

**STATE EMPLOYMENT RELATIONS BOARD**

**FACT FINDER'S REPORT  
AND  
RECOMMENDATION**

IN THE MATTER OF:

CITY OF KETTERING

AND

KETTERING PROFESSIONAL FIREFIGHTERS  
INTERNATIONAL ASSOCIATION OF FIREFIGHTERS LOCAL 2150

Case Number: 2017-MED-10-1292  
Full-time Fire Captains

Before Fact Finder: Thomas J. Nowel, NAA  
June 8, 2018

PRESENTED TO:

Daniel G. Rosenthal, Esq.  
Jackson Lewis P. C.  
425 Walnut Street, Suite 2300  
Cincinnati, Ohio 45202

Stephen S. Lazarus, Esq.  
Lazarus & Lewis, LLC  
30 Garfield Place, Suite 915  
Cincinnati, Ohio 45202

Donald M. Collins  
State Employment Relations Board  
65 East State Street, 12<sup>th</sup> Floor  
Columbus, Ohio 43215

## INTRODUCTION

Thomas J. Nowel was appointed to serve as Fact Finder in the case as captioned on the cover page of this Report by the State Employment Relations Board on March 1, 2018 in accordance with Ohio Revised Code Section 4117.14 (C) (3). Hearing in this matter was held on May 8, 2018 at Kettering City Hall.

The City of Kettering Fire Department consists of Firefighters, Fire Captains, Battalion Chiefs and Fire Chief. The subject of this Fact Finding case is a bargaining unit representing Fire Captains. Currently there are 14 Captains in the bargaining unit. Prior to 2014, Captains were not unionized. The recently expired collective bargaining agreement was the first between the Union, representing Fire Captains, and the City of Kettering. The first negotiations were settled following the fact finding process. Bargaining unit members ratified the Report and Recommendation of Fact Finder Bernardini. Captains serve as supervisors, overseeing personnel and station activity, and they engage in various Department projects.

The parties engaged in collective bargaining negotiations commencing in November 2017. The term of the Agreement ended on December 31, 2017. Mediation sessions were held in January and February 2018. The parties reached a tentative agreement on all outstanding issues. It is unclear if the Union bargaining committee indicated to the City its concern that the tentative agreement may not be ratified by its membership. Union membership rejected the tentative agreement. The parties met again following the ratification meeting, outlined the status of unresolved issues and agreed to proceed to fact finding.

OUTSTANDING ISSUES

1. Article 7, Wages
2. Article 8, Hours
3. Article 9, Overtime Pay
4. Article 10, Holidays
5. Article 18, Uniform Allowance and Program
6. Article 20, Medical, Dental and Life Insurance
7. New Article, Removal of Reprimands
8. New Article, Random Drug/Alcohol Testing

APPEARANCES

Those participating for the City of Kettering included the following:

Daniel G. Rosenthal, Esq., Attorney for the Employer

Jill Tauber, Esq., Attorney

Mark Schwieterman, City Manager

Sara Mills Klein, Human Resources Director

Patti Houser, Human Resources Manager

Jenny Smith, Human Resources Manager

Tom Butts, Fire Chief

Mike Miller, Assistant Fire Chief

Those participating for the Union included the following:

Stephen S. Lazarus, Esq., Attorney for the Union

Alex Beck, Attorney

Peter Buncham

Neil A. Frederick

Mike Holbert

Shawn Morgan

## BACKGROUND

In analyzing the positions of the parties regarding each issue at impasse and then developing a recommendation, the Fact Finder is guided by the principles which are outlined in Ohio Revised Code Section 4117.14 (G) (7) (a-f) as follows.

1. Past collectively bargained agreements, if any, between the parties.
2. Comparison of the issues submitted to final offer settlement [fact finding] 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.
3. The interests and welfare of the public, the ability of the public employer to finance and administer the issues proposed, the effect of the adjustments on the normal standard of public service.
4. The lawful authority of the public employer.
5. The stipulations of the parties.
6. Such other factors, not confined to those listed in this section, which are normally or traditionally taken into consideration in 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 private employment.

During the course of the hearing, the parties had full opportunity to advocate for their respective positions, submit exhibits, present testimony and discussion, and engage in rebuttal of the submissions and arguments of the other party.

ANALYSIS AND RECOMMENDATIONS

**1. Article 7, Wages**

The Union proposes three across the board wage increases as follows. 3% effective (retroactive) January 1, 2018; 3% effective December 30, 2018; and 3% effective December 29, 2019. Across the board increases will apply to both wage schedules, 605 and 605-1. In addition, the Union proposes to reduce steps in the wage schedules from four to two steps. "A" Step would be entry level and "B" Step would be after six months service.

The Employer proposes three across the board wage increases as follows. 2% effective with execution of the Agreement; 2% effective December 24, 2018; and 2% effective December 23, 2019. The Employer rejects the Union proposal to reduce the four step wage schedules from four to two steps.

UNION POSITION: The Union states that, prior to unionization, Fire Captains were compared to Police Lieutenants. Just prior to the formation of the bargaining unit, the Employer changed wage parity and compared members of the bargaining unit to Police Sergeants in both supervisory responsibility and comparative wage. As a result, members of the bargaining unit have been placed on a two tiered wage schedule. Captains, who were hired or promoted prior to September 9, 2013, were placed on the 605 wage schedule which represented parity between bargaining unit members and Police Lieutenants. Captains hired or promoted after September 9, 2013 were placed on the 605-1 wage schedule which was intended to represent parity with Police Sergeants. During this time, the Employer created the position of Battalion Chief (non-bargaining unit). The Union states that wage parity between Fire Captains and

Police Sergeants was lost following the conclusion of the last collective bargaining negotiations. The Union states that the 2014 - 15 negotiations were the first between the parties, and the wage settlement, based on the Fact Finder's Recommendation, was a three year wage increase package, 1.75%, 2% and 2.25%. Police Sergeants were granted, at the bargaining table, 2%, 2.75% and 2.75%. The Union argues that a pay gap now exists between Fire Captains and Police Sergeants which violates a historic trend at the City. To compound the loss of equity, the Union states that Firefighters were granted, at the bargaining table, wage increases of 2%, 2.75% and 2.75% during the last three year cycle. All other safety force employees received wage increases which were 1.5% greater than those received by Fire Captains. The Union argues that a significant gap in wage parity was created. The Union cites the collective bargaining agreement which represents Police Command. Sergeants wage schedule consists of two pay steps which justifies its proposal regarding a reduction in steps.

The Union argues that its wage proposal in the current negotiations assists in closing the gap created by the Employer from the previous round of negotiations. The Union argues, as well, that the proposal to reduce steps in the wage schedules will assist in closing the wage gap. The Union argues further that its wage increase is more than justified based on the above average employee share of health insurance costs. The Union states that, not only is its three year proposal justified, the Employer possesses the resources to meet the demands. The Union states that at the end of 2017, the City's general fund reflected a total balance of \$46,179,003 with an unassigned balance of \$31,806,730. Revenue from city income taxes has increased. The City's general fund reserves are far above what is recommended by the Government Finance Officers Association.

The Union states that bargaining unit wages rank at the top in respect to external comparables, but the bargaining unit lost standing among its peers following the low wage increases of the last cycle. The Union urges the Fact Finder to recommend its wage proposal, including the reduction of steps in the wage schedule, in order to bring Fire Captains back into parity with Police Sergeants and other employees.

EMPLOYER POSITION: The Employer states that Fire Captains' wage increases averaged 2% each year during the last three years. The City argues that this is in line with average increases in Firefighter wages, across the State, of 2.23% based on the state-wide wage survey published by the State Employment Relations Board. The Employer states that Fire Captains are first line supervisors and argues that the City pays bargaining unit employees significantly greater than first line supervisors in comparable jurisdictions. In addition, the Employer illustrates total gross wages of Captains, including overtime, which in many cases exceed wages paid to the Fire Chief and Assistant Chiefs. The Employer states that the highest paid Fire Captain earned \$165,812.69 in 2017. The Employer lists salary comparisons of regional cities and fire districts and illustrates that both wage schedules of Kettering Fire Captains surpass all but one jurisdiction.

The Employer disagrees that the wages of Fire Captains fell behind those of other employees. The Report and Recommendation of the Fact Finder, during the previous negotiations, included a number of advances by the new bargaining unit. And the Employer failed to make certain gains as well including the Random Drug and Alcohol Testing program which other bargaining units accepted.

The Employer agrees that the City enjoys a solid revenue base and financial outlook. The policy of City Council requires a budget in which revenue exceeds expenditures. Policy prohibits the funding of wage increases with general fund reserves. In addition, the Employer cites the funding of capital improvements including new fire stations. The Employer cites the significant impact the high cost of overtime has on the finances of the City. The Employer urges the Fact Finder to recommend its three year wage proposal. The Employer argues that the Union negotiating committee bargained in bad faith when the parties achieved a tentative agreement on all issues at the bargaining table, including a three year wage package, and then suggested to its membership to reject the new Agreement. In light of the failure at ratification, in particular, and other factors, the Employer's wage proposal is appropriate and consistent with internal and external comparables.

RECOMMENDATION: There are numerous factors which must be considered in developing a recommendation for the three year wage package. As the Union argues, the City of Kettering enjoys substantial reserves in its general fund; revenues have increased; the economic outlook is enviable. Nevertheless, it is through creative and conservative policy that the City Manager, City Council and administrators have maintained a robust budget and sound financial planning. Kettering Fire Department employees are some of the highest paid in the region and state. This, of course, includes Fire Captains. The Employer has created a top level professional Fire Department which allows Fire Captains to excel in managing the staff and developing programs and projects which benefit the community. The collective bargaining process has enhanced the level of professionalism in the Department.

The Employer feels betrayed in that the tentative agreement, which was achieved by the committees, was rejected by the Union membership. Yes, it is frustrating (As a former advocate, I experienced this disappointment.), but the negativity needs to be short-lived. The relationship is long term. The Union argues that a pay gap was created following the last negotiations, and this assertion has merit. The overall package from the previous negotiations resulted in lower wage increases compared to all other bargaining units, due, in part, to the Union's rejection of the drug and alcohol testing proposal of the City. This new bargaining unit was also handicapped to a degree in that its negotiations were the first to occur of the various negotiations which were scheduled at the time. Fact Finder Bernardini had no internal comparable wage increases to consider for that cycle of negotiations. The same is true today. In recognition of the Union's argument regarding the gap in pay, created during the last negotiations between Fire Captains and Police Sergeants, greater wage increases granted Firefighters during the last negotiations, and other recommendations in this Report, the recommendation includes wage increases of 2.50%, 2.75% and 3%. The Union's proposal to reduce the wage schedule from four to two steps is understandable but better left for another set of negotiations.

#### Article 7, Wages

Section 1. Effective and retroactive to December 25, 2017 all wage rates in pay scale 605 and 605-1 will increase by 2.50%. Effective December 24, 2018 all wage rates in pay scale 605 and 605-1 will increase by 2.75%, and effective December 23, 2019 all wage rates in pay scale 605 and 605-1 will increase by 3.0%. The wage progression plan for regular full-time Fire Captains shall be as follows:

Hourly wage schedules are to be developed, based on the above, by the parties. In the event the actual start date of the three pay periods is not accurate, the parties will adjust the language in Section 1.

## **2. Article 8, Hours**

The Employer proposes to modify this provision of the Agreement by substituting the 40 hour work week standard with a 24/48 regular work schedule. The Employer proposes further to substitute the overtime rate with “employee’s regular rate” in the second paragraph.

The Union opposes the language reflecting the 24/48 schedule. The Union proposes to substitute applicable overtime rate for time and one-half in the second paragraph.

EMPLOYER POSITION: The Employer states that all employees in the bargaining unit work a 24/48 schedule. Current language does not reflect the reality of the work schedule. By 2014 the 40 hour work week no longer existed. The Employer states that current language forces the City to pay excessive overtime as such payment is out of line. Captains are paid overtime based on a fictitious 40 hour work week as opposed to the average work week of 56 hours.

Additionally, the Employer states that it is forced to pay overtime based on certain hours not actually worked. The Employer asks the Fact Finder to adopt its proposals.

UNION POSITION: The Union states that the Employer’s proposal in Article 8 is tied to its proposals to reduce overtime income for Captains. In addition, the Union states that there are occasions when Captains are placed on a 40 hour schedule. The designated 40 hour work week

has existed for many years, and this language currently exists in the Firefighter collective bargaining agreement. The 40 hour work week utilization existed for many years prior to the unionization of the Captains. The Union suggests current contract language with the exception of its proposed modification of the last sentence of the second paragraph which states “applicable overtime rate” and which was included in the tentative agreement.

RECOMMENDATION: The Employer is correct in that the regular schedule of Fire Captains is currently 24/48. The 40 hour schedule continues to be utilized for employees who are in training and for light duty assignments. The goal of the Employer is a re-ordering of the overtime structure, and the Union’s concern is lost income. Issues of overtime are addressed in the next section, Article 9, Overtime Pay. The recommendation is to maintain current contract language and to modify the second paragraph as the Union has suggested and as appeared in the tentative agreement as follows.

If a permanent change in an employee’s work schedule is ordered by the City without the requisite one (1) or two (2) weeks’ notice, the first day worked under the new schedule shall be at the applicable overtime rate.

### **3. Article 9, Overtime Pay**

The Employer proposes that overtime pay should be based upon what is now the standard work schedule of 24/48. Article 8 of the Agreement establishes a base work schedule of 40 hours, but all employees in the bargaining unit regularly work the 24/48 schedule. The Employer’s proposal is to substitute Section 11 with modified language which allows for overtime at time and one-half for Captains on the 24/48 schedule. The current calculation of

multiplying the rate by 1.4 and then 1.5 would be eliminated. The Employer further proposes that EDOs not be counted as time worked for purposes of overtime calculation.

The Union opposes the Employer's proposals to re-order overtime calculation and advocates for current contract language.

EMPLOYER POSITION: The Employer states that it has phased out the 40 hour work schedule which makes the current practice of paying overtime obsolete. The Employer states that, due to the current method of calculating overtime, its costs in this area are completely out of line. Kettering City Council has tasked the administration with controlling overtime costs, and a number of Captains have been added to the roster in an attempt to rein in these costs. The Employer argues that overtime costs continue to exceed expectations. This is due, in large measure, to Article 9 of the Agreement. In addition, the Employer states that all paid time, which is not worked, is treated as time worked for purposes of overtime calculation. The Employer argues that, its proposal to only consider EDOs as time not worked as opposed to other non-paid time, is more than reasonable as EDOs were to be considered as cost saving features for the Employer. The Employer cites comparable jurisdictions which offer less generous overtime benefits to its Firefighters. Of 14 regional jurisdictions, which compare to the City of Kettering and its Fire Department, 6 are less generous when overtime is paid, and 8 pay at a lower rate. Ten of the jurisdictions do not count all paid time, which is not worked, for overtime calculation, and most provide fewer EDOs. The Employer argues that it must gain control of the high cost of overtime in the Fire Department. While other collective bargaining agreements have not been re-negotiated in the current cycle, the goal of the Employer is to

rein in excessive overtime payments across the board. By paying overtime at the rate of time and one-half based on the 24/48 hour rate, overtime costs will reflect the reality of current work schedules of all employees in the bargaining unit.

UNION POSITION: The Union states that it faced these same proposals in the last collective bargaining negotiations which was resolved at fact finding. The fact finder in those negotiations viewed the Employer's proposals as concession bargaining and, therefore, rejected them in the recommendation. The fact finder cited the economic health of the City and potential loss in income for Fire Captains. The Union argues that nothing has changed since the conclusion of the last negotiations. The Union states that the Employer's proposals would reduce the overtime compensation paid Captains by 40%. The Union states that, based on average overtime worked by the bargaining unit over the past three years, average overtime pay for Captains on the 605 wage schedule would be reduced by \$7369, and, for Captains on the 605-1 schedule, the loss would be \$7005. The Employer's proposal to count EDOs as time not worked in calculating overtime pay would cause further financial loss. The Union, giving consideration to the same comparable jurisdictions as offered by the Employer, argues that a number offer overtime benefits similar to the City of Kettering and argues further that there is no consistency from one city or fire district to another. The Union states further that compensatory time benefits would likewise be negatively impacted if the Employer's proposals were included in the collective bargaining agreement.

The Union states that the collective bargaining agreement with the Firefighters bargaining unit contains the same overtime benefits, and Battalion Chiefs, who are not

represented by a Union, also continue to enjoy the overtime benefits as currently contained in the Captains' bargaining Agreement. The Union states that there is no financial or economic justification for the Employer's proposals and asks the Fact Finder to recommend current contract language.

RECOMMENDATION: Both parties have cited the Report and Recommendation of the Fact Finder from the previous negotiations. The Report was issued on February 5, 2015. The parties believe that certain recommendations are relevant today. The Employer's proposals regarding overtime, compensatory time, EDOs relationship to overtime calculation and the 24/48 schedule are generally the same as in the previous negotiations, and this Fact Finder is faced with nearly the same issues at impasse as that of the previous neutral, Felicia Bernardini. Fact Finder Bernardini suggested that the overtime proposals were concessionary. Her recommendation was based on two factors, the impact of potential loss of income for Fire Captains and the strong financial condition of the City's revenues and general fund budget. This Fact Finder cannot disagree with those conclusions. Little has changed since the previous negotiations and fact finding process. It is understandable that the Employer, any Employer, strives to reduce overtime costs. The Employer increased staffing levels of Firefighters and Captains, but is handicapped by the shrinking pool of part-time Firefighters. At hearing, the City Manager stated that progress had been made in reducing overtime costs in 2017 although there were no numbers to illustrate a trend.

The Employer argues that its goal in the current cycle of collective bargaining negotiations is to modify overtime provisions in order to reduce costs. Negotiations for the Fire

Captains Agreement is the first in the cycle. The Firefighters collective bargaining agreement currently provides for overtime compensation in the same manner as that contained in the Fire Captains Agreement. This is an internal comparable which must be considered in the instant matter. It is unknown if the successor Firefighter Agreement will contain changes sought by the Employer. The Union makes a compelling argument regarding Battalion Chiefs who, based on testimony at hearing, continue to enjoy the same overtime benefits as Fire Captains. The Employer has the ability to change overtime benefits unilaterally as Battalion Chiefs are not unionized. This could have been the starting point for the Employer in its argument that overtime benefits in the Fire Department must be modified.

The Union argues history of bargaining. The Firefighters' Agreement has provided for the overtime benefit since 1982, and the benefit had been extended to Fire Captains for 30 years. It then, of course, was incorporated in their first collective bargaining agreement in 2015. This history must be considered by the Fact Finder.

An initial tentative agreement was achieved by the parties at the bargaining table. It included a phased in modification to Article 9. Any quid pro quo and phase in failed to gain ratification by the Union membership. The Employer's desire to standardize both Articles 8 and 9 is understandable, but determining the quid pro quo necessary to getting there is difficult at best. The parties may wish to discuss what the possibilities might be in labor management committee meetings during the term of the Agreement in order that an agreed upon course of action may be developed for the future. The potential loss of income at this point of the process is too difficult to overcome.

The recommendation for the new collective bargaining agreement is current contract language for Article 9.

#### **4. Article 10, Holidays**

The Union proposes an increase in Earned Days Off (EDOs) from twelve to fourteen annually and rejects any modification to scheduling time off.

The Employer opposes any increase.

UNION POSITION: Fire Captains have not received an increase in EDOs in ten years. Workload has increased and total alarms have steadily increased. The Union states that the tentative agreement included an increase to 14 EDOs. The Union argues that the City is able to finance and schedule two additional EDOs.

EMPLOYER POSITION: The Employer states that EDOs were, at one time, a benefit to both parties. They existed to reduce overtime costs. This no longer is the case. EDOs are counted as time worked for purposes of overtime calculation. The Union's proposal does not benefit the citizens of the City. The fact finder is urged to reject the proposal.

RECOMMENDATION: An increase in EDOs was negotiated as part of a tentative agreement involving a package of issues including overtime. Beyond this bargaining strategy of give and take, there is insufficient evidence regarding the importance or need for an increase in this benefit. Firefighters enjoy 12 EDOs. The Union believed that the Employer was interested in an

additional modification to the scheduling of EDOs. The Employer had stated its desire to consider EDOs as time not worked for the calculation of overtime.

The recommendation is current contract language.

#### **5. Article 18, Uniform Allowance and Program**

The Union proposes to add a section to Article 18 which would provide a \$300.00 annual boot allowance for members of the bargaining unit.

The Employer opposes the addition of a boot allowance to Article 18 of the Agreement.

UNION POSITION: The Union argues that the inclusion of the proposed boot allowance moves Fire Captains closer to Police Sergeants in respect to overall uniform allowance. Additionally, the Union points out that the Firefighters collective bargaining agreement provides a \$300.00 boot allowance in addition to the same uniform allowance provided to the Captains. The Union states that non-bargaining unit employees in the Fire Department likewise receive a boot allowance. The Union argues that its proposal is based on equity.

EMPLOYER POSITION: The Employer states that the Captains' uniform allowance is sufficient, and the proposal to add a \$300.00 boot allowance is not justified.

RECOMMENDATION: Evidence at hearing indicates that a \$300.00 boot allowance was included in the tentative agreement between the parties which failed ratification by the Union. Setting that factor aside, the Union's proposal creates equity with most other employees in the Fire

Department. Firefighters and non-bargaining unit professional employees receive the boot allowance benefit. The \$300.00 boot allowance proposal is recommended as follows.

Article 18, Uniform Allowance and Program

Section 4. In addition to any Fire Department provided footwear, Captains will be paid a boot allowance of \$300.00 per year. This boot allowance will be for the Captain to purchase, maintain and replace structural firefighting “turn out” boots and station work boots and/or shoes that comply with Fire Administration standards. This allowance will be paid to each Captain in four (4) equal payments at the beginning of each quarter year.

**6. Article 20, Medical, Dental and Life Insurance**

The Employer submits a number of proposals while maintaining the basic framework of covered benefits contained in Article 20. The Employer proposes to change the comparable coverage in a number of sections from the Firefighters’ collective bargaining agreement to non-bargaining unit employees. The proposal includes reducing HSA funding commencing in 2019. Additionally, the Employer proposes language which would allow for further reduction of HSA funding in 2019 or 2020 in the event “Cadillac” excise taxes are imposed based on the Affordable Care Act.

The Union rejects the proposal to reduce HSA funding during the term of the Agreement including reductions based upon the imposition of excise taxes based upon the Affordable Care Act. The Union seeks to maintain parity with the Firefighters’ collective bargaining agreement in those sections of the Article which contain that comparable.

EMPLOYER POSITION: The Employer states that a reduction in HSA funding in 2019 is reasonable and was part of the tentative agreement reached between the parties prior to fact finding. Although the Fact Finder in the previous negotiations recommended the Firefighter

Agreement as the benchmark for certain benefit levels, the Employer believes that it is more reasonable to utilize non-bargaining unit employee benefit levels as appropriate comparisons. The Employer urges a recommendation for its modifications to Article 20.

UNION POSITION: In respect to a reduction in HSA funding in 2019 and in the event of an excise tax, the Union states that, at one time, the Employer funded 100% of the deductible. The Union states further that employee premium share of 17% is significantly greater compared to most jurisdictions based on the 2017 Health Insurance Review of the State Employment Relations Board. The Union cites the high cost of monthly health insurance contributions of members of the bargaining unit. The Union states that proposed HSA contribution reductions are not necessary based upon the Employer's excellent financial standing. The Union states that much of its proposal includes current contract language and benefit levels.

RECOMMENDATION: Either prior to the fact finding hearing or during the proceedings, the parties reached agreement on a number of points including language regarding enrollment of new employees in an HRA and conversion to the HSA in the following year. The expired collective bargaining agreement was the first between the parties, and, typically, a number of unresolved issues were submitted to fact finding during those initial negotiations. After a close review of the proposals regarding health insurance, Fact Finder Bernardini recommended the Firefighter Agreement benchmark for certain provisions of the Captains' insurance provision. There is no compelling reason to change that benchmark in only the second bargaining agreement between the parties. This recommendation includes a referral to the labor

management committee provision of the Agreement, Article 23, in the event of potential imposition of an excise tax based on the Affordable Care Act which would require a reduction in HSA funding by the Employer. This provision of the law has been delayed, and its imposition is uncertain at this time. The parties will have the opportunity to consider and discuss the impact of a potential excise tax which may require a reduction in HSA funding at the appropriate time if it is imposed. The recommendation for Article 20 is as follows.

Article 20, Medical, Dental and Life Insurance

Section 1. Health and Dental Insurance. Current contract language except second sentence as follows. "The plan coverage and premium as determined by the City will be the same as that provided to all non-bargaining unit employees, except as provided in this Article."

Second paragraph. Current contract language.

Section 2. Effective January 1, 2018, the City shall pay 83% and the employee shall pay 17% of the premiums for the Medical Insurance Plan. If, however, the City reduces the Medical Insurance Plan employee premium share below 17% for non-bargaining unit employees, such reduction shall also apply to the Regular Full-Time Fire Captains.

Second paragraph. Current contract language except insertion of January 1, 2018.

Section 3. Effective January 1, 2018, and through the duration of the agreement the City will fund the employee's HSA at the same percentage of the network deductible as that provided to employees under the Kettering Firefighter contract. (Union proposal at Fact Finding)

In the event it is determined that provisions of the so-called "Cadillac" excise tax, as contained in the Affordable Care Act, require reductions in or modifications to the HSA benefit in 2019 or 2020, the parties to this Agreement agree to meet, pursuant to Article 23, Labor-Management Committee, to share information and to develop options, if required, regarding HSA funding as provided in this Article. The parties will consider the utilization of an interest based approach and will also consider a joint session with representatives of the Firefighters' bargaining unit if such meeting becomes necessary. The Employer is the final decision maker if reduction is required by potential implementation of the excise tax.

The network deductible of the High Deductible Platinum Plan shall not exceed \$2500.00 for a single plan and \$5000.00 for a family plan for each plan year beginning in 2019.

Last paragraph in Section 3, current contract language. "HSAs will be funded . . . ."

Section 4. Employees joining the City mid-year, eligible for health insurance coverage, will be placed in a similar High Deductible Consumer Driven Health Plan but will be enrolled in a Health Reimbursement Account (HRA) or Health Savings Account (HSA) at the discretion of the City. In the event an employee is placed in an HRA, amounts will be available for reimbursement similar to those specified for HSA accounts above. At the end of the year, if enrolled in an HRA, any money not spent is retained by the City, and the employee is thus enrolled in the HSA in the subsequent year. The HRA system may also be used for other employees who do not qualify for the HSA under IRS provisions, such as those enrolled in Medicare.

Section 5. Current contract language.

## **7. New Article, Removal of Reprimands**

The Union proposes a new provision of the collective bargaining agreement which provides for removal of an oral or written reprimand from the employment record of any employee who does not receive another reprimand or more serious discipline during a two year period following the issuance of the reprimand.

The Employer opposes the proposal.

UNION POSITION: The Union states that this benefit has been included in the Firefighters' collective bargaining agreement for over 30 years, and all other bargaining agreements with the City include this provision. The Union states that the Employer indicated that it was attempting to remove this provision from other collective bargaining agreements, but to date the language

remains in those Agreements. The Union suggests that the removal of minor discipline after a two year period is reasonable.

EMPLOYER POSITION: The Employer refers to this proposal as “an amnesia provision” and is opposed to the removal of properly administered reprimands. The Employer states further that the proposed language is unnecessary as arbitrators generally consider reprimands as minor levels of discipline when considering progressive discipline. The Employer urges rejection of the proposal.

RECOMMENDATION: The removal of reprimands following two years of no additional discipline is found in all collective bargaining agreements with the City including Firefighters, Police Patrol, Police Command, Dispatchers and AFSCME Ohio Council 8. In addition, such provisions are common in public sector bargaining agreements across the state. The proposal of the Union is recommended as it appears in the Firefighter Agreement.

New Article. Removal of Reprimands. After a two-year clean slate, an employee may request the City to remove a previous oral or written reprimand, which will be done, except that if the employee has received a written reprimand instead of more serious corrective action, as stated in the written reprimand, the written reprimand shall remain a part of the employee’s personnel file.

## **8. New Article, Random Drug/Alcohol Testing**

The Employer proposes a comprehensive random drug and alcohol testing process in addition to its right to conduct reasonable suspicion drug and alcohol testing. The Employer proposes that an employee may be provided with a last chance agreement in the event of a confirmed positive test.

The Union's response is that it is not opposed to this provision with a number of modifications including a guaranteed right to a last chance agreement in the event of violation.

EMPLOYER POSITION: The Employer states that the Union refused to consider this proposal during the previous negotiations. But all other bargaining agreements representing safety forces include a random drug and alcohol testing procedure. In addition, the Employer states that none of these agreements allow for a mandatory last chance agreement for the affected employee. The Employer states its opposition to such provision and states that it condones a first offense. The Employer states that other bargaining units were granted greater wage increases than Fire Captains during the last negotiations based on agreeing to the random testing proposal. The Fire Captains' bargaining unit did not give consideration to the proposal at the time. The Employer emphasizes the issue of morale for Firefighters who become aware of a Captain testing positive and then being granted a mandatory last chance agreement. The Employer urges the Fact Finder to recommend its proposal in total.

UNION POSITION: The Union states its intention to agree to random drug and alcohol testing but only with the stipulation of a mandatory last chance agreement. The Union argues that the

Employer's proposal, which includes "may" enter into a last chance agreement, is not narrowed to only include an additional violation related to the testing process for purposes of termination of employment. Any policy violation would lead to immediate termination of employment, and the Union states that it is, therefore, unable to agree to the Employer's language. The Union states that there have been no incidents or history regarding drug/alcohol abuse among Fire Captains. It is therefore unreasonable to allow the Employer total discretion. The Union counters the Employer's argument regarding the last negotiations in that there was no formal proposal on the table, and the Fire Captains' negotiations were completed prior to other negotiations with City Unions. The Union states that its proposal is based on language from the Police Patrol and Command Officers collective bargaining agreement but with the mandatory last chance agreement language.

RECOMMENDATION: The significant difference between the Employer's proposal and that submitted by the Union is the issue of last chance agreement, the City proposing "may" enter into a last chance agreement and the Union advocating for a mandatory last chance agreement which is limited to violations of the drug and alcohol testing provision with a five year sunset. Collective bargaining agreements with Police Command, Police Patrol, Dispatchers and Firefighters contain a random drug and alcohol testing provision. Command, Patrol and Dispatchers' Agreements provide for a last chance agreement at the Employer's discretion, "may enter into." In respect to a confirmed positive test, all collective bargaining agreements provide for disciplinary action based on just cause. This language is critical in assuring that the Employer's actions are not arbitrary; that discipline recognizes service record and disciplinary

record; and that there is an absence of disparate treatment. If the Agreement is silent regarding last chance agreements, as is the Firefighters contract, or if the language allows for such provision, but not mandatory, the parties always have the ability to negotiate a last chance agreement and specifics such as length of agreement and the impact of other disciplinary violations on a case by case basis. The parties to many collective bargaining agreements, both public and private sectors, consider last chance agreements in this manner.

The Firefighters collective bargaining agreement is silent regarding last chance agreements. All other safety force Agreements contain a random drug/alcohol testing provision which allows for a last chance agreement although not mandatory. The Employer's proposal includes key wording, "subject to a just cause standard" which allows for discipline based on this critical standard. It also allows for a last chance agreement to be negotiated by the parties on a case by case basis.

In consideration of the various issues and recommendations contained in this Report and Recommendation, the Employer's proposal "New Article, Random Drug/Alcohol Testing" as found under Tab 10 of its submissions at the fact finding hearing is hereby recommended.

#### CONCLUSION

The Fact Finder has reviewed the pre-hearing statements of the parties and all facts and testimony presented at hearing including exhibits presented during the evidentiary hearing. The Fact Finder has carefully reviewed the positions and arguments presented by each party and the criteria enumerated in Ohio Revised Code Section 4117.14 (G) (7) (a-f).

In addition to the recommendations contained in this Report, those tentative agreements, which are recognized by the parties at the commencement of the fact finding hearing, and all unopened articles of the Agreement are hereby incorporated in this Report and Recommendation by reference.

Respectfully submitted and issued at Cleveland, Ohio this 8<sup>th</sup> Day of June 2018.

A handwritten signature in cursive script that reads "Thomas J. Nowel". The signature is written in black ink on a light-colored background.

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Thomas J. Nowel, NAA  
Fact Finder

CERTIFICATE OF SERVICE

I hereby certify that, on this 8<sup>th</sup> Day of June 2018, a copy of the foregoing Report and Recommendation of the Fact Finder was served by electronic mail upon Daniel G. Rosenthal, Esq., Jackson Lewis, P. C., representing the City of Kettering; Stephen S. Lazarus, Esq., Lazarus & Lewis, LLC, representing the Kettering Professional Firefighters, IAFF Local 2150; and Donald M. Collins, General Counsel, State Employment Relations Board.

A handwritten signature in cursive script that reads "Thomas J. Nowel". The signature is written in black ink on a light-colored background.

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Thomas J. Nowel, NAA  
Fact Finder

