

**STATE EMPLOYMENT RELATIONS BOARD
State of Ohio**

In the matter of Fact Finding between:)	Case No. 2013-MED-03-0380
)	
CITY OF WESTLAKE, OHIO,)	Hearings: August 15, 2013,
)	September 25, 2013 and
Public Employer,)	September 26, 2013
)	
and)	
)	
WESTLAKE FIREFIGHTERS)	FACT FINDING REPORT
ASSOCIATION, IAFF LOCAL 1814,)	
)	
Employee Organization.)	Before Mitchell B. Goldberg,
)	SERB Appointed Fact Finder

Date of Report: November 14, 2013

Appearances:

For the Association:

Ryan Lemmerbrock,	Counsel
Patrick M. Grealis,	President, Local 1814
Tyler Kelly,	Treasurer, Local 1814
Brian Wilker,	Trustee, Local 1814
Phil Gauer,	Vice President, OAPEE
Craig Goodwin,	Vice President, Local 1814
Nick Tummino,	Secretary, Local 1814
Mary Schultz,	Financial Expert

For the City:

Michael D. Esposito,	Shareholder, Clemans, Nelson and Associates, Inc.
Kevin Shebesta,	Senior Consultant, CNA
Jazmyn Stover,	Human Resources Director
Prashant Shah,	Finance Director
James Hughes,	Acting Fire Chief
Dennis M. Clough,	Mayor

I. Introduction and Background.

The Ohio State Employment Relations Board (“SERB”) appointed the undersigned as the Fact Finder of this public employment labor dispute on May 14, 2013. The parties and the Fact Finder

engaged in a mediation session on August 15, 2013. Certain issues were resolved and the parties became closer to resolving other issues, but the following identified issues remained in dispute.

Hearings were held on September 25 and 26, 2013 at the City's offices. The parties submitted timely pre-hearing statements in accordance with SERB rules and guidelines. They presented oral evidence and submitted documentary exhibits at the hearings. The following issues remain unresolved: Article (1) 14-Hours; (2) Article 19-Holidays; (3) Article 20-Vacations, Accumulation of Time; Article 21-Sick Leave; (5) Article 22-Longevity; (6) Article 23-Salaries; (7) Article 26-Health Benefits and Spending Plan; (8) Article 38-Acting Lieutenant's Pay; (9) Article 46-Duration; and (10) New Article-Fitness for Duty/Physical Fitness Testing.

Accordingly, the following recommendations on the unresolved issues in this Report incorporate all unchanged articles and provisions in the collective bargaining agreement that expired under its terms on February 28, 2013, all tentative agreements reached between the parties during their negotiations, through mediation, and any agreements reached during the hearing or made before the issuance of this Report. The following recommendations are made in accordance with the existing statutory factors and standards incorporated in SERB Rules and Guidelines. They are: (A) past collectively bargained agreements between the parties; (B) consideration of issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved; (C) the interests 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 stipulations of the parties; (F) such other factors, 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 procedures in the public service or in private employment.

II. Economic Evidence.

Westlake is located in the western part of Cuyahoga County, 13 miles west of downtown Cleveland. It has approximately 33,000 residents and is favorably located near 3 interstate highways and the airport. It is a desirable residential community with a broad range of available services that include parks, a Recreation Center, golf courses and other community services. It is home to many businesses that include hospitals, large public corporations, industrial parks, hotels and shopping centers. It is, by any measure, the most prosperous, if not among the most prosperous communities in the western part of Cuyahoga County and the surrounding counties.

The Council, Mayor and management all strive to provide the highest level of services to its residents, but take pride in keeping taxes at the lowest possible levels. The economic recovery has provided increased tax collections. These projected increases will ameliorate the State's reductions in funding to local governments by cutting local government taxes by 50%, and the elimination of the estate tax. While these reductions will have an adverse effect on the General Fund, management is optimistic that its operations and services will be maintained "at optimal levels." Labor costs are its largest expenses. It intends to control these costs by maintaining staffing levels, notwithstanding the increased population growth over the years. For 2013, it has budgeted for filling all vacant positions, but "it will only replace missing personnel if necessary." It operates under its statement that "fiscal conservatism has always been forefront."

Its lack of dependence on State funding is evidenced by the fact that income taxes represent approximately 51% of the City's General Fund revenues. Property taxes comprise 31% and State local government funding only represents 3% of General Fund Revenue. It appears that the economic recovery in terms of employment will produce higher income tax revenue and the upswing in the real estate market should produce higher property tax revenues. The City, however, is losing all revenue from the estate tax in 2013. The combination of lower state funding and estate tax elimination will

cause a decline in revenue of about \$1.8 million.

Nevertheless, the General Fund balance increased from \$12.4 million in 2010 to \$22.3 million in 2012, and is budgeted for a 2013 balance of \$18.1 million. The 2013 budget provides for significant increases in most departments with an overall budget increase of \$3.85 million or a 16% increase over 2012 expenditures. The 2012 carryover represents a 79% reserve carryover. The projected carryover in 2013 of \$18.1million would produce a 56% carryover reserve that is more than 3 times the GFOA recommendation of 2 months of operating expenditures, or in the City's case 16%.

The Fire Department is financed by the General Fund, the Police and Fire Operating Levy Fund and the EMS Fund. The percentage of General Fund spending for the Department fell from 14.4% in 2010 to 13.2% in 2012. Wages were the same in 2011 and 2012, but were lower than that paid in 2010. The operating levy produces about \$1.2 million per year and the EMS Fund produces about \$1 million per year. At the beginning of 2013, about \$22.4 million was available from the 3 funds to pay firefighter wages and benefits.

The Union's expert concluded that a 1% increase for the firefighters together with roll-ups would cost about \$42,000 for the first year. She noted that the 2013 budget for firefighters is \$448,000 higher than 2012, or an increase of 13%. Her bottom-line opinion is that the Union's economic proposals are “easily affordable.” The City did not substantially dispute her financial analysis. Accordingly, there is no “ability to pay” issue, but only an issue of financial decisions based upon the other SERB factors.

II. Unresolved Issues.

(1) Article XXIII-Salaries

The Union proposes across-the-board wage increases of 3.25% for each year of a 3-year CBA beginning March 1, 2013. It prepared a detailed cost analysis that considers the increases for 4 Captains, 6 Lieutenants, and 32 firefighters. The analysis considers only base wages and includes City

contributions for the pension fund, Medicare costs and Workers Compensation payments. The cost for the first year is \$129,040. and the cost over the life of the CBA is \$747,666. It compares the total compensation paid to fire employees in 15 other departments, including the nearby departments in Brookpark, Fairview Park, North Olmsted, Rocky River, Avon, Avon Lake, Berea, and Bay Village. Total compensation consists of base salary, longevity payments, paramedic pay, uniform allowance , bonuses, and payments for non-use of sick leave. Westlake ranks fifth in this group behind Beachwood, Solon, Strongsville and Middleburg Hts. The Union contends that its proposal will keep Westlake in the same ranking, while the City's proposal using the same type of data will cause the members to fall behind the other departments. Moreover, after insurance costs are factored in, that remove contribution caps as proposed by the City, Westlake will fall below Fairview Park to a six ranking within the group, while the Union's wage proposal and the retention of insurance caps will permit it to retain its five ranking.

The City focuses more upon internal comparability. It proposes a 1% across-the-board wage increase in each year of the CBA effective March 1 of each year. The Union received a 6% increase over the last CBA when many municipalities were having freezes or minimal increases and other concessions. It believes that the members are well situated when comparisons are made to departments that it believes are in the appropriate labor market for consideration. These include Avon, Fairview Park, Rocky River, Avon Lake, North Olmsted, Bay Village and North Ridgeville.

Its arguments for maintaining its conservative wage proposal are based upon the following factors: The City's population has stabilized; it has grown only by 3% from 2000 to 2010. This shows a stabilizing tax base. The General Fund had modest increases in 2009 and 2010, a large increase in 2011, but a regression back to 2008 levels in 2012. It reduced its expenditures to address the revenues in 2010, 2011 and 2012. It has increased its reserves and carryover balances to protect against the uncertainty of the economy and its increased personnel costs. General Fund tax collections have

increased at moderate levels; 2013 will mirror 2012 levels. It has managed for the state reductions in funding, the elimination of the estate tax and other taxes. Its interest income is at a record low. Property tax collections have been stagnant for the last 5 years. Collections in 2012 were \$.5 million less than 2009 collections. It believes the members are well paid based upon government data. It believes that the economy has a long way to go based upon the financial circumstances of the residents, 40.5% of whom are non-working, and 22% of whom are on fixed incomes. Moreover, the Ohio unemployment rate remains around the 7% range.

Also, when considering comparable communities, one must consider and evaluate their revenue sources compared with Westlake's. The City's comparison group income taxes range from a high of 2% for North Olmsted, and a low of 1% for North Ridgeville. Westlake is in the middle at 1.5%, but it exceeds all of the others in the City's group when per capita tax revenue is considered.¹

The Westlake members are well paid relative to comparable departments whether one considers the number 5 ranking within the Union's larger group, or their number 1 ranking within the City's chosen sample. I conclude that based upon the total evidence and data in the record, that comparisons involving the firefighters and command personnel with those performing the same specialized work are more meaningful than internal considerations involving the work performed by other represented and non-represented City employees.²

RECOMMENDATION: I recommend that wages be increased 2.25% across-the-board for all members beginning on March 1, 2013. Beginning March 1, 2014, the City should pay a 2.5% across-the-board wage increase. Beginning March 1, 2015, the City shall pay a 3% across-the-board wage increase to all members. These increases are based upon the evidence in the record together with my recommendation that caps are removed from member insurance contributions as set forth below.

1 Westlake is at \$615.16. The next highest in the group is Avon at \$484.25.

2 Comparisons involving the police wages are relevant. The police in Westlake are still in the dispute resolution process. They have gone through fact finding and are headed for conciliation.

(2) Article XXVI – Health Benefits and Spending Plan

The City proposes major changes to the article. The proposal mandates that during the new CBA the members must receive “the same insurance” as that provided to the non-bargaining unit members. The benefits would remain as currently exists for the first two contract years. In addition, a wellness program would be instituted that in the City's view would produce long-term cost savings. To encourage participants, those members who join and/or meet program goals and standards would receive reduced premium contribution rates.³ In terms of contribution levels, the current monthly cost sharing as between the City and members would remain at 90%/10% without any caps. The percentages would be adjusted for the second year to 85%/15%. During the last year, certain cost containment provisions would be inserted that first would limit the City's cost contribution to “a maximum base amount of the total cost per employee, per coverage type, per month depending upon certain surcharges or credits for healthy or non-healthy choices that are made.

For example, examining only family coverage, the base contribution without any surcharge or incentive would be 85%/15% of the 2014 employee contribution cost. Tobacco users would be surcharged 5% more, but could receive a 2.5% contribution deduction by accepting a health screening, for a net credit of 2.5%, altering the percentages to 82.5% for the City and 17.5% for the employee. Otherwise, the entire 5% surcharge would result in an 80%/20% level.

Beginning in 2015, the third CBA year, “any costs above the cumulative total of the City and employee base contribution amounts would be paid 50% by the City and 50% by the employee. Cost savings would produce reductions on the same 50%/50% basis. Employee affordability under ACA will be measured based upon the cost of the bronze or lowest tier offering and the employee's household income. Employees may contest their contribution levels if they believe they exceed the legal maximum by filing review requests with the Finance Director.

³ The Plan is self-insured with stop loss coverage, so “premium” might not be the correct nomenclature.

A health care committee would be established that would study, review and analyze available options for coverage and benefits. It could make changes to the plan and benefit levels. The Union would be required to participate in the committee, that would be composed of 1 non-bargaining unit employee, and management members equal to or less than the number of bargaining unit members so that there is a total odd number of voting members. The majority of the committee members would have the authority to recommend alterations to the plan benefit levels, and to make adjustments to coverage levels. This would also begin in the third contract year. They could recommend cost increases above the existing plan costs to participating employees, reduce plan costs, or maintain the existing costs. They could not recommend costs beyond the ACA maximum, but it is empowered to enhance, adjust or reduce plan costs, which costs are otherwise managed by the sharing formula and the 50%-50% cost sharing when costs rise above existing levels.

The key provision is that the City would be obligated to implement a valid committee recommendation, and the recommendations are considered final and binding upon all City employees, each of whom participate under the same plan and benefits. Union members who object to the recommendations are nevertheless bound by them and they forfeit their rights to grieve or appeal.

The City believes the proposal is reasonable to deal with the present uncertainties in health care and health insurance coverages and addresses cost containment, including preventative measures such as screening and a wellness program that are embodied as objectives in the ACA.

The Union objects to this proposal for a myriad of reasons. It proposes to maintain the current CBA language with 90%/10% and caps. It would add a provision that would provide its members with a 50% discount off the community recreation center family membership, a proposal that it believes will promote wellness. It does not object to a wellness program, but one should provide an incentive, such as a \$400 payment to employees who test negative for tobacco use and who voluntarily complete the City's proposed screenings.

It believes the City's request for increased contribution levels is unnecessary and unjustified. Its members have willingly accepted increased cost payments as medical costs have increased over the years at double digit rates. In 2006, firefighters were paying up to \$1,800 per year for family coverage. Now, their costs have increased to \$4,700 per year for the same family coverage, an increase of over 160%. It has acceded to the City's pleas for cost containment by having its members accept a larger load. This has produced major cost savings to the City. It paid nearly \$500,000 less than it paid in 2009 notwithstanding medical costs that have risen far beyond inflation. The May 2013 health care fund balance was over \$2.5 million, an increase of \$500,000 over 2011. The City attributes this to the good fortune of having good claim years, but the fund nevertheless is at its highest level in years. There is simply no rational or financial basis to further increase the employee's burden by increasing contribution levels or by removing the caps. Member families need certainty in managing their finances and budgets. The prospect of unexpected costs with no caps places these budgets in jeopardy. The City is in the position of addressing and managing these costs – the members are not.

The Union does not object to the formulation of a health care committee, or even the composition of the committee as proposed by the City. It objects, however, to the proposition that it would be required to be bound by all of the recommendations relative to plan provisions, benefits and costs, without any right to bargain or grieve if it believed that the recommendations were not in accord with the best interests of its members. It would not agree under any circumstances to forfeit its statutory right to bargain over these insurance matters. In the first instance, it objects to being forced to accept contribution levels and costs that are agreed to by the non-bargaining unit employees or other represented groups. Specifically, it does not want its present contribution levels increased beyond the present level with existing caps. It would not want to find itself in the position of having increased costs forced upon its members based upon the majority vote in a committee, with the City's contributions managed by a cap of only being exposed to 50% of any increase above current costs,

while its members would be assessed the other 50% of some unknown and possibly unaffordable cost increase.

The Union believes that the most important factor to consider is the comparable insurance costs being paid by neighboring firefighters for performing the same work. This factor should prevail over some artificial construct of internal uniformity where all city employees have the same plan with the same costs. Westlake's firefighters ranks as paying the sixth highest employee insurance expenses in the Union's 16 department comparison list. Beachwood has the lowest expense by far, and Brookpark has the highest employee expense. Westlake is close to Rocky River, which is somewhat higher, and more than North Olmsted and North Ridgeville. Westlake, however, is in better financial shape than most of these cities.

The City points to its more compact list of comparable departments; Avon, Avon Lake, Bay Village, Fairview Park, North Olmsted and Rocky River. All but Avon and Rocky River have 90%/10% contribution rates. Avon is at 80%/20% with optional plans, and Rocky River is at 87%/13%. None have caps, except for Bay Village, which provides for a cap of \$56/month for single coverage and \$96/month for family. This compares to the present Westlake contribution rate of 10% with a \$100/month cap.

The City believes that the members need to step up by putting “more skin in the game” to have the incentive to keep costs at manageable levels. Presently, they contribute much less toward insurance costs than employees statewide, 6.6% verses 11.5%. In terms of actual dollars spent, the cap of \$100/month is lower than the statewide average of \$171/month for family coverage. The City's costs of \$1,500/month, however, are more than the statewide average and somewhat higher than cities of its size.

Analysis of the Conflicting Positions

I accept the proposition that the plan itself in terms of provided benefits, co-payments,

deductibles and the like should be uniform for all city employees for purposes of administrative efficiencies. This does not necessarily mean that the contributions toward those costs should automatically be the same for all the employees. The chief executive or administrator could have the same insurance plan, but could have the right to have his or her employer pay more for insurance or even 100% of the cost as part of a comprehensive compensation arrangement. The contributions could vary for other groups of employees depending what is provided in their other wages and benefits.

The safety forces continuously argue that their work results in exposure to more medical care and services. No empirical data or evidence was provided in this record, but the argument seems logical and carries some weight. External comparisons that involve other safety forces performing the same type of dangerous work should control over internal comparisons with other City employees performing much different work. This might not be the case when the public employer is faced with heavy budget cuts that demand concessions necessary to perform the needed governmental services, but we are now beyond those circumstances for many of the state's public entities. This is certainly not the case in Westlake with its present financial health and prosperity, and its bright future.

This is not to suggest that health costs are no longer a concern. We are in the midst of a complete reorganization of health service delivery. It is truly uncertain as to what will happen with costs in the next few years with more of the country's population being insured, a shortage of medical providers, and the increased costs related to medical treatments. The ACA already has produced some improvements in cost management; but the question of whether costs will continue to rise at past annual levels still remains. There is evidence that the rate of increase has declined. No one knows if this will continue or what the future holds.

The City's plan has reasonable elements. A committee of the type proposed is a good start provided the committee members devote the necessary time and effort to study and analyze all of its available choices and options. It is in the best interests of all to control and minimize costs.

Knowledge and education are the best ways to make the best choices. However, going from an existing contribution formula that firsts eliminates the caps, then raises the percentages, and then provides a mechanism where this unit eventually forfeits its negotiating power for its members to a committee decision that exposes its members to future unknown costs and expenses, including a 50% share of increased costs over the City's present cost of \$1,500/month seems unreasonable and unnecessary at this negotiating point in time. There are too many unknowns. It seems unwise to commit to a fixed rigid formula for cost control without knowing the ACA's effects upon health care costs after it is in effect for some period of time. Moreover, there is no evidence that any other public employer in the state or elsewhere has implemented this type of system where the employer's costs are fixed with exposure for 50% of increases, and the employees through their committee are limited to choices within this fixed budget, and otherwise expose themselves to large increases for the other 50%. Nobody, at this point in time, has any idea where such a plan would eventually shake out.

The City's other ideas have merit. The credits for participating in the wellness program, health screenings, and credits for ceasing tobacco use are valid preventative measures that should produce long term savings. The credits, however, should apply only to the employees, not their family members. The idea that an employee has automatic control over the health choices of his or her family members is suspect. It seems reasonable to start with improving the employee's behaviors and hope that he or she would set an example for the other family members.

Recommendation: The City should continue deciding the insurance plan and coverages during the term of the CBA under the existing language in Article XXVI, but efforts should be made to develop a working committee of the type proposed by the City and accepted by the Union, with non-binding recommendations. The premium sharing language shall be changed to provide that employees will share 10% of the City's costs in 2013 and 2014, but without any caps, so that the City will be in line with the comparable cost sharing formulas in the other mentioned departments. For 2015, the

contribution level should be 12.5% if the City has in place its described wellness program. Employees (not spouses or family members) who meet the established goals with screenings and non-tobacco use would receive a credit of 1.5% toward their contributions, bringing their net contribution level to 11%, just .5% below the present state level. The rate shall remain at 10% if no wellness program is in place. Further, if employees meet their goals and qualify for the percentage reductions, the employee and his or her family members who participate in the City's insurance plan, or who otherwise have substitute medical insurance coverage shall be entitled to a 25% reduction for annual membership dues in the City's recreation center.

(3) Article XIV-Hours

The City proposes to add an additional work schedule, one for certain employees to work four-twelve-hour turns per workweek. The existing schedule consists of only firefighters who work the traditional 24/48 hour schedule. The new schedule would apply only to those employees hired after August 14, 2013, and those existing employees who volunteer for the duty. The specific work period, scheduling and shift timing would be determined by the City based upon operational needs. The justification for hiring this selected group of firefighter-paramedics is the fact that the department needs coverage during certain high call volume periods to serve the citizenry. The evidence shows that the high volume period is from 8:00 am to 8:00 pm. 79.71% of calls occur during this period compared to only 20.29% during the off-times. Hiring 12-hour employees who would become members of the bargaining unit would cover 144 peak time hours, compared to only 72 hours of peak time coverage if additional 24/48 personnel were added.

The City has prepared a proposed schedule for hiring three 12-hour firefighter/paramedics once a pending court case has been resolved. The purpose for this new scheduling plan is to address the service needs by efficiently hiring personnel for the heavy demand periods, while not retaining the additional personnel when they are not needed for lower volume call periods.

The Union has a number of objections and concerns. It is vehemently opposed to changing the traditional 24/48 schedule that provides around-the-clock staffing to deal with medical and fire emergencies when they occur. The Union views this proposal as an opportunity to address what it believes is an existing short-staffing problem that has caused its members to work harder and longer than other firefighters whose departments are adequately staffed. The Union is concerned about the placement of the 12-hour firefighters, problems that might occur during shift changes when calls occur, and other operational problems that will result from this radical change. It objects to being presented with the proposed change and details regarding the proposed schedule late in the bargaining process. The schedule was composed without rank and file input, or discussions with the command staff. Moreover, it believes that the City would be opening itself up to higher costs from more turnover that would occur after employees accept 12-hour positions, but would soon leave to join other departments when 24/48 positions become open.

Much discussion occurred about the change to 12-hour shifts that was awarded by this Conciliator in the city of Delaware, Ohio. This is the only other department in the state that is authorized to employ firefighters for 12-hour shifts or 40-hour work weeks to deal with high call volume periods. The fact is that this experiment has yet to be implemented, notwithstanding that the undersigned's conciliation award was issued on December 3, 2012 with the assurance that Delaware's plan was ready to be implemented immediately with the hiring of a number of firefighters willing to work the new schedule. There was evidence that both the City and the Union spoke to their various constituents in Delaware. Supposedly, Delaware hired 6 new firefighters for the new schedule and operated under the new schedule under a two week pilot program. The change was discontinued for operational reasons and has yet to be reinstated. Both parties stated that Delaware was more concerned about hiring additional 24/48 personnel to staff a new station, and that the new shift arrangement has been put on the back burner until sufficient staffing is in place.

Likewise, in terms of Westlake, there is consensus that the existing staffing level is low and existing vacancies need to be filled. Acting Chief Hughes confirmed the need for more staff. He stated that he would take additional 24/48 firefighters or 12-hour firefighters now and put them to work. Union bargaining representatives believe that they have been working in a short-staffed environment for sometime when there always has been sufficient funds to adequately staff the department.

Recommendation: I believe the idea of addressing particular high volume call periods with 12-hour personnel is reasonable on its face considering that most of the work now involves medical runs, and less fire runs. However, this should only be done when there already exists adequate or sufficient staffing to cover the entire 24-hour period with existing 24/48 staff. Moreover, all of the operational bugs need to be addressed, discussed and resolved before the plan is permanently implemented.

Westlake should continue to take its lead from Delaware if and when it actually puts its plan in place. Westlake's decision should be delayed until it is determined that the new shift schedule has a reasonable chance of addressing its coverage problems from an operational standpoint. It should assure itself that the new shift does not present a new set of unintended consequences that could otherwise be avoided if it did not hire these new 12-hour employees. Instead, it should first increased its staff to appropriate levels with existing 24/48 personnel before employing the new 12-hour shift personnel. Accordingly, I recommended that the existing contract language should remain with no change at this point in time.

(4) New Article-Fitness For Duty/Physical Fitness Testing

The parties spent a considerable amount of time negotiating over the specifics of these subjects, finally producing separate proposals. Ironically, they are requesting that the neutral, the least informed person in the room about the essential physical job requirements necessary to perform firefighting duties, recommend solutions to resolve their differences. The City's initial proposal combined the subject of a "Health and Wellness" program with mandatory physical testing requirements. I believe

these are two separate issues. I agree with the contractual requirement that the parties must agree to develop the program, and that the program could address the specific components identified in proposed Section xx.1 (a)-(1) in the City's initial proposal. However, this entire subject should be included under the Health Insurance article and not in a new article related to fitness to perform duties. These recommended components should be voluntary and should be supervised by health professionals. The individualized programs are intended to operate as preventative health measures that will eventually reduce medical care and lower the insurance claims and costs. The entire program should be subject to physician-care, provider-patient confidentiality that would not be disclosed to the employer, except on a voluntarily basis.

The subject of physical fitness sufficient to perform firefighter duties is a separate subject, one that is of vital interest to the employer and the community. The City, however, initially combined medical health testing with physical testing in its proposal for 4-year testing, 3-year testing and 2-year testing based upon employee age. Notwithstanding the preliminary issue of whether an employer and a union may legally agree upon physical fitness examinations based upon the criteria of age, the City's proposal contains tests for confidential medical information that would ordinarily remain confidential as between an employee and his or her chosen medical provider. It seems unreasonably invasive for the employer to have employees mandatorily tested for items such as prostate health and colonoscopies. These conditions and other medical testing should be done under the auspices of the wellness program on a voluntary basis. Moreover, requiring urinalysis and blood tests are subjects of drug testing and DOT regulations that are covered elsewhere in the CBA. Finally, all of this mandatory medical testing and examinations are to be conducted by an unidentified health care provider, not necessarily the employee's own treating physician or medical care provider. This person would then be required to notify the HR Director about a condition that would prevent the employee from performing the essential functions of his or her position, with or without a reasonable accommodation. I believe

that in the final analysis, the determination of whether the firefighter is medically able to perform all of the functions of his or her job should be decided by the firefighter and his or her own medical provider, or otherwise by command personnel or supervisors who observe the firefighters on an everyday basis. If supervisors reasonably suspect that a firefighter is impaired or unfit, based upon some apparent medical condition, the employee should be referred for a fitness for duty examination.

This would trigger the following physical fitness testing and examinations that I believe have merit.

Recommendation: The following recommendations combine language from each party's final proposal: Physical Fitness Testing/Incentive, Section .01 of the City's proposal shall be accepted but revised as follows:

The physical fitness of the bargaining unit members is a requirement of members of the City's Fire Department and benefit the citizens served by the Fire Department. As such, beginning in calendar year 2014, all employees shall take the physical fitness test described herein on a bi-annual basis. Testing shall be conducted annually, and shall be supervised and administered by the Fire Chief or his/her authorized representative. The test shall be administered on City property unless certain portions of the test require off-site testing. Any such off-site testing shall be deemed under the control and supervision of the City. The employee's participation in the mandatory testing on a bi-annual basis, or on a voluntary annual basis shall be considered in the course and scope of his/her regular employment.

Section .02 (a)-(e) shall be the language proposed by the City.

Section .03 shall be the language proposed by the Union, except 15:00 minutes shall be changed to 12:00 minutes and the monetary bonus shall be deleted.

Section .04 shall be the language proposed by the Union except for the last sentence in the first paragraph (beginning with "Any injury"), which shall be deleted. Section (b) shall be revised to state that a monetary bonus shall be paid of \$100 for scoring a composite score of a 50 percentile level or above, and \$150 for scoring 50 or above on each event.

The City's language in Section .01 of the Fitness for Duty section shall be accepted. Section 02 shall be accepted with the addition of the following language: "All leave benefits shall be restored to the employee if it is later determined under the provisions herein that the employee was in fact fit for duty."

Section .03 of the Union's proposal shall be accepted with the addition of the following sentence at the end: "Should the notification be that the employee intends to seek another examination, such examination must be conducted within thirty (30) days of the employee providing notice to the Employer (40 days from receiving the report)."

Section .04 of the Union's version shall be accepted.

Section .05 of the Union's version shall be accepted.

Sections .06 through .09 of the Union's proposals shall be deleted and the following language shall be added as Section .06

In the event that the employee is determined to be temporarily or permanently unfit for duty, the employee may contest the employer's decision by (1) filing a grievance under the within grievance procedures; or by (2) availing himself/herself of available state or federal administrative or court remedies, but the employee must choose one redress avenue or the other. The employee may also avail himself/herself of all available and applicable contractual leaves and/or FMLA leaves before being separated from service.

(5) Article XIX – Holidays

The City proposed changing holiday pay to conform to its proposed new 12-hour shifts. The Union proposes to increase the number of paid holidays from 4 to 5 for time and one-half compensation if the holiday is worked. This would bring the benefit in line with 11 other comparable departments who pay time and one-half for holidays if the firefighter works on the day of the holiday. The holiday ranges for these 11 other departments are from 5 to 12.

The City's proposal is premature. The Union's proposal is not supportable if the parties accept the above wage recommendations.

Recommendation: No change.

(6) Article XX - Vacation

The City proposes capping the vacation accumulation at ten turns for all new hires and those not currently accruing greater than that amount. Those hired before March 1, 2013 will be grandfathered at the existing accrual rate. The Union opposes to having different rates of accrual for firefighters who work together from a morale perspective. Moreover, there is no reason to reduce this financial benefit based upon the City's financial condition. The present maximum accumulation is 12 turns, a number within the average of the 16 comparable departments.

Recommendation: No change.

(7) Article XXI – Sick Leave

The City proposes capping sick leave accumulation at a maximum of 2,000 hours, a reduction from the current 2,500 hours. Employees with more than 2,000 hours now would be cashed out. The Union contends that 2,500 hours with a 75% payout after 25 years of service is within the normal range for the comparable departments, and there is no economic justification for reducing this economic benefit. Instead, it proposes to increase sick leave incentive pay from \$100 every 3 months for missing less than 6 hours to \$50 every month for missing less than 6 hours.

Recommendation: No change.

(8) Article XXII - Longevity

The City proposes to grandfather employees hired before March 1, 2013 for the current benefit. Those hired after that date would no longer be eligible for longevity pay. This benefit has been taken away from non-bargaining unit employees, and the benefit has been eliminated in the AFSCME CBA. The Union wants to retain this benefit that was achieved in past negotiations. It believes there is no economic justification for this take back. The police have this same benefit. The benefit is below the average longevity payments in comparable departments.

Recommendation: No change.

(9) Article XXXVIII – Acting Lieutenant's Pay

The Union proposes that a senior firefighter acting as a squad leader in the absence of an officer should be paid an additional rate of pay for performing these services. The City proposes current language based upon its belief that a senior ranking officer who is relocated to a station receives the higher lieutenant's pay. The Union wants additional pay for an acting squad leader of the paramedic unit except when a senior firefighter is already earning acting lieutenant's pay under this article. The City maintains that it assigns an officer only when one is needed, and that on some occasions it is not necessary to employ an officer and bear the additional expense. This subject needs further discussion and negotiations over the department's operational needs, and when, if at all, additional pay should be required for a lower rank officer performing a higher rank officer's duties and responsibilities.

Recommendation: No change.

(10) Duration

The City proposes a three-year contract retroactive to the expiration of the prior CBA, but wants to delete the reference to Section 4117.14 (G)(11). This states that notwithstanding this section economic increases may be agreed to or awarded by a conciliator to take effect in the fiscal year in which the conciliator is appointed. The City argues that the statute is designed to prevent cost impacts to political subdivisions that arise after the normal budgetary process. Inclusion of the present language adversely affects the public employer's right to evaluate retroactivity requests within the scope of bargaining, during each set of negotiations.

The Union contends that the City did not raise this issue in a timely manner. Placing it on the table at the last minute effectively limited the issue from being adequately discussed or negotiated. Moreover, the language has never posed a problem. It allows for the parties to negotiate without the artificial time limits imposed by the statute. This was language originally proposed by the City and

accepted by the Union.

Recommendation: No change.

Summary

This Fact Finder realizes that at the time of this Report the police have gone through the fact-finding process, and are headed toward conciliation. The above recommendations materially vary from the recommendations of wages and health insurance found by the police Fact-Finder. While recognizing that most fact-finders attempt to impose a substantial degree of parity between the police and fire in terms of economic issues, the record presented here contains unique issues relative to the firefighters that are not present in the police negotiations. The City has proposed a change in the traditional fire work shifts to include 12-hour shifts during peak medical run times. This has been conditionally recommended as stated above. It has also proposed mandatory fitness for duty requirements. These are proposals that were rejected by the Union, and could not be negotiated over the table. Since they are major changes to the CBA, and are recommended to be imposed upon the Union and its members, the proposals if awarded should not come without a price. Accordingly, the above recommended wage increases are somewhat higher than those recommended by the police Fact-Finder. Moreover, I do not believe that the City's major proposed unilateral changes in member health insurance costs and contributions should be instituted without a negotiated settlement beyond removing the caps and increasing the contribution levels as stated above.

Date of Report: November 14, 2013

/s/ _____
Mitchell B. Goldberg, Fact-Finder

Certificate of Service

This Report was served upon the following persons by electronic mail on the 14th day of November, 2013:

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/s/ _____
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