CONCILIATION, MEDIATION AND ARBITRATION COMMISSION (CMAC)

HELD AT MBABANE **DSPT 1244/03**

In the matter between:-

SNACS FOR FIRE SERVICES EMPLOYEES Applicant

And

PRINCIPAL SECRETARY - PUBLIC SERVICE & INFORMATION 1st Respondent

PRINCIPAL SECRETARY - HOUSING AND URBAN DEVELOPMENT 2nd Respondent

CHIEF FIRE OFFICER 3rd Respondent

THE SECRETARY - CIVIL SERVICE BOARD 4th Respondent

THE ATTORNEY – GENERAL 5th Respondent

ARBITRATION AWARD

RE: FAILURE TO REACH AGREEMENT AT NEGOTIATION TABLE

VENUE : CMAC

DATE OF ARBITRATION MEETING : 21st May, 2004

DATE OF AWARD : 08th August, 2004

1. PARTIES AND HEARING

The Applicant is the Swaziland National Association of Civil Servants (SNACS) representing Swaziland National Fire & Emergency Services employees, a duly registered trade union in terms of Section 27 of the Industrial Relations Act 2000 with its offices in Manzini, office no.11 Umbeluzi Building. The members so cited are employed within the Ministry of Housing and Urban Development. The SNACS negotiation team was led by Quinton Dlamini its secretary General assisted by the following union officials.

- L.T. Lushaba – Branch Chairman
- A Sibiya
- J.Z. Nkambule
- S.M. Mthikhulu
- E.G. Makhanya
- S. Sihlongonyane
- S. Manana
- M. Simelane
- I. Mabuza

The Respondent in the matter is the Swaziland Government represented by The Principal Secretary, Ministry of Public Service and Information 1st Respondent, appearing for this Ministry is Thuli Nkwanyana, a legal officer; The Principal Secretary – Ministry of Housing and Development, second Respondent represented by Alvit Fakudze who holds the position of Chief Fire Officer, appointed in terms of the Kings Order in Council 1975 establishing the Fire and Emergency Services Department;

The Third Respondent is the Secretary, Civil Service Board. The fourth Respondent is the Attorney – General's chambers represented by Sanele Khuluse a legal officer.

2. ISSUES IN DISPUTE

This arbitration relates to a number of issues arising out of disagreement on certain terms and conditions of employment of the Fire Services employees for which the Applicants are seeking relief namely:-

2.1. Provision of institutional housing

2.2. Reviewal of driving allowance

2.3. Payment of overtime hours.

2.4. Revocation of the agreement entered into and between the parties on the 13th July, 1994.

2.5. Prohibiting the employer from instituting military discipline including drills, saluting and hard labour.

3. **BACKGROUND INFORMATION**

3.1. The Applicant in the matter are the employees of the Respondent employed under Swaziland National Fire & Emergency Service and in terms of Section 93 (9) (c) of the Industrial Relations Act 2000 are deemed to have been designated as essential services as defined in Section 2 of the same Act.

3.2. Pursuant to the above the Applicant reported the dispute to the Commission on 25th November, 2003 in terms of Section 96 of the Industrial Relations Act 2000 which states that *"any party to a dispute that is precluded from participating in a strike or lockout by reason that party is engaged in an essential service may refer the dispute to the Commission which shall immediately call the parties involved in the dispute and conciliate"*

3.3. The conciliation process was characterized by numerous postponements but was eventually concluded on 2nd December, 2003. The parties had failed to find common ground on the issues in dispute hence the commission issued a certificate of unresolved dispute on 12th December, 2003 in terms of Section 85 (1) of the Industrial Relations Act 2000. The reasons for failure to resolve the matter through conciliation is clearly stated in the brief contents of the certificate of unresolved dispute.

3.4. Following the above in 3.3. Applicant sought further reddress to the commission under Section 96 (3) (b) of the Industrial Relations Act 2000 on the 17th March, 2004. The issues on which Applicant is seeking arbitration are namely: -

- Provision of institutional housing
- Review of driving allowance
- Prohibition of military discipline ‘
- Paying of overtime in terms of the wages regulation Act 1964 or the General Orders
- Revocation of the July 14, 1994 agreement.

3.5. I was appointed on the 31st March, 2004 by the Commission to preside over this matter. The pre – arbitration meeting was set on for the 13th April, 2004. The Respondent in the matter raised a point in limine in that the Respondents were invited to participate in an arbitration hearing in terms of Section 85 (2) and (3) of the Industrial Relations Act, 2000, which section provides for the other party to consent to arbitration prior. As far as Respondent’s counsel their instruction was to deal with arbitration in terms of the said section which to the best of their knowledge they have not consented to arbitration.

Applicant’s counsel on the other hand averred to say that the dispute was reported in terms of Section 96 (3) (b) which clearly does not oblige the other party in the dispute to consent to arbitration instead it reads:

"If the dispute remains unresolved in terms of Section 85 after conciliation any party to the dispute may refer the matter to arbitration by the commission. Hence the filing of the dispute by Applicant.

3.6. The arbitrator ruled in the Respondent's counsel favour and the objection succeeded. However, that was not the end of the objection, as the arbitrator observed that both parties were correct in their submissions and arguments following that the invitation to appear for an arbitration hearing is prepared and distributed by the commission, hence the anomaly was an administrative one. The hearing ruled that the matter be suspended to allow the commission to issue the appropriate invite which was to be in terms of Section 96 (2) (b).

3.7. Subsequent to the above, the commission rendered the administrative error and an invitation to appear for an arbitration hearing was sent to the parties under Section 96 (2) (b) for an set on date of 23rd April, 2004.

The parties on this date agreed in terms of Section 85 (7) to extend the time limit referred to in Section 85 subsection (4) of the Industrial Relations Act 2000.

The parties identified common cause issues as being:-

- that the matter was before CMAC correctly]
- that the Applicant cited was appropriate

- that the Respondent was correctly cited – as Swaziland Government
- that the issues in dispute shall be dealt with individually while the two items 3 and 4 it was agreed, were intertwined.

3.8. The parties also agreed that each party would submit the bundle of documents not later than 29th April, 2004 which would be used in support of their arguments and evidence thereof.

Applicant counsel submitted documents which we shall call Ann. 35 while Respondent's documents would be referred to as DOC 1 to DOC 10.1

3.9. That the parties to the dispute have their employment relationship regulated by a valid recognition agreement. Government General Orders and in particular General Order A. 250, amendment No. A 101 dated 1st April, 1994, General Order A. 526 amendment no. A 103 dated 18th September, 2001, General Order A. 525 Amendment No. A. 48 dated 18th September, 2001 and various Government Circulars. Of importance would be Establishment Circular no. 1 of 1994 dated 18th January 1994 and Establishment Circular No. 8 of 1994 dated 15th July, 1994.

3.10. It should also be noted that some of these issues if not all of them date back to more than nine years and discussions, debates and negotiations over same appear to have taken place during the year 1994 as supported by Ann. 4,5,6,7 and 8 and hence, the subsequent Establishment of Circular no. 8 of 15th July, 1994.

3.11. Further to the above it is also important to note that the Swaziland National Fire and Emergency Service employees were required and expected to work a two shift system of twenty four hours at a given time since the inception of the department. In or about the late seventies it is understood that the working shifts were increased to three and there was no consideration for staff who work extra hours.

3.12. It common cause that the issues giving rise to the dispute are subject for negotiation as agreed to and by the parties under Article 7 of the Recognition Agreement Ann.8.

3.13. Applicant in the head of his arguments submitted that the matter argued in the prayers 1,2, and 3 were argued in the Industrial Court on 3rd February, 2001 wherein the Court made an order that the dispute be referred to this commission Ann. 20 and 21. The Applicant and the commission at the time had differences in the interpretation of the Court Order causing another unnecessary delay.

The matter was eventually conciliated upon by CMAC and a Memorandum of Agreement between the Applicant and Respondents was entered into and it was agreed that the matter be referred back to the negotiation table.

3.14. It is common cause that the parties deliberated on the issues and failed to find common ground at the negotiation table on or about 11th June, 2002 save for prayer 3.

It is alleged that Respondents for whatever reason failed and or refused to sign a deadlock on the unresolved issues in accordance with their recognition agreement dispute resolution mechanism hence the said issues remained unresolved.

3.15. On or about the 25th November, 2003 Applicant filed a new dispute with the commission in terms of Section 96 of the Industrial Relations Act 2000 which was conciliated upon on 2nd December, 2003 after numerous postponements.

The dispute again remained unresolved apparently at the instance of the Respondents and the certificate of unresolved dispute was issued on 15th December, 2003 by the commission. The reasons highlighted by the conciliator as to why the dispute remained unresolved are categorically clearly stated namely,

"that the Respondents while admitting that the issues in dispute were negotiated between the parties asserted that CMAC is not the rightful body to settle the said dispute and that the Respondents displayed lack of cooperation to have the dispute resolved through the conciliation process".

3.16. Pursuant to the above the Applicant union filed an application for arbitration under Section 96 (3) (b) of the Industrial Relations Act 2000.

Following the aforesaid background information I shall now direct myself to the merits of the dispute and in doing so shall deal with one item at a given time.

3.17. It is necessary for the arbitrator to make a direct comment on whether indeed the commission has a jurisdiction over the dispute before it. In doing so I am guided by the provisions of Section 93 (9) (c) that the Applicant's members fall under the category of the services that had been deemed to have been designated as *"essential services"* as defined in Section 2 of the same Act. It therefore follows that such a party is precluded from participating in a strike or lockout by reason of that party falling under Section 91 of the Industrial Relations Act, 2000.

With that in mind it therefore follows that the Applicant in seeking redress in the matter had to evoke Section 96 (1) and if the matter remained unresolved proceeds to evoke Section 96

(3) (b) of the Industrial Relations Act 2000 if it is still not happy with the outcome of the conciliation.

4. **THE ISSUES IN DISPUTE AND PRAYERS THEREOF**

4.1. **PROVISION OF INSTITUTIONAL ACCOMMODATION.**

It is common cause that the parties are bound by the provision of the Industrial Relations Act 2000 and the Employment Act 1980 over and above the General Orders and the Recognition Agreement.

The parties further in their Memorandum of Agreement signed on the 28th February, 2000 by Government, Swaziland National Association of Teachers and the Swaziland Nurses Association bound themselves to common understanding in article 1.4. which reads *"That the existing respective Recognition Agreements between Government and each of the association will continue to guide their relationship and negotiations processes between Government and the Association jointly however, where the law and the Recognition Agreements are in conflicts, the provisions of the Industrial Relations Act will prevail"*.

4.2. Applicant submitted that the following arguments which were not rebutted by the Respondents to support why the membership from the National Fire and Emergency Services department are entitled to institutional housing.

4.2. (a) That the Applicant members are required to be on duty for not less than twenty four (24) hours at a given time.

4.2. (b) The fire stations where they provide services are all located in the urban areas.

4.2. (c) That by virtue of the nature of their job they are expected to be on stand by for any eventuality hence they must be easily accessible.

4.2. (d) That the present institutional housing provided by third respondent is insufficient and only accommodate not more than 20% of the Fire Services personnel.

4.2. (e) That the same Respondent who employ other cadre employees that fall under essential services like the nurses and the police force ensure that they are adequately provided for with institutional accommodation.

4.2. (f) That the prayer is supported by the statutes in terms of Part XV, Section 152 of the Employment Act, 1980 which reads *"where an employee is employed in circumstances where it is impracticable, for reasons of distance, for him to return to his home or normal place of residence at the end of his day's work, his <u>employer shall</u> cause such employee to be housed in such manner as may be prescribed"*

4.2.(g) Further, the Applicant's argument is supported by the Respondents document DOC 2 para 2 and 3 dated 15th July, 1994 which is Establishment circular no. 8 of 1994 which clearly indicate that Applicant membership is expected to work extra – ordinary hours thus necessitating their accessibility for emergencies at all times.

4.2. (h) Applicant counsel further submitted that Respondents, especially third respondent had not even made any effort over the years to provide institutional housing even through Capital Expenditure Project applications to at least raise hope that the problem would be addressed in the near future. The last meaningful Capital Project application wherein houses were built was in the year 2002 and 2003 where about eight units were built at the Lobamba Fire Station.

4.2.(i) Applicant argued that to date – Respondents had not proved any financial constraints in abiding by this requirement.

4.2. (j) Applicants submitted to the arbitrator at least a couple proposals for consideration by the arbitrator.

1 – Provision of the institutionalized housing or alternatively

2 – a market related housing allowance in accordance with the survey undertaken by Applicants Ann. 27.1 which appear to have originated from estate agent company called Swaziland Property Market (PTY) LTD.]

The document while it bore the letter heads of the said estate agents was nothing more than a simple *"compliment slip"* with the following inscription made by hand "**2 bedroom house at Ngwane Park E880.00".**

3 – That the Applicant members be housed by Respondents in the Government Pool Houses

4 – Or rent them out appropriate houses as in the case of other Civil Servants.

4.3. The Respondents on the other hand while they agree in principle and appreciate the claim by the Applicant presented to the arbitrator the following arguments in support of why they believed the demand should not be awarded.

4.3. (a) that they were not in a position to commit Government because they did not know the resources of government but were known by the Ministry of Economic Planning and Development.

4.3.(b) That in regard to the Applicant's proposed alternative of an increased housing allowance to market related rates, it was not feasible because there is presently a standard allowance applicable to all Civil Servants in different ministries and varies only on the ranks.

4.3. (c) Further, Respondent was providing all her employees who reside outside a six kilometer radius a standard transport allowance of E187.00 in accordance with the General Order A 526 (I) and General Order 525 (1) which is attached hereto as DOC 5.

4.3.(d) With regard to the alternative prayer to rent out houses for the Applicants, Respondent submitted that whilst there was an attempt to do same by Government it was not all government officers that are accommodated in that manner. In addition there were financial constraints as well and that Respondents would have to consult the policy makers on that issue.

4.3. (e) That Respondent even if she wanted to acceed to the request of institutional housing it was impossible to do it for every fire service personnel and at once.

4.3. (F) That Respondents efforts to build more houses was hampered by the fact that land is not readily available.

4.3. (g) That the arbitration grant an order that the matter be referred to the negotiation table for negotiation by the parties.

4.3. (h) In support for efforts being made by Respondents to provide institutional housing, Respondents submitted DOC 7 which was a Capital Expenditure document indicating an application for same to take place in phases of two to three years.

4.3.(i) Respondents further argued that the matter should not be blown out of proportion because there were problems associated with institutional housing following that at one stage when the rentals were increased to cope with the maintenance of same a number of employees in other ministries opted to build their own houses through the housing loan schemes. Hence government on the other hand is encouraging people to build their own houses for self empowerment. Same had happened for some of the Fire Service employees. The question then is what would happen to these houses once the employees have built their own houses?

4.3. (j) Further, even those employees who have institutional housing are however, never found in their place of residence for any emergency and are never disciplined.

4.3. (k) Respondent informed the arbitration that DOC 7 should not be read in isolation but with DOC 7.1 and 7.2 and were indicators that efforts were being made to address the problem. Government was committed to address the anomaly.

4.4. The Applicant team argued that the said DOC 7, DOC 7.1 and DOC 7.2 should not be admissible as authentic documents because they were not signed by the relevant ministry which is housing ministry instead only had stamp from the ministry of works. Even if the documents were to be admissible and approved accordingly that would not be addressing the problem that exists now but would only bring hopes for the future.

4.5 In addition said the Applicant counsel the budget speech had just been released few weeks ago and there was no mention of Capital Projects money set aside for the fire and emergency personnel institutional housing hence the request that the arbitrator should rule in their favour in order to address the interim while they await the Respondents to put their acts together.

5. ANALYSIS OF THE ARGUMENT ON THIS ITEM

5.1. It is unfortunate that the parties have allowed themselves to fail to negotiate for an amicable agreement on this matter which in itself is common cause that the other party has an obligation to provide the Applicants with institutional housing. In fact the arbitrator observed that there was deliberate lack of cooperation and commitment by the Respondents to have the matter resolved amicably.

5.2 The above is clearly indicated by the conduct displayed by Respondents to have failed to come out with an alternative arrangement ever since the matter was raised by the Applicants. I am mindful of the alleged financial constraints and efforts made in respect of application for Capital Project funds in the past, the achievements thereof and what was in progress at the Lobamba Fire Station. However, this did and does not address the entire problem to put in place an interim arrangement.

5.3. Further, the opportunity to work out an amicable interim arrangement when the matter was referred back to the negotiation table by the commission after having been referred to it by the Industrial Court was never fruitfully utilised. According to the Applicant/ Respondents never showed any commitment neither did they do so after the dispute was again referred to CMAC for conciliation. In fact the report of the conciliator of the day one Khontaphi Manzini reads I repeat,

"lack of cooperation on the part of the Respondents to have the dispute resolved by conciliation. They instead expressed desire for the issues to be returned to the negotiating table" dated 15th December, 2003. This I observe, is negotiation in bad faith.

5.4. This is despite the fact that Respondents did not rebutt the facts submitted by the Applicants in the following;

5.4. (a) That the nature of the Applicant's jobs, dictates for institutional housing.

5.4. (b) That the parties are bound by the existing recognition agreement entered into and between the parties on 18th March, 1992; the Employment Act 1980 Section 5 which reads

"subject to Section 6, the provisions of this Act shall apply to employment with, by, or under the Government, other than employment in the Royal Swaziland Police Force, the Umbutfo Defence Force and the Swaziland Prison Service" and the provision of Section 152 of the same Act.

5.4. (c) I further do not have a record indicating that the Respondents were not in agreement with the spirit of the Industrial Court case no. 331/02 dated 3rd December, 2002 page 7 paragraph 2 referred to and relied upon by the Applicant.

5.4. (d) No documentary evidence was submitted by Respondents to support their argument hat indeed land shortage was a limiting factor.

5.4. (e) The Applicant while he is seeking an order for the provision by Respondents of institutional housing Applicant had in store what was in the alternative and hence the submission of three proposals. On the contrary, the Government team had nothing as an alternative other than that the arbitrator should dismiss the Applicant's claims and at the least order that the matter be referred back to the negotiation table by the parties. I shall revert back to these arguments once I have addressed myself to the other items of Applicant's prayers.

6. ITEM 2: DRVING ALLOWANCE

6.1. In this prayer Applicants are seeking an order to compel Respondents to have the Applicants Driving allowance as indicated in Ann. 25 paragraph 2 (a) of 28th July, 1976 reviewed at the rate of not less than 9% cumulative of all the years or any reasonable review in accordance with the Applicant counsel's illustrations on Ann. 22.1 following that the circular which dates back to 1976 has never been reviewed at the instance of the Respondent.

6.2. However, as the matter progressed through during arbitration it became clear that the claim prayer was twofold. That is the reviewal of driving allowance from the rate applicable in July, 1976 to a cumulatively reviewed rate and that it be backdated to 1977; that the annual accident free bonus that was paid since July, 1976 in accordance with annexure 25 (a) paragraph 2 which was stopped in later years be reinstated effective from the date it was stopped unceremoniously by the Respondents.

6.3. With the foregoing, I shall address myself first to the issue of **re – instating the annual accident free bonus**. The arguments for order to reinstate and backdate to the date of stoppage by Applicant counsel was as follows :

6.3.1 That their understanding of the last paragraph in 2 (a) which reads

"all drivers are of course eligible for annual accident free bonus" is making reference squarely to the same fire services personnel who were a subject of that memorandum.

6.3.2 In support of this Applicant submitted that after the issuance of this memorandum 1st Respondent complied with this instruction and paid the annual accident free bonus to the fire service personnel who were involved in driving motor vehicles in execution of their duties.

6.3.3 When Respondent issued the memorandum and further paid the said bonus Respondent was quite aware that there was no personnel in this department employed solely for driving.

6.3.4 That the payment became part and parcel of the fire service personnel's terms and conditions of employment which necessitated full consultation if there was a need or legitimate ground to have it withdrawn.

6.3.5 That the document DOC 2 of Respondent is not affording all Respondent's employees equal treatment or alternatively is allowing Respondent to engage himself in an unfair labour practice.

6.3.6 Respondent on the other hand argued that the 3rd Respondent had no control over the application of the annual accident free bonus as it was administered by the Central Transport Administration section which is responsible for all government motor vehicle structures, a section which is responsible for all government fleet vehicles. Hence, the list which indicated who qualified and should be paid such came from the Central Transport Administration section.

6.3.7 Further the issue of backdating the payment of such bonus to 1977 would not hold because it is common knowledge that this has become a debt to government requiring a legal action against government before it is complied with which however,

in terms of *The Limitation of Legal Proceedings against The Government Act of 1972*, the Applicants are debarred from doing so. This is an Act to prescribe limitations of time in connection with institution of legal proceedings against the government. Of importance in this act is Section 2 (1) (c). Because of the afore going if Applicants claimed to be owed by government since 1976 that means it arose in 1976 hence debarred in terms of this Act. The claim could have been filed in 1978 which was within two years instead of 2002. Government negotiation team held meetings with the Applicant union several times before 2002 and Applicants never raised this as an issue.

6.3.8 Respondent argued that even if the arbitration would make a ruling against Respondent, Respondent could not be ordered to comply beyond the period of 2002. Respondent added that they were open to negotiations but not for as far back as 1976.

6.3.9 Applicant counsel's counter argument was that this was not a civil suite while appreciating the argument brought forth by the Respondent in terms of The Limitation Act of 1972.

6.3.10 Further, Applicant counsel drew the attention of the arbitrator to Applicants' head of arguments page 8 paragraph 11 that the matter was reported for conciliation in 2001 whereby the result of which conciliation was a binding agreement that the matter be referred back to the negotiation table. Therefore reading Section 2 (1) of the Limitation Act of 1972 the debt became due in 2001 when it was reported.

6.3.11 Even if it were to be declared to be a debt and DOC 8 was a document to be admitted, Applicant prays that at the least it should be backdated to 2001 as an alternative.

6.3.12 Further, Applicant counsel argued that DOC 2 of Respondent would however reflect a clear double standard practice by Respondent on her employees.

6.3.13 The Applicant counsel argued that Respondents had in the past through the very same DOC 2 dated 15th July, 1994 addressed a similar dispute with full knowledge of the Limitation Act of 1972 by awarding Applicant's membership payment of a lumpsum amount of an Ex – Gratia equivalent to 10% of the then current basic annual salary in lieu of overtime worked and not paid for in previous years. This was definitely inclusive of a period longer than twenty four months.

7. ANALYSIS OF THE ARGUMENTS

7.1. In analyzing the above for and against arguments by the parties, I believe both parties submitted well thought of arguments. It is however noteworthy that none of the parties attempted to explain the meaning of a "qualified driver" as used in the memorandum Ann. 25 paragraph (a) and a "driver" as used in second paragraph of (a) in the same document which if it was done by the parties, it would have helped the arbitrator to explain the context in which the word was used.

Subsequent to this, clarity is required whether this reference was in respect of any fire and emergency personnel driving motor vehicles in their execution of their duties or personnel in fire and emergency services employed solely for driving company vehicles. I therefore had to interpret the word in the context I believe it was used in this document (ann. 25).

7.2. According to the Oxford Dictionary of current English, Eighth Edition, *"driver means a person who drives a vehicle"*. That is the meaning the arbitrator has interpreted the word to mean which does not necessarily means an occupation for someone employed as such as interpreted in the Regulation of Wages (Road Transportation) Order 2002 under Section 2. It is therefore my view that the author in annexure 25 when he said

"all drivers are of course eligible for annual accident free bonus" was not making reference to fire and emergency services personnel. Moreso because above that paragraph in (a) the author had clearly explained himself what he meant by "Drivers". That members of the fire and emergency services who were qualified drivers and pump operators should receive allowances as indicated in that document, ann. 25 paragraph (a).

7.3. The reference therefore was made in respect of all employees who were employed as *"drivers"* as a general statement. A statement that was said in passing which was not necessarily part or subject of that document.

If it were to be the other way round that would, in my opinion mean double benefit to the fire and emergency services personnel as they were already granted special allowances as in paragraph (a) of that document, ann. 25. I shall revert back to this shortly in my award hereinunder.

8. DRIVING ALLOWANCES REVIEWAL

8.1. The next stage of this item is the prayer to have the driving allowance reviewed. The reviewal according to Applicant should be with effect from 1977 to date at a yearly reviewal rate of nine percentage (9%) as indicated in Applicant document ann. 26.1.

8.2. That means the driving allowance as at today should be as follows:-

2004 – light motor vehicle @ E33.64 per month

2004 – Heavy duty Equipment @ E44.52 per month

2004 – Hydraulic Appliances @ N/A

1976 – Light motor vehicle @ E3.00 per month

1976- Heavy duty Equipment @ E4.00 per month

1976- Hydraulic Appliances @ E72.00 per month

8.3 The arbitration was furnished with two salary advice slip hereinafter referred to as annexure 29 and annexure 30 dated 23rd September, 1994 and 23rd April, 2004 respectively. These were agreed by the parties that they should be admitted as authentic records.

8.4. The two documents have distinct earnings description as follows:-

Ann. 29 – (23-09-1994)

	EARNINGS DESCRIPTION	**AMOUNT**
01	Basic salary	E978.33
02	Department allowance	E 10.00
17	20% fireman extended duty hours	E195.67
06	20% firemen extended duty hours	E978.35
21	10% firemen Ex – Gratia payment	E1174.00
31	Housing allowance	E116.97

	TAXABLE TOTAL	2474.97

NON TAXABLE 978.35	978.35
GROSS EARNINGS	3453.32

Annexure 30 – (23 - 04 -2004)

EARNINGS DESCRIPTION

001 BASIC SALARY	3439.17
017 20% firemen extended duty hours	687.83

TAXABLE TOTAL	4127.00
NON - TAXABLE TOTAL	00.00
	4127.00

In a closer look at the two annexures there are clear differences in the earnings description. Annexure 30 has an omission of the following:-

Departmental allowance of E10.00
Housing allowance of E116.97

8.5. Of importance to me is the departmental allowance of E10.00 which was earned at the time which is not specified what type of allowance it was. The arbitrator's understanding is that this was the standby allowance of E120.00 per annum broken down on a monthly basis. Obviously the driver's allowance is not indicated anywhere which could have been either E3.00 or E4.00 respectively as the case may be.

8.6. It is clear therefore from the foregoing that the Respondent never implemented the drivers allowance as in annexure 25 paragraph (a) yet paragraph

(b) *"stand - by allowance"* was implemented hence the departmental allowance of E10.00 in annexure 29 of 1994 or alternatively no evidence was presented to that effect.

8.7. The question that needs to be answered is that should the arbitrator grant prayer for payment of *"drivers allowance"* or not and if so at what scale? That is to say, the 1976 scale or proposed scale of annual cumulative increase of nine (9%) percentage.

8.8. Before I answer this question it is important to note that annexure 9 which is DOC 2 for Respondent titled "Establishment Circular N0. 8 of 1994, National Fire & Emergency Service Staff – Extended Duty Allowance and lump sum payment' dated 15th July, 1994 came into effect 1st April, 1994.

More discussions shall centre around this document's contents shortly. Of importance for now is its item 2 paragraph which makes reference to allowances being reviewed from the 1976 annexure 25 item (b) stand – by allowance. Regrettably this circular mentioned above for some reason best known to the author and the parties does not make mention of the Drivers allowance as stated in annexure 25 paragraph 2 (a).

8.9. Further to this, it is also important to note that DOC 2 and ANN 9 of the Applicant and Annexure 25 makes the prayers on payment of Stand –by allowance and payment of overtime to be intertwined hence the arguments of the parties are almost similar under those two items.

8.10. Reverting to the above question in 8.7 I must mention that the Applicant's counsel submitted this prayer with a proposal to have it increased by nine (9%) percentage and that it should be backdated from the date it was stopped which however was never specified by both parties as to which year the stoppage take place. The alternative is that the payment be backdated to 1999 taking into account that the matter was reported to the commission in 2001.

On the other hand the Respondent's counsel relied on the Limitation Act 0f 1972 while willing to be taken on board on this issue for negotiations but definitely not as far back as 1976.

8.11. Having expressed their willingness to be taken on board for negotiations over the issue, it remains a mystery why Respondents failed to have meaningful negotiations to achieve

a settlement while the matters were at shopfloor level for at least two occassions and subsequently at conciliation. The question then which arises is can the arbitrator enforce "good faith" negotiations by the one party?

The answer is certainly not, the arbitrator in terms of our Act has a duty to determine or achieve what the two parties failed to achieve at the negotiation table and at conciliation level. I am mindful that this involved a distributive dispute which is normally better achieved through negotiations. I have taken into account that this is an essential service provider which both parties accept and subscribe to.

8.12. The Respondents in the matter never at any stage alluded to at any element of whether government could not afford the proposed increase by Applicants of a cumulative nine percent (9%) to the drivers allowance, save to say that Applicants were debarred from instituting the claim in terms of the Limitation Act of 1972. Regrettably The Limitation Act of 1972 existed on the 13th July, 1994 when the agreement to compensate for overtime worked from 1976 to July, 1994 and also on 15th July, 1994 when Establishment Circular No. 8 of 1994 Ann. 9 was issued. Thus the parties set a precedent for themselves.

8.13. The question the arbitrator needs to answer is does the argument presented by Respondent in respect of the said authority DOC 8, "*The Limitations of Legal Proceedings Against the Government Act of 1972 and the Decision of the High Court in the Civil Case No. 504/87 in the matter of*

"Walter Sipho Sibisi vs. The Water and Sewerage Board 1st Respondent and The Attorney – General as 2nd Respondent. A judgement by the learned High Court judges C.J. Hannah dated 31st July, 1987". I certainly cannot temper with this authority because it is conclusive. I have read in details both the Act and the Case cited by Respondents and the contexts therein in which the judgement was arrived at.

8.14. Pursuant to the above I need to draw the attention of the Respondents to the provision of Section 3 (1) of the same Limitation Act 1972. That section necessitates further scrutiny whether or not it does not apply to the issues at hand. It reads *"Section 2 shall not apply in respect of (a) a debt for which the Government has unequivocally in writing acknowledged liability to the person instituting legal proceedings in respect of such debt"*. I shall revert back to this again later on at the bottom of the document because I need to address myself to the issue of Applicant's prayer no. 3 & 4 which I have already mentioned that it is intertwined with the prayer dealing with allowances.

9. **ITEM 3 & 4 - PAYMENT OF OVERTIME AND REVOCATION OF THE AGREEMENT ENTERED INTO AND BY THE PARTIES ON THE 13TH JULY, 1994**

9.1. Applicants submitted that Respondent require members to work hours well in excess of the stipulated hours per shift but were not being paid for this overtime in accordance with the General Orders. In particular as stipulated in Respondents' document DOC 3 (General Order A. 250 (3) (a) (ii) like all the other civil servants.

9.2. Further, Ann. 28 circular no. 1 of 1994 which is a translation of the said General Order into a circular dated 18th January, 1994 gave authority to all departmental heads to pay overtime allowances in accordance with the guidelines provided therein.

9.3 On or about the 13th July, 1994 the parties, SNACS representative and Government representative entered into an agreement as per Annexure 8.1. This agreement was primarily to govern and regulate part of the terms and conditions of employment between the Swaziland Government and Swaziland National Association of Civil Servants (representing members of the National Fire and Emergency Service).

9.4. The above agreement gave rise to the Establishment of Circular No. 8 of 1994 dated 15th July, 1994 an authority circular authorizing the department how it needed to conduct itself in respect of paying the fire and emergency personnel for

- *extended duty*
- *Overtime worked*
- *number of hours per shift*
- *a lump sum payment of 10% of the current basic annual salary in lieu of overtime worked and never paid for.* The overtime referred to in this document (Annexure 8.1 and 9) was worked in previous years prior to July, 1994. While the construction of the wording of these two documents is different, the meaning, texture and message being conveyed is exactly the same. They are addressing the same subject. Ann. 9 is signed by one Sandile Ceko the Principal Secretary at the time in the Ministry of Labour and Public Service while Ann. 8.1 was signed by someone who was the chairman of the Government Negotiating Team and the other was the chairman of SNACS.

9.5. Annexure 8.1 is the said agreement which today the Applicant counsel believe disadvantaged its membership in respect of payment of overtime equitably.

Annexure 26.2 is an affidavit submitted by Applicant counsel as a statement of fact to support why Applicant pray that the agreement 8.1 be revoked and to be declared null and void because the Applicant negotiating team at the time of entering into this agreement did not form a corum as stipulated in the recognition agreement regulating the relationship between the parties and in particular Annexure 26.1 paragraph 2.

9.6. Respondents raised a point in limine objecting the admissibility of the affidavit asserting that the affidavit document should not be admitted as a legal document because the Commissioner of Oaths one Elliot Mkhatshwa had an interest in the matter particularly the outcome thereof.

The argument in support of the objection is that

- the solicitor is a member of SNACS
- cited case no. 28/95 between the Director of Public Prosecution vs. The Law Society of Swaziland DOC 10
- That the position held by the attesting officer is not amongst the exclusion from the appendix of the recognition agreement.
- That it was common cause that the said officer had made numerous statements in the press and media on behalf of SNACS.

- The High Court Judge made these observations on page 13 paragraph 1 page 15. The ruling of the Court a quo was that *"no commissioner of oaths shall attest any affidavit or declaration relating a matter in which he has an interest"*, that the affidavit so attested would not be admissible evidence since the commissioner of oaths must be independent of the office in which the affidavit to be attested by him is drawn. *"He cannot be regarded, so it was found, as independent if his partner, employee or employer is the draughtsman or deponent"*.

9.7 The Applicant's counsel on the other hand brought up counter arguments to the following:-

- That the Respondent had failed to prove that at the time of attesting thereto the commissioner of oaths had an interest or had made a public statement.
- That the Respondent had failed to produce proof that Mr. Mkhatshwa was a union member but only assumed.
- There were no press cuttings indicating that solicitor had made statements in the press in respect of fire and emergency personnel issues.

9.6. ANALYSIS AND RULING ON THE OBJECTION

The arbitrator noted the authorities cited by the Respondent in respect of the point in limine raised.

It was noted that in the case quoted the Respondent was the Law Society of Swaziland and the attesting officer was the professional assistant in the Law Society of Swaziland, wherefore his objectivity was indeed questionable subsequently leading to the affidavit being in admissible. The arbitrator urged the parties to read the entire case in order to fully comprehend the context of the judge's decision. In particular I would refer the parties to page 11 last paragraph and page 12.

I have observed that the said Elliot Mkhatshwa is a solicitor in the office of the Respondent, the Government of Swaziland and the attesting to of this affidavit was carried out in his capacity as a Commissioner of Oaths in the premises of the Swaziland Government.

Further, I am not in the position to determine with the evidence presented by the parties with certainty whether Elliot Mkhatshwa is a member or not of the SNACS neither do I believe that it is of importance in this instance. In particularly because no evidence was adduced by Respondents to the effect that the Commissioner of Oaths at the time of signing the

document did that in his capacity as a member or partner for Applicant.

No evidence was led as to what office within SNACS Mr. Elliot Mkhatshwa held. Pursuant to the foregoing the objection was dismissed and that Annexure 26.1 is be admissible evidence.

9.7. I will now revert back to the arguments by Applicant why Applicant prays that the agreement entered into by the parties should be declared null and void.

9.7.1. That the agreement is contrary to the legal provision of Section 27 of the Employment Act 1980 because the agreement made the then existing terms and conditions of he Applicant members less favourable than before.

9.7.2. In terms of all Legal Notices as provided for in the Wages Act of 1964, overtime computation in is the same as that in Annexure 28.2.

Further Section 4 (1) (b) of the Industrial Relations Act 2000 provide a protection for employees to be afforded equal treatment.

9.7.3. The said agreement is deficient in that it does not provide how public holidays and Sundays were to be treated but only a flat rate of 20% percent above their salaries which was far below in comparison to the excess hours worked (see Annexure 4), an average of 208 extra hours per month for each fireman.

9.7.4. Even if the Applicant's representative were not induced into signing the said agreement, the agreement is null and void in common law.

10. The Respondents' response on the issue of payment of overtime in accordance with the General Order A. 250, Annexure 19 and the revocation of the agreement entered into and by the parties on the 13th July, 1994 Annexure 8.1 is as follows:-

10.1. To suggest that the agreement so signed was signed by a team which did not form a quorum hence invalid the Applicant was overstretching the imagination of their minds as there was and still is no need for all the members to have attached their signatures on this document.

10.2. The person who signed on behalf of the union was an authorized person to commit the membership and that has not been rebutted.

10.3. At page 4 of the heads of argument for the Applicant, Applicant concede that this is a valid and binding agreement. Therefore Applicant is barred from denying the validity of the agreement. They cannot violet the principle of estoppel which states that *when a person by his conduct or words presents to another that a certain state of affair exists and induces him to act on that belief to his prejudice the former is prevented from denying as against the latter the existence of that state of affairs!* Since 1994 the Respondents has acted upon the agreement believing that it was meant that they should act upon it. For that reason the Applicants are precluded in law from contesting the authority of the agreement. The Respondent referred the arbirtration to the case of Collen vs. Rietfontein Engineering Works 1948 I S.A. 413 & 430 *"if whatever …….. intention may be he so conduct himself that a reasonable man would believe that he was assenting to the terms proposed by the other party and the other party upon that belief enters into a contract with him the man thus conducting himself will be bound as if he has intended to agree to the other party's terms"*

Applicants did not only sign the document with the agreement but further conducted themselves in the manner in which a reasonable man believe they were at peace with the terms of the circular.

10.4. The Respondent further submitted that the agreement could not be reviewed at this forum except by the parties themselves. Respondent further referred the arbitration again to the citation made earlier being page 16 of Christie where it says

"Our law does not recognize the right of a Court a quo to release the consenting party from the consequences of the agreement duly entered into by him because that agreement appear to be unreasonable and the intervention by the Courts or any forum would be a form of paternalism inconsistent with the deed of the contract". However if it should be found that the contract is invalid then it should follow that an order which is being prayed should be made ordering the Applicants to re – imburse the Swaziland Government the monies that have been paid to them since 1994. In terms of the law they cannot unjustly enrich themselves.

If the agreement should be declared invalid then the order should re – instate the status quo to avoid the financial prejudices to the Respondent.

10.5 Respondents submitted further that while they recognize that the agreement so referred to is in conflict with Section 128 of the Employment Act 1980 it should be understood that the 20% allowance is a flat rate inclusive of work done on public holidays and Sundays. That it was common sense that there was transfer of money from

the Respondent to Applicants' members in terms of the said legal document.

10.6 Respondent again submitted the provision of the Limitation Act of 1972 and reiterated their position that it would appear the Applicants were labouring under the impression that Respondents relied on Section 21 (1) (a) yet in all material times Respondents submissions were confined to Section 2 (1) (c) of the Limitation Act. Section 2 (1) (a) (b) and (c) were relevant. In support of the application of the said Limitation Act 1972 by the High Court, Respondent cited, *Civil case no. 504/1987 in the matter between Walter S. Sbisi and The Water and Sewerage Board as 1st Respondent and The Attorney – General as 2nd Respondent in particular page 3 paragraph 1 and page 5 paragraph 1.*

10.7 As a final counter argument Applicant counsel submitted that the matter was brought to the attention of the Respondent in terms of Annexure 18 dated 11th December, 2000 in a form of a letter addressed to the Principal Secretary, Ministry of Housing and Urban Development.

10.8 That the Applicant membership were in agreement to re - imburse Swaziland Government provided they were paid what was due to them and in accordance with the law in the same way as other Civil Servants under this category.

10.9 That the Respondent apply equity in the same way as Respondents have recognized the situation underwhich the police force work whose allowances were reviewed in July, 1996.

11. ANALYSIS OF THE ARGUMENTS

11.1 This appears to me to be the most critical issue in the dispute and the fact that there are intertwined, payment of overtime and revocation of the agreement entered into and by the parties on 13th July, 1994, makes it even more complex.

A lot can be said in respect of the comprehensive arguments and counter – arguments submitted by the parties in terms of the legal authorities and statements of facts used in arguing their case or why they believe the arbitrator should rule in any one's favour.

11.2 I am only going to address myself to the arguments and facts which will be relevant to my award. I must say that I am a bit taken aback why the two parties failed to reach some common grounds over this issue all the years and in all the other forums that are in existence and at their disposal to utilise.

11.3 The arguments and supporting documents by Respondents are indeed convincing. The question to consider is, does this forum has the jurisdiction to have the said agreement reviewed, nullified or otherwise.

My view would be to answer that question in the affirmative for the simple reason that the parties are not at variance that the Applicant members are classified under Section 93 subsection 9 and are as defined in Section 2 of the Industrial Relations Act 2000 and the fact that the parties agree to have been unsuccessful in resolving the matter themselves with a subsequent issuance of a Certificate of Unresolved Dispute in terms of Section 96 (3) (b).

11.4 Having said that, I need to make a few comments in respect of *The Limitation Act of 1972*. I do not believe that the arbitrator has the jurisdiction to temper with the spirit of this piece of legislation and cited case by Respondent DOC 10.1, *Civil case no. 504/87, Walter Sipho Sibisi vs. Swaziland Government.*

11.5 I would further proceed and draw the attention of the parties to the dates on which this legislation became effective, 1972 and to the date of the promulgation of the Industrial Relations Act 2000 and The Employment Act 1980 as amended. I would further remind the parties about their own recognition agreement and the contents therein which are all documents governing and regulating the relationship of the parties together with the General Orders and in particular, General Order A. 250

DOC 3, General Order A.526 which is DOC 5 and General Order A. 525 DOC 6 which are extracts submitted by the Respondents.

11.6 A further closer look and reading of The Limitation Act 1972, it is regrettable that the parties only had their indulgence to read and confine themselves to the entire Section 2 and conveniently overlooked the provisions of Section 3 (1) which reads I quote *"NON – APPLICABILITY "*

(1) Section 2 should not apply in respect of -

(a) A debt for which the Government has unequivocally in writing acknowledged liability to the person instituting legal proceedings in respect of such debt;

(b) A counter claim in any legal proceedings instituted by the Government.

(c) A claim in respect of which the motor vehicle insurance act no. 19 of 1946;

(d) A claim in respect of which any of the provisions of the Workmen's compensation Act no.4 of 1963 apply.

11.7 Of interest to me in this section (section 3) is subsection (1) (a). I hold the view that the Respondent, Swaziland Government, has unequivocally in writing acknowledged liability to the employees of the department of Fire and Emergency Services in the following manner:

11.7(a) Through the provision of Memorandum dated 28th July, 1976 in respect of Drivers allowance and Stand – by –

Allowance which is Annexure 25 of Applicant documents.

11.7. (b) Through the Establishment Circular No. 1 of 1994 Ann. 28 of Applicant documents dated 18th January, 1994.

11.7. (c) Through the provisions of General Orders A. 250 Part 5 Amendment no. A 101 of 1st April, 1994 which is DOC 3 of Respondents' bundle of documents which is Ann. 19 of Applicants bundle.

11.7. (d) Through the controversial agreement entered into by and between Swaziland Government and The Swaziland National Association of Civil Servants representing Fire and Emergency Service members dated 13th July, 1994 Annexure 8.1 which came as a consequence of Annexure 7 which is a correspondence from Principal Secretary, Ministry of Labour and Public Service to the Principal Secretary, Ministry of Housing and Urban Development dated 4th July, 1994.

11.7.(e) Through the **"Establishment of Circular No. 8 of 1994, National Fire and Emergency Service Staff – Extended Duty Allowance and Lump Sum Payment"** dated 15th July, 1994 article 1 paragraph 2 which is Annexure 9 and DOC 2 of the Applicant's and Respondent's bundle of documents respectively.

Of particular importance is article 1 paragraph 2 and 3 which reads *"any hours worked in excess of the stipulated fifty six hours shall be regarded as overtime, and shall be compensated in terms of the existing provision of General Orders. In terms of Establishment Circular No. 1 of 1994, authority is hereby delegated to the Principal Secretary of the Ministry of Housing and Urban Development to authorize overtime hours for the Fire Service personnel in terms of these approved conditions"*

11.8 If the above cannot be said to be the Government's unequivocal acknowledgement of her liability to the Applicants then that would be stretching it a little too far.

12. Coming back to the question should the arbitrator in the circumstances declare the agreement Annexure 8.1 null and void? Before answering that question the arbitrator would like to analytically consider the contents of the said agreement to determine whether indeed it does provide unfair terms and conditions to the Applicants.

12.1 It is common cause that the parties agree that the agreement is in a way controversial (at least according to Applicant) in that it provided less favourable guidelines for paying overtime for the Fire and Emergency personnel. However, the arbitrator holds a completely different view of the meaning of this document.

12.2 The first paragraph of Annexure 8.1 reads "**The normal working week for officers of the Fire Service engaged in shift work will on average be fifty six (56) hours per week, calculated over three weeks on the basis of a three shift system".** This seems to be in conflict with the normal provision of forty eight (48) hours per week as expressed in the General Order A. 250 page 103 and 104 DOC 3. Further than that this paragraph is quite clear to me.

12.3 Paragraph 2 reads "**Overtime will be paid for any period in excess of the fifty six (56) hours mentioned in (1) above based on the existing provisions of the General Orders", my emphasis on existing General Orders".** Again to me this paragraph and statement of fact therein is totally unambiguous and very definitive. The "existing provisions of General Orders in respect of payment of overtime are clearly expressed in Annexure 19 pages 117, 118 and 119 of the Applicant's documents which is DOC 3 pages 103 paragraph 3 (a) (i) and (ii) and 104 paragraph 3

(a) (iii) especially the example provided for on page 104. I need to mention though that in both documents paragraph 3 (ii) is worded incorrectly or let me say differently than the example of computation I quote

> *"for all approved…… Monday to Friday and on Saturday, the hours work shall be multiplied by the factor of one half (1.5) to arrive at the number of pay hours……"* This however is an obvious wording error which is subsequently corrected in paragraph (1) page 104 of DOC 3 and paragraph (1) page 118 of Annexure 19.
>
> The appropriate wording of course would have been *"……a multiplication factor of one and one half times (1.5.)"*. In the interest of repeating myself I fail to find anything ambiguous in this paragraph of the agreement let alone any element of a disadvantageous nature in respect of how overtime was to be paid to the fire and emergency personnel. I may not know the intention of the parties at the time of signing this document but to me it could not have been made more clearer than this. As to why the parties, especially the third Respondent who was to implement and apply the agreement as it stands tailed to interpret this accordingly, is another matter.

12.4 Establishment Circular No. 8 of 1994 dated 18th January, 1994 (annexure 28), repeats verbatim these General Orders while Establishment Circular No. 8 of 1994, dated 15th July, 1994 mutatis mutandis expresses the same thing. Ann. 9 item 1 paragraph 2 and 3 repeat these provisions while item 2 "rate of pay" addresses the issue of allowance of twenty (20) percent in accordance with paragraph 3 of the agreement (Ann. 8.1) which deals with extended duty allowance which is simply the stand – by allowance as expressed in Ann. 25 item 2 (b).

12.5 Paragraph 3 of the agreement (Annexure 8.1) reads *"an extended duty allowance of twenty percent (20%) of basic salary will be paid with effect from 1st April, 1994 to all officers in the ranks of fireman, leading fireman and sub – officer engaged in shift work"*. This to me clearly refers to the stand – by allowance and or shift allowance. It has nothing to do with the overtime worked which is adequately covered and explained in paragraph 2 of the agreement that it shall be paid based on the existing General Orders. The twenty (20) percent of basic salary referred to in paragraph 3 is not covered anywhere in the General Orders. In fact the extended Duty Allowance of twenty percent (20%) can easily be equated to that awarded to the Police Force, Annexure 14 dated 12th July, 1996 by the Respondent save to state that

the percentages for the one awarded to the Police Force are staggered in rank order.

12.6 Further to the above arguments, Annexure 4 of the Applicant documents is a letter to the Principal Secretary, Ministry of Labour and Public Service dated 8th July, 1994 signed by one Jameson Mkhonta the then Secretary General of SNACS seeking authority to be granted to the 3rd Respondent, Ministry of Housing and Urban Development, to pay the fire and emergency service personnel overtime worked.

In reply thereto the Principal Secretary, Ministry of Labour and Public Service granted this sought authority in terms of *Establishment Circular No. 1 of 1994 dated 18th January, 1994 item 1 (c), item 4 on page 4 and in an extract letter signed by one Sandile Ceko, the then Principal Secretary page 4 (b) paragraph 1 and 2 therein, Annexure 28.* The reason why the Housing and Urban Development Ministry decided not to pay the overtime hours worked by the firemen in accordance with these provisions was never forwarded at the arbitration save to say that there was an agreement to the

effect that the Applicants would be paid twenty percent (20%) of their basic salary which as I said is irrelevant to the issue of overtime as governed by the General Orders. Nothing therefore came from the Respondents' counsel to suggest that there were and are financial constraints causing the inability to pay.

12.7 Paragraph 4 of the agreement was clearly and simply addressing the shortfalls which occurred in previous years from 13th July or 15th July. 1994 backwards. It reads *"a lump-sum amount of ten percent (10%) of the current basic salary will be paid to all serving officers in the ranks of fireman, leading fireman and sub – officers in lieu of all overtime worked in previous years"*. This addressed the issue of overtime for period 1976 to July, 1994 in terms of this agreement. Whether that agreement is today seen as having inadequately addressed said shortfall is another matter.

While the clause does not state that this was a full and final settlement of that dispute on overtime worked during that period it is very clear that the parties intended to close that chapter of the overtime for that period. I do not believe the Applicant is candid enough therefore to claim overtime effective from 1976.

12.8 Pursuant to the above analysis the question that begs the answer is should the prayer to have the agreement

revoked after taking into account all the arguments and the aforesaid analysis?.

My answer to this question is equivocal and made so by the situation.

First, the agreement itself does not state how it shall expire and or at least reviewed by the parties which in itself is an anomaly for a document governing a relationship between an employer and employee representative. Further, the parties even failed to make such a provision in their recognition agreements save to state that all their agreements shall be in writing as in article 11 of the said recognition agreement. Article 12.5 page 6 of the same Recognition Agreement clearly provide guidelines on how disputes in respect of interpretation and disagreements would be handled inclusive of the arbitration process. Secondly, equivocal because even if the agreement was to be revoked as per the prayer, that in my view, does not alter anything in respect of the overtime provisions and the obligation of the Respondents, that of paying overtime in accordance with the General Orders.

In any event this agreement is not the only document where the guidelines are provided for paying out overtime to fire and emergency service personnel. This was supported by Establishment Circular No. 8 of 1994 paragraph 3 & 4 and The General Orders A. 250 which is DOC 3 document for the Respondents.

As stated above the issue dealing with payment of overtime and that of revocation of the agreement entered into and by the parties on the 13th July, 1994 which is document Ann. 8.1 is intertwined hence the arguments have been clusted together. I shall now move on to the next prayer's arguments before concluding this one.

13. PROHIBITING THE EMPLOYER FROM INSTITUTING MILITARY DISCIPLINE INCLUDING DRILLS, SALUTING AND HARD LABOUR.

13.1 According to the Applicant's submissions the parties had had some common understanding over this issue only to discover through the proceedings that the 3rd Respondent had strong objections hence the matter needed to be debated for a determination to be issued.

13.2 Applicant's counsel submitted that their members, fire and emergency personnel, have their terms and conditions of employment regulated by the Swaziland Government General Orders as in document DOC 3 of the Respondent.

They are classified as civil servants and are employed by the Civil Service Board.

13.3 Applicants in support of their arguments and claim submitted Annexure 1& 2 which are letters of acknowledgment of acceptance of the offer of employment acknowledged by Civil Service Board and offer of employment duly signed by the Secretary, Civil Service Board. In particular paragraph 6 of Annexure 2 which reads *"If you assume this appointment, you will be required to abide by the General Orders of the Swaziland Government, and will be subject to all laws and regulations in force, or as may be amended from time to time, which govern the Swaziland Public Service"*.

13.4 That application of discipline should be in line with that of the rest of the Civil Servants. Applicant submitted that presently the 3rd Respondent was using military discipline to the members in the form of punishment for offences so committed which is contrary to their terms and

conditions of employment. They, for example are subjected to hard labour at the whims of their seniors.

13.5 Their (Applicants) argument is not that it is *"why should it be there"* but are concerned about its legality and or authenticity as this does not appear in the Swaziland Government General Orders.

Even if the chief fire officer may, in terms of section 9 of

The National Fire and Emergency Service Discipline Regulation of 1977, issue "In service Orders", for the proper execution of the service such regulation should be in line with the Principal Act especially Section 6 therein.

13.6 Further, the fact that the chief fire officer can make regulations unilaterally without the approval of the minister as per regulation 6 and without consultation with the employee representative is a cause for concern and in fact that should render the regulation illegal.

13.7 At the time of the Establishment of the department in 1976 Ann. 3 was relevant because there was no fully fledged Training Centre until 1994, ensured adequate training. However, Applicant believe that with the coming into effect of the Training Centre Annexure 3 should have been reviewed.

13.8 Respondents on the other hand submitted the following as to why they believe Military Discipline including drilling, saluting and hard labour should not be prohibited?

13.8. (a) Firstly that while governed by the Swaziland Government General Orders, the fire and emergency personnel have other Standing Orders which are the regulations in force in terms of paragraph 6 of Annexure 2. This provide for salutation to their superiors.

13.8. (b) With regard to drilling, this practice could not be done away with because according to Respondent it is part and parcel of the job.

13.8. (c) Further, the Chief Fire Officer is empowered to institute in – service orders in terms of Regulation 9 of the National Fire and Emergency Service Discipline Regulations, 1977. This would be accompanied by routine checks at any station. For that reason Annexure 3 *"Station Routines"* does indicate the difference in the Standing Order for week – days, Saturdays, Sundays and public holidays.

13.8. (d) Further Annexure3 period 9:05 a.m. to 10:00 a.m. has a purpose for a continuous training at the stations to update firemens on initially acquired skills in respect of new equipment coming into service for familiarisation.

13.8.(e) Both parties however agreed that such training as presently administered can derail an emergency that may

occur as the firemen would first have to make up the equipment before moving away to attend to the incident.

13.8. (f) Training continuously is to ensure the physical fitness of the firemen.

13.8. (g) Further Respondent submitted document DOC 4 which provides guidelines for salutation of officers as a regulation. In closing, Respondents prayed that the arbitrator should dismiss the prayer by Applicant.

14. Applicant averred to say that Respondent was missing the point in that their (Applicants) concern was the military style of training and punishment for the fireman especially that of being made to run up a tower with a twenty (20) litre container in order to be declared fit. Further the chief fire officer was not a physician to determine one's fitness.

The document submitted for "salutation of officers" DOC4 has no signature by an authorized person hence it should not be admitted as authentic. Respondent does not have legal basis for enforcing this style of military training.

15. On the basis of the above arguments the arbitrator should determine whether to grant the prayer to *"prohibit the employer from instituting military discipline including drills, saluting and hard labour or otherwise"*.

16. To answer that question the arbitrator observed the following:-

16.1 That the Respondent failed to produce a job description detailing the activities expected to be carried out by the firemen.

16.2 That the Applicant members were civil servants and are governed by Swaziland Government General Orders.

16.3. That the military discipline was used by Respondent especially the third respondent as a tool to punish firemen in the event they commit a transgression and this is outside the norm. The application of hard labour is definitely a military style of discipline yet the PART V of the Public Service Act of 1993 provide guidelines how to apply disciplinary measures where necessary.

16.4. That while the Respondents submitted that if this practice was to be done away with the fire and emergency service standard of performance would drop considerably no convincing evidence was presented to substantiate same.

16.5. That the firemen were subjected to extensive training prior to posting to stations as opposed to the past in the 1980s. That inspite of this training there was a need for on the job training which could be termed as a “refresher

course" coupled with training on new equipment coming into the market.

16.6. That the Station Routine as outlined in Annexure 3 programme established before there was a fully fledged training centre has never been reviewed, and hence it has provided an opportunity to be manipulated by the 3rd Respondent to the disadvantage of the firemen.

16.7. It however became evidently clear that for the department to maintain high standard of efficiency there is need to conduct *"fire drills"* as often as practically possible. Fire drills are nothing else but practices which initiate and imitating the real situation which will provide an opportunity to determine that all the equipment was in a working condition every minute and all the time.

16.8. It is again a pity that and exercise of this nature for a decision to be fair and just would have been better done in the negotiation forum wherein the parties would work out a system that shall not compromise the concerns of each party. However, the two parties have failed to do this despite the opportunity they had. I am therefore charged to do what the two parties failed to do on their own and my determination has to be based on what governs the terms and conditions of the employment of firemen. It is however important that the parties need to be warned to refrain from failing to use the provisions

provided in their own recognition agreement which regulates their relationship.

17. THE AWARD

17.1. Pursuant to the above arguments, evidence, analysis and taking into account all the circumstances of the case per item, the arbitrator has come to the following decisions that it is ordered as follows:-

17.2. PROVISION OF INSTITUTIONAL HOUSING

Following my analysis of the arguments by both parties and taking into account all the circumstances of this part of the dispute it is ordered that Respondent addresses this dispute in one of the following manner:

(a) That the Government of Swaziland provide government pool houses to fire and emergency service personnel affected by this dispute where possible <u>OR</u> not later than 30th September, 2004

(b) That government provide fire and emergency services personnel with rented out houses at the Respondent's expense in accordance with their ranks not later than 30th September OR

(c) If the above is not achievable and or where it is not practically possible to do so, that the Government pays to the fire and emergency services personnel a housing allowance of not

less than E650.00 (Emalangeni Six Five Zero Only) effective from September 2004 pay month.

17.3. **ITEM 2: DRIVING ALLOWANCE**

As stated above this prayer is twofold: re-instating the *"drivers annual accident free bonus"* and the *"reviewal of driving allowance by a cumulative nine percent per year effective from 1977"*.

On the first part of the prayer it is ordered as follows:

(a) That pursuant to the analysis provided in 7.2. and 7.3 above that this prayer should fail.

(b) On the second part ***"driving allowance reviewal"*** the arguments advanced in 8.14, 11.6, 11.7 and 11.7(a) to 11.7(e) have been taken into account hence are the basis of my decision. I have however taken into consideration the provisions of Section 16 subsection 5 of The Industrial Relations Act 2000.

The Applicants have failed to provide convincing reasons why there was so much unreasonable period of delay in initiating or prosecuting this claim over the years until 2001. Taking this into account the arguments presented in 6.3.10 and 6.3.11, 8.10, 8.12 and 8.13 I did not find any document suggesting that Government had unequivocally committed herself to pay a drivers allowance at an increased rate of nine (9%) percent especially for the period 1976 to March, 2001.

It is therefore ordered that the Respondent pays Applicant the drivers allowance in the following manner:-

(a) From the period when it was stopped to March, 2001 at the same monthly rate as provided for in document Annexure 25 dated 28th July, 1976;

(b) From April, 2001 to date at the monthly rates as indicated below;

YEAR	LIGHT VEHICLE	HEAVY VEHICLE
April, 2001 to March'02	**E25.76**	**E28.94**
April, 2002 to March'03	**E28.08**	**E37.47**
April, 2003 to March'04	**E30.61**	**E40.84**
April, 2003 to March'05	**E33.64**	**E44.52**

17.4 **ITEM 3 AND 4: PAYMENT OF OVERTIME AND REVOCATION OF THE AGREEMENT ENTERED INTO AND BY THE PARTIES ON 13TH JULY, 1994**

Pursuant to my analysis in 11.1 to 11.7 and the fact that the overtime issue started in July, 1994 yet the Applicant's evidence suggest that Applicant only challenged the issue in or about August, 1998 as per annexure 15.

I have again taken into account the provisions of Section 16 (5) of the Industrial Relations Act 2000. No reasons were canvassed by the Applicant's counsel why there was so much unreasonable delay in initiating or prosecuting this claim over the years until 1998.

(a) It is therefore ordered that Respondent pays Applicant members currently in the employ of Respondent all overtime hours worked in excess of their normal hours in accordance with the General Orders effective from August, 1998 to date.

(b) That for the period 1994 to July, 1998 Respondent pays as compensation, Applicant members currently in the employ of Respondent, the equivalence of twenty percent (20%) of the current annual basic salary in lieu of overtime worked by officers in the ranks of firemen, leading firemen and sub – officers. That the order as to payment is complied with not later than 30th September, 2004. This is in accordance with the precedent set by the parties in the previous agreement of July, 1994 which is annexure 8.1. Which put the matter at rest.

(c) That the "agreement on National Fire ands Emergency Service allowance" entered into by and between the

Government and the Swaziland National Association of Civil Servants (representing the members of the National Fire and Emergency Service) Ann. 8.1 shall be amended solely to avoid the confusion of hours of work especially paragraph 2 and 3 to read as follows:-

Paragraph 1 *" The normal working week for officers of the Fire and Emergency engaged in shift work will, on average be forty eight hours (48) per week calculated over three weeks on the basis of the three shift system"*
That any further changes should be referred to the negotiation forum and the circulars dealing with overtime payment.

Paragraph 2 *"Overtime will be paid for any period in excess of the forty eight hours mentioned in paragraph 1 above, based on the existing provisions of General Orders"*

Paragraph 3 remain unchanged to read *"an extended duty allowance of twenty percent (20%) of basic salary will be paid with effect from 1st April, 1994 to all officers in the ranks of firemen, leading firemen and sub – officer engaged in shift work"*. This refers to Stand – by allowance

Paragraph 4 is irrelevant for this case and remains unchanged.

17.5 **ITEM 5 PROHIBITING THE EMPLOYER FROM INSTITUTING MILITARY DISCIPLINE INCLUDING DRILLS, SALUTING AND HARD LABOUR**

(a) The Respondent is hereby ordered to cease forthwith from the practice of applying all forms of military discipline whatsoever as guidelines for applying discipline in the event an offence is committed are adequately covered in the General Orders and or PART IV of the Public Service Act of 1973.

(b) The basis of this is that the Fire and Emergency Service personnel fall squarely under the Public Service Act and are governed by the General Orders and are within the bargaining unit of the Swaziland National Association of Civil Servants.

(c) *That the Respondent is ordered to cease with immediate effect the practice of saluting and hard labour like carrying extra objects as part of punitive disciplinary action.* The Respondent failed to substantiate how this added any value to the general performance of the fire and emergency personnel. In any event it is not provided for in the General Orders which govern the terms and conditions of the Applicants.

(d) With regards to the performing of drills one needs to be a little cautious about it in that for this type of work undertaken by the fire and emergency personnel. There is a need to carry out regularly "fire drills" and my understanding is that this refers to routine practices to ensure that the skills of the rescuers are not lost and or that the refresher courses and training on new equipment coming to the operation takes place. However, if the

drills are excessively undertaken to such an extent that it become disadvantageous they should be discouraged. It is therefore ordered that the 3rd Respondent and Applicant work out a *"fire drill"* programme that shall be acceptable to both parties.

THUS SIGNED AT MBABANE ON THIS …….. DAY OF AUGUST, 2004.

AARON M. DLAMINI

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ARBITRATOR