IN THE MATTER OF AN ARBITRATION

BETWEEN:

METROPOLITAN TORONTO POLICE SERVICES BOARD
(the "Board")

- and -

METROPOLITAN TORONTO POLICE ASSOCIATION
(the "Association")

GRIEVANCE REGARDING 1995 EARLY RETIREMENT INCENTIVE PLAN

ARBITRATOR: Pamela Cooper Picher

APPEARING FOR THE BOARD:			
	Michael Hines	-	Counsel
	Lea Hazel	-	Manager, Labour Relations
	Lorne Perron	-	Consultant

APPEARING FOR THE ASSOCIATION:			
	C.M. Mitchell	-	Counsel
	Paul Walter	-	President, MTPA
	Roger Aveling	-	Legal Counsel, MTPA

Hearings in this matter were held in Toronto on June 19; September 22; November 9 & 10, 1995; March 6; April 24; May 8 & 22; and June 3 & 10, 1996.

AWARD

Through this arbitration the Association grieves the unilateral offer by the Police Services Board of an early retirement incentive (ERI) for members of the Force on or about January 24, 1995. The ERI was offered to members of the uniform and civilian branches of the Force without the agreement of the Association. The parties have agreed that, initially, the Arbitrator should determine the issue of liability only and should remain seized regarding remedy.

A. *AGREED STATEMENT OF FACTS:*

At the outset of the hearing, the parties submitted the following Agreed Statement of Facts:

AGREED STATEMENT OF FACTS

B E T W E E N:

METROPOLITAN TORONTO POLICE ASSOCIATION

- and -

METROPOLITAN TORONTO POLICE SERVICES BOARD

The following Agreed Statement of Facts is agreed to without prejudice to the right of either party to take the position that any of the material set out herein is not relevant to the determination of the legal issues in the case.

The facts agreed to herein are also without prejudice to any position the parties may take in any other proceedings, including interest arbitration.

1. The subject matter of the grievance is that on January 24, 1995, the Metropolitan Toronto Police Services Board unilaterally adopted an early retirement incentive ("ERI") without the agreement of the Association. The package was announced to the uniform officers on January 25, 1995.

2. The Association subsequently grieved the Board's action. The grievance is set out in a letter dated February 10, 1995 from Paul Walter, President of the Metropolitan Toronto Police Association, to Susan Eng, Chairperson, Metropolitan Toronto Police Services Board, an extract of which is set out in Exhibit "A".

3. The provisions of the relevant collective agreement are contained in the 1993 collective agreement of the parties. The formal document is unsigned, (Exhibit "B.1"); however, that collective agreement is comprised of the pre-existing 1989-90 collective agreement, the 1991 Memorandum of Settlement dated July 15, 1991 (Exhibit "B.2"), and the terms of the Kennedy interest arbitration award dated February 18, 1993 (Exhibit "B.3"). There is no dispute that the material provisions of the collective agreement in dispute here are as set out in the unsigned document.

4. The provisions of the relevant civilian collective agreement are contained in the 1993 collective agreement of the parties. The formal document is unsigned (Exhibit "C.1") however, that collective agreement is comprised of the pre-existing 1989/90 collective agreement (Exhibit "C.2"), the terms of the 1991 Memorandum of Understanding regarding civilian negotiations dated October 10, 1991 (Exhibit "C.3"), the 1991 McKechnie civilian arbitration award dated April 13, 1992 (Exhibit "C.4"), and the 1992 Kennedy interest arbitration award dated February 18, 1993 (Exhibit "B.3").

5. The Metropolitan Toronto Police Benefit Fund (the "Benefit Fund") is a pension plan covering all uniformed officers hired before July 1, 1968. Police officers hired prior to that date are covered by this Fund in respect of their pensions, whereas those hired on or after that date are covered by OMERS. Just prior to the January, 1995 decision of the Board to unilaterally implement early retirement incentive, the relative numbers of officers in each of the benefit fund and OMERS were 485 and 4,814, respectively. Civilian employees hired before July 1, 1968 are covered by the Metropolitan Toronto Pension Plan ("MTPP") which covers approximately 1,800 employees, most of whom are municipal employees, and approximately 75 of whom are employees of the Board. The remaining civilian employees of the Board are covered by OMERS.

6. The Benefit Fund referred to in paragraph 5 is managed by a Board of Trustees, and the composition of the Board of Trustees is set out in Exhibit "D".

Metro by-law 181-81 applies to the benefit fund (Exhibit "DD"). From time to time changes to the benefit fund have been requested by the Association in bargaining, have been denied by the Board, and then ultimately implemented without the Board's consent by the Board of Trustees and Metro Council. For the last eleven years this has not occurred. <u>To date, it has been held that the terms of OMERS are not bargainable, and are determined by the province. Generally the terms of the Metropolitan Toronto Pension Plan are not bargained but are determined by the trustees and approved by Metro Council</u>.

7. <u>The Benefit Fund has since 1987 provided for the right to retire after 25 years of service on an unreduced pension</u>. Prior to that time, it provided for a reduced pension after 25 years of service. This change was sought by the Association through negotiation, and was ultimately awarded in stages by interest arbitrators and by agreement of parties.

8. <u>The Benefit Fund has been the subject of collective bargaining proposals in virtually every round of bargaining for many years</u>.

9. <u>The group of people who are covered by the PBF (Pension Benefit Fund) is made up of former members who have already retired (or their survivors) and still active members who have yet to retire</u>. All active members of the Force covered by the PBF as of July 1, 1993 were eligible for an unreduced

pension. The relative numbers of those receiving benefits vs. still-active members as of January 1, 1995 was approximately 2069 vs. 470. Without prejudice to any position it may wish to take on the issue of remedy, the Board is prepared to agree, for purposes of the determination of liability, that the greater the number of persons who actually take early retirement under the PBF, the greater the cost of pension benefits to the Fund, **and the less monev there is potentiallv available in the Fund** to pay for other benefits such as ad hoc increases for PBF members who have already retired or indexation of benefits for active members. The Board takes the position that the impact of the 1995 ERI on the potential for the granting of such PBF benefits in addition to those called for by the collective agreement was **de minimis**. **The Association agrees that the 1995 ERI did not compromise the abilitv of the PBF to meet anv of its obligations presentlv called for under the collective agreement**. It does not agree that the impact of the 1995 ERI on the potential for granting other PBF benefits was **de minimis**. The Association asserts that the actual impact of the 1995 ERI is irrelevant to the issue of liability and only intends to argue that the potential impact of the 1995 ERI affects the legal issues going to liability in this case.

10. The Board has in the past asserted and continues to assert that the Association has no bargaining rights of any kind with respect to retired members of the Force. The Board also asserts (and has asserted in the past) that the Fund's currently negotiated pension provisions are the maximum benefits allowable at law and

consequently that bargaining proposals for benefits for PBF members (such as indexation) in addition to those which have already been negotiated are unlawful. The Association disagrees strongly with these positions and the issue of indexation of benefits for active members is currently before the interest arbitration board. Ad hoc distribution of surplus PBF funds to members who have already retired have occurred in past years at the discretion of the PBF Board of Trustees.

11. In 1984, the Association sought, but did not obtain in collective bargaining, a provision to be added to the 1985 agreement which would have required the continuation of working conditions then in effect unless changed by mutual consent of both parties (Exhibit "E"). It was resolved early in the mediation process that year, by way of the introduction of the last paragraph to a letter of understanding, which now appears at page 59 of the Uniform agreement and page 55 of the civilian agreement.

12. In 1993, Sectoral and Local Agreements were negotiated pursuant to the ***Social Contract Act***. A copy of the Local Agreement is contained in Exhibit "F". **Pursuant to paragraph 6 of the Local Agreement, an early retirement incentive program was offered in order to reduce complement and thereby reduce salary expenses. The savings from this ERI were applied against the Board's Social Contract target pursuant to the Local Agreement**.

13. Prior to the Social Contract in 1993, an early retirement incentive had never been offered by the employer. Prior to December, 1994, the Association had never tabled a proposal concerning time-limited early retirement incentives specifically designed to reduce complement within a certain period. Pension enhancements to the Benefit Fund arising out of Association proposals in the past to have unreduced pensions, combined with Medi-pak, has encouraged members hired prior to July 1, 1968 to take early retirement. The Board opposed the unreduced pension on several occasions, inter alia, on grounds that they could lead to an undesirable number of early retirements. The changes described above were not designed to reduce complement, nor was complement reduced at that time. The Association has never advocated a reduction in complement.

14. The Board has never, whether in Social Contract bargaining or elsewhere, represented that it would not unilaterally establish early retirement incentives separate and apart from those contemplated in the Social Contract Local Agreement. The issue of whether the employer would or would not unilaterally establish early retirement incentives was not discussed between the parties.

15. In 1993 the grants allocated to the Board via Metro Council were reduced as a result of two factors; namely: 1) general reductions in grants to municipalities, and 2) the Social Contract. The parties are agreed that the amount of general budget reductions faced by the Board in 1995 is greater than the Social

<u>Contract Target for the members of the Metropolitan Toronto Police Association</u>, which target is approximately $18,000,000. The difference between the 1992 and 1995 gross budgets of the Board attributable to reductions other than Social Contract is approximately double the Social Contract amount. The statement by both parties is without prejudice to the positions they may take in interest arbitration.

16. <u>Following the implementation of the early retirement incentive established under paragraph 6 of the Local Agreement, the Board unilaterally, and without consultation with the Association, introduced a further early retirement incentive in early December, 1993, in order to reduce complement and reduce salary expenses. The Board did not apply the resulting savings to the Social Contract targets</u> (Exhibit "G"). (The Board minutes of December 2, 1993 is Exhibit "EE"). The "$42 million reduction" referred to in the minute is the amount (understood at that time) of the reduction in general grants apart from the Social Contract.

17. <u>Immediately following this Board action, the Association and some members expressed concern regarding the situation of members who reached 30 years of service in the August to December, 1993 period, since they were ineligible for the early retirement incentive offer described in paragraph 16 above. The Board then unilaterally in late December, 1993, opened up this early retirement incentive to that capacity of people. See Exhibit "FF"</u>.

18. No grievances were filed with respect to the December, 1993 incentives offered by the employer. The Association did send a memo to its members (Exhibit "H") which was the subject of the letter from Ms. Eng to Mr. Lymer (Exhibit "I").

19. Notice to bargain for 1994 was given by the employer on December 19, 1993 (Exhibit "J"). However, there was no exchange of proposals from either party. Although a few formal bargaining meetings were scheduled, none were held.

20. In February, 1994, in order to reduce the number of civilian employees, the Board entered into an agreement with the OMERS Board as contemplated in paragraph 9(b) of the Local Agreement under the Social Contract regarding the civilian Type VII downsizing. The Association had repeatedly urged the Board to take this step, not only for civilian employees but for uniform members as well. This agreement between the Board and the OMERS Board establishes an early retirement incentive. In addition to the incentive created by the Type VII agreement, the Board unilaterally established additional incentives regarding extended health coverage, life insurance and the payment of one year's vacation entitlement. In addition, for those members who would be retiring on a reduced pension, the Board offered an additional financial incentive of between two and four months' salary. These additional incentives were offered concurrently with the Type VII pension (see Exhibits "K" and "L"). The Association was aware of the matter (see Exhibits "GG" and "HH"). No grievance was filed in respect of this.

21. At a meeting to discuss bargaining on June 7, 1994, the Board proposed that the 1992 agreement be extended to cover 1994. The Association indicated it would consider the request. On August 4, Mr. Perron, on behalf of the Board, asked Mr. Aveling on behalf of the Association if the Association had taken a final decision on extending the 1992 agreement to 1994. Mr. Aveling responded that he did not know whether the Association had taken a final decision since he had just returned from vacation. There was never an oral or written agreement to extend the 1992 agreement to 1994. On August 12, 1994, Lorne Perron sent Roger Aveling a letter (Exhibit "M"). He received no reply.

22. On October 11, 1994, Paul Walter was elected President of the Association succeeding Art Lymer.

23. On October 18, 1994, Paul Walter wrote to Susan Eng regarding the possibility of unilateral action by the employer with respect to a further early retirement incentive for uniform members in the Metropolitan Toronto Police Benefit Fund (Exhibit "N"). No proposals regarding an early retirement incentive or any other term of the collective agreement were then outstanding.

24. On October 19, 1994, Mr. Walter wrote Ms. Eng seeking, among other things "an Association/Board Committee meeting as soon as possible to discuss issues of mutual concern".

25. Ms. Eng replied to the October 19, 1994 letter by letter dated October 28, 1994 indicating her willingness to convene such a meeting and requesting an agenda.

26. **By letter dated November 10, 1994, the Association advised the Board of its desire to bargain collective agreements for the 1994 contract year** (Exhibit "O").

27. On November 16, 1994, Ms. Eng and Mr. Walter met.

28. By letter dated November 17, 1994 the Board indicated its position that section 129 (1) of the *Police Service Act* applied to the 1994 contracts (Exhibit "P").

29. Further to his letter of October 18, 1994, Paul Walter wrote to Mr. Norm Gardner, Vice-Chair of the Metropolitan Toronto Police Services Board on December 5, 1994 (Exhibit "Q"). The parties had agreed by December 5 to meet ("without prejudice" to the employer's position of November 17) on December 14, 1994 concerning the 1994 contracts. The source of the information in paragraph 4 of Exhibit "Q" was an authoritative one in senior management.

30. **The parties met for the first time to discuss the 1994 contracts on December 14, 1994. At that time, the Association for the first time tabled subjects for bargaining for 1994. (Exhibit "R"), and verbally made an ERI incentive proposal**, which was as follows:

"With regards to the PBF 30 year plus members, they would receive one week for each year of service to a maximum of 26 years.

PBF members with 26 ½ years of service but less than 30 years could elect either a full medipack or 26 weeks retirement incentive.

The Type VII uniform would be entitled to the same incentives as "PBF 26 ½ years but less than 30 years of service" members.

In the Metro Pension Plan, members that met the 85 factor would receive one week for each year of service to a maximum of 26 weeks.

All members would be entitled to their accrued vacation."

At the December 14 meeting, there was extensive discussion regarding a variety of ERI alternatives, including discussion of the proposal put forward by the Association. The Association wanted a Memorandum of Agreement on ERI and to have it agreed to at that time. The Association reiterated its position that the employer could not unilaterally implement an ERI, and one could only be implemented on agreement of the parties. The Board disagreed and said it didn't think ERI's had to be subject to agreement by the Association to be able to do it in the future unilaterally. The Board said that action on the issue had to be taken quickly or savings would be lost. The Board advised the Association that in its view, the Association's proposed ERI was more than would be required to achieve the desired level of downsizing. The ERI program adopted by the Board on January 24 (see paragraph 34) was not proposed to the Association on December 14, or subsequently.

31. As of December 15, 1994, the Association had in its possession Exhibit "II", which they understood was a document to be tendered to the Board at some time.

32. The December 14 meeting was followed by letter of December 20, December 29, 1994 and January 4, 1995 (Exhibit "S", "T" and "U" respectively). The Association gave notice to bargain on January 6, 1995 regarding the 1995 contract (Exhibit "V"). There were subsequent letters between the parties on January 9 and 18, 1995 (Exhibits "W" and "X" respectively).

33. Following the December 14, 1994 meeting, discussions were ongoing in January, 1995 regarding the introduction of an OMERS Type VII for uniformed members. Agreement in principle was reached by correspondence of January 4, 1995 (Exhibit "JJ") and January 20, 1995 (Exhibit "KK") between the parties, and formalized in an agreement dated February 28, 1995 (Exhibit "CC").

34. On January 24, 1995, the Metropolitan Toronto Police Services Board unilaterally adopted an early retirement incentive without the agreement of the Association (Exhibit "Y"). The package was announced to the uniform officers on January 25, 1995 (Exhibit ("LL").

35. The incentive offered to members of the Police Benefit Fund with over 25 years and less than 30 years of service set out in Exhibits "Y" and "LL" was equivalent to the following:

(a) Employer paying premiums for dental, semi-private, and extended health care (i.e., comprehensive medical insurance) benefits to age 65, and, a paid-up life insurance policy of $5,000, OR

(b) four months' salary plus employer paying the premiums for extended health (i.e., comprehensive medical insurance) to age 65 plus a paid-up life insurance policy of $5,000.

36. The Association did not tell its members not to accept the ERI and did not bring injunction proceedings after consulting counsel.

37. **An additional early retirement incentive offered to persons who were entitled to retire under the anticipated OMERS Type VII agreement agreed to on February 28, 1995, was determined by the Board on January 24, 1995**. It is set out in Exhibit "Y" and was employer paying the premiums for extended health coverage to age 65, a paid-up life insurance policy of $5,000, **and one year's additional vacation entitlement**.

38. **At the time that the Board decided to unilaterally implement the ERI, it was apprised that for every month of delay, it would lose $600,000 in savings, and that if the program was not implemented until July 1, there would be no**

savings in the 1995 year, but there would be savings in 1996 and subsequent years. As of January 24, 1995, the only proposals which had been tabled in bargaining with respect to ERI were those referred to in paragraph 30.

39. At the time of the adoption of the ERI program there were no meetings scheduled for bargaining. Due to the appointment of a new Chief of Police and a new Director of Labour Relations for the Board, and other factors, no further meetings were held until March of 1995, but to accommodate the Board due to these and other factors, proposals were not exchanged until April 3. Correspondence between the parties is set out in Exhibit "MM". The Association proposals are Exhibit "NN", and the employer proposals are Exhibit "OO". The parties have met since that date on several occasions both alone and with mediator K. Burkett. The Board has stated that these meetings have been without prejudice to its position regarding the application of section 129(1). The parties are now proceeding to interest arbitration. The Association is proceeding with respect to both 1994 and 1995, and the Board is maintaining its position with respect to 1994. The interest arbitration began on October 30 before Arbitrator Keller. At the first day of hearing, before the interest arbitration board, the Association advised the Board that it was requesting a proposal in the new contract so that no early retirement incentive could be implemented without the consent of the Association.

40. On April 27, 1995, the Metropolitan Toronto Police Services Board approved an early retirement incentive for senior officers. The terms of the offer and a news release with respect to the program are attached as Exhibit "Z" and "AA".

41. The practice of the Police Board is that fourth class constables who finish high in their class at Aylmer Police College receive a "credit" of two months towards their reclassification to third class constable. This practice was implemented unilaterally, and nothing in the collective agreement deals with this practice. This practice has been in effect for at least 25 years. The matter of reclassifications is dealt with by Ontario Regulation R.R.O. 1990, Reg. 929, s.4.

42. Until 1975, the Chief of Police determined the number of officers assigned to patrol cars. The matter was not dealt with in the collective agreement. Since 1975, the matter has been included in the collective agreement as a result of a decision of a board of arbitration and the courts involving these parties reported at 8 O.R. (2nd) 65 (Application for Leave for Appeal to the S.C.C. dismissed). This history of the two patrol car issue was summarized in the interest arbitration award of Arbitrator Swan (Exhibit "BB").

43. The issue of child care leave is not dealt with in the collective agreement, but is dealt with pursuant to a Board policy based upon, inter alia, a draft policy contained in the report of a task force in which the Police Association had representation.

44. <u>Lieu time is provided for members of the force who participate in the Metropolitan Toronto Police Force pipe band and those who participate in the chorus. It is not dealt with in the collective agreement</u>. When the Association became aware that members of the chorus were not being given lieu time, and members of the pipe band were, both were granted lieu time with the knowledge and agreement of both the Board and the Association.

45. <u>The Board has a practice of allowing former members of the bargaining unit to "buy in" to Medi-pak after they reach the age of 65 on a "cost" basis. This practice is not set out in the collective agreement</u>, but the concerns leading to this practice were raised by the Association in bargaining. Prior to 1985, the collective agreement contained no provisions for health benefits for retirees. The Board had a unilateral practice of allowing retirees to purchase certain health benefits on a cost basis. In 1985, the parties agreed on certain health benefits for retirees, but not other benefits. The Board's practice regarding allowing retirees to purchase semi-private health benefits at cost continued after 1985. Complete Medi-pak benefits were established in 1991. The Board still has a practice of allowing retirees to purchase the same benefits at cost post age 65. The Board has taken the position in bargaining with the Association that the Association has no jurisdiction to negotiate on behalf of people who have already left the force, but acknowledges the right of the Association on behalf of existing members to

bargain regarding entitlements which may arise following the completion of their employment.

46. The dates of negotiated agreements and arbitrated awards since 1971 is set out in Exhibit "PP".

47. Attrition rates for the uniform bargaining unit are set out in Exhibit "QQ".

48. The Force operates a training facility at its C.O. Bick College in Scarborough. The annual operating budget (e.g., training staff, equipment, etc.) for the College is approximately $6.7 million. In 1994, the Force engaged an average of 180 members per day in training at the College over roughly 260 days of operation. The total cost of compensating the members while they were engaged in these training exercises was approximately $9.7 million (180 members x 260 days x $200/day). In addition, the Force engages members in training programs at the Ontario Police College in Aylmer and the Canadian Police College in Ottawa, as well as internally at the divisional level.

49. The Board received its timetable for budget preparation from Metro Council by letter dated June 29/94 (Exhibit "RR"). In July, 94, the Board's Labour Relations and Budget personnel were analyzing additional early retirement incentive options (Exhibit SS). In September/94, the Board directed consideration of additional retirement incentives (Exhibit "TT"). The Board's Operational, Labour Relations

and Budget personnel subsequently became involved in the development of potential ER1 options. One of the documents they developed was E# UU. This led ultimately to the tabling of the Chief's Dec 14/95 Report on the 1995 Operating Budget on Dec. 15/95 in the Board's open session. (Exh. "VV"). The Association had no knowledge of this process.

DATED: November 8, 1995.

[emphasis added]

B. *RELEVANT SECTIONS OF COLLECTIVE AGREEMENT*:

...

THE METROPOLITAN TORONTO POLICE SERVICES Board
(hereinafter called "The Board")

OF THE FIRST PART

- and -

THE METROPOLITAN TORONTO POLICE ASSOCIATION
(hereinafter called "The Association")

OF THE SECOND PART

Whereas the Parties have mutually agreed to enter into and execute this Collective Agreement defining, determining and providing for remuneration, benefits, pensions and working conditions of the members of the Metropolitan Toronto Police Force coming within the Uniform Branch as set out in Schedule "A" hereto.

Now, therefore, this Collective Agreement witnesseth that in consideration of the premises the Board and the Association hereby mutually agree and covenant as follows:

...

ARTICLE 3 - MANAGEMENT RIGHTS

3:01

(a) The Association and its members recognize and acknowledge that, subject to the provisions of the ***Police Services Act*** and the Regulations thereto, it is the exclusive function of the Board to:

(i) maintain order, discipline and efficiency;

(ii) discharge, direct, classify, transfer, promote, demote or suspend, or otherwise discipline any members;

(iii) hire.

...

(c) The Board agrees that it will not exercise any of the functions set out in this Article in a manner inconsistent with the provisions of this Collective Agreement or **The Police Services Act** of Ontario and the Regulations thereto.

...

ARTICLE 4 - SALARIES

4:01 Subject to the exceptions set out below, the salary to be paid to each member shall be in accordance with the rate of pay for each rank as set forth in Schedule "A" annexed hereto and forming part of this Collective Agreement, such salaries being in accordance with the differentials set out in the said schedule.

...

ARTICLE 5 - HOURS OF WORK AND PREMIUM PAY PROVISIONS

5:01

(a) A regular tour of duty shall consist of eight consecutive hours of work. Where a member on such regular tour of duty is required by his/her supervisory officer to terminate his/her tour of duty before the completion of eight hours he/she shall receive no less than eight hours of pay for such tour.

. . .

(c) Each member's normal week shall consist of five tours of duty and two days off . . .

. . .

ARTICLE 7 - VACATIONS

7:01

(a) A member shall be eligible for vacation on the following basis:

(i) following the completion of one year of service - 2 weeks vacation;

(ii) following the completion of three years of service - 3 weeks vacation;

(iii) following the completion of nine years of service - 4 weeks vacation;

(iv) following the completion of sixteen years of service - 5 weeks vacation;

(v) following the completion of twenty-two years of service - 6 weeks vacation;

(vi) following the completion of thirty-five years of service - 7 weeks vacation.

Effective February 19, 1993 - following the completion of twenty-eight years of service - 7 weeks vacation.

(b) A member who is qualified for two weeks vacation entitlement under clause 7:01 (a) (i) shall thereafter as of January 1st of each year be entitled to receive vacation for which he/she will be eligible during the year provided that in any year such member ceases employment with the Force prior to his/her anniversary date (other than by retirement on pension) his/her vacation pay will be readjusted on the basis of the amount of time employed in the twelve months prior to such anniversary date in accordance with clause 7:04.

. . .

7:04

(a) Where a member leaves the Force after his/her anniversary date in that calendar year and prior to receiving his/her vacation entitlement, such member shall be given vacation pay on account of such service in accordance with clause 7:01.

...

(e) A member who retired on pension shall, in the calendar year in which he/she retires, be entitled to the vacation benefits set out below in lieu of the provisions of clauses 7:04 (a) and (b) above.

(i) The vacation benefit to which his/her years of service entitle him/her according to the schedule set out in clause 7:01 (a), and for that purpose his/her years of service shall be calculated to his/her anniversary date in the year of his/her retirement regardless of whether he/she retires before or after the anniversary date;

(ii) In addition to the vacation benefit specified in sub-clause (i) above, a vacation accrual based on the pro rata formula set out in clause 7:04 (b), provided, however, that such accrual shall be calculated from January 1st of his/her retirement year to the date of his/her retirement.

The benefits provided in (i) and (ii) above shall be granted as pay or time off at the discretion of the Chief of Police.

...

ARTICLE 8 - PENSIONS

8:01 Each member who joined the Force prior to July 1, 1968, shall be entitled, on his/her retirement, or his/her dependents on his/her death, to the benefits as set forth in By-law No. 181-81 of the Municipality of Metropolitan Toronto, as amended, being a By-law to provide pensions and death benefits to members of the Metropolitan Toronto Police Force.

8:02 Each member who joined the Force on or after July 1, 1968, shall be entitled, on his/her retirement, or his/her dependents on his/her death, to the basic benefits for normal retirement at age 60 set forth in the Ontario Municipal Employees Retirement System plus the following additional benefits:

(a) An earned pension without actuarial reduction upon completion of thirty years of service as a Police Officer.

(b) An earned pension without actuarial reduction if he/she is declared by the Board to be unable to perform the duties of his/her employment due to mental or physical incapacity within ten years of normal retirement age.

(c) The regular contribution for the provision (a) and (b) above is to be met equally by the member and the Board.

...

8:04

(a) The coverage under this Article shall only be furnished provided:

(i) such coverage is not provided at the retired member's or retired member's spouse's place of employment. Upon termination of a period of ineligibility resulting from the fact that some or all of the coverage has been provided at the retired member's or retired member's spouse's place of employment the retired member may apply or re-apply for all or the remainder of the benefits under this clause 8:04, to which he/she is entitled;

(ii) these benefits do not apply to dependents other than spouse and an invalid dependent child of the member (as defined in the applicable insurance contract) and provided that the member (or spouse) remains covered under the terms of this clause and such benefits are not available to the invalid dependent child from another source without cost to the member;

(iii) premium payments cease when the member attains age 65. If the retired member dies or received such benefits (i.e. has coverage hereunder) until age 65 and dies thereafter, his/her surviving spouse will be eligible for such coverage until the earlier of such surviving spouse attaining age 65 or the coverage to the member and surviving spouse has continued for a total of 120 months;

(iv) the retired member (or spouse) resides in Canada but, if resident outside Ontario, the member or dependent shall be entitled to the insured benefits only to the extent that equivalent benefits are not available to the member or dependent under the provincial/territorial medicare plan in the province/territory in which the member or his/her dependent resides (this requirement shall be waived with respect to the $5,000 paid up life insurance policy described in the clauses (b)(ii), (c)(ii), (d)(i)and (e)(i); and

(v) ninety (90) days prior to the commencement of the coverage the member must make written application to the Board for this coverage.

(b) For members retiring under the Benefit Fund with 25 or more years of service but less than 30 years of service

(i) the member may elect (irrevocable for a specified term) to be covered for semi-private hospitalization insurance (clause 11:03) and/or basic dental services by paying the required premium at the retiree group rate for such coverage; and

(ii) when the member's years of service and years of retirement total 30, the Board shall pay 100% of the cost of premiums for comprehensive medical insurance (clause 11:04) and the member (but not his spouse or any other dependent) will be provided by the Board with a $5,000 paid up life insurance policy (any existing life insurance provided by the Board and continued after retirement shall be reduced by such $5,000);

(c) For those members retiring with less than 30 years of service and whose combination of years of age and years of credited service total not less than 85 and who qualify for early retirement and an unreduced pension under the Benefit Fund or OMERS Plan

(i) the Board shall pay 100% of the cost of premiums for semi-private hospitalization insurance (clause 11:03) and dental insurance (clause 11:06) but in no event to exceed a period of 180 months; and

(ii) when the members' years of service and years of retirement total 30, the Board shall pay 100% of the cost of premiums for comprehensive medical insurance (clause 11:04) and the member (but not his spouse or any other dependent) will be provided by the Board with a $5,000 paid up life insurance policy (any existing life insurance provided by the Board and continued after retirement shall be reduced by such $5,000);

(d) For members who qualify for early retirement and an unreduced pension under the Benefit Fund or OMERS Plan and

(i) who have no less than 30 years of credited service, or

(ii) who are on a disability pension

(e) For those members retiring on or after July 1, 1991 whose combination of years of age and years of credited services is not less than a total of 85 and who

qualify for early retirement and an unreduced pension under the benefit fund or OMERS shall be provided, until the member reaches 65 years of age but in no event for a period in excess of 180 months, with

(i) a $5,000.00 paid up life insurance policy (any existing life insurance provided by the Board and continued after retirement provided by the Board and continued after retirement shall be reduced by such $5,000.00), and

(ii) the Board shall pay 100% of the cost of premiums for comprehensive medical insurance (clause 11:04).

(iii) the Board shall pay 100% of the cost of premiums for semi-private hospital insurance (clause 11:03) and dental insurance (clause 11:06).

...

ARTICLE 14 - SICK PAY GRATUITY

14:01 In this Article the words "termination of employment shall mean separation from employment with the Force by retirement on pension or by resignation, but shall not include dismissal.

14:02 Upon termination of employment with the Force:

(a) there shall be paid to every member who has been in the employ of the Board for an aggregate period of at least ten years; and

(b) there shall be paid to the estate of a member who dies while in the employment of the Board, having completed at least 10 years of service

the whole or part of such amount as is equal to one-half the cumulative sick pay credits of the member, but in no case shall such amount exceed the aggregate amount of his salary or other remuneration for the period set forth in Column 2 of the Schedule contained herein, corresponding to the service requirements set forth in Column 1 thereof. The following is the schedule hereinbefore mentioned:

COLUMN 1 - SERVICE REQUIREMENT	COLUMN 2 PERIOD
At least 10 years and less than 15 years	Three calendar months
At least 15 years and less than 20 years	Four calendar months
At least 20 years and less than 25 years	Five calendar months
At least 25 years and less than 30 years	Six calendar months
At least 30 years and less than 32.5 years	Seven calendar months

At least 32.5 years and less than 35 years	Eight calendar months
At least 35 years	Nine calendar months

...

ARTICLE 15 - GRIEVANCE PROCEDURE

15:01
Any difference concerning the interpretation, application, administration or alleged violation of the provisions of this Collective Agreement, including any question as to whether a matter is arbitrable, will be dealt with in the following manner:

(a) STEP 1
An aggrieved member, accompanied and represented by an Association Monitor or Director, may present his/her grievance, ...

(b) STEP 2
Failing satisfactory settlement at Step 1, the Association may, within twenty working days, submit the grievance to the Chief of Police or his/her designate for further discussion with a view to reaching a settlement. To facilitate settlement, a meeting shall be held at which the Board may be represented by such persons as the Board deems necessary and at which the Association may be represented by such persons as the Association deems necessary. The Chief of Police or his/her designate shall render a written decision within seven working days of the Step 2 meeting.

15:02
Either party to this Collective Agreement may lodge a grievance in writing with the other party on any difference between the parties concerning an interpretation, application or administration of the Collective Agreement, including any question as to whether a matter is arbitrable and such grievance shall commence at Step 2.

15:03
A grievance is to be commenced within 25 working days of the incident which gave rise to the grievance, unless the grievor, Association or Board is unaware that grounds exist for a grievance, in which case, the grievance is to be commenced within 25 working days of the time at which the grievor, Association or Board became aware that grounds for a grievance existed.

15:04
Failing satisfactory settlement at Step 2 of the Grievance Procedure either party, within ten working days, may refer the grievance to arbitration pursuant to the provisions of Sections 123 and 124 of the ***Police Services Act***.

...

ARTICLE 26 - TERM OF AGREEMENT

26:01
The terms and conditions herein contained shall remain in full force and effect for the period extending from January 1, 1993, until December 31, 1993, and thereafter, until replaced by a new Collective Agreement, decision or award. Either Party may give notice to the other Party at any time after ninety days before December 31, 1993 that it desires to bargain for a new Collective Agreement or amendments to the existing Collective Agreement. Within fifteen days from the service of such notice, each Party shall provide to the other Party a list of the changes to the Collective Agreement it desires.

26:02
(a) The parties agree that the process set out below shall constitute the means by which Collective Agreements are hereafter reached under sections 118, 119 and 120 of the *Police Services Act*.

(b) Following the giving of notice under section 119 of the *Police Services Act*, either party may refer outstanding issues to mediation by notice to the other party requesting agreement to a mediator.

...

MEMORANDUM OF UNDERSTANDING BETWEEN THE METROPOLITAN TORONTO POLICE SERVICES BOARD AND THE METROPOLITAN TORONTO POLICE ASSOCIATION CONCERNING MEMBERS COVERED BY THE UNIFORM COLLECTIVE AGREEMENT

...

4. ASSOCIATION/BOARD COMMITTEE

To resolve any problem or differences, including any alleged change in established working conditions not covered by the Collective Agreement, other than matters in negotiations or before standing committees which may arise and to consider and

make suggestions or recommendations for their solution to the respective Parties, the Parties shall establish a joint committee comprised of two appointees representing the Association, at least one of whom shall be a seconded member, and two representing the Board, at least one of whom shall be a member of the Board, to meet to discuss matters of mutual concern. Seven days prior to such meeting the representatives of the Board and the Association shall advise each other in writing of the matters which they wish to place on the agenda for discussion. Time spent by appointees in attendance at such meetings shall not result in loss of regular pay.

The Board will give the Association 30 days notice of any changes the Board intends to make to working conditions, where the Board is aware of such conditions.

...

THE BOARD ADVISES THE POLICE ASSOCIATION OF ITS POLICY ON THE FOLLOWING MATTERS NOT INTENDED TO BE COVERED BY THE COLLECTIVE AGREEMENT:

1. ANNUAL LEAVE: ...
2. RESIGNATIONS: ...
3. PERSONNEL FILES: ...
4. UNIFORM AND EQUIPMENT: ...
5. EDUCATION LEAVE: ...
6. EXTENDED LEAVE: ...
7. WORKERS' COMPENSATION: ...
8. LOCKER INSPECTION: ...
9. ORIENTATION PROGRAM: ...
10. AIR CONDITIONING: ...
11. SICK BANK: ...
12. FACILITIES: ...
13. LEGAL INDEMNIFICATION RETAINER: ...
14. VACATION DRAW: ...
15. FITNESS FACILITIES: ...
16. COMMUNICABLE DISEASES: ...
17. BILL OF RIGHTS: ...
18. JOB SHARING: ...
19. RETIREE PENSION INCREASES

    The Board and the Association acknowledge that recommendations in respect of increases in and/or improvements to pensions of retirees in the

Metropolitan Toronto Police Benefit Fund are to be made to the Executive Committee by the Trustees of the Fund.

20. **COURT ATTENDANCE FOR RETIREES:**
Board will pay to a former member of this Force who has retired on pension and who is required by summons to attend court in connection with his/her duties as a member of this Force ... the sum of $75.00 for each day ...

21. **PAID UP LIFE INSURANCE:**
A uniform member who retires under the N.R.A. 60 rule or later and who does not qualify for paid-up insurance under the provision of the Collective Agreement shall receive a paid-up life insurance policy as follows:

If 10 years of service but less than 15 - $1,500.00
If 15 years of service but less than 20 - $2,500.00
If more than 20 years of service - $3,500.00

22. **BENEFIT CONTRACTS:** ...

23. **WITNESSES AT DISCIPLINE HEARINGS:** ...

24. **DENTAL PLAN - I.C. CODES:** ...

25. **HEARING OF DISCIPLINE CHARGES:** ...

26. **RULES COMMITTEE:** ...

27. **SICK PAY GRATUITY:**
A member may use up to six months of his/her sick pay gratuities in time rather than in pay, immediately prior to retirement.

Definitions

...

Eligible Number of Work Days

...

Benefit Entitlements

...

Wage Increases

Increases which are effective during the period a member is no Sick Pay Gratuity leave are not to be applied to the salary of the retiring member

...

C. *RELEVANT SECTIONS OF THE POLICE SERVICES ACT:*

...

MUNICIPALITIES

4. (1) Every municipality to which this subsection applies shall provide adequate and effective police services in accordance with its needs.

...

5. A municipality's responsibility for providing police services shall be discharged in one of the following ways:

> 1.The board may appoint the members of a police force under clause 31 (1)(a), in which case the municipal council shall pay the cost of the police force.
>
> ...

...

10.
(1) The Solicitor General may enter into an agreement with the council of a municipality for the provision of police services for the municipality by the Ontario Provincial Police.

(2) The agreement requires the board's consent.

(3) No agreement shall be entered into under this section if, in the Solicitor General's opinion, the council seeks the agreement for the purpose of defeating the collective bargaining provisions of this Act.

...

31.
(1) A board is responsible for the provision of police service and for law enforcement and crime prevention in the municipality and shall,

...

38. A municipal police force shall consist of a chief of police and such other police officers and other employees as the board considers adequate, and shall be provided with the equipment and facilities that the board considers adequate.

. . .

40.

(1) A board may terminate the employment of a member of the police force for the purpose of abolishing the police force or reducing its size if the Commission consents and if the abolition or reduction does not contravene this Act.

. . .

59.

(1) If the chief of police investigates apparent or alleged misconduct and concludes that the police officer is guilty of misconduct but that the misconduct is not of a serious nature, the following rules apply:

. . .

(3) Nothing in this section affects agreements between boards and police officers or associations that permit other penalties than admonition to be administered, if the police officer in question consents, without a hearing under section 60.

117. A member of a police force shall not become or remain a member of a trade union or of an organization that is affiliated directly or indirectly with a trade union, unless the membership is required for secondary activities that do not contravene section 49 and the chief of police consents.

118.

(1) If a majority of the members of a police force, or an association that is entitled to give notices of desire to bargain, assigns the members of the police force to different categories for the purposes of this Part, bargaining, conciliation and arbitration shall be carried on as if each category were a separate police force.

. . .

119.

(1) If no agreement exists or at any time after ninety days before an agreement would expire but for subsection 129 (1) or (2), a majority of the members of a police force may give the board notice in writing of their desire to bargain with a view to making an agreement, renewing the existing agreement, with or without modifications, or making a new agreement.

(2) Within fifteen days after the notice of desire to bargain is given or within the longer period that the parties agree upon, the board shall meet with a bargaining committee of the members of the police force.

(3) The parties shall bargain in good faith and make every reasonable effort to come to an agreement dealing with the remuneration, pensions, sick leave credit gratuities and grievance procedures of the members of the police force and, subject to section 126, their working conditions.

(4) The board shall promptly file a copy of any agreement with the Arbitration Commission.

(5) If at least 50 per cent of the members of the police force belong to an association, it shall give the notice of desire to bargain.

...

120.
(1) The members of the bargaining committee shall be members of the police force.

...

122.
(1) If matters remain in dispute after bargaining under section 119 and conciliation, if any, under section 121, a party may give the Solicitor General and the other party a written notice referring the matters to arbitration.

...
(5) In making an award, the arbitration board shall take into account the interest and welfare of the community service by the police force as well as any local factors affecting the community.

...

126. Agreements and awards made under this Part do not affect the working conditions of the members of the police force in so far as those working conditions are determined by sections 42 to 49, subsection 50 (3) and Parts V, VI and VII of this Act and by the regulations.

...

128. Agreements, decisions and awards made under this Part bind the board and the members of the police force.

129.
(1) Agreements, decisions and awards remain in effect until the end of the year in which they come into effect and thereafter continue in effect until replaced.

...

D. *RELEVANT SECTIONS OF THE LOCAL AGREEMENT*:

BETWEEN:

METROPOLITAN TORONTO POLICE SERVICES BOARD
(the "Board")

- and-

METROPOLITAN TORONTO POLICE ASSOCIATION
(the "Association")

LOCAL AGREEMENT

[under Part V of the Social Contract Act, 1993 (the "Act")

...

2. SECTOR FRAMEWORK

The parties agree to implement those measures required under the Social Contract Sectoral Agreement for Municipal Police and to adhere to the principles set out in same.

3. EXPENDITURE REDUCTION TARGETS

Pursuant to the Act, expenditure reduction targets ("ERTs") are to be established for the Board. Presently the best available information is that the Board's ERT (assuming a 20% reduction pursuant to Section 7 of the Act) will be approximately $17 million annually. It is also anticipated that, pursuant to Section 2 of the Sectoral Framework, 25% of the Board's ERT in respect of the first

"year" of the Social Contract (i.e. June 14, 1993 to March 31, 1994) will be deferred until and in respect of the period April 1, 1996 to June 30, 1996.

...

4. EXPENDITURE REDUCTION MEASURES - GENERAL PRINCIPLES

(1) Progress towards the achievement of expenditure reduction targets will be reviewed by the parties on a monthly basis commencing September 1, 1993 through January 1, 1994 and on a quarterly basis thereafter. The parties will, at the same time, discuss and attempt to resolve difficulties in the implementation of this Agreement.

(2) The parties agree that the expenditure reduction measures set out in paragraphs 5 - 8 below, shall be implemented in each of the Social Contract years in the order set out below:

(a) mandatory leave without pay (paragraph 5)

(b) 1993 early retirement incentive (paragraph 6)

(c) acting pay (paragraph 7)

(d) contingency leaves without pay (paragraph 8)

(3) if in any year the expenditure reduction target is not met or is surpassed by the savings hereunder, the overage or shortfall shall be carried forward to the next target year.

(4) This Agreement does not apply to members who earn less than $30,000.00 annually, excluding overtime pay.

...

6. 1993 RETIREMENT INCENTIVE

a) Any member who is eligible to retire in 1993 on a 30 years service pension (uniform) or on an 85 factor pension with a minimum of 30 years' service (civilian) may tender his/her letter of resignation from the Force with an effective date no later than December 31, 1993. The member will receive a retiring allowance in 1994 equal to the member's base salary (inclusive of, where applicable, (a) service pay (b) senior constable's rate and/or (c) the 6.75% plainclothes allowance where the member has been in the position for the twenty-four consecutive months immediately prior to his/her date of retirement) in respect

of the period from the retirement date to the earlier of (i) the end of the month in which the member would ordinarily have been required to retire, or (ii) December 31, 1993. The member will receive all normal retirement benefits and entitlements including unused 1993 vacation entitlement, sick pay gratuities and medi-pak. The vacation accrual payable upon retirement will be calculated to the earlier of (i) the end of the month in which the member would ordinarily have been required to retire, or (ii) December 31, 1993 and will be paid in 1994. Members will be provided by the Board with options to minimize tax consequences, where possible, and the retiring allowance will be structured, so far as practicable, in accordance with the member's directions as they relate to such options.

b) The savings attributable to such retirements will be calculated and allocated in accordance with Schedule "A".

...

9. OMERS

a) Whereas the Province has advised that there will be an Actuarial Review of OMERS as set out in the Police Sectoral Framework Agreement, the parties agree that the local agreement may be re-opened on mutual consent, for the purposes of negotiating the application of identified and available surpluses in accordance with the terms of the Framework Agreement.

b) TYPE VII DOWNSIZING

Civilian Members

The parties agree to discuss Type VII downsizing as a method of assisting them to achieve the targeted savings required under the **Social Contract Act**. The parties agree to ascertain how many members would be interested in this benefit and to obtain a costing from OMERS. Thereafter, negotiations will commence on whether or not the benefit will be made available to eligible members.

[NOTE: A Type VII Supplementary Plan applies to NRA 65 members of OMERS, which includes civilian members. The benefits under the Plan allow for an immediate early retirement pension to be paid provided the member is at least 60 years of age or provided the member's age plus service equals at least 80 (80 factor) and the member is at least 50 years old].

Uniform Members

If, for NRA 60 members, the Government of the Province of Ontario introduces any of the Supplementary Benefits listed below to facilitate downsizing,

the parties agree to ascertain how many members would be interested in this benefit and to obtain a costing from OMERS. Thereafter, negotiations will commence on whether or not the benefit will be made available to eligible members:

An immediate Early Retirement Pension may be payable to a member who has a Normal Retirement Age of sixty years:

- if the member is at least fifty-five years of age; or

- if the member's age, in full years and months, plus his or her credited service and eligible service, in full years and months, equals at least seventy-five and the member is at least forty-five years of age.

10. PENSION CONTRIBUTIONS

Where unpaid leave must be taken, the parties recognize and agree that the obligations of the Board and members to contribute to any pension plan and any member's entitlement under such pension plan are not affected by any reduction in earnings that results from such unpaid leaves.

11. COLLECTIVE AGREEMENT

Where any inconsistencies or discrepancies occur between the terms of this Agreement and the terms of any Collective Agreement in existence between the Board and the Association during the life of this Agreement, the terms of this Agreement shall prevail.

...

13. TERM

The duration of this agreement shall be from August 1, 1993 to March 31, 1996.

E. OVERVIEW OF POSITION OF THE PARTIES:

1. WHETHER THE EARLY RETIREMENT INCENTIVE (ERI) WAS PROHIBITED BY THE LOCAL AGREEMENT:

A. POSITION OF THE ASSOCIATION:

It is the position of the Association that the Local Agreement contemplated only one ERI during the currency of the Social Contract (between August 1, 1993 and March 31, 1996), specifically, the ERI provided for in paragraph 6 of the Local Agreement. Counsel for the Association argues that because the Local Agreement prevails over the terms of the collective agreement, the ERI unilaterally introduced by the Board in 1995 is unlawful because it is in breach of the Local Agreement.

Counsel for the Association asserts that under the Local Agreement the parties carefully negotiated how much money had to be saved and the manner in which those savings would be attained over the three year Social Contract period. Counsel asserts that the provisions of the Local Agreement are a total agreement between the parties for such savings and that any addition thereto introduced by the Board was in breach of the Local Agreement.

Counsel for the Association acknowledges that the Association did not complain when the Board introduced another ERI later in 1993 (December 1993) to reduce complement and to reduce salary. The Association acknowledges that this second 1993 ERI was outside of the Local Agreement but asserts that it did nothing to condone the

actions of the Board and that it expressly put the Board on notice in 1994, prior to the implementation of the 1995 ERI in dispute, that it would no longer tolerate the unilateral introduction of an ERI.

B. *POSITION OF THE POLICE SERVICES BOARD*:

Counsel for the Board argues that the *Social Contract Act* provided the means to achieve one kind of savings, i.e. the savings required to meet the Expenditure Reduction Target (ERT) set out in the Social Contract, which was approximately $17 million for the Board. Counsel disputes that the Local Agreement can regulate any factors between the parties that are unrelated to the specific focus of the Social Contract.

Counsel for the Board observes that the cutbacks imposed by the Province required the Board to find savings that were outside the scope of the ERT under the Social Contract and, thus, outside the scope of the related Local Agreement. Counsel contends that there is nothing in the *Social Contract Act* or the Local Agreement that would preclude the Board from implementing additional means to address the impact of budgetary cuts imposed by the Province that were not dealt with by the *Social Contract Act*, the ERT therein or the Sectoral or Local Agreements. Accordingly, counsel for the Board argues that the Early Retirement Incentive (ERI) contained within the Local Agreement was implemented solely to achieve the ERT required by the Social Contract and was not intended to limit the Board in respect of its need to address the further budgetary cutbacks imposed by the Province. Counsel notes that section 14 of the

Agreed Facts, set out above, stipulates that "[t]he Board has never, whether in Social Contract bargaining or elsewhere, represented that it would not unilaterally establish early retirement incentives separate and apart from those contemplated in the Social Contract Local Agreement. The issue of whether the employer would or would not unilaterally establish early retirement incentives was not discussed between the parties."

Counsel for the Board asserts, then, that the stipulation in article 11 of the Local Agreement, that "[w]here any inconsistencies or discrepancies occur between the terms of [the Local] Agreement and the terms of any Collective Agreement ... the terms of [the Local] Agreement shall prevail" modifies the collective agreement, inclusive of management's rights, only in respect of those provisions of the collective agreement that directly contradict or interfere with the Local Agreement's implementation of the requirements under the *Social Contract Act*, i.e. the meeting of the ERT under the Social Contract. Counsel asserts that the Local Agreement is a "complete code" only in respect of how the Social Contract targets will be met. Counsel emphasizes that there is no evidence that the 1995 ERI interfered in any way with the ERI established in the Local Agreement. Counsel comments that the Board's promise in the Local Agreement to provide the 1993 ERI did not include a further promise not to offer any other ERI at a subsequent time. Counsel notes that if the Association had wanted to preclude the Board from offering any other ERI to deal with the other areas of savings it was required to achieve, it could have negotiated such language to achieve that end, but did not do so.

2. *WHETHER THE ERI IS IN BREACH OF INDIVIDUAL ARTICLES OF THE COLLECTIVE AGREEMENT*:

A. POSITION OF THE ASSOCIATION:

(i) Articles 4 and 5 - Salary and Hours of Work:

An employee who opted for the 1995 ERI in issue could have become entitled to a benefit which included the payment of salary. Counsel for the Association argues that because the collective agreement stipulates in articles 4 and 5 that salaries are paid in exchange for hours worked, the payment by the Board of salary outside the terms under which salary is paid in the agreement is a violation of the collective agreement. Counsel asserts, in other words, that for the Board to pay salary in return for someone agreeing to stop working is a breach of articles 4 and 5 of the collective agreement.

(ii) Article 7 - Vacations:

One of the benefits for people under OMERS 7 in the 1995 ERI is an additional year of paid vacation. Counsel for the Association asserts that article 7 of the collective agreement fully covers the circumstances of vacation entitlement, including vacation benefits upon retirement. Counsel argues that article 7 fully occupies the field in respect of vacation entitlement and that for the Board to add a further year of paid vacation in the 1995 ERI is a breach of the collective agreement.

(iii) ***Article 8 - Pensions***:

Counsel for the Association asserts that article 8 of the collective agreement establishes a full code of benefits upon retirement and that for the Board to unilaterally offer more under the 1995 ERI is a breach of article 8. Under article 8, employees essentially become entitled to an unreduced pension after 25 years and various gradations of medical/dental/life insurance benefits. Through the 1995 ERI, for employees with more than 25 years but less than 30, the Board added the further benefit of a full medi pak with the Board paying the premium and the elimination of the gap before the onset of the benefit. Moreover, those members who have 30 years of service become entitled under the 1995 ERI to the alternative benefit of four months' salary because under the collective agreement they would already be entitled to essentially the same level of benefits as one segment of those offered through the 1995 ERI. Counsel argues that the option of gaining an additional four months' salary through the 1995 ERI over and above the retirement benefits set out in article 8 is a breach of article 8 of the agreement.

(iv) ***Article 14 - Sick Pay Credits Upon Termination:***

Article 14 stipulates that termination of employment includes retirement such that the benefits thereunder would apply to retirement. Counsel for the Association maintains that it is inappropriate for the Board to unilaterally offer in the 1995 ERI payment for any

greater benefits upon retirement than those offered in the collective agreement, inclusive of article 14. Counsel argues that since the field in the collective agreement has been occupied, there is no room left for the Board to add additional benefits upon retirement.

B. POSITION OF THE BOARD:

It is the position of the Board that the articles in the collective agreement dealing with salary, vacations, pensions and sick pay credits upon termination do not overlap or conflict with the 1995 ERI because the ERI is an isolated offer of an incentive to employees to retire at a time convenient to the Board as opposed to at a time selected by the member. More specifically, counsel argues that as an incentive to retire, the ERI covers an area that is not touched by any of the provisions of the agreement. Regarding the payment of the benefit of additional salary in one segment of the 1995 ERI, counsel maintains that the payment is not the payment of salary but rather is the payment of a lump sum simply quantified by reference to salary. Counsel further asserts that the 1995 ERI is not a pension and, therefore, is not covered by article 8.

3. WHETHER, EVEN IF THE 1995 ERI DOES NOT BREACH INDIVIDUAL ARTICLES OF THE COLLECTIVE AGREEMENT, IT BREACHES THE COLLECTIVE AGREEMENT AS A WHOLE:

A. POSITION OF THE ASSOCIATION:

Counsel for the Association maintains that compensation is at the heart of the collective agreement. He asserts that the collective agreement fully covers all aspects of

compensation and that there is nothing left over for the Board to do on its own in the area of compensation, including the offering of early retirement incentives.

B. *POSITION OF THE BOARD:*

Counsel for the Board argues that the parties have left numerous areas unregulated by the collective agreement as is clearly evidenced by, among other factors, the terms of both the *Police Services Act* and the document attached to the collective agreement which sets out 27 areas of Board Policy clearly stipulated by the Board to be "not ... covered by the Collective Agreement."

Counsel argues that the area of incentives for retiring at a time chosen by the Board is one of those areas that remains unregulated by the collective agreement.

4. *WHETHER THE BOARD ACTED IN VIOLATION OF ARTICLE 3 OF THE COLLECTIVE AGREEMENT REQUIRING BARGAINING IN GOOD FAITH:*

A. *POSITION OF THE ASSOCIATION:*

Counsel for the Association emphasizes that the management rights clause of the collective agreement, article 3.01, stipulates that management's functions will not be exercised in a manner inconsistent with either the collective agreement or the *Police Services Act*. Counsel argues that in this manner the provisions of the *Police Services*

Act, inclusive of the duty to bargain in good faith contained in section 119(3) of the *Police Services Act*, are incorporated into the collective agreement.

Counsel asserts that the duty to bargain has two sides, one being the recognition of the Association and the other being the discussion of bargaining proposals. Counsel asserts that in the instant circumstances the Board failed to meet both these obligations.

Counsel for the Association argues that in article 119 of the *Police Services Act*, the Association is expressly recognized as the body entitled to give notice, the party with whom bargaining is to take place and the party to whom the duty to bargain in good faith is owed. Counsel argues, then, that in respect of bargaining, at least, the Association is the exclusive bargaining agent even though there is no express recognition clause in the collective agreement. Counsel maintains that the Association's exclusive bargaining agent status is incorporated into the agreement through section 119 of the *Police Services Act*. Counsel further asserts that an ongoing recognition clause is implied into the agreement so long as the Association has 50% support of the members. Counsel argues that because the Association is given an ongoing role in the collective agreement for such things as handling grievances, submitting grievances to arbitration and dues deduction, it must be implied that it has ongoing representation rights so long as it continues to represent 50% of the members.

It is the position of the Association that the duty to bargain in good faith was triggered in December of 1993 when the Board gave notice to bargain to the Association.

In the alternative, counsel argues that the duty was triggered on November 10, 1994 when the Association gave the Board its notice to bargain for the 1994 agreement.

Counsel for the Association emphasizes that the Association put the Board on notice on October 18, 1994 and November 10, 1994 that it was the Association's position that the Board could not unilaterally implement an ERI. The Association put an ERI on the negotiations table on December 14, 1994. Counsel for the Association argues that the Board cannot unilaterally implement a matter, such as the 1995 ERI, when it is the subject of bargaining without allowing the normal process of negotiation, or mediation or binding arbitration to take place. Counsel maintains that for the Board to unilaterally implement something that is the subject of bargaining constitutes bargaining in bad faith because it would effectively undercut the Association's ability to negotiate and to refer outstanding issues to mediation and arbitration. Accordingly, the Association asserts that even if the Board were entitled to unilaterally implement an ERI when the parties were not in the middle of bargaining, it relinquished that entitlement when the parties entered into the bargaining process. Counsel maintains that because the ERI was implemented quickly and cannot be effectively undone through the bargaining process, its unilateral introduction completely undercut and frustrated the Association's bargaining rights.

It is the position of the Association that the key element giving rise to the Board's breach of its duty to bargain in good faith is not that the Board did not want to enter into an agreement but rather that it would not negotiate with the Association regarding the ERI, as evidenced by the fact that the Board would not make the Association a counter

offer regarding the ERI and clearly did not want the subject of ERIs in the collective agreement. The bargaining in bad faith, according to the Association, resulted from the Board going directly to the members with the 1995 ERI instead of bargaining either with the Association or with the collectivity of the members. Counsel argues, in addition, that the failure of the Board to give the Association a clear picture of what it intended to do, which thereby denied the Association a chance to respond to the Board's intended course of action, was another element that constituted a breach of the duty to bargain in good faith.

Counsel asserts, more generally, that the fact that the 1995 ERI might have been attractive to numerous members is immaterial to the evaluation of the Board's duty to bargain in good faith.

B. POSITION OF THE BOARD:

Counsel for the Board maintains that in unilaterally introducing the 1995 ERI, the Board did nothing to breach its duty to bargain in good faith. Counsel argues that it was not required to agree to place the subject of ERIs in the collective agreement and was entitled to act in accordance with its understanding of its entitlement to unilaterally introduce an ERI, particularly when time was of the essence, when doing so was necessary to meet its budget and when it was a bona fide business decision which was not intended to undercut the Association.

Counsel for the Board maintains that the entire issue respecting bargaining in good faith must be considered within the unique context applicable to the Board and police officers. Counsel stresses the fundamental difference between an association under the ***Police Services Act*** and a union under the ***Labour Relations Act*** of Ontario. Counsel emphasizes that the members of the Board are not entitled to become members of a union, that it is the members who are entitled to bargain with the Board and that the Association simply does not enjoy the rights of exclusivity that exist for unions under the ***Labour Relations Act***.

In the result, counsel argues, the cases relied on by the Association regarding rights of union exclusivity do not apply to this matter because they are cases decided either under the ***Labour Relations Act*** of Ontario or under a similar labour relations scheme. Counsel asserts that under the ***Police Services Act***, the Association, unlike a traditional union governed by the ***Labour Relations Act***, is a collection of members without a separate legal identity or status and without rights that exceed those of the members. Counsel emphasizes that the Association is not a signatory to the agreement, is not a party to the agreement and is not bound by the contract; counsel describes the Association as a spokesperson for the members but not a principal.

D. DECISION:

The parties have agreed that the Arbitrator has jurisdiction to interpret the Local Agreement as well as the provisions of the ***Police Services Act***.

1. WHETHER THE ERI WAS PROHIBITED BY THE LOCAL AGREEMENT:

Pursuant to paragraph 6 of the Local Agreement, an early retirement incentive program was offered by the Board for the purpose of decreasing complement and thereby decreasing salary expenses. The savings from the Local Agreement ERI were applied against the Board's Social Contract Expenditure Reduction Target (ERT). Prior to the Social Contract in 1993, an early retirement incentive had never been offered by the Board.

Following the arrangement of the ERI in the Local Agreement, the Board unilaterally offered numerous other ERIs which were outside the scope of the Local Agreement and, as with the 1995 ERI in dispute, were targeted for meeting the budget cutbacks that were outside the Expenditure Reduction Target (ERT) under the Social Contract.

Paragraph 16 of the Agreed Statement of Facts indicates that, "Following the implementation of the early retirement incentive established under paragraph 6 of the Local Agreement, the Board unilaterally, and without consultation with the Association, introduced a further early retirement incentive in early December, 1993, in order to reduce complement and reduce salary expenses. The Board did not apply the resulting savings to the Social Contract targets (Exhibit "G")...".

As set out in paragraph 17 of the Agreed Statement, 17, "Immediately following this Board action, the Association and some members expressed concern regarding the situation of members who reached 30 years of service in the August to December, 1993 period, since they were ineligible for the early retirement incentive offer described in paragraph 16 above. The Board then unilaterally in late December, 1993, opened up this early retirement incentive to that capacity of people...". Paragraph 18 reflects the agreement of the parties that "[n]o grievances were filed with respect to the December, 1993 incentives offered by the employer".

In or about February of 1994, as set out in paragraph 20 of the Agreed Statement, "...the Board unilaterally established additional incentives regarding extended health coverage, life insurance and the payment of one year's vacation entitlement" for the new agreement between the Board and the OMERS Board. The Agreed Statement continues, "In addition, for those members who would be retiring on a reduced pension, the Board offered an additional financial incentive of between two and four months' salary. These additional incentives were offered concurrently with the Type VII pension... . The Association was aware of the matter ... . No grievance was filed in respect of this".

Accordingly, on several occasions in the period following the point when the parties entered into the Local Agreement, the Board unilaterally implemented a number of ERIs and directed the savings to expenditure reductions outside the ERT in the Local Agreement. The fact that the Association did not file grievances or even complain about that unilateral action from the Board, is a strong indicator that limiting the Board's ability

to unilaterally implement further ERIs was not within the intention of the parties when they entered into the Local Agreement.

Having carefully reviewed the submissions of the parties and the evidence, the Arbitrator concludes that although under the Local Agreement the Board agreed to provide an ERI to meet its ERT under the Social Contract, it did not agree, either expressly or through implication, that that would be the only ERI it would offer or that it would not offer a different ERI outside the Local Agreement in its more general attempt to reduce costs and meet its restricted budget.

The Arbitrator finds that there is no basis in the Local Agreement to conclude that the parties' agreement in paragraph 6 thereof to a 1993 ERI to meet the ERT under the Social Contract prevented the Board from implementing a further ERI in a different context, if it was otherwise entitled to do so. While the Local Agreement may have been a "total agreement between the parties", to use the words of counsel for the Association, it was only a total agreement between the parties for savings going to the ERT under the Social Contract. The Local Agreement itself does not restrict the Board in respect of its options for meeting its other budgetary restrictions.

2. *WHETHER THE ERI IS IN BREACH OF INDIVIDUAL ARTICLES OF THE COLLECTIVE AGREEMENT:*

It is undisputed that the collective agreement contains no provision that covers the issue of ERI or incentives for leaving one's employment at a time convenient to the Board.

Moreover, the Association does not assert that the Board has failed to apply any of the provisions of the agreement to the members or that it has done so incorrectly. Instead, the complaint of the Association is that the Board has paid compensation to staff that is not required by the collective agreement and by so doing has gone outside the agreement by acting unilaterally in areas that are covered by the collective agreement.

To determine whether specific provisions of the agreement have been breached by the 1995 ERI, it is helpful to summarize briefly the terms of the 1995 ERI, as set out in paragraphs 34 to 38 of the Agreed Statement of Facts:

> 34. On January 24, 1995, the Metropolitan Toronto Police Services Board unilaterally adopted an early retirement incentive without the agreement of the Association (Exhibit "Y"). The package was announced to the uniform officers on January 25, 1995 Exhibit "LL"). [The announcement provided, in part, as follows:
>
> Metropolitan Toronto Police Services Board
>
> ...
>
> January 25, 1995
>
> ANNOUNCEMENT
>
> **BOARD offers retirement incentives**
>
> The Metropolitan Toronto Police Services Board is offering a package of retirement incentives for eligible members of the Metropolitan Toronto Police Association and the Senior Officers' Organization.
>
> Members wishing to take advantage of the incentives must retire between **February 1, 1995 and March 31, 1995**.
>
> Members are eligible for incentive packages as follows:

Eligibility	Incentive
Members of the Police Benefit Fund with 30 or more years of service	4 months salary
Members of the Police Benefit Fund with over 25 and less than 30 years of service	full Medi-Pak coverage until age 65 OR 4 months salary plus extended health coverage and $5,000.00 paid-up life insurance
Members of the Metro Toronto Pension Plan with an 85 factor	4 months salary

...

Note: Discussions are currently underway with regard to providing OMERS Type VII downsizing benefits to uniformed members. Further details will be provided to members as soon as they become available.]

35. The incentive offered to members of the Police Benefit Fund with over 25 years and less than 30 years of service set out in Exhibits "Y" and "LL" was equivalent to the following:

(a) Employer paying premiums for dental, semi-private, and extended health care (i.e., comprehensive medical insurance) benefits to age 65, and, a paid-up life insurance policy of $5,000, OR,

(b) four months' salary plus employer paying the premiums for extended health (i.e., comprehensive medical insurance) to age 65 plus a paid-up life insurance policy of $5,000.

36. The Association did not tell its members not to accept the ERI and did not bring injunction proceedings after consulting counsel.

37. An additional early retirement incentive offered to persons who were entitled to retire under the anticipated OMERS Type VII agreement agreed to on February 28, 1995, was determined by the Board on January 24, 1995. It is set out in Exhibit "Y" and was employer paying the premiums for extended health coverage to age 65, a paid-up life insurance policy of $5,000, and one year's additional vacation entitlement.

- ***Decision Regarding Articles 4 and 5 - Salary and Hours of Work:***

The payment of salary under the 1995 ERI is a different form of compensation than the salary provided under article 4 and 5 of the collective agreement. The salary provided for under articles 4 and 5 of the collective agreement is payment in exchange for hours worked. The "salary" or compensation offered under the 1995 ERI is an incentive payment for an employee's agreement to leave his or her employment at a time convenient to the Board. It is not compensation in exchange for work provided to the Board.

Even if articles 4 and 5 regarding salary and hours of work occupy their respective areas, such that the Board cannot unilaterally act in these fields, the 1995 ERI is not a breach of these provisions because the 1995 ERI is placed in an entirely different field. If the Board unilaterally decided to pay the employees $2.00 more per hour for all work performed, the Association would have a different argument Such unilateral action would breach the salary provisions of the agreement because it would constitute payment for work performed of an amount different from that expressly agreed to by the parties under the collective agreement for the same purpose, that being, as payment for work performed.

In contrast, the "salary" offered under the 1995 ERI is in a wholly different area than that occupied by articles 4 and 5. The parties have not in the collective agreement provided for compensation as an incentive for an employee's agreement to leave the Board during a brief window of time convenient to the Board. The payment of compensation,

expressed in terms of salary, under the 1995 ERI for an employee's willingness to leave during the narrow window established in the ERI is not a salary. The terms of the ERI could just as easily have stipulated that what was being offered was "compensation in an amount equivalent to four month's salary" (emphasis added) instead of simply "four month's salary." The reference to four month's salary is not the payment of salary for work performed. It is the quantification by reference to salary of a lump sum payment being offered as an incentive for an employee to retire in the brief window of time stipulated by the Board.

Accordingly, the Arbitrator concludes, for the reasons stated, that the 1995 ERI does not breach the salary provisions of articles 4 or 5 of the collective agreement.

- *Decision Regarding Article 7 - Vacation:*

Under one of the 1995 ERI packages, an additional one year's vacation entitlement is offered as part of the incentive. For reasons similar to those set out above for salary, the Arbitrator finds that this vacation benefit under the 1995 ERI does not occupy the same field as the vacation provisions in article 7 of the collective agreement. The general vacation entitlement is in recognition of years of ongoing service while the person remains an employee. The vacation entitlement in the 1995 ERI is the quantification by reference to vacation of an incentive being offered by the Board in exchange for an employee's agreement to retire in a specified short window of time stipulated by the Board. The further vacation provision in article 7.04(e) of the collective agreement establishes the

vacation benefits payable in one's year of retirement and addresses the circumstance of calculating vacation when a person retires in mid year. It does not, however, occupy the same field as the one year's additional vacation entitlement in the 1995 ERI which was offered as an incentive for the employee's agreement to retire during a limited window set by the Board. Article 7.04(e) establishes the vacation entitlement in one's year of retirement. The 1995 ERI uses vacation entitlement for a purpose quite distinct from that of article 7.04(e). The vacation entitlement in the 1995 ERI is not a recognition of years of service but rather is a quantification of incentive being offered to obtain an employee's agreement to retire during the narrow window of time set by the Board.

These two vacation benefits, the one under the collective agreement and the one under the 1995 ERI, are not mutually exclusive or inconsistent with one another. They could both be received by an employee. There is no suggestion that the payment of the 1995 ERI vacation entitlement interfered in any way with the vacation benefits payable under article 7.

Accordingly, for the reasons set out, the Arbitrator concludes that the 1995 ERI does not breach article 7 of the collective agreement.

- *Decision Regarding Article 8 - Pensions*:

Article 8 of the collective agreement sets out the benefits that an employee receives when he or she retires at a time chosen by that person. The article establishes a

series of different pension benefits that are measured in accordance with years of service. Article 8 also provides for different levels of medical, dental, life insurance coverage and premium responsibility depending on years of service. Moreover, some of those benefits change "when the member's years of service and years of retirement total 30...".

The benefits under article 8 are entitled "Pensions." In the ***Pension Benefits Act,*** R.S.O. 1990, c. P.8, "pension benefit" is defined as "the aggregate monthly, annual or other periodic amounts payable to a member ..." In the ***Ontario Municipal Employees Retirement System Act,*** R.S.O., 1990. c. O.29, "pension" is defined as "an amount that is payable at periodic intervals accordance with regulations;" In the ***Income Tax Act,*** "retiring allowance" is defined as "an amount (other than a superannuating or pension benefit, ... received) ... (a) on or after retirement of a taxpayer from an office or employment in recognition of the taxpayer's long service, ..."

The Arbitrator accepts the submission of counsel for the Board that what was paid under the 1995 ERI was not a pension, in that it was not in the form of periodic payments. The Arbitrator accepts the further submission of the Board that article 8 does not "occupy the field" in respect of retirement allowances or gratuities. Article 8, for example, does not fully exhaust the benefits a person receives upon retirement even under the collective agreement. As noted above, article 7:04(e) provides some specific vacation entitlement in one's year of retirement. Moreover, article 14, Sick Pay Credits Upon Termination, provides some benefits applicable to retirement.

Moreover, unilateral steps taken by the Board regarding benefits to persons who have already retired are covered in paragraphs 10 and 45 of the Agreed Facts:

> 10. The Board has in the past asserted and continues to assert that the Association has no bargaining rights of any kind with respect to retired members of the Force. The Board also asserts (and has asserted in the past) that the Fund's currently negotiated pension provisions are the maximum benefits allowable at law and consequently that bargaining proposals for benefits for PBF members (such as indexation) in addition to those which have already been negotiated are unlawful. The Association disagrees strongly with these positions and the issue of indexation of benefits for active members is currently before the interest arbitration board. Ad hoc distribution of surplus PBF funds to members who have already retired have occurred in past years at the discretion of the PBF Board of Trustees.
>
> ...
>
> 45. The Board has a practice of allowing former members of the bargaining unit to "buy in" to Medi-pak after they reach the age of 65 on a "cost" basis. This practice is not set out in the collective agreement, but the concerns leading to this practice were raised by the Association in bargaining. Prior to 1985, the collective agreement contained no provisions for health benefits for retirees. The Board had a unilateral practice of allowing retirees to purchase certain health benefits on a cost basis. In 1985, the parties agreed on certain health benefits for retirees, but not other benefits. The Board's practice regarding allowing retirees to purchase semi-private health benefits at cost continued after 1985. Complete Medi-pak benefits were established in 1991. The Board still has a practice of allowing retirees to purchase the same benefits at cost post age 65. The Board has taken the position in bargaining with the Association that the Association has no jurisdiction to negotiate on behalf of people who have already left the force, but acknowledges the right of the Association on behalf of existing members to bargain regarding entitlements which may arise following the completion of their employment.

While the collective agreement, in articles 7 and 8, provides for benefits upon retirement, nothing in the collective agreement speaks to or precludes the Board's offering

an incentive to prompt the timing of a member's decision to retire within a narrow window stipulated by the Board.

The management rights clause recognizes the Board's exclusive function to "maintain ... efficiency". It also stipulates that the functions will not be exercised in a manner inconsistent with the other provisions of the agreement or the *Police Services Act*. Section 38 of the *Police Services Act* stipulates that the police force "shall consist of ... such other police officers and other employees as the board considers adequate". The collective agreement anticipates that the Board will maintain the size of force it "considers adequate." There is nothing whatever in article 8 or elsewhere in the agreement to force the Board to implement layoffs or to preclude the Board from offering an incentive to employees to retire sooner than they otherwise would have in order to affect the size of and, in turn, the costs related to the Force. The incentives in the 1995 ERI are not in conflict with the article 8 benefits applicable upon a person's retirement. They are of a different nature because they are incentive payments affecting the timing of retirement and are simply in addition to, as opposed to, in conflict with, article 8.

Accordingly, for the reasons set out above, the Arbitrator concludes that the 1995 ERI does not breach article 8 of the collective agreement.

- *Decision Regarding Article 14 - Sick Pay Credits Upon Termination*:

This provision provides to each member of the force who has been in the employ

of the Board for at least 10 years a benefit upon "termination" that is "equal to one-half the cumulative sick pay credits of the member," in accordance with a schedule provided that is graduated with graduated years of service. For reasons similar to those set out for articles 4, 5, 7 and 8, the Arbitrator concludes that the 1995 ERI is not in conflict with or in violation of article 14 of the collective agreement. This article does not occupy the entire field of what payments may be made to a person upon retirement. This article is not contradicted by any element of the 1995 ERI. Moreover, articles 7, 8 and 14 in combination do not exhaust the field of payments upon retirement. An area left wholly untouched by the collective agreement is the area of incentives designed to affect the timing of an employee's decision to retire in the first place.

Accordingly, for the reasons set out, the Arbitrator concludes that the 1995 ERI does not breach article 4, 5, 7, 8 or 14 of the agreement or any other provision thereof.

3. WHETHER, EVEN IF THE 1995 ERI DOES NOT BREACH INDIVIDUAL ARTICLES OF THE COLLECTIVE AGREEMENT, IT BREACHES THE COLLECTIVE AGREEMENT AS A WHOLE:

The evidence establishes that the 1995 ERI was of utmost importance to the Board because of the savings that it would generate for the 1995 calendar year and the need for such savings to accommodate the substantial budgetary cuts that had been made by the Province. The staff were required under the 1995 ERI to leave between February 1, 1995 and March 31, 1995. As set out in paragraph 38 of the Agreed Statement, the Board "was

apprised that for every month of delay, it would lose $600,000 in savings, and that if the program was not implemented until July 1, there would be no savings in the 1995 year ...". The Board's purpose in implementing the 1995 ERI was clearly one of business efficiency.

Section 38 of the ***Police Services Act*** stipulates that "[a] municipal police force shall consist of a chief of police and ***such other police officers*** and other employees ***as the board considers adequate***, and shall be provided with the equipment and facilities that the board considers adequate" (emphasis added). Section 28(b) of the ***Interpretation Act***, R.S.O. 1990, c. I.11 provides that,

> 28. In every Act, unless the contrary intention appears,
>
> ...
>
> (b) where power is given to a person, officer or functionary to do or to enforce the doing of an act or thing, all such powers shall be understood to be also given as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing;

The 1995 ERI is a means chosen by the Board to regulate the size of the Force which is an obligation given to the Board in section 38. Naturally, this is not an obligation that can be carried out in a vacuum. The 1995 ERI, however, does not frustrate or side-step any of the express terms of the collective agreement. Nor does the Association allege that it does. Every provision of the agreement has been fulfilled by the Board. The Association alleges, instead, that articles 4, 7, 8 and 14 occupy the entire retirement field and that there is no room left for an ERI. For reasons set out above, though, the

Arbitrator has concluded that while those provisions in articles 4, 7, 8 and 14 may occupy their own areas, they do not, either separately or in combination, operate as a complete code of retirement. Specifically, they do not occupy the field of incentives that the Board may offer to affect the timing of early retirement in order to maintain efficiency and reduce the complement to control costs.

Nor does the 1995 ERI breach any implied term of the collective agreement. It is clear that there are many areas of the employment relationship that are not regulated by the collective agreement. Paragraphs 41 - 45 and 48 of the Agreed Statement of Facts, for example, set out agreed areas of benefits provided on behalf of members that are not regulated by the collective agreement, such as, for example, child care, lieu time for playing in the chorus/band and training at the C.O. Bick College. Moreover, on pages 68 - 76 of the collective agreement document, 27 management policies expressly stipulated to be "not covered by the collective agreement" are listed. These unregulated management policies cover such matters as annual evaluations, resignations, education leave, extended leave, sick bank statements, vacation draw, bill of rights, job sharing, retiree pension increases, paid up life insurance, dental plan and sick pay gratuities. Moreover, in article 4 of the Letter of Understanding at the conclusion of the collective agreement, the parties agree that the parties will discuss any alleged changes in established working conditions "not covered by the Collective Agreement".

Incentives to affect the timing of a person's decision to retire is simply another area that at this point is unregulated by the collective agreement. Accordingly, the Board's

unilateral implementation of the 1995 ERI was not a breach of any implied or express term of the collective agreement.

4. *WHETHER THE BOARD ACTED IN VIOLATION OF ARTICLE 3 OF THE COLLECTIVE AGREEMENT REQUIRING BARGAINING IN GOOD FAITH:*

Section 2(1)(d) of the *Labour Relations Act* of Ontario exempts the Board from the scope of the *Labour Relations Act* and the obligations established for employers thereunder. Instead, the labour relations of the Board and its employees are regulated by the *Police Services Act*. Unlike the labour relations scheme under the *Labour Relations Act* of Ontario, the members of police force are precluded by section 117 of the *Police Services Act* from becoming members of a union. Instead, they may become members of an association that is not a union. A further fundamental difference between the traditional scheme under the *Labour Relations Act* and that under the *Police Services Act* is that the majority of the members of a police force are entitled under section 119 of the *Police Services Act* to give notice to bargain, at which point the Board becomes obligated to meet with a bargaining committee of the members and bargain in good faith. If at least 50% of the members of the police force belong to an association, then section 119(5) stipulates that the association shall give notice to bargain. Unlike the scheme under the *Labour Relations Act*, however, members of the force are entitled to bargain directly with the Board. The express role given to the association under section 119 of the *Police Services Act* is to give the notice to bargain. In addition, under section 128 of the *Police*

Services Act, the agreement is made binding on the Board and the members of the police force. Unlike the scheme under the *Labour Relations Act*, it does not expressly make the association a party to the collective agreement. Under the Uniform collective agreement there is no express clause recognizing the Association as the exclusive bargaining agent. Instead there are certain functions the Association performs under the collective agreement like processing grievances and giving notice to bargain. Article 3.09 of the Civilian agreement, which does not appear in the Uniform agreement, stipulates the following:

> 3:09 Provided the Association continues to represent not less than 50% of those members of the Force eligible for membership in the Association, the Board shall not negotiate or contract with any member or members respecting any of the terms and conditions covered by this agreement without the consent of the Association or unless authorized under the terms of this Collective Agreement.

The recognition clause in article 3:09 of the Civilian Agreement does not preclude the Board's unilateral implementation of the 1995 ERI because the ERI was not "covered by [the] agreement". Moreover, the ERI benefit for Civilians was limited to four months' salary, which has been found to be simply a lump sum payment for agreeing to leave at a time convenient to the Board and is not covered by the agreement.

The Arbitrator is satisfied that absent bargaining, a situation addressed below, the Board's unilateral implementation of the 1995 ERI without the consent of the Association was not a breach of any recognition due the Association. Pursuant to article 3 of the collective agreement, the management has the right to "maintain efficiency". As previously

noted, this right cannot be exercised in a manner contrary to the provisions of either the collective agreement or the *Police Services Act*, which is incorporated by reference into the agreement. Section 38 of the *Police Services Act*, however, provides the Board with the right and duty to regulate the size of its work force. The 1995 ERI was a means, presumably short of layoffs, employed by the Board to do just that, i.e. to reduce the size of its work force in order to decrease its related costs. Naturally, the Board does not have unbridled freedom but can act in accordance with its rights under section 38 as long as it is not in contravention of some other obligation under the *Police Services Act* or the collective agreement. For the reasons set out above, the Arbitrator has determined that the Board's unilateral implementation of the 1995 ERI was not a breach of any implied or express provision of the collective agreement.

Two express rights and obligations are triggered in bargaining pursuant to the *Police Services Act*: 1) the right and obligation of the Association to give notice to bargain if it represents 50% of the members of the force (119(2)), and 2) the obligation under section 119(3) for the parties to bargain in good faith. Under the express wording of section 128 of the *Police Services Act*, the collective agreements bind the Board and the members of the force. The Association is not separately referred to in section 128. The bargaining committee that the Board is obligated to meet with is a committee of members of the force; it is not expressly stipulated to be the Association.

Notice to bargain for 1994 was given to the Association by the Board on December 29, 1993. More than 10 months went by after the Board issued its notice to

bargain on December 29, 1993 without any response from the Association to suggest it had any interest whatever in changing the agreement. It was not until November 10, 1994, a month after Mr. Walter was elected President of the Association on October 11, 1994, that the Association expressed a desire to exchange proposals and become involved in the budgetary process that had been going on for months through unilateral action by the Board without complaint by the Association.

Mr. Walter knew well before he issued his notice of desire to bargain that the Board was contemplating the 1995 ERI, as demonstrated through his letter to the Board dated October 18, 1994. Accordingly, with the knowledge of the Association, the 1995 ERI plans were already under way by the Board before notice to bargain was given by the Association. In addition, when the notice to bargain was given, the subject of ERIs was not put on the table. It was only placed on the table on December 14, 1995, by which point the Association had definite knowledge of the Board's proposed ERI program through an authoritative source in senior management, as referred to in paragraph 29 of the Agreed Facts.

In her response of November 17, 1994, Ms. Eng did not refuse to bargain; she expressly accepted the suggestion of Mr. Walter that the parties should meet. She simply asserted the position that the Board was not required to do so in respect of the 1994 agreement because of the lack of response from the Association for 11 months following the Board's notice to bargain dated December 29, 1993. She asserted the legal position

that article 129(1) of the agreement had been triggered and that the agreement had been continued by the agreement of the parties.

As set out in paragraph 30 of the Agreed Statement, it was only on December 14, 1994, when the parties first met to discuss the 1994 agreement (without prejudice to the Board's position that it was not required to bargain about the 1994 agreement), that the Association first tabled subjects for bargaining, including an ERI incentive proposal as one of the subjects for bargaining.

At the December 14, 1994 meeting, the parties squared off with respect to their views regarding the Board's entitlement to unilaterally implement an ERI. At that meeting, the Association stated that it wanted a Memorandum of Agreement on ERI and reiterated its position that the Board would not be entitled to unilaterally implement an ERI without the Association's agreement. The Board, for its part, asserted the contrary view that it was not required to obtain the Association's agreement. Moreover, the Board said that action regarding an ERI had to be taken quickly or savings would be lost.

At the December 14, 1994 meeting, the parties discussed the Association's ERI proposal, which the Board asserted was more than was required to achieve the desired level of downsizing. Neither at that meeting nor at any subsequent time did the Board put forward for the Association's consideration the ERI it unilaterally introduced on January 24, 1995 and which is the subject matter of this arbitration. Counsel for the Board acknowledges that the parties did not discuss the 1995 ERI after the December 14, 1994

meeting. This failure to discuss the 1995 ERI with the Association is a large part of what the Association asserts was bargaining in bad faith.

If any obligation arises respecting bargaining in good faith when the issue in question is a subject matter of proposals for negotiation between the parties, that obligation could only arise in this case respecting the ERI on December 14, 1994, as that is the first moment the Association indicated to the Board its desire to bargain the ERI issue.

By December 14th, however, the Board was well along in its processing of the 1995 ERI, as reflected in the letter dated December 14, 1994 from the Chief of Police to the Board which was placed before the Board at its meeting of December 15, 1994. Paragraph 4 of that letter provides the following:

> 4. RETIREMENT INCENTIVE PROGRAM
>
> To date, here have been two retirement incentive programs offered resulting in 185 staff leaving the Force. It is proposed that the Force provide senior staff another retirement incentive program for 1995. This program would target the following groups:
>
> - police personnel, belonging to the Police Benefit Fund, with over 25 years' service,
> - police personnel under the OMERS Type 7 plan, and
> - civilian personnel in the Metro Pension Plan.

> It is proposed that this program be implemented after January 1, 1995 and before February 1, 1995. From our past experience, it is projected that approximately 144 of the 717 employees would participate in this program at a cost of 3.8 million, and a projected savings in 1995 of 6.5 million and 2.4 million towards Social Contract. The 1996 annualized savings would amount to $8.4 million and $1.3 million towards Social Contract. After the expiry of the Social Contract legislation in 1996, the full savings in 1997 would be approximately 9.7 million.

Counsel for the Association emphasizes that the Board knew from the point of the Board meeting on December 15, 1994 that it was going to unilaterally introduce the 1995 ERI and had an obligation to discuss the matter with the Association.

The Arbitrator cannot conclude that the Board refused to discuss with the Association the Association's ERI proposal, notwithstanding the maturity of its own budgetary decisions and notwithstanding its position that pursuant to article 129(1) of the agreement, it was not obligated to discuss the 1994 collective agreement. As set out in paragraph 30 of the Agreed Statement,

> 30. ... At the December 14 meeting, there was extensive discussion regarding a variety of ERI alternatives, including discussion of the proposal put forward by the Association. The Association wanted a Memorandum of Agreement on ERI and to have it agreed to at that time. The Association reiterated its position that the employer could not unilaterally implement on ERI, and one could only be implemented on agreement of the parties. The Board disagreed and said it didn't think ERI's had to be subject to agreement by the Association to be able to do it in the future unilaterally. The Board said that action on the issue had to be taken quickly or savings would be lost. The Board advised the Association that in its view, the Association's proposed ERI was more than would be required to achieve the desired level of downsizing. The ERI program adopted by the Board on January 24 (see paragraph 34) was not proposed to the Association on December 14, or subsequently.

31. As of December 15, 1994, the Association had in its possession Exhibit "II", which they understood was a document to be tendered to the Board at some time. [This document sets out the summary of the 1995 ERI

The Board's insistence at the December 14, 1994, meeting that it was entitled to introduce the ERI for 1995 without the agreement of the Association was not a refusal to bargain; it was the expression of its legal position, a position not agreed to by the Association. The Board discussed the Association's proposed ERI in depth, as well as "a variety of ERI alternatives". The position of the Board included a position regarding its management rights and the scope of the areas that were unregulated by the collective agreement. The Arbitrator is satisfied that the Board did have an intention to enter into a collective agreement; it simply disagreed with the Association over the content of it. The impasse was not over the content of the ERI, although the Board did not agree with the content of the Association's ERI (believing it was more than required). The impasse was whether the content of an ERI had to be bargained and included in the collective agreement or whether it was and could stay in an unregulated area. Disagreement over what falls within the unregulated area does not constitute bargaining in bad faith. It then becomes a question that can be resolved at interest arbitration.

On December 29, 1994, Mr. Lorne Perron, the Director of Labour Relations, wrote to Mr. Walter stating that without prejudice to the position of the Board that 1994 negotiations had concluded, it would be prepared to discuss some eight listed subjects. It did not include the ERI. On January 4, 1995, Mr. Walter wrote Ms. Eng with concerns about the wide breadth of the suggested subjects for 1994 bargaining and re-iterated the

Association's position that the Board required the consent of the Association to offer an ERI to the members.

On January 6, 1995, the Association gave the Board notice of its desire to bargain for all units for the 1995 contract year and proposed that they combine the 1994 and 1995 bargaining. On January 9th, Mr. Walter stated in a letter to Ms. Eng that he believed that the likelihood of the Board and the Association coming to agreement regarding the 1994 negotiations would be "slim" without third party intervention. He then asked Ms. Eng if she would be prepared to establish meeting dates and times, to select a mediator in the event of a lack of success in negotiations and to put in place a Dispute Resolution Board in the event that mediation proved unsuccessful.

Counsel for the Association argues that Ms. Eng's reply, dated January 18, 1995, constitutes a clear refusal to bargain. In the letter of January 18th, Ms. Eng asserted that the 1994 negotiations had been concluded and that all existing provisions of the collective agreement applied to the end of 1994. Ms. Eng asserted that she at no time indicated that the 1994 collective agreement provisions could be re-negotiated. Ms. Eng further stated her view that the December 14th meeting focused on the possible agreement regarding the use of excess funds in the OMERS Type III fund and was not intended to re-open 1994 bargaining. In conclusion regarding the Board's obligation to bargain for 1994, Ms. Eng asserted that the Association's request for a negotiation timetable and possible mediation was not appropriate. Regarding its willingness to bargain for 1994 without prejudice to its position that the 1994 negotiations could not be re-opened, Ms. Eng stated that it would

seem to make sense to consolidate 1994 with the 1995 bargaining. Accordingly, Ms. Eng stated that the Board would have no objection to the Association placing its 1994 items in the 1995 bargaining.

The Arbitrator does not consider that the January 18, 1995 letter from Ms. Eng to Mr. Walter constitutes an unwillingness to bargain; in fact it is directly to the contrary: "Therefore, without prejudice to the Board's position that 1994 negotiations cannot be re-opened, the Board has no objection to the Association placing its 1994 items in 1995 Bargaining." The Board's insistence on its legal position that it did not need the Association's consent to offer an ERI was not an attempt to diminish the Association. It was a difference of opinion on a legal issue of fundamental importance to the Board because it was required to act quickly in order to deal with the imposed budgetary restraints, and was at peril of losing $20,000.00 per day if it had not acted when it did. The Board did not refuse to discuss the difference of position. It discussed it to impasse and then took action in accordance with its legal position fully stated in advance to the Association.

The matter of the 1995 ERI had been under consideration by the Board for months and was put before and approved by the Board at its meeting of December 15, 1994. The Board's plans for the ERI were well under way before the Association gave notice to bargain on November 10, 1994. The Association was aware of the Board's intentions to unilaterally implement an ERI at least by October 18, 1994. Moreover, at the point when the ERI was approved by the Board, on December 15, 1994, the Board

had had an ERI proposal from the Association for only one day, since December 14, 1994. It is undisputed by the evidence that time was of the essence for the Board in respect of the implementation of this 1995 ERI. Every month of delay would cost the Board $600,000 of savings or $20,000 per day (see para 38 of Agreed Statement.) Moreover, in implementing the 1995 ERI to deal with the financial pressures, the Board acted in the same way it had on a number of prior occasions without objection from the Association.

While the Board had knowledge, at the point of implementation, of the Association's position that the Board was not entitled to unilaterally implement the 1995 ERI without the agreement of the Board, the Board's action was taken for bona fide business considerations in accordance with its responsibility to manage the Force. It was taken in accordance with the Board's understanding of its rights under the collective agreement and the *Police Services Act*. Its position regarding its entitlement to unilaterally implement an ERI is one that was reasonably held and was not, the Arbitrator concludes, aimed at denigrating the Association. The action was not a tactic of intimidation, and was clearly not intended to undermine the bargaining strength of the Association.

The Board did not make direct deals with individual members in an area encompassed by the collective agreement. As has been concluded above, ERIs are not covered by the collective agreement. Nor did the Board talk directly to individual members instead of with the Association about an issue in bargaining. The 1995 ERI was a time limited incentive offered to members of the force generally, which they could then

choose to accept or reject. It did not involve direct discussion or negotiation with individual members as opposed to the Association.

Looking specifically to section 119(3) of the ***Police Services Act***, the parties are directed to bargain in good faith and make every reasonable effort to come to an agreement dealing with "remuneration, pensions, sick leave credit gratuities and grievance procedures ... and, subject to section 126, their working conditions." The Arbitrator is satisfied that the 1995 ERI is neither "remuneration" nor "pensions" nor "working conditions" within the meaning of section 119(3). The 1995 ERI was not about remuneration of employees. It was an incentive to prompt some members of the force to accelerate the timing of their decision to retire. It was not a payment for work performed or even payment in recognition of work previously performed. It was an incentive offered to impact the timing of a member's decision to retire.

Equally, the 1995 ERI was not a pension because it was not a periodic payment and does not fall within the definition of pension in the ***Pension Benefits Act***, discussed above. In addition, the 1995 ERI, in and of itself, was not a "working condition" within the meaning of section 119(3). It was not a term under which the employees worked. It was an incentive put out for a very narrow window of time to encourage some employees to accelerate their decision to stop working. It was not an ongoing feature of the contractual arrangement under which the employees worked. While the parties might be able to bargain a clause covering ERIs which, through its generality or repetitive nature,

or some other feature, might render it a working condition, the specific 1995 ERI was not a working condition within the meaning of section 119(3).

It is apparent through the wording of section 119(3) that the phrase "working condition" carries a limitation in its scope. If it were otherwise, there would be no need to have "remuneration, pensions, sick leave credit gratuities and grievance procedures ... and ... their working conditions" separately listed.

Moreover, even if the 1995 ERI could fall under a broad definition of "working conditions," section 119(3) does not require that all working conditions be included in the collective agreement, as evidenced by the acknowledged fact that at the end of the agreement the Board formally advises of 27 listed items of Board policy that are "not intended to be covered by the collective agreement." The Association cannot bring an issue into the scope of section 119(3) and prevent the Board from carrying on business as usual in a heretofore unregulated area simply by putting an ERI on the table the day before an ERI is passed by the Board to cope with a pressing problem of substantial budgetary cutbacks. The Association cannot in this fashion suddenly co-opt the Board in its prerogative to manage and require it to put critical matters on hold until the conclusion of the interest arbitration process (which could be many months down the road). It could not unilaterally derail the Board's well matured plans to cope with immediate budget cutbacks, particularly when those plans had to be implemented immediately for 1995 savings to occur and when they involved an area not covered by the collective agreement or

otherwise foreclosed to the Board.

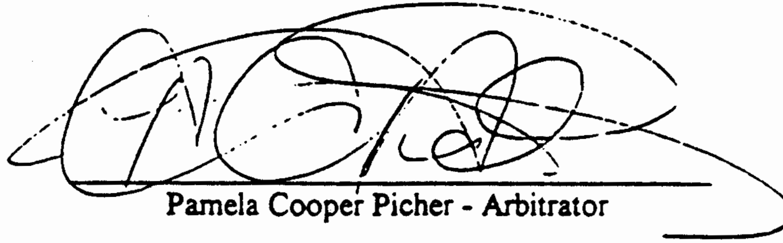
In addition, even if the 1995 ERI could fall within the scope of either remuneration or working conditions under section 119(3), the Arbitrator could not conclude that it failed to bargain in good faith. It bargained to impasse the issue in dispute which was not the content of the ERI, but rather whether the ERI had to be part of the agreement, i.e. whether implementation of the ERI required the consent of the Association. Having reached impasse on that issue, the Board, for pressing business reasons, took unilateral action and left the ultimate resolution of the conceptual issue to interest arbitration and/or adjudication.

Accordingly, for the reasons set out above, the Arbitrator concludes that the Board did not fail to meet its duty to bargain in good faith. It did not fail to give the required recognition to the Association; nor, following notice to bargain, did it fail to bargain with the Association as required by either or both the ***Police Services Act*** and the collective agreement.

To summarize, the Arbitrator concludes as follows: 1) that the 1995 ERI was not prohibited by the Local Agreement, 2) that the 1995 ERI did not breach any of the expressed or implied provisions of the collective agreement, and 3) that the 1995 ERI was not implemented in breach of the Board's duty to bargain in good faith.

Accordingly, the grievance is hereby dismissed. The Arbitrator remains seized of any related outstanding issues between the parties as referred to in the hearing.

DATED in Toronto this 17th day of January, 1997.



Pamela Cooper Picher - Arbitrator