

STATE EMPLOYMENT
RELATIONS BOARD

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

2011 MAY 26 A 11:49

In The Matter of The Fact-Finding Between:

CITY OF ELYRIA)
) SERB Case No:
) 09-MED-06-0677
)
 -AND-)
)
)
 INTERNATIONAL ASSOCIATION)
 OF FIREFIGHTERS, LOCAL 474)

ATTENDANCE:

For The City:

Robin Bell, Esq., Consultant
Matthew Baker, Esq., Consultant
Honorable Bill Grace Mayor
Chris Eichenlaub Safety Service Director
Richard Benton Fire Chief

For The Union:

Ryan Lemmerbrock, Esq., Attorney
Dean Marks President
Craig M. Camp Vice President
Brett Bevan Secretary
James M. Roth Treasurer
Carl J. Mack Shift Representative
David S. Seljan Shift Representative
Robert Donofrio Shift Representative

BEFORE ALAN MILES RUBEN, FACT-FINDER

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BACKGROUND:

The City of Elyria, the County seat of Lorain County, occupies an area of 20.5 square miles and includes within its borders an estimated residential population of 55,000 housed in 23,000 units with a median household income of \$40,966.00. It is home to seventeen schools, the Lorain County Community College, the Elyria Memorial Hospital, the Midway Mall and several industrial facilities.

At the time of this proceeding the City's Fire Department consists of fifty-seven Firefighters, plus seven Fire Lieutenants, six Fire Captains, four Assistant Fire Chiefs and the Fire Chief. Except for the Fire Chief, and the Assistant designated as Fire Marshall, the members of the Department's staff form a Bargaining Unit exclusively represented by Local 474, International Association of Firefighters.

The City and the Union were signatories to a Collective Bargaining Agreement effective as of July 12, 2006 for an initial term of three years.

Pursuant to Contractual requirements, timely notices were given by the parties of their intent to modify or amend the Agreement, and negotiations proceeded looking towards the execution of a successor Agreement.

The parties met on two occasions to establish ground rules for the negotiations, and the possibility of conducting those sessions on an "interest-based bargaining" model. On November 23, 2009, the parties exchanged proposals and met on December 16th to discuss the issues so raised.

Certain events outside of the negotiations resulted in the Union filing an Unfair Labor Practice charge which has since been resolved in the City's favor.

The parties declared impasse and on March 29, 2010 the undersigned was appointed Fact-Finder by the State Employment Relations Board.

The Fact-Finder conducted mediation sessions with the parties on July 20, 2010 and September 21, 2010. As a result of the mediation, the parties reached tentative agreements on the text of the following Articles or Sections of Articles:

Article 5 - "Layoffs and Restorations";

New Article - "Seniority";
Letter of Understanding Related to Prospective Application of Layoff and Seniority Provisions;

Article 8, Section 8.1 - "Pledge Against Discrimination & Coercion";

Article 20 - "Injury on-Duty";

Article 26 - "Grievance procedure" (Exclusive of Section 26.3);

Article 30 - "Hazardous Materials Response Team";

Article 32 - "Discipline Procedure";

Article 31 - "Job Bid Process";

The parties also agreed to file a "G-11" Waiver. (O.R.C. Section 4117.14(G)(11)).

The parties, moreover, tentatively agreed to carry-forward and incorporate into the new Agreement, mutatis mutandis, all other Articles, Appendices and Memoranda from the 2006 Agreement except those listed below.

A series of proposals to add new provisions and to amend other Articles and Sections of Articles of the 2006 Contract were withdrawn and are deemed to have been abandoned.

Remaining unresolved are proposals submitted by one or both parties for changes to Sections of the following Articles:

Article 7 - "Prevailing Rights;

Article 10 - "Work Schedules and Hours";

Article 12 - "Wages and Longevity";

Article 13 - "Overtime";

Article 15 - "Vacation";

Article 16 - "Holidays";

Article 17 - "Clothing Allowance":

Article 19 - "Sick Leave";
Article 21 - "Bereavement Leave";
Article 26 - "Grievance Procedure";
Article 33 - "Duration";
New Article - "Water Rescue/Recovery Team";
New Article - "Minimum Apparatus Staffing".

At the direction of the parties evidentiary hearings were held on October 21st, November 15th and November 17th, 2010.

Timely in advance of the first day of hearing, the parties provided the Fact-Finder with the statements required by Ohio Administrative Code 4117-9-05(F) and the Ohio Revised Code, Section 4117.14(C)(3)(a). At the hearings the parties introduced an accumulative total of more than 150 documents. Among other officials, the City presented as a witness City Auditor Ted Pileski, CPFA, to report on the City's financial condition. The Union, in its turn, in addition to some of its Officers, called upon Consultant Mary Schultz, CPA/CFE, to offer an evaluation of the City's financial statements.

Those financial statements were updated to include the entire calendar year 2010, and the parties submitted post-hearing briefs summarizing their positions and supporting

evidence, and extended the time within which the Fact-Finder might issue his Report.

In making his analysis of the evidence and his recommendations upon the unresolved issues, the Fact-Finder has been guided by the factors set forth in O.R.C. Section 4117.14(C)(4)(e) and Ohio Administrative Code Section 4117-9-05(K) namely:

"(a). past collectively bargained agreements, if any, between the parties;

"(b). comparison of the issues submitted to final offer settlement relative to the employees in the bargaining unit involved with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;

"(c). 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;

"(d). the lawful authority of the public employer;

"(e). the stipulation of the parties;

"(f). such other facts, not confined to those listed in this section, which are normally or traditionally taken into consideration in the determination of the issues submitted to final offer settlement through voluntary collective bargaining, mediation, fact-finding, or other impasse resolution proceedings in the public service or private employment."

CONTRACT PROVISIONS AT ISSUE:

PREFACE:

Taking one thing with another, the Fact-Finder's lot is not a happy one. He is required to make recommendations with respect to the economic relationship between the parties during the next thirty months or so, at a time of unprecedented and, as yet, unabated recession whose length not even Nobel Prize laureates can predict with assurance.

In analyzing the proposals for the parties and making his recommendations to resolve the present impasse, the Fact-Finder focuses upon two of the listed statutory factors - the City's financial condition in relation to its need to provide adequate services to the public, and the Firefighters' compensation level and working conditions as compared with those of their peers in Fire Departments of comparable jurisdictions.¹

¹ The Fact-Finder finds that "internal comparisons" are inappropriate. While the Union would relate Firefighter wages, benefits and conditions of employment to those of the members of Police Department Bargaining Unit, there has been no history of "parity" between the two Units. The Police Officers' qualifications, duties, wages, schedules, time-off, benefits and working conditions have always departed in material respects from those of the Firefighters.

So too, the Fact-Finder does not consider significant the recent increase to 3.5% in the enhanced Consumer Price Index (i.e., including gasoline and food) since the expected volatility of these commodities suggests that the rise may be temporary.

The City's Ability To Pay:

The City was not immune to the current economic downturn.

A cash basis calculation of General Fund revenues revealed that in 2009, revenues declined to \$28,460,000.00 from \$30,986,000.00 in 2008, and by more than 12% below their 2007 level. The General Fund carry-over, or unencumbered cash balance, fell to \$571,509.00 in 2009 from \$1,060,000.00 in 2008.

The Fact-Finder is informed that the City laid-off seventeen Firefighters, demoted nine others and eliminated minimum manning levels.

With effect from July, 2010, the City was awarded a two year Federal SAFER grant allowing it to recall or hire twenty-three Firefighting personnel.

However, the City's financial status appeared to have stabilized in 2010. Consistent with the beginnings of the presently ongoing economic recovery, the revenue loss slowed. Revenues in 2010 were some \$329,000.00 less than in 2009.

As a result of the reduction of expenditures the General Fund unencumbered cash balance rose to \$626,470.00 in 2010 from \$274,000.00 in 2009. Nevertheless, this

amount represents only some 2.5% of revenues, still far below the 5% to 10% range sought by bond rating agencies.²

This history notwithstanding, the Fact-finder must be concerned with the future, not the past.

The economic forecast for Northeast Ohio is for a continued gradual improvement in employment and income levels which bodes well for the City's tax revenues. That expectation is tempered, however, by the likely reduction in the City's receipts from the State's Local Government Fund as of July, 2011, and an additional reduction in July, 2012, and the possibility of the elimination of the estate tax or enactment of other measures reducing local government tax sources.

While the City does not argue "inability to pay", it does insist that its prospective financial position

² Although Moody's Investors Service affirmed its "A-1" rating on the City's \$40.6 million of long-term general obligation debt as of July 22, 2010, it assigned a "negative outlook for the following reasons:

"The A1 general obligation rating reflects the city's very narrow financial operations; moderately-sized tax base located in the Cleveland (GOLT rated A1/stable outlook) metropolitan area; and average debt burden with additional borrowing plans. The negative outlook incorporates potential pressures on the General Fund from the health insurance fund, which currently has a deficit fund balance, unsettled union contracts, and negative budget variances; coupled with limited financial flexibility and the lack of an immediate plan to restore liquidity."

requires material concessions to be made by the Firefighters in terms of freezing all compensation levels for the duration of the successor Contract, elimination of future longevity pay, the reduction of paid holiday, vacation and sick leave and other time-off, and the elimination of "sell-backs" of accrued but unused paid time-off, among other cost saving demands.

Some of the City's proposals would have merit as original propositions, and were this an initial Fact-Finding, they would be recommended by the Fact-Finder for incorporation into the parties' first Contract. However, the Fact-Finder does not write on a clean slate. The terms of the extant document are the product of years of negotiations and mutual concessions to obtain what was then perceived as each party's priority objectives.

Furthermore, although the City pegged its proposals to its need for financial relief in light of its economic condition, it did not provide the Fact-Finder with an estimate as to the total dollar concessions it believes necessary in light of projections of revenues and priority expenditures for 2011 and 2012. Nor, while the City has indicated the expense reductions which could be achieved by the adoption of some of its proposals, has it estimated the

aggregate amount of the cost reductions if all of its proposals were to be put into effect.³

The cost to the City of providing Firefighters' wages and benefits, cannot be considered in isolation. The Fact-Finder must evaluate the adequacy of Firefighters compensation, and whether the City should devote more, less or the same quantity of its resources to these personnel.

Over the period 2005-2011 the Fire Department's share of the City's General Fund outlays for wages and benefits, as distinguished from the Department's total percentage of the City's budget, ranged from 22% to 24% and averaged 23.1%. In 2009, 23% was allocated to Fire Department's personnel. In 2010, however, the Firefighters' share fell to 21.25%.

Whatever amount the City is able to set aside for its entire personnel budget, the historical pattern suggests that Firefighters ought to receive at least 22% of the total.

The Union, on the other hand, seeks not only to maintain its current level of benefits, but to enhance them with wage increases of 2% in 2011 and 4% in 2012 in order to keep pace with the entitlements offered to Firefighters

³ The Union calculates that Firefighters, with the average seniority of thirteen years, would lose some 17.8% of the dollar value of their current benefits.

in comparable communities. It also seeks to have the City commit to minimum manning requirements for certain apparatus staffing and the maintenance of a Water Rescue/Recovery Team. The Union bears the burden not only of demonstrating an unjustified disparity in the relative terms and conditions of employment in Elyria as compared to other appropriately considered jurisdictions, but also that the costs can be absorbed by the City in light of its immediate and prospective fiscal position.

Comparable Communities:

A McGrath Consulting Group, Inc., report commissioned by the City and issued on July 17, 2009 found nine communities "in the area" comparable to Elyria. These were: Cleveland Heights, Cuyahoga Falls, Hamilton, Lakewood, Lorain, Mansfield, Middletown, Springfield and Zanesville.

At fact-finding the City proposed a list of eleven comparable jurisdictions which excluded three of the McGrath selections - Cleveland Heights, Lakewood and Zanesville - but added Canton, Parma, Warren, Euclid and Youngstown.

The Union used different collections of jurisdictions for different purposes. It's "short list" of nine jurisdictions tracked the McGrath Report.

Its longest list of twenty jurisdictions eliminated Zanesville from the McGrath Report assembly, but added the following: Euclid, Parma, Brunswick, Strongsville, Mentor, North Olmsted, North Ridgeville, Avon, Avon Lake, Sandusky, Westlake and Sheffield Lake.

Each of the cities chosen by the parties is similar to Elyria in one or more relevant characteristics - size of Fire Department, population, area served, tax and revenue base (i.e., median household income and tax rate), and proximity to Elyria (i.e., whether contiguous located in Lorain County or the Northeast Ohio labor market), None, however, are similar to Elyria in all attributes.

Thus, the population and Fire Departments of North Ridgeville, Avon, Avon Lake, Sheffield Lake and Brunswick are half the size of Elyria's.

The median incomes of households in Lorain, Euclid, Sandusky and Mansfield are much less than that of Elyria while those of North Ridgeville, Avon, Avon Lake, Strongsville, Sheffield Lake, Westlake, Brunswick and Mentor are 50% greater.

The 1.75% municipal income tax rate charged by Elyria is matched by Mansfield and Middletown, but exceeded by Lorain, Hamilton, Cuyahoga Falls, Warren, Euclid, Springfield, Parma, Canton and Youngstown.

Simply put, Elyria has no twin, and the Fact-Finder will consider each combination of jurisdictions in his analysis of the parties proposals.

I. Article 7 - "Prevailing Rights"

A. The 2006 Contract:

Article 7 of the expired Contract provided:

"Section 7.1: All rights and working conditions enjoyed by the employees at the present time which are not included in this agreement shall remain in full force during the term of this agreement.

"Section 7.2: The City agrees not to diminish any established benefits now enjoyed by the employees.

B. The City's Proposal:

The City seeks to replace the word "rights" with the term "prevailing rights", strike the references to "working conditions" and "established benefits" and substitute for the latter the phrase "prevailing rights". The City would then define "prevailing rights" as binding "past practices".

C. The Union's Proposal:

The Union seeks to maintain the current language which had been the subject of an interpretive arbitration award.

D. THE FACT-FINDER'S ANALYSIS, FINDINGS AND RECOMMENDATIONS:

On February 17, 2010 Arbitrator Virginia Wallace-Curry issued an Award resolving grievances filed over the City's removal of certain employees from extended sick leave or injury-on-duty status and its placement of them on vacation

leave. The Union alleged that the City had violated, inter alia, Article 7.

In resolving the grievance, Arbitrator Curry interpreted the term "prevailing rights" as "past practices", and adopted the definition set forth in "The Common Law Of The Workplace", Section 2.20, (St. Antoine, Editor, 2nd ed., 2005): "[A] past practice is a pattern of prior conduct consistently undertaken in recurring situations so as to evolve into an understanding of the parties that the conduct is the appropriate course of action."

Conceding that a prior Arbitration Award has defined the term "prevailing rights", the City states that it "does not want to have to argue the prior arbitration award in a hearing, but rather [wants to] have clear contract language defining 'prevailing rights'."

The Section 2.20 definition is simply a simplified version of the standard definition of a "past practice" as first formulated by Arbitrator Justin in Celanese Corp. of Am., 24 LA 168, 172 (Justin, 1954). See, Elkouri & Elkouri, "How Arbitration Works", at p. 608 (6th ed., Alan Miles Ruben, Editor-In-Chief, 2003); "In the absence of a written agreement, a 'past practice', to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated

and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties."

The Justin definition was adopted by the Ohio Supreme Court in Association of Cleveland Fire Fighters, Local 93, I.A.F.F. vs. City of Cleveland, (2002), 99 Ohio St.3d 476; 793 N.E.2d 484; 2003-Ohio-4278.

Because the Justin definition has been repeatedly cited with approval in arbitration awards and followed by the Ohio Supreme Court, it makes sense to incorporate that language into the Contract provision.

The City's proposed deletions from the present text of Article 7 of the terms "working conditions" and "established benefits" have not been the subject of further explanation, and cannot be recommended at this time.

Accordingly, the Fact-Finder finds appropriate, and recommends that Article 7 be amended to read as follows:

Section 7.1: All prevailing rights and working conditions enjoyed by employees at the present time which are not included in this Agreement shall remain in full force during the term of this Agreement."

Section 7.2: The City agrees not to diminish any prevailing rights or established benefits now enjoyed by the employees.

Section 7.3: A 'prevailing right' is one that is (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time

as a fixed, and established practice accepted by both parties."

II. Article 10 - "Work Schedules and Hours":

A. The 2006 Contract:

Article 10 of the expired Contract provided in relevant part:

"Section 10.1: During the period of this agreement, each employee covered by this agreement shall work a normal tour of duty, which shall be a twenty-four (24) hour tour, and shall be assigned by the Fire Chief. Each employee shall work a normal tour of duty of twenty-four (24) hours on duty immediately followed by twenty-four (24) hours off duty. After five (5) calendar days, in which the employee works three (3) twenty-four (24) hour tours then he/she shall be off-duty for four (4) calendar days, and then revert to his/her normal schedule of twenty-four (24) hours on-duty followed by twenty-four (24) hours off duty. On duty tours shall be an average of fifty-six (56) hours per week (2,912 hour per year) for the first 2 years of employment. Beginning in the 3rd year of employment the hours shall be an average of fifty-two (52) hours per week (2,704 hours per year). Beginning the fourth year of employment the work week shall be an average of fifty (50) hours per week (2,600 hours per year.)

"Members changing work week hours during the year (56/52) shall be granted 4 hours of FHT for each 52 hour week worked. Members changing work week hours during the year (52/50) shall be granted 6 hours FHT for each 50 hour week worked until January 1st when the regular 50 hour schedule shall become effective. (Provided herein below):

"Each member assigned to a twenty-four (24) hour tour, 50 hr. work schedule shall receive three hundred twelve (312) hours of 'Kelly Day' time per year. This time shall be granted in the following manner:

"One hundred-twenty hours (120) of floating holiday time (FHT) shall be added to each member's FHT total as of January 1st each year. On the first day of each quarter throughout the year, (January 1, April 1, July 1, and October 1) each member will be granted twenty-four (24) hours of 'Kelly Day', or choose to bank the time and add to

their FHT total. When scheduling this time, the following guidelines will be followed:

"1. Each 'Kelly Day' will be picked before the 15th day of the month preceding that quarter.

"2. The 'Kelly Day' will be chosen by using the departmental seniority list per shift.

"3. Assistant Chiefs and Captains will not be permitted to pick a 'Kelly Day' unless one (1) officer of these ranks remains on duty.

"4. No more than one (1) member on 'Kelly Day' per work day.

"The additional ninety-six (96) hours of 'Kelly Day' time, may be banked as FHT or the granting of, the scheduling of, and the guidelines to be followed will be determined by the Fire Chief. The policy set forth for the scheduling of the additional ninety-six (96) hours will be reviewed at the end of each year and will be subject to change as determined by the Fire Chief. The availability of this time shall not be reduced.

Section 10.2: Exceptions to Section 1 above shall be all employees who are assigned by the Employer to work a normal week of forty (40) hours. Such forty (40) hour employees shall work a normal tour of five (5) eight (8) hour days per week or such other schedule as the Fire Chief shall determine to be in the public interest. Forty (40) hour employees shall be on-call during their paid lunch period.

Section 10.3: All hours worked in excess of the normal tour of duty in Sections 1 and 2 above shall be considered overtime."

B. The City's Proposal:

The City seeks Contractual recognition of the twenty-eight day, 212 hour schedule such that all hours worked in excess of 212 in a twenty-eight day period would be

compensated at time and one-half the regular rate of pay, consistent with the Fair Labor Standards Act (FLSA).

The Employer also proposes that the present "floating holiday time" provision be excised from the Agreement, that the existing policy of cashing-out "FHT" (Floating Holiday Time) be terminated, that the time be scheduled-off instead, and that each twenty-four hour tour employee be scheduled-off once every ninth tour.

The City rejects the Union's proposal that all tour employees, regardless of their years of employment, work an average of fifty-hours per week.

C. The Union's Proposal:

The Union proposes to amend Section 10.1 to provide:

"On-duty hours for all shift members regardless of years employed shall be an average of fifty (50) hours per week (2,600 hours per year)."

D. THE FACT-FINDER'S ANALYSIS, FINDINGS AND RECOMMENDATIONS:

The City asserts that its proposal of scheduling twenty-eight day, 212 hour work periods, with twenty-four hour tour employees being scheduled-off once every ninth tour, would provide the same 312 hours, or thirteen tours of paid "Kelly Day Time", but, would reduce the amount of "built-in overtime".

The City's further proposal for the deletion of "floating holiday time", and termination of the practice of cashing-out reduced workweek time instead of requiring that the time be scheduled-off, has the potential of saving the City five hundred hours of floating and regular holiday time for each Firefighter, or, at the average hourly wage rate of \$19.00, some \$9,500.00 per Firefighter.

The City did not provide information as to the interplay of their proposal with the manning of Fire Stations on each shift or quantify the potential effect on overtime utilization.

The economic significance of Elyria's present scheduling system was assessed by the McGrath Management and Operations Study which concluded: "Although there are a vast number of days-off, there does not appear to be an increase in overtime hours."⁴

The Union estimated that the elimination of FHT and holiday time sell-backs for the twelve months ending in May, 2010 would have resulted in Bargaining Unit members losing \$270,287.00 in cash paid for not taking earned leave. However, the Union calculates that were members

⁴ Overtime expense reached a height of \$871,340.00 in 2006 and declined in each year thereafter. As of the end of the third quarter of 2010, overtime expense was \$106,540.00.

required to take all "floating holiday time" off, at least an additional four personnel would be needed to cover the hours no longer worked and maintain the same manpower level. The cost to the City would amount to approximately \$407,000.00 a year, or \$137,393.00 more than the 2009-2010 cost of the "sell-backs".

The Fact-Finder observes that requiring Firefighters to take their "floating holiday time" appears inconsistent with the City's general assertion that Firefighters have too much time-off, its specific opposition to reducing the work hours of employees with less than three years of service, and its desire to decrease overtime compensation.

Elyria's twenty-four hour tour Firefighters are scheduled to work 2600 hours a year. Among the eleven jurisdictions the City has proposed as comparable, only Hamilton schedules the same 2600 hours as does Elyria. Three jurisdictions - (Parma (2502) and Mansfield and Euclid (2496)) - schedule fewer hours. On the other hand, seven of the jurisdictions schedule Firefighters for more work hours per year - Canton (2621); Middleton, Springfield, Lorain and Youngstown (2652) and Cuyahoga Falls and Warren (2704).

Translating these annual totals into weekly schedules Parma, Mansfield and Euclid Firefighters work forty-eight

hours, while those of Hamilton work fifty. The rest of the jurisdictions schedule between 50.4 and 52 hours per week.

Among the Union's list of seventeen jurisdictions it proposes as comparable for this purpose, seven schedule Firefighters for fewer than fifty-hours a week - Brunswick, Euclid, Mansfield, Mentor, Parma, Strongsville and Westlake. Sheffield Lake and Cleveland Heights maintain the fifty-hour workweek adopted by Elyria. Avon (51.7), Avon Lake (52), Cuyahoga Falls (52), Lorain (51), Lakewood (50.4), North Olmsted (50.4), North Ridgeville (50.769) and Sandusky (51) schedule more hours.

Elyria's fifty-hour workweek for four Firefighters is not substantially less than that required by other jurisdictions.

Firefighters have been allowed to bank and cash-in or "sell-back" unused "floating holiday time" since the 1977 Contract.

The restructuring of Article 10 to eliminate sell-backs as proposed by the City goes far beyond any present financial need and cannot be recommended at this time.

The Fact-Finder comes next to consider the Union's proposal to reduce to fifty, the weekly work hours of Firefighters with less than three years seniority. The Union argues that their present differentiated work

schedules is unique to Elyria, and that all similarly situated Firefighters should work the same number of hours.

But, the City cogently argues that the additional hours allow the newer employees to receive the extra training they need, and that any curtailment of their hours would either hamper their development or cause the City to provide the training at an additional overtime expense.

The circumstances cited by the Union were known at the time the Union agreed to the scheduling differentials, and the Fact-Finder does not find any justification for recommending reducing the schedule of Firefighters with less than three years of service.

Accordingly, the Fact-Finder finds appropriate and recommends that Article 10 be carried forward without change and incorporated into the successor Contract.

III. Article 13 - "Overtime":

A. The 2006 Contract:

The expired Contract provided:

"Section 13.1: All employees covered by this agreement shall receive overtime pay when:

"A. Called-in (when off-duty) due to serious fires, emergencies, for special instructions, training, or any other Fire Department business, shall be paid a minimum of four (4) hours and for actual time to the nearest tenth (1/10) of an hour for all time beyond four (4) hours including meal time. 40 hour employees shall have the option of taking overtime pay or taking FHT at the same rate (4hrs OT =6hrs FHT).

"B. Held over at the close of the regular shift for any of the above reasons, and shall be paid a minimum of two (2) hours and for actual time to the nearest tenth (1/10) of an hour for all time beyond two (2) hours.

"Section 13.2: Call-in and holdover overtime shall be paid at one and one-half (1 ½) times the employee's basic hourly rate of pay, determined by dividing the employee's annual base salary by 2080 hours, except for the following:

"Two (2) times the basic hourly rate for Sundays and legal holidays, except New Year's Day, Thanksgiving Day, and Christmas Day (based on 2080 hours);

"Three (3) times the basic hourly rate of pay for New Year's Day, Thanksgiving Day, and Christmas Day (based on 2080 hours).

"Regular pay plus ½ times for working regularly scheduled 24 hour days beginning at 0800 hours on Thanksgiving Day, Christmas Eve Day, and Christmas Day.

"Section 13.3: Notwithstanding Sections 13.1 and 13.2 herein, whenever an employee is called in to fill the shift complement established by the City, such employee shall be compensated at one and one-half (1 ½) times the employee's basic hourly rate computed by dividing the employee's annual base salary by the employee's annual hours plus longevity.

"Section 13.4: All overtime due shall be paid to employees the first pay day following the pay period to include all overtime worked, up to and including the last Wednesday of the pay period. Longevity shall be paid on all overtime. Such overtime is to be reported to the City Auditor on the Thursday following that Wednesday."

B. The City's Proposal:

The City wishes to limit the four-hour minimum call-in pay to cases of "serious fires and emergencies", and reduce the scheduled call-in pay minimum guarantee to two-hours.

With respect to "hold-overs" the Employer seeks to limit the two-hour minimum to situations where an employee has worked at least thirty-minutes.

Consistent with its proposal to modify Article 10 - "Work Schedule and Hours" - the Employer proposes to eliminate the "forty-hour" employee's option of taking compensatory Floating Holiday Time (FHT) in lieu of overtime pay for the call-in time.

In determining the overtime rate for all overtime except for emergency call-in overtime, the City would base the calculation upon the average of the employee's scheduled hours (2600 hours for twenty-four hour tour employees). The 2080 hour rate would be retained in the calculation of emergency call-in pay.

The City also wishes to delete Sunday overtime from the double time rate.

Finally, the City proposes to remove the longevity supplement from Contractual overtime wages, as distinguished from statutory (FLSA) overtime wages, for call-in and acting officer assignments where the Firefighter does not actually work the full paid time.

C. The Union's Proposal:

The Union wants to maintain the current Contract language without change.

D. THE FACT-FINDER'S ANALYSIS, FINDINGS AND RECOMMENDATIONS:

1. Exclusion Of Longevity From The Calculation Of The Overtime Rate:

The City reprises its unsuccessful 2006 proposal to eliminate longevity compensation from the calculation of Contractual overtime pay.

The longevity payment, though separated from the basic wage rate, is a regular and inseparable component of an employee's regular hourly wage. The Fact-Finder finds no justification for materially lowering the compensation paid to an employee when the overtime hours are "contractual" hours, as opposed to "FLSA" hours.

2. The Overtime Base Of 2080 Or 2600 Hours:

The City would calculate overtime rates in two different ways. For emergency call-outs the 2080 hour base would be used. For call-outs of tour Firefighters to fill a shift complement, overtime calculation would be based upon the 2600 hour formula.

Of fourteen allegedly comparable communities cited by the City for this issue, four - Canton; Cuyahoga Falls; Lorain and Youngstown compute overtime compensation on the basis of 2080 hours a year, although each maintains an average workweek of more than fifty-hours - Canton - (50.4 hours); Lorain & Youngstown - (51 hours) and Cuyahoga Falls - (52 hours). Three - Euclid (2496 hours), Mansfield (2496 hours) and Parma (2496 hours) - base overtime rates upon more than 2080 hours but less than 2600. Two others - Cleveland Heights and Hamilton - calculate overtime on the basis of 2600 hours of work per year as proposed by the City. The remaining five jurisdictions base their overtime rate on more than 2600 hours: Lakewood (2620), Middletown and Springfield (2652), Warren (2704) and Zanesville (2912).

The City estimates that if the 2600 hour overtime base were utilized instead of the present 2080 hour, without elimination of the longevity element, it might realize an annual Contractual overtime saving of \$41,645.00. If

longevity were excluded from the overtime rate, the potential annual savings might increase to \$67,265.00. The actual amount of savings would depend upon whether the overtime would be "Contractual", or "FLSA", or emergency call-in resulting in more than 212 work hours in a twenty-eight day period.

Overtime hours have been declining over the past three years with the result that the City's total overtime outlays have significantly diminished.

In 2008 the Contractual overtime payments amounted to \$624,251.00. In 2009, the total fell to \$284, 357.00. And, as of the twenty-second of twenty-six pay periods of 2010, the aggregate reached only \$223,831.00.

Further reductions in 2011 can be expected because of the expanded workforce resulting from the SAFER grants.

The McGrath Consultants Report concluded that the City's overtime outlays were in line with what was spent by comparable communities.

The Fact-Finder does not find that the City's proposal should be adopted.

3. Overtime Rate Of Pay For Call-Ins And Hold-Overs:

The City seeks to limit the present four-hour minimum call-in pay only to cases of "serious fires and

emergencies" and reduce the call-in minimum for scheduled call-ins to two-hours.

When an off-duty employee is unexpectedly called-in, the employee's plans for the day go out the window. It is the inconvenience suffered by the employee that warrants a premium payment. If the employee knows in advance that he is to report for work when he would normally be scheduled off-duty, the employee's previous plans for utilization of his off-duty time can usually be adjusted. Since the interference with an employee's plans in cases of scheduled call-ins is significantly less than when he is called-in in emergency situations, the minimum hour guarantee need not be as great.

The Fact-Finder finds that the City's proposed call-in pay distinction is justified.

The City also proposes to limit the hold-over pay minimum at the overtime rate to situations where the employee is held over beyond thirty minutes.

During 2009, there were 122 occasions when employees were held-over at the end of their regularly scheduled shift. Of that total, 106 lasted for thirty minutes or less.

The total cost of the 2009 hold-over overtime pay amounted to \$10,770.00. Had the thirty minute minimum been

in effect, the City estimates it would have saved some \$7,530.00.

Although the amount is relatively small compared to the total personnel and benefit expenditures of the Department, this saving when combined with other relatively small cost reductions, can achieve economic significance.

On the other hand, the impact upon Bargaining Unit members would be modest, since the hold-overs are random and sporadic, and do not necessarily affect all members.

Of the McGrath Consultants' group of comparable communities only Cuyahoga Falls, Hamilton, Warren and Zanesville offer minimum hold-over pay, and only Hamilton offers a two-hour minimum although this is available only if the employee is held-over for more than one-hour.

Employees who are held over for less than thirty minutes normally suffer only a slight inconvenience, and their personal schedules can usually be appropriately adjusted.

The Fact-finder finds the City's hold-over proposals also have merit.

As to the City's proposal that forty-hour employees no longer have the option of taking floating holiday time instead of banking overtime pay, the Fact-Finder does not find sufficient reason to eliminate this provision and

thereby disproportionately affect the benefits of this small segment of the Department's staff.

4. The overtime rate of pay for Sundays and Holidays:

At present, employees who are scheduled to work on Sundays and legal Holidays receive two times their basic hourly rate. Those scheduled on New Year's Day, Thanksgiving Day and Christmas Day receive three times their basic hourly rate of pay.

The City's desire to identify "legal holidays" as those set forth in Article 16, Section 16.1 of the Contract is unobjectionable, but its proposal to eliminate Sundays from the premium call-in and holdover rates of pay cannot be recommended. Sundays, in common with legal Holidays, are typically "family time", not only because there is no school, but also because most adult family members who are employed are usually not scheduled to work on Sundays.

In view of the foregoing, the Fact-Finder finds appropriate and recommends that Sections 13.1 and 13.2 be amended as set forth below, and as so amended, carried forward and incorporated into the successor Contract:

"Section 13.1: Commencing on and after July 1, 2011 all employees covered by this Agreement shall receive overtime pay as follows:

"A. If an employee is called-in (when off-duty) due to serious fires and emergencies, the employee shall be paid at the overtime rate a minimum of four (4) hours and for

actual time to the nearest one-tenth (1/10) of an hour for all time beyond four (4) hours including meal time. Forty-Hour (40) employees shall have the option of taking overtime pay or taking FHT at the same rate (four (4) hours overtime = six (6) hours FHT).

"B. If an employee is held-over at the close of the regular shift the employee shall be paid at the overtime rate for the actual time worked to the nearest tenth (1/10) of an hour for the first thirty (30) minutes. If the employee is held beyond the thirty (30) minutes, the employee shall be paid a minimum of two (2) hours pay at the overtime rate, and if the employee works beyond the minimum of two (2) hours he shall be paid at the overtime rate for the actual time worked to the nearest tenth (1/10) of an hour.

"C. If an employee is scheduled in (when normally off-duty) for special instructions, training or any other Fire Department business, the employee shall be paid at the overtime rate a minimum of two (2) hours and for actual time to the nearest tenth (1/10) of an hour for all time beyond two (2) hours."

"D. Prior to July 1, 2011 all employees covered by this Agreement shall receive overtime pay in accordance with Section 13.1 of the 2006 Contract.

Section 13.2: Commencing on and after July 1, 2011 call-in and hold-over overtime, shall be paid at one and one-half (1 1/2) times the employee's basic hourly rate of pay, determined by dividing the employee's annual base salary by 2080 hours, except for the following:

"Two (2) times the basic hourly rate for Sundays and the holidays identified in Section 16.1 hereof, except New Year's Day, Thanksgiving Day, and Christmas Day. (based on 2080 hours).

Prior to July 1, 2011 all employees covered by this Agreement shall receive call-in and hold-over overtime in accordance with Section 13.2 of the 2006 Contract.

..."

IV. Article 15 - "Vacation":

A. The 2006 Contract:

The expired Contract provided in Article 15:

"Section 15.1: All employees covered by this agreement shall be granted vacation leave with full pay according to the following schedule:

"A. Twenty-four Tour Employees:

1 Year But Less Than 7	6 Tours of Duty
7 Years But Less Than 14	9 Tours of Duty
14 Years But Less Than 21	12 Tours of Duty
21 Years or More	15 Tours of Duty

"B. All Others:

1 Year But Less Than 7	2 Weeks
7 Years But Less Than 14	3 Weeks
14 Years But Less Than 21	4 Weeks
21 Years Or More	5 Weeks

"Section 15.2:

"A. If an employee is terminated, voluntarily or involuntarily, prior to taking his vacation, he shall receive the pro-rated portion back to his anniversary date of any earned but unused vacation leave at the time of separation. In the case of death of the employee, the unused vacation leave shall be paid to the extent provided for, by, and in accordance with Ohio Revised Code, Section 2113.04. No employee whose employment has been terminated shall be entitled to any pro-rated vacation pay unless he has been employed by the City for one (1) year.

"B. To calculate the amount due a terminated twenty-four hour tour employee, the following formula shall apply.

"Multiply the number of twenty-four (24) hour tours due the employee times 1/108 times the employee's base pay (including longevity).

"C. In the event an employee has taken his vacation, subject to normal scheduling procedures, prior to his having been employed by the City for one (1) year, he shall not be required to reimburse the City any vacation pay, nor shall he be entitled to any unused vacation.

"Section 15.3: Vacations shall be scheduled by each shift according to shift seniority. The vacation days shall be selected in three (3) day increments.

B. The City's Proposal:

The City seeks to reduce the Firefighters' vacation accrual to an amount proportional to that accrued by forty-hour City employees.

Thus, the senior Firefighters who work fifty-hours a week, and thereby working a regular schedule of 25% more hours than forty-hour employees, would earn and accrue 25% more vacation leave. Leave would be calculated in terms of "weeks-off".

For this purpose, the City would adopt a standard continuous hourly accrual method based on a twenty-eight day cycle for fifty-hour employees and a two week cycle for all other employees, and eliminate the present annual lump sum payment of accrued but unused leave. Employees leaving service would be paid only for the unused portion of vacation time that accrued in their final seniority year.

C. The Union's Proposal:

The Union would carry forward the present text without change.

D. THE FACT-FINDER'S ANALYSIS, FINDINGS AND RECOMMENDATIONS:

In pursuit of its goal of "proportionate equalization" and "continuous accrual" of vacation time, the City would allow "twenty-four hour", "fifty-hour" or "tour" Firefighters who have completed one year, but less than seven years of service, to accrue 7.7 hours of vacation allowance in each twenty-eight day cycle which would equal two weeks, or one hundred hours of vacation for each completed year of employment.

For each seven years of service, up to twenty-one years thereafter, tour Firefighters would receive an increased accrual rate reaching a maximum of five weeks or 250 hours of vacation.

Employees scheduled on a forty-hour per week basis, who have completed one year, but less than seven, would receive 3.1 hours for each bi-weekly pay period aggregating vacation time of eighty-hours, or two weeks per year. The sequence would continue for employees who have completed seven, fourteen, and, finally, twenty-one years of service, reaching a maximum of five weeks or 200 hours of vacation time.

However, the expired Contract adopted the concept that employee vacation entitlements are earned during a prior year's service, and taken in the succeeding year, rather

than in the same year as the City's accrual method contemplates.

Thus, Article 15 computes yearly earned vacation time as of the anniversary of the Firefighter's employment date.

The extent to which the City's proposal would materially improve the City's financial posture was not estimated. Employees leaving the City during the course of a seniority year would no longer receive payment for an entire year's unused vacation, but only for a pro rata share of the vacation time they would have earned if they had completed the full year.

However, it may be more expensive for the City to encourage its most senior, and hence most highly compensated employees to remain for the entire year in order to gain full vacation entitlements, rather than to replace them earlier with less costly new hires. In this connection the Fact-Finder calls to mind the City's concern about the timing of the annual uniform allowance payment. (See discussion of proposals for amendments to Article 17).

The significance of the proposal is uncertain since relatively few employees retire or otherwise leave City employment in any given year. For 2011, the City estimates that five employees will retire, and expects the same number to retire in 2012.

Moreover, implementation of the City's proposal would not be free from difficulties.

As the City's proposed vacation accrual is not divisible by twenty-four hour shifts, tour Firefighters would have to take some vacation time on an hourly basis. Furthermore, vacations are presently scheduled and approved in advance to minimize possible staffing shortages and resulting overtime. Having vacation time accrue throughout the year would inhibit advance scheduling, or require that it be done on "expectations" of continuing accrual.

The City also proposes to reduce the vacation hours of tour employees to 200.

According to the City in its listing of comparable communities, only Cuyahoga Falls offers the same vacation entitlements - 288 hours - to their tour employees with fourteen years seniority (the average for Elyria's staff) as Elyria. The other cities provide fewer hours: Mansfield (144), Lorain (159), Hamilton (168), Euclid, Middletown, Parma and Springfield (192), Canton (202), Warren (208) and Youngstown (224).

When vacation time-off is expressed in terms of shifts, Elyria's twenty-four shift employees with fourteen years seniority receive twelve shifts of vacation annually which the City would cut-down to 8.3 shifts. Again,

Elyria's total is matched only by Cuyahoga Falls. The other of the City's proposed comparable jurisdictions provide the following number of vacation shifts-off: Mansfield (6), Lorain (6.6), Hamilton (7), Euclid, Middletown, Parma and Springfield (8), Canton (8.4), Warren (8.7) and Youngstown (9.3).

When the Union's comparable jurisdictions are canvassed in terms of vacation time expressed in twenty-four hour tours, only Zanesville at 15, exceeds the number presently offered by Elyria. However, the average vacation entitlements of Union proposed comparable cities - 9.3 tours - is greater by one tour than the City's proposal.

In terms of hours of vacation leave, four of the McGrath Report's comparable communities, exceed the City's proposed 200 hours-off: Lakewood (240), Cleveland Heights (266), Cuyahoga Falls (288), and Zanesville (360). The City's proposal falls short of the average of 205 vacation hours offered by the McGrath listed Fire Departments.

The McGrath Consulting Group Report concluded that "overall, the Elyria Fire Department vacation schedule is in line with its market comparisons. There are, of course, certain Departments which offer less/more vacation than Elyria's; however, Elyria is within average parameters."

The Union asserts that when making comparisons with other jurisdictions, vacation time cannot be viewed in isolation, but rather that the Firefighters' total paid time-off entitlements, inclusive of vacations, holidays, personal and Kelly Days, must be considered. After their first year of service Elyria Firefighters' total hours of paid leave is exceeded by Cleveland Heights; Euclid and Mansfield, and is not significantly more than the amount of paid leave granted by North Olmsted; Strongsville and Cuyahoga Falls.

When other seniority levels are examined, Elyria's Firefighters do not receive greater amounts of paid leave than other jurisdictions.

For example, at the twenty-one year seniority level, Elyria Firefighters' total time-off is matched or exceeded by Avon Lake; Strongsville; Parma; Cleveland Heights; North Olmsted; Euclid; Cuyahoga Falls and Mansfield.

After one year, Elyria has the fewest hours-off of any of the seventeen cities the Union proffered as comparable for this purpose - Lorain, North Ridgeville, Avon Lake, Avon, Sheffield Lake, Strongsville, Westlake, Parma, Lakewood, Cleveland Heights, North Olmsted, Euclid, Cuyahoga Falls, Sandusky, Mansfield, Brunswick and Mentor.

After five years service Elyria Firefighters receive less total scheduled paid time-off than those in six of the seventeen jurisdictions: (Avon Lake, Strongsville, Parma, Cleveland Heights, Euclid and Mansfield).

At the ten year and fifteen year seniority levels, only three or four of the cities provide more time-off. By the twentieth year, however, seven jurisdictions provide more time-off (Strongsville, Parma, Cleveland Heights, North Olmsted, Cuyahoga Falls, Euclid and Mansfield.)

Whether vacation time-off is viewed independently or in conjunction with all other scheduled paid-time off, the Fact-Finder does not find the evidence persuasive that vacation allotments should be reduced.

The Fact-Finder therefore finds appropriate and recommends that Article 15 be carried forward without change and incorporated into the successor Contract.

V. Article 16 - "Holidays":

A. The 2006 Contract:

The expired Contract provides for holiday time-off as follows:

"Section 16.1: Twenty-four (24) hour tour employees covered by this agreement are authorized eight (8) tours of duty off per year in lieu of the hereinafter thirteen (13) stated holidays. The eight (8) tours of duty off shall be granted to the members of the Elyria Fire Department whether or not the member actually performed services on the stated holidays, and may be added to the employee's vacation. Twenty-four (24) hour tour employees may elect to receive one hundred ninety-two (192) hours of holiday time in lieu of the eight (8) tours of duty off per year. Employees may also choose not to take holiday time for any or all of these holidays, and cash out up to eight (8) of these tours upon notification to the Employer during December of the preceding year. Payment for holidays to be cashed out shall be made in January of that year. All other employees shall be granted the following [14] holidays..."

"Section 16.2: As provided in Section 1 above, the employee shall receive one (1) tour of duty off per year for personal business. This may be taken as a demand day with one (1) hour notice before starting time. Furthermore, employees may use one (1) of the tours of duty that is not cashed out in January of that year as a second demand day. Demand days must be used in twenty-four (24) hour increments. Those employees who average forty (4) hours per week shall receive three (3) eight (8) hour tours of duty off per year for personal business.

"Section 16.3: Twenty-four (24) hour tour employees may choose not to cash out one (1) tour for Martin Luther King, Jr. Day and/or one (1) tour for Good Friday, per Section 16.1. Such time for these holidays may be taken in one (1) hour increments.

Section 16.4: In addition to Sections 1,2, and 3 above, the employee shall receive one (1) tour of duty off for any day appointed and recommended by the Mayor as a holiday,

celebration, or a day of mourning, and it may be taken in one (1) hour increments.

....

Section 16.6: A. Beginning May 2007, each employee shall have the option on the first pay in May and the first pay in December of being paid up to 250 hours (500 per year maximum) of floating or holiday time. The maximum amount which an employee may accumulate at the end of each calendar year shall be three-hundred (300) hours. The pay shall be determined by dividing the employee's annual salary plus longevity by their normal annual hours of work.

Section 16.7: Each twenty-four hour tour employee on the payroll as of January 1st shall be granted six (6) tours of duty in lieu of the stated holidays or 144 hours of holiday time, even if employment is terminated before the year is over.

"B. Each employee on the payroll as of January 1st shall be granted the time subject to provisions in Sections 2, and 3 of this article.

"C. Neither Items "A" nor "B" will be subject to prorating, but will be paid in their entirety.

"D. Employees shall have the right to schedule or 'bank' their six (6) holidays in two (2) three (3) tour periods. Holidays shall be selected in three (3) day increments.

Section 16.8:

"A. All new employees hired after January 1st, whose employment is not terminated before the end of the first calendar year, shall receive only those holidays (Section 16.7(A)) that actually occur while he is on the payroll. To determine the time off due him, the following formula will apply:

"Multiply the factor (.55) times the number of holidays remaining. This will give the amount of tours (twenty-four (24) hours periods) due as time off. This time off shall be taken before the end of the first calendar year, except as otherwise mutually agreed to by the employee and the Fire Chief.

"B. Each new employee shall receive one (1) tour of duty for Good Friday only when Good Friday actually falls after his hiring date.

"C. Each new employee shall receive one (1) personal day which is not subject to prorating.

"D. Each new employee shall receive one (1) tour of duty in lieu of Martin Luther King Day, if he is actually on the payroll when this day occurs.

"Section 16.9:

"A. An employee starting after January 1st who is terminated before the end of that calendar year shall have his holidays (Section 16.7(A)) prorated on the basis of the actual holidays passed during his term of employment.

"B. Items "B", "C", and "D" of Section 8 also apply to these employees:

"Section 16.10: When an employee is not able to take this time off as provided in Sections 7,8 and 9 above due to his termination of employment, then he may, at his option, take the time off or receive pay based on the following formula:

"Multiply the number of tours (twenty-four (24)) due the employee time 1/108 times his base pay (including longevity)."

B. The City's Proposal:

The City proposes that Firefighters' holiday time-off be made proportionate to that received by other City employees, so that a tour Firefighter working fifty-hours a week, or 25% more hours than a forty-hour employee, would earn and accrue 25% more holiday time.

To accomplish this equalization, the City would reduce tour Firefighters' holiday time from 8 to 6.5 tours, or 156 hours, instead of the current 192 hours.

The City also proposes to allow a Firefighter to take-off the "personal business day" as a "demand day", to be taken in a single twenty-four hour increment, but permit only one Firefighter to utilize a demand day on any scheduled day or tour. The City further proposes to allow twenty-four hour tour employees to utilize two and one-half tours of holiday time - sixty (60) hours - in minimum increments of four-hours upon prior notice and approval.

The City would delete the Firefighters' present option of being paid for accumulated and unused holiday and floating holiday time.

Further, when a Firefighter leaves the City's employment, the City proposes that any earned and unused holiday time for that year be paid to him at the straight-time rate.

The City would also amend Sections 16.4; 16.7; 16.8 and 16.9 to read as follows:

Section 16.4: In addition the above-stated holidays, the employee shall receive ten (10) hours off for any day appointed and recommended by the Mayor as a holiday, celebration, or a day of mourning, and it may be taken in four (4) hour increments upon approval of the Fire Chief or his designee.

....

"Section 16.7:

....

"D. Employees shall schedule their six and one-half (6.5) holidays in conjunction with vacation scheduling or may designate holiday tours to be taken pursuant to Sections 16.2 or 16.3. Holiday time shall be scheduled in two (2) or three (3) tour periods except as set forth in Sections 16.2 and 16.3.

"Section 16.8:

"A. All new employees hired after January 1st, whose employment is not terminated before the end of the first calendar year, shall receive only those holidays (Section 16.7(A)) that actually occur while he is on the payroll. To determine the time-off due him, the following formula will apply:

"Multiply the factor (.46) times the number of holidays remaining. This will give the amount of tours (twenty-four (24) hour periods) due as time-off. This time-off shall be taken before the end of the first calendar year, except as otherwise mutually agreed to by the employee and the Fire Chief.

....

"B. Each new employee may use one (1) tour of holiday time as a personal business day.

....

"Section 16.9:

"If an employee starts after January 1st and is terminated before the end of that calendar year he shall not have the right to payment for any remaining holiday time not taken.

...."

C. The Union's Proposal:

The Union prefers to retain the text of Article 16 without change.

D. THE FACT-FINDER'S ANALYSIS, FINDINGS AND RECOMMENDATIONS:

The City's proposal to limit holiday time is similar to its proposal to restrict vacation time. That is, the Firefighter's holiday time-off should be proportional to the time-off taken by the City's forty-hour employees.

The City complains that at present the Firefighters receive 192 hours of holiday time or, 68% more hours than employees in the AFSCME Bargaining Unit.

The Firefighters, however, do not work the same schedules nor receive the same pay as other employees, and it does not necessarily follow that they should receive the same holiday time-off as other Elyria employees. Each Bargaining Unit is entitled to seek its own priorities, and not all value holiday time-off equally.

Keeping that caveat in mind, the more appropriate comparison is with the holiday time offered Firefighters in comparable communities.

When compared to the City's selected "comparable communities", the current 192 hours of holiday leave available to twenty-four hour tour employees is equaled by the City of Springfield and is exceeded by Euclid (216),

Lorain (240), Mansfield and Youngstown (264) and Cuyahoga Falls (312). Four others - Middletown (132), Hamilton (136) and Canton and Parma (144) - offer less holiday time.

No difference is apparent when holiday time is expressed in terms of tours. Here, Elyria's current eight shifts off is equaled by Springfield (8) and exceeded by Euclid (9), Lorain (10), Mansfield and Youngstown (11) and Cuyahoga Falls (13). But, Elyria does offer more tours off than Middletown (5.5), Hamilton (5.7), Canton and Parma (6) and Warren (7).

When the City's proposal to reduce the number of hours of holiday time-off to 156 is considered, only four of Elyria's eleven suggested comparable cities offer less time-off, while the remaining seven cities would offer more.

The 2009 McGrath Report stated: "The eight tours of duty, or 192 hours, are rather consistent with the surrounding Fire Departments".

The McGrath Report further pointed-out that in five out of the nine Departments the consultants deemed comparable to Elyria's, the Firefighters were paid overtime for working their holidays.

The Union again points-out that when Elyria Firefighter's total time-off, including holidays, personal

days, and vacation time, is considered, the aggregate is comparable to the total paid off-duty time offered in other comparable jurisdictions.

The City's proposal to eliminate the option of being paid for accumulated and unused holiday and floating holiday time is related to its proposal to amend Article 10 to eliminate floating holiday time altogether. The Fact-Finder once more observes that encouraging Firefighters to take time-off instead of working, is inconsistent with the City's basic premise that personnel should work more hours, not fewer.

The present holiday leave provision was placed in the last Contract as part of a "deal" in light of the increased benefits granted the Police personnel, and the acceptance by the Firefighters of increased responsibility for the payment of health care costs. That deal also involved an increase in the number of hours the Firefighters could bank for later payment.

The Fact-Finder does not find sufficient reason to revise the Holiday Article of the Contract as the City proposes.

The City has not presented evidence which would support its other suggested amendments to the Holiday Article, including the limitation of Firefighters' ability

to use demand days; the requirement that Firefighters take holiday time in minimum increments; the diminution of the holiday leave rights of new hires; and the reduction of compensation for unused holiday time upon termination.

Accordingly, the Fact-Finder finds appropriate and recommends that Article 16, Holidays, be carried forward without change and incorporated into the successor Contract.

VI. Article 17 - "Clothing Allowance:

A. The 2006 Contract:

The expired Contract provided in pertinent part:

"...

Section 17.3: Each employee shall receive a clothing allowance of one thousand dollars (\$1,000.00) annually for the purchase of regulation uniform and clothing. The clothing allowance shall be paid on the first pay day following July 12th of each year.

..."

B. The City's Proposal:

The City seeks to maintain the current amount of the Uniform Allowance but to change the single annual payment to quarterly payments.

C. The Union's Proposal:

The Union asks for an additional \$200.00 annually for the purchase of regulation uniform clothing. It rejects the City's request for quarterly payments of the allowance and wants instead, to retain the current provision for payment on the first payday following July 12th of each year.

D. THE FACT-FINDER'S ANALYSIS, FINDINGS AND RECOMMENDATIONS:

The City's proposal to pay the clothing allowance in quarterly installments is based upon its concern that "it

is entirely possible for an employee to collect \$1,000.00 from the City under this Article on the payday following July 12th, and then separate immediately from employment. In such a circumstance the City cannot recover the unused funds or the items purchased."

The circumstance envisioned by the City has not arisen in the case of any previous retirement or resignation. The speculation thus seems unwarranted in light of past experience.

Furthermore, employees do not purchase their uniforms and clothing in quarterly installments, and the consequence of the City's proposal would be that an employee who leaves the City's service at any time prior to the last quarter of the Contract year would not be able to obtain reimbursement for expenditures made earlier.

Finally, it is not clear that encouraging its most highly compensated Firefighters to postpone retirement in order to obtain at least three quarters of Uniform Allowance would be cost effective.

The Fact-Finder therefore does not find appropriate and does not recommend the City's proposal to pay the uniform allowance in quarterly installments.

As to the Union's proposal to increase the allowance by \$200.00, a survey of the City of Elyria's proposed

comparable jurisdictions reveals that three Departments - Euclid (\$1,900.00); Cleveland Heights (\$1,400.00) and Canton (\$1,300.00) offer more than Elyria; two Departments - Lakewood and Mansfield - provide the same allowance; six others - Youngstown (\$964.00); Warren (\$900.00); Lorain (\$800.00); Springfield (\$775.00); Middletown (\$750.00) and Hamilton (\$700.00) pay less.

Looking at the McGrath list of nine proposed comparable jurisdictions, only Cleveland Heights at \$1,400.00 pays more for clothing allowance, Lakewood and Mansfield pay the same amount as Elyria and the remainder of the jurisdictions pay less.

The Fact-Finder cautions that the clothing allowances set forth above represent, for the most part, the amounts available in 2009 under expired Contracts.

The Union insists that purchase of the required uniforms presently costs a Firefighter almost \$900.00 and when the cost of the "Class A" uniforms are added, the total amount for uniforms exceeds \$1,500.00.

The Union further notes that the personal purchases of clothing by Police Officers is much less than that of the Firefighters yet they receive \$25.00 more a year than the Firefighters.

The Union estimates the additional cost to the City, if the Union's proposal were adopted, would amount to \$15,000.00 per year, of which \$4,600.00 would be covered by SAFER Funds.

The City counters that Firefighters do not buy a complete uniform set every year so that the Union's reference to total uniform costs is misleading.

It has become common for employers to offer rather generous uniform allowances because the compensation is not subject to "roll-ups", and therefore becomes a cost efficient way of providing increased compensation to Firefighters.

The Fact-Finder will recommend the additional uniform allowance sought by the Union, and has considered that compensation enhancement when making his wage recommendation.

Accordingly, the Fact-Finder finds appropriate and recommends that Article 17, Section 17.3 be amended to read as set forth below, and as so amended, carried forward and incorporated into the successor Contract:

Section 17.3: Effective on and after July 1, 2011 each employee shall receive a clothing allowance of twelve-hundred dollars (\$1,200.00) annually for the purchase of regulation uniforms and clothing. The clothing allowance shall be paid on the first pay day following July 1, 2011 and for each year thereafter.

VII. Article 19 - "Sick Leave":

A. The 2006 Contract:

The expired Contract provided in relevant part:

"Section 19.1: Each employee covered by this agreement shall be granted sick leave with pay for personal illness or injury as follows:

"A. Paid sick leave will be earned and accumulated at the rate of one and one-quarter ($1\frac{1}{4}$) days for each month on the payroll.

"B. A new employee, at the end of two (2) months of employment, shall be advanced a total of six and one-quarter ($6\frac{1}{4}$) days of sick leave credit. However, the employee shall not be credited with any additional sick leave credit until he has worked a total of five (5) months.

...

"Section 19.8: If an employee was hired by the City before January 1, 1988, he shall receive pay for one-hundred five (105) days, plus fifty percent (50%) over one-hundred five (105) days, of his unused sick leave in cases of death, permanent disability, retirement, resignation for a proven bona fide illness of himself or a member of his immediate family, or leaving employment for any reasons after ten (10) years of continuous service. For those employees who were hired by the City on or after January 1, 1988, shall receive pay for up to one-third ($1/3$) the value of two-hundred ten (210) days of their accumulated but unused sick leave and up to an additional one-half ($1/2$) the value of the next seventy (70) days of their accumulated but unused sick leave. No such employee shall receive more than one-hundred five (105) full days' pay.

...

"Section 19.10: Sick leave shall be chargeable as follows:

"1. For personnel working a forty (40) hour week, sick leave will be charged in minimum units of one-half ($1/2$) hour.

"2. Personnel working a twenty-four (24) hour tour schedule shall be charged .33 hours for each hour or fraction of an hour's absence. They shall be charged eight (8) hours sick leave for each full tour of duty when absent.

...

"Section 19.12: An employee who does not use any of his sick leave in any period consisting of four (4) consecutive months shall be granted four (4) hours of FHT. An employee who does not use any of his sick leave in any period consisting of eight (8) consecutive months shall be granted eight (8) hours of FHT. An employee who does not use any of his sick leave in any period consisting of twelve (12) consecutive months shall be granted sixteen (16) hours of FHT, and shall continue to receive sixteen (16) hours of FHT every four (4) months until such time as he uses sick leave. The employee shall be permitted to use this FHT in accordance with the provisions of this Agreement."

B. The City's Proposal:

The City proposes to change the sick leave accrual benefit so that twenty-four hour tour employees would accrue one-hundred and fifty-hours per year instead of the current one and one-quarter days per month.

But, the City also proposes that tour employees be charged for utilization of sick leave on an hour-for-hour basis to be taken in minimum units of four-hours instead of the current charge of 1/3 of an hour for each hour of sick leave utilized and without a required minimum usage. [The City makes no proposal to restrict forty-hour employees use of sick leave to four-hour increments].

To implement its proposal, the Employer would change the present sick leave accrual method from one and one-quarter days for each month on the payroll to a continuing hourly accrual of 4.6 hours for each bi-weekly pay period for "forty-hour employees", and 11.84 hours for a twenty-eight day work period for "twenty-four hour employees".

The City would also change the name of the leave earned for the non-use of sick leave from "FHT" [floating holiday time] to "sick leave incentive time" and allow the Fire Chief to establish scheduling guidelines for the use of sick leave incentive time.

The City opposes the Union's proposal to remove the two-tier sick leave cash-out on separation, and allow all employees, not simply those hired prior to January 1, 1988, to receive the maximum allowance.

C. The Union's Proposal:

The Union seeks to remove the bifurcation between employees hired before and after January 1, 1988 so that the employees hired after that date receive pay for one-hundred five (105) days, plus fifty percent (50%) over one-hundred and five-days of unused sick leave in case of severance of employment under the same terms and conditions as employees hired before 1988.

The Union rejects all of the City's proposals to amend Article 19.

D. THE FACT-FINDER'S ANALYSIS, FINDINGS AND RECOMMENDATIONS:

The Firefighters accrue sick leave at a rate which has its origin in Contracts negotiated almost twenty years ago.

And, during the last set of negotiations the Firefighters agreed to contribute 15% towards the monthly premium for health care coverage and waived spousal coverage in exchange, inter alia, for increasing the sick leave payment and the creation of a sick leave incentive bonus.

The City would change the sick leave accrual methodology so that the twenty-four hour tour employees would accrue 150 hours per year, rather than the current 120 hours, but be charged for their use of sick leave on a hour-for-hour basis, instead of the current .33 of an hour, and be subject to a minimum usage of four hours. The City points-out that although tour Firefighters work 25% more hours per year than forty-hour employees and earn the same 120 hours of sick leave per year, they actually receive 66% more sick leave time, 360 hours, because their sick leave accounts are debited with only one-third of the hours actually used.

The City complains, first, that the present system of drawing down sick leave has allowed employees to take extended periods of absences while on paid sick leave pending their retirement with the result that the City has been precluded from hiring replacement employees. The problem has been exacerbated because employees with serious health problems can also utilize 312 hours of "floating holiday time" pursuant to Article 10, and 192 hours of holiday time pursuant to Article 16 to further extend their sick leave status.

The City notes that over the past three years, eleven employees have taken between twenty-eight and fifty-six calendar days-off. Another five were absent between fifty-seven and one hundred and twenty days. Four more employees were absent for over six months, and three more were absent for more than one year. One employee still on the payroll has been absent for over one year, and one other has been away for more than two years.

The Union rejoins that the Firefighters use only approximately 40% of all accrued sick leave - a rate which appears to be among the lowest among all City Departments.

In 2009 the Firefighters used an average of 5.2 sick days and in 2010 the Department average was only 2.5 sick leave days and, excluding the twenty-three Firefighters

hired in 2010 pursuant to the SAFER Grant, but including the group of Firefighters on extended sick leave cited by the City, the Department averaged only 3.5 sick days per Firefighter. .

The concerns over Firefighters who remain on extended sick leave from six months to over two years is better addressed by the adoption of a disability insurance policy. But, this is a matter that the Fact-Finder must leave to the parties for consideration in the next round of bargaining.

Second, the City argues that the sick leave allowance for tour employees is excessive when considered in light of the amount comparable communities provide because only .33 hours of accrued sick leave is debited for each hour of sick time taken. The City asserts that the "real" sick leave per year available to twenty-four hour tour Firefighters is 360 hours - an amount offered only by the City of Canton.

However, the City's proposal to reduce maximum annual sick leave of tour employees to 150 hours annually has been adopted by only one of the jurisdictions it lists as comparable to Elyria - Hamilton. Three others - Warren (118) and Parma and Euclid (144) offer fewer hours. The remaining seven communities on the City's list of

comparables offer more hours. The City's proposal of 150 hours is significantly below the average of these jurisdictions.

When expressed in terms of sick leave accrual rates per hour of work, Elyria's proposed accrual rate of 0.05769 per work hour is matched by three communities - Euclid; Hamilton and Parma - but less than that offered by six other of the City's proposed comparable jurisdictions and below the average of 0.06884.

Comparing the City's proposal of 150 sick leave hours per year with the hours offered by the comparable communities considered in the McGrath Report, the outcomes are quite similar. Three of those communities - Cleveland Heights; Lakewood and Hamilton - provide the same 150 as proposed by the City. However, six other communities - Lorain; Middletown; Springfield; Zanesville; Mansfield and Cuyahoga Falls - all provide more hours ranging from 156 to 216. The group average is 168 hours.

The results are no different when annual sick leave is expressed in terms of the number of twenty-four hour tours, or by accrual rates per hour of work.

In the larger array of nineteen jurisdictions which the Union has included in some of its Exhibits, five - Cleveland Heights; Hamilton; Lakewood; Mentor and North

Olmsted - offer the same 150 hours as proposed by the City, while four - Euclid, Parma, Brunswick and Strongsville provide less - 144 hours. Ten others provide more hours than proposed by the City - North Ridgeville (152); Lorain and Avon (156); Middletown (162); Springfield (166); Avon Lake (180); Sandusky (182); Mansfield (192), Cuyahoga Falls (216) and Sheffield Lake (360). The group average of 171.81 hours is significantly higher than the total proposed by the City of Elyria.

These comparisons suggest that the City's proposal to reduce maximum sick leave utilization to 150 hours is not to be recommended.

However, it is apparent that Elyria's present disjunction between accrual and utilization is both unique and excessive.

On balance, the Fact-Finder concludes that a modest increase in the utilization rate from .33 to .50 for each hour of accrued sick leave actually used, while still leaving Elyria's sick leave allotment relatively high compared to its peers, would bring it closer to the average, reduce the likely cash-out expense to the City, partially offset the additional cost of a wage increase and not irreparably damage the core of the parties' long-term bargain on the subject.

The City's proposal that sick leave be taken in four-hour increments also makes sense. Unlike holidays, personal business or vacation time, sick leave is offered to account for the contingency that a person is actually too ill to work.⁵ Allowing sick leave to be taken in hourly installments suggests that the time is being taken for reasons other than a temporary inability to work because of illness or injury or a doctor's appointment.

The Fact-Finder does not find any compelling reason to eliminate the "Floating Holiday Time" option expressed in Section 19.12. The "FHT" issue was previously raised and rejected by the Fact-Finder.

The City also seeks to revise Section 19.8 "to correct" two (2) demonstrably incorrect and ambiguous sentences identifying the terms of sick leave cash-out for employees hired on or after January 1, 1988, upon separation of employment after ten (10) or more years continuous service, in accordance with the Arbitration Decision on the subject issued on February 8, 2010.

The Fact-Finder sees no reason to let the adjudicated erroneous language remain in the Contract, and agrees that

⁵ FMLA-approved absences, according to the present regulations issued under the Act, may be taken in half-hour increments.

the language should be revised consistent with the Arbitration Award.

The Fact-Finder finally turns to consider the Union's proposal to remove the seniority based two-tier sick leave cash-out on separation as provided in Section 19.8 and, in its place, provide that all employees will have the ability to cash-out sick leave at the top-tier level upon their separation from service.

In light of the Fact-Finder's analysis of the sick leave provision and the City's financial posture, the Fact-Finder concludes that it is inappropriate at this time to eliminate Section 19.8's seniority-based two-tier sick leave cash-out system as the Union proposes.

The Fact-Finder therefore finds appropriate and recommends that Article 19, be amended to read as set forth below, and as so amended, carried forward and incorporated into the successor Contract:

Section 19.8: An employee hired by the City before January 1, 1988, shall receive pay for one-hundred five (105) days, plus fifty percent (50%) over one-hundred five (105) days, of the employee's unused sick leave in cases of death, permanent disability, retirement, resignation for a proven bona fide illness of the employee or a member of the employee's immediate family, or leaving employment for any reasons after ten (10) years of continuous service.

"An employee hired by the City on or after January 1, 1988 shall receive pay for up to one-third (1/3) the value of two-hundred ten (210) days of the employee's accumulated but unused sick leave and up to an additional one-half

leave. On and after July 1, 2011 the employee shall be permitted to use this FHT in minimum increments of four (4) hours."

(1/2) the value of the next seventy (70) days of the employee's accumulated but unused sick leave in cases of death, permanent disability, retirement, resignation for a proven bona fide illness of the employee or a member of the employee's immediate family, or leaving employment for any reason after ten (10) years of continuous service."

"No such employee shall receive more than one-hundred five (105) full days pay.

"Employees shall receive payment in full for their unused sick leave within thirty (30) days following their termination date unless they agree to some other form of payment."

...

Section 19.10: Sick leave shall be chargeable as follows:

"1. For personnel working a forty (40) hour week, sick leave will be charged in minimum units of one-half (1/2) hour.

"2. Personnel working a twenty-four (24) hour tour schedule shall be charged .33 hours for each hour or fraction of an hour's absence. They shall be charged eight (8) hours sick leave for each full tour of duty when absent.

"3. Commencing on and after July 1, 2011, personnel working a twenty-four (24) hour tour schedule shall be charged .50 hour for each hour or fraction of an hour's absence in minimum units of four (4) hours. They shall be charged twelve (12) hours sick leave for each full tour of duty when absent."

....

Section 19.12: An employee who does not use any of his sick leave in any period consisting of four (4) consecutive months shall be granted four (4) hours of FHT. An employee who does not use any of his sick leave in any period consisting of eight (8) consecutive months shall be granted eight (8) hours of FHT. An employee who does not use any of his sick leave in any period consisting of twelve (12) consecutive months shall be granted sixteen (16) hours of FHT, every four (4) months until such time as he uses sick

VIII. Article 21 - "Bereavement Leave":

A. The 2006 Contract:

Article 21, Section 21.2 of the expired Contract provides:

"Section 21.2:

"...

"An employee shall be allowed one tour of duty-off (charged to sick leave) in the event of the death of an aunt or uncle. FHT time (up to eight-hours) shall be available to attend the wake or funeral of a friend or relative not named above.

...."

B. The City's Proposal:

The City would delete the reference to "FHT time" and substitute in its place "sick leave incentive time" in order to make the text consistent with the City's proposal to delete "FHT" from Article 16 and renaming of "FHT" to "sick leave incentive time" in Article 19.

C. The Union's Proposal:

The Union opposes the elimination of FHT and therefore concludes that no change in the text of Article 21 is required.

D. THE FACT-FINDER'S ANALYSIS, FINDINGS AND RECOMMENDATIONS:

The Fact-Finder has not recommended the City's proposals to delete floating holiday time in Article 16 and to rename "FHT" as "Sick Leave Incentive Time" in Article 19.

Consequently, the Fact-Finder does not find appropriate and does not recommend the City's proposal to amend Section 21.2 so as to delete the term "FHT" and replace it with "Sick Leave Incentive Time" and "Holiday Time".

IX. Article 12 - "Wages and Longevity":

A. The 2006 Contract:

The expired Contract offered 3% annual wage increases and 1% longevity increments. Article 12 provided the following wage and longevity schedule for the last Contract year:

"C. Effective first pay period of July, 2008, employees within the bargaining unit shall receive a base pay in accordance with the following schedule:

	<u>Step B:</u>	<u>Step A :</u>
EMT - Fire Chief Assistant		\$73,457.44
EMT - Fire Captain		\$64,436.35
EMT - Fire Lieutenant		\$56,523.11
EMT - Fire Fighter	\$45,685.38	\$49,581.68
Fire Fighter	\$44,144.58	\$47,921.68

...

"Section 12.7: Longevity benefits will be a one percent (1%) salary increase for each year completed on the payroll following the completion of the employee's first anniversary date on the City payroll. The one percent (1%) increments due to longevity are limited to twenty per cent (20%)."

B. The City's Proposal:

The City proposes no increase in base pay and further proposes that both the base wage and longevity benefits be "frozen" for the duration of the Agreement at the amounts in effect as of July 12, 2009.

Further, the City wants to apportion and make payable on a quarterly basis various bonuses, incentives and allowances.

The City also seeks to discontinue longevity benefits for all employees hired after January 1, 2010.

C. The Union's Proposal:

The Union proposes a 2% base wage increase effective as of the first pay in July, 2011, and a 4% increase effective as of the first pay in July, 2012. It further proposes to modify Section 12.2 by adding terms governing Acting Officer Pay:

"B. When an employee is assigned to a higher rank two or more ranks above the rank he normally holds, he shall receive credit for such service according to the hourly base pay for that higher rank plus longevity.

"C. Demoted officers shall be given primary preference for acting pay according to former rank seniority as long as they are on the recall list for the higher rank. Other employees shall be assigned to higher rank according to departmental or rank seniority.

"D. At no time shall an acting officer jump above or ahead of a ranking officer for acting pay at the next higher rank. For example: A demoted officer in the rank of Firefighter cannot be assigned the acting Captain position above or ahead of a ranking Lieutenant. The Lieutenant would assume the Captain position and the Firefighter would be assigned acting Lieutenant."

D. THE FACT-FINDER'S ANALYSIS, FINDINGS AND RECOMMENDATIONS:

According to the City's calculations, as of December 31, 2009, Elyria's starting compensation wages, longevity and allowances totaled \$47,935.00. A wage comparison study prepared by the City showed that this compensation level

was the second highest among the eleven comparable communities suggested by the City or the nine utilized in the McGrath Report.

But, after the completion of the fifth year of service, Elyria Firefighters' total compensation amounted to \$54,414.00 - below that provided by five of City listed jurisdictions - Parma (\$61,352.00), Middletown (\$59,598.00), Euclid (\$58,672.00), Hamilton (\$57,674.00) and Cuyahoga Falls (\$55,792.00), but still above that offered by Lorain (\$53,152.00), Springfield (\$52,577.00, Mansfield (\$50,325.00), Canton (\$50,301.00), Warren (\$49,383.00) and Youngstown (\$46,918.00).

At the tenth and fifteenth year, the rankings did not materially change with Elyria ranking either sixth or seventh.

However, after twenty and twenty-five years of service, only Hamilton and Middletown paid their Firefighters more than Elyria. This change in status was attributable to the effect of Elyria's accumulative longevity payments.

Looking at the McGrath array of nine cities however, by the fifth year Elyria Firefighters' total compensation was \$1,200.00 less than the average of \$55,605.00.

By the tenth year of service the total compensation of Elyria's Firefighters - \$57,493.00 - fell short of the average of \$58,312.00 for the group of nine.

After the fifteenth year of service, Elyria's pay at \$59,972.00 was slightly higher than the average of \$59,049.00.

At both the twenty and twenty-fifth year of service, Elyria's total compensation was less than that paid by Hamilton, Cleveland Heights, Lakewood and Middletown, but still almost \$3,000.00 more than the average compensation of the nine communities after twenty years and by approximately \$2,500.00 after twenty-five years.

When the Union's schedule of sixteen comparable cities is surveyed quite a different picture emerges. According to the Union's calculation, the total compensation of Elyria's Firefighters with five years seniority (\$52,061.00) ranks 15th behind Mentor (\$69,971.00), Westlake (\$66,839.00), Strongsville (\$63,923.00), Avon Lake (\$63,408.00), North Olmsted (\$63,314.00), Cleveland Heights (\$62,634.00), Parma (\$61,652.00), Avon (\$61,598.00), North Ridgeville (\$58,694.00), Euclid (\$55,803.00), Cuyahoga Falls (\$55,110.00), Brunswick (\$54,788.00), Lorain (\$53,152.00) and Mansfield (\$52,496.00). Elyria's pay level was higher only than Sandusky (\$49,929.00) and

Sheffield Lake (\$49,320.00). At the ten, fifteen and twenty year service levels, Elyria's ranking among the sixteen would improve slightly to twelfth or thirteenth.

Several Contracts negotiated and taking effect in 2010, 2011 and 2012 offer compensation increases which would effectively place Elyria Firefighters' compensation materially behind their peers.

According to SERB records, in 2010 of twenty-three cities in Northeast Ohio, the following cities were reported as having given wage increases: Avon Lake (2.75%), Cleveland Heights (2.00%), Hamilton (3.00%), Mentor (3.00%), Middletown (3.00%), Sheffield Lake (3.00%) and Zanesville (4.00%). Three others - Euclid, Lakewood and Sandusky were recorded as affording no wage increments.

Ten had negotiated Contracts effective in 2011 and beyond.

Eight offered wage increases in 2011: Avon (3.00%), Avon Lake (2.75%), Cleveland Heights (2.00%), Euclid (2.50%), Lakewood (1.00%), Middletown (3.00%), Sandusky (1.00%) and Zanesville (4.00%). Cuyahoga Falls and Warren provided no increases.

For 2012 three cities granted raises: Cuyahoga Falls (2.25%), Lakewood (2.00%) and Sandusky (2.00%). One

allowed no raise (Warren). The remainder had not completed negotiations over wage proposals for 2012.

A survey made by the Union of thirty-five jurisdictions in Ohio which had negotiated contracts effective in 2010 or beyond revealed that twenty-five provided wage increases in 2010, averaging an increase of 2.04%.⁶ Nine jurisdictions offered no increase. (Ashtabula had a reopener clause). In 2011, twenty jurisdictions offered wage increases averaging 2.85%. The remaining cities had not yet completed negotiations.

In 2012 ten of the cities granted wage increases averaging 2.53% with the remainder still in negotiations.

The Fact-Finder must balance considerations of Elyria's relatively small General Fund carryover, and its uncertain revenue prospects for 2011 and 2012 with considerations of the Firefighters' economic status including (1) the fact that they have not received a wage increase beyond the automatic 1% longevity increment since July of 2008, while several of the comparable jurisdictions have offered greater increases; (2) the likelihood that ten

⁶ Five of the communities listed as comparable by the Union or both parties provided increases: Avon (3.00%), Avon Lake (2.75%), Cleveland Heights (2.00%), Mentor (3.00%), Strongsville (1.50%). Five others did not: Brunswick, Cuyahoga Falls, Euclid, Lakewood and Sandusky.

of the most senior and highly compensated Firefighters will retire in 2011 and 2012, and (3) the fact that the Fire Department's share of the City's wage and benefit budget has historically ranged between 22% and 24%, but was reduced as a lower priority for 2010.

Obviously, the recommendation of the Fact-Finder is a difficult judgment call, but at least, it is an informed judgment call.

The City estimates that a 1% base wage increase would cost the City an additional \$63,156.00 in a twelve month period after adjustment for "roll-ups" (Workers' Compensation - 4.1%, Medicare - 1.45% and OP&F (Pension) - 24%.

Certainly, if the increase were made effective as of July, 2011 the additional 2011 outlay required of \$31,600.00 is well within the City's ability to pay.

For calendar year 2012, again based upon the City's calculation, an additional wage increase of 1.5% which would take effect as of July, 2012 would result in an accumulative cost to the City in calendar year 2012 of approximately \$111,000.00. This amount would still be well within the City's financial capacity under current assumptions concerning a continuation of the economic recovery.

Taking all available information into account, and including the economic impact of his other recommendations, the Fact-Finder finds that the City can afford a modest increase in Firefighter wages and recommends that the successor Contract provide Firefighters with a one percent (1.00%) base wage increase effective as of the first pay period of July, 2011 and a one and one-half percent (1.50%) wage increase effective as of the first pay period of July, 2012.

Accordingly, the Fact-Finder finds appropriate and recommends that Article 12, Section 1, Paragraph A and B be amended as set forth below, and, as so amended, carried forward and incorporated into the successor Contract, and that Paragraph C be deleted:

"Section 1 (A): Effective with the first pay period of July, 2011 employees within the Bargaining Unit shall receive a base pay in accordance with the following schedule:

	<u>Step B:</u>	<u>Step A :</u>
EMT - Fire Chief Assistant		\$74,192.01
EMT - Fire Captain		\$65,080.71
EMT - Fire Lieutenant		\$57,088.34
EMT - Fire Fighter	\$46,142.23	\$50,077.50
Fire Fighter	\$44,586.03	\$48,400.90

...

"B.: Effective with the first pay period of July, 2012 employees within the Bargaining Unit should receive a base pay in accordance with the following schedule:

	<u>Step B:</u>	<u>Step A :</u>
EMT - Fire Chief Assistant		\$75,304.89

EMT - Fire Captain		\$66,056.92
EMT - Fire Lieutenant		\$57,944.67
EMT - Fire Fighter	\$46,834.36	\$50,828.66
Fire Fighter	\$45,254.82	\$49,126.91

...

The Fact-Finder comes next to review the City's longevity proposals.

Article 12 offers a 1% automatic salary increase as a "longevity benefit" following the completion of an employee's first anniversary date, and an additional 1% increment on each subsequent anniversary date up to twenty years.

In effect, Firefighters are guaranteed an annual wage increase which serves to help maintain employees' real income despite cost of living increases.

The City would discontinue longevity benefits for employees hired after January 1, 2010, and "freeze" each incumbent Firefighter's existing rate as of July 12, 2009.

Calling these payments "longevity" increments is a bit misleading since the premium is offered to employees after only one year's service.

The City declares that employees are in need of additional training instruction and supervision during their first three years of service in order to become fully effective. There is consequently merit in limiting this

annual increment to employees who have become fully proficient in their positions.

There is nothing unusual about delaying longevity payments beyond the first year of service.

Only Mansfield offers longevity pay after the first year of service.

Canton, Youngstown, and Lorain allow longevity to accrue after three years of service. Zanesville, Warren, and Springfield delay longevity payments until five years of service. Cuyahoga Falls and Middletown do not grant longevity.

In light of the City's professed need to reduce expenditures, the Fact-Finder believes that it is reasonable to reserve longevity payments for all employees hired after the execution date of this Agreement, until such employees have completed three years of service.

Accordingly, the Fact-Finder finds appropriate and recommends that Article 12, Section 7 be amended as set forth below, and, as so amended, carried forward and incorporated into the successor Contract:

Section 12.7: Longevity benefits will be a one percent (1%) salary increase for each year completed on the payroll following completion of first anniversary date on the City's payroll of all employees hired on or before July 1, 2011. For all employees hired after July 1, 2011 longevity benefits will be a one percent (1%) salary increase for each year completed on the payroll following each

employee's third anniversary date on the City's payroll. The one percent (1%) increments due to longevity are limited to twenty percent (20%).

The City's proposal to pay bonuses, incentives and allowances in quarterly installments is consistent with its proposals to accrue vacation and other benefits throughout the year proposals which the Fact-Finder has already rejected. The Fact-Finder is not persuaded of this significance either of the need for, or the benefit to be derived from, this compensation change, and therefore does not recommend adoption of the City's proposal.

The Union has not produced sufficient evidence to persuade the Fact-Finder to adopt its proposed changes to Section 12.2 - Acting Officer Pay.

X. Article 26 - "Grievance Procedure":

A. The 2006 Contract:

The expired Contract provides in Section 26.3:

"Section 26.3: Where the alleged grievance is of a nature that qualifies for appeal under the rules of the Civil Service Commission, the aggrieved employees shall have the option to appeal through Civil Service or proceed under this article, but not both."

B. The City's Proposal:

The City seeks to eliminate the alternative dispute resolution procedure of an appeal under the rules of Civil Service Commission, and make the grievance-arbitration procedure the exclusive dispute resolution procedure.

C. The Union's Proposal:

The Union insists upon retaining Section 26.3 without change, and thereby permit an aggrieved employee to choose either arbitration or a Civil Service Commission proceeding to resolve an issue which is cognizable under the Contractual grievance procedure and concurrently subject to the jurisdiction of the Commission.

D. THE FACT-FINDER'S ANALYSIS, FINDINGS AND RECOMMENDATIONS:

Allowing disputes involving Contractual provisions to be resolved within both the Civil Service Commission system and the arbitration process may give rise to conflicting

decisions with the consequence that employees who are successful in obtaining favorable Civil Service rulings may be subject to different working conditions than employees who have unsuccessfully pursued the same issue to arbitration, or vice-versa.

There is an even more subtle problem in allowing a dual dispute resolution system.

Where a particular employer action or inaction favors the interests of an individual or a group of employees, but disfavors another individual or group, the Union, as representative of the Bargaining Unit as a whole, may conclude that the employer's decision is correct and refuse to process the grievance of the disfavored person or group to arbitration. But, notwithstanding the objection of the Union, if the disfavored parties have the opportunity to resolve the matter through the Civil Service Commission proceeding the position of the Union could be undercut by an adverse decision, and the interest of the Bargaining Unit majority compromised.

In Batavia Local School District Board of Education Ohio Association of Public School Employees AFSCME, Local 4, 89 Ohio St.3d 191, 729 N.E.2nd 743 (2000), the Ohio Supreme Court determined that "in order to negate statutory rights of public employees, a collective bargaining

agreement must use language with such specificity as to explicitly demonstrate that the intent of the parties was to preempt statutory rights." That case involved the contracting-out of work performed by employees whose positions had just been "abolished". The contract was silent as to the District's authority to replace laid-off employees with independent contractors while O.R.C. Section 3319.08 offered job security. Justice Douglas held that "where the agreement makes no specification about a matter, public employers and public employees are subject to all applicable state or local laws or ordinances pertaining to wages, hours and terms and conditions of employment for public employees".

The issue does not arise, however, if the Contract contains a provision as to which a claim of violation is made and is thus susceptible to arbitral resolution of the Contract term at issue.

O.R.C. Section 4117.10(A) provides:

"If the agreement provides for a final and binding arbitration of grievances, public employers, employees, and employee organizations are subject solely to that grievance procedure and the state personnel board of review or civil service commission have no jurisdiction to receive and determine any appeals relating to matters that were subject of a final and binding grievance procedure."

The Fact-Finder therefore finds appropriate and recommends that Section 26.3 be amended to read as set

forth below, and as so amended carried forward and incorporated into the successor Agreement:

Section 26.3: It is acknowledged by the parties that this is a final and binding grievance procedure as defined in Ohio Revised Code Section 4117.10, and that any appeals regarding specific provisions of this Agreement are to be resolved exclusively through this grievance procedure as set forth in Section 4117.10.

XI. New Article 34 - "Water Rescue/Recovery Team":

A. The 2006 Contract:

The expired Contract did not contain a provision concerning the maintenance of a Water Rescue/Recovery Team.

B. The City's Proposal:

The City opposes the inclusion of a provision requiring maintenance of a Water Rescue/Recovery Team on the ground that the creation of a special unit and its staffing is a matter confined to the exclusive managerial discretion of the City. Since the matter is only a permissive, not a mandatory, subject of bargaining, the City declines to negotiate over the proposal.

C. The Union's Proposal:

The Union seeks to add the following Article to the Contract:

"Article 24 - Water Rescue/Recovery Team:

"Section 34.1: The City of Elyria shall continue to maintain a Water Rescue/Recovery Team with the standards governing the team to be determined by the Fire Chief with input from the Dive Team Coordinator. The size and composition of the team will be determined by the Fire Chief with direction from the Dive Coordinator with a minimum of nine (9) personnel. All members of the team shall be trained to a level of competency to be determined by the Fire Chief and Dive Coordinator.

"Section 34.2: Members of the Water Rescue/Recovery Team must attend a minimum of two-thirds of the scheduled training sessions and maintain the appropriate level of training to remain on the team. Any members called-in to attend training and/or respond to a call shall be

compensated according to Article 13 (Overtime) of the Collective Agreement."

D. THE FACT-FINDER'S ANALYSIS, FINDINGS AND RECOMMENDATIONS:

The Union points-out that over the past three years more than a dozen water related accidents have required response from the Department's Dive Team. In 2009 a child drowned in Elyria's Black River. Yet, the Union complains that the Department does not conduct the quantity of training necessary to maintain the competency of the Dive Team members. The lack of training, the Union contends, is the reason why there are so few volunteers to man the Dive Team. The training proposed by the Union would cost the City an additional \$20,500.00 a year.

The Fire Chief indicated at the Fact-Finding hearing that he would look with favor upon the training of nine Dive Team members, if economically feasible, but insisted that issues involving the training and deployment of Department personnel should lie within his sole discretion.

Consequently, the City opposes the Union's proposal on the ground that it is only a permissive not mandatory, subject of bargaining pursuant to Ohio Revised Code Section 4117.08(C), which provides:

"(C) Unless a public employer agrees otherwise in a collective bargaining agreement, nothing in Chapter 4117. of the Revised Code impairs the right and responsibility of each public employer to:

"(1) Determine matters of inherent managerial policy which include, but are not limited to areas of discretion or policy such as the functions and programs of the public employer, standards of services ... and organizational structure;

...

"(3) Maintain and improve the efficiency and effectiveness of governmental operations;

"(4) Determine the overall methods, process, means, or personnel by which governmental operations are to be conducted;

...

"(6) Determine the adequacy of the workforce;

"(7) Determine the overall mission of the employer as a unit of government;

"(8) Effectively manage the workforce;

"(9) Take actions to carry-out the mission of the public employer as an governmental unit.

"The employer is not required to bargain on subjects reserved to the management and direction of the governmental unit except as affect wages, hours, terms and conditions of employment, and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement."

The Fact-Finder agrees with the City that it cannot be compelled to bargain over the issue.

The Fact-Finder therefore does not find appropriate and does not recommend adoption of the Union's proposal to

add a "Water Rescue/Recovery Team" requirement to the successor Agreement.

XII. New Article - "Minimum Apparatus Staffing":

A. The 2006 Contract:

The expired Agreement does not provide for a designated minimum number of personnel to be "on the vehicle" when a Fire Department vehicle is dispatched for fire suppression service.

B. The City's Proposal:

The City rejects the Union's minimum staffing proposal on the ground that the subject is not one as to which the City is required to bargain pursuant to O.R.C. Section 4117.08(C)(4) and (6).

C. The Union's Proposal:

The Union seeks to have the following provision added to the Contract:

"New Article - "Minimum Apparatus Staffing":

Section 35.1: In an effort to provide for safety of Firefighters and the citizens of The City of Elyria, there shall be a minimum number of personnel assigned to Fire Department Vehicles.

"Section 35.2: Any time a Fire Department Vehicle is placed into service for emergency response situations, it shall maintain the following minimum number of personnel on the vehicle:

"A. Engine companies - minimum of three (3) personnel, recommended four (4).

"B. Tower or Ladder companies - minimum of three (3) personnel, recommended four (4).

"C. Rescue Truck - minimum two (2) personnel.

"D. Support Vehicles - minimum one (1) personnel.

"All personnel shall be properly trained on the operation of the vehicles that they are riding."

D. THE FACT-FINDER'S ANALYSIS, FINDINGS AND RECOMMENDATIONS:

While staffing decisions are ordinarily a matter of permissive, not mandatory, negotiations, if inadequate staffing affects the safety of employees, the matter may be said to implicate their "conditions of employment" and hence become a mandatory subject of bargaining. Cf., Toledo Police Patrolmen's Ass'n., Local 10, IUPA vs. Toledo, 127 Ohio App.3d 450, 713 N.E. 2d 78 (6th Dist., 1998).

Casting the issue in terms of "safety", and calling attention to NFPA Standard 1710 which recommends that engine and ladder companies be staffed with a minimum of four on-duty personnel in order to assure "safe, effective, and efficient emergency operations",⁷ the Union proposes

⁷ "NFPA 1710 outlines the following minimum requirements for staffing fire suppression services (based upon operations for a 2000 square-foot, two story, single family occupancy, with no basement, exposures or unusual hazards):

"A minimum of four fire fighters per engine company or truck company" (The standard sets requirements for the number of personnel required per company not per apparatus.) Therefore, "if a company is composed of two or more engines, it can staff each engine with two personnel

that the Elyria Fire Department dispatch Tower, Ladder and Engine vehicles to fire scenes with at least three personnel, and not just two Firefighters.

In support of its minimum staffing proposal the Union cites an April, 2010 study conducted by the National Institute of Standards and Technology of the United States Department of Commerce, (NIST Technical Note 1661) which examined the impact of crew size on Firefighter safety at residential structure fires, and found that NFPA standard 1710 was justified. The empirical study based on over sixty full-scale fire experiments concluded that four-person crews exceed three-person crews in performance and rescue ability.

The NIST study considered the physiological effects of crew size on Firefighters, and reported linkage between crew size, overexertion and sudden cardiac arrest.

The McGrath Consultants' Report, in which the Fire Chief concurred, found that safety considerations demanded that the Department be staffed with at least seventy-four Firefighters, including sixty shift personnel.

However, in 2009, Departmental staffing was reduced from seventy-five to fifty-two, and it was not until July,

as long as the company contains a minimum of four personnel continually operating together..."

2010 when, as a result of a SAFER Grant, furloughed Firefighters were recalled and new candidates hired, that the staffing was brought back to the 2008 level.

The 2009 elimination of Elyria's minimum staffing levels and the announced reduction of shift personnel from fourteen to eleven, was criticized by the City's former Fire Chief and by the Fire Chiefs of Hamilton; Springfield and Cleveland Heights as creating an unsafe environment for the Firefighters.

The Union points-out that all of the City's designated comparable Fire Departments staff their Engine Companies with at least three Firefighters, while Elyria, so the Union alleges, sometimes runs with just two Firefighters on an Engine or Ladder Company.

It should be kept in mind, however, that the Company personnel minimums observed in these jurisdictions was not Contractually specified.

Because the presentation focus of the parties in the instant proceedings was elsewhere, the evidence of a material threat to Firefighters safety, while suggestive, is too meager to permit a finding.

In any event, the problem is not immediate, and will arise only if the Fire Department staffing is once more substantially reduced should the present SAFER Grant not be

renewed or otherwise replaced when it expires in July, 2012.

Accordingly, the Fact-Finder does not find appropriate and does not recommend the Union's proposal to include a "minimum apparatus staffing" Article in the successor Contract.

XIII. Present Article 33 (To Be Renumbered) - "Duration of Agreement":

A. The 2006 Contract:

The expired Contract concluded its initial term on July 11, 2009.

B. The City's Proposal:

The City wishes to have the successor Contract take effect retroactively to January 1, 2010, and terminate on December 31, 2012.

C. The Union's Proposal:

The Union agrees that the successor Contract should begin as of January 1, 2010, but wants the successor Contract to terminate on July 11, 2013, rather than December 31, 2012.

D. THE FACT-FINDER'S ANALYSIS, FINDINGS AND RECOMMENDATIONS:

The Fact-Finder usually recommends that Contracts expire as of December 31st of a given year so as to coincide with a public employer's fiscal year.

The parties here have elected to begin their last Contract as of July 12, 2006 for a period which ended on July 11, 2009, and the Union requests that the successor Contract which is to commence as of January 1, 2010, continue until July 11, 2013 instead of December 31, 2012

in order to provide an additional leeway for what is likely to be a protracted and arduous period of negotiations. The point is well taken.

The Fact-Finder notes that before the current march towards a new Agreement reaches its destination, most likely with a Conciliation award, almost two years beyond the expiration of the 2006 Contract will have gone by.

Having the Contract end on July 11th, however, is awkward and the Fact-Finder recommends, instead, that the Contract expire as of June 30, 2013, a full six month period.

Further, to maximize the time for negotiations, an intent to change any of its terms should be announced at least ninety (90) calendar days in advance of the expiration date.

Accordingly, the Fact-Finder finds appropriate and recommends that presently numbered Article 33 of the initial Agreement be amended as set forth below, and, as so amended, carried forward and incorporated into the successor Agreement:

Section 33.1: This Agreement shall be effective on January 1, 2010 and shall remain in full force and effect until and through June 30, 2013, unless otherwise terminated as provided.

Section 33.2: If either party desires to modify or amend this Agreement the party shall give written notice of such

intent no earlier than one-hundred twenty (120) calendar days nor later than ninety (90) calendar days prior to the expiration date."

Fact-Finding Report and Recommendations issued this 26th day of May, 2011 at Cleveland, Ohio.

A handwritten signature in black ink, appearing to read "Alan Miles Ruben". The signature is written in a cursive, flowing style.

Alan Miles Ruben
Fact-Finder

AMR:ljg

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