

they were denied bonuses on the documented suspension even though the imposition of the suspension was held in abeyance.” (J-2-c).

The matter continued through the grievance procedure and is now before me for an Opinion and Award.

Relevant Testimony

Testimony was offered by the FOP and the County. The FOP offered testimony from George Herbert, FOP President. Herbert testified that he was not aware of the County’s claimed practice involving Meyer and Thompson but he knew that Matos did not receive the attendance bonus one year. Gary Merline, Director and Warden of the Jail, testified for the County. Merline testified that there were three other denials of the attendance bonus to Matos, Meyer and Thompson for suspensions that were held in abeyance. On cross examination, Merline stated that he was not aware if Matos, Meyer or Thompson had other suspensions or “w” time when they were denied the attendance bonus.

Relevant Contract Language

ARTICLE X **SICK LEAVE**

- F. A perfect attendance bonus of \$750 shall be paid for annual perfect attendance and determined by looking back at the prior calendar year. To be eligible the Officer must be employed for the entire calendar year and have no “W” time or suspensions. Perfect attendance excludes only the use of vacation, administrative and bereavement time. The bonus shall be paid by February 1 of the year succeeding annual perfect attendance.”

FOP Position

The FOP disputes the County’s position that the language is ambiguous. The FOP submits that the only “ambiguity” may be the definition of the term “suspension” as being applied by the County. The FOP contends that in reading the language of the specific attendance bonus provision coupled with the definition of the term “suspension” by the

Background

The County of Atlantic and FOP Lodge 34 are parties to a collective bargaining agreement (the "CBA") with a term of January 1, 2003 to December 31, 2006. (J-1). The basic facts in this matter are undisputed.

This arbitration arises as the result of a grievance filed by FOP Lodge 34 on behalf of Corrections Officer Manuel Almeida. The grievance asserts that Officer Almeida should have received his perfect attendance bonus in the amount of \$750 for calendar year 2006 in accordance with Article X(F) of the CBA. It is undisputed that Officer Almeida was disciplined in September 2006. The Notice of Minor Disciplinary Action (the "Notice") indicates that Officer Almeida was "found to not be wearing his protective (vest) while on duty." The Notice further provides that Officer Almeida was "in violation of the undergarment protective vest policy 1.3.8." Finally, the Notice provides that the one-day suspension is: "Held in abeyance from the date of infraction pending the receipt of no further disciplinary sanctions that require suspension time, excluding time and attendance matters." (J-3). Officer Almeida sought payment of the perfect attendance bonus for 2006 and when the payment was denied a grievance was filed by the FOP. The grievance was denied at Step One by Captain Thomas on January 22, 2007. Warden Gary Merline denied the grievance on January 26, 2007 stating, in relevant part, as follows:

1. You were suspended for the day for a vest violation. Only the imposition of the sanction was held in abeyance for one year as the notice states, it does not state that the suspension was removed or not imposed. If you were to do this again (not have your vest on) it would be your second occurrence thus elevating the sanction according to our policy since you already had one occurrence of this type and documented sanction.
2. In review of similar incidents of this nature this has been the policy and practice of the facility for years. This type of incident has occurred for past employees (if I recall correctly it was Meyers, Thompson and Matos) and

Department of Personnel (the "DOP"), the grievant is entitled to receive the perfect attendance bonus for 2006 without any other guide than a knowledge of simple and plain English and the use of common sense and reasonableness. The FOP maintains that the CBA must be construed and interpreted based on its entirety as well as any external definitions that may be relative to the instant matter.

The FOP asserts that the key question is if a suspension "held in abeyance" constitutes a "suspension" which would render the attendance bonus for perfect attendance to be not applicable even though Officer Almeida was physically in attendance on all work days during the 2006 year. The FOP submits that the language in Article X, Section 3, Section F is clear, providing for a \$750 bonus for annual perfect attendance. The only exceptions would be if the employee had "W" time or was suspended. There is no question that Almeida had no "W" time. It is undisputed that Officer Almeida was physically present on all possible work days and was never docked a day's pay during 2006. The County argues that Almeida was suspended and therefore not eligible for the bonus. The FOP notes that it is undisputed that the suspension was never invoked and was being held in abeyance until one year from the date of occurrence of the offense. The FOP submits that the County was unclear as to whether or not Officer Almeida would be entitled to the bonus for 2007 as the suspension held in abeyance in 2006 would not expire until September of 2007. The FOP maintains that the issue of Officer Almeida's entitlement to the 2007 attendance bonus is not before the Arbitrator. The sole issue is Almeida's entitlement to the 2006 attendance bonus.

The County, in its presentation, asserted that the Arbitrator lacked jurisdiction to consider the definition of the word "suspension" as defined by the DOP. (J-4). The FOP has not and is not asking the arbitrator to redefine or to rule on the DOP's definition of the term

“suspension.” It is the FOP’s position that the CBA is not silent regarding the relationship between contractual terms and law/regulation covering the subject matter. The definition by the DOP of the term “suspension” is clear on its face and needs no further interpretation. The FOP asserts that the term “suspension” means “temporary separation from employment for disciplinary reasons.” The testimony showed that Officer Almeida was never “separated” from employment during the 2006 year. He was physically present on each and every work day. The FOP is not asking for any legal clarification of the DOP’s definition of suspension as suggested by the County. The FOP asks that consideration be given to the DOP’s definition in determining the meaning of the contractual language. The FOP asserts that the term “suspension” as used in the CBA must be in concert with the definition given the term by the DOP as the contractual language guarantees compliance. The language in the CBA and regulation must be harmonized and the CBA should not be interpreted to authorize a violation of that regulation.

The FOP disputes the County’s claim that a “past practice” existed, by which officers in the past had been denied their attendance bonus if they had a suspension “held in abeyance” during that year. The FOP contends that the County presented no documentation or evidence to substantiate that claim. In fact, Warden Merline under cross-examination admitted that he was not sure of whether or not the three individuals named had any other suspensions or “w” time that would have precluded them from receiving the bonus. The County also failed to produce those individuals as witnesses to corroborate their claim. Allegations and assertions do not constitute proof. Therefore, the County failed to provide sufficient hard evidence or testimony to substantiate its claim of a past practice.

The FOP contends that it presented credible testimony that other employees at the County jail, covered by a CBA with the same contractual language, received their attendance bonus in or about April (paid on a quarterly basis) even though they also had “suspensions held in abeyance.” This fact was substantiated by the County which then attempted to explain the payment by stating it was a mistake and would have to be rectified.

The sources of contractual interpretation include the language of the CBA, and to the extent it may be ambiguous, the bargaining history and past practice. No bargaining history testimony was presented by either party and no past practice was proven by the County.

There is no question that Officer Almeida has an excellent work record and has received numerous commendations for perfect attendance as well as for other actions. The sole issue is not whether or not disciplinary action was warranted or appropriate, but only whether or not he is entitled to the attendance bonus for the year 2006. An arbitrator may look for guidance from many sources, yet the award to be legitimate must draw its essence from the CBA. Whenever two interpretations are possible, one making the CBA valid and lawful, and the other making it unlawful, the former must be used. When the rights as set forth in the CBA are similar to those created by legislation/regulation, external law must at least be considered to determine if the definitions of words in dispute are in sync. The County presented no evidence as to the origination, purpose, appropriateness or legality of the term “suspension held in abeyance.” The FOP is asking that the Arbitrator construe the CBA as a whole in light of external regulations and the simple test of reasonableness. The disputed provision of the CBA must be read in light of the entire CBA. If in fact, Officer Almeida was actually suspended from work and lost a day’s pay, he would not be entitled to the bonus for 2006. The bonus for 2007 would be based upon his performance during that year. The County, utilizing the “holding in abeyance” concept, actually can deny an employee

the attendance bonus for two calendar years as the alleged offense may occur in one year, which based on the County's belief would render the employee ineligible for that calendar year, as well as rendering him ineligible for the bonus in the succeeding year as the "suspension held in abeyance" would continue into that subsequent year. This is not a reasonable interpretation of the intent of the contractual language.

The FOP submits that the "reasonable man standard" in interpreting the contractual provision is more in accord with the ordinary meaning of the words and therefore should prevail. The FOP submitted legal and dictionary definitions of the word "suspension" which provides the Arbitrator with a neutral interpretation of the word. The meaning of each paragraph and each sentence must be determined in relation to the Agreement as a whole, which in this case encompasses and requires adherence to the DOP Regulations which set forth a clear and unambiguous definition of the term "suspension."

Finally, putting definitions of the word "suspension" aside, there is no argument that Officer Almeida was present on every possible work day in 2006 and therefore is entitled to the bonus. The County failed to substantiate its claim of a past practice, failed to explain why other employees under the same circumstances as Officer Almeida received perfect attendance bonuses, and as such, failed to substantiate or give credence to its arguments.

The FOP requests that the grievance be sustained.

County Position

The County asserts that it did not pay Officer Almeida a perfect attendance bonus for calendar year 2006 because he received a one-day suspension in September 2006 for failing to wear his protective vest while on duty in violation of the County's policies and procedures. The one-day loss of pay was held in abeyance for a period of one year pending the receipt of no further disciplinary sanctions by Officer Almeida. However, the fact remains that Officer

Almeida received a one-day suspension, as evidenced by the Notice of Minor Disciplinary Action dated September 7, 2006.

It is undisputed that Officer Almeida admitted that he failed to wear his protective vest on September 5, 2006. The County asserts that the merits of the disciplinary action resulting in the one-day suspension are irrelevant.

Officer Almeida and FOP Lodge 34 take the position that because the loss of pay/time off was held in abeyance and Officer Almeida was not actually absent from work to serve the suspension, the existence of the suspension should not preclude Officer Almeida from his entitlement to the perfect attendance bonus in accordance with Article X (F) of the collective bargaining agreement. However, the County submits that the plain language of the CBA states that in order to be eligible for the bonus, an officer must have no suspensions. Moreover, as noted in Warden Merline's response to the Step 2 grievance, and as Warden Merline testified, uncontradicted, at the May 21, 2007 arbitration hearing, this situation has arisen on several occasions in the past and employees were denied the perfect attendance bonus based on suspensions held in abeyance. In fact, one such employee was the former president of FOP Lodge 34 and the language in question was in effect at the time his situation occurred. Thus, the County maintains that it has clearly established that the past practice has been to deny the perfect attendance bonus where an employee has received a suspension, even where the suspension was held in abeyance. The County notes that the FOP did not grieve the denial of the perfect attendance bonus in previous situations similar to the one at issue here.

The County contends that the plain language of Article X(F) of the CBA compels a finding that Officer Almeida is not entitled to the perfect attendance bonus for calendar year 2006.

Article X (F) provides: “To be eligible [for the perfect attendance bonus] the Officer must be employed for the entire calendar year **and have no** “W” time or *suspensions*.” (Emphasis added). The County submits that the language of the CBA could not be clearer. The CBA specifically and unequivocally states that an officer must have “no suspensions” in order to be entitled to the perfect attendance bonus. It is undisputed that a one-day suspension was imposed on Officer Almeida for failing to wear his protective vest on September 5, 2006. Under the circumstances, the plain language of the CBA dictates that Officer Almeida is not entitled to the perfect attendance bonus.

It is a basic tenet of contract law that where the contract language is clear, it must be interpreted according to its plain meaning. Barclays Bank v. 865 Centennial Avenue Associates, 26 F. Supp. 2d 712, 718 (D. N.J. 1998). Moreover, “when the collective bargaining agreement is the sole source of the arbitrator’s authority, and it limits awards to an interpretation thereof, the arbitrator must give effect to the plain meaning of the contract language.” High Concrete Structures Inc. v. United Electrical, Radio and Machine Workers of America, Local 166, 879 F. 2d 1215, 1218 (3d Cir. 1989). In this case, Article II (C) of the collective bargaining agreement between the parties specifically provides that “the arbitrator shall not have the authority to add to, modify, detract from or alter in any way the specific and express written provisions of this agreement or any amendment or supplement thereto. The arbitrator shall have no authority to interpret any law, court decision or statute of this State or the United States in rendering any determination.” It is respectfully submitted that the language at issue is patently clear. Under the circumstances, the express language of Article X (F) must prevail. Given the fact that Officer Almeida had a one-day suspension

imposed by means of the September 7, 2006 Notice of Minor Disciplinary Action, he is not entitled to the perfect attendance bonus.

Officer Almeida and FOP Lodge 34 argue that because the loss of pay/time off was held in abeyance for a one-year period and not actually served, Officer Almeida, in fact, achieved perfect attendance for the 2006 calendar year. While it may be true that Officer Almeida was physically present for every work day during calendar year 2006, the fact remains that he has a suspension during calendar year 2006. Whether the suspension was held in abeyance or not, Officer Almeida received a suspension. Article X (F) does not specify that a suspension must be served to preclude entitlement to a perfect attendance bonus. Article X (F) simply states that in order to be entitled to the bonus an employee must have no suspensions. Thus, the County submits that the existence of the suspension alone serves to deny an employee a perfect attendance bonus.

The County contends that the FOP's focus on the definition of the term "suspension" is entirely misplaced. The County does not dispute the definitions presented by the FOP. The fact remains that Officer Almeida received a suspension. The fact that it was held in abeyance does not change the fact that he received it. The suspension was a disciplinary measure imposed as a result of a violation of a safety policy on the part of Officer Almeida. While the suspension was held in abeyance pending Officer Almeida's receiving no further disciplinary sanctions for one year, the suspension is and will remain a part of Officer Almeida's permanent personnel record. Even if Officer Almeida successfully completes the one year without further disciplinary action (and it is worthy to note that the one-year period is not up until September 2007), the one-day suspension remains part of his personnel file and his employment record with the County. The one-day suspension was and is a disciplinary penalty and under the plain language of Article X, the fact that Officer Almeida

received the suspension precludes him from being entitled to the perfect attendance bonus. The language of the CBA is clear and unequivocal. An employee is only entitled to the perfect attendance bonus if he or she has no suspensions.

To accept FOP Lodge 34's argument, an employee would have to actually serve a suspension in order to be precluded from receiving the perfect attendance bonus. The fallacy of this argument can be demonstrated by the following scenarios. If an employee is suspended as a disciplinary measure and his or her pay is docked but the employee is not precluded from actually attending work, would that individual be entitled to the perfect attendance bonus? Similarly, if an individual received a suspension as a disciplinary penalty and was permitted to forfeit compensatory, vacation or other accumulated leave time in lieu of actually serving the suspension, would that individual be entitled to the perfect attendance bonus? In both scenarios, the employee in question would not miss a day of work as a result of the suspension. It is respectfully submitted that in either of the two preceding scenarios, the employee at issue would not be entitled to a perfect attendance bonus for the year in which the suspension was imposed. The situation presented here is essentially the same as the two preceding scenarios. In all three situations, a suspension was imposed as a disciplinary penalty. Whether the suspension is actually served or not is not the issue. The fact that a disciplinary suspension was imposed alone is sufficient to preclude an employee's entitlement to a perfect attendance bonus.

Moreover, to accept FOP Lodge 34's argument defies logic and would quite likely serve as an incentive for the County to require that all suspensions imposed in the future actually be served rather than allow a suspension to be held in abeyance or to allow an employee to forfeit accumulated time in lieu of serving the suspension.

The County takes strong exception to FOP Lodge 34's continued reference to the suspension not being disciplinary but merely "just a threat." (See Presentation of FOP dated May 21, 2007, page 10). The fact is that Officer Almeida violated a policy put in place for the protection of the officers. The one day suspension was arguably a minimal penalty under the circumstances. In fact, the policy at issue specifically authorizes a suspension of from one to five days for a first infraction. Clearly, Officer Almeida was given a light sentence for this infraction. Not only was he suspended for the minimum period, but the County allowed the one day suspension to be held in abeyance.

The County disputes the FOP's characterization of this suspension as something other than a disciplinary penalty. The one-day suspension was and is clearly a disciplinary penalty. It is clearly stated as such on the Notice of Minor Disciplinary Action (J-3 at the May 21, 2007 arbitration hearing). The County's actions in holding the loss of pay/time off in abeyance for one year was essentially an exercise of good will on the part of the County. In holding the suspension in abeyance, the County sought to motivate Officer Almeida to do the right thing, i.e., wear his protective vest at all times, without having to lose a day's pay. This method of discipline has been used frequently by the County as a means to get its employees to act appropriately and in accordance with the County's policies and procedures. The method has proved quite effective in a number of instances and, quite frankly, it is in the interest of both the employees and the County to proceed in this manner.

There is no question that Officer Almeida was not wearing his protective vest on September 5, 2006 nor is there any question that he was in violation of County policy. Moreover, the policy in question was put in place for the safety and protection of the officers. To now try to turn this around and paint the County as the bad guy is not only offensive, but

foolhardy on the part of FOP Lodge 34. The County is under no obligation to hold a suspension in abeyance. As noted, it is in both the County's and the employee's interest to do so. The protestations of FOP Lodge 34 with regard to the County's holding the suspension in abeyance and FOP's attempts to characterize a suspension held in abeyance as anything other than the disciplinary penalty it is intended as is unwarranted and should be rejected in its entirety.

The County submits that its decision in this matter is consistent with past practice as well the plain language of the CBA. The County asserts that the plain language of Article X (F) of the CBA compels the denial of the grievance and that the past practice of the County further supports the denial of the grievance. The County submits that it presented evidence to show that in the past when an employee received a suspension that was held in abeyance, that employee was denied the perfect attendance bonus.

In denying the within grievance at both Steps Two and Three, it was noted that denial of the perfect attendance bonus based on the imposition of a suspension held in abeyance was consistent with the past practice of the County. (See J-2 entered into evidence at the May 21, 2007 arbitration hearing). Similarly, Rick Mulvihill, Department Head, Public Safety, in denying the within grievance at Step Three, specifically noted that denial "is consistent with past practice."

Moreover, at the May 21, 2007 arbitration hearing, FOP Lodge 34 was unable to dispute that this, in fact, has been the past practice of the County. When asked on cross examination about other employees who were allegedly denied the perfect attendance bonus in the past based on a suspension held in abeyance, George Hebert, President of FOP Lodge 34, acknowledged that two of the employees referred to the Warden's denial of the

grievance, Meyers and Matos, had not, in fact, received the bonus as a result of a suspension which was held in abeyance. Officer Hebert did not know one way or the other with regard to the third employee (Officer Thompson) referenced in Warden Merline's January 26, 2007 grievance response.

The County asserts that denial of the perfect attendance bonus to Officer Almeida is consistent with past practice and with the plain language of the CBA.

The County asks that the grievance be denied.

Discussion

I have thoroughly reviewed and carefully considered the arguments of the parties and the evidence submitted into the record by the FOP and the County. The issue to be determined is: Did the County violate the collective bargaining agreement when it denied Officer Almeida a \$750 attendance bonus for the calendar year 2006, and if so, what shall be the remedy?

The burden in a contract violation matter rests with the FOP. Therefore, the FOP must show by a preponderance of the evidence that the County violated the CBA when it denied Officer Almeida a \$750 attendance bonus for the year 2006.

For the following reasons, I have determined that the County did violate the CBA when it denied Officer Almeida a \$750 attendance bonus for the calendar year 2006.

The language of Article X, Section F of the CBA clearly states that "a perfect attendance bonus of \$750 shall be paid for annual perfect attendance and determined by looking back at the prior calendar year." In this case, the prior calendar year is 2006. It is undisputed that Officer Almeida had perfect attendance in 2006. While not dispositive of this

grievance, Dennis Levinson, Atlantic County Executive, acknowledged Almeida's perfect attendance in 2006 when he congratulated Almeida in a letter written on January 31, 2007:

I would like to personally congratulate you for having perfect attendance in 2006. I applaud your dedication and commitment to Atlantic County Government. Your accomplishment serves as outstanding example to others. Be assured that your efforts are greatly appreciated. Keep up the good work! (U-3).¹

Almeida has satisfied the initial requirement that he have "annual perfect attendance" for the "prior calendar year." Section F further provides that the officer must be employed for the entire calendar year (this is undisputed) and have no "W" time or "suspensions." Again, it is undisputed that Almeida had no "W" time. What is in dispute is the meaning of the term "suspension" as it is used in Section F. The County argues that suspension includes all suspensions including suspensions that are held in abeyance for one year. The FOP argues that the term "suspension" requires that an officer be "temporarily separated" from employment. In other words, the suspension must be served to deny the payment of the attendance bonus.

I agree with the FOP's view of this case. A "Perfect Attendance" bonus is intended to provide an incentive to employees to attain perfect attendance. The wording of Section F requires that an officer have perfect attendance and have no "W" time and "suspensions." A common sense reading of the language reveals that the term "suspensions" refers to being suspended from work with no payment for the day suspended. This is the plain meaning of the term "suspensions." An employee who misses work because of a suspension does not have perfect attendance. The County's designation and use of a suspension that is held in

¹U-1 and U-2 are similar letters from County Executive Levinson congratulating Almeida for perfect attendance in 2002 and 2004.

abeyance is a sanction that is more severe than a written warning and less severe than a one-day suspension that is not held in abeyance. Clearly, the employee that receives a one-day suspension that is not held in abeyance is not entitled to receive the annual attendance bonus. To deny an attendance bonus to an employee with perfect attendance who receives a suspension held in abeyance is inconsistent with the purpose of a perfect attendance bonus. There is simply no basis to find that the use of the term “suspensions” was intended to include suspensions held in abeyance. *Black’s Law Dictionary*, in relevant part, provides the following definition of suspension:

Suspension. A temporary stop, a temporary delay, interruption, or cessation. Temporary withdrawal or cessation from employment as distinguished from permanent severance accomplished by removal; (*Black’s Law Dictionary*, 6th Edition, 1990).

I find that the term “suspensions” clearly and unambiguously refers to being suspended from work with no payment for the day suspended. This is the plain meaning of the term “suspensions.” There is no basis to conclude that the parties intended the term “suspensions” to include suspensions held in abeyance.

The County asserts that there is past practice that suspensions held in abeyance make an employee ineligible to receive the perfect attendance bonus. The County relies on Warden Merline’s testimony that three other officers have been denied the perfect attendance bonus because of suspensions held in abeyance. Warden Merline’s testimony regarding these officers is insufficient to establish a past practice. First, there was no documentation of the claimed suspensions (held in abeyance) nor was there any documentation to show that none of these officers had “W” time or other suspensions. Second, even if such documentation was in the record, three examples are insufficient to establish a past practice. A past practice is a consistent and habitual pattern of behavior that is engaged in over time, on a repetitive

basis, with mutual knowledge and acquiescence. Three examples of prior incidents (documented or undocumented) cannot be properly construed as a past practice.

I found the language of Appendix B to be clear and unambiguous. It is well established that a past practice cannot give meaning to language that is clear and unambiguous. This is best said by Arbitrator Jules Justin:

Plain and unambiguous words are undisputed facts. The conduct of the Parties may be used to fix a meaning to words and phrases of uncertain meaning. Prior acts cannot be used to change the explicit terms of a contract. An arbitrator's function is not to rewrite the Parties' contract. His function is limited to finding out what the parties intended under a particular clause. The intent of the Parties is to be found in the words which they, themselves, employed to express their intent. When the language is clear and explicit, the arbitrator is constrained to give effect to the thought expressed by the words used. (Elkouri and Elkouri, How Arbitration Works, Fifth Edition, BNA Books at 651).

For all of the above reasons, and in full consideration of the evidence and testimony in the record, I find that the County violated Article X, Section F of the CBA when it denied Officer Almeida a \$750 attendance bonus for the calendar year 2006. The County is directed to pay \$750 to Officer Almeida for attaining perfect attendance in calendar year 2006. I shall retain jurisdiction for the limited purpose of resolving any dispute regarding the implementation of this remedy.

The grievance is sustained.

AWARD

The grievance is sustained. The County violated Article X, Section F of the CBA when it denied Officer Almeida a \$750 attendance bonus for the calendar year 2006. The County is directed to pay \$750 to Officer Almeida for attaining perfect attendance in calendar year 2006. I shall retain jurisdiction for the limited purpose of resolving any dispute regarding the implementation of this remedy.

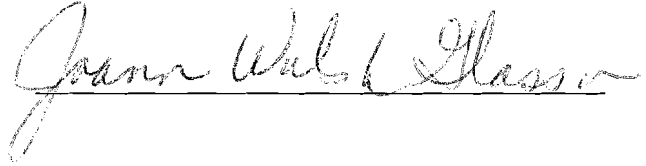


ROBERT M. GLASSON
ARBITRATOR

Dated: July 6, 2007
Pennington, NJ

STATE OF NEW JERSEY) ss.:
COUNTY OF MERCER)

On this 6th day of July 2007, before me personally came and appeared ROBERT M. GLASSON, to me known and known by me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

A handwritten signature in cursive script that reads "Joann Walsh Glasson". The signature is written in dark ink and is positioned above a horizontal line.

JOANN WALSH GLASSON
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 12/11/2011