

I. PROCEDURAL BACKGROUND

This matter came on for hearing on August 15 and September 12, 2003, before Jonathan I. Klein, appointed as fact-finder pursuant to Ohio Revised Code Section 4117.14, and Ohio Administrative Code Section 4117-9-05, on June 23, 2003. The hearing was conducted between the City of Solon (“City” or “Employer”), and the Solon Firefighters, IAFF Local 2079, AFL-CIO (“Union”), at the Solon City Hall. The bargaining unit involved in the fact-finding process consists of all full-time members of the City’s fire department holding the rank of battalion chief, lieutenant, fire prevention bureau officer and inspector, and firefighter. There are currently fifty-nine (59) employees in the bargaining unit.

The following seven (7) issues were submitted by the parties based on the proposals as set forth in their respective pre-hearing briefs dated on or before August 8, 2003:

1. Article 6 - Wages
2. Article 6 - Paramedic Allowance
3. Article 6 - Rank Differential
4. Article 6 - Fire Prevention Bureau
5. Article 9 - Health Insurance
6. Article 13 - Part-Timers
7. Article 22 - Drug Testing

The fact-finder incorporates by reference into this Report and Recommendation all tentative agreements between the parties relative to the current negotiations, and any provisions of the current collective bargaining agreement not otherwise modified during negotiations and fact-finding. In making the recommendations which follow, the fact-finder has reviewed the

arguments and evidence presented by the parties at hearing, their respective position statements and the post-hearing briefs filed in this matter on or before October 13, 2003.

II. FACT-FINDING CRITERIA

In the determination of the facts and recommendation contained herein, the fact-finder considered the applicable criteria required by Ohio Rev. Code Section 4117.14(C)(4)(e), as listed in 4117.14(G)(7)(a)-(f), and Ohio Admin. Code Section 4117-9-05(K)(1)-(6). These fact-finding criteria are enumerated in Ohio Admin. Code Section 4117-9-05(K), as follows:

- (1) Past collectively bargained agreements, if any, between the parties;
- (2) Comparison of the unresolved issues relative to the employees in the bargaining unit with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;
- (3) The interest and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service;
- (4) The lawful authority of the public employer;
- (5) Any stipulations of the parties;
- (6) Such other factors, not confined to those listed above, which are normally or traditionally taken into consideration in the determination of issues submitted to mutually agreed-upon dispute settlement procedures in the public service or in private employment.

III. FINDINGS OF FACT AND FINAL RECOMMENDATIONS

Introduction

The City is located in southeastern Cuyahoga County, and it has a population of approximately 22,000 residents. The City is comprised substantially of residential homes, however, it also has a significant industrial base. In the past, the City has generated favorable revenue streams due to its industrial base. As of the date of the fact-finding hearing, the City anticipates the completion of the construction and opening of a new fire station in the southern section of the City in October 2003. The record establishes that the City has hired nine additional firefighters to staff the new facility. The current collective bargaining agreement between the City and the Union expires on December 31, 2003.

Upon review of the comparable jurisdictions offered by both parties, the fact-finder determines that the following jurisdictions shall be used for comparability purposes throughout this report: Cleveland Heights, Shaker Heights, Beachwood, Lyndurst, Highland Heights, South Euclid, Euclid, Westlake, Strongsville, Brookpark, North Olmsted, Twinsburg, Rocky River, Richmond Heights, University Heights, Bedford Heights, Fairview Park, Bay Village, Maple Heights, Bedford, Lakewood, and Berea. The fact-finder has also given consideration to other bargaining units within the City when evaluating the statutory criteria as applied to the bargaining unit.

Issue 1: Article 6 - Wages

The City has proposed the following wage rate increases:

3.25 %	effective January 1, 2004
3.50 %	effective January 1, 2005
3.50 %	effective January 1, 2006

The Union's proposed wage rate increases are as follows:

4.75 %	effective January 1, 2004
4.50 %	effective January 1, 2005
4.50 %	effective January 1, 2006

The City asserts that its position is clearly more reasonable under the statutory factors to be considered by the fact-finder. Perhaps the most important factor to be reviewed by the fact-finder in evaluating proposals is the comparison of the City's firefighters with firefighters employed by other communities. The City has looked at a comparison in two different pools: (1) a comparison to other cities located in Cuyahoga County and contiguous cities, and (2) a comparison to geographically contiguous cities.

The City maintains that its firefighters presently receive a wage rate which is significantly above the average compensation earned by firefighters employed in Cuyahoga County. The average firefighter in Cuyahoga County earns a top-level salary of \$51,044.62, while firefighters employed by the City receive an average of \$52,702.75 per year. (City Ex. 3). In a straight, descending-order of comparison based on an analysis of salary, longevity and paramedic pay, the City's firefighters rank 15th out of 27 surveyed cities. (City Ex. 4). In

comparison to its geographically contiguous neighbors, the City's firefighters rank 2nd out of five cities. (City Ex. 5).

However, the aforementioned analysis only portrays part of the story. The City asserts that its firefighters enjoy one of the "richest overtime compensation benefit schemes" in the area. Specifically, the City pays its firefighters an overtime rate based on a 2080-hour annual work schedule, rather than an FLSA required 2700-hour annual work schedule. Thus, the City's firefighters are paid overtime at an hourly rate of \$25.34 rather than at \$19.61 per hour. Out of the twenty-eight cities surveyed by the City, only five other cities pay overtime based on such a lucrative compensation scheme.

The City notes that overtime is generally a "part of life" and a necessity for firefighters. In 2001, the average first class firefighter employed by the City earned \$62,018 with a base salary of only \$49,198, and in 2002, the average first class firefighter earned \$56,609. The City asserts that the 2002 figures were artificially deflated due to the hiring of nine additional firefighters that year. Overall, the City's firefighters rank near the top when all forms of compensation are considered. In fact, the City's firefighters ranked second behind only Beachwood in gross earnings. The City's wage rate proposal is very fair and reasonable under the facts and circumstances presented.

The City contends that simply because it is a financially sound community does not provide the Union with a license for gluttony. Although the City maintains a favorable fiscal condition, revenues in 2003 have been flat. The City points out that it has virtually reached its geographic capacity for business and industry. As such, 2003 will spell an end to growing

income tax receipts. As of May 31, 2003, the City's income tax revenues were below year 2000 levels. Furthermore, L'Oreal has announced that it will be closing its facility located in the City. As a result, the City will lose approximately \$365,000 in yearly tax receipts. City Council recently requested Finance Director William Webber to prepare a three-year analysis of projected revenues and expenditures for the General Fund because it was concerned with the downturn in income tax receipts. The Finance Director projected revenue to expenditure deficits of \$900,000 in 2004, \$1.35 million in 2005, and \$1.9 million in 2006. (City Ex. 9). The City maintains that its resources are finite and unwarranted expenditures must be avoided.

Finally, the City points out that the Union seeks exorbitant increases to its compensation package at a time when the national economy is sputtering and unemployment is at its highest level in many years. (City Ex. 10). Furthermore, the wage increases sought by the Union are not supported by the average wage rate increase provided to employees in the public sector. In 2002, the average wage rate increase provided to public sector employees was 3.59 %. (City Ex. 11). The City notes that attrition does not exist with its firefighters due to the favorable working conditions that they enjoy.

During the fact-finding hearing, the City reiterated that it is "well off financially." However, its financial success is "tapering." Specifically, the City asserted that its expenditures will exceed its revenues next year. Finance Director Webber stated that the financial picture is "good;" however, it was better at the beginning of the year. He testified that income tax revenues, the main source of revenue for the general fund, have declined in 2003, and the City has placed some of its hiring decisions on hold. Finance Director Webber

acknowledged that the City has a 100% income tax credit for its residents, and City Council has expressed no intent to lower the tax credit. He further stated that the City will lose additional tax receipts as a result of creating a foreign trade zone for a local company. On cross-examination, Webber acknowledged that income tax receipts are difficult to project, and time will tell if his economic forecasts are accurate. He confirmed that the City recently opened a new fire station in order to provide better service to the residents residing in the southern portion of the City. Additionally, the City recently opened a community center which cost approximately \$18.5 million to construct.

The Union contends that its proposed wage rate increases should be recommended by the fact-finder for the following reasons. According to the Union, the City is the envy of Cleveland's other suburbs, and it is clearly able to afford the wages and benefits sought by the firefighters. The Union points out that Finance Director Webber indicated that the general fund year-end cash balance increased from \$5.5 million in 1997 to \$17.4 million at the end of 2002. Additionally, Standard & Poor upgraded the City's bond rating from AA to AA+ due to the City's excellent finances. The Union also notes that the City's operating budget estimate prepared by Finance Director Webber reveals that gross revenues increased an average of \$600,000 per year between 1998 and 2002, and the general fund increased from \$7,786,802 in 1998 to \$17,453,579 in 2002. Furthermore, the income tax collected from individuals and businesses between 1998 and 2002 has increased by 8.9 %.

In contrast to the information provided by the Union on the City's financial health, the City relied primarily on general financial trend information printed in newspaper articles and

published by SERB. However, such data provides no information on employment and unemployment among the City's residents. The Union contends that the City has provided no reliable evidence to support its position that its success has "tapered." Additionally, the only reason that the City created an enterprise zone for Swagelok was because it believed that such a zone was in its long-term financial interest. The City recently opened a community center which cost approximately \$18.5 million. Thus, City Council clearly believed that it had sufficient revenue to fund a state-of-the-art facility for its residents. The Union further asserts that the 100% tax credit afforded to residents of the City results in an enormous loss in potential revenue for the City.

The Union has utilized two comparisons in its analysis of the wages received by the City's firefighters. First, the Union obtained wage and benefit data from the 37 fire departments which the City previously utilized in wage studies for its non-bargaining unit employees. The second comparison utilized 22 fire departments that are within 50% of the size of the City's fire department, measured by personnel. (Union Ex. 15). In contrast to the Union's comparables, the comparables selected by the City are "cherry picked." According to the Union, Aurora, Bedford Heights, Bedford and Twinsburg have much smaller fire departments than the City, and they are not comparable.

After establishing the appropriate comparables, the Union looked at the City's revenue per capita in relationship to other communities. The City ranks 9th out of thirty-eight cities in regard to its general fund revenue, and it ranks 7th out of thirty-eight communities in per capita revenue. (Union Ex. 14). However, the salaries paid to the City's firefighters reveal a far less

generous comparison. According to the Union, the salary paid to the firefighters ranked them 14th out of twenty-two communities. (Union Ex. 18). Furthermore, the salary ranking for the City's firefighters has declined during the three years of the current collective bargaining agreement.

The Union bases its wage rate proposal on the fact that the requested increases are fair and equitable given the City's financial health and the total salary paid to firefighters in the City in relationship to comparable communities. In further support of its position, the Union calculated the entire cost of both parties' proposals. In 2004, the difference in the cost of the parties' proposals is \$69,652. As a cost against the City's revenue, the aforementioned difference would cost the City less than .15 % of its revenue in 2003. The Union notes that the difference in the parties' proposals in 2005 is \$146,060. While the wage rate increases sought by the Union are relatively small in relationship to the Fire Department's overall budget, the increases are not small for the firefighters. The Union maintains that the City's firefighters should be compensated in the upper 1/3 of firefighters in the area. For each of the aforementioned reasons, the Union believes that its wage rate proposal should be recommended by the fact-finder.

Final Recommendation

Based upon the testimony and documentary evidence presented at the fact-finding hearing, it is clear that the City is well-managed, financially sound and economically prosperous. In 2002, the City's general fund balance increased from \$30,598,732 to

\$34,336,152. (Union Ex. 12). Furthermore, Finance Director Weber testified that the City's cash balance in the general fund at the end of 2002 was \$17.4 million. Additionally, the fact-finder notes that the City recently opened a community center which cost \$18.5 million, and a new fire station was scheduled to open in October 2003. Moreover, the record reveals that the City's revenue per capita was \$1,036.22, a figure which places the City toward the top of the list in that statistical category. Although the City asserts that its financial success is "tapering," the fact-finder concludes that the City has present insufficient evidence to establish that its ability to pay precludes the wage rate increases proposed by the Union. Similarly, the fact that a municipality may be financially well-positioned is not sufficient grounds, standing alone, to grant whatever pay increases are sought by bargaining unit members in negotiations.

According to the Union, the average total salary afforded firefighters employed by the City in 2003 was \$54,103 per year. (Union Ex. 17). The SERB Benchmark Report dated July 22, 2003, indicates that the top-level City firefighter earned \$52,702.75 in 2003. (City Ex. 3). However, the City asserts that its firefighters enjoy one of the "richest overtime schemes" in the area. The record establishes that the City's firefighters receive overtime compensation based on a 2,080 hour work year, while the majority of communities in the surrounding area cited by the City as comparables calculate overtime payments based on annual hours worked. (City Ex. 6).

First, the fact-finder notes that the "overtime scheme" is not an issue before him – the parties are in agreement to utilizing the division of 2,080 hours to arrive at the basic rate of pay for overtime calculations in Article 6, A(2) and B(1). Second, while the average gross

earnings for a firefighter employed by the City were \$62,018.69 in 2001, that figure dropped significantly to \$56,609.83 in 2002. (City Ex. 7). Whether that decrease is the result of the City hiring additional firefighters or better management of overtime utilization is not entirely clear. There was also evidence at hearing that the City placed the hiring of three new firefighters on hold following a June 2003 meeting with Finance Director Weber.

The annual ten-year wage settlement data compiled by SERB reveals that the average wage rate increase for firefighters in the State of Ohio was 3.87 % in 2002, and the average wage rate increase in 2002 for employees of cities was 3.64 %. (City Ex. 11). Based upon the evidence presented, the fact-finder concludes that the firefighters employed by the City should be compensated at a level which reflects the City's healthy financial standing relative to comparable jurisdictions, and the compensation paid to comparable bargaining units.

The fact-finder determines, however, that the wage rate increases proposed by the Union while currently affordable by the City, are excessively high under the circumstances. It is readily apparent that a wage increase slightly above the average should be awarded, particularly in the first year of the collective bargaining agreement. The fact-finder recommends that the following wage rate increases should be incorporated by the parties into their new collective bargaining agreement.

2004 - 4.00 %

2005 - 3.75 %

2006 - 3.75 %

Issue 2: Article 6 - Paramedic Allowance

Under the current contract, a firefighter employed by the City who is a certified paramedic receives a bonus of \$1,400 per year. The Union proposes to increase the paramedic allowance to \$1,600/year in 2004, \$1,700/year in 2005 and \$1,800/year in 2006. In support of its position, the Union maintains that the City is in a sound financial position and clearly has the ability to pay the proposed increase. The Union's analysis set forth above in regard to its proposed wage rate increase is equally relevant to justify the proposed increased for paramedic pay. Additionally, the Union believes that the paramedic allowance paid to firefighters in the City in relation to comparable departments further justifies the proposed increase in the paramedic allowance. The Union points out that firefighters employed by the City rank 24th out of thirty-eight communities in regard to paramedic allowance. (Union Ex. 19). Such a ranking is in sharp contrast to the City's per capita revenue, which places it seventh out of thirty-eight communities.

The Union reiterated its position at the fact-finding hearing that the City ranks very low concerning the paramedic allowance afforded its firefighters. Under the Union's proposal, the City's firefighters would rank 15th out of thirty-eight communities regarding paramedic allowance. The Union notes that paramedic pay is rolled into the base pay for firefighters employed by some cities, however, it is not aware of which cities utilize such a compensation structure. The Union further argues that the City of Cleveland cannot be considered when comparing paramedic allowances because only a small number of firefighters employed by

Cleveland are paramedics. In the City, paramedic work comprises the bulk of the duties performed by firefighters.

The City proposes to maintain the current contract language pertaining to paramedic allowance. The Union's proposal to increase paramedic pay should be rejected for many of the same reasons that support the City's position on wages. The City asserts that its firefighters rank very favorably when one considers all forms of compensation, including paramedic pay. (City Ex. 23). Moreover, when viewed in isolation, an increase in the paramedic allowance is not warranted. The City points out that nine of the twenty-seven cities surveyed in northeast Ohio do not even afford their firefighters a separate paramedic premium, and eight other cities pay a lower paramedic allowance than the City. (City Ex. 4). The City also notes that while its firefighters receive \$1,400 per year for being certified as paramedics, the City's police officers only receive a \$1,100 annual firearm proficiency premium. For each of the aforementioned reasons, the Union's proposal to increase the paramedic allowance should be rejected by the fact-finder.

Final Recommendation

It is the final recommendation of the fact-finder that the paramedic allowance should be increased to \$1,500 per year in 2004, \$1,600 per year in 2005 and \$1,700 per year in 2006. The evidence of record establishes that the firefighters employed by the City currently rank 24th out of thirty-three communities cited by the Union which offer a paramedic bonus. (Union Ex. 19). Taking into consideration only those comparable jurisdictions referenced by the fact-

finder, the City's paramedic allowance ranks 15th out of twenty-three. Under the Union's proposal, and assuming the other jurisdictions remained relatively static, the bargaining unit employees would move ahead of firefighters employed by nine other cities used by the Union in reference to paramedic allowance by the end date of the collective bargaining agreement. Using the comparables selected by the fact-finder, the City's firefighters would move ahead of four cities assuming no increases in paramedic bonus in the other jurisdictions.

The fact-finder also notes that the City's revenue per capita is higher than many of the communities which currently offer far more lucrative paramedic allowances. The fact-finder concludes that the proposed increase in the paramedic allowance is fully warranted even in light of the City's argument that the firefighters work under a very favorable calculation of overtime compensation.

Issue 3: Article 6 - Rank Differential

Currently, firefighters employed by the City receive a 9.75% rank differential. The Union proposes to increase the rank differential to 10% in 2004, 10.5% in 2005 and 11% in 2006. In support of its position, the Union points out that the rank differential in the City's police department is 10.75%. The Union also notes that the average rank differential for forty area fire departments is 10.69%, and the City ranks 36th out of forty communities. Clearly, the ranking officers in the Solon Fire Department deserve an increase, whether the differential is examined in relationship to comparable communities or in relationship to the City's police department.

The Union further contends that the new contract language which established “working out of classification pay” will save the City \$891,022 between 2001 and the end of 2003. (Union Ex. 28). Moreover, the City will still save \$384,827 in 2004 even if the Union’s proposed rank differential increase is recommended by the fact-finder. (Union Ex. 28). At the fact-finding hearing, Union president Tim Taylor testified that he was approached by Fire Chief Shaw regarding the creation of a command car which required taking a lieutenant off engine 2 and replacing him with a firefighter. The Union agreed mid-term to allow Fire Chief Shaw to establish a command car with the understanding that the City would introduce acting lieutenant’s pay and acting battalion chief’s pay into the next contract. This was, in fact, accomplished done by the parties. According to the Union, this scenario is an example of what can happen when the City works cooperatively with the firefighters, rather than in an adversarial fashion.

It is also additional evidence in support of the Union’s position to increase the rank differential afforded firefighters. The Union points out that the overtime cost for the City to cover engine 2 would have been enormous but for the mid-term agreement regarding acting pay. While the increase in the rank differential does not make up for the loss of overtime, it does help ranking officers by slightly increasing their annual salaries. The Union’s proposed rank differential is not “crazy high” as claimed by the City. For each of the aforementioned reasons, the Union’s proposal regarding rank differential should be recommended by the fact-finder.

The City argues that the Union's proposal to dramatically increase the rank differential from 9.75% to 11% should not be recommended by the fact-finder. The Union's proposal on rank differential, in conjunction with its wage rate proposal, would increase the wages for lieutenants and captains by approximately 15%. According to the City, there is no justification for such an increase. The City contends that rank differential cannot be analyzed in a vacuum. Although the City's lieutenants rank in the lower half county-wide in terms of base compensation, most of the comparables do not reflect the lucrative overtime formula that applies to the City's ranking officers. In 2001, the City's lieutenants earned an average of \$65,476.66 per year, and captains earned an average of \$75,827.00 per year. The City also points out that the Union's own comparable chart reflects that nearly one-half of those cities with reported differentials pay a rank differential of 10% or less. (Union Ex. 21). Furthermore, the City's rank differential exceeds that paid in neighboring cities Bedford, Aurora and Twinsburg, and is only .25 % below the rank differential paid in Bedford Heights. (City Ex. 15). Finally, the City maintains that it has had no problems attracting applicants or filling vacancies in the promotional ranks. Accordingly, the Union's proposal should be rejected by the fact-finder.

Final Recommendation

It is the fact-finder's final recommendation that the rank differential currently set forth in Article 6(K) of the collective bargaining agreement shall be increased to 10% in 2004, 10.5% in 2005 and 10.75% in 2006. In reaching such a recommendation, the fact-finder is

well aware that the overall gross wages received by the City's firefighters place them near the top in regard to compensation received by similarly situated firefighters in the area. Nonetheless, an increase in the rank differential is warranted for the following reasons.

First, the fact-finder notes that the rank differential afforded the City's police officers currently is 10.75%. At hearing the City presented insufficient justification for the disparity in the rank differential between the internal bargaining units of police and fire, such as a disproportionate amount of duties performed by command police officers as compared to command fire department officers, or a difference in the skill level required by command level police officers as compared to the skill level required by command level fire department officers in their respective occupations. This is not to say that rank differentials between safety forces within a jurisdiction need be identical, but all other factors being equal the notion of rank differentials for command officers of safety forces within a City being in close proximity to one another is not unreasonable.

Second, the evidence of record establishes that the average rank differential afforded firemen employed by forty area fire departments is 10.69%. (Union Ex. 21). Third, the average rank differential paid by the comparables selected by the fact-finder is 11.2%. Fourth, the evidence indicates that command level fire department officers have and will lose overtime opportunities as a result of the City's implementation, with the Union's concurrence, of a command car and the introduction of "acting pay" language into the contract. For each of these reasons, the fact-finder determines that the recommended increase in the rank differential is appropriate, and will begin to bring the City into line with the comparable jurisdictions.

Issue 4: Article 6 - Fire Prevention Bureau

Article 6(J) of the collective bargaining agreement entitled “Fire Prevention Incentive Bonus,” provides as follows:

The Employee(s) appointed by the Fire Chief to the Fire Prevention Bureau and who regularly are on a forty (40) hour schedule shall receive a bonus of two thousand four hundred dollars (\$2,400.00) annually (aprx. \$92.31/bi-weekly), paid in equal bi-weekly payments, for the period of said appointment and while working a forty (40) hour schedule. This bonus is not applicable to Employees assigned to the Fire Prevention Bureau for light duty or on a temporary basis. It is the intent of both parties to this agreement that no Employee receives more than one bonus for any pay period.

The City asserts that the Union has proposed absurdly excessive increases to the already very handsome premium paid to employees in the Fire Prevention Bureau. Despite such a premium already paid to these employees, the City has agreed to increase those payments to \$2,500 effective January 1, 2004; \$2,600 effective January 1, 2005; and \$2,700 effective January 1, 2006. The City contends that the Union has provided no basis for its proposed increases. The Union’s position that an increase is necessary in order to entice employees to remain in or apply to the unit is simply untrue. The City points out that all of the employees currently in the Fire Prevention Bureau have volunteered for those positions. The Union’s desperate attempt to make the Fire Prevention Bureau appear to be an undesirable place to work should be summarily dismissed by the fact-finder.

The City further argues that the Union’s efforts to attach money to certifications is non-persuasive and even borderline unprofessional. The City notes that it pays for the training

involved in obtaining a specialized certification in fire prevention, and it compensates employees for their time spent in training. The City also contends that the Union's proposal is not justified by the comparables. In northeast Ohio, the City ranks seventh out of twenty-eight cities in regards to fire prevention premiums, and thirteen cities in the area do not even provide a premium for fire prevention duties. (City Ex. 17).

At the fact-finding hearing, Fire Chief Shaw testified that no employees have made a request to transfer out of the Fire Prevention Bureau since he has been with the department. He also discussed the various duties and tasks engaged in by employees assigned to the Fire Prevention Bureau. Shaw acknowledged that employees assigned to the bureau are afforded the opportunity to obtain additional certifications. Fire Chief Shaw also confirmed that he wanted the Union to present a proposal regarding a career path for employees in the Fire Prevention Bureau. He acknowledged that the structure of the Fire Prevention Bureau in regard to Inspector I and Inspector II classifications as proposed by the Union would be beneficial.

The Union points out that there are significant differences in the parties' proposals regarding the Fire Prevention Bureau. Specifically, the Union proposes the creation of Inspector I and Inspector II positions, with an Inspector I receiving a 7.5% increase over the base wage, and an Inspector II receiving a 10% increase over the base wage. Specifically, the Union's proposed language for Article 6(J) of the contract provides, as follows:

The Employee(s) appointed by the Fire Chief to the Fire Prevention Bureau and who regularly are on a forty (40) hour schedule shall receive a bonus as noted in the table below. This

bonus shall be paid in equal bi-weekly payments, for the pay period of said appointment and while working a forty (40) hour schedule. This bonus is not applicable to Employees assigned to the Fire Prevention Bureau for light duty or on a temporary basis.

Those members serving one year assignments in the Fire Prevention Bureau shall receive a bonus of two thousand four hundred dollars (\$2,400.00) annually (\$93.31/bi-weekly), paid in equal bi-weekly payments for the pay period of said appointment and while working a forty (40) hour schedule. It is the intent of both parties to this Agreement that no Employee receives more than one bonus for any pay period.

Firefighter's bonus shall be based on a Firefighter 1st Class base pay. Lieutenant's bonus shall be based on a Lieutenant's base pay. Battalion Chief's bonus shall be based on a Battalion Chief's base pay.

Table #1

Inspector 1 Level

18 month commitment and attainment of Basic Sprinkler Class and Basic Cause and Origin, Arson Investigation

7.5% of Base Rate of Pay

Inspector 2 Level

Additional 18 month commitment and attainment of Basic Fire Alarm Systems and Advanced Cause and Origin, Arson Investigation

10% of Base Rate of Pay

The Union points out that Fire Chief Shaw discussed the Union's proposed structure of the Fire Prevention Bureau and he supported the changes. In regard to the pay for firefighters in the Fire Prevention Bureau, the Union asserts that the demands of the job have increased

substantially over time. As such, the level of training which is needed and the level of responsibility and skill have also increased over time. According to the Union, the comparable data also supports its proposed wage increase for employees in the Fire Prevention Bureau. (Union Ex. 22). Accordingly, the fact-finder should accept the Union's position on this issue.

At the fact-finding hearing, Lieutenant Al Benedict discussed the duties and responsibilities of employees assigned to the Fire Prevention Bureau. He confirmed that there are currently four employees in the bureau, and there were some problems filling vacancies in the bureau after several employees retired. Lieutenant Benedict acknowledged that he entered the Fire Prevention Bureau by choice, and he has elected to stay in the bureau after his initial two-year commitment.

Final Recommendation

It is the fact-finder's recommendation that Article 6(J) of the new collective bargaining agreement shall provide for fire prevention incentive bonuses of \$2,500 in 2004, \$2,600 in 2005 and \$2,700 in 2006 as proposed by the City, with the exception that bargaining unit employees who achieve the classification of Inspector 2 shall receive a one-time bonus of \$1,000 paid in quarterly payments over the course of a one-year period. The fact-finder determines that the one-time bonus awarded to employees who achieve the classification of Inspector 2 is warranted due to the increased training, skill and commitment required for an employee to become an Inspector 2.

Based upon the evidence of record, the fact-finder concludes that the Union has failed to present sufficient evidence to justify its rather significant premium increases for bargaining unit employees in the fire prevention bureau. The fact-finder concludes that the recent turnover of employees in the fire prevention bureau was primarily the result of retirements, and the Union has presented no evidence which would indicate that the bureau is an undesirable work assignment. In fact, all of the employees who are currently assigned to the fire prevention bureau have volunteered for those positions. Furthermore, the Union presented no evidence which would indicate that any employee currently in the fire prevention bureau desires to leave his or her position, or that retention in the position is otherwise an issue.

Moreover, the Union failed to demonstrate a necessity to assign additional employees to the fire prevention bureau. As such, the fact-finder determines that there is no need to increase the monetary incentive for employees to volunteer for the fire prevention bureau at the Inspector I level beyond those wage increases which were proposed by the City. The fact-finder notes that firefighters employed by the City currently rank 7th out of 28 fire departments in northeast Ohio in regard to fire prevention incentive bonuses. (City Ex. 17).

The fact-finder further recommends that the *structure* of the fire prevention bureau in regard to Inspector 1 and Inspector 2 classifications as proposed by the Union shall be incorporated into the new collective bargaining agreement. The fact-finder notes that Fire Chief Shaw acknowledged at the fact-finding hearing that the Union's proposed structure for the fire prevention bureau would be beneficial for the department.

Issue 5: Article 9 - Health Insurance

The City maintains that its health care insurance proposal should be recommended by the fact-finder for the following reasons. Initially, it points out that health care costs have been increasing at double digit inflation rates, and anticipated increases in 2004 will average over 16%. In Solon, the cost of the Medical Mutual PPO plan increased by 17.6%. However, the City has maintained a cadillac insurance plan for its employees which covers virtually all treatment at 100% levels. Currently, employees have only been required to pay a co-insurance premium of \$10 per month for single coverage and \$20 per month for family coverage.

The City's proposal set forth in City Exhibit 1 provides two reasonable choices. The first choice maintains benefits at substantially the same levels but increases premium contributions only to those levels seen on average throughout the State of Ohio. (City Ex. 1). The second choice offers the elimination of premium contributions with the introduction of certain deductibles and moderate increases to prescription drug co-pays. The City asserts that the co-pays and deductibles under the second option are below or consistent with the norm in today's workplace. In contrast to the City's proposal, the Union offers only token changes involving little if any "gives" on the part of the bargaining unit employees.

The City maintains that it seeks premium contribution increases which will simply place it in line with public sector employers. It points out that 70% of public sector employees in Ohio contributed to health care in 2001, and the average contribution for single coverage was \$16.33 per month and \$55.96 per month for family coverage. Under the City's column 2 proposal, the single coverage contribution would be approximately \$23.00 per month for single

coverage and \$60.00 per month for family coverage.¹ The City's column 3 proposal offers a plan design which is still better than those commonly found in the United States, and such a plan assesses no premium contributions whatsoever. The City agrees that the office visit co-pay amount under its proposed plan alternative is \$20, and the 80% co-insurance amount would not apply.

In contrast to the City's position, the Union's proposal offers only modest increases to prescription drug co-pays and the elimination of two HMO plans. In exchange, the Union seeks an opt-out program whereby employees would receive \$3,000 per year to opt out of the City's health insurance plans. The City contends that the Union's proposal is unrealistic, and the comparables simply do not support its position. The only component of the Union's proposal which should be recommended by the fact-finder is the opt-out provisions, which virtually mirrors the language proposed by the City.

The testimony presented at the fact-finding hearing by Robert Treend, an expert in insurance benefits, staunchly supported the City's health care proposal. Treend stated that the City's proposal was designed to increase "consumerism," and it was by no means beyond the norm. In fact, Treend asserted that the City's proposed insurance plans would offer benefits better than those commonly found in the workplace. As such, both the comparative data

1. The Union reasons that based on the City's representation of an anticipated 15% increase in premium for 2003-2004, these numbers will be \$25.59/month and \$71.69/month, respectively.

compiled by SERB and Treend's testimony indicate that the City's proposal should be recommended by the fact-finder.

The City reasons that the Union's reliance upon the health care committee is misguided and irrelevant to these proceedings. The City does not dispute that the health care committee is a valuable committee for addressing health care concerns during the life of the contract. However, similar to labor/management committees commonly found in collective bargaining relationships, significant change is not viable. The City notes that while the Union has agreed to certain changes through the health care committee, in no case did the changes come at any cost to the bargaining unit employees. The City's Law Director, Dave Matty, and Human Resources Manager, Tom Cornhoff, both testified that the committee has served an advisory role regarding health insurance plans. The City attempted to negotiate changes in the health care policies during this round of negotiations, but those changes were simply unacceptable to the Union. The City points out that the Union's own exhibit reflects an increase in insurance costs of \$665,000 in 2002.

Robert Treend further testified at the fact-finding hearing that the vast majority of the City's employees are on the Medical Mutual PPO plan, and 38% of the City's total cost for that plan is attributed to prescription drug costs. According to Treend, the prescription drug costs for the aforementioned plan are higher than normal. He stated that employees' costs for prescription drugs under the current plan are at the "low end." Specifically, generic drugs cost \$2 per prescription and brand name drugs are \$4 per prescription. Treend testified that prescription drug costs will continue to increase in the future. He stated that co-pays are

intended to obtain a “bigger spread” between the cost of generic and brand name drugs.

Treend reiterated that the City’s employees have two options regarding health care insurance.

Under the City’s column 3 proposal, there is a \$20 co-pay without the need to meet a deductible amount, and the plan is intended to provide easier access for employees to visit their doctors.

On cross-examination, Treend acknowledged that only two of his clients are public sector employers, and he has no knowledge regarding the origins of the health insurance committee. Treend testified that he developed the city’s proposed plans based upon actual claims experience provided by Medical Mutual. According to Treend, consumers’ behaviors are changed as a result of increasing co-pay amounts for prescription drugs. The goal in increasing co-pay amounts is to persuade more employees to purchase generic, rather than brand name drugs. He acknowledged that there are no formulary drugs offered under the City’s proposed current plan. Treend further admitted that the health care committee is effective in the long-term. He admitted that he does not know the health care benefit amounts received by firefighters employed by other cities. Treend also confirmed that a substantial amount of the health costs incurred by the firefighters in 2002 were the result of three large claims.

The Union’s proposal concerning health care insurance seeks to maintain the current contract language with five exceptions. First, the Union seeks to have one member of the City Council appointed to the joint medical/hospitalization insurance committee. Second, the Union seeks an opt-out program which would afford employees who have insurance coverage under

another program the option of refusing healthcare coverage provided by the City. In such a case, the employee will be compensated 30% of the yearly COBRA premium as determined under the City's plan, and the payments would be made by the City to the employee on a quarterly basis. However, employees who opt-out of the City's healthcare program would still be entitled to maintain dental coverage and life insurance at no additional cost to the employee. The Union notes that the City concurs that there should be an opt-out program in some format.

Third, the Union requests that the City establish a wellness program for City employees in conjunction with the recreation center. Additionally, employees would be entitled to receive a 50% discount on the yearly cost of membership at the recreation center. Under the Union's proposal, the Fire Department "is to train, or the City is to provide wellness instructors to develop a program in accordance with the First Service Joint Labor Management Wellness/Fitness Institute.

Fourth, with respect to hospitalization and medical coverage, the Union proposes that all current healthcare plans are to remain in effect except as follows:

1. The City may eliminate SuperMed-HMO single and SuperMed-HMO family plans.
2. The City may eliminate Kaiser single, single + one and family plans.
3. The City shall retain HMO-Health Ohio single and family with the following changes: \$20 single monthly premium employee contribution and \$40 family monthly premium employee contribution.

The City concurs with the proposal to eliminate the SuperMed-HMO single and SuperMed-HMO family plans, as well as all Kaiser plans. The City also concurs that it will retain HMO-Health Ohio. However, the City proposes an increase in the employee

contribution amount from the current premiums of \$10 per month for single coverage and \$20 per month for family coverage. The 2003 rates for HMO-Health Ohio are \$379.28 per month for single coverage and \$1,014.69 per month for family coverage. Under the City's estimates for 2004, the annual premium for HMO-Health Ohio will be \$5,234.06 for single coverage and \$14,002.72 for family coverage. An employee who paid 10% of the annual premium would be responsible for paying \$523.41 for single coverage and \$1,400.27 for family coverage under the City's proposal.

In 2003, the top paid firefighter employed by the city earned \$52,702.75. If that firefighter received a 4% wage rate increase in 2004, he or she would receive an increase of \$2,108.11. As a result of changing the current co-pay on family coverage from \$240.00 per year to \$1,400.27 per year under the City's proposal, there would be an additional expense of \$1,160.27. Thus, a 4% wage rate increase for that employee would be reduced from \$2,108.11 to \$947.84, which represents only a 1.8% wage increase. According to the Union, the City's proposed 10% increase is, in effect, a back door way of eliminating HMO coverage for its employees.

Fifth, the Union proposes that the prescription drug co-pay be modified from \$2 for generic drugs and \$9 for brand name drugs to \$5 for generic drugs and \$12 for brand name drugs. The Union notes that the City does not propose any change in the prescription drug co-pay for the HMO-Health Ohio plan. However, the City proposes to increase the prescription co-pay under the SuperMed Plus plan and its proposed alternative plan to \$10 for generic drugs and \$20 for brand name drugs. Additionally, the City's proposed alternative plan requires a

\$30 non-formulary co-pay by employees. According to Medical Mutual, the estimated savings for the February 1, 2003 - January 31, 2004, contract year would be \$31,458 under the Union's proposed plan regarding prescription drug co-pay amounts.

The sixth and most significant issue concerning health care involves the City's proposal to increase the premium cost for the current SuperMed Plus program from \$10/month for single coverage and \$20/month for family coverage to 7% of the applicable premium and introduce an alternative 80/20 plan with less coverage and more co-pays. The Union asserts that the City has failed to present any evidence to justify this enormous reduction in health care benefits. It points out that fifty-two firefighters are currently enrolled in the SuperMed Plus plan.

Utilizing the City's estimates, the annual premiums under the SuperMed Plus plan in 2004 will be \$4,387.02 for single coverage and \$11,662.52 for family coverage. The Union proposes to maintain the current employee premium contributions of \$10/month for single coverage and \$20/month for family coverage. If the City's proposed increases of 7% were put into effect in 2004, a single employee's annual contribution would increase from \$120 per year to \$307.09 per year, and the annual contribution for a firefighter under the family plan would increase from \$240 to \$860.38. Assuming that a first class firefighter was awarded a 4% wage rate increase in 2004, his or her salary would increase from \$52,702.75 to \$54,810.86, an increase of \$2,108.11 per year. However, the increased co-pays proposed by the City would reduce this amount to \$1,921.02 for single employees and \$1,487.73 for married employees. This would result in a reduction in the 2004 wage rate increase from 4% to 3.6% for single

employees and 2.8% for married employees. The Union notes that the aforementioned reductions in the wage increase do not even take into account the increases in prescription drug coverage and the change in the out-of-network payments from 90% to 70%.

At the fact-finding hearing, Treend testified that changes to the SuperMed plus plan would save the City \$95,542 in 2004. (City Ex. 22). According to Treend, the savings were calculated from the change in the out-of-network co-insurance from 90% to 70% and from the change in the prescription drug co-pays. Treend admitted on cross-examination that all of the aforementioned savings would be the result of a direct shift in cost from the City to its employees because the City is self-insured. If these savings are divided among the fifty-two employees currently in the SuperMed Plus plans, it would be, in effect, an average shift in cost of \$1,837.35 per employee. The Union points out that the \$2,108.11 wage increase afforded a first class firefighter as a result of a 4% wage rate increase would be reduced by an additional \$1,837.35. As such, a single employee's salary would increase by \$83.67 in 2004, the equivalent of a .16 % wage increase, and a married employee's salary would actually decrease by \$349.62 in 2004. Given the City's healthy financial condition, there is no justification for such a drastic cut in benefits. The Union further asserts that an employee's financial situation would be even worse under the City's proposed plan alternative. Rather than a 4% wage rate increase in 2004, single employees would receive a 5.2% wage cut and married employees would receive a 5.4% wage cut according to the Union's calculations.²

2. The fact-finder notes this calculation is based on the City's savings estimates in
(continued...)

The Union maintains that it has been attempting to work with the City to address the increases in health care costs in a way that is both fair and equitable. Union president Taylor testified at the fact-finding hearing that the health insurance committee has been very successful in addressing the increased cost of health care without cutting benefits. The Union points out that the health insurance committee began meeting on a regular basis in November 2000. The Union noted several instances which resulted in savings for the City that were attributable to the work of the health insurance committee and the decision by the City to bid health insurance. The Union asserts that part of the reason for the City's increased health care costs is due to the fact that it has hired additional employees. The Union contends that the health care committee has done its job, and the City concedes that the committee has resulted in "smarter shopping."

The Union points out that Treend admitted at the fact-finding hearing that he had no information on other cities in Cuyahoga County concerning health care. He also acknowledged that two-thirds of his clients are non-union. The Union also notes that the City agreed that part of the high cost of health care in 2002 was due to the fact that one employee underwent chemotherapy and two employees had knee replacements. The City should work through the health insurance committee if it truly desires to reduce health care costs without reducing coverage. For each of these reasons, "the Union requests that the fact-finder recommend that health care not be reduced other than the change in the prescription drug co-pays proposed by

2(...continued)

City Exhibit 22, and Treend's admission of cost-shifting.

the Union, and that the Union's other positions on health care are recommended." (Union's Post-Hearing Brief, at 26).

Final Recommendation

The final recommendations of the fact-finder concerning the issue of health care are as follows. The fact-finder concludes that the Union has presented insufficient evidence to justify the appointment of one member of City Council to the health care committee. At the fact-finding hearing, the Union stressed that the health care committee has been very effective in the past, and it has reduced the City's health care costs on several occasions. However, it presented no rationale for including a member of City Council on the committee.

Accordingly, the Union's proposal regarding this subsidiary issue is rejected by the fact-finder. The fact-finder also determines that the Union has presented insufficient evidence to warrant the recommendation of its proposal regarding the establishment of a wellness program by the City. As such, the Union's proposal concerning that issue is also rejected by the fact-finder.

Based upon the documentary evidence and testimony presented at the hearing, the fact-finder recommends that the Union's proposed contract language regarding an opt-out program should be incorporated by the parties into their new collective bargaining agreement, with the exception that the last section in paragraph 2 of the Union's proposal is modified, as follows: "Employees who opt-out of the City's health care program shall still be entitled to maintain dental coverage and life insurance on the same terms and conditions as those employees who

elect not to opt-opt.” The fact-finder notes that the City concurs with the establishment of an opt-out program.

The record establishes that the parties are in agreement regarding the elimination of the Super-Med HMO single and SuperMed-HMO family plans, as well as all plans currently provided through Kaiser. For the following reasons, the fact-finder recommends that the parties should maintain the current health care plans provided by HMO-Health Ohio and SuperMed Plus with the exception that the monthly employee premium contribution for single employees shall be \$20 under both plans, and the monthly employee premium contribution for employees covered by the family plan shall be \$40 under both plans.

In rejecting the City’s “proposed current plan” and “proposed plan alternative,” the fact-finder concludes that the costs shifted to the employees under both proposals are excessive under the facts and circumstances presented. Based upon the evidence of record, the fact-finder notes that a bargaining unit member with a family health care plan would effectively receive a pay cut in the event that he or she selected the City’s “proposed current plan” or the “proposed plan alternative.”

The fact-finder also recommends that the amount of prescription drug co-pays should be increased to \$10.00 for generic drugs and \$20.00 for brand name drugs as proposed by the City. In support of this recommendation, the fact-finder notes that the cost of prescription drugs have increased dramatically in the past and are anticipated to increase in the future. These dollar amounts are consistent with an above average health care plan. (*See, The Plain Dealer, 9/23/03; attached to City’s post-hearing brief*).

Issue 6: Article 13 - Part-Timers

The City maintains that its proposal regarding part-time employees is intended to clarify its right to utilize such employees. As such, the City seeks the inclusion of a specific reference to part-time employees in Article 13 of the collective bargaining agreement. The City asserts that its “management rights” as defined in Article 3 of the collective bargaining agreement may provide the right to utilize part-time employees although the contract is silent concerning the use of such employees.

The City points out that it has an obligation to operate in an efficient manner. According to the City, it could utilize firefighters from other jurisdictions, or recently certified firefighters to fill vacancies created by vacations, holidays and sick leave, and thereby avoid needless overtime costs. The part-time employees would be fully-qualified, certified firefighters and paramedics. The City notes that a significant number of communities currently utilize part-time firefighters, including Twinsburg, Aurora, Brecksville, Independence and North Royalton to name a few.

At the fact-finding hearing, the City reiterated its desire to utilize part-time firefighters in order to fill in for absent, full-time employees. However, the City acknowledged that it has no current plans to hire part-time firefighters. According to the City, thirteen communities in Cuyahoga County currently utilize part-time firefighters. The City’s proposal merely seeks confirmation of its management right to staff its workforce in an efficient manner. For each of the aforementioned reasons, the City’s proposal should be recommended by the fact-finder.

The Union maintains that there should be no changes to the language contained in Article 13 of the collective bargaining agreement. According to the Union, the Solon Fire Department is one of the most highly skilled and professional fire departments in the region. It points out that every firefighter is employed on a full-time basis by the City, and they receive the training necessary to maintain their full-time positions. The Union asserts that the proposal to hire part-time firefighters constitutes a step backwards for the City. Although the City claims that there are other fire departments that utilize part-time employees, it has provided no evidence that any of these fire departments moved in the direction of introducing part-timers into pre-existing, full-time only departments. The Union further asserts that the City's proposal is nothing more than a threat to its work jurisdiction. The Union argues that if the City intends to utilize part-time firefighters, it should ". . . say so publicly and explain itself so the need can be properly discussed." (Union's Post-Hearing Brief, at 27).

At the fact-finding hearing, the Union pointed out that Article 13 (A) of the contract restricts the City's right to utilize part-time firefighters. As such, the City's proposal seeks a contract modification, rather than a "confirmation" of its management right to utilize part-time employees. The Union reiterated that the City would be taking a step backwards by introducing part-time firefighters to the departments. The City has provided no evidence in support of its position, and its tactic should be squarely rejected by the fact-finder.

Final Recommendation

Article 13 (A) of the collective bargaining agreement entitled “Sub-Contracted Labor,” currently provides as follows: “The Employer shall not use volunteer or part-time personnel to take the place of any full-time Fire Department Employee.” It is the final recommendation of the fact-finder that the aforementioned contract language should remain unchanged for the following reasons.

First, the City has failed to present sufficient evidence which would demonstrate a need to utilize part-time firefighters. Second, the City has acknowledged that it has no current plans to hire any part-time employees in the fire department. Third, although the City pointed out that other communities in the area currently utilize part-time firefighters, it was unable to establish that any of those fire departments were staffed by only full-time firefighters at the time part-time employees were introduced into the department. Accordingly, the City’s proposed language shall not be incorporated into the new collective bargaining agreement.

Issue 7: Article 22 - Drug Testing

The City proposes a random drug and alcohol testing procedure which would also include reasonable suspicion testing. The Union vigorously rejected the City’s efforts to institute random testing. The City maintains that drug testing of public employees in safety-sensitive positions has long been recognized as a legitimate practice. In support of its position, the City relies upon two decisions by the United States Supreme Court, and several decisions by various federal court of appeals. In Penny v. Kennedy, 915 F. 2d 1065 (Sixth Cir. 1990),

the court upheld mandatory urinalysis, without reasonable suspicion, of the police officers and firefighters employed by the City of Chattanooga, Tennessee. The federal government has also expanded its random drug testing policy by requiring all drivers subject to Department of Transportation regulations to be randomly tested.

According to the City, it is a given that employees occupying safety-sensitive positions can be required to undergo random drug testing. The City points out that it currently randomly tests its CDL drivers employed in the Service Department. The City asserts that it is ridiculous that it cannot test its safety forces. It notes that firefighters employed by Twinsburg are subject to the same testing requirements as the employees assigned to the service department in that community. It is also important to emphasize that despite the Union's unsupported attacks on the substance of the City's proposed policy, this same policy has been in place by the City of Cleveland since 1999. The City should be permitted to randomly test its safety-force personnel in order to enhance the likelihood that no such employee will perform his or her duties under the influence of alcohol or drugs. The City's proposed contract language regarding drug testing is fully set forth in its Fact-Finding Hearing Brief at Tab 1.

At the fact-finding hearing, the City confirmed that the parties currently have no formalized drug and alcohol testing policy in place. The City reiterated that its proposal contains both random and reasonable suspicion drug and alcohol testing. According to the City, reasonable suspicion drug and alcohol tests are not "fail safe." The City needs to ensure that its firefighters are not under the influence of drugs or alcohol while they are on duty. Fire

Chief Shaw testified at the hearing that he is in favor of random drug and alcohol testing, and he discussed an off-duty incident involving a firefighter who is currently in a treatment program for alcohol abuse. Under the City's proposal, twenty-five percent of the bargaining unit would be randomly tested over the course of a year. The City reiterated that a similar drug and alcohol policy has been in effect in the City of Cleveland for the past five years. The City asserted that there were no extensive discussions between the parties concerning this issue because the Union rejected its random drug testing proposal. It further maintained that the language regarding reasonable suspicion is somewhat open-ended because it is based upon objective observations. The City also noted that there is language contained in its proposal regarding an educational period.

The Union believes that the fact-finder should recommend its proposed policy on alcohol and drug testing for the following reasons. Initially, the Union notes that the parties' proposals concerning drug testing language contain substantial differences in six areas. First, there are substantial differences between the two proposals on reasonable suspicion testing. Under the Union's proposal, there is an actual form which must be completed by a supervisor each time an employee is suspected of drug or alcohol use while on duty. In contrast, the City's proposal contains no definition of "reasonable suspicion." As such, there are few safeguards in place under the City's proposal for a supervisor who claims there was reasonable suspicion to require a firefighter to undergo a drug or alcohol test.

Second, the Union's proposed policy specifically defines what is required for post-accident testing. However, there is no language in the City's proposed policy which

specifically addresses post-accident testing, and therefore no safeguards under the City's policy concerning the requirements for a drug or alcohol test following an accident. Third, there are no limits on what types of drugs may be tested for and what the threshold levels of abuse should be under the City's proposed policy. However, the Union's proposed policy specifically lists the drugs to be tested for and includes the limits that must be met before an employee can be considered to have failed a drug test.

Fourth, under the City's proposed policy, an employee would fail an alcohol test if he or she had only .02 grams per 210L of breath. In contrast, an employee would need a concentration of at least .04 grams per 210L of breath in order to fail an alcohol test under the Union's proposed policy. The Union notes that under Section 382.201 of the Department of Transportation regulations, the federal government also requires a threshold of .04 in order for an individual to fail an alcohol test.

Fifth, the City's proposed policy includes random testing while the Union's proposal does not contain such language. The Union points out that Fire Chief Shaw testified at the hearing that there was no evidence of any need for random testing by the Solon Fire Department. Fire Chief Shaw also testified that there was no evidence of any on-duty usage of drugs or alcohol. In further support of its position that there should be no random drug and alcohol tests, the Union relies on an article contained in the April 2003 issue of Fire Chief magazine which discussed the high rate of false positives, the adverse effects of random testing on the profession, and the fact that drug testing is a very poor way to address a national problem of drug and alcohol abuse. The Union also cites a decision by the Alaska Supreme

Court which held that random testing was unlawful under the Alaska Constitution. The Union also notes that in a conciliation hearing between the City of Stow and the IAFF Local 1662, arbitrator Robert Stein determined that the City of Stow had failed to meet its burden to justify random drug testing. The Union points out that its proposal in this case is almost identical to the proposal awarded by arbitrator Stein in the aforementioned conciliation.

Lastly, the language regarding discipline contained in the City's proposed policy is substantially different than the Union's proposed contract language. The focus of the Union's proposed language is on rehabilitation, rather than discipline. The language recognizes that drug and alcohol abuse is a disease and it should be treated differently than other violations of the Fire Department Rules and Regulations. However, the Union points out that under its proposal, the City "reserves the right to impose progressive discipline at any time during the employee's employment."

In contrast to the Union's proposed policy, the City's proposal is harsh and punitive in nature. Under the City's proposed language, there is no room for mitigating circumstances, and an employee who tests positive for drugs is immediately discharged. The Union asserts that the City has failed to justify a reason for implementing its proposed policy. The Union maintains that an employee could conceivably engage in the legal use of marijuana while on vacation, test positive after returning to work, and face immediate discharge even with twenty years of an unblemished record of service. With respect to alcohol, the City's proposed policy has a "two strikes and you're out" rule without any consideration for mitigating factors. The

Union's proposed policy regarding drug and alcohol testing is fully set forth in its Pre-Hearing Statement.

According to the Union, the City admitted at the fact-finding hearing that there were virtually no discussions concerning a drug and alcohol policy during negotiations. The City was not open to discussing other aspects of its proposed policy because it refused to consider a policy that did not include random testing. The Union pointed out that the parties do not disagree on the need to implement a drug and alcohol policy. The Union also reiterated that the City's policy does not specifically address post-accident testing, and it is extremely vague regarding reasonable suspicion testing. The Union points out that its policy contains a form which forces supervisors to be specific regarding the reasons for requiring an employee to undergo a reasonable suspicion test. The Union further argues that it is harsh to terminate an employee who tests positive for marijuana on one occasion. The Union contends that the humanistic approach discussed by Fire Chief Shaw is inconsistent with the City's proposed random drug testing policy. Finally, the Union asserts that its proposal contains language which is more comprehensive than the provisions contained in the City's proposal. For each of the aforementioned reasons, the fact-finder should recommend the Union's proposal regarding drug and alcohol testing.

Final Recommendation

It is the fact-finder's final recommendation that Article 22 of the collective bargaining agreement shall contain a drug and alcohol policy which shall have the following provisions set

forth below. The fact-finder notes that neither of the parties' proposals is recommended in its entirety. Specifically, the fact-finder determines that the City has presented insufficient evidence to justify the implementation of random drug and alcohol testing. In support of the recommendation that a provision regarding random testing should not be contained in the new article establishing a drug and alcohol policy, the fact-finder notes that Fire Chief Shaw testified at the hearing that there was no evidence of a need for random testing by the Solon Fire Department. Additionally, the City presented no evidence indicating any on-duty usage of drugs or alcohol by bargaining unit members, or that any employees had been under the influence of drugs or alcohol during the course of performing their duties for the City. In fact, the City only referenced one off-duty incident involving alcohol abuse by a firefighter. Accordingly, the City's proposed random drug and alcohol testing is rejected by the fact-finder based upon the facts and circumstances presented in this case.

Although a random testing procedure is not recommended by the fact-finder, it is important for the City to implement an effective drug and alcohol policy which ensures that its firefighters safely and efficiently perform their duties. As such, bargaining unit members abusing drugs and alcohol must be properly disciplined and afforded appropriate treatment programs for their substance abuse problems. Based upon an analysis of the parties' proposed drug and alcohol policies, the fact-finder recommends that the Union's proposal (Union Exhibit 9A) be adopted with the exception of Section VIII (B) and ©) pertaining to disciplinary action for positive drug tests, and alcohol tests of .04 or above. The fact-finder believes that the Union's proposed language regarding positive drug and alcohol tests is excessively lenient

for safety force employees. Accordingly, the fact-finder recommends that the parties' drug and alcohol policy contain certain of the disciplinary action provisions proposed by the City, as modified by the fact-finder:

VIII. Discipline

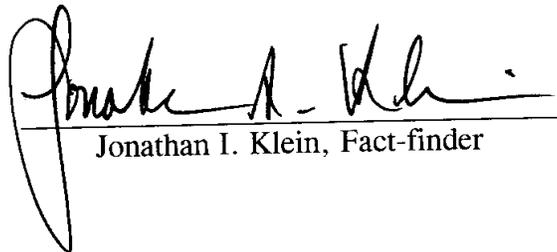
* * *

- (B). An employee who tests positive for alcohol shall be subject to dismissal unless the employee agrees to participate in and satisfies the obligations of a treatment program approved by the Human Resources Manager and recommended by a substance abuse professional. An employee who agrees to participate and satisfies the obligations of this treatment program will be subject to discipline up to a ten (10) day suspension (but is also subject to discipline for other rule violations).
The employee shall also be subject to random drug and alcohol testing for a period of twenty-four months following the completion of the treatment program.
Any employee testing positive for alcohol for a second time within twenty-four months of the date of the first positive test shall be subject to discharge.

- (C) An employee who tests positive for any of the five drug types shall be subject to dismissal unless the employee agrees to participate in and satisfies the obligations of a treatment program approved by the Human Resources Manager and recommended by a substance abuse professional. An employee who agrees to participate and satisfies the obligations of this treatment program will be subject to discipline up to a ten (10) day suspension (but is also subject to additional discipline for other rule violations).
The employee shall also be subject to random drug and alcohol testing for a period of twenty-four months following the completion of the treatment program.
Any employee testing positive for drugs for a second time within twenty-four months of the date of the first positive test shall be subject to discharge.

CERTIFICATE OF SERVICE

Originals of this Fact-finding Report and Recommendations were served upon Jon M. Dileno, Duvin, Cahn & Hutton, Erievue Tower, 20th Floor, 1301 East Ninth Street, Cleveland, Ohio 44114, and upon Susannah Muskovitz, Faulkner, Muskovitz & Phillips, LLP, 820 West Superior Avenue, Suite 900, Cleveland, Ohio 44113-1800, and upon Dale A. Zimmer, Administrator, Bureau of Mediation, State Employment Relations Board, 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, each by express mail, sufficient postage prepaid, this 22nd day of November, 2003.



Jonathan I. Klein, Fact-finder