FILE NO. 55-2023-A

EXECUTIVE SUMMARY OF AGREEMENT

BETWEEN

THE CITY OF CLEVELAND

AND

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 4340 – EMS SUPERVISORS (Captains)

(Approximately 16 employees currently in this bargaining unit)

Fact-Finding Report:	**Report not rejected March 9, 2019**
Terms in Dispute:	**April 2019 through August 2022**
Final Agreement:	**November 10, 2022**

NOTE: The City and CWA reached impasse in negotiations for the 2016-2019 contract in November 2018 and participated in a fact-finding hearing in January 2019. Neither party rejected the fact-finder's March 1, 2019 report but significant disagreements arose as to the meaning of specific elements of the report when drafting the 2016-2019 contract. The parties filed unfair labor practices with SERB, arbitrated, and litigated these differences from 2019 through August 2022. Below is a summary of the final terms derived from that process.

1. ARTICLE XXVIII - COMPENSATION

Wages:

2016:	No base wage increase
2017:	Retroactive to April 1, 2017, establish a 10% rank differential based on the top CARE bargaining unit paramedic rate which increases to 15% after one year in the Captain classification and maintain rank differential percentages thereafter.

2. ARTICLE XXVI – HEALTH COVERAGE (and ADDENDUM A)

Amend to reflect pattern health coverage:

- 2% increase in employee wellness and non-wellness insurance premium payments for MMO coverage
- Reductions in employee wellness and non-wellness insurance premium payments for HDHP coverage
- The City's right to implement an employee smoking cessation program

- Increase MMO annual deductible from $500 to $750 (single) and from $1,000 to $1,500 (family)
- Increase MMO co-insurance annual out-of-pocket maximum from $1,250 to $1,500 (single) and from $2,500 to $3,000 (family)
- Increase HDHP annual deductible from $1,000 to $2,000 (single) and from $2,000 to $4,000 (family)
- Increase HDHP co-insurance annual out-of-pocket maximum from $2,000 to $4,000 (single) and from $4,000 to $8,000 (family)

3. ARTICLE IX – LEAVES OF ABSENCE

Amend Sections I and J to allow use of paid sick leave in four hour increments at the beginning or end of an employee's shift.

4. ARTICLE XIV – SHIFT ASSIGNMENTS

Amend to eliminate "Star Days" (additional time off in lieu of overtime pay) and convert to payment for hours worked in excess of forty in a week.r

5. ARTICLE XV – DOCKING

Delete Article XV which set time increment for work hours at six minutes and follow City policy on docking.

6. ARTICLE XVII – HOLIDAYS

Amend to tighten and clarify requirement that an employee must work the regularly scheduled work day before and after a Holiday to be eligible for Holiday Pay subject to express exceptions.

7. ARTICLE XXIII – PAYDAY

Amend to eliminate hand delivery of paychecks.

8. ARTICLE XXIV – DISCIPLINE

Amend to expand period from City's knowledge of potential misconduct to the date the City must issue discipline from thirty to forty-five working days.

9. ARTICLE XXXII – UNIFORM ALLOWANCE

Increase annual uniform maintenance allowance from $200 to $325 effective and increase annual uniform allowance from $450 to $475 both effective April 1, 2016.

10. APPENDIX A – ATTENDANCE POLICY

Delete attendance policy and abide by City attendance policy.

AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION TRIBUNAL
Robert J. Vana
Labor Arbitrator

In the Matter of the Arbitration Between:		Case No: 01-19-0003-0998
COMMUNICATION WORKERS OF AMERICA, LOCAL 4340 (the"Union")	)	OPINION AND AWARD
-and-	)	Grievance of EMS Captains Pay/Allowance
CITY OF CLEVELAND (the "City")	)	

The oral hearings for this matter was held on August 31, 2020 and October 22, 2020 in a conference room of Burke Lakefront Airport, Cleveland , Ohio, before Robert J. Vana, the arbitrator who was mutually selected by the parties through the administrative services of the American Arbitration Association.

Mr. Ryan J. Lemmerbrock, Esq. presented the case on behalf of the Union. Also present on behalf of the Union were: David Passalacqua, Union Executive Vice President and Leonard Brooks, Union Business Agent.

Mr. Patrick Hogan, Esq. presented the case on behalf of the City. Also present on behalf of the City were: Nicole Carlton, EMS Commissioner; Jon Dalian, Esq, and George Cars, Esq.

There was a stenographic record of the arbitration proceeding taken and transcribed by

Karen Toth of Fincun-Mancini, Court Reporters (the "Transcript"). Both parties filed post hearing briefs (the Post "Hearing Briefs"). The Transcript, along with the documents submitted into evidence, the Post Hearing Briefs and this Opinion and Award constitute the entire record for this case.

GRIEVANCE

On July 18, 2019, the following Grievance was filed on behalf of the EMS Captains (the "Grievance"):

> Union Position:
>
> On March 1, 2019, Fact-Finder Jonathan Klein issued his fact-finding recommendations for the April 1, 2016-March 30, 2019 CBA. The Fact-Finder's recommendations were accepted and became the successor CBA terms. The Fact-Finder recommended the following for Article 28, Compensation:
>
> - Wage increases of 0% (effective April 1, 2016); 2% (effective April 1, 2017); 2% (effective April 1, 2018);
> - The wage increases shall be applied prior to any equity wage adjustment;
> - Compressed wage step schedule from 5 steps to 2 steps:
>   - Starting Step -wage differential of 10% based upon the top rate of pay for top CARE Paramedic;
>   - After Year 1 - wage differential of 15% based upon the top rate of pay for top CARE Paramedic
> - Equity adjustment received by CARE (applied after the 2% increase in the 3rd year of CBA).
>
> For Article 32 of the CBA, the Fact-Finder recommended that the bargaining unit members each receive an annual maintenance allowance of $325 and an annual uniform allowance of $476 - a total annual increase per employee of $150.
>
> The City has refused to pay the bargaining unit members the pay associated with the compressed wage step schedule and the wage differential effective to the start of the successor CBA (April 1, 2016). The City has refused to pay the bargaining unit members the increased uniform allowance for 2016 or thereafter. The City's refusal is in

continuing violation of the terms of the Fact-Finding report (specifically Article 28 and 32), which was accepted by the parties and is now the terms of the successor CBA.

Union Remedy:

Make retroactive payments to April 1, 2016, to all members consistent with the Fact-Finder's recommended and accepted successor terms for Article 28 and 32 of the CBA (i.e., compressed step schedule and step differential, and uniform allowance. That all arbitration costs, including attorney fees, be assessed to the City.

ISSUE

The issues presented to the arbitrator for his final and binding determination is stated as follows:

1) Is the Grievance arbitrable?

2) Did the City violate Articles 28 and 32 of the parties' 2016 Collective Bargaining Agreement, and if so, to what remedy is the Union now entitled?

CONTRACTUAL PROVISIONS

The arbitrator considers the following provisions of the 2016-2019 Collective Bargaining Agreement between the parties (the "2016 CBA") to be relevant to the final and binding resolution of the Grievance:

Article XXV - Grievance Procedure

"Section 1. A grievance is a dispute or difference between the City and the Union, or between the City and an employee, concerning the interpretation and/or application of any provision of this contract. . . the Grievance Procedure shall serve as the exclusive remedy for the employees or the Union to address alleged violations of this Agreement. When a grievance arises, the following procedure shall be observed:

***

Step 1. A grievance shall be reduced to writing and presented to the Commissioner, or his designee within fourteen (14) calendar days after the event

giving rise to said grievance . . ."

***

Section 3.

***

The losing party at arbitration shall be responsible for the fees of the arbitrator.

***

In instances where either party contests arbitrability, the question of arbitrability will be placed in front of an arbitrator and the same arbitrator will also hear the case on its merits.

***

The arbitrator shall have no authority to add to, substrata from, disregard or modify any provisions within the contract and shall confine his decision to the express issues put before him by the parties.

Section 4. For the purposes of this Article, timeliness is counted as working days, Monday through Friday, excluding holidays. Extensions of time may be granted by mutual agreement of the parties.

Section 5. A grievance which is untimely filed initially shall not be considered a grievance, or at subsequent steps shall be considered settled in accordance with the most recent (last) answer of management . . .

***

Article XLV - Duration

This contract represents a complete and final understanding on all operation policy between the City and the Union and it shall be effective upon execution and remain in full force and effect until March 31, 2016.

BACKGROUND

The Union is the exclusive bargaining representative of the City Division of EMT Supervisors (the "Division"), otherwise referred to as EMS Captains. The bargaining unit consists of 16 Captains (the "Bargaining Unit") that supervise the Division's Paramedics, Emergency Medical technicians ("EMTs") and Emergency Medical Dispatchers (EMDs").

On January 21, 2016, the Union filed its notice to negotiate a successor collective bargaining agreement with the Ohio State Employment Relations Board ("SERB").[1]

The parties met to bargain on March 30, 2016 and each submitted written proposals (the "2016 Negotiations"). The parties met sporadically from March 30, 2016 until their sixth (6^{th}) and final bargaining session on November 6, 2018. At the March 30, 2016 meeting, the parties reached tentative agreement on a number of contractual items (the "March 30, 2016 TAs")

However, during the scope of the 2016 Negotiations, the parties reached impasse on a number of issues including contractual provisions relating to the following subjects (the "Subject Impasse Provisions):

- COMPENSATION
- UNIFORM ALLOWANCE

Pursuant to R.C. § 417.14 (C), the parties selected a fact finder to assist in the resolution

[1]The parties prior collective bargaining agreement expired on March 31, 2016.

of all the impasse issues[2] (the "Fact Finder"). On November 30, 2018, SERB confirmed the parties selection of the Fact Finder in SERB Case No: 2016-MED-01-0043.

On January 22, 2019, a fact-finding hearing commenced to attempt to resolve the impasse issues presented to him by the parties (the " Fact Finding Hearing"). After the conclusion of the Fact Finding Hearing, the Fact Finder sent the parties a draft copy of his report ("Draft Report") for review.[3] The Draft Report included the following recommendation regarding Article XXVIII, Compensation:

> "Based upon the evidence of record presented in this case, the parties are in agreement regarding annual, percentage wage rate increase. Accordingly, the fact-finder recommends that bargaining unit employees shall receive the following wage rate increases in the new contract: 0% effective April 1, 2016; 2% retroactive to April 1, 2017; and 2% retroactive to April 1, 2018.
>
> The fact-finder further recommends that the current wage step schedule should be modified to provide two steps: a Starting Step (old step After Year 3) and After Year 1 Step (old Step After Year 4); and a wage differential of 10% and 15% at each new step, respectively, based upon the top pay for CARE paramedic $52, 724.63 under the 2013-2016 City/CARE collective bargaining agreement). Although the top pay for a paramedic to be used for purposes of applying the aforementioned wage differentials does not include the supplemental pay received by a paramedic while performing the duties of a crew chief, the arbitrator notes that the enhancements of a compressed wage step schedule and the wage differential will still result in significant increase in compensation afforded Captains over employees they supervise. The fact-finder determines the City is able to absorb the costs associated with a two-step wage-step, rather than three steps as it proposed, based upon improved financial condition.

The Fact Finder further summarized his wage recommendation and further recommended a conditional equity adjustment:

---

[2] Including the Subject Impasse Provisions.

[3]While not typical, the Fact Finder agreed to submit a Draft Report upon the request of the parties.

> In this case, the fact-finder determines that the Union has presented insufficient evidence to warrant an additional equity adjustment for the Captains in light of the above recommended wage increases; modification of the step schedule; wage differential; and the equity adjustment discussed below. Based upon the record presented, the fact-finder recommends that all Captains should receive an equity adjustment of $3,000 retroactive to April 1, 2018, if an equity adjustment is ultimately received by members of the CARE bargaining unit, enhanced by the above recommended wage differentials.[4] No further equity adjustments or other incentives as proposed by the Union are recommended by the fact-finder.

Regarding XXII UNIFORM ALLOWANCE, the Fact Finder made the following recommendation:

> "The fact-finder recommends that the Captains receive the same uniform allowance afforded CARE bargaining unit employees as the two units are closely related to each other and perform their respective assignments in the same work settings. Therefore, the Captains shall receive an annual maintenance allowance of $325.00 and an annual uniform allowance of $475 during the term of the new contract. There is no substantive justification for members of the bargaining unit to receive a one-time allowance of $150.00, and that proposal is rejected."

After the parties reviewed the Draft Report, they raised no issues with regard to the Fact Finder's recommendations. On March 1, 2019, the Fact Finder issued his final report (the "Final Report") and served it upon the parties as required by R.C. Chapter 4117. The Final Report included the following sentence not contained in the Draft Report in connection with compensation: "These percentage was [sic] increase shall be applied prior to the equity adjustment." The Fact Finder also revised the last sentence for the conditional equity adjustment to read: "Based upon the record presented, the fact-finder recommends that all Captains should receive the same equity adjustment, if any, that is ultimately received by members of the CARE

---

[4]At the time of the Fact Finder recommendations negotiations were on-going in connection with the CARE bargaining unit and the City. Subsequently, the CARE negotiations were finalized and CARE bargaining unit members did receive the subject $3,000 equity adjustment.

bargaining unit, enhanced by the above recommended wage differentials" and added a sentence reading: "This equity adjustment shall be applied after the 2% increase in the third year, effective April 1, 2018."

On March 14, 2019, SERB notified the parties that it viewed the negotiations as settled and would close the file. SERB further stated: "Once the negotiations are complete, the executed Collective Bargaining Agreement along with the Contract Data Summary Sheet are to be emailed to [SERB] within 30-days of execution."

The City prepared a red-lined draft of the new collective bargaining agreement, high-lighting the insertion of the Fact Finder Final Report recommendations (the "Red-Lined CBA Draft"). The City contends the Red-Lined CBA Draft was consistent with the recommendation of the Fact Finder. In subsequent communications between the parties, it became clear that the parties did not agree on the effective date of i) the wage-step compression changes, ii) rank differentials and iii) uniform allowance.[5]

On April 24, 2019, the City notified the Union that it rejected the Union's interpretation of the Final Report, and that it would not execute a successor agreement reflecting the interpretation demanded by the Union. The parties engaged in back-and-forth communications on their respective interpretations of the Fact Finder's Final Report until June of 2019.

The Union then contacted the Fact Finder, and requested clarification of the effective dates of the differential based salary schedule and the uniform allowance increases. The City did not consent to the Fact Finder issuing the requested clarification. Lacking the City's consent,

---

[5]The Union contended the differential based salary schedule and uniform allowance increases went into effect April 1, 2016. The City contended the differential based salary schedule and uniform allowance increases went into effect March 8, 2019..

the Fact Finder was precluded from issuing any clarification of his Final Report.[6]

On July 18, 2019, the Union filed the Grievance, alleging a violation of Article XXVIII, (Compensation) and Article XXXII (Uniform Allowance). After a Grievance meeting was held, the City denied the Grievance upon the basis 1) that it was not arbitrable and 2) the Union's alleged attempt to insert terms that were not included in the Fact Finder's Final Report in the 2016 CBA.[7] The City, further, concluded that it was the Union, not the City, that refused to execute the final draft of the 2016 CBA.

On August 9, 2019, the City filed an Unfair Labor Practice ("ULP") charge with SERB[8] (the "City's ULP"). The City ULP asserted the Union was:

> "Refus[ing] to bargain collectively with a public employer if the employee organization is R.C. § 4117.11(B)(3) recognized as the exclusive bargaining representative or certified representative of public employees in a bargaining unit."

On September 3, 2019, the Union filed its own ULP charge with SERB[9] (the "Union's ULP"), asserting, the City violated R.C. 4117 (A)(1), (2), (3), (5), and (8) when it refused:

> " . . . to implement the terms of the successor CBA . . ."

On January 9, 2020, SERB issued a "Dismissal of Unfair Labor Practice Charges"

---

[6] The Fact Finder did note that the parties did not raise the issue of the effective dates for the i) wage-step changes, ii) rank differentials and iii) uniform allowance, in connection with the parties review and acceptance of the Draft Report.

[7] In denying the Grievance, the City reserved the right to contest the timeliness of the Grievance.

[8] SERB Case No. 2019-ULP-08-0168.

[9] SERB Case No. 2019-ULP-09-0179,

dismissing both the City's ULP and the Union's ULP as being untimely (the "SERB Dismissal of ULPs"). However in the SERB Dismissal, by way of *dicta* , SERB indicated that the new agreement became effective on March 14, 2019, whether the parties signed it or not but SERB did not address the issues raised by the Grievance. Neither the City nor the Union appealed the SERB Dismissal.

As a result of the inability of the parties to resolve the Grievance, this matter is before the arbitrator for a final and binding resolution.[10]

SUMMARY OF THE POSITION OF THE UNION

The Union maintains the Grievance must be presumed arbitrable unless the City can establish by reasonable certainty that the Grievance is precluded from being resolved through arbitration. Based upon cited arbitral authority, the Union further asserts that if there is any doubt concerning whether or not a case is arbitral, the benefit of the doubt should be resolved in favor of the arbitrability of the case.

The City herein bases its argument that the Grievance is not substantively arbitrable upon the claim that no successor agreement is in effect between the parties since there was not a meeting of the minds on the issues presented in this arbitration proceeding (the "Substantive Arbitrability Assertion"). In addition the City has contested the procedural arbitrability of the Grievance, arguing the Grievance was untimely (the "Procedural Arbitrability Assertion").

The Union submits that the City can not carry its burden of proving either the Substantive

---

[10] For reasons more fully stated herein below, the City contends the Grievance is not arbitrable and should be denied on procedural and substantive grounds.

Arbitrability Assertion or the Procedural Arbitrability Assertion. The evidence establishes that there is a legally binding Successor Agreement between the Union and the City for the 2016-2019 period. Such Successor Agreement clearly permits arbitration of the instant Grievance. Further, the City's refusal to pay the EMS Captains the wages and uniform allowances provided for under the Successor Agreement was a continuing violation thereof. Further, the City's failure to raise the issue of the alleged timeliness prior to the arbitration hearing constituted a waiver of the City's procedural arbitrability claim.

With regard to the merits of the Grievance, the Union argues the wage and uniform allowance terms at issue must be interpreted consistent with the Fact Finder's recommendations and applicable bargaining history. The City argues that there is no contract, and therefore, no contract terms the arbitrator has the authority to interpret. The City claim is without merit. Ohio law is clear that once the City and the Union accepted the Fact Finder's Final Report those terms became the 2016 CBA by operation of law. Contrary to the City's claims, there are numerous examples of Ohio arbitrators, in the absence of finalized contract language on the dispute of an issue, basing their decisions upon interpretations of the underlying Fact Finder's reports or conciliation awards and the applicable bargaining history.

The arbitrator herein is tasked with interpreting the terms of the 2016 CBA based upon the recommendations of the Fact Finder, and the applicable bargaining history of the terms at issue.

In his Final Report the Fact Finder noted the parties agreement to general wage increases of 0.0% effective April 1, 2016; 2.0% retroactive to April 1, 2017; and 2.0% retroactive to April 1, 2018 (hereinafter collectively "0/2/2"). The Fact Finder then recommended the EMS Captains

five (5) step salary schedule be reduced to two (2) steps, with their salary being based on a wage differential of 10.0 % above the top Paramedic pay in year one, and 15.0 % above the top Paramedic pay after one year. The Fact Finder further recommended the EMS Captains receive the same equity adjustment received by the Paramedics, as enhanced by the wage differentials and that equity adjustment be effective April 1, 2018, after the 2.0% increase for 2018. As to the effective dates of the recommended wage increases, the Fact Finder specified the general wages terms are effective back to April 1, 2016 and the equity adjustment was to be effective before April 1, 2018.

As the Fact Finder noted, in later responding to the City's opposition to him clarifying his intent on the effective dates, there was no dispute between the parties at Fact Finding regarding the effective dates of the increases and no dispute on the effective dates when the parties reviewed the preliminary draft of the Fact Finding report. A review of the record of the Fact Finding proceedings confirms the Fact Finder's statement - there was no dispute at Fact Finding on the effective dates of economic increase. The City promised full retroactivity.

Although the 2016 Negotiations commenced on March 30, 2016, the parties' fourth (4) negotiation meeting was not until June 5, 2017, at the City's request. The City wanted to conclude its negotiation with the City's larger safety bargaining units.[11] The City represented to the Union that delaying negotiations would not disadvantage the EMS Captains in the final settlement and that the economic terms would be retroactive. The City promised that it's wage proposal - all three components- were consistent with the wages in place for the City's other

---

[11] Namely, the Fire, Police and Paramedics (CARE) units. The City indicated that the settlements with the larger units would shape the settlement with the Union, and that the EMS Captains would potentially benefit from the outcome of the settlements of the larger units.

safety units, including the wage differential in place for all other safety unit supervisors of April 1, 2016. The only wage increase the City proposed to be prospectively applied was the equity adjustment tied to the CARE bargaining unit members (which the Fact Finder rejected, making it effective April 1, 2018). At no point in negotiations, at Fact Finding, or during the parties communication on the Draft Report, did the City even suggest the differential based step schedule would be applied prospectively.

While the Union had been reassured throughout negotiations that economic terms would be retroactive, and the EMS Captains would not be disadvantaged by the City delaying the EMS Captains negotiations until the City resolved its negotiations with the other safety units. Yet, at arbitration the City is denying retroactivity was ever contemplated.

The City claimed that the Fact Finder could not have recommended retroactivity to April 1, 2016 because other units had not received increases in 2016. That claim flies in the face of the numerous representations the City made at the Fact Finding hearing when the it stated that the differential-based step schedule would be implemented prior to applying the general increase of 0 /2 /2 . The Fact Finder indicated he believed there was no dispute regarding the effective date of the differential-based step schedule. The City's urged reading of the Fact Finder's recommendations to make the wage differentials prospective cannot be reconciled with the record of the fact-finding proceedings, the representations of the City at Fact Finding, and the Final Report.

Likewise the Final Report can only be read as recommending the uniform allowance be made effective as of April 1, 2016. Interpreting the Fact Finder's recommendation on the uniform allowance increases first must be viewed in the context of the City promising full

retroactivity at Fact Finding and the City representing that the duration of negotiations would not disadvantage the EMS Captains.

The provisions at issue before the Fact Finder were continuously identified as from 2016 through 2019, and as "years 1, 2, 3," reflecting the term of the CBA. This same time period is then referred to by the Fact Finder in his recommendation on the uniform allowance when he states: "[T]he Captains shall receive an annual maintenance allowance of $325.00 and an annual uniform allowance of $475.00 **during the term of the new contract** " (emphasis added by the Union).

It is apparent the Fact Finder is referring to "term" as April 1, 206 through May 31, 2019. In response, the City argues the phrase "term" only covers the period of March 8, 2019 (the date the Final Report is deemed to have been accepted) through March 31, 2019 (the expiration date of the 2016 CBA. In support, the City cites a purported tentative agreement that the 2016 CBA be effective from ratification through March 31, 2019. However, there is no written, signed tentative agreement indicating such. In fact, City Council enacted legislation recognizing the CBA as being effective April 1, 2016 through March 31, 2019. The Union acknowledges there was an oral agreement reached between the parties at their first bargaining meeting on March 30, 2016. The Union understood the duration agreement to be three (3) years from April 1, 2016 to March 31, 2019. The Union contends that it is unreasonable to conclude the 2016 CBA would only be effective from the end of the dispute resolution process through March 31, 2019 - when the parties continued to bargain wages effective as of April 1, 2016.

There is no scenario under which the City's claim - that the differential-based salary schedule is to be applied prospectively effective March 8, 2019 - can be reconciled with the Fact

Finder's recommendations or the undisputed evidence before the arbitrator.

It is undisputed that as of April 1, 2018, the EMS Captains were to be paid $60,339.46 as their "Start" salary and $63,082.16 as their "After Year 1" salary[12]. These are the wages proposed by the City at Fact Finding. These are the wages (approximate) recommended by the Fact Finder. Any interpretation of the Final Report must be consistent with these wages. The wages identified in the Final Report cannot be reached on April 1, 2018 unless the differential-based step increases are made effective as of April 1, 2016.

The City claims there is no mention at Fact Finding of the differential-based step schedule being applied retroactive. That is blatantly not true. The City promised retroactivity without exception and proposed the differential-based step schedule being effective prior to the general wage increases of 0/2/2, which would begin on April 1, 2016. The Final Report should be interpreted in accordance with the parties' proposals at Fact Finding, the parties' descriptions of those proposals at Fact Finding, and the written words of the Fact Finder in issuing his recommendations based upon the parties' presentations.

The Union cannot be left with the recourse the City suggests, and that is to remand this matter to the parties for further negotiation. Requiring the Union to re-bargain the terms of the 2016 CBA would be wholly irrational and inequitable. The Union should not be forced back to the table to bargain what the Fact Finder already recommended. The Union would have no relief and potentially be strong-armed into lesser terms. The Union would be forced to capitulate to

---

[12]The Start and After 1 Year wages identified here were based on 2013-2106 CBA for the CARE bargaining unit. The wages for the Captains 2016-2019 CBA were to be based on the 2016-2019 CARE bargaining unit wage schedule, once that CARE bargaining unit collective bargaining was finalized.

what the City put on the table at that point and the City would be rewarded for reneging on the promises it made to the Union and Fact Finder at Fact Finding. The terms of the 2016 CBA are covered by Article XXV's grievance-arbitration procedure and grant the arbitrator full authority to resolve the parties' contract interpretation dispute as to whether the Fact Finder intended differential-based step schedule and uniform allowance increases to be retroactive to April 1, 2016 or prospective from March 8, 2019.

The Union requests that its grievance be sustained in its entirety and that the arbitrator:

1) Affirm the 2016 CBA is effective and that the grievance is arbitrable;

2) Order that per the terms of the 2016 CBA the EMS Captains are to receive pay in accordance with the differential-based, two-step schedule effective as of April 1, 2016, and recommended uniform allowance increases effective as of April 1, 2016;

3) Order that the EMS Captains be made whole and be awarded statutory interest on the amounts owed;

4) Order that the arbitration costs be assessed to the City per Article XXV, Section 3 of the CBA; and

5) Retain jurisdiction for 60 days to resolve any dispute over the remedies awarded.

SUMMARY OF THE POSITION OF THE CITY

Although the 2016 Contract negotiations with the Union commenced on March 30, 2016, the negotiations were delayed by two (2) significant events; 1) the July 2016 Republican National Convention, which demanded significant attention and 2) a campaign to approve a tax increase proposal that would increase the City income tax from 2% to 2.5%, which ultimately was approved by City voters in November, 2016 (the "Tax Increase") These events delayed

negotiations not only with the Union, but all of the other unions with which the City has contractual relationships. The Tax Increase enabled the City to revise its position on compensation issues for all bargaining units. As is the practice of the City, looked to finalize contractual terms with the larger safety forces first. The negotiations continued first with the 1,200 Cleveland Police Patrolmen's Association (the "CPPA"), and included a prospective equity adjustment separate from any restorative base wage increase, a benefit the City anticipated might be extended to all other safety force bargaining units. The City advised the Union of the ongoing CPPA negotiations. Further, the City advised the Union that if the Cleveland Association of Rescue Employees ("CARE")[13] negotiated an equity adjustment into its successor agreement, a similar offer would be made to the Union. The City made it clear that it would not agree to any pay increases in 2016.

Ultimately, the City did reach agreement with the CPPA,[14] the Fraternal Order of Police (the "FOP")[15], and the International Association of Fire Fighters ("IAFF")[16].

With these wage agreements with the CPPA, FOP and IAFF, the City established the following safety-force wage pattern (the "Safety Force Wage Pattern"):

- Base wages -

---

[13] CARE employees are supervised by the EMS Captains.

[14] The CPPA agreement included a wage freeze from April 1, 2016 to March 31, 2017, a 2% base wage increase retroactive to April 1, 2017 and an additional 2% base wage increase effective on April 1, 2018. The CPPA terms included an equity increase of up to $3,000 for members with 10 or more years seniority prospectively effective on April 1, 2018.

[15] On February 21, 2018, the City and the FOP reached agreement on wages identical to the terms reached with the CPPA.

[16] In May, 2018, the City reached the same wage terms with the IAFF.

- 0% April 2016 through March 31, 2017;
- 2% April 1, 2017 through March 31, 2018; and
- 2% April 1, 2018 through March 31, 2019.

- Equity Adjustment effective April 1, 2018 -

  - $1,200 for employees with fewer than 10 years' service;
  - $3,000 for employees with 10 years or more of service; and
  - For promoted ranks, equity differential were increased by the application of existing rank differentials effective April 1, 2018.

At the parties last negotiating meeting on November 6, 2018, the City proposed the Safety Forces Wage Pattern to the Union. The Union rejected the offer indicating it did not create a sufficient wage separation between the Union and the CARE members. The Union's rejection of the City's Safety Force Wage Pattern offer, among other issues, resulted in the parties reaching impasse. At that point in time the parties selected the Fact Finder pursuant to the provisions of R.C. § 4117.14(C).

The issue of compensation was only one of eleven open issues that were presented to the Fact Finder for his recommendations (the "Issues Presented to the Fact Finder"). Among the other Issues Presented to the Fact Finder was Article XXXII, Uniform Allowance.

As noted above, the Fact Finding process was then commenced, with the resulting Final Report being issued by the Fact Finder on March 1, 2019. As further noted above, the parties had differing interpretations of the Final Report. [17]

As a result of the parties inability to agree upon the interpretation of the Final Report, the Union filed the Grievance. The City asserts the Grievance is not substantively or procedurally

---

[17]The interpretation dispute concerned primarily Article XXVIII, Compensation and Article XXXII, Uniform Allowance.

arbitrable, for the reasons identified herein below.

An arbitrator's authority to issue a binding award arises from the express agreement of the parties' agreed-to language to resolve interpretation disputes. Here there is no agreed-to contract language on the retroactivity issues presented. There is only the report of a Fact Finder appointed under R.C. § 4117.14(C)(3) to make recommendations on the issues presented to him.

This dispute is not about interpretation of negotiated contract language, but about competing interpretations of the Fact Finder recommendations. Here, each party asserts rights created by and arising under R.C. Chapter 4117, not negotiated contract rights. There is no dispute the parties did not have a meeting of the minds as to the issues here. Without contract language to interpret, an arbitral decision impermissibly creates contract terms which, absent the parties express agreement, is outside the arbitrator's authority.

Under Ohio law, questions related to the formation of R.C. § 4117 labor contracts are within SERB's exclusive jurisdiction. Here each party filed it's ULP charge, with each party accusing the other party of not executing a contract reflecting the March 1, 2019 Final Report, and argued that its interpretation of the Final Report was correct as to the retroactive wage-step changes, rank differentials and uniform allowances.

The City has held from the inception of the Grievance that this dispute arises under R.C. Chapter § 4117, is within SERB's exclusive jurisdiction, an arbitrator has no authority to issue an award, and the Grievance must be denied. Ohio law and arbitral precedent counsel that, in the absence of a meeting of the minds as to essential terms such as those at issue here, and with SERB's dismissal of the ULPs, the only remedy is to return to the bargaining table.

While the arbitrator has no jurisdiction to rule on the merits, the Final Report could not be clearer as to the core dispute. The Report recommended only two (2) unequivocally retroactive wage components - a 2% wage increase effective on April 1, 2017 and a 2% wage increase effective April 1, 2018. It further recommended a reduction of the wage steps from five (5) to two (2) and the creation of related rank differentials for each step but did not state that these terms were retroactive (emphasis added by the City). Thus, the wage-step and rank differential changes can only take effect when the contract takes effect.

As to the contract effective date, the parties agreed that the contract at issue takes effect "upon ratification." As ratification occurred, at the earliest, on March 9, 2019, if there was a contract, the wage-step reduction and rank differential would take effect on March 9, 2019. The Union's claim regarding the uniform allowance increase also fails on the merits. The Final Report's recommended uniform allowances increases "during the term" of a contract which began on ratification. At the earliest, uniform allowance increases would occur on March 9, 2019. There can be no retroactive application of the uniform allowance increases.

Based upon the substantive and the procedural arguments above, it is the position of the City that the Grievance should be denied in its entirety.

DECISION

I) ARBITRABILITY

The City argues that the Grievance is not arbitrable, on both substantive and procedural grounds, and must be denied on that basis.

Substantively, the City maintains that the Grievance is predicated upon the failure of the parties to have a meeting of minds regarding the formation of the 2016 CBA. The City contends that collective bargaining relations are the exclusive province of R.C. Chapter 4117 and SERB. The City further argues that since the claims raised by the Grievance arise from or depend on the collective bargaining rights created by R.C. Chapter 4117, and the remedies provided in that chapter are exclusively vested in SERB. Accordingly, this arbitrator has no authority to issue the binding determination the Union seeks herein.

Procedurally, the City additionally submits that the Grievance is untimely, and, therefore, must be denied.

On the issue of substantive arbitrability, the Union maintains that the 2016 CBA became a valid and binding contract by operation of law when the City and the Union did not reject the Final Report issued by the Fact Finder on March 1, 2019.[18]

The Union contends that SERB specifically notified the parties that the Final Report was deemed accepted by the parties on March 14, 2019, thereby recognizing the existence of the 2016 CBA. As a result thereof, it is clear the dispute between the Union and the City concerning the interpretation and/or application of the Compensation and Uniform Allowance Articles is subject to arbitration under the provisions of the 2016 CBA.[19] Accordingly, the Union indicates the

---

[18]Citing R.C. 4117.14(C)(6)(a), O.A.C. 4117-9-05(O) ("If neither party rejects . . . the recommendations shall be deemed agreed upon as the final resolution of the issues submitted to the fact-finding panel and a collective bargaining agreement shall be executed, including the fact-finding panel's recommendations, except as otherwise modified by the parties mutual agreement.')

[19]The Union submits that the provisions of the Grievance Procedure from the 2013-2016 CBA to the 2016 CBA remain unchanged, and are to be applied regarding the Grievance now.

Grievance must be deemed substantively arbitrable.

Regarding, the contention of the City that the Grievance was not filed timely, the Union argues that the issues concerning Compensation and Uniform Allowance are continuing violations of the 2016 CBA, and, as such, the issue of timeliness is not a factor to be considered herein.

The Union submits that since there is no basis to deny arbitrability, on either substantive or procedural grounds, the Grievance must be decided on its merits.

The arbitrator shall address the question of substantive and procedural arbitrability separately.

Substantive Arbitrability

The Fact Finder issued the Final Report on March 1, 2019, to the City, the Union and SERB. On March 7, 2019, the Union voted to accept the Final Report, and reported such acceptance to SERB. The City did not communicate an acceptance of the Final Report to SERB.

On March 14, 2019, SERB sent the following letter, in pertinent part, to the parties (the March 14 SERB Letter"):

> "The fact-finding report in the referenced case was issued on March 1, 2019.
>
> On March 7, the [Union] delivered to the SERB certification of the results of its vote on the fact-finding report. The [Union] voted to accept the report.
>
> The fact-finding report is deemed accepted by the [City] in that it has not voted upon the report or has failed to communicate the vote to SERB. We view the negotiations settled and will begin closing the case file.
>
> Reminder: Once negotiations are complete, the executed Collective Bargaining Agreement along with the Contract Data Summary Sheet are to be emailed to Research@SERB.ohio.gov within 30-days of execution."

There is no dispute that the both the City and the Union failed to execute a successor agreement to the 2013-2016 Collective Bargaining Agreement. There further is no question that the reason the parties did not execute a successor agreement was due to their failure to agree upon the effective date for the i) Wage Compression Step Schedule and the Wage Differential and ii) Uniform Allowance increases (collectively the "Subject Effective Dates"). The Wage Compression Step Schedule, Wage Differentials and the Uniform Allowance were matters addressed by the Fact Finder, and matters upon which the Fact Finder issued recommendations. The Fact Finder, at the parties request, issued a Draft Report, which the parties reviewed and requested no changes thereto. The Fact Finder then issued the Final Report. The parties then realized, while finalizing the successor agreement there was a disagreement upon the Subject Effective Dates.

The Union then unilaterally sought a clarification from the Fact Finder as to his intent regarding the Subject Effective Dates. The City did not consent to the requested clarification. Accordingly, the Fact Finder, although expressing a willingness to do so[20], was precluded from indicating what his intent was in connection with the Subject Effective Dates, since both parties are required to consent to the clarification.

On July 8, 2019, the Union filed the Grievance, stating in part:

> ". . . The City has refused to pay the bargaining unit members the pay associated with the compressed wage step schedule and the wage differential effective to the start of the successor CBA (April 1, 2016). The City has refused to pay the bargaining unit members the increased uniform allowance for 2016 or thereafter. The City's refusal is in continuing violation of the terms of the Fact-Finding report (Specifically Articles 28 and

---

[20]The Fact Finder did indicate to the parties 1) that they did not raise the issue of the Subject Effective Dates during the scope of the Fact Finding Hearings and 2) had the opportunity to question the Subject Effective Dates when reviewing the Draft Report.

32), which was accepted by the parties and is now the terms of successor CBA."

Subsequently, each party filed ULPs with SERB[21] maintaining the other party committed an ULP by failing to execute a successor agreement. Both parties' ULPs were dismissed by SERB for being untimely. SERB issued the dismissal of the ULP Charges on January 9, 2020 (the ("SERB Dismissal"). The SERB Dismissal stated in pertinent part:

> "Pursuant to Ohio Revised Code § 4117.12, the State Employment Relations Board (SERB) conducted an investigation of these charges. The investigation reveals no probable cause existed to believe Ohio Revised Code § 4117.11 has been violated. Information gathered during the investigation reveals that the Union's failure to sign the Tentative Agreement, which included the Fact-Finder's recommendations, could constitute a (B)(3) statutory violation. In addition, the City's failure to implement the terms of the deemed-accepted agreement could constitute an (A)(5) statutory violation.
>
> . . . Even with the potential statutory violations alleged by each party, the fact remains that both charges are untimely filed. The City, based on the above referenced case law, should have executed the terms of the agreement after SERB notified the parties that the agreement was deemed accepted on March 14, 2019. The successor agreement became effective on that date, whether it was signed by the parties or not . . .
>
> The charges are dismissed with prejudice for lack of probable cause to believe the statute has been violated and for being untimely filed."

Based upon the foregoing, it is the opinion of the arbitrator that SERB deemed the Final Report to have been accepted by the parties on March 14, 2019. Further SERB indicated its opinion that the Final Report was considered part and parcel of the successor agreement. Further SERB opined "[t]he successor agreement became effective on March 14, 2019, whether it was signed by the parties or not. . ."

The arbitrator accepts the SERB opinion that the successor agreement became effective

---

[21]The City's ULP was filed with SERB on August 9, 2019 and the Union's ULP was filed with SERB on September 3, 2019.

March 14, 2019 (the " 2016 CBA") by operation of Ohio statutory law.[22]

Further, the City asserts that SERB has exclusive jurisdiction over the subject dispute, and that as a result thereof, the arbitrator is without authority to render a decision on regarding the Grievance.

With regard to the Grievance, the arbitrator is of the opinion that the 2016 CBA, which by operation of law, became effective March 14, 2019, contains a grievance procedure which permits resolution of the Grievance by arbitration. The arbitrator was duly appointed by both parties in accordance with the successor agreement. The arbitrator is of the opinion that he does have the requisite authority to render a final and binding decision on regarding the Grievance.

As to the exclusive jurisdiction of SERB in matters related to R.C. Chapter 4117, to take the position that SERB has exclusive jurisdiction in this matter is to ignore SERB's own well established precedent that both an arbitrator and SERB may have jurisdiction over a matter at once, with the arbitrator addressing the contract violation and SERB addressing the ULP. Here SERB has already addressed the ULPs filed in connection with this matter. SERB dismissed the ULPs on the basis of the lack of probable cause that a violation occurred and for being untimely filed. Accordingly, SERB bo longer has a role in these proceedings. It follows that jurisdiction remains with the arbitrator to resolve the alleged contract violation.

Finally, the City argues that since there was not a meeting of minds on the Subject Effective Dates, that the arbitrator should deny the Grievance and remand it to the parties for

---

[22]The City identifies the 2016-2019 CBA effective date as March 8, 2019, based on Ohio law. SERB identified the 2016-2019 CBA effective date as March 14, 2019 (above). For the purpose of this arbitration the effective date, whether March 8 or 14, is not material. Accordingly, the 2016-2019 CBA effective date used by the arbitrator throughout this Decision is March 14, 2019, as identified by SERB.

further negotiation. The arbitrator does not believe that is a viable option. There is a binding 2016 CBA in effect by operation of law, and disputes as to its interpretation is, by its terms, to be resolved through arbitration. Additionally, the resolution of this Grievance is not based upon a meeting of the minds of the parties, but rather what the intent of the Fact Finder was in issuing his Final Report.

Based upon the totality of the foregoing, the arbitrator is of the opinion the Grievance is properly before him on its substance; however, the arbitrator must next address the issue of whether the Grievance is procedurally arbitrable.

Procedural Arbitrability

The evidence suggests that the Union first became aware of the interpretation differences concerning the Subject Effective Dates when it received the Re-Lined Draft of the 2016 CBA on or about April 11, 2019. Subsequently, the parties continued to discuss the issues regarding the Subject Effective Dates, attempting a resolution of the issues.

On July 17, 2019, the Union filed the Grievance. Article XXV of the CBA[23] provides in pertinent part as follows:

> "Section 1. A grievance is a dispute or difference between the City and the Union, or between the City and an employee, concerning the interpretation and/or application of any provision of this contract. . . the Grievance Procedure shall serve as the exclusive remedy for the employees or the Union to address alleged violations of this Agreement. When a grievance arises, the following procedure shall be observed:
>
> > Step 1. A grievance shall be reduced to writing and presented to the Commissioner, or his designee within fourteen (14) calendar days after the event

[23] Article XXV of the 2013-2016 CBA, was agreed upon by the parties to be carried over to the 2016, verbatim.

giving rise to said grievance . . ."

The City argues that it is clear that the filing of the Grievance on July 17, 2019, was well outside of the contractually mandated filing period of fourteen (14) calendar days after the event giving rise to the Grievance. The Union had actual knowledge of the City's position with regard to the Subject Effective Dates on or about April 11, 2019, and did not file the Grievance until July 17, 2019. Since the Union failed to follow the parties' Grievance Procedure in a timely fashion, the City contends the Grievance must be denied.

The Union does not contest that the Grievance was filed outside of the required time period found in the parties' Grievance Procedure, but the Union asserts the City waived such time lines while attempting to resolve the Subject Effective Date issues with the Union[24]. In addition thereto, the Union submits that the Grievance involves a continuing violation of the 2016 CBA, and as such, the time lines contained in the parties' Grievance Procedure are not applicable. The Union argues that each day the City fails to pay the Captains in the manner that the Union interprets the 2016 CBA, constitutes a continuation of the violation of the 2016 CBA (the "Alleged Continuing Violation").

The arbitrator finds the Union's contention that the Grievance represents a continuing violation of the 2016 CBA is well taken. As stated in Elkouri & Elkouri. How Arbitration Works 8th Edition, 2019 Cumulative Supplement Ch. 5.7 (A)ii), (2019):

> "Arbitrators also continue to invoke the continuing violation principle in compensation-related areas."

Based upon the continuing violation principle the arbitrator is of the opinion that the

---

[24] The Union contends the City never raised the issue of timeliness until the arbitration hearing.

Grievance cannot be denied on the basis of being untimely.

With regard to the Union's contention that the City waived the argument of timeliness of the Grievance by failing to reserve such argument throughout the period subsequent to the filing of the Grievance until the arbitration hearing on the Grievance, the arbitrator is of the opinion arbitral precedent is, at best mixed, whether the contractual requirement of timeliness can be considered waived by an employer. There is a body of arbitral precedent that holds the right to object to arbitrability can be raised even for the first time at an arbitration hearing. In the opinion of the arbitrator it is not necessary to resolve that question here. Since the alleged violation of the 2016 CBA has been determined to be a continuing violation, the issue lack of timeliness is rendered moot.

Having determined that this matter is both substantively and procedurally arbitrable, the arbitrator must turn to the merits of the Grievance.

II) MERITS

As stated above, the arbitrator is not considering the merits of the Union's contention concerning the Subject Effective Dates on a *de novo* basis, rather the arbitrator is required to render a decision on the intent of the Fact Finder in issuing the Final Report. Stated another way, the arbitrator is to determine, based upon the record, if the Fact Finder had been engaged to clarify the Final Report, what the Fact Finder's clarification would have been.

In that regard, the arbitrator concurs with Arbitrator Zeiser, who, in a case[25] similar to the instant matter, stated:

---

[25]Education Association, 2014 BNA LA Supp. 166013 (Zeiser, 2014).

> "[T]his case is a bit out of the ordinary. It does not involve just examining the language negotiated by the parties to interpret their intent. The language at issue resulted from the fact finding process and came from the Fact Finder nine (9) months after the contract effective date. This case involves not necessarily what the parties intended when they adopted the Fact Finder's recommendation, but what the Fact Finder meant when he made his recommendations.

In this matter, the issue presented to the arbitrator concerns the absence of an identification of the Subject Effective Dates in the Final Report. Since the Final Report constitutes a part of the 2016 CBA, as a matter of law, between the parties at this point, the arbitrator views the absence of Specific Effective Dates as "omitted terms" in the Final Report, and therefore, the 2016 CBA. Arbitrators are often called upon to address omitted terms in collective bargaining agreements. This arbitration case is no different. Here, the arbitrator is called upon to address the omitted terms in the Final Report. For guidance on how to go about the task of providing the answer to the omitted terms question, the arbitrator relies, in part, on the *Restatement (Second) of Contracts*. As stated in Elkouri & Elkouri, *How Arbitration Works*, 8th Edition, at Ch. 9.2.D (citations omitted):

> Under the *Restatement (Second) of Contracts* standard, when the parties [in this case the 'Fact Finder'] "have not agreed [or in this case 'have not addressed'] with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the courts [here the 'arbitrator'], that is, 'a term that comports with community standards of fairness and policy . . .' Most often, the standard will be 'good faith' or reasonableness under the circumstances."

With that in mind, the arbitrator shall address the issue of the effective dates for Compensation and Uniform Allowance separately.

COMPENSATION

With regard to the issue of Compensation, the Fact Finder made the following final recommendation (the "Final Recommendation - Compensation"):

"Based upon the evidence of record presented in this case, the parties are in agreement regarding annual, percentage wage rate increases. Accordingly, the fact-finder recommends that bargaining unit employees shall receive the following wage rate increases in the new contract: 0% effective April 1, 2016; 2% retroactive to April 1, 2017; and 2% retroactive to April 1, 2018. These percentage was increases [sic] shall be applied prior to any equity adjustment.

The fact-finder further recommends that the current wage step schedule should be modified to provide two steps: a Starting Step (old step After Year 3) and After Year 1 step (old Step After Year 4); and a wage differential of 10% and 15% at each new step, respectively, based upon the top rate of pay for the CARE paramedic . . . Although the top rate of pay for a paramedic used for purposes of applying the aforementioned wage differentials does not include the supplemental pay received by a paramedic while performing duties of crew chief, the arbitrator notes that the enhancements of a compressed wage step schedule and the wage differential will result in significant increase in the compensation afforded Captains over employees whom they supervise. The fact-finder determines that the City is able to absorb the costs associated with a two-step wage scale, rather than three steps, as it proposed, based upon its improved financial condition.

While *The City Record* provides a minimum and maximum pay range for various classifications as approved by City Council, it does not mandate a maximum wage for a specific job classification under terms of a collective bargaining agreement. Those wages are determined through the process of negotiation and agreement between the City and the Union representing the employees in the bargaining unit, or in absence of an agreement, as set by a conciliator. As previous stated by this fact-finder in *City of Cleveland-and-Fraternal Order of Police, Ohio Labor Council, Inc. (Scientific and Fingerprint Examiners), Case No. 03-MED-12-1396, at 10, January 29, 2006:* " . . . the concept of City-wide pattern of bargaining has, with few exceptions, existed for many years. To break the established pattern, the Union 'bears a significant burden to demonstrate' that its members warrant a more favorable wage increase relative to other bargaining units performing similar work."

In this case, the fact-finder determines that the Union has presented insufficient evidence to warrant an additional equity adjustment for the Captains in light of the above recommended wage step schedule; wage differential; and equity adjustment discussed below. Based upon the record presented, the fact-finder recommends that all Captains should receive the same equity adjustment, if any, that is ultimately received by the members of the CARE bargaining unit, enhanced by the above recommended wage differentials. This equity adjustment shall be applied after the 2% increase in the third year, effective April 1, 2018. No further equity adjustments or other incentives as proposed by the Union are recommended by the fact-finder."

The dispute between the parties, in connection with the Final Recommendation - Compensation, is the effective date for the recommended wage step schedule and wage differential. There is no dispute that the wage step schedule compression and the wage differential were intended to be applied in tandem (the "New Wage Schedule"). The dispute is over the effective date of the New Wage Schedule. The Union interprets the recommended New Wage Schedule to be effective retroactive to April 1, 2016. The City interprets the New Wage Schedule to be effective prospectively; that is, as of the effective date of the 2016 CBA.[26] The arbitrator notes the Final Report did not identify, with specificity, whether the recommended New Wage Schedule was to be applied retroactively or prospectively.

Accordingly, the arbitrator must look to the Final Report, and if necessary, the record of the Fact Finding process to see if he can glean therefrom the intent of the Fact Finder with regard to the effective date for the recommended New Wage Schedule. In doing so, the arbitrator deems the absence of such effective date as an "omitted term".

In reviewing the record of the Fact Finding proceedings, the arbitrator finds the City recognized an inequity between the wages paid to Paramedics and wages paid to the Captains, who supervise the Paramedics. In the City's Fact Finding Pre-Hearing Position Statement[27] (the "City's Pre-Hearing Statement") the City indicated such recognition by stating the start rate of a Captain and the starting rate for a Paramedic Crew Chief, under the 2013-2016 CBA, difference was "only $274.49". As a result thereof, the City proposed a wage differential and a compressed

---

[26] Which, as noted above, was determined to be March 14, 2019, by SERB.

[27] At pages 22-23.

wage step schedule[28] to increase the range of pay between a Paramedic Crew Chief and a Captain. As a matter of illustration, in the City's Pre-Hearing Statement, the City noted the following affect of it's compressed wage step schedule and wage differential proposal (the " Wage Differential Example"):

> "[A] ten-percent wage differential for the Start rate (before factoring in the 0-2-2 pattern wage increases) establishes a difference of $2,272.40 [between the Paramedic Crew Chief and the Captains]."

In the opinion of the arbitrator, the City, in the interest of addressing the inequality existing under the 2013-2016 CBA wages for the Captains compared to the wages paid during 2013-2016 to the Paramedics, inferred in the Wage Differential Example, that its wage differential proposal was to be implemented prior to the annual wage increases of 0/2/2[29].

Since the proposed 0/2/2 wage increases were retroactive by definition, the wage differential and step schedule compression, in order to precede the annual wage increase, infers that the New Wage Schedule was also to be retroactive.

This inference is specifically supported by the recitation of the City's intent memorialized by the Fact Finder in the Final Report. In the Final Report, the Fact Finder noted, in reference to the issue of Compensation, that the City's proposal was as follows:

---

[28] The City's proposal for the Captains was for a three-step wage schedule, with a wage differential of 10%, 12.5% and 15% at the Start step, the After 1 Year step and After 2 year step, respectively. The Fact Finder's Final Recommendation for the Captains was a two step wage schedule, with a wage differential of 10% at the Start step and a 15% differential at the After 1 Year step.

[29] 0/2/2 refers to 0% effective April 1, 2016; 2% effective April 1, 2017 and 2% effective April 1, 2018.

"b. Wage Increase

After placing employees on the new wage schedule, amend Article XVIII to reflect the following across-the-board wage increase (emphasis added by the arbitrator):

First Year	0% wage increase effective April 1, 2016
Second Year	2% wage increase effective April 1, 2017
Third Year	2% wage increase retroactive to April 1, 2018"

It is clear the reference to the "new wage schedule" identified immediately above referred to the following, which the Fact Finder deemed was part of the City's wage proposal:

"a. Wage Differential Schedule

Modify the current wage schedule as follows:

Reduce the current five-step wage schedule (Start-After Year 4) and replace with wage differential for each step, based upon the top rate for the Top CARE Paramedic ($52,724 under the 2013-2016 City/CARE Labor Agreement)

Start:	10%
After Year 1:	12.5%
After year 2:	15.0%

Place employees in the current wage step schedule on the following steps under the new wage step schedule:

Current Step	New Step
Start	Start (Old After Year 2)
After Year 1	After Year 1 (Old After Year 3)
After Year 2	After Year 2 (Old After Year 4)
After Year 3	After Year 2 (Old After Year 4)
After Year 4	After Year 2 (Old After year 4)"

In the Final Recommendation - Compensation of the Final Report the Fact Finder accepted the City's wage proposal in principle. In doing so, the Fact Finder reduced the number of steps contained in the New Wage Schedule from 3 (as the City suggested) to 2, and adjusted

the wage differential proposal of the City to a wage differential to: Start 10% and After Year 1 to 15%, stating:

> "The fact-finder determines that the City is able to absorb the costs associated with a two-step wage scale, rather than three steps as it proposed, based upon improved financial condition."

Although on first impression, it may appear that if the 0/2/2 wage increase is retroactive, then the New Wage Schedule, in order to precede the 0/2/2 wage increase, must also be retroactive. However, the omission of a specific effective date of the New Wage Schedule does arguably leave open the question in which year of the 0/2/2 schedule does application of the New Wage Schedule apply?

In the opinion of the arbitrator, increasing the wage differential between Paramedics and the Captains, without making the New Wage Schedule retroactive, would fail to achieve the general objective of both the City and the Union of creating a greater separation in wages for Paramedics and Captains throughout the years covered by the 2016 CBA. If only the wage increase of 0/2/2 was retroactive, detached from the New Wage Schedule, then the inequity of pay for the Captains and the Paramedics would continue up to March 14, 2019. The arbitrator can find no evidence that the effective date for the New Wage Schedule was intended by the Fact Finder to be delayed until March 14, 2019.

There is reason to believe that the Fact Finder knew, or should have known, that his Final Report, issued on March 1, 2019, was going to be in effect only several weeks before the 2016 CBA would expire on March 30, 2019. If the New Wage Schedule was deemed to be effective for only several weeks, the general benefit intended by the parties to be granted to the

Captains of an increase in separation of wages compared to the Paramedics (the "Parties' General Intent") would have been de minimis. To interpret the Final Report as only expanding the wage differential for the Captains for several weeks out of a three year wage period would be unreasonable in the opinion of the arbitrator. The arbitrator is required to interpret the Final Report in such a way to achieve a reasonable outcome, not an unreasonable outcome, given the Parties' General Intent.[30]

Additionally, in order to find that the effective date of the New Wage Schedule was intended to be delayed to the effective date of the 2016 CBA would require the Fact Finder (and this arbitrator), to completely ignore the assurance the City gave to the Union that its cooperation to delay its negotiations until the City completed negotiations with its larger safety unions, would not disadvantage the Union bargaining unit (the "City's Assurance").[31] The Union's agreement to delay the negotiating process at the request of the City was a major contributing factor in delaying the effective date of 2016 CBA, The only way the Union bargaining unit is not disadvantaged by the City's requested bargaining delay is to make the New Wage Schedule retroactive. The arbitrator is of the opinion that the Fact Finder would have given, or should have given, significant consideration to the City's Assurance.

Accordingly, the arbitrator is of the opinion, in connection with the Parties' General Intent and the City's Assurance, the Fact Finder intended to make the New Wage Schedule retroactive.

---

[30] See Elkouri and Elkouri, *How Arbitration Works, 8th Edition*, C.P.9.3.A.xv.

[31] At page 22 of the City's Pre-Hearing Position Statement the City indicated: "In faithfulness to the wage pattern, the City's proposal includes full retroactivity so that the duration of these negotiations will not disadvantage [the Union's] members.

The conclusion that the New Wage Schedule must be deemed retroactive, is consistent with the *Restatement (Second) of Contracts*, which the arbitrator noted above would be used as guidance with regard to this matter:

> Under the *Restatement (Second) of Contracts* standard, when the parties [in this case the 'Fact Finder'] "have not agreed [or in this case 'have not addressed'] with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the courts [here the 'arbitrator'], that is, 'a term that comports with community standards of fairness and policy . . .' **Most often, the standard will be 'good faith' or reasonableness under the circumstances"** (emphasis added by the arbitrator)

The arbitrator is of the opinion that by interpreting the Final Report requiring the New Wage Schedule to be retroactively applied is consistent with the aforementioned " standards of fairness and policy " and the standard of "good faith or reasonableness under the circumstances", given the Parties General Intent and the City's Assurance.

The one caveat to the foregoing conclusion that the Fact Finder intended to make the New Wage Schedule retroactive is the City-wide wage pattern the Fact Finder found as a dominant and controlling factor regarding his recommendations. As an example thereof, the Fact Finder noted that the equity adjustment requested by the Union was not consistent with the City-wide wage pattern. In the interest of protecting the widely accepted City-wide wage pattern, the Fact Finder made the equity adjustment of $3,000 conditionally effective only if the CARE bargaining unit was successful in negotiating the equity adjustment into its 2016-2019 collective bargaining agreement (the "Conditional Equity Adjustment").[32] With regard to the City-wide

[32] In the opinion of the arbitrator, the Fact Finder recognized if the CARE bargaining unit received an equity adjustment, the Captains would also be required to receive an equity adjustment in order to maintain the wage deferential between the Paramedics and the Captains,

wage pattern, the Fact Finder indicated "[t]o break the established pattern, the Union 'bears a significant burden to demonstrate' that its members warrant a more favorable wage increase relative to other bargaining units performing similar work." Accordingly, the Fact Finder granted the Conditional Equity Adjustment to the Union only if the CARE bargaining unit had a similar benefit.

The arbitrator finds that the Equity Adjustment condition was fulfilled since the $3,000 equity adjustment was included in the CARE 2016-2019 CBA. As a result thereof and consistent with the Final Report, effective as of April 1, 2018, after the application of 2% wage increase on the same date, the Union bargaining unit was awarded the $3,000 Equity Adjustment.

However, since the Fact Finder gave significant weight to the City-wide wage pattern, the City-wide wage pattern must be taken under consideration with respect to the Final Report, taken as a whole. The record was clear that, due to financial constraints, no bargaining unit in the City received wage increases effective April 1, 2016. As the Fact Finder found, the City finances improved substantially, due to the passage of an income tax increase by the City voters in November of 2016. As a result of the improved financial standing of the City post-2016, the Fact Finder specifically found the City could afford the New Wage Schedule and the 0/2/2 wage increases.

While the City made the representation to the Union that it would not be disadvantaged by the delay in negotiations for 2016 CBA, the City did not indicate the Union would definitively gain a significant advantage by delaying its negotiations. In the opinion of the arbitrator, given the City-wide wage pattern and the City's financial constraints in 2016, the Fact

---

who supervised the Paramedics.

Finder would not have awarded any wage increase to the Union effective April 1, 2016. That is further recognized in the 0/2/2 wage increase which was awarded by the Fact Finder.

Based upon the improved financial condition of the City subsequent to 2016, the arbitrator is of the opinion the Fact Finder would have made the recommended New Wage Schedule retroactive to April 1, 2017, not April 1, 2016. If the New Wage Schedule was made retroactive to April 1, 2016, the award would break the City-wide pattern since as a result of the New Wage Schedule the Captains would have received a substantial increase in wages in 2016, while the other bargaining units would have received no increase. Reading the Final Report in its entirety, the arbitrator is of the opinion that the Fact Finder intended to adhere to the City-wide wage pattern to the extent possible.[33]

In summary, in the opinion of the arbitrator, a reasonable interpretation of the Final Report, and the record that preceded it, results in the following:

1) Effective April 1, 2016 no wage increase for the Captains, consistent with the negotiating results of the other City bargaining units.

2) Effective April 1, 2017, the New Wage Schedule is implemented. Thereafter, the 2% wage increase is applied at each step of the New Wage Schedule.

3) Effective April 1, 2018, the 2% wage increase is applied to each step of the New Wage Schedule. The agreed upon $3,000 Equity Adjustment is to be added to each step of New Wage Schedule, after the application of the 2% wage increase..

---

[33] Consistent with: "[t]o break the established pattern, the Union 'bears a significant burden to demonstrate' that its members warrant a more favorable wage increase relative to other bargaining units performing similar work", the arbitrator is of the opinion the Fact Finder would have concluded the Union did not carry its burden regarding gaining a more favorable wage increase commencing April 1, 2016, relative to other bargaining units performing similar work, which bargaining units received no wage increase.

UNIFORM ALLOWANCE

With regard to the Uniform Allowance, the Fact Finder made the following Final Recommendation (the "Final recommendation - Uniform Allowance"):

> "The fact-finder recommends that the Captains receive the same uniform allowance afforded CARE bargaining unit employees as the two units are closely related to each other and perform their respective assignments in the same work settings. Therefore, the Captains shall receive an annual maintenance allowance of $325.00 and an annual uniform allowance of $475.00 during the term of the new contract. There is no substantive justification for members of the bargaining unit to receive a one-time promotion allowance of $150.00 and that proposal is rejected."

The Final Report language at issue is the following: " . . . during the term of the new contract." The Union submits the "term" of the new contract is April 1, 2016 through March 30, 2019. Based upon that position the Captains would be entitled to the uniform allowance commencing in 2016, and continuing through contract years 2017- 2018 and 2018-2019. The City argues that the new contract was not effective until March 8, 2019[34]; therefore, the "term" of the new contract is March 8, 2019 through March 30, 2019. As a result, the City maintains the Captains are only in entitled to the uniform allowance contained in the Final Report for 2019 only.

The issue for the arbitrator to determine is: did the Fact Finder intend the use of the phrase "during the term of the new contract" to cover i) the period of April 1, 2016 through March 30, 2019, or ii) the period of March 8 through March 19, 2019?

In the opinion of the arbitrator the Fact Finder intended for the period of time to be

---

[34] Although SERB indicated the effective date was March 14, 2019, the City contends the new contract effective date was seven (7) days after the issuance of the Final Report, since neither party objected to the Final Report. In the opinion of the arbitrator the effective date, whether March 1 or March 14 is not material to the outcome of this dispute.

covered by the 2016 CBA was form April 1, 2016 to March 30, 2019, as evidenced by the Compensation section of the 2016 CBA, if nothing else. The Compensation section, as stated above provided for the wages to be paid the Captains effective April 1, 2016; April 1, 2017 and April 1, 2018. Accordingly, it is impossible to conclude therefrom that the term of the 2016 CBA was only limited to March 14, 2019 to March 30, 2019. Although certainly not controlling, but supportive of such conclusion, is *The City Record*, dated March 27, 2019, which reflected City Council's approval of the "collective bargaining agreement with the [Union] . . . for a period of April 1, 2016 through March 30, 2019 . . ."

In the opinion of the arbitrator, based upon the foregoing, that the use of the word "term" by the Fact Finder was meant to cover the time period which was covered by the 2016 CBA. Therefore, the arbitrator must conclude that the use of "term" in the Uniform Allowance final recommendation was intended to cover the period of April 1, 2016 through March, 2019.

Unlike the Compensation provision discussed above, the arbitrator does not believe the Uniform Allowance is considered "wages"; accordingly, the retroactive application of the Fact Finder's final recommendation for the Uniform Allowance would not have been considered by the Fact Finder to have been impacted by the City-wide wage pattern. Therefore, in the opinion of the arbitrator, the Fact Finder intended the Final Recommendation - Uniform Allowance in the Final Report to be retroactive to April 1, 2016.

Finally, as to the retroactive awarding of the Compensation and the Uniform Allowance of the 2016 CBA, the Union is seeking an additional award of interest on the monetary award granted herein. As stated in Elkouri & Elkouri, *How Arbitration Works*, 8th Edition, at Chp. 18.3.G (citations omitted):

"The question of whether interest should be allowed on the principle sum awarded has arisen frequently. The traditional majority rule is that in the absence of an express contract provision to the contrary, arbitrators traditionally do not award interest on back pay or other monetary awards . . ."

Accordingly, following the above stated traditional majority rule, the Union's request for interest on the amount of money due to the Captains is denied.

AWARD

Consistent with the Decision above, the Grievance is sustained in part, and denied in part, as follows :

1) The 2016 CBA is deemed effective, in accordance with the terms of this Decision, and the Grievance is deemed to be arbitrable;

2) In accordance with the terms of the 2016 CBA including the Final Report, the EMS Captains are to receive pay in accordance with the New Wage Schedule effective as of April 1, 2017, and the recommended Uniform Allowance increases effective as of April 1, 2016;

3) The EMS Captains are to be made whole, in accordance with the foregoing Decision;

4) Although the fee of the arbitrator is to be assessed to the "losing party" pursuant to Article XXV, Section 3 of the CBA, the arbitrator finds neither party's interpretation of the Final Report - Compensation was accepted by the arbitrator. As a result the arbitrator concludes there is not a "losing party" in this proceeding. Accordingly, the arbitrator fee shall be divided evenly between the parties.

5) The arbitrator shall retain jurisdiction for 60 calendar days, from the date hereof, to resolve any dispute over the remedies awarded herein. As to all other matters, this Decision is final and binding.

Robert J. Vana
Labor Arbitrator

Dated and made effective this 15th day of February, 2021, in the County of Cuyahoga, State of Ohio.

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of Fact-Finding Between:	)	
THE CITY OF CLEVELAND	)	**Case No. 2016-MED-01-0043**
-and-	)	
	)	**Jonathan I. Klein, Fact-Finder**
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, LOCAL 4340	)	

FACT-FINDING REPORT and RECOMMENDATIONS

Appearances

For the Union:
Leonard Brooks - Business Agent, Communication Workers of America (CWA), Local 4340
Dave Passalacqua - Executive Vice President, CWA
Michael Threat - Chief Union Steward

For the Employer:
George S. Crisci, Esq. - Zashin & Rich Co., L.P.A.
Nicole Carlton - Commissioner
Austin Opalich - Labor Relations Manager
Edward Eckart, Jr. - Asst. Safety Director

Date of Issuance: March 1, 2019

I. PROCEDURAL BACKGROUND

This matter came on for hearing on January 22, 2019, before Jonathan I. Klein, appointed as fact-finder pursuant to Ohio Revised Code Section 4117.14, and Ohio Administrative Code Section 4117-9-05, on November 30, 2018. The hearing was conducted between the City of Cleveland ("Employer" or "City"), and the Communications Workers of America, Local 4340, AFL-CIO ("Union" or "CWA"), at Burke Lakefront Airport, 1501 North Marginal Road, Cleveland, Ohio 44114. As set forth in Article II of the collective bargaining agreement effective April 1, 2013 through March 31, 2016, the Union is the sole and exclusive bargaining representative of all full-time employees with the job title of EMT Supervisors (Captains) who have completed their probationary period. At the time of the hearing, the bargaining unit was comprised of approximately 16 Captains.

The parties reached tentative agreements regarding numerous articles contained in the collective bargaining agreement. However, as of the fact-finding hearing the following issues remained open and are properly before the fact-finder for resolution:

Issue 1:	Compensation- Article 28
Issue 2:	Leaves of Absence- Article 9
Issue 3:	Shift Assignments- Article 14
Issue 4:	Holidays- Article 17
Issue 5:	Overtime- Article 22
Issue 6:	Discipline- Article 25
Issue 7:	Hazardous Duty Injury- Article 27
Issue 8:	Advanced Life Support- Article 29
Issue 9:	Uniform Allowance- Article 32
Issue 10:	Appendix A- Attendance Policy
Issue 11:	Staffing- new article

The fact-finder incorporates by reference into the Report and Recommendations any provision of the current collective bargaining agreement not otherwise modified during negotiations, as well as the parties' tentative agreements. In making the recommendations which follow, the fact-finder has reviewed the arguments and evidence presented by the parties at hearing, together with their respective position statements.

II. FACT-FINDING CRITERIA

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

(1) Past collectively bargained agreements, if any, between the parties;

(2) Comparison of the unresolved issues relative to the employees in the bargaining unit with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;

(3) The interest and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service;

(4) The lawful authority of the public employer;

(5) Any stipulations of the parties;

(6) Such other factors, not confined to those listed above, which are normally or traditionally taken into consideration in the determination of issues submitted to mutually agreed-upon dispute settlement procedures in the public service or in private employment.

III. FINDINGS OF FACT AND FINAL RECOMMENDATIONS

Issue 1: Compensation- Article XXVIII

Position of the City

To date, the City has settled 20 of its 22 non-safety force bargaining agreements and seven of eight safety force contracts. At the present time, the Union is the last safety force bargaining unit in negotiations. The City's pre-hearing statement discussed the events and circumstances which it has faced since 2004, including, but not limited to, the Great Recession; cuts in local government funding by the State of Ohio; loss of revenue from the traffic camera program; increases in expenditures; a consent decree with the U.S. Department of Justice; and various lawsuit pay outs. In November 2016, the City's residents passed a 0.5 percent income tax increase effective in 2017. The bargaining unit employees will receive the benefit of this income tax increase in the second and third years of the new contract. However, the City only projects to stabilize the budget, address some basic needs, and gradually build reserves to acceptable levels as a result of the tax increase. Therefore, it needs to remain financially cautious and judicious.

According to the City, the tax increase is projected to generate an additional $83.5 million for the General Fund. The projected General Fund carryover will increase from 3.12 percent at

the end of 2016 to approximately 10 percent by 2020. However, even at the aforementioned level, the General Fund carryover balance will not approach the minimum acceptable level of 16 percent recommended by the Government Finance Officers Association. The record indicates that the City had a $32.8 million carryover in its General Fund at the end of 2017, representing just over five percent of its expenditure budget. The City notes that this carryover is misleading as it was only able to fill a small number of its budgeted vacancies and the cost of wage increases and filling vacancies was projected to be in excess of $20 million in 2018. The City estimated that it would have a carryover balance of $33.4 million at the end of 2018. However, the City spent more on health benefits last year than it anticipated, and it has lost approximately $250 million in funding from the State of Ohio during the past decade. In sum, the income tax increase will only stabilize the City's financial condition and avert further layoffs and cuts. Nonetheless, the City acknowledged that it has realized a significant financial improvement.

The City also discussed its massive unfunded needs. The record indicates that it has hired hundreds of essential personnel in an effort to rebuild its employment rolls. However, overall staffing is still lower than it was in 2004. The City expended almost $7 million in 2018 and 2019 on personnel and equipment improvements in the Division of EMS. Specifically, 60 paramedics, eight emergency medical dispatchers and four captains were hired at a cost of $4.5 million. The City also purchased nine new ambulances. The City asserts that the ongoing costs associated with filling hundreds of vacancies and addressing the structural deficit will largely consume the $83 million generated by the income tax increase. It notes that the identified costs of repairing and/or replacing buildings, road and bridges is nearly $1 billion.

The City rejected the Union's wage proposals and its opposition to the cost-saving measures which it negotiated with nearly every other bargaining unit. The terms proposed by the Union would be ruinous for the City during the next round of negotiations. Furthermore, the economic struggles of the City during the past 15 years do not support the Union's wage demands. During the current round of negotiations, the City has a well-established wage and insurance-benefit pattern. The City recently resolved its negotiations with AFSCME Local 100, which represents the largest civilian bargaining unit of 1,123 members, by agreeing to wage increases of 0%, 2% and 2%, as well as a $500.00 lump sum ratification bonus. In turn, AFSCME agreed to the City's health insurance proposal. The City reached a settlement on the aforementioned pattern wage and health insurance terms with 20 of the 22 civilian bargaining agreements.

In addition to the reasonableness of a 0%, 2% and 2% wage rate pattern, the City took the extraordinary measuring of offering more to some of its safety forces. The City ultimately agreed to pattern wage increases without lump sum increases, equity adjustments effective prospectively and pattern health insurance terms for over 2,600 civilian and non-civilian safety force employees. The City also developed a number of proposals which it made in all of its collective bargaining negotiations to address a number of operational issues. It points out that neutrals have long rejected proposals that would break the City's established pattern bargaining agreements. The City cited awards by this fact-finder and others in support of its position regarding pattern bargaining. According to the City, "[p]arity, or the use of patterns among a multitude of bargaining units that negotiate with a single employer, has long been cited as controlling in

settling negotiation disputes." (City Pre-Hearing Statement, at 13). It claims that there is no surer way to undermine goodwill than to grant more to one group than is negotiated with another. The fact that the City and the unions representing its employees have endorsed parity is no surprise. During the current round of negotiations, the enhanced terms for the City's non-civilian safety forces followed a specific pattern: "a $3,000 equity adjustment for employees with more than 10 years' service and a $1,800 equity adjustment for employees with fewer than 10 years' service (or those amounts factored into a wage differential), effective after the 2% general wage increase on April 1, 2018, . . ." (City Pre-Hearing Statement, at 19).

The City's wage proposal in this matter is as follows:

a. Wage Differential Schedule

Modify the current wage schedule as follows:

Reduce the current five-step wage schedule (Start-After Year 4) and replace with a three-step schedule (Start-After Year 2).

For the three steps on the new wage step schedule, establish the following wage differential for each step, based upon the top rate for the Top CARE Paramedic ($52,724 under 2013-16 City/CARE Labor Agreement):

Start:	10%
After Year 1:	12.5%
After Year 2:	15.0%

Place employees in the current wage step schedule on the following steps under the new wage step schedule:

Current Step	New Step
Start	Start (Old After Year 2)
After Year 1	After Year 1 (Old After Year 3)
After Year 2	After Year 2 (Old After Year 4)

After Year 3	After Year 2 (Old After Year 4)
After Year 4	After Year 2 (Old After Year 4)

b. Wage Increase:

After placing employees on the new wage step schedule, amend Article XVIII to reflect the following across-the-board wage increases:

First Year	0% wage increase effective April 1, 2016
Second Year	2% wage increase retroactive to April 1, 2017
Third Year	2% wage increase retroactive to April 1, 2018

c. CARE Contingency

If members of the CARE bargaining unit receive an equity adjustment for the 2016-2019 Labor Agreement, then employees in this bargaining unit will receive prospectively the same equity adjustment, enhanced by the wage differential.

(City Pre-Hearing Statement, Appendix B).

The City emphasizes that it has maintained a nearly unabridged adherence to pattern bargaining for the last 25 years. In being faithful to the wage pattern in these negotiations, the City points out that its proposal is retroactive so that the bargaining unit members will not be disadvantaged. Regarding the majority of the City's unions whose members are paid from the General Fund, no neutral has ever issued an award or recommendation at variance with an established pattern on wages and insurance.

As indicated above, the City's wage proposal is comprised of three components. First, the City's proposed annual base wage increases of 0%, 2% and 2% during the term of the contract are the same as it negotiated with every other bargaining unit. Second, the City

proposed to establish a multi-step wage differential which is based upon the regular wages of the highest paid paramedic in the CARE bargaining unit.[1] This arrangement is currently in effect with the police, civilian law enforcement and fire units and the 10 %, 12.5% and 15% differentials which are proposed by the City track the arrangement between the chief dispatchers and dispatchers. Third, the City proposed contingency language which allows Captains to receive an even greater wage increase if the paramedics receive an equity adjustment to their wages.

The City asserts that the above enhancements will significantly increase the compensation for Captains. For example, simply converting to a wage differential tied to the top paramedic rate without factoring in the wage rate increases will result in an increases of $1,997.91 for a new captain; $2,755.18 after year one; $3,391.27 after year two; $2,616.24 after year three; and $1,304.86 after year four. When factoring in the zero percent, two percent and two percent wage increases, the proposed enhancements result in increases of $4,340.96 for a new captain; $5,151.49 after year one; $5,840.83 after year two; $5,065.80 after year three; and $3,754.42 after year four. Additionally, establishing a wage differential that is at least 10% higher than the top paramedic rate also addresses issues regarding the difference between the starting rate of a

1. The City notes that paramedics assigned to perform the duties of a paramedic crew chief receive a supplemental pay of $3,000.00, which is not used in the calculation of wage increases and is always in addition to the employee's base rate. A crew chief is not a regular civil service job classification and the EMS Commissioner has the sole discretion whether to assign an employee to serve as a crew chief. Therefore, the City asserts that it is inappropriate to tie a Captain's wages to that level of compensation.

Captain and the compensation for a paramedic crew chief (top rate for paramedic plus $3,000.00 stipend). Currently the difference is only $274.49 ($55,998.49 compared to $55,724.00). The ten percent wage differential for the starting rate of a Captain before factoring in the wage increases results in a difference of $2,272.40.

In sum, the maintenance of the pattern wage increase is reasonable and recognizes the City's broader collective bargaining realities. Moreover, the City's proposal results in a fair compensation increase for the bargaining unit employees. For each of the aforementioned reasons, the City requests that the fact-finder recommend its proposals regarding Article XXVIII.

Regarding the Union's wage proposal, the City indicates that it was rejected for the following reasons. First, the City's proposed wage differential and CARE contingency proposals largely moot the Union's equity adjustment proposals. Any equity adjustments received by the Captains will be related to the equity adjustments received by their subordinates. Second, the contingency language addresses the possible delay caused by the motion to vacate the CARE conciliation award by ensuring that the Captains will receive such an equity adjustment when and if CARE members receive an adjustment. Third, the Union's demand for a nearly $5,000.00 equity adjustment for employees with ten years of service is excessive in comparison to the equity adjustments afforded employees in other safety forces bargaining units.

Position of the Union

The Union proposes that the wage step schedule be modified to include only two steps, a starting step and after 1 year. The Union indicated that it agreed to the City's proposed general wage increases of 0% in year one; 2% in year two with retroactivity; and 2% in year three with

retroactivity. Additionally, the Union also agreed with the City's proposed $3,000.00 equity adjustment after the above percentage increases. The Union further proposes an additional $1,962.57, or an ALS incentive of $1,962.57, after ten years of service.

The Union contends that the City is not in the same financial strait which it suffered through years ago. It points out that only three out of the 16 Captains have at least 10 years of service at the present time. Therefore, its wage proposal will not have a significant impact upon the City, nor will it result in a financial burden. The Union asserts that its ". . . additional ask was just under $2,000 as an additional equity adjustment based on years of neglect, in our opinion, of rightful increases, commensurate with the position of supervisor as compared to other public safety forces like police and fire." (Tr. at 35). The testimony indicates that the Captains supervise approximately 280 EMTs, paramedics and dispatchers represented by CARE.

Michael Threat, a Captain with the City's Emergency Medical Service and the chief Union steward, provided the following testimony regarding how the Union arrived at its proposed wage increase of $1,962.00:

> Because that represents the amount of salary that's described in the City Record for the captains group. Every other public safety group, whether it be police or fire, their top salary is represented in City Record. So whatever the range of pay is between the beginning range and end range is recorded in City Record. City Council votes on it, and once its approved the members that are in those affected units get the pay based on where they sit in that particular procedure.
>
> (Tr. at 39-40).

According to Mr. Threat, the maximum pay in the City Record is consistent with the top salary of each group in public safety with the exception of EMT supervisors. The top of the range maximum for EMT supervisors as of March 2014 was $61,147.43, while the current top wage rate for a Captain is only $59,327.74. Regarding the requested equity adjustment, Mr. Threat pointed out that the FOP, sergeants, lieutenants and captains all received $3,000.00 equity adjustments. Additionally, he claimed that all of the other safety forces units have two wage steps. Mr. Threat reiterated that the Union's proposal would not have a huge financial impact upon the City.

Final Recommendation

Based upon the evidence of record presented in this case, the parties are in agreement regarding annual, percentage wage rate increases. Accordingly, the fact-finder recommends that bargaining unit employees shall receive the following wage rate increases in the new contract: 0% effective April 1, 2016; 2% retroactive to April 1, 2017; and 2% retroactive to April 1, 2018. These percentage was increases shall be applied prior to any equity wage adjustment.

The fact-finder further recommends that the current wage step schedule should be modified to provide two steps: a Starting Step (old step After Year 3) and After Year 1 step (old Step After Year 4); and a wage differential of 10% and 15% at each new step, respectively, based upon the top rate of pay for the top CARE paramedic ($52,724.63 under the 2013-2016 City/CARE collective bargaining agreement). Although the top rate of pay for a paramedic to be used for purposes of applying the aforementioned wage differentials does not include the supplemental pay received by a paramedic while performing the duties of a crew chief, the

arbitrator notes that the enhancements of a compressed wage step schedule and the wage differential will still result in a significant increase in the compensation afforded Captains over the employees whom they supervise. The fact-finder determines that the City is able to absorb the costs associated with a two-step wage scale, rather than three steps as it proposed, based upon its improved financial condition.

While *The City Record* provides a minimum and maximum pay range for various classifications as approved by City Council, it does not mandate a maximum wage for a specific job classification under the terms of a collective bargaining agreement. Those wages are determined through the process of negotiation and agreement between the City and the union representing the employees in that bargaining unit, or in the absence of an agreement, as set by a conciliator. As previously stated by this fact-finder in *City of Cleveland -and- Fraternal Order of Police, Ohio Labor Council, Inc. (Scientific and Fingerprint Examiners)*, Case No. 03-MED-12-1396, at 10, January 29, 2006: ". . . the concept of City-wide pattern of bargaining has, with few exceptions, existed for many years. To break the established pattern, the Union 'bears a significant burden to demonstrate' that its members warrant a more favorable wage increase relative to other bargaining units performing similar work." (City Tab 26).

In this case, the fact-finder determines that the Union has presented insufficient evidence to warrant an additional equity adjustment for the Captains in light of the above recommended wage rate increases; modification of the wage step schedule; wage differential; and the equity adjustment discussed below. Based upon the record presented, the fact-finder recommends that all Captains should receive the same equity adjustment, if any, that is ultimately received by

members of the CARE bargaining unit, enhanced by the above recommended wage differentials.[2] This equity adjustment shall be applied after the 2% increase in the third year, effective April 1, 2018. No further equity adjustments or other incentives as proposed by the Union are recommended by the fact-finder.

Issue 2: Leaves of Absence- Article IX

Position of the City

Article IX of the collective bargaining agreement entitled "Leaves of Absence," provides, in pertinent part, as follows:

* * *

F. Union Leave

* * *

> The City shall grant the Union twelve (12) days per calendar year, with pay, for the Representative of the Union to take care of Union business as operational needs permit. The Union shall decide how the time is spent, and shall notify the City at least five (5) days in advance.

* * *

2. The motion to vacate the CARE, Local No. 1975 and City of Cleveland conciliation award referenced by the City does not, at a cursory glance, allege any error by the conciliator with respect to the equity adjustment. The implications for the viability of the equity adjustments if the motion to vacate and relief requested are granted remains unclear, however. *See, City of Cleveland Association of Rescue Employees, Local 1975 (Cuyahoga Cty. C.P., CV18908520)(2018).*

I. Sick Leave With Pay

* * *

5. Upon retirement or death, an employee, or his legal representative, shall have the right to convert his accumulated paid sick leave into cash at the rate of one (1) day's pay for each three (3) days of unused accumulated paid sick leave. The pay rate used shall be the same three (3) years average as used under "P.E.R.S." Once sick leave is converted upon retirement, all then accumulated sick leave is forfeited.

* * *

K. Sick Leave Without Pay

After an employee has exhausted his sick leave with pay, he or she shall be granted a leave of absence without pay for a period not to exceed six (6) months because of personal illness, injury, or pregnancy (including post-partum recovery periods), upon request, supported by medical evidence satisfactory to the City if the employee has reported such illness, injury, or pregnancy (including post-partum recovery periods), to his or her department head or immediate supervisor by no later than the second day of absence. If the illness, injury, or pregnancy (including post-partum recovery periods), continues beyond six (6) months, the City may grant additional sick leave under this paragraph upon request. An employee on sick leave is expected to keep the City informed on the progress of his or her illness, injury or pregnancy (including post-partum recovery periods), as circumstances allow. An absence of three (3) or more consecutive shifts requires a doctor's certification in order for the employee to return to work.

* * *

The City proposes to modify the second sentence in paragraph I.5 of Article IX to base the formula for sick leave cash-out on an employee's current base hourly rate, rather than on his

or her three-year average of total earnings. The City also proposes to modify the first sentence of paragraph K to specify that the granting of the first six months of unpaid leave resides within the sole discretion of management.

The City's sick leave pay out proposal is based upon the economic savings of the proposed language. Under the current provision, employees contemplating retirement within the next three years have the ability to cash out their accumulated and unused sick leave at the same average rate used to calculate their pension, which includes overtime, longevity and other earnings. This provision has potentially massive economic implications for the City because there is no contractual limitation on the amount of sick leave that employees may accrue. An employee who converts sick leave into 1,300 hours of pay would receive over 60 percent of their annual wages. The City notes that the overall difference between a base hourly rate and a rate which includes overtime, longevity and other earnings is substantial. Under its proposal, the City does not seek to eliminate this sick leave conversion benefit or place a cap on the amount of sick leave that an employee may accumulate. The City simply desires to ensure some economic savings by paying this benefit to bargaining unit employees at their base hourly rate.

At hearing, the City reiterated that it seeks to reduce the amount of sick leave cash out in an effort to save money. The City acknowledged that its proposed language has only been negotiated with the bargaining unit represented by the Ohio Nurses Association. The City also asserts that it is not penalizing employees for being healthy as claimed by the Union. It points out that the 1/3 rate at which it pays out accumulated sick leave is higher than the statutory rate and there is no ceiling on the number of hours that may be cashed out.

The basis of the City's second proposal regarding this issue is to ensure that it has the discretion to deny an unpaid leave request for up to six months when operational and staffing needs preclude allowing so much time off for an employee. The record establishes that the City has appropriately administered this benefit for the bargaining unit. It points out that employees who have FMLA-covered leave have been permitted to use this benefit to extend their absence if supported by appropriate medical documentation. For each of these reasons, the City requests that the fact-finder recommend its proposal on leaves of absence.

The City rejects the Union's proposals to modify the current contract language to provide that each CWA representative may take up to 12 days of leave with pay to conduct Union business; and that employees be allowed to take paid or unpaid sick leave in four-hour increments instead of the requirement that such time off be used in full-day blocks. The City maintains that there is no justification for increasing the amount of paid Union leave. It asserts that employees are paid to perform their jobs and allowing such an increase in paid time off is both expensive and inefficient. Regarding the Union's comparison to the amount of union time received by CARE representatives, it points out that CARE is almost 20 times larger than this bargaining unit. Additionally, the Union provided no indication of the number of days used for Union leave by CWA representatives. Commissioner Carlton asserted that grievance hearings or pre-disciplinary hearings have only been rescheduled due to operational concerns.

Regarding the Union's use of sick time proposals, the City contends that it would cause operational problems in situations where ". . . an employee calls in sick, the City adjusts for that employee's absence by making necessary staffing changes, and the employee 'feels better and

desires to return to work on that same day; and . . . employees schedule medical appointments in the middle of their shifts and wish to work immediately before and after that appointment." (City Pre-Hearing Statement, at 30-31). Furthermore, the City claims that reducing the increments in which an employee must use sick leave does not necessarily reduce overall sick leave usage. According to the City, it is actually a deterrent for an employee to take sick time if it must be utilized in full 12-hour blocks. The City believes that there is no basis to change the current system. However, the City indicated at the hearing that it would be acceptable for an employee to utilize sick leave at either the beginning or end of his/her shift.

Position of the Union

The Union proposes to modify Section F of Article IX to provide as follows: "The City shall grant the Union 12 days per calendar year, with pay for each Representative of the Union to take care of Union business [as] operational needs permit." The Union also proposes to add a new paragraph 8 to Section I of Article IX which provides that "Employees shall have the option of using partial sick time in two hour increments." Lastly, the Union proposes to add the following sentence at the end of Section K of Article IX: "Employees shall have the option of using partial sick time without pay in two (2) hour increments." The Union notes that it has countered with four hour increments regarding its use of sick time proposals.

Mr. Threat pointed out that CARE representatives receive 36 days of union time per quarter. However, he acknowledged that there are approximately 300 members in the CARE bargaining unit. The Union claims that its representatives have run out of union leave and pre-

disciplinary hearings and grievances have been rescheduled because the City would not approve union time.

In support of its proposed new language regarding the partial use of sick leave, the Union claims that its members are forced to take an entire day off when it is unnecessary to do so. As an example, Mr. Threat testified that he recently had to take a whole day off in order to attend a two-hour medical appointment. The Union asserts that employees are placed on an accelerated path towards violating the no-fault attendance policy as a result of being forced to utilize sick leave in 12-hour increments. It also maintains that the forced use of an entire shift for sick leave creates operational issues for the City. Under its proposal, less sick time would be used by bargaining unit employees. The Union also points out that the City has adopted the concept of partial sick time usage with some bargaining units.

Regarding the City's proposal to modify the sick leave cash out formula, the Union maintains that the City already receives a reduction of value at the expense of the employees because it only pays out one hour of sick leave for every three hours earned. The Union asserts that any further reduction would result in an extreme hardship for the bargaining unit employees. Additionally, other safety forces units have not agreed to the City's proposal regarding this issue. In response to the City's proposal to modify Section K of Article IX, the Union points out that there is no evidence of any bargaining unit employees abusing the sick leave policy. In fact, the forced use of sick leave under the current contract language is causing a hardship for employees in terms of being paid while sick.

Final Recommendation

The fact-finder determines that the Union presented insufficient evidence to support its proposal to increase the amount of union leave afforded representatives under Article IX, Section F of the collective bargaining agreement. The comparison of union leave afforded CARE representatives is unpersuasive given the significant difference in the number of employees represented by CARE as compared to the size of this bargaining unit. The Union presented no evidence that any bargaining unit employees have been denied representation or that it has been unable to conduct any necessary Union business. The fact-finder notes that the current language provides that such leave will be granted as operational needs permit. Although some grievance meetings or pre-disciplinary hearings may have been rescheduled by the City, there is insufficient evidence that it did so for any non-operational reasons.

The fact-finder further recommends that the City's proposal to base the formula for sick leave cash out on an employee's current base hourly rate should not be incorporated into the new contract. Under the current language, the pay rate utilized for calculating sick leave cash out is the same three year average set forth by OPERS for pension purposes. The City presented no basis for modifying this long-standing formula, other than its simple desire to save money. The fact-finder notes that the City's proposal would result in a significant cost to employees who have accumulated a significant bank of sick leave as a result of their good attendance. As discussed above, although the City is not flush with cash its financial position has certainly improved as compared to prior years. The fact-finder notes that the City estimates that its General Fund balance will increase from $32,851,044.00 to $33,436,680.00 in 2018.

The City's proposal to modify Section K of Article IX is also not recommended by the fact-finder. The City presented insufficient evidence to warrant a modification of the current contract language. There is no evidence that any bargaining unit employees have abused sick leave in the past, or that the granting of unpaid sick leave at the request of an employee during the first six-months upon submission of appropriate medical documentation has resulted in any undue hardship upon the City.

Based upon the evidence of record presented at hearing, the fact-finder recommends that new language should be added to Article IX of the collective bargaining agreement to allow bargaining unit employees to utilize both paid and unpaid sick leave in four hour increments as proposed by the Union. In order to alleviate issues faced by bargaining unit employees who are forced to utilize more sick leave than is necessary and address administrative and scheduling concerns raised by the City regarding the Union's proposal, the fact-finder recommends that the new language added to the contract should provided that bargaining unit employees may utilize paid and unpaid sick leave in four hour increments either at the beginning or end of their shifts.

Issue 3: Shift Assignments- Article XIV

Position of the City

Article XIV of the current collective bargaining agreement entitled "Shift Assignments," provides, in part:

> Prior to implementation of the shift selections (January 1), the Commissioner may transfer up to four (4) employees to an alternate shift and/or key.

Three shifts shall be established for operation of the system. They shall be as follows: 7:00 a.m. to 3:00 p.m.; 3:00 p.m. to 11:00 p.m.; and 11:00 p.m. to 7:00 a.m. Provided, however, that the City reserves the right to change the foregoing shift hours as operational needs dictate. It is the general policy of the City that shifts shall be rotated every three months for each employee. It is also the general policy of the City to rotate shifts from days to nights to afternoon shifts. The rotation and shift schedule shall be posted quarterly.

* * *

The City will staff all employees (except Coordinators) on twelve (12) hour shifts through the expiration of this Collective Bargaining Agreement (March 31, 2016), except as provided below. If the City desires to convert the schedules of the employees back to eight (8) hour shifts, it must commence negotiations with the Union over the decision and effects of that decision no less than thirty (30) days prior to implementation. Upon expiration of this thirty (30) day period (but no sooner than March 31, 2016), the City may convert the schedules of any of its employees to eight (8) hour shifts.

* * *

Employees scheduled to work twelve (12) hour shifts shall be governed by the following modification in this Agreement:

* * *

4. Overtime.

   a. Every pay period in which an employee works a forty-eight/thirty-six hour schedule including paid union leave, the employee will earn and be paid two additional hours of pay (at straight time) and will accumulate six hours to be applied toward a star day.
   b. Every pay period in which an employee is scheduled a star day (36/36), the employee will not be paid the additional two hours.

c. The City will attempt to schedule the star day either every third or fourth pay period. If the star day is not scheduled until the fourth pay period, the employee will have earned an additional six hours toward the next star day.

d. If the City is unable to schedule the star day by the end of the fourth pay period, the employee at his or her option, may either bank the accumulated time earned or be compensated in cash (i.e., 24 hours at straight time).

e. Unless the affected employee advises the payroll officer of how he or she wishes to be compensated within five business days prior to the end of the next pay period, the City will maintain discretion on how the employee will be compensated.

f. Any cash payments owed will be paid on the succeeding pay period following the employee's request or the City's discretionary judgment.

* * *

The City proposes to delete the second and fourth paragraphs of Article XIV in order to provide management with the discretion to change shifts and schedules if operational and staffing needs warrant such actions. According to the City, the motive for its proposal is preventative and not reactive. The City asserts that it does not contemplate making any changes to the current operations in the foreseeable future in the event this proposed modification is adopted.

As it concerns the Union's proposal to modify paragraph 1 of Article XIV, the City claims that it ". . . needs the discretion to transfer employees if there is a documented deficiency in employee performance . . . , if there is a need for coaching or training, and to maintain staffing

balance based upon operational needs." (City Pre-Hearing Statement, at 31). It points out that the initial proposal by the Union placed a cap on the number of employees who could be transferred and based it on seniority. The City maintains that there are certain instances where transfers need to be made for operational or performance based reasons. However, it acknowledged that one of the reasons for these transfers in the past was to maintain racial balance among the ranks. According to the City, there is significant distrust on both sides regarding this issue. Nonetheless, the City indicated that it would accept a proposal that affords management the necessary discretion for transfers when operationally required.

The City further asserts that the Union's proposal regarding paragraphs four and five of Article XIV is more than clean-up language. The current provision allows it to move to either eight or ten-hour shifts if operationally necessary. The City acknowledges that employees are currently assigned to 12-hour shifts, however, there is a built-in overtime cost associated with such a schedule. The City would like to retain its managerial discretion to modify the work schedule and it points out that it did not agree with the conciliator's award regarding the CARE contract. It notes that this Union is not a conciliation bargaining unit.

Regarding the Union's star day proposal, the City indicated that it would agree to pay bargaining unit employees for star day hours if it is not optional. The City notes that it needs to maintain consistency in administrating the program and it would be adversely affected by allowing bargaining unit employees an option to select either payment or banking the accumulated time. According to the City, compensatory time places a strain on scheduling, costs more money, and is an "administrative nightmare to keep up with." (Tr. at 143). The City

indicated that it has not been giving comp time for star days since 2009 and it is easier to just pay cash for overtime work. It points out that the bargaining unit employees currently receive more days off than most employees of the City due to the nature of their work schedules. The City would simply like to memorialize the parties' regular practice in the contract by removing the current star day language and paying out the time earned at the overtime rate. Commissioner Carlton pointed out that bargaining unit employees are able to track their star days earned on TeleStaff, notwithstanding the Union's argument that there are flaws in the system.

Position of the Union

The Union proposes to delete the first paragraph of Article XIV of the collective bargaining agreement, and it indicates that the parties reached a tentative agreement on the following language: "If there is an elimination of keys/shifts after bidding but before completion of vacation canvass there shall be a reposting of the available shift/keys from the most senior affected captain down." According to the Union, the misapplication of the above contract language has caused conflicts regarding seniority scheduling. This has resulted in numerous grievances and a civil rights complaint being filed by the Union. (Union Tab 9). Therefore, the Union seeks to eliminate any ambiguities in the language and the possibility of abuse by the City.

The Union also proposes to modify the first sentence in the fourth paragraph of Article XIV to state that the "[t]he City will staff all employees (except Coordinators) on twelve (12) hour shifts through the expiration of this Collective Bargaining Agreement (March 31, 2019)." Additional, the remaining language in the fourth paragraph and the entire fifth paragraph of Article XIV are deleted under the Union's proposal. The Union maintains that all of the

bargaining unit employees are assigned to 12-hours shifts and there is no need to reference either 8 or 10-hour shifts in the contract.

The Union further proposes that the following new subsection should be added to Section 4, Overtime contained in Article XIV of the contract: "g. Employees at his/her option, shall be paid star day hours earned in the pay period that it is accumulated." The Union's Pre-Hearing Statement indicates that the City agreed to this proposal, however, the issue of the pay treatment is unresolved. Specifically, whether the payment should be six hours at the straight time rate or overtime pay.

Mr. Threat acknowledged that bargaining unit employees have been paid by the City for their star days, rather than receiving compensatory time, since at least 2009. However, time off is what was agreed to in the contract and the City should not arbitrarily decide whether it will give an employee a star day. According to Mr. Threat, the bargaining unit employees want the compensatory day off because their jobs are stressful, and the City should be required to explain the hardship if it cannot accommodate the time off. Additionally, the timeliness of the City in paying star days is also in dispute.

Final Recommendation

The fact-finder determines that the City presented insufficient evidence to support its proposal to delete paragraphs 2 and 4 of Article XIV. The City itself recognizes that it does not contemplate making any operational changes at this time. The fact-finder notes that the City retains some discretion to modify the shift schedules as set forth in the current contact language. Therefore, in order to afford the City such discretion, the fact-finder does not recommend the

Union's proposals to delete the fourth and fifth paragraphs of Article XIV. However, the first sentence in the fourth paragraph shall be modified to provide that "[t]he City will staff all employees (except Coordinators) on twelve (12) hour shifts through the expiration of this Collective Bargaining Agreement (March 31, 2019), except as provided below." The last sentence of the fourth paragraph of Article XIV shall also be changed so that the date of March 31, 2016, reads March 31, 2019.

Additionally, the fact-finder recommends that the first paragraph of Article XIV shall not be deleted as proposed by the Union, but shall remain in the new contract with the inclusion of language which allows management to transfer employees for legitimate operational concerns. It shall read: "Prior to implementation of the shift selections (January 1), the Commissioner may transfer up to four (4) employees to an alternate shift and/or key for legitimate operational concerns."

The fact-finder further recommends that language should be added to the new contract which provides that star days shall be paid out by the City at the overtime rate in the pay period in which they are earned to reflect the current practice of the parties over the past ten years. Although the Union expressed concerns over the lack of time off for star days, it presented insufficient evidence that any bargaining unit employees have been adversely affected by the current practice. For at least ten years bargaining unit employees have received pay, rather than compensatory time for star days. No proof of grievances or protests filed over application of this provision were in evidence. The fact-finder recognizes that employees desire paid time off. The reverse is often just as true – instead of time off they desire cash payments. It is important,

however, that contract language on an issue of this importance accurately reflect the parties clear, unambiguous custom and practice in the application of the language.

Here, there is a decade of undisputed application consistent with the removal of star days from the agreement. In order for employees to use compensatory time by working standard overtime, no changes shall be made to Article XXXIV – Compensatory Time, and the election of either a 40 or 240 hour cap shall remain unchanged. As an aside, no contract ready language was offered to improve the timing or tracking of star days of which the Union complained – an issue disputed by Employer witnesses at hearing as having no basis in fact. Finally, the term "star day" in Article XIV, 4. Overtime shall be deleted, and that numbered paragraph shall simply refer to overtime earned as the result of working twelve hour shift assignments per Article XIV. Article XIV shall read as follows:

SHIFT ASSIGNMENTS

> Prior to implementation of the shift selections (January 1), the Commissioner may transfer up to four (4) employees to an alternate shift and/or key for legitimate operational concerns.
>
> Three shifts shall be established for operation of the system. They shall be as follows: 7:00 a.m. to 3:00 p.m.; 3:00 p.m. to 11:00 p.m.; and 11:00 p.m. to 7:00 a.m. Provided, however, that the City reserves the right to change the foregoing shift hours as operational needs dictate. It is the general policy of the City that shifts shall be rotated every three months for each employee. It is also the general policy of the City to rotate shifts from days to nights to afternoon shifts. The rotation and shift schedule shall be posted quarterly.
>
> The City will maintain an overtime distribution policy aimed at providing equal distribution of available overtime, recognizing that supervisory personnel may be assigned overtime where after reasonable efforts or under extenuating circumstances, such overtime cannot be assigned to bargaining unit employees.

The City will staff all employees (except Coordinators) on twelve (12) hour shifts through the expiration of this Collective Bargaining Agreement (March 31, 2019), except as provided below. If the City desires to convert the schedules of the employees back to eight (8) hour shifts, it must commence negotiations with the Union over the decision and the effects of that decision no less than thirty (30) days prior to implementation. Upon expiration of this thirty (30) day period (but no sooner than March 31, 2019), the City may convert the schedules of any of its employees to eight (8) hour shifts.

The City may assign employees to four (4) ten-hour shifts with thirty (30) days advance notice. Employees moved from twelve-hour to ten-hour schedules will receive an additional five percent (5%) of their base salary while assigned to a ten-hour shift.

Employees scheduled to work twelve (12) hour shifts shall be governed by the following modifications in this Agreement:

1. Working Hours. Employees working twelve-hour shifts will work an average of seven days every two weeks, or 84 hours.

2. Holidays. Employees shall receive their two floating holidays on a day-for-day basis (i.e., each floating holiday will consist of twelve hours). In addition, if the employee works on any of the other nine holidays, the employee will receive twelve hours per pay at the overtime rate. In addition, all employees, whether they work the holidays or not, shall receive twelve hours of compensatory time for each holiday.

3. Vacations. Vacations will be pro-rated on an hour for hour basis and partial vacation days may be combined with compensatory time to add up to entire days. For example, one week of vacation will equal 40 hours, or 3 and 1/3 days. The employee may add eight hours of compensatory time to the partial day for a total of four vacation days.

4. Overtime. Overtime earned as the result of working twelve (12) hour shift assignments shall be paid out by the City at the overtime rate in the pay period in which they are earned.

5. Sick Leave. Employees will continue to earn sick leave at the same rate, i.e. 120 hours per year.

6. Hazardous Duty Injury. Hazardous Duty Injury will be pro-rated. The 120 day benefits shall be provided for 80 twelve-hour days and the 60 day extension benefits shall be provided for 40 twelve-hour days.

7. Union Leave. Union time shall be granted on a day-for-day basis.

8. Other Leave Provisions. Jury Duty Leave, Educational Leave and Administrative Leave are not affected.

9. Disciplinary Suspensions Without Pay. Disciplinary suspensions without pay will be pro-rated on an hour for hour basis, and partial days may be combined with compensatory time or accumulated time to add up to entire days. For example, an employee who is suspended for one day will be suspended for eight hours, and may add four hours of compensatory time to the partial suspension day, for a total of one twelve-hour day. An employee suspended for three days will be suspended for the equivalent of 24 hours, or two twelve-hour days.

Issue 4: Holidays- Article XVII

Position of the Union

Article XVII of the collective bargaining agreement entitled Holidays," states in relevant part:

* * *

> To be entitled to holiday pay, an employee must work on or be on paid benefit time other than sick leave (i.e., vacation, personal holiday, or compensatory time) for his or her full shift scheduled immediately prior to and immediately after the holiday, and work the holiday if scheduled on that day.

The Union proposes to modify the above holiday pay provision to provide as follows:

> To be entitled to holiday pay, an employee must work his/her scheduled work day before and first scheduled work day after the holiday unless on an approved vacation, personal day, FMLA leave, compensatory day off, funeral leave, paid administrative leave, military leave or on full or partial sick day where the

> employee has presented a certified letter from a licensed physician (or medical provider) immediately upon return to work.

Using the Martin Luther King holiday as an example, the Union asserts that there are two things wrong with the current language regarding eligibility for holiday pay:

> The first is the forced whole day off. The forced 12 hours off without having a partial sick day. That's a practice that's accepted by the City and allowed with other employees of the City. And the second thing is the inability to get paid for the holiday if you have a doctor's excuse.
>
> (Tr. at 186-187).

The Union claims that the current language which it seeks to modify is unfair and ". . . causes the employee to have a hardship on a day that is much more expensive than a regular day off." (Tr. at 187). It also points out language regarding holiday pay which is contained in the City's attendance policy in further support of its proposal regarding this issue.

Position of the City

Under the current language, employees are precluded from receiving holiday pay if they fail to work their last scheduled workday immediately before and their first scheduled workday after a holiday, or if they fail to work on a holiday when scheduled to do so. The City maintains that such restrictions deter employees from attempting to extend a holiday weekend by improperly utilizing sick leave or avoid working on a holiday. The later concern is significant for a 24/7 operation that provides life-saving services to the public. However, the City expressed a

willingness in its Pre-Hearing Statement to establish requirements and limitations which satisfy the Union's concerns and are consistent with the current attendance policy.

At hearing the City reiterated that it was not philosophically opposed to the Union's proposed modification and would agree to language which included ". . . that this requirement of a medical certificate apply not only for the last workday before and first workday after, but if they were actually scheduled to work the holiday and they call in sick they have to have medical certification." (Tr. at 188).

Final Recommendation

Based upon the positions of the parties, the last paragraph of Article XVII shall be modified to provide as follows:

> To be entitled to holiday pay, an employee must work his/her scheduled work day before and first scheduled work day after the holiday and the holiday, if scheduled to work, unless on an approved vacation, or personal day, FMLA leave, compensatory day off, funeral leave, paid administrative leave, military leave or on full or partial sick day where the employee has presented a certified letter from a licensed physician (or medical provider) immediately upon return to work.

Issue 5: Overtime- Article XXII

Position of the City

Article XXII entitled "Overtime - Premium Pay," provides, in pertinent part: "All overtime may be earned in cash, and paid in the pay period in which it is earned, or compensatory

time at the same rate, at the employee's discretion. Compensatory time earned may be banked in accordance with Article XXXIV of this Agreement." The City proposes that the aforementioned language be modified to provide that it shall determine whether overtime is paid in cash or compensatory time off. This proposal is submitted in order to maintain staffing levels which could be impaired in the event that too many employees seek to take compensatory time. The City asserts that this may be a recurring issue due to the fact that structural overtime is built into the employees' schedules as they work 12-hour shifts with alternating three/four-day workweeks. As a result, employees work eight hours of overtime every two weeks. The City maintains that it needs the authority to pay employees for working overtime, instead of receiving paid time off.

Position of the Union

The Union proposes current contract language.

Final Recommendation

Based upon the evidence of record presented in this case, the fact-finder recommends that Article XXII should retain current language. This recommendation is justified in light of the elimination of star days and the corresponding reduction in compensatory time. There can be little debate that the administration of overtime compensation is more complicated by the inclusion of compensatory time in lieu of cash payments. Problems with manpower coverage increase when large banks of compensatory time accumulate and employees seek to utilize their bank of compensatory time off.

That said, the administration of any large municipality necessitates a level of skilled administration properly staffed. Excessive overtime may result in employee fatigue, and an increased risk of less than optimum performance – critical factors with emergency medical services. For these reasons, the fact-finder recommends current contract language be maintained.

Issue 6: Discipline- Article XXIV

Position of the City

Article XXIV of the collective bargaining agreement entitled "Discipline," provides, in part, as follows:

> Discipline is defined as any verbal or written warning, suspension, discharge, demotion, or reduction in pay. An employee who is disciplined must be disciplined within thirty (30) working days from the date the Commissioner or Chief of Operations had knowledge of said event. If the event is referred to the City's Accident Review Committee or the City's EEO office, this shall be extended to sixty (60) working days. . . .
>
> * * *
>
> The City shall not consider, as a basis of progressive discipline, any reprimand, suspension, or other disciplinary action which occurred more than two (2) years previous.
>
> **Administrative Suspensions**.
>
> Any employee arrested for any felony charge or a misdemeanor offense of being in possession of or under the influence of alcohol or drugs, or for failure to possess a valid driver's license for those employees required to drive a City

> vehicle can be placed immediately on administrative suspension following a pre-disciplinary hearing. Employees are required to report to the Commissioner arrests and/or convictions for any of the aforementioned offenses. Following criminal adjudication of such charges, any discipline undertaken against the employee must be administered within thirty (30) days of the time the Commissioner or Chief of Operations had knowledge of the adjudication.
>
> * * *

The City proposes to modify the above language by increasing the time frame for discipline from 30 working days to 60 calendar days, and increasing the shelf-life for discipline from two to three years.[3] According to the City, its proposals are intended to improve the discipline process, both procedurally and substantively. The City notes that it succeeded in negotiating this proposed change in many of its contracts. (City Ex. 30).

The City contends that 30 working days is not enough time to conduct a thorough investigation, pre-disciplinary hearing and necessary follow-up investigation before issuing a decision. Management will be able to thoroughly investigate the issue before assessing discipline if the time frame is expanded.

According to the City, this will avoid issues which result from the initial discipline constraints. The City maintains that it is simply ". . . looking to give ourselves more time to get the job done based upon the resources we have available, . . ." (Tr. at 192). Additionally, the proposal will reduce confusion for employees and management regarding the computation of

---

3. The City notes that a change would also need to be made to the language contained in Article XIX of the contract entitled "Personnel Records," regarding its proposal to increase the shelf-life for disciplinary actions.

"working days" where the City has multiple divisions with 24/7 operations and a wide variety of shift schedules.

Regarding its second proposal to increase the shelf life of discipline, the City seeks to improve workplace performance and conduct by increasing the deterrence of repeated offenses. The City claims that there is a noticeable amount of discipline imposed between two years and one day and three years after the employee's most recent disciplinary action. It argues that a number of employees use the two-year shelf life of discipline as their gauge for how long they must be on good behavior.[4] As such, it is reasonable to extend that period of good behavior to three years under its proposal. The proposed language will not affect those employees whose *modus operandi* is good behavior. The City notes that its proposal has been accepted by nearly all of the non-safety forces bargaining units. According to the City, the basis for its proposal is to maintain a consistent policy citywide. The testimony reveals that the City's proposed language is contained in the contracts with the FOP, CPPA and Local 93.

Position of the Union

The Union does not agree with the City's proposal to extend the shelf life for disciplinary actions. It claims that contracts for other safety forces bargaining units do not contain the City's

4. At hearing, the City asserted that it has ". . . noticed on a citywide basis, and I can't give you any definitive evidence but [anecdotally] we've noticed employees tend to behave themselves when they have discipline on the shelf and shortly after that they tend to deteriorate." (Tr. at 192).

proposed language. The Union also notes that there are currently no bargaining unit members at any of the disciplinary steps. Therefore, it does not understand the urgency of the City to force such a provision on its members.

Regarding its opposition to the City's proposal to extend the period for issuing discipline to 60 days, Mr. Threat testified, in part, as follows:

> . . . We have a lot of violations of deadlines when it comes to us and the City and we would never get anything done if we extended it to 60 days. Our grievance, our PDH, whatever deadline is in place for the Union, the City violates it. Grossly violates it. We have grievance answers from steps that are two years old that we haven't gotten an answer on. The person is out of the policy by that time.
>
> (Tr. at 198).

The Union indicated that it would be willing to agree to the City's proposal if the grievance procedure is modified to provide that the Union would prevail by default in the event that the City does not respond in a timely manner at any point. The City rejected this proposal.

Final Recommendation

Based upon the evidence of record presented, the fact-finder declines to recommend the City's proposal to increase the time frame for issuing discipline to sixty (60) calendar days; rather, an increase of the time frame to forty-five (45) working days is reasonable and should be incorporated into the new collective bargaining agreement. This recommendation is based on several factors. First, it is important that any employer prior to taking disciplinary action against an employee have sufficient time to conduct a thorough and fair investigation. Forty-five

working days should aid efforts to achieve those twin goals of any investigation. Second, the record lacks probative evidence to warrant sixty days, or problems with counting working days. Third, Article XXIV has additional language that the City does not propose to change which contains reference to working days. Finally, the Union presented insufficient evidence that any bargaining unit employee(s) would be prejudiced or harmed in any manner as a result of this modification to the discipline procedure which will afford management additional time to conduct a thorough investigation concerning alleged misconduct.

As to the City's proposal on extending the roll-off period for discipline, the fact-finder does not recommend the City's proposal to extend the shelf life of discipline to three years. There is no evidence that bargaining unit employees are "sharpshooting" the disciplinary roll-off period, or that extending the retention period to three years would largely resolve recurrences of employee misconduct. As such, the current contract language regarding the two-year look back period for discipline should remain unchanged. The testimony reveals that no bargaining unit members are currently at any disciplinary steps.

Issue 7: Hazardous Duty Injury- Article XXVII

Position of the City

Article XXVII of the collective bargaining agreement entitled "Hazardous Duty Injury," currently provides, in pertinent part, as follows:

* * *

A. "Hazardous Duty Injury" is defined as an injury suffered on duty which is not caused by a failure to perform in the correct and standard manner and which meets one of the following conditions:

* * *

3. Any fracture, serious abrasion, or visible contusion suffered as a result of aiding a patient and which is determined to be of a serious and debilitating nature by the Safety Director and the City's Medical Bureau.

4. Any injury not covered by paragraphs one (1) through three (3) which has been jointly determined a "Hazardous Duty Injury" by the Safety Director and the City's Medical Bureau.

* * *

G. An employee may receive hazardous duty injury benefits for a total of one hundred twenty (120) days per incident, and may be extended, as deemed necessary by the Safety Director, for additional periods of sixty (60) working days, but not to exceed three hundred (300) working days.

* * *

City has proposed the following changes regarding hazardous duty injuries. First, delete reference to the "Medical Bureau" in paragraphs A.3 and A.4; and second, confirm that the 120-day benefit period set forth in paragraph G means 120 calendar days. The City points out that the Medical Bureau no longer exists as an in-house operation and its functions have been outsourced. The City's proposal regarding paragraph G simply confirms the current interpretation of the

contract that the duration of hazardous duty injury leave is measured by calendar days, rather than working days.

Position of the Union

The Union is not opposed to deleting the reference to "Medical Bureau" in Article XXVII of the contract. However, the Union would like to substitute "Medical Bureau" with "the City designated medical professional" as agreed to by the City and police bargaining unit. The Union also agreed with the City's proposal to clarify the language regarding the benefit period.

Final Recommendation

Based upon the stated positions of the parties, all references to the City's "Medical Bureau" in Article XXVII shall be deleted and replaced with the City's "designated medical professional." Additionally, the initial 120-day hazardous duty injury benefit period referenced in paragraph G of Article XXVII shall be clarified to provide that said period is 120 calendar days in duration.

Issue 8: Advanced Life Support- Article XXIX

Position of the Union

The Union proposes that the following language should be added to Article XXIX of the contract: "Upon successful completion of the examination, the employee will receive incentive pay in the amount of eight percent (8%) of base pay." The Union pointed out that this was still an open issue at the time it was proposed. However, not long before the hearing the Union ". . .

came up with the idea of using an ALS incentive pay to the compensation portion of our proposal." (Tr. at 203). The Union references various forms of incentive pay received by fingerprint scientific examiners; police officers; and airport safety officers in support of its position regarding this issue. Mr. Threat stated that Captains are required to pass the advanced life support functioning test in addition to all of the certification requirements which are necessary for paramedics. He pointed out that this additional testing is required in order for an employee to maintain his or her position as a Captain. In the event that an employee does not pass the test he or she is either returned to the rank of paramedic or terminated by the City. Mr. Threat indicated that the Union's proposed ALS pay incentive should either be contained in Article XXIX or in the wage article of the contract.

Although the Union acknowledged that the proposed ALS incentive pay is approximately $4,500.00 per employee, its proposal is intended to make up for missed increases which were available based on the maximum pay band portion of its argument. Additionally, the Union simply wants a monetary value associated with passing the examination as it is required of its members to continue as supervisors.

Position of the City

The Union's proposal appears to be in response to the requirement that CARE bargaining unit employees possess paramedic certification for which they receive a wage adjustment. The City contends that its proposed wage differential renders moot the Union's proposal regarding ALS

incentive pay as this wage adjustment would be included in calculating wage differentials for Captains. According to the City's calculations, the Union's ALS incentive pay proposal of eight percent of an employee's base wage rate would result in a sum of between $4,500.00 to $5,000.00 per employee. Those sums are entirely unacceptable to the City. Additionally, the City's position in its wage proposal is that ". . . paramedics get paid more than EMTs because they have that certification. So to the extent that you have a rank differential [then] that additional compensation from having that certification is reflected in the rank differential, enhanced by the rank differential itself." (Tr. at 208-209). The City maintains that the Union's proposal regarding this issue should not be recommended by the fact-finder.

Final Recommendation

Based upon the evidence of record presented in this case, the fact-finder determines that the Union's proposal should not be incorporated into the new collective bargaining agreement. An ALS incentive is not warranted at this time in light of the wage increases, wage differentials, modification of the wage step schedule enhancements, and potential equity adjustment discussed above.

Issue 9: Uniform Allowance- Article XXXII

Position of the Union

Article XXXII of the collective bargaining agreement entitled "Uniform Allowance," provides as follows: "Beginning in 2015, all regular full-time employees shall receive an annual

maintenance allowance of Two Hundred Dollars ($200.00), payable on March 1 and an annual uniform allowance of Four Hundred and Fifty Dollars ($450.00), payable on June 1, of each year." The Union proposes to modify this provision so as to state: "Beginning in 2016 all regular full-time employees shall receive the same as CARE Union but not less than the current ($200.00) annual maintenance allowance payable March 1 and an annual uniform allowance ($450.00) payable on June 1, of each year." The Union also proposes to add the following language to Article XXXII of the contract: "Upon promotion, new Captains shall receive a one-time clothing allowance of $150.00." It notes that this clothing allowance is in addition to the quartermaster provided uniform.

The Union asserts that while CARE bargaining unit members have received increases in their uniform allowances the Captains have not. According to the Union, the uniform allowance afforded the Captains is low compared to other supervisors. It points out that police officers and police supervisors receive $1,150.00; firefighters receive $1,000.00; and paramedics and EMTs receive $800.00 respectively for their annual uniform allowances, which also includes maintenance. The Union maintains that all of the uniforms worn by officers are similar with the only distinction being the patches. It requests that the Captains receive a uniform allowance which is at least equal to that afforded employees represented by CARE.

The testimony presented by the Union indicates that uniforms often get stained and shirts are required to be replaced more often. It also notes that there is increased wear and tear on the uniforms caused by wearing bullet proof vests. Additionally, the carrier for the vest gets soiled

on occasion requiring it to be air dried. The testimony reveals that each Captain possesses only one vest carrier. The Union also desires a one-time promotion allowance of $150.00. Although it recognizes that the City provides the initial uniforms for Captains, it requests this sum so that newly promoted employees may purchase the required brass for their lapels.

Position of the City

The City opposes both of the Union's proposals to increase the uniform allowance for bargaining unit employees. It points out that any differences in the uniform allowances between CARE and CWA bargaining unit employees is a product of the bargaining choices that the unions have made during negotiations over the years. Additionally, new Captains do not need an additional uniform allowance as they already receive basic uniform clothing from the City at no charge. The City asserts that any extra items may be purchased with the annual uniform maintenance and uniform allowances. There is simply no reason for the one-time allowance requested by the Union. As it concerns stains on the Captains' uniforms, the City responded that there are proper ways for uniforms to be washed. The City also finds it interesting that the Union wants to tie its uniform allowance to CARE while still requesting a minimum amount regardless of any changes to the CARE contract in the future. The Union's proposals should not be recommended by the fact-finder for each of the aforementioned reasons.

Final Recommendation

The fact-finder recommends that the Captains receive the same uniform allowance afforded CARE bargaining unit employees as the two units are closely related to each other and perform their respective assignments in the same work settings. Therefore, the Captains shall receive an annual maintenance allowance of $325.00 and an annual uniform allowance of $475.00 during the term of the new contract. There is no substantive justification for members of the bargaining unit to receive a one-time promotion allowance of $150.00, and that proposal is rejected.

Issue 10: Appendix A- Attendance Policy

Position of the City

The City proposes to delete Appendix A attached to the current collective bargaining agreement because it is obsolete and has been replaced by the current attendance policy which provides for no-fault absences. (City Exhibit 31). The Union previously agreed in the last contract to permit the City to implement such a policy. This is precisely what the City did when it implemented a new attendance policy during the term of the last collective bargaining agreement. Therefore, the bargaining unit employees are no longer subject to the policy attached to the contract as Appendix A. Accordingly, its removal is mandated. The City also points out that both the police and firefighter bargaining units have no-fault attendance policies.

Position of the Union

The Union indicates that there are a couple of items in the attendance policy attached as Appendix A, which are not mentioned in the City's no-fault attendance policy. The issue of tardiness is the Union's primary concern. Mr. Threat asserted that the Union wants to retain the tardiness language because although the Union ". . . is invited to negotiate with the City, ultimately the City has the final say. . . the negotiations is a formality and the City can really make the choice that they want and the Union has to kind of take it." (Tr. at 228).

Final Recommendation

Based upon the evidence presented at hearing, the fact-finder recommends the City's proposal to delete the attendance policy attached as Appendix A to the collective bargaining agreement. The fact-finder notes that Section O of Article IX provides as follows:

> The City reserves the right to implement a no-fault attendance policy. The City will notify the Union prior to implementing such a policy and will negotiate with the Union regarding the policy wherein the City may implement a policy if an impasse is reached in those negotiations. The Union reserves the right to file a grievance regarding the reasonableness of a newly-implemented policy.

The City clearly reserved the right to implement a no-fault attendance policy under the aforementioned provision. The Union presented no evidence that any grievances were filed to challenge the reasonableness of the new no-fault attendance policy implemented by the City. Furthermore, the Union presented no proposal to modify Article IX, Section O of the contract.

Therefore, the no-fault attendance policy is now the current policy and Appendix A of the collective bargaining agreement is obsolete and shall be deleted.

Issue 11: Staffing- new article

Position of the Union

The Union proposes the following language should be added to the collective bargaining agreement as Article XV: "At no time shall only one Captain be assigned to field operations. The City shall have at least three (3) Captains covering the City of Cleveland at all times."

The Union maintained that there is only one Captain in the field "more than half the time." However, there should be at least three Captains in the field at all times given the number of employees that they supervise and the increased call volume. On average, there are 27 ambulances and 54 employees in the field at any given time. Mr. Threat indicated that the Captains are ". . . running from one side of town to the next." (Tr. at 156). The Union notes that pursuant to the National Incident Management System (NIMS), the recommended supervisor to subordinate employee ratio is between 1:3 and 1:7. The Union is only requesting one additional field Captain, rather than the cited national ratios. According to the Union, ". . . given the understanding that the City is a participant of a NIMS program receiving federal funding and things of that nature, and the definition of the expectations of being under that system is what's

driving this proposal." (Tr. at 169). The Union simply seeks to operate in a safe and efficient manner when responding to calls.

Position of the City

The City asserts that the Union's proposed language is nothing more than an unnecessary and potentially costly minimum manning proposal. It maintains that staffing should remain a matter of managerial discretion without the need to pad the number of employees in any classification. The City requires discretion to implement changes regarding the staffing of Captains in the field if operational or financial needs dictate a reduction.

At hearing, the City reiterated that it would never accept a minimum manning requirement proposal from any bargaining unit. Additionally, the City does not staff for emergencies because those situations do not occur that often. The City maintains that it has the resources required to deal with emergencies, and it ". . . schedule[s] enough people if everybody shows up to work." (Tr. at 172). Regarding NIMS, the City asserts that it is "irrelevant" because it deals with domestic incidents, rather than day-to-day operations. Therefore, the Union's reliance upon NIMS in support of its staffing proposal is misplaced. Furthermore, the draft deployment model does not support the Union's position because EMS and Fire were never combined into an integrated unit. As such, there were no operational cost savings which may have allowed increased staffing. For each of these reasons, the City requests that the fact-finder not recommended the Union's staffing proposal.

Final Recommendation

The fact-finder recommends that the Union's proposal to add a new staffing provision to the contract should not be adopted. The Union presented insufficient evidence that the City has managed its EMS field operations in an unsafe or inefficient manner. No evidence was presented that any of the Captains were placed in undue physical danger as a result of the City's current staffing levels. Additionally, there is no evidence that any federal agency has indicated that the City is not adequately prepared to address emergency situations that may arise. The fact-finder also notes that the City recently hired four Captains following the income tax increase. The City needs to retain some managerial discretion in assigning employees and there is no evidence that this has been abused by management so as to warrant granting the Union's proposal.

/S/ Jonathan I. Klein, Fact-finder

Dated: March 1, 2019

CERTIFICATE OF SERVICE

A copy of this Fact-finding Report and Recommendation was served on Leonard Brooks, Communications Workers of America, AFL-CIO, Local 4340, at 1400 East Schaaf Road, Brooklyn Hts., OH 44131, *Brooks4340@hotmail.com*; and upon George S. Crisci, Esq,, Zashin & Rich Co., L.P.A., 950 Main Avenue, 4th Floor, Cleveland, OH 44113, gsc@zrlaw.com; and upon the Bureau of Mediation, State Employment Relations Board, 65 East State Street, Suite 1200, Columbus, Ohio 43215-4213, MED@SERB.ohio.gov ; each by electronic mail this 1st day of March 2019.

/s/ Jonathan I. Klein, Fact-finder