twelve (12) months.

I. Posting of Notice of Petition

Upon the request of the Chairman, after the filing of a petition, the Authority shall post copies of a notice to employees on bulletin boards where notices are normally posted affecting the employees in the negotiating unit involved. Such notice shall remain posted for ten (10) days and shall set forth:

(1) The name of the petitioner;

(2) The description of the negotiating unit

involved;

(3) A statement that all interested parties are to advise the Panel in writing of their interest or position within ten (10) days from the date of posting of such notice.

J. Processing of Petition

(1) The Chairman shall determine the adequacy and timeliness of a showing of interest administratively, and a determination that any showing of interest required under these Representation Procedures is sufficient shall not be subject to collateral attack at any hearing conducted in accordance with subdivision 2 hereof.

(2) Upon the filing of any petition, the Chairman shall direct an investigation of the petition to determine the facts, including whether the showing of interest requirement has been met, whether the petition has been timely filed, whether more than one employee organization seeks to represent some or all of the employees in the allegedly appropriate unit, and whether there is agreement among the parties as to the appropriateness of the alleged unit. If the Chairman determines after investigation that questions exist with respect to any such matters, he may order a hearing to be conducted. If he determines after investigation that the petitioner has not made the requisite showing of interest, or that the petition has not been timely filed, or that no valid question concerning the representation of employees exists in the negotiating unit, he

may request the party filing such a petition to withdraw it without prejudice to refiling at any future time or he may, in the absence of such withdrawal, dismiss the petition. Upon any such dismissal, a request for review by the Panel with or without hearing may be filed by the affected petitioner within ten (10) days from the date of such dismissal. If review without a hearing is requested, the Panel shall render its decision based on the material submitted to the Chairman, the information compiled in the course of his investigation, and such additional material as shall be submitted to the Panel by the petitioner at the time review is requested.

K. Hearing

(1) A hearing pursuant to Paragraph J hereof shall be conducted by a hearing officer appointed by the Panel not less than ten (10) nor more than twenty (20) days from the date of his appointment. Notice of such hearing shall be served by the hearing officer upon the Authority and any employee organization which represents, or has requested or filed a petition for certification, of any employees in the allegedly appropriate negotiating unit.

(2) The hearing shall be open to all parties having a direct interest in the matter before the hearing officer. It shall be the duty of the hearing officer to inquire fully into all matters in issue and the hearing officer shall obtain a full and complete record of the proceedings. A designated recorder

shall make the only official transcript of such proceedings. A copy of the official transcript may be obtained by each party upon payment of the cost of preparation thereof.

(3) The hearing is to be considered investigatory and not adversary. Its purpose is to develop a full and complete factual record, and the technical rules of evidence do not apply.

(4) A party shall have the right to appear at any hearing in person, by counsel, or by other representatives, and to introduce into the record documentary or other relevant evidence.

(5) Upon the close of the hearing, the hearing officer shall submit the record of the proceedings to the Panel, which shall include the petition, notice of the hearing, official transcript of the hearing, exhibits, and any other material properly submitted by the parties. At the request of the Panel, the hearing officer may make recommendations regarding the petition or other issues in the hearing. The decision of the Panel will be transmitted to the parties within twenty (20) days from receipt of the hearing record from the hearing officer.

L. Intervention

(1) Subject to the provisions of subparagraph 2 hereof, an employee organization may be permitted to intervene in any proceeding to resolve a question concerning the representation of employees provided (a) it has submitted a showing of interest in the form of dues deduction authorization

cards which have not been revoked, designation cards or petitions, signed and dated within the previous six months by not less than thirty percent (30%) of the employees in the negotiating unit involved in the petition, and an alphabetical list of names constituting such showing, or (b) it currently is recognized as the exclusive representative of employees in the negotiating unit.

(2) No employee organization may participate to any extent in any representation proceeding unless it has notified the Panel of its desire to intervene within ten (10) days after the posting of the notice of petition as provided in Paragraph I, and the Chairman has determined that the proposed intervention has met the requirements of this section.

(3) The Authority may in its discretion be a party to any representation proceeding.

M. Conduct of Elections

(1) If it is determined that an election shall be held, appropriate notices of election shall be posted on all bulletin boards where notices are normally posted affecting the employees in the negotiating unit involved. Such notices shall set forth the details and procedures for the election, the negotiating unit involved, the date, hour and place of the election and shall contain a sample ballot.

(2) All elections shall be by secret ballot supervised by an election supervisor which shall be the Chairman

or an independent balloting organization designated by the Chairman.

(3) An employee organization other than the petitioning employee organization may be placed on the ballot if it is recognized as the exclusive representative of employees in the negotiating unit or, if not so recognized, upon submission to the Chairman of a showing of interest in the form of dues deduction authorization cards which have not been revoked, designation cards or petitions, signed and dated within the previous six months by at least thirty percent (30%) of the employees in the negotiating unit, as long as notification is given to the Chairman at least fifteen (15) days prior to the scheduled date of the election.

(4) After an election is scheduled, the names and addresses of the eligible voters in the negotiating unit involved in the election, as such information is currently reflected in the files of the Authority, shall be made available upon request to any party to the election.

(5) Whenever two or more employee organizations are included as choices in an election, or in any proceeding involving a petition for decertification, any employee organization may request the Chairman to remove its name from the ballot. The request must be received not later than five (5) days before the date of the election. Such request shall be subject to the approval of the Chairman, whose decision shall be

final; provided, however, that in a proceeding involving a petition for decertification, the employee organization currently recognized may not have its name removed from the ballot without giving the aforementioned notice in writing to all parties and the Chairman, disclaiming any representation interest among the employees in the unit.

(6) Any party may be represented at the polling place(s) by observers of his own selection, subject to such limitations as the election supervisor may prescribe.

(7) Any party or the election supervisor may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded.

(8) Upon the conclusion of the election, the election supervisor shall cause to be furnished to the parties a tally of ballots.

(9) Within five (5) working days after the tally of ballots has been furnished, any party may file with the Chairman an original and four (4) copies of objections to the conduct of the election or conduct affecting the results of the election, which shall contain a short statement of the reasons therefor. Copies of such objections shall be served simultaneously on the other parties by the party filing them, and a statement of service shall be made.

(10) If no objections are filed within the time set

forth above, and if the challenged ballots are insufficient in numbers to affect the result of the election, and if no runoff election is to be held, the Chairman shall forthwith issue to the parties a certification of the results of the election, including notice of certification or decertification, where appropriate.

(11) If objections are filed to the conduct of the election or conduct affecting the result of the election, or if the challenged ballots are sufficient in number to affect the result of the election, the Panel shall investigate such objections or challenges, or both.

(12) Where objections are filed, or challenges are determinative, the Panel shall conduct an investigation and shall, where appropriate, issue a notice of hearing designating the Chairman or hearing officer to hear the matters alleged and to issue a report and recommendations. The objecting party shall bear the burden of proof regarding all matters alleged in the objections to the conduct of the election or conduct affecting the results of the election. Upon the conclusion of the investigation, the Panel shall render a decision as to the validity and/or the results of the election.

N. Runoff Election

(1) The Chairman shall provide for a runoff election when an election in which the ballot provided for not less than three (3) choices (i.e., at least two representatives and "neither" or "none") results in no choice receiving a

majority of the valid ballots cast and the number of valid ballots cast totals at least thirty percent (30%) of the number of eligible voters in the negotiating unit and any objections filed have been disposed of as provided in Paragraph M hereof. Only one runoff election shall be held pursuant to this Paragraph.

(2) Employees who were eligible to vote in the original election and who are in an eligible category on the date of the runoff election shall be eligible to vote in the runoff election.

(3) The ballot in the runoff election shall provide for a selection between the two choices receiving the largest and second largest number of votes.

(4) Upon the conclusion of the runoff election, the provisions of subparagraphs 8-12 of Paragraph M shall govern insofar as applicable.

b. Certification of An Employee Organization After Election

An employee organization shall be certified as the exclusive representative of employees in a negotiating unit following an election upon petition for certification if such employee organization was designated on a majority of the valid ballots cast in the election and the valid ballots cast in the election equalled in number at least thirty percent (30%) of the number of eligible voters in the negotiating unit.

P. Decertification of An Employee Organization After Election

An employee organization shall be decertified as the exclusive representative of employees in a negotiating unit following an election held upon petition for decertification if such decertification was specified on a majority of the valid ballots cast in the election and the valid ballots cast in the election equalled in number at least thirty percent (30%) of the number of eligible voters in the negotiating unit.

XIII. JUDICIAL REVIEW

Nothing in this Instruction shall preclude any party from invoking judicial review of any decision, determination or order of the Panel in the courts of the State of New York or the State of New Jersey pursuant to applicable State law and court rules.

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