

IN THE MATTER OF FACT FINDING  
BEFORE  
GREGORY J. LAVELLE, ESQ., FACT-FINDER

STATE EMPLOYMENT  
RELATIONS BOARD

2009 DEC 18 P 2:17

SOLON FIREFIGHTERS ASSOCIATION,  
IAFF, LOCAL, 2079, AFL-CIO

SERB CASE NO. 09-MED-05-0594

Employee Organization

-and-

FACT-FINDING REPORT AND

CITY OF SOLON

RECOMMENDATIONS

Public Employer

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December 2, 2009

## **DESCRIPTION OF THE UNIT**

The unit herein consists of fifty-eight (58) full-time members of the Fire Department of the City of Solon (Article 1, Recognition). There are no part-time employees of the Fire Department. The classifications covered by the collective bargaining agreement are Battalion Chief, Lieutenant, Firefighter, First Class, Firefighter, Step 4, Firefighter Step 3, Firefighter, Step 2, Firefighter, Step 1 and Firefighter Inspectors, there being no covered employees serving in other capacities such as dispatcher or clerk.

## **HISTORY OF THE CASE**

The City of Solon (hereinafter, the City) and the Solon Firefighters Association, IAFF Local 2079, AFL-CIO (hereinafter, IAFF) are parties to a collective bargaining agreement effective January 1, 2007 through December 31, 2009 covering full-time members of the Fire Department of the City, excluding the Fire Chief and the Assistant Fire Chief.

The parties bargained for a new collective bargaining agreement and were unsuccessful. The City, however, reached a tentative agreement with the Police Unit. The tentative agreement with the Police Unit included wage increases of 2.5%, 2.5% and 2.75%, an increase in holiday hours from 104 to 108, a sixth week of vacation after 25 years, an increase in the amount of employee contributions toward health care and prescriptions and an agreement to random drug testing, the language of which was to be mutually rewritten as a later date. The City and the Police Unit, as of the date of the writing of this report have not finalized their collective bargaining agreement.

The Fact-Finder requested that the parties submit their Position Statements, the collective bargaining agreement and all tentatively agreed items, including items which the parties agreed to remain unchanged prior to the Pre-Hearing Telephone Conference. Both parties timely submitted Position Statements. Both parties submitted their version of items to which they

believed were tentatively agreed and the City submitted a list of provisions which it believed were agreed as unchanged.

The parties submitted their Pre-Hearing Materials, including the existing collective bargaining agreement on November 9, 2009. The City, however, did not submit all of its proposals in final language form. In reviewing the submitted tentative agreements, it was confirmed that the parties had agreed on a change in Article 4 F), a change in Article 6 C), a change in Article 8 A) 3) and a change in Article 15 A). The City materials included a tentative agreement with respect to Article 8 D) 3) and the IAFF materials included a tentative agreement with respect to Article 8 A) 4) and Article 20 A) 2)

The Fact-Finder reviewed the various articles of the collective bargaining agreement and found that the parties had no proposals with respect to changes in the following provisions of the collective bargaining agreement:

PREAMBLE	
ARTICLE 1	RECOGNITION
ARTICLE 2	MEMBERSHIP, MEETINGS AND DUES
ARTICLE 3	EMPLOYER AND UNION RIGHTS
ARTICLE 4	GRIEVANCES, A, B, C, D, E, G, H, I, J, K, L, M
ARTICLE 5	HOURS OF WORK
ARTICLE 6	COMPENSATION, B(1)(3)(4)(5), D, E, F, G, H (1) (2), K
ARTICLE 7	SICK LEAVE, INJURY LEAVE AND BEREAVEMENT LEAVE, A, B, C(1)(2)
ARTICLE 8	VACATION AND HOLIDAYS C, D(1)(2)(3)(b-f)
ARTICLE 10	UNIFORMS AND SAFETY SHOE ALLOWANCE D, G, H
ARTICLE 11	FIREFIGHTER TURNOUT GEAR A, B, D
ARTICLE 12	EDUCATION AND TRAINING TUITION REIMBURSEMENT PARAMEDIC EMT HOURS
ARTICLE 13	PERSONNEL AND SENIORITY RIGHTS B, C, D, E

ARTICLE 14	DISCIPLINARY PROCEDURES
ARTICLE 15	MODIFICATION AND NEGOTIATION PROCEDURES B, C, D, E, F, G, H
ARTICLE 16	SAFETY
ARTICLE 17	SAVINGS CLAUSE
ARTICLE 18	SUCCESSORSHIP
ARTICLE 19	MISCELLANEOUS
ARTICLE 20	GENDER AND PLURALITY
APPENDICES AND AMENDMENTS	
PRINTING AND SUPPLYING	
UNION PROPERTY	
LABOR MANAGEMENT COMMITTEE	
ARTICLE 20	TEMPORARY LIMITED DUTY
ARTICLE 21	PREGNANCY AND MATERNITY
ARTICLE 22	DRUG AND ALCOHOL POLICY
INTRODUCTION	
IIA	
IIB	
LETTERS OF INTENT VACATION/HOLIDAY SCHEDULE	
MEMORANDUM – PHYSICAL WELLNESS	
EXHIBIT A	TUITION REIMBURSEMENT PROGRAM
MEMORANDUM – USE OF FIRE PREVENTION VEHICLES	
EXHIBIT B	HEALTH CARE PPO
EXHIBIT B	HEALTH CARE ALTERNATE PLAN

The Fact-Finder, however, noted that there were several items of contract language where the parties intended that there be no change in the effect of the language, but which, as written, needed to be reworded to avoid confusion as to their continuing effect; Article 6, Section I(1), Article 6, Section K and the Memorandum regarding the use of City vehicles by full-time members of the Fire Prevention Bureau. The IAFF took the position that the Letter of Understanding regarding the use of City vehicles remained in effect, despite its stated December 31, 2006 expiration date. The City maintained that the Memorandum of Understanding had expired. Both parties, however, acknowledged that the City continued to permit the remaining members of the Fire Prevention Department to commute to and from work in City vehicles.

A Pre-Hearing Telephone Conference was held on November 10, 2009. The Fact-Finder, after a review of the submitted materials, determined that there were issues open with respect to the following contract provisions:

ARTICLE 6, ARTICLE A(1)  
ARTICLE 6, SECTION A(2)  
ARTICLE 6, SECTION B(2)  
ARTICLE 6, SECTION J(1)(2)(3)  
ARTICLE 6, SECTION L(1)(2)  
ARTICLE 6, SECTION L(3)(A)(B)(C)(D)(E)  
ARTICLE 6, SECTION L(4)(A)(B)(C)(D)(E)  
ARTICLE 7, SECTION C(3)(4)  
ARTICLE 8, SECTION B(1)(2)(3)(4)  
ARTICLE 8, SECTION D(4)  
ARTICLE 9  
ARTICLE 10, SECTION A  
ARTICLE 10, SECTION B  
ARTICLE 10, SECTION C  
ARTICLE 10, SECTION E  
ARTICLE 10, SECTION F  
ARTICLE 13, SECTION A  
ARTICLE 13, SECTION F  
ARTICLE 22, II(C)

A Fact-Finding Hearing was conducted on November 11, 2009 commencing at 9:30 a.m. in the Mayor's Conference Room of the Solon City Hall. Presentations were made on behalf of their parties by their designated representatives. Testimony and exhibits with respect to the issues in dispute were presented and considered in accordance with regulations of the State of Ohio and considered taking into account:

- (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.

Testimony was taken with respect to the issues of Wages, Health Insurance and Overtime. The hearing was not concluded and an additional day of hearing was scheduled for November 30, 2009.

The hearing was reconvened at 8:30 a.m. on November 30, 2009 and further evidence was heard. Testimony was completed at 3:45 p.m. and a further hearing date was scheduled. The hearing was again convened on December 13, 2009. The parties agreed at hearing to a modification of Article 6, Compensation, Section 6 B) 2) which would require the City to distribute overtime equitably among the members of the Department, rather than only on a shift by shift basis. Evidence was heard on the overtime issues, the issue of changes in the Fire Prevention Bonus, the Working Out of Classification Issue, the Bereavement Issue, the Holiday Issue, the Emergency Comp Time Issue, the Promotion Issue and the Authorized Use of City Vehicles Issue. The hearing was completed on December 13, 2009 and the parties stipulated to a decision date of December 16, 2009.

## **DISCUSSION OF THE ISSUES**

### **INTRODUCTION**

The purpose of this recommendation is to suggest a collective bargaining agreement which provides economic parity for the Firefighters with respect to the increases granted to the Police Unit while serving the legitimate ends of the City and while serving the interests of equity and fiscal responsibility. Ratification is recommended since the majority of the goals of both sides would most likely be thwarted if the matter were to proceed to Conciliation both in terms of economics and in terms of good future working relationship.

There are three (3) elements of an economic proposal which provides parity; 1) General Wage Increases, 2) Other Components of Compensation and 3) "Extras". In order to provide and preserve true parity, all three elements must be addressed.

The first element, General Wage Increases is essential to perceived parity. For this reason, increases of 2.5%, 2.5% and 2.75% are recommended.

The second element, Other Components of Compensation, is also essential to provide actual, as opposed to perceived parity. If the Other Components of Compensation are altered, the overall parity is defeated. Components of Compensation for the Firefighters include the manner of computing overtime and sick leave payout and the amount and manner of payment for time off. In order to preserve parity, therefore, proposals of both parties with respect to both of those matters, except as otherwise provided herein, are rejected.

The third element, the "Extras", is also essential to true parity. The Police Unit received three (3) Extras; an increase of four (4) hours of holiday pay, an extra week of vacation for employees having over twenty-five (25) years of service and a "me too" on the Fire Department Sick Leave payout. To provide true parity, therefore, the economic package for the Firefighters should include similar costs for the City and benefits to the employees as were provided by the Extras for the Police Unit. The task for the Fact-Finder is to determine what manner of providing those benefits best suits the interests of the City and the spirit of equity and financial responsibility.

The most pressing issue for the City in these negotiations appears to have been the issue of obtaining the right to conduct random drug testing. Both parties appear to accept the proposition that there should be an economic trade-off for the City obtaining that right. The City, prior to Fact-Finding, proposed that the Fire Unit accept higher deductibles in order to in exchange for the City dropping its proposal for random drug testing. For reasons cited in the main opinion, it would seem inequitable for there to be a penalty for employees failing to waive the right to prohibit a personal intrusion. There should, instead, be an economic benefit to permit the intrusion. There certainly should be no penalty for an employee who would be willing to accept random testing. The economic benefit for accepting random testing should be the same for all persons waiving that right and should not depend on whether the person takes health insurance coverage and whether that coverage is single or family. For that reason, it is recommended that for current employees there be a one-time bonus paid for the employee to opt-in to the random testing policy. The amount of the bonus should be non-trivial. Therefore, the recommended bonus is \$ 300.00 (pro-rated for person who opt-in after the initial January 31<sup>st</sup> deadline) New hires would be subject to random testing and would not be entitled to the bonus.

The Union should ratify this proposal for several reasons. First, for both those who would elect not to opt-in and those who would elect to opt-in, the proposal would be economically better than what the Union appeared to be willing to accept. Second, the individual right to reject random testing would be preserved. Third, there is no guarantee that a Conciliator would not grant the City the right to random testing where such a policy may come into effect for all other employees. Fourth, the cost of Conciliation both in terms of economics and in terms of the future relationship of the parties would be prohibitive.

The City should also ratify this proposal for several reasons. First, it is anticipated that a majority of the bargaining unit employees would initially opt-in to random testing. Others would be expected to opt-in after it becomes clear that the random testing program is being properly conducted. Second, it is doubtful that a Conciliator would grant the City the right to conduct random testing since there is no Conciliation Award in existence granting that right for

any unit in the State of Ohio and since the City had previous lost the same issue under the same circumstances in Fact-Finding. Third, even if a Conciliator were to grant random testing, there still could be challenges on constitutional grounds. If employees, on the other hand, accept good and valuable consideration as individuals for the waiver of the right to object to random testing, there would appear to be a valid and enforceable waiver of their constitutional rights. Fourth, the money spent for the bonus would be less than the value of the extras given to the Police Unit. Fifth, the cost of Conciliation both in terms of economics and in terms of the future relationship of the parties would be prohibitive.

Having dealt with the issue of random drug testing and with the first two (2) elements parity of parity; the General Wages Increases and the Other Components of Compensation, the question becomes how to allocate the cost of the "Extras. The total cost of the opt-in provision, assuming all current employees opt-in would be \$ 17,400.00. (58 x \$ 300.00) That one-time cost should be considerably less than the cost of fifteen (15) weeks of vacation for the highest paid members of the Police Department (5 employees x 1 week x 3 contract years) under the 2010 contract and on into the future.

There remains to be allocated the costs of the other extras; twelve (12) hours of pay for each employee of the Police Unit and the cost of the change in sick leave payout for the Police Unit. It is firmly believed that the "me too" on sick leave payout is a "big ticket item". There are two (2) recommended extras for the Fire Unit to partially offset the value of these Police extras. It is recommended that pay for all the eleven (11) holidays worked be at time and a half. This has an element of equity to it in that Police already are paid double-time. No additional idle/off time is recommended so as to create no additional overtime. The other economic extra recommended is the proposed bonuses for the Level 3 and Level 4 Fire Inspector. In this case, the extras are being recommended not only for the purpose of parity, but as compensation for additional training and certification.

The Firefighters, even with the extras recommended and even if all bargaining unit employees were paid the Opt-In Bonus would be receiving far less than full parity since the

value of the “me too” for the Police on sick leave buyout alone, in all probability, exceeds the value of all of the recommended extras for the Fire Unit. The Fact-Finder could not recommend the City proposals regarding sick leave buyout since that effect would have angered the Police Unit who would certainly have felt that the City had bargained in bad faith with it in granting them a “me too” on that benefit and then stealing it away in separate negotiations. It is also likely that such a result would drive a wedge between the Police and Fire Units as the Police might feel that Fire Unit negligently or intentionally cost the Police Unit their bargained benefit. Starting a tri-partite civil war is not the goal of any Fact-Finder.

### **DISCUSSION OF THE ISSUES**

The major issues in this case can be broken down into four (4) issues; the Wage Issue, the Overtime Issues, the Health Care Issue and the Drug and Alcohol Testing Issue. These issues will be discussed first, followed by the remaining issues.

### **DISCUSSION OF THE WAGE ISSUE**

#### **POSITION OF THE PARTIES**

##### **POSITION OF THE CITY**

The City has proposed wage increases of 1.75% effective 1-1-10, 1.75% effective 1-1-11 and 2.25% effective 1-1-12. The City points out that the region is facing its highest unemployment rate in fifteen (15) years. The City also points out that its income tax revenues are three million dollars (\$ 3,000.00.00) behind the level of last year and that expenses for 2009 exceed current revenues and that expenditures are expected to exceed revenues in 2010.

##### **POSITION OF THE IAFF**

The IAFF proposes wage increases of 3.75% effective 1-1-10, 3.75% effective 1-1-11 and 3.75% effective 1-1-12. The IAFF contends that the City is the envy of most cities in the State of Ohio, having a large cash balance. The IAFF points out that despite the positive

economic picture for the City, firefighters in the City rank 31<sup>st</sup> in terms of hourly rate of pay and 19<sup>th</sup> in terms of annual earnings. (IAFF Exhibit 12) The IAFF, further, points out that the Police Unit received increases of 2.5%, 2.5% and 2.75%.

### **RECOMMENDATION ON THE WAGES ISSUE**

There can be no doubt that the economic picture in Northeast Ohio is far bleaker than it was in 2006 when the current collective bargaining agreement was negotiated. There can also be no doubt that Solon is somewhat atypical in its economic situation compared to other neighboring communities. The IAFF has proposed wage increases which exceed the rate of increase of the prior collective bargaining agreement. The City, on the other hand, proposes wage increases for the Fire Unit which are less than what was agreed for the Police Unit. The City, clearly must have felt the wage increase proposed for the Police Unit to have been affordable and appropriate. There is no reason to conclude that the economic condition now is worse than that which existed at the time of the settlement for the Police Unit. Both parties have expressed an understanding and appreciation for the concept of parity. Therefore, it is the recommendation of the Fact-Finder that increases of 2.5%, 2.5% and 2.75%.

### **DISCUSSION OF THE OVERTIME ISSUE**

The "Overtime Issue" has two (2) components; the Part-Time Firefighters Issue contained in City Proposal # 17 and the three (3) Overtime Computation Issues contained in City Proposals # 15 and # 16. The Part-Time Firefighters Issue will be discussed first, followed by the remaining Overtime Issues.

### **DISCUSSION OF THE PART-TIME FIREFIGHTER ISSUE**

#### **POSITION OF THE CITY**

The main thrust of the City argument with respect to the Part-Time Firefighter issue

relates to the cost of overtime paid to Firefighters. The City argues that it needs to reduce overtime and overall costs through the use of part-time firefighters. The City points out that there are many fire departments in the area which are staffed by a combination of full-time and part-time firefighters. (See City Exhibit 15) The City points out that it spent over four hundred thousand dollars in firefighter overtime in 2008 and projects that it will spend about the same amount in 2009. (See City Exhibit 13, page 3)

### **POSITION OF THE IAFF**

The IAFF points out that there is no evidence that any fire department now having part-time employees had ever been a fire department having only full-time employees. The IAFF argues that having part-time firefighters would make the department less efficient and less professional. The IAFF contends that there is a potential for abuse in that the part-time employees would have no benefits and would have no set wages and working conditions established by a collective bargaining agreement. The IAFF further points out that the City had previously sought the right to have part-time firefighters and had lost that issue in a prior fact-finding. (Union Exhibit 15) Finally, the IAFF points out that for at least six (6) years the City has chosen to accept overtime costs, rather than hiring additional full-time fire fighters, the Chief having proposed hiring three (3) additional Fire Fighters and Council having rejected the proposal.

### **RECOMMENDATION ON THE PART-TIME FIREFIGHTER ISSUE**

There is no doubt that there are fire departments having part-time employees. There is probably no real doubt that the higher the concentration of part-time employees, the less professional the fire department. A few part-timers, however, like a few new full-time employees, probably would not make a significant negative impact on the professionalism of the department, provided, that the few part-time firefighters were not continually being replaced by

other part-timers as those part-timers left for full-time positions. There is also no doubt that hiring a few part-time firefighters who could fill in for full-time fire-fighters being paid straight-time would reduce overtime costs.

The language proposed by the City, however, being an “all or none” type of proposal with no limiting language, can not be recommended. The change in language requested by the City would literally allow full-time employees to be replaced by part-time employees. While the City did not intend such an effect, the language, as proposed, would permit the replacement of the entire department by part-time employees.

If there were a dire economic emergency, or an extreme problem with the amount of overtime hours, drastic measures might be considered. In this case, however, there neither appears to be a dire economic emergency nor an extreme problem with overtime hours. Looking at the total overtime hours in 2008 for Police and Fire, the Fire Department for non-training overtime has approximately ten percent (10%) more overtime hours. (Compare Union Exhibits 16 and 18) The amount of non-training overtime costs for the Fire Department have decreased dramatically from the costs which were being experienced under the prior collective bargaining agreement, declining over twenty percent (20%) \$ 1,208,463.40/\$ 950,150.52. Overtime hours for the Fire Department have decreased by even a higher percentage. In addition, the City has recently taken additional actions to reduce overtime and overtime costs; covering shortage of personnel with supervisory personnel and reducing staffing minimums from 14 to 13 and recently down to 12 and eliminating training overtime. There is, thus, insufficient reason and evidence produced permit the City the language requested. The Fact-Finder recommends that there be no change in Article 13 A).

## **DISCUSSION OF THE OVERTIME COMPUTATION ISSUE**

### **POSITIONS OF THE PARTIES**

The City basically urges changes in the computation of overtime for the purpose of reducing overtime costs. The IAFF opposes the City proposals as take-backs.

## **RECOMMENDATION ON THE OVERTIME COMPUTATION ISSUE**

The main thrust of the City on the overtime computation issues is economic; a desire to reduce overtime costs. There is not a claim that the method of calculation is unfair, or unreasonable. The most relevant factor considered, however, remains the issue of parity. The Firefighters are recommended to receive increases of 2.5%, 2.5% and 2.75% so that there is parity in the increases of the Police and Fire Departments. The method of calculation overtime is a part of the compensation package of the Fire Department. If the method of computation for overtime is changed, the economic package changes. Thus, parity in wage increases of 2.5%, 2.5% and 2.75% would no longer represent parity, as a portion of the economic package afforded the Firefighters would decrease. Again, there is insufficient reason to recommend changes in the overtime language contained in the collective bargaining agreement relative to overtime compensation. In addition, were the Fact-Finder to change the method of sick leave payout, the Police Unit would be impacted. No doubt that unit would be incensed that the benefit they negotiated was being taken away and that they were "sandbagged" in negotiations. To blame would be the City and the Fire Unit. That type of situation is not healthy for safety forces upon which the City residents stake their lives.

## **DISCUSSION OF THE HEALTH CARE ISSUE**

### **POSITIONS OF THE PARTIES**

The City has proposed modest increases in employee contributions for health care coverage which it represents have been acceptable to the Police Unit. The City, however,

had proposed increased deductibles for the Fire Unit should random testing not be included in the collective bargaining agreement. The IAFF has found the health care proposal generally acceptable and had expressed a willingness to accept higher deductibles should random testing not be required.

#### **RECOMMENDATION ON THE HEALTH CARE ISSUE**

The City proposal regarding health care is not onerous. It is also recommended that the City health care proposal be incorporated into the collective bargaining agreement for the sake of consistency and ease of administration so that all units have the same coverage under the same terms and conditions. For that reason, and for the reasons set forth in the discussion on the drug and alcohol testing issue, higher deductibles for the Fire Unit are rejected.

#### **DISCUSSION OF THE DRUG AND ALCOHOL TESTING ISSUE**

##### **POSITION OF THE CITY**

The City maintains that there is a need for random testing of employees to assure public safety. The City indicates that City employees having commercial drivers licenses are already subject to random testing. The IAFF opposes random testing for several reasons; that mandatory random testing in public employment may be unconstitutional; that false positives can be a problem; that no current problem exists and that the bargaining unit would self-police any problem which may occur in the future. The City had proposed to require the IAFF to be subjected to higher rates of deductibles in order to avoid random drug testing.

#### **RECOMMENDATION ON THE DRUG AND ALCOHOL TESTING ISSUE**

There are a number of factors to be considered in this case. The most important would be public safety. The Department of Transportation, in the interests of public safety, has promulgated regulations requiring random testing for persons who generally drive vehicles at

normal speeds in non-emergency situations. The rationale for such regulations would appear to be even stronger in the case of persons who would be expected to be driving vehicles at higher rates of speed in the most critical of situations. Random drug testing is a means of attaining the goal of providing a drug-free and safe workplace. Just because there is no apparent problem at this time does not mean that there will be no problem in the future. There being no apparent present problem, further does not mean that there is no actual current, but hidden problem. Practically everyone has been involved in a situation where it was revealed that a friend or loved has had a drug or alcohol problem for some time which was only discovered after it was already too late.

If public and personal safety were the only concern, random drug testing for all employees would be recommended without reservation. There are other issues, however, to be considered relative to collective bargaining and individual rights.

Considering the collective bargaining issues, the existence of a random testing clause for the police units would mitigate toward a finding that such a provision should be included within the IAFF unit. The City, however, since the closing of evidence of this hearing, has represented to the Fact-Finder that the Police Unit contract has not been finalized. Therefore, based on the evidence, there is no parallel provision for the Police Unit in effect. It should also be noted that such provisions, generally are not included in comparable units in other neighboring communities and appear to have never been accepted through a Fact-Finding Report or mandated by a Conciliation Award. It is clear, further, by the history of the parties that such a provision was rejected in a prior Fact-Finding. Thus, the only likely means in which the City could expect to gain inroads into random testing is through the Opt-In provision. It is unlikely that a substantial percentage of the Fire Unit members would throw away three hundred dollars (\$ 300.00) not to be random tested. Therefore, over the course of time, all new employees and practically all existing Fire Unit employees will become subject to random testing. Through

Conciliation, in light of having lost the issue in prior years, it is highly likely that **none** of the employees will become subject to random drug testing.

The final matter to be considered is the question of individual rights. The employees of the City are public employees. The City is a governmental body and subject to the restrictions of the 4<sup>th</sup> and 14<sup>th</sup> Amendments. A random drug test, by its very nature, is a test, a very private search, undertaken without probable cause. The City recognizes this issue in its proposal which clearly and succinctly states:

#### Conflict with Laws

This Article is in no way intended to supersede or waive any constitutional or other rights that any employee may be entitled to under Federal or State statutes.

Thus, if the collective bargaining agreement were to contain the provision proposed by the City, the City would **still** be faced with possible litigation on constitutional grounds by each employee who might find himself subject to a random testing request and face the possibility through litigation that **none** of its employees **in any unit** would be subject to testing. It is questionable, further, whether a labor organization stands on firm ground waiving individual rights. Obviously, the City is aware of this issue since its own proposal indicates that the provision is not intended to supersede or waive constitutional rights. That language may represent a “hedge” against a Fact-Finder or Conciliator being concerned about exceeding his jurisdiction. As much as it is a “hedge”, it is also a “red flag” for the decision-maker, providing a reason to avoid crossing the line between adjudicating individual rights and adjudicating collective bargaining rights.

This recommendation is made for the purpose of ensuring that the City gains the unquestioned right to conduct random testing through individual intelligently executed waivers, rather than having no rights at all to perform random testing. A way around the dilemma of

dealing with individual rights would be to provide an economic incentive for current employees to waive their objections to random testing, while requiring future employees to accept random testing as a condition of employment. The City had proposed a disincentive not to reject random testing, having all employees be faced with an increased medical expense deductible if random testing were rejected. There are several problems with that proposal. First, it would appear unfair that persons having no individual objection to random testing would still have to face an increased deductible. In addition, the proposal of the City appears punitive, rather than compensatory for securing the waiver of an individual right. Further, for the sake of consistency with respect to health insurance, it would be unreasonable to have two separate sets of deductibles, depending on the collective bargaining agreement.

The Fact-Finder, therefore, recommends a different economic tradeoff; a bonus to current individuals to opt in to random testing. New-hires could be hired on condition that they accept random testing. The recommended bonus would be a one-time bonus of three hundred dollars (\$ 300.00) a maximum total for the unit of \$ 17,400.00. Hidden extras for the Police unit; the “me too” or the sick leave buyout, the four (4) extra hours of holiday for each employee and an extra week of vacation for each employee having over twenty-five (25) years of service, each extra potentially carrying on into perpetuity would certainly more than offset the one-time cost of the bonus for the Fire Unit. The employee acceptance of the bonus, as a waiver of rights should also serve the interests of defeating any objection of such an employee to random testing based on constitutional grounds.

It is recommended, for the sake of consistency, that the testing procedures of the City proposal be incorporated, except with respect to the re-testing in the case of alcohol where there is a result of greater than .00 and less than .04. Since the City proposal does not appear punitive for a first offense, therefore, it is recommended that the automatic suspension be removed from current language and since there appears to be no issue with respect to discipline of members of

the bargaining unit, it is recommended that the incorporation by reference of the policies and procedures be deleted from the City proposal.

## **DISCUSSION OF THE UNIFORM AND SAFETY SHOE ALLOWANCE**

### **POSITION OF THE PARTIES**

The IAFF seeks two (2) changes in this article. The IAFF seeks an increase in the amount of the uniform allowance of fifty dollars (\$ 50.00) and the elimination of the \$ 200.00 maximum for the reimbursement for the initial issue of uniforms upon promotion. The City seeks to eliminate the shoe allowance.

### **RECOMMENDATION ON THE UNIFORM AND SAFETY SHOE ALLOWANCE**

It is clear that the allowances are not reimbursements and that the change proposed by both parties are economic. The City contends that employees are not wearing “safety shoes” and indicates that safety shoes are not necessary, citing a lack of foot injuries. The statistic cited by the City misses the point in several ways. First, the lack of foot injuries may be the result of employees wearing safety shoes. Second, injuries prevented by wearing “safety style” shoes can not be established. A safety style shoe may prevent other types of injuries, such as falls, which would injure the back or head, rather than the foot.

Since the proposals of the parties are economic and really have to relation to safety shoes, it is recommended that the safety shoe and uniform allowance amounts remain the same, but that they be merged into a single allowance. Since the City indicated that it did not want to enforce the wearing of safety shoes, it is recommended that the language be changed to say that the City **may** require employees to wear safety shoes. It is recommended that the City pay the cost of the initial uniforms of employees on promotion since that is consistent with the requirement of the City to pay for the initial uniforms upon hire as stated in Article 10, Section F).

## **DISCUSSION OF THE FIRE PREVENTION BONUS ISSUE**

### **POSITIONS OF THE PARTIES**

The IAFF proposed to create two (2) new positions, Assistant Fire Marshall and Fire Marshall, the Assistant Fire Marshall to receive an annual bonus of \$ 4,614.00 and the Fire Marshall to receive an annual bonus of \$ 5,498.00 based on employees within those classifications attaining advanced certifications. The IAFF indicated that the City had agreed to the proposal as a part of an earlier package proposal. The City opposed the proposal, indicating that the creation of additional classifications would be met by resistance in the ratification process. The City further maintained that the title Fire Marshall was a title contained in the Ohio Revised Code, the powers of which might conflict with the intended use of the potential position by the City. In discussions with the parties, it was acknowledged that the earlier discussions of the positions contemplated a single person being employed in each of the classifications and that an employee attaining the required qualifications would not automatically entitle them to be granted the position and pay rate.

### **RECOMMENDATION ON THE FIRE PREVENTION BONUS ISSUE**

It appears from the evidence that additional certifications have been required for persons to perform certain aspects of the duties of Fire Inspectors. Additional duties and additional required training logically calls for additional compensation. The amount of additional compensation proposed by the IAFF is the amount proposed by the City. The IAFF had proposed titles of Fire Marshall and Assistant Fire Marshall. The City, however, stresses that a conflict might be created since Fire Marshall is a title with specific powers and duties under the Ohio Revised Code. While the IAFF suggested that a title of "Fire Warden" be created for the purpose of stressing the importance of the position to the public, that rationale is insufficient to overcome the objection of the City to creating new titles. The Fact-Finder, therefore,

recommends that the positions with the qualifications and bonus amounts proposed by the IAFF be adopted with titles of Fire Inspector 3 and Fire Inspector 4. Additional language relative to the filling of the position is recommended as shown in the attached proposed collective bargaining agreement.

## **DISCUSSION OF THE WORKING OUT OF CLASSIFICATION ISSUE**

### **POSITION OF THE PARTIES**

The IAFF has proposed a number of changes in Article 6 l). The IAFF, in Subsection 1, proposes to add the word “qualified” to limit the personnel who can be placed in the position of Shift Lieutenant. The IAFF, further, proposes that only an officer replace an officer in Firestations 1 and 3. The IAFF, in Subsection 2, likewise, proposes to add the word “qualified” with respect to the personnel who can be placed in the position of Battalion Chief. The IAFF, in both Subsections 3 and 4 requests a change in language so that a person would be considered qualified to be placed in the position of an absent officer so long as he had passed the promotional examination for the position within the prior six (6) years, rather than requiring the person to have passed the most recent promotional examination. The IAFF, further, proposes in Subsection 3 that employees who remove themselves from the promotional list would not be considered to be qualified to fill a position on a temporary basis until the employee is placed on a subsequent promotional list.

The City opposes the change limiting replacement of officers with officers, citing management rights. The City also expressed a feeling that employees who might feel uncomfortable assuming the duties of a position on a temporary basis be given the option of requesting to be excused from said assignments, rather than having to withdraw themselves from the promotional list.

## **RECOMMENDATION ON THE WORKING OUT OF CLASSIFICATION ISSUE**

The Fact-Finder recommends that the word “qualified” be added in Subsections 1 and 2. The Fact-Finder, however, can not agree that the City should be prohibited from replacing an officer with anyone but an officer. The City, obviously, would prefer to fill an officer position with an officer, but should not be prohibited from assigning any employee in emergency situations.

The Fact-Finder understands the rationale for requesting that persons be considered qualified as long as they passed a promotional examination within the past six (6) years. This change would prevent the expense of having persons repeatedly having to take promotional examinations in order to remain on the list. What neither party has considered is what to do if an employee passes the examination and subsequently fails the next examination. It would seem logical that such a person would not be considered qualified. Language is recommended to resolve that issue. It should be made clear, however, that passing an examination within six (6) years only suffices to make the person eligible for temporary assignment, rather than permanent promotion. The language of the IAFF proposal creates an ambiguity in that regard since, as written refers to the qualifications of filling the position of “Lieutenant”, rather than only “Acting Lieutenant”. That ambiguity is resolved in the recommended language for this provision attached in the Recommended Collective Bargaining Agreement.

The suggestion of the City that a person should have the option of requesting to be excused from temporary assignments is logical in that a person may have a legitimate reservation about filling a position on a temporary basis even if seeking the position on a permanent basis. Employees should be encouraged to be honest about their feelings and concerns and not be given the sole option of removing themselves from the promotional list. It should, however, remain within the discretion of the Chief to honor or reject the request.

## **DISCUSSION ON THE BEREAVEMENT LEAVE ISSUE**

### **POSITION OF THE PARTIES**

The IAFF has proposed that the amount of Bereavement Leave allowed employees working on a forty (40) hour per week schedule for “Other Family Members” be increased from eight (8) hours to ten (10) hours to match the length of shift. The IAFF has also proposed to change the definitions of “immediate family” and “other family members”. The City acknowledges that the changes in family definition is consistent with the contract for the Police Unit.

### **RECOMMENDATION ON THE BEREAVEMENT ISSUE**

The proposal to change the number of hours of Bereavement Leave for employees working on a forty (40) hour per week schedule from eight (8) to ten (10) is a very logical proposal. Employees working on a forty (40) hour per week schedule work ten (10) hour days. It would not make sense for a person to have to work two (2) hours of a ten (10) hour day on which he was taking bereavement. The other proposal of the IAFF would make the Bereavement Leave provision of the Fire Unit be consistent with that of the Police Unit. That change is also recommended.

## **DISCUSSION OF THE HOLIDAY ISSUES**

### **POSITION OF THE PARTIES**

The IAFF has proposed a number of changes with respect to holidays. The IAFF has proposed that there be two (2) additional holidays; Patriot Day and Christmas Eve. The IAFF has proposed that employees be paid time and a half for working on each holiday, rather than only for working Thanksgiving Day, Christmas Day and New Year’s Day. The IAFF has proposed that any employee working overtime or ordered to work on a holiday be paid double time and a half. The City opposed these proposals on the basis of the additional direct cost for

employees and also for the overtime costs which would be incurred as a result of employees being off for the additional holidays.

### **RECOMMENDATION ON THE HOLIDAY ISSUES**

The IAFF seeks economic gains in the area of holidays. Additional time off, leading to additional overtime, obviously can not be recommended. The only rationale for making any change in the holidays comes relates to matters of parity. The Police Unit received an additional four (4) hours of holiday pay. The Police Unit also received additional vacation time and the “me too” on sick leave buyout. Due to these factors, some adjustment should be made. The change should not create additional time off, complicating the problems of staffing and creating overtime. A reasonable manner of making a “parity adjustment” which also makes sense is to require the City to pay time and a half for holidays worked. That change alone is recommended.

### **DISCUSSION OF THE EMERGENCY COMPENSATORY TIME ISSUE**

#### **POSITION OF THE PARTIES.**

The IAFF proposes a new section permitting emergency use of up to twenty-four (24) hours of compensatory time indicating that such a provision is present in the collective bargaining agreement for the Police Unit. The IAFF indicates that the policy is intended to provide allow the use of compensatory time without advance notice in case of emergencies, up to a total of twenty-four (24) hours, said compensatory time to be utilized in increments of not less than four (4) hours.

### **RECOMMENDATION ON THE EMERGENCY COMPENSATORY TIME ISSUE**

The proposal of the IAFF, as stated orally is reasonable. Both parties stated during the course of the hearing that it was the intent that the Emergency Comp Time be used for unexpected absences of not less than four (4) hours.

## **DISCUSSION OF THE PROMOTIONS ISSUE**

### **POSITIONS OF THE PARTIES**

The IAFF proposes changes in the provisions of the collective bargaining agreement relative to Promotional Examinations. Some of the proposals deals with the timing of the examinations and accommodations to facilitate employees being able to study for the examinations. Other changes, however, would change the scoring of the tests. The City expressed no serious objections to the accommodation provisions, but objected to having the Civil Service Commission having to deal with different sets of rules for different bargaining units.

### **RECOMMENDATION ON THE PROMOTIONS ISSUE**

There are a number of changes requested by the IAFF. The IAFF requests that promotional exams be given no later than March 1<sup>st</sup> of every other year commencing 2010. The IAFF requests that there be minimum service requirements employees to take the Lieutenant and Battalion Promotional Exams. The IAFF requests that a book list be posted sixty (60) days prior to the posted exam date and that a copy of each book be placed in the library of each fire station. The IAFF requests that extra credit time be counted for full-time Solon Fire Service time only and that evaluations not be utilized in calculating final examination scores.

The IAFF proposals are of three (3) types; requests for accommodation, requests to change the requirements for eligibility to take examinations and requests to change the calculation of final examination scores. The accommodation requests are reasonable. Therefore, it is recommended that the City be required to schedule examinations as requested; that the City be required to publish book lists as requested and that the City be required to make the books available as requested. The Fact-Finder, however, can not recommend the other proposals of the IAFF. There has been no evidence that there has been any particular problem with the

administration of promotions. The IAFF proposing to limit the eligibility of some of its members for promotion because of length of service requirements could be seen by the disqualified members as inappropriate. More senior employees already have the advantage of the service being counted for their final score. The proposal to limit the use of evaluations might be considered if there were evidence that promotions have been improperly denied by virtue of unfair evaluations. Absent such evidence, there is insufficient reason to have the Civil Service Commission apply different rules for different sets of employees.

## **DISCUSSION OF THE USE OF CITY VEHICLES ISSUE**

### **POSITION OF THE PARTIES**

The IAFF proposes that the members of the Fire Prevention Bureau remain entitled to use City vehicles to go to and from work. The IAFF argues that the practice remains in effect despite the fact that the Memorandum of Understanding in which the City agreed to maintain the practice contained an expiration date of December 31, 2006, pointing out that the practice continues to be followed and pointing out that the Memorandum of Understanding continued to be incorporated into the collective bargaining agreement. The City argues that the Memorandum of Understanding expired and is of no effect and that it should not be incorporated into the collective bargaining agreement.

### **RECOMMENDATION ON THE USE OF CITY VEHICLES ISSUE**

A grievance arbitration regarding an alleged violation of the Memorandum of Understanding regarding the use of City vehicles would be highly interesting. While the Memorandum of Understanding, by its initial terms, expired on December 31, 2006, it is clear that the parties incorporated the Memorandum of Understanding into the 2007 collective bargaining agreement. Obviously, it was incorporated for some reason. It is also clear that the practice required by the Memorandum of Understanding continued through the date of this Fact-

Finding. What is also clear is that neither party in negotiations leading up to the 2009 Fact-Finding made a proposal regarding the Memorandum of Understanding. Finally, what is clear, by implication is that neither party made such a proposal in the 2006 negotiations. In all probability, everyone at the bargaining table in 2006 and in 2009 did not revisit the actual wording of the Memorandum of Understanding and assumed that the terms of the Memorandum of Understanding continued to be in effect and binding since the practice continued and neither party proposed a change in the practice. While the academic exercise involving a grievance over an alleged violation of the Memorandum of Understanding would be interesting, this is not an arbitration, but, a Fact-Finding and the parties have put forth alternate proposals.

The Fact-Finder recommends that the practice reflected in the Memorandum of Understanding be modified as shown in the recommended collective bargaining agreement attached hereto to continue the practice with respect to employees in the Fire Prevention Bureau, said provision being incorporated into the collective bargaining agreement without an express expiration date so that further confusion is avoided.

## **DISCUSSION OF THE SURVEILLANCE ISSUE**

### **POSITION OF THE PARTIES**

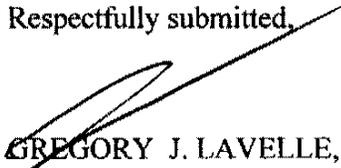
The IAFF requests language in the collective bargaining agreement prohibiting audio and video surveillance. The proposal of the IAFF stems from installation of video conferencing equipment in the firehouses. The IAFF expressed concerns that the equipment could be utilized to monitor union meetings. The City contends that the conferencing equipment is not intended for surveillance and further assert that the IAFF is estopped to present the proposal regarding surveillance pursuant to the ground rules for negotiations entered by the parties which would prohibit the introduction of new proposals after the fourth negotiation meeting.

## RECOMMENDATION ON THE SURVEILLANCE ISSUE

The Fact-Finder can not agree with the City that the IAFF can not present the proposal regarding surveillance since it is being presented for the first time during the Fact-Finding. The proposal arises out of a recent event and could not been presented prior to the fourth negotiation meeting of the parties. The ground rule, moreover, seems to have been mutually ignored by the parties, the City having presented new language at hearing even after having presented its Position Statement.

The Fact-Finder, however, can not recommend inclusion of the IAFF surveillance proposal in the collective bargaining agreement. Such a provision has no place in the collective bargaining agreement, appearing somewhat inflammatory/accusatory. In addition, the provision, in effect, provides less, rather than more protection to the IAFF. If, indeed, surveillance of union meetings were taking place without notice to the IAFF, an unfair labor practice might be filed and sustained. If the surveillance provision were in the collective bargaining agreement, resolution of the matter would be subject to arbitration and deferral, thus costing the IAFF the cost of an arbitrator and gaining only an arbitral statement that the collective bargaining agreement was violated. The fact-Finder recommends that the IAFF proposal regarding surveillance not be included in the collective bargaining agreement.

Respectfully submitted,



GREGORY J. LAVELLE, ESQ.  
Fact-Finder

## SERVICE

A copy of the within Report together with the Appended Recommended Collective Bargaining Agreement was sent to the IAFF c/o Suzannah Muskovitz, Esq. 820 West Superior, Suite 900 Cleveland, Ohio 44113 by Federal Express and by email at [Muskovitz@fmplaw.com](mailto:Muskovitz@fmplaw.com) and upon the City of Solon c/o Charles De Gross, Esq. 34200 Bainbridge Road Solon, Ohio 44139 by Federal Express and by email at [tcornoff@solonohio.org](mailto:tcornoff@solonohio.org) this 16<sup>th</sup> day of December, 2009.

  
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GREGORY J. LAVELLE

*Gregory J. Lavelle*

ATTORNEY AT LAW AND ARBITRATOR

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STATE EMPLOYMENT  
RELATIONS BOARD

2009 DEC 18 P 2:17

December 16, 2009

Edward E. Turner  
Administrator, Bureau of Mediation  
State Employment Relations Board  
65 East State Street, 12<sup>th</sup> Floor  
Columbus, Ohio 43215-4213

Re: Solon Firefighters Association, IAFF, Local 2079, AFL-CIO  
and  
City of Solon  
Case No. 09-MED-05-0594

Dear Sirs,

Enclosed please find the Fact-Finding Report in the above matter. If you have any questions, please feel free to call.

Thank you for your cooperation.

Sincerely,



GREGORY J. LAVELLE  
Fact-Finder

GJL/bij  
Enc: Report and Report CBA  
SERBIAFFSolon