

**STATE OF NEW YORK PUBLIC
EMPLOYMENT RELATIONS BOARD**

**In the Matter of the Interest Arbitration between

BUFFALO PROFESSIONAL FIREFIGHTERS
ASSOCIATION, INC., LOCAL 282**

and

CITY OF BUFFALO, NEW YORK

PERB Case No. IA-2003-020-M-2003-160

**OPINION

AND

AWARD**

Before Interest Arbitration Panel:

Thomas N. Rinaldo, Esq., Chairperson

Edward Piwowarczyk, Public Employer Member

Joseph Foley, Employee Organization Member

The New York State Public Employment Relations Board, pursuant to the New York Civil Service Law, Section 209.4, designated the Chairperson and the Public Employer and Employee Organization Panel Members on January 7, 2004, in this proceeding.

Hearings were held in Buffalo, New York on November 8, November 9, November 15, November 16, 2004 and January 3, and January 17, 2005. Appearing on behalf of the City of Buffalo, New York ("City") was the law firm of Jaeckle, Fleischmann & Mugel, LLP, Sean P. Beiter, Esq., of counsel, and on behalf of the Buffalo Professional Firefighters Association, Inc., Local 282 ("Union") was W. James Schwan, Esq., and the law firm of Sammarco, Mattacola, and Sammarco, Tracy Dale Sammarco of counsel. It is noted that pursuant to the provisions of

Public Authorities Law, Section 3858, the Buffalo Fiscal Stability Authority (“Authority” or “Control Board”) was provided by the Panel with the opportunity “to present evidence regarding the fiscal condition of the City” on January 3, 2005. The Buffalo Fiscal Authority Board was represented by the firm of Harris Beach LLP, Peter J. Spinelli of counsel. It is further noted that, on January 17, 2005, the Union was afforded the opportunity to respond to the presentation made by the Authority. The City, the Union, and the Authority have filed post-hearing briefs with the Panel.

At the hearings, the Parties were given a full opportunity to produce witnesses and present documentary, video, and other evidence in support of their respective positions, as well as the opportunity to question witnesses appearing on behalf of the Parties and the Authority. This Opinion and Award constitutes the results of the Panel’s consideration of the evidence presented within the context of the criteria set forth in Section 209.4 of the Civil Service Law. Before issuing this Opinion and the Award, the Panel engaged in substantial deliberations. The Award constitutes the position of the Chairman of the Panel and the Public Employer Member of the Panel. However, the Public Employer Member has elected to issue a concurring opinion

Specifically, it is noted that the evidence presented by the Parties and the Authority was considered against the criteria set forth in Section 209.4 of the Civil Service Law, including, but not limited to a comparison of wages, hours and conditions of employment of other employees performing similar services or requiring similar skills under similar working conditions; the interest and welfare of the public and the financial ability of the public employer to pay; the peculiarities in regard to other professions such as hazards, educational qualifications, training

and skills; and the terms of collective agreements negotiated between the Parties in the past providing for compensation and fringe benefits.

PROPOSALS OF THE PARTIES

Union's Proposals

BPFFA PROPOSAL # 1

SUBJECT: ARTICLE III, SALARIES and HOURS of WORK

THE BPFFA PROPOSES THE FOLLOWING:

The following salary or wage increases shall be implemented:

<u>Effective</u>	<u>Percentage Increase</u>
7/1/03	3.4%
7/1/04	3.4%

BPFFA PROPOSAL # 2

SUBJECT: ARTICLE III, SALARIES and HOURS of WORK

THE BPFFA PROPOSES THE FOLLOWING:

The City agrees to a retroactive \$5,000.00 across the board increase in base wages or salaries, effective July 1, 2002.

BPFFA PROPOSAL # 3

SUBJECT: EMERGENCY MEDICAL SERVICES DELIVERY

THE BPFFA PROPOSES THE FOLLOWING:

The Buffalo Fire Department shall be the sole provider of Emergency Medical Services within the City limits or any subsequent district the parties

mutually agree upon. The City and the Union agree to mutually appoint a committee to determine the method of integrating EMS delivery into the Fire Department's existing services.

BPFFA PROPOSAL # 4

SUBJECT: ARTICLE XXIV, DISCIPLINE and DISCHARGE
THE BPFFA PROPOSES THE FOLLOWING:

That Article 24.2 (D) be amended as follows:

D. The impartial hearing officer so selected and so designated shall be vested with all of the powers of the Commissioner and shall make a record of such hearing. ~~His findings and recommendations shall then be referred to the Commissioner for review and decision.~~ His findings and recommendations shall be final and binding except that the Commissioner may impose a lesser penalty than that recommended by the hearing officer.

BPFFA PROPOSAL # 5

SUBJECT: ARTICLE XVII, TEMPORARY ASSIGNMENT
THE BPFFA PROPOSES THE FOLLOWING:

Article XVII, Temporary Assignment, Sections 17.1 Rates of Pay, will be deleted and replaced with new Section 17.1 to read:

17.1 Rates of Pay

Whenever an employee is temporarily assigned to perform the duties of a higher rank, the member shall be paid at the maximum hourly rate of the rank in which he is acting, and he shall be paid at such rate for each hour in which he acts in the higher rank.

BPFFA PROPOSAL #6

SUBJECT: WORK SUBSTITUTION
THE BPFFA PROPOSES THE FOLLOWING:

The Collective Bargaining Agreement is amended by the addition of the following language:

Work Substitution

In recognition of past practice in the Buffalo Fire Department, it is recognized that "work substitution", the practice whereby one member trades work shifts with another member of equal rank, is permitted, under the following terms:

1. No member working for another will receive any payment or sum of money or substance of value for work substitution.
2. The work substitution assumes a trade between members of work time. The arrangement for work substitution is between the individuals working for each other, and the Department shall have no responsibility for any time lost to a member.
3. The City shall incur no overtime obligation as a result of work substitution.
4. In cases of alleged abuse of this Work Substitution agreement, the City may, at its option, present the matter to the Labor Management Committee established in Paragraph 11 of the July 1, 2000 to June 30, 2002 Agreement, for resolution.

BPFFA PROPOSAL # 7

SUBJECT: ARTICLE III, SALARIES and HOURS of WORK

THE BPFFA PROPOSES THE FOLLOWING:

Article 3.2(H)(2), of the CBA be amended as follows:

- 2) If directed to remain on duty more than 15 minutes beyond scheduled relief time, ~~he shall receive a minimum of one (1) hour straight time pay~~ the member shall receive a minimum of one (1) hour at the overtime rate in units of one (1) hour multiples. If directed to remain on duty less than 15 minutes beyond scheduled relief time, he shall receive no overtime pay.

BPFFA PROPOSAL # 8

SUBJECT: ARTICLE XVIII, PROMOTIONS

THE BPFFA PROPOSES THE FOLLOWING:

Article XVIII, Promotions, shall be amended by addition of new Section 18.4 as follows:

18.4

Promotions shall be made within thirty (30) calendar days of the occurrence of a vacancy within the Department.

BPFFA PROPOSAL # 9

SUBJECT: ARTICLE III, SALARIES and HOURS of WORK

THE BPFFA PROPOSES THE FOLLOWING:

Article III of the CBA shall be amended by addition of new section 3.5, as follows:

3.5 Hourly Rate of Pay

Where sections of the agreement require that an hourly rate be used in calculations, the divisor shall be 1948.

BPFFA PROPOSAL # 10

SUBJECT: ARTICLE XM, UNION ACTIVITIES ON CITY'S TIME

THE BPFFA PROPOSES THE FOLLOWING:

Article XIII of the CBA, Union Activities on City time, shall be amended as follows:

A. ~~The Union agrees that Union activities on City time shall be kept at a reasonable level, as determined by the Commissioner or his designee.~~

~~These Union Activities are:~~

The City agrees that during working hours, on off its premises, and without loss of pay, Local 282 representatives reasonably necessary to conduct the business of Local 282, as designated by Local 282's President, shall be allowed to:

Investigate and process grievances

Post Union notices

Distribute Union literature

Solicit Union membership during other employees' non-working time
Attend negotiating meetings

Transmit communications, authorized by the local Union or its , officers, to the City or its representative

Consult with the City, its representative, local Union officers, or other Union representatives concerning the enforcement of any provisions of this agreement

Attend Union business on City time.

- B. (same)
- C. In recognition of existing and past practice, the President and First Vice President of Local 282 shall be on full release time.

BPFFA PROPOSAL # 11

SUBJECT: ARTICLE XVI, SENIORITY

THE BPFFA PROPOSES THE FOLLOWING:

The parties expressly agree that positions within the Fire Investigation Unit will henceforth be filled by Seniority bid, consistent with Article XVI of the CBA. The positions within Fire Investigation will be:

1. One Captain in charge, on a straight day schedule;
2. One Lieutenant per platoon; and
3. One firefighter per platoon.

BPFFA PROPOSAL # 12

SUBJECT: ARTICLE VI, HEALTH and LIFE INSURANCE

THE BPFFA PROPOSES THE FOLLOWING:

Article 6.1 shall be amended by addition of the following language:

"The spouse of a retired member shall be offered the lowest priced HMO at no cost, upon the death of the member. The spouse shall also be offered the option of electing any of the more expensive plans offered, with contribution from the spouse of 100% of the difference between the lowest priced HMO and the more expensive plan. The City's obligation to provide health insurance under this

section shall cease when the spouse attains the age of 65."

City's Proposals

City Proposal 1

September 19, 2003

Subject: **Reduction in Force**

Proposal:

The Union agrees not to object to the closing of any companies and station houses by the City during the period of this Agreement, and it further agrees not to object to a reduction in the number of firefighters and officers to six hundred eighty seven (687) during the period of this Agreement. The Union agrees that the parties have fully and completely bargained over these issues and waives its right, if any, to further bargain over the reductions in the numbers of firefighters and officers or the impact thereof, and further waives its right, if any, to submit any issues relating to the reduction in the numbers of firefighters and officers or the implementation and/or impact thereof to separate negotiations or compulsory interest arbitration. Local 282 agrees to cooperate fully with the City's

City Proposal 2

September 19, 2003

Subject: **Minimum Staffing**

Proposal:

Notwithstanding any other provision of the collective bargaining agreement or a prior interest arbitration award to the contrary (including, but not limited to the Foster Panel Award in PERB Case No. 1A93-002), there shall be no minimum fire company staffing level. The Award on page 21 of the Foster Panel Award in PERB Case No. 1A93-002 shall be rendered null and void.

City Proposal 3

September 19, 2003

Subject: **Health Insurance**

Proposal:

Amend section 6.1 of the collective bargaining agreement to read as follows:

Effective January 1, 2004, all current bargaining unit employees and retirees shall have the option of selecting either of the following plans and the City shall pay the full cost of the premiums for these plans:

- A. Independent Health Encompass C 1, or
- B. Community Blue III

In the event that an individual selects a more expensive plan, the individual must pay the full cost of the difference between the average cost of the plans set forth above and the cost of the more expensive plan selected. Such payment shall be by payroll deduction.

Any individual hired on or after January 1, 2004 shall be required to pay twenty-five percent (25%) of the monthly premium for either of the plans set forth above for single coverage and fifteen percent (15%) of the monthly premium for either of the plans set forth above for family coverage. If an individual hired on or after January 1, 2004 elects enrollment in a more expensive plan, the individual will contribute, in addition to the foregoing, one hundred percent (100%) of the difference between the cost of the more expensive plan selected and the average cost of the plans set forth above.

All health insurance coverages specified in this collective bargaining agreement are subject to product availability from the various carriers. Providing the coverage specified is available, it will be provided as specified. In the event that product availability changes, the City of Buffalo may not be held responsible.

An employee shall only be entitled to medical insurance as a retiree if all of the following conditions are met:

- A. The employee must retire from the New York State Retirement System and begin, as well as continue, receiving pension payments immediately following the employee's retirement from City service; and
- B. The employee must have had at least ten (10) years of continuous, full-time service with the City immediately preceding the date of retirement.

Once an individual is eligible for Medicare, the individual shall be required to take Medicare A and B and the City will provide at no cost to the individual a Medicare HMO product.

City Proposal 4

September 19, 2003

Subject: **IOD Procedure**

Proposal:

Delete the March 31, 1993 Memorandum of Agreement concerning procedures for "IOD" cases and replace with the following new Article of the collective bargaining agreement.

Section 1- Intent and Definitions

A. This procedure is intended to implement the express language of § 207-a of the General Municipal Law and is not intended to reduce any benefits that firefighters are entitled to pursuant to G.M.L. § 207-a, including any benefit, requirement, or limitation under statute or case law the effective date of which is subsequent to the enactment of this Policy.

B. The parties hereto specifically acknowledge that the purpose of this agreement is to enact procedural requirements for the provision of G.M.L. § 207-a benefits in the Buffalo Fire Department. The enactment of this policy is in no way intended to alter the coverage available under G.M.L. § 207-a for any particular type of injury/illness, nor does it supercede any applicable case law concerning when coverage applies or is available.

C. For the purposes of this procedure, "business day" shall mean Monday through Friday excluding any holiday when City Hall is closed for regular business.

D. For the purposes of this procedure, "member" shall mean any employee of the Buffalo Fire Department who is covered under the provisions of G.M.L. § 207-a.

E. For the purposes of this procedure, "Commissioner" shall mean the Commissioner of Human Resources, or his designee.

Section 2 - Notice of Disability or Need for Medical or Hospital Treatment

A. A member or anyone acting on his/her behalf, who claims a right to benefits under G.M.L. § 207-a either because of a new illness or injury or the recurrence of a prior illness or injury, shall make written notice and application for those benefits within ten (10) business days of when the firefighter reasonably should have known that the illness or injury would give rise to the claim of entitlement to § 207-a benefits. The member shall have the continuing right to supplement or amend his notice and application with any information obtained subsequent to the filing of such notice and application. Any dispute arising over an alleged failure of the member to file notice and application within the time limits set forth herein shall be subject to the dispute resolution procedure provided for in Section 6 of this Article.

B. The member shall provide a medical authorization for the Commissioner to obtain copies of those medical records from his/her treating physician or other health care provider which pertain to the illness/injury claimed.

The City will provide the member, without cost to the member, a copy of the records and reports provided to the City pursuant to the authorization. The medical authorization shall contain a confidentiality statement prohibiting the use or release of the member's medical records except for purposes authorized by this Procedure including any hearing undertaken pursuant to Section 6, and shall be specifically limited to the illness or injury for which benefits are claimed pursuant to Section 2(a).

C. The Commissioner's Office shall also fill out a report notifying the Retirement System of the member's claim for on-the-job injury upon the Commissioner's receipt of the member's claim.

D. The failure to satisfy any time limits specified above shall render a notice of filing untimely and shall preclude an award of any benefits pursuant to § 207-a of the General Municipal Law; provided, however, that the Commissioner shall have the discretionary authority to excuse a failure to provide notice or file a report upon good cause shown. Any alleged failure to satisfy the time limits under this section shall be subject to the dispute resolution procedure set forth in Section 6.

Section 3 - Status Pending Determination of Eligibility for Benefits

A. The member shall be placed on sick leave pending determination of his/her eligibility for § 207-a benefits.

B. If the member's 207-a application is approved by the Commissioner, the City shall reimburse the member for all leave time expended during the determination period.

Section 4 - Benefit Determinations

A. The Commissioner shall promptly review a member's application for § 207-a benefits and shall determine his eligibility within fifteen (15) business days after the Commissioner receives the application.

B. In determining the application, the Commissioner may require a more detailed statement from the member than that contained on the application. The Commissioner may take statements from witnesses and may send the member to a physician or physicians of its choice for examination at the City's expense.

C. The determination will be made in writing to the firefighter, and copied to Local 282, setting forth in detail any and all reasons for the

determination. In the event that the application is denied, the City will simultaneously provide the member, without cost, a copy of all medical or other information produced or acquired by it, in connection with the member's application and determination for § 207-a benefits. The City will continue to provide the member with additional medical information subsequently produced or acquired.

D. Denial of § 207-a benefits is appealable, at the member's option, pursuant to the terms of Section 6 of this policy. The Commissioner's determination shall include notice and instructions to the member regarding how to initiate the appeal process.

Section 5 - Assignment to Light Duty

A. As authorized by the provisions of Subdivision 3 of Section 207-a, the Department, acting through the Commissioner, may assign a disabled member specified light duties, consistent with his/her status as a firefighter.

B. The Commissioner, prior to making a light duty assignment, shall advise the member receiving benefits under § 207-a that his/her ability to perform a light duty assignment is being reviewed. The member may submit to the Commissioner, any document or other evidence in regard to the extent of his/her disability. The Commissioner may cause a medical examination or examinations of the member, to be made at the expense of the City. The physician selected, the member and his/her physician, shall be provided with the list of duties and activities associated with a proposed light duty assignment, prior to any implementation of the same. The City's physician shall make an initial evaluation as to the ability of the disabled member to perform certain duties or activities, given the nature and extent of the disability. If the member's physician does not agree that the member is medically able to perform the light duty assignment, he/she must express, in writing, those elements of the light duty assignment which the employee cannot perform and the specific medical reasons which preclude the member from performing the duties.

C. If there is a disagreement between the City's physician and the member's physician as to the member's fitness to perform one or more portions of the duties of the light duty assignment, those portions cannot be assigned until the dispute is resolved pursuant to Section 6. It is understood that assignment to light duty is temporary and that a member so assigned does not have any entitlement to a continued light duty assignment for an indefinite duration of time. In no event

shall the firefighter be held in such light duty assignment for a period of more than one (1) year and six (6) months. Members on light duty shall not be allowed to work overtime in such position. Nothing contained herein shall require the Department to create light duty assignments.

Section 6 - Dispute Resolution Procedure

A. In the event that the City denies an application for § 207-a benefits, seeks to discontinue Section 207-a benefits, there is a dispute about whether a member is capable of performing a specific light duty assignment, there is an issue with respect to outside employment, there is an issue regarding whether a member has waived his/her benefits, or any other dispute concerning continued entitlement to § 207-a benefits, the matter will be submitted directly to binding arbitration pursuant to Article XXIII of the Collective Bargaining Agreement.

B. An arbitrator shall be appointed from a panel agreed to by the parties, based upon a rotating schedule of availability. Said panel shall be subject to review and change as needed. A hearing shall be held within thirty (30) days of appointment except that the deadline may be extended upon mutual consent in writing the date that the member's application is denied. The arbitrator shall render a decision within ten (10) days of the hearing date. The arbitrator's determination shall be based upon the submissions made at hearing, and the parties shall not be permitted to submit post-hearing briefs or arguments, unless mutually agreed to.

C. The parties shall have the option, upon mutual consent and whenever practicable, to submit their respective evidence and positions to the arbitrator upon a stipulated record and written arguments, without necessity of hearing. In this case, such submission shall be made to the arbitrator on or before day thirty (30), measured from the date of the Commissioner's initial determination.

D. Should the arbitration process extend beyond ninety (90) days measured from the date of the Commissioner's initial determination, the member shall be placed on interim 207-a leave until such time as the arbitrator makes a final determination. Any leave time advanced pursuant to this paragraph shall be recouped by the City, in the event that the arbitrator finds that the member's application for benefits should be denied.

E. Should the arbitrator's decision award the member § 207-a benefits, the member shall be restored any accruals expended during the hearing process.

F. The determination of the arbitrator shall be final and binding on the City and the member, but shall not preclude further review at a subsequent date based upon new or supplemental medical or other information. The cost of the arbitration shall be borne equally by the City and the member. The costs of any transcript, or medical testimony shall be borne by the person/party requesting the same.

Section 7 - Disability Retirement

A. Consistent with § 207-a, the City may file an application on the member's behalf for retirement under Sections 363 or 363-c of the New York State Retirement and Social Security Law. Any injured or sick member who is receiving § 207-a benefits shall permit reasonable medical inspections in connection with such an application for accidental disability retirement or performance of duty disability retirement.

B. Salary payments provided by § 207-a (1) shall terminate upon the employee being retired pursuant to an accidental disability retirement or a performance of duty disability retirement as set forth in the Retirement and Social Security Law. Upon such retirement pursuant to accidental or performance of duty disability retirement, the member may also be entitled to those benefits provided for under § 207-a (2). The City reserves the right to make a determination independent of the findings of the New York State Comptroller as to whether the member is entitled to § 207-a benefits, including those benefits available under § 207-a (2). Notwithstanding his/her retirement status, the member shall be entitled to appeal any denial of, or failure to process, a request for § 207-a (2) benefits to the Commissioner of Human Resources. The Commissioner of Human Resources may conduct a hearing or designate a hearing officer to conduct a hearing on the eligibility of a member for §207-a (2) benefits.

Section 8 - Continuation of Contract Benefits

A. For the first ninety (90) days of leave pursuant to § 207-a, a member will continue to accrue all contract benefits. After ninety (90) days, the member shall not accrue any contract benefits except for wages, applicable longevity and health insurance; however, nothing contained herein shall operate to restrict any benefit available under G.M.L. § 207-a.

Section 9 - Outside Employment

A. If, as a result of an investigation, the Commissioner determines that a member has engaged in paid outside employment while simultaneously receiving salary pursuant to § 207-a, the Commissioner shall provide written notice of such determination. The notice shall specify in detail any and all reasons and the factual basis for those reasons for the determination. The member may appeal the determination pursuant to Section 6 herein. The arbitrator shall have the authority to determine the amount of benefit to be reimbursed, if any, and direct the manner in which such reimbursement shall be made. The member must provide the City, upon request, with a W-2 form or tax returns or other proof other than sworn statements. The member may redact irrelevant information from the income tax information requested by the City, e.g., spousal income. Additionally, the City shall have the right to discipline the member pursuant to Article XXIV of the Agreement.

Section 10 - Hazardous Exposure

A. A member who reasonably believes he/she may have been exposed to a health hazard, e.g., AIDS, Hepatitis-B, biological or chemical toxins, etc., as a result of the performance of his or her duties, shall file a hazardous exposure incident form at the time of the exposure. If the member is unable to file such form, the City shall cause the same to be completed on his/her behalf. The City will maintain the exposure form in the member's personnel file.

B. If a member claims a job-related injury due to exposure to a health hazard, then he or she must comply with the requirements of this Article.

Section 11- Exclusivity of Procedures

A. These procedures are the sole exclusive procedures for determining a member's eligibility for benefits under § 207-a.

B. Either party may file a grievance for a violation of these procedures, pursuant to Article XXIII of the CBA. In that case, the scope of the arbitrator's authority will be solely to determine whether the procedures were complied with or violated.

City Proposal 5

September 19, 2003

Subject: **Drug and Alcohol Testing**

Proposal:

1. Delete the June 26, 1995 Drug Testing Policy of the Buffalo Fire Department and replace with the following new Article of the collective bargaining agreement:

A. Employees shall be referred to a Substance Abuse Professional through the City's Employee Assistance Program ("EAP").

B. The City shall administer reasonable suspicion, post accident, return to duty, and follow up alcohol and controlled substances testing. The City shall also require pre-employment controlled substance testing from conditional new hires, at the individual's expense. The City shall administer, on an annual (calendar year) basis, an amount of random controlled substances tests equal to 25% of all employees in the bargaining unit in the Fire Department. The City shall administer, on an annual (calendar year) basis, an amount of random alcohol equal to 10% of all employees in the bargaining unit in the Fire Department. Employees will be selected for random testing by a computer program containing employee social security numbers. Employees that are on leave (for any reason, including, but not limited to sick or IOD leave) or serving a disciplinary suspension may be tested while they are on leave or suspension if they are selected for random testing. Employees that are not on duty when selected for random testing will be tested when they next report for duty.

It is agreed that the City will provide a representative of the Union with the number of employees tested for controlled substances and alcohol on a random basis quarterly.

C. The City agrees that it will provide its supervisors with at least one hour of training in the detection of alcohol/controlled substance use each year.

D. Use of Hospital/Police Blood Tests: In the event that police/medical officials administer a blood test, the results of that test may be used to find a violation under this policy (on-duty incidents).

E. The City agrees that in the collection and processing of samples, appropriate precautions will be followed to maintain the chain of custody. Employees will be directed to provide at least 45 ml of urine, and the split sampling procedure (30 ml/15 ml) will be followed. In the event of a positive test, an employee may request that the split sample be tested: if the split sample tests negative, the City will pay for the cost of the test; if the split sample tests positive, the employee will pay for the cost of the test.

F. An employee who is taking prescription or over-the-counter medications which may result in symptoms, impairments, or limitations similar to alcohol or controlled substance use must bring this matter to the immediate attention of the Commissioner of Human Resources. This information will be maintained as confidential by the City and shall only be used where necessary for safety or performance reasons.

G. The City agrees that it will not discipline an employee for a breath alcohol test that is below .04 or a controlled substances test results below the levels established by the United States Department of Transportation and/or the Federal Highway Administration. The term positive controlled substances test as it is used in this document shall mean a positive test under the levels established and used by the United States Department of Transportation and/or the Federal Highway Administration. A positive alcohol test as it is used in this document shall mean a result of .04 or higher on a breath alcohol test.

H. Employees testing positive for alcohol or the controlled substances marijuana, cocaine, opiates, phencycline (PCP), and amphetamines shall be subject to discipline on the following basis:

- a. ACCIDENT: In the event of a positive controlled substance test following an accident involving the loss of life or serious property or vehicle damage, the employee will be subject to discipline up to and including immediate discharge.
- b. In all other cases, the following procedure will apply:
 - i) 1st Positive -Following notification of an employee's first positive alcohol or controlled substances test result, the employee shall be referred to a substance abuse professional. The employee shall also be suspended from duty without pay until such time that the employee submits to and passes a return to duty test. The employee may utilize available paid time off during this period. If the return to duty test results are positive, the test result will be considered a second positive under this Agreement. If an employee refuses to submit to a return to duty test within a thirty (30) day period following the employee's suspension, the employee will be terminated.
 - ii) 2nd Positive - Following notification of a second positive

alcohol or controlled substance test result, the employee shall be immediately discharged.

- iii) Any time off required for treatment shall be without pay; however, an employee may use any available accrued time off.
- iv) The City shall not be responsible for the cost of any treatment. Health Insurance benefits may be available.
- v) If a Substance Abuse Professional recommends that an employee participate in a treatment program, successful completion of that program is required as a condition of continued employment. The employee must agree to execute a release allowing the City to obtain information concerning the employee's attendance only in such a program. In the event the City learns that an employee has failed to attend one scheduled appointment in such a treatment program, it will advise the employee to consult with the Union. Unless good cause is shown, an employee will be discharged for missing two scheduled appointments.

I. MRO: The City will retain the services of a Medical Review Officer. All positive test results from the laboratory will be sent to the MRO for review and confirmation. It is agreed and understood that the MRO shall follow established DOT procedures and guidelines.

J. It is understood that a failed test for alcohol or controlled substances can be any of random, reasonable suspicion, post accident, return to duty, or follow up tests. It is further understood that a failed controlled substance test need not be for the same controlled substance in order to progress through the disciplinary procedure.

K. It is agreed that all employees are required to submit to alcohol and controlled substances testing as a condition of his/her employment. If an employee refuses to submit to such a test, he will be advised to consult with the Union if time and circumstances permit. In the event that this employee continues to refuse to submit to testing, he/she will be subject to discipline up to and including discharge for insubordination.

L. Information concerning alcohol and controlled substance test results shall be handled confidentially by the City.

M. To the extent that any part of this Agreement may conflict with any provision of the collective bargaining agreement, the provisions of this Agreement shall be controlling.

N. Discipline issued pursuant to this Agreement may be submitted to grievance arbitration under the terms of the collective bargaining agreement solely for the issues of whether the employee has violated the Alcohol and Controlled Substance Rules and whether the City was in compliance with the terms of this Article.

O. This Agreement shall have no effect on any other City rules or orders.

P. Whenever possible, each provision of this Article shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Article is held to be prohibited by or invalid under applicable law, such provisions will be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Article.

Q. The City will issue a Policy on Alcohol and controlled Substances. A copy of which is attached hereto.

**CITY OF BUFFALO FIRE DEPARTMENT
POLICY ON ALCOHOL AND SUBSTANCE
ABUSE**

Introduction

Every employee should be aware that one of the City of Buffalo Fire Department's chief objectives is to provide a safe, healthful and pleasant working environment for our employees. Employees also expect one another to be in suitable mental and physical condition while at work. This means keeping the workplace completely free of the presence and effects of impairing substances.

We all know that alcohol can cause job impairment. Our society has also seen an increase in the use of illegal drugs. These substances can create similar problems in the workplace, and in addition, their use is a violation of the law. The City does not wish to inquire into the private conduct of employees, but we cannot tolerate unsafe and possibly criminal activities which can manifest themselves in the workplace.

Employees make their own individual life-style choices, and are responsible for their own health and well-being on their own time. However, these individual choices cannot be permitted to jeopardize our work together. All employees are required by the City to report to work on schedule, alert and in proper condition to perform their duties, and to remain in that condition throughout the work day.

The City and Buffalo Professional Firefighters Association, Inc., Local 282 have negotiated an agreement implementing procedures for controlled substance testing. You should be aware that pursuant to this agreement, alcohol and controlled substance violations will result in discipline up to and including an employee's discharge.

In light of the serious penalties associated with alcohol and controlled substance violation, if an employee has a problem with alcohol or drug use which could lead to a violation, the employee must do whatever is necessary to see that a violation does not occur. If the employee needs professional help, then it is the employee's responsibility to obtain that help and resolve the problem. The City does offer reasonable assistance in this regard, as discussed in this Policy, but it is the employee's responsibility to recognize the problem and ask for such assistance.

Please read this Policy carefully and completely. Any questions should be addressed to the Commissioner of Human Resources.

Definitions

For purposes of this Policy:

The term "working hours" means the employee's entire shift or workday, from the time the employee first reports for work until his or her work is done for the day, including lunch and break times.

The term "City premises" means all City property including offices, work locations, eating areas, parking lots, desks and City vehicles and trucks.

The term "illegal drugs" means all controlled substances, narcotics and other drug-related materials whose use without specific medical authorization is a criminal offense under State or Federal law, especially including marijuana, cocaine, opiates, amphetamines and phencyclidine (PCP).

Rules

All employees must report to work on schedule, alert and in proper condition to perform their duties and must remain in that condition throughout the work day. Therefore, the following conduct is strictly prohibited:

1. Reporting to work or working with an illegal drug in the employee's system.
2. Reporting for work or working with a blood alcohol concentration of .04 or greater.
3. Unlawful consumption of an illegal drug or consumption of alcohol during working hours, or on City premises at any time.
4. Unlawful manufacture, distribution, dispensing or possession of an illegal drug on City premises at any time. Possession of alcohol on City premises at any time.
5. Refusing to submit to a test to scientifically determine the concentration of alcohol or presence of illegal drugs in the employees system.

Violations of the Rules

Any employee who violates any of the Controlled Substance Rules contained in this policy will be removed from duty and then be referred to a Substance Abuse Professional ("SAP") for evaluation, and the SAP will determine what assistance, if any, the employee needs in resolving substance abuse issues. Before an employee may return to duty, he/she must pass a return to duty test for controlled substances. The employee may be required to enter a rehabilitation program and/or submit to follow-up testing.

VIOLATIONS OF THESE RULES WILL RESULT IN DISCIPLINE OR DISCHARGE AS SET FORTH IN THE ATTACHED AGREEMENT.

Testing

All bargaining unit employees of the City of Buffalo Fire Department are subject to testing to scientifically determine the presence and level of alcohol and illegal drugs in their system. Testing will be done on a pre-employment, post-offer basis, a random basis, a postaccident basis and may be directed when a supervisor concludes that there are reasonable grounds to suspect the employee

has violated one of the Rules set out in this policy.

In the event that an employee has been in an accident involving the loss of life or an accident where a traffic citation has been issued, he/she should remain at the scene of the accident and available for testing unless he/she must leave the scene to provide first aid or medical assistance to another or in order to receive first aid or medical assistance.

Additionally, employees may also be tested on a return to work or follow-up basis.

Random testing will be unannounced and spread periodically throughout the year. A number of employees equal to twenty-five percent (25%) of employees in the bargaining unit at the Fire Department must be tested for controlled substances each year. A number of employees equal to ten percent (10%) of employees in the bargaining unit at the Fire Department must be tested for alcohol each year. Because each employee has the same chance of being selected for testing every time the random tests are conducted, it is possible that one employee may be tested more than once in any calendar year, while others may not be selected for testing for a number of years. Employees will be selected for random testing by a computer program containing employee social security numbers.

Depending on the circumstances and the violation, the employee will be directed to permit collection of a sample of urine or breath for analysis by a laboratory. Collections will be carried out as privately as possible, and will use methods required by the Department of Transportation to ensure the integrity of the sample provided. Tamper-proof methods of storage shall be used, a secure chain of custody shall be maintained, and laboratory analyses will use methods which have been demonstrated to produce specifically accurate and reliable results. If you would like more information about the testing of chain of custody procedures, please see the Commissioner of Human Resources.

Additionally, if there has been an accident or if a traffic citation has been issued, law enforcement officials may require the collection of urine, breath, blood, or another body substance.

Employees will be permitted to justify positive test results by providing evidence of a doctor's prescription or some other legitimate explanation to an independent medical review officer ("MRO"). If an employee satisfies the MRO that there is a legitimate, lawful explanation for the confirmed positive test result, the MRO will

report a negative test result and the City will not learn of the initial confirmed positive test result. Analysis results and all other documents pertaining to the testing process will be maintained as confidentially as possible.

If an employee tests positive for alcohol or controlled substances, it will be treated as a violation of the Rules. The employee will be removed from duty, referred to a SAP for evaluation, and will be subject to discipline or discharge as provided in the attached agreement.

In the event that an employee remains employed and is ultimately returned to duty, the employee must satisfactorily complete a return to duty test. Testing will be done at the City's expense, and time spent by employees for testing purposes will be paid time.

All employees must agree to submit to the testing process, including the collection and analysis of samples, as a condition of their employment with the City. A refusal to submit to testing when directed will be deemed a refusal to comply with City requirements and will result in the employee's discipline up to and including immediate discharge.

To ensure your safety and the safety of your coworkers, the employee is encouraged to inform the Commissioner of Human Resources if they are taking medically prescribed drugs or are ingesting a substance for a legitimate reason that may manifest itself as an apparent violation of the Controlled Substance Rules.

Referral Program

As you can see, it is essential for all employees to remain drug free while they are in the workplace. The City does have an Employee Assistance Program, and employees who have a substance abuse problem and sincerely wish to correct it, both for personal health reasons and to prevent a violation of the controlled substance rules, are encouraged to request confidential assistance through this program.

Employees who have a problem that could result in a violation of the controlled substance rules are strongly encouraged to seek voluntary assistance before a disciplinary situation arises, cooperate fully with all requirements of the program of professional help that is established, and do whatever is necessary to prevent any disciplinary situations from arising thereafter.

* * *

It is the City's policy and objective to provide a safe, healthful and pleasant working environment for our employees. This means keeping the workplace completely free of the presence and effects of impairing substances.

We hope that together we can make the City of Buffalo Fire Department a safe and drug free place to work and live.

CERTIFICATE OF RECEIPT

I hereby certify that I have received a copy of the City of Buffalo Fire Department's current Policy on Alcohol and Substance Abuse.

Date

Signature

_____ was provided a copy of the City of Buffalo Fire Department's current Policy on Alcohol and Substance Abuse on , but refused to sign and return the Certificate of Receipt.

Date

Signature

City Proposal 7

September 19, 2003

Subject: **Civilianization of Dispatch**

Proposal:

Amend paragraph "6" of the July 1, 1996 to June 30, 1998 Memorandum of Agreement, dated October 27, 1998 to read as follows:

Effective January 1, 2004, the City shall have the right to replace all Assistant Dispatchers and Dispatchers in Local 282 with civilian dispatchers. All Assistant Dispatchers and Dispatchers displaced as a result shall be returned to the rank of fire fighter.

City Proposal 9

September 19, 2003

Subject: **Use of Personal Leave Days**

Proposal:

Amend section 12.2 of the collective bargaining agreement to read as follows:

On the following days, the number of personal leave days off that are granted shall be limited to twenty (20):

New Year's Day	Labor Day
President's Day	First Day of Shotgun
Good Friday	Deer Hunting Season
Easter	Columbus Day
Mother's Day	Thanksgiving Day
Father's Day	Christmas Eve
Independence Day	Christmas Day
	New Years Eve.

Personal leave days shall be granted subject to the availability of man-power.

City Proposal 10

September 19, 2003

Subject: **Civilianization**

Proposal:

Effective January 1, 2004, the City shall have the right to civilianize the following positions/assignments and the functions performed by those positions/assignment may be assigned outside the bargaining unit or may be contracted out by the City: EAP Coordinator, mask room, service station, tool room, and the administration/coordination of the drug and alcohol testing policy.

Amended City Proposal 14

October 1, 2003

Subject: **Wages**

Proposal:

Effective July 1, 2002, no increase to base wages or salaries. Effective July 1, 2003, no increase to base wages or salaries.

City Proposal 15

September 19, 2003

Subject: **Term**

Proposal:

Amend Article XXVIII to read as follows:

This agreement shall be effective as of July 1, 2002 and shall remain in full force and effect until the 30th day of June, 2004.

BACKGROUND FACTS

The most recent version of an expired Collective Bargaining Agreement between the Parties covered the period July 1, 1984 through June 30, 1986. This expired Collective Bargaining Agreement contains the Keil Arbitration Panel Award for the period July 1, 1986 to June 30, 1988 and the Bantle Arbitration Panel Award covering the period July 1, 1988 through June 30, 1990. Subsequent thereto, the Selchick Arbitration Panel Award covered the period July 1, 1990 through June 30, 1992; the Foster Arbitration Panel Award applied to the period July 1, 1992 though June 30, 1995; the Lewindowski Arbitration Panel Award followed for the

period July 1, 1995 through June 30, 1996; a Settlement Agreement between the Parties covered the period July 1, 1996 through June 30, 1998, and the Pohl Arbitration Panel Award covered the period of July 1, 1998 to June 30, 2000.

The Parties' most recent Agreement was a Memorandum of Agreement dated March 27, 2003, which covered the period of July 1, 2000 to June 30, 2002. Thus, the two year period that is addressed in this proceeding is the period from July 1, 2002 to June 30, 2004.

The Panel will now address various topics set forth in the Parties' proposals. For each topic considered by the Panel, the Parties' positions will be set forth, followed by the Panel's analysis and Award.

WAGES INCREASES (UNION PROPOSALS 1, 2)

The Parties, as is typically the case in an interest arbitration proceeding, devote a great deal of their arguments in support of their respective positions regarding the Union's proposals on wage increases. In Union Proposal #1, the Union seeks a general wage increase of 3.4% effective 7/1/03 and 3.4% effective 7/1/04. However, pursuant to section 209 (4)(c)(vi) the 7/1/04 proposal falls outside the two(2) year period that the Panel may award. Union Proposal #2 seeks a retroactive \$5,000 across the board increase in base wages or salaries, to be effective on the first day of the two year period covered by the Award. It is also noted that the Authority has weighed in on the question of wage increases.

Position of the Union

The Union, in support of its proposals, points out that the record evidence is very clear that there has been parity between the Union and the Buffalo PBA since the enactment of the Taylor Law. In setting forth this observation, the Union notes that, for the period 1974 to 1976, the Union and the PBA jointly participated in interest arbitration, and, for the period 1980 to 1982, the PBA submitted to interest arbitration first and the Award on salary increases issued in the PBA proceeding was then adopted by the panel hearing the Union's interest arbitration case. Further, the Union observes that, for the period 1982 to 1988, salary increases that were either negotiated or imposed by interest arbitration panels were the same for the PBA and the Union, and, for the period 1988 to 1990, the PBA again went first in interest arbitration and the panel hearing the Union's case awarded the same monetary increases given to the PBA. The Union further notes that interest arbitration panels for the PBA and the Union awarded identical increases in compensation for the period 1990 to 1992.

For the period 1992 through 1995, the Union observes, the PBA negotiated a three year collective bargaining agreement with the City. The Union observes that it submitted wage issues to interest arbitration before the Forster Panel for this same period. The Foster Panel, the Union notes, adopted the wage increases obtained by the PBA. The Foster Award, according to the Union, must be considered significant in the instant proceeding. Thus, the Union notes that the Foster Panel had before it a three year negotiated Agreement between the City and the PBA entered into when it was commonly known that the City had serious financial problems. As the Union puts it, "[t]he Foster Panel refused to allow the City to negotiate wage and other economic

increases for the police and then refuse to grant the same increases to fire on the basis that the City was experiencing serious budgetary problems.” This Panel, the Union argues, should likewise not allow the City to extend increases to the PBA, as it has done in the March 2003 Agreement between the City and the PBA for the contract period 2002 through 2007, and yet seek to stonewall the Union’s attempt to achieve parity based on the 2002 to 2007 Agreement between the PBA and the City.

The Union further observes that, subsequent to the Foster Award, parity continued to be the guiding principle for wage increases. Thus, it notes that the PBA award for the period July 1, 1995 through June 30, 1996 was followed by the subsequent Award in the interest arbitration proceeding between the Union and the City. The award for the PBA for the period 1996 through 1998, the Union notes, was adopted by the Parties in the negotiated Agreement as it applied to wage increases. Further, the Union notes that the PBA and the City negotiated a two year Agreement for the period July 1, 1998 through June 30, 2000, and that the negotiated wage increases were applied to the Union and the City in the interest arbitration proceeding before the Pohl Panel. The Union identifies the observation offered by Arbitrator Pohl “that the criterion of parity between these two units [PBA and Union] is the most relevant factor to apply.” The Union observes that, for the period July 1, 2000 through June 30, 2002, the Parties negotiated wage increases based on the increases awarded to the PBA by the Shapiro Panel. Hence, the Union concludes that the principle of parity mandates that the negotiated wage increases in the five year Agreement between the PBA and the City, executed on March 19, 2003, should be applied by this Panel to Union Proposals #1 and #2.

The Union also argues that the Panel should take into account the fact that a member of the Union “works significantly more hours than a Buffalo Police Officer.” Anything less than the wage increases it seeks, the Union contends, would add to the “disparity” one finds by a base pay comparison between the Union and the PBA. In addition, the Union maintains that the re-engineering monies received by the City can properly be applied to the City’s obligations to Union members. According to the Union, the record evidence establishes that re-engineering money is available and can be used to fund the City’s obligations to the Union.

The Union also asserts that its wage proposals are supported by a comparison with Rochester. In fact, the Union puts forth, a comparison with Rochester would establish that “Buffalo Firefighters are significantly underpaid.” Additionally, the Union contends that the general fund balance of the City is growing whereas Rochester’s general fund balance is “stagnant.”

The Union rejects claims raised by the City and the Authority that the City does not have the ability to pay. The projection of the State Comptroller that there would be a negative unreserved fund balance as of June 30, 2003 in the City, according to the Union, has not been accurate. Rather, the Union claims, the City ended the fiscal year ending June 30, 2003, with a surplus instead of a budget shortfall. The Comptroller’s projection that the City would finish the fiscal year ending June 30, 2004, with an accumulated negative fund balance is also incorrect, the Union contends, in that the City had a reserved fund balance of over \$6 million dollars for fiscal year ending June 30, 2004, and an unreserved balance in excess of \$47 million dollars. Additionally, the Union points to correspondence from City Comptroller establishing that, as of

June 30, 2003, there was over \$14 million dollars remaining in re-engineering monies, which balance already reflected the \$5,000 per police officer payout.

The Union notes that the Authority had full opportunity to present its case to the Panel and argues that, in large part, the Authority's "presentation was related to fiscal conditions that allegedly existed prior to the July 3, 2003 creation of the Control Board and not to conditions that have since existed." The evidence presented by the Authority, according to the Union, ignored essential indicators of fiscal health.

Moreover, the Union contends that the costs associated with the Fire Department have gone down, given the reduction in the number of employees and related costs. The Union also notes that Standards & Poor's upgraded the City's credit rating from negative to stable in May, 2004, and noted at that time that the general fund balance in the City remained positive. The City's claim that only the police are entitled to re-engineering monies because they agreed to re-engineering, according to the Union, must be rejected. In this regard, the Union claims that, "[t]he primary intent of re-engineering is to do more with less, or alternatively stated, to reduce the overall costs of operations whether it be the police department or the fire department." Hence, the Union claims that re-engineering essentially means the reduction of the number of employees, which has been experienced by the Fire Department. In fact, the Union claims, re-engineering has worked more effectively in the Fire Department than in the Police Department. The Union concludes that the record evidence establishes that the City clearly has the ability to address wage increases such that parity with the PBA can be maintained.

Position of the City

The City acknowledges that “considerable weight” has been given to the concept of parity by past interest arbitration panels. Nevertheless, the City contends that the Union, in the first instance, seeks parity with wage increases obtained by the PBA but “is unwilling to agree to the same level of meaningful contract and operational concessions provided by the PBA.” Additionally, parity must be set aside by the Panel, the City argues, because “[t]he overwhelming factor in this case is the precarious financial position of the City of Buffalo and [the] impact that a potential economic award would have on the City.” Needless to say, the City identifies the creation of the Control Board and what the City maintains are the economic conditions giving rise to the Board’s creation, which conditions, the City maintains, continue in the present. Thus, the City asserts that it “is facing a fiscal crisis with no end in sight.”

Specifically, the City claims that, if all of the Union’s proposals were to be awarded, the City would face a total cost of over \$15 million dollars, even though it has no money reserved that would fund wage increases or other economic benefits. Funding would thus be achieved, according to the City, “through drastic reductions in white collar employees and firefighters.” The City puts aside the claim that it has \$12 million dollars in available taxing margin on the ground that it must maintain the margin to hold the confidence of credit rating agencies. The City also claims “it cannot raise its property taxes any further without seriously jeopardizing its ability to borrow, which it must be able to do annually in order to provide adequate cash flow.”

The City also claims that, at the end of the period covered by the Award, June 30, 2004, its unreserved, undesignated fund balance was \$10.2 million dollars, which was below the amount recommended by the State Comptroller and was achieved after approximately \$ 26

million dollars in deficit borrowing through the Authority. The City also claims that the four year financial plan approved by the Authority does not contain funds for wage or benefit increases for the Union and there is no reason to believe that the \$7 million dollars in additional shared tax revenue from the County of Erie, which is relied upon in the City's plan for the 2005 to 2006 fiscal year, "will materialize, and the City's most likely option to close that gap is to reduce expenses, primarily through layoffs." Any economic increase that the Panel might award, the City concludes, would throw the City's four year financial plan approved by the Authority "out of balance."

Simply put, according to the City, the "trend" of parity "cannot continue" because of the City's financial crisis. It is the City's position that, by giving due consideration to ability to pay, the Panel can appropriately "refuse to impose an award with wage increases or any other economic benefits for the period of July 1, 2002 through June 30, 2004."

Turning to the re-engineering monies, the City notes that, at the end of fiscal year 2002 to 2003, it had designated approximately \$14.5 million dollars of its unreserved fund balance for re-engineering agreements. Moreover, the City points to the record evidence that, as of November 15, 2004, it had approximately \$8.5 million dollars remaining from the re-engineering agreement funds. Such funds, the City claims, cannot be used to fund wage increases for the Union. The State legislation providing for the re-engineering assistance, the City observes, states that it only "can be used for re-engineering agreements." No language can be found in the legislation, the City claims, that the re-engineering funds can be used to fund an interest arbitration Award. The re-engineering monies were properly used for the PBA agreement, according to the City, because

the monies were used to buy major concessions from the PBA. Any additional re-engineering monies available, according to the City, can only be obtained by the Union in the event that the Union is willing and able to negotiate a re-engineering Agreement with the City.

On the question of parity, the City also states that the major concessions provided by the PBA in its recent agreement with the City cannot be overlooked. These concessions included, the City observes, “an implementation of one officer cars, change of shift starting times, civilianization of various positions, and the ability of the City to utilize exempt positions in command of the districts.” The City claims the record supports the conclusion that the PBA’s Agreement with the City to downsize the Police Department will save approximately \$5.8 million dollars whereas, if wage parity is now given to the Union, the cost to the City would be approximately \$8.1 million dollars. The Union, according to the City, is essentially “seeking a free-ride on the back of the PBA.” In fact, according to the City, the Panel would not be breaking “parity” by refusing to go along with the Union’s Proposals for wage increases, since, “the City and the PBA have already done that.”

Position of the Authority

According to the Authority, the Panel must “recognize the unique nature of Buffalo’s condition which led to the imposition of BFSA and its role in this proceeding.” In the Authority’s estimation, the Union’s evidence and arguments that Buffalo does not actually have a fiscal crisis must be rejected as having no rational relationship to credible evidence in the record.

The Authority claims that “Buffalo needs to undergo major, permanent structural change in the way it delivers its services to the community, and that process must start with this Panel’s

decision.”

The record evidence establishing that Buffalo has a clear and present fiscal crisis, according to the Authority, is found in a variety of different areas. Thus, the Authority posits that Buffalo is one of the poorest cities in the country and that its population has declined 14% since 1990, the third worst of any city in the United States. As of November, 2004, the Authority notes, the unemployment rate in Buffalo was the highest of any city in upstate New York and the eighth highest of the 100 largest cities in the United States.

The Authority also points to the findings of the State Comptroller when a review was conducted of the City's finances in 2003. The Authority notes that the Comptroller “concluded that Buffalo's fiscal position was unsustainable, noting that its finances would collapse without more State aid; that it was facing enormous and growing annual deficit; that further property tax increases were unsustainable; that its outstanding debt levels were excessively high; that it was being forced to borrow extraordinary amounts each year to solve cash flow shortages.”

According to the Authority, no wage increases should be awarded based on the lack of the City's ability to pay them. Further, any such increases would be inconsistent with the financial plan the City has submitted to the Authority, the Authority argues, and would also “exacerbate the crisis.” To the extent the Union might rely on the fact that there is \$10.2 million dollars in the unreserved, undesignated fund balance, the Authority replies that the fund balance already is “dangerously low” and not in keeping with the State Comptroller's 2003 recommendation that the City maintain an unreserved, undesignated fund balance of between 24 and 30 million dollars.

It is the Authority's position that the Union, despite claiming that the City is not in fiscal crisis, has not established the source of any available funds for an increase of wages or an exclusion from the current wage freeze. The fiscal crisis faced by the City, the Authority argues, heavily outweighs the parity factors of the statutory criteria. The Authority urges the Panel to resist the temptation to award some increase to the Union, contending that the record plainly illustrates "that there are insufficient funds to provide any increase to firefighters, that no changes in wages, salaries or benefits can be made at this time."

Discussion

Three criteria that are found in the statutory factors the Panel must consider emerge as key components of the analysis of the Union's wage increase proposals. These criteria are parity, the City's ability to pay, and the nature of the duties undertaken by firefighters. The largest battle in this proceeding finds the Union arguing that its proposals are more than supported by the concept of parity and the City arguing, along with the Authority, that parity cannot be given the weight it has in the past because of the City's inability to address any wage increases because of the conditions that produced the Control Board.

Clearly, the record amply demonstrates that, for over 30 years, the concept of parity has basically carried the day when it came to addressing questions of wage increases. That is to say, interest arbitration panels have uniformly followed the wage increases achieved by the PBA when addressing the Union's proposals on wage increases. The historical precedent regarding parity caused Arbitrator Foster to remark over ten years ago that "[t]here can be little doubt that the parties, both historically and currently have sought to treat police officers and firefighters

uniformly ...” Arbitrator Lewindowski subsequently commented that “[t]he parties have a long history of using parity to set wage and benefit salaries for the unit and the PBA.” Arbitrator Pohl in 2000 likewise commented that “the criterion of parity between those two units [PBA and Firefighters] is the most relevant factor to apply” and that parity should prevail “[a]bsent any plausible explanation” to support a contrary conclusion.

An essential question in this proceeding is whether there should be a deviation from the long historical practice of parity because of the City’s fiscal condition. Initially, it can be noted that the City faces a financial crisis that is real and ongoing. The record evidence clearly demonstrates that the City’s fiscal crisis has developed over time. In a nutshell, a decreasing population and decreasing property values put limits on the City’s ability to generate revenues. As the City’s population grew smaller, the City also, not surprisingly, grew poorer. At the same time, the cost of services the City provided continued to increase. The point was reached where the City’s declining financial position led the State to increase its financial aid on an annual basis to the City in order to cover the City’s budget gaps. The events of September 11, 2001, made matters worse by the adverse economic consequences they caused the State. Moreover, the decline in the value of the stock market, which followed September 11, 2001, created substantial increases in pension costs to local governments, including the City. The worsening economic conditions of the State hampered its ability to continue to increase its financial assistance to the City. It was within the context of these factors that the State Legislature passed the Buffalo Fiscal Stability Authority Act, which took effect on July 3, 2003. After identifying the factors leading to the City’s financial crisis, the legislature noted that:

These factors have led to a structural imbalance between revenues and expenditures, which, when combined with the City's limited ability to increase taxes on its residents, has resulted in a downgrade of Buffalo's bonds by independent bond rating services. It is hereby found and declared that the City is in the state of fiscal crisis and that the welfare of the inhabitants of the City is seriously threatened.

Subsequent to the creation of the Authority, the City, according to clear record evidence, has balanced its budgets only by the deficit borrowing by the Authority. Thus, in fiscal year 2003 to 2004, the Authority borrowed \$7.81 million dollars for the City, and, in fiscal year 2004 to 2005, the Authority borrowed \$19.054 million dollars for the City. The City's current bond rating by both Standard & Poor's and Moody's are currently at the minimum investment grade. Any lower rating by these agencies would in all likelihood keep the City from entering the short-term borrowing market to address payroll obligations while waiting to receive property taxes.

The fiscal crisis facing the City is unprecedented. There is a genuine limitation on the City's ability to pay that was not in existence at the time the past interest arbitration awards were issued. Despite the clear pattern of parity shown in the record, the circumstances presented by the City's fiscal crisis are such that the Panel is constrained to break the pattern of parity to some extent. In arriving at this conclusion, the Panel is not at all unmindful of the professionalism required of members of the Union and the extremely dangerous work they face each day. The public depends as much on the Union members as it does on their counterparts in the PBA for protection of life, limb, and property. Members of the Union, like their counterparts in the PBA, are faced with the possibility of life-threatening situations each and every time they perform their firefighting duties. These observations concerning hazards and professionalism are not offered

for the sake of paying lip service to the statutory factors, but must and will be taken into account by the Panel. The Panel's conclusion that the City's fiscal condition prevents what in the past has been a routine application of parity does not support the conclusion that no wage increases are appropriate.

A final word regarding the Panel's belief that strict parity cannot be followed in the instant proceeding is that the wage increases achieved by the PBA occurred within the setting of negotiations whereby the PBA made substantial concessions to the City of a type that will not occur in this proceeding. It can be argued, therefore, that these substantial concessions made by the PBA present other reasons as to why parity should not be followed in this proceeding. It can also be noted that the Panel finds no particular reason to address and resolve the Parties' differing beliefs about re-engineering monies. Suffice it to say that some wage increases will be awarded by the Panel and the Panel finds nothing in the State legislation that led to the re-engineering monies being made available that would bar the City from using some portion of the re-engineering monies to address its obligations under this Award.

In setting forth its conclusion that the City's position on Proposals 1 and 2 will not be accepted across the board, the Panel would point out that the Award will generate some savings to the City by the Panel's Award on City Proposals 3 and 4. In a different vein, the Panel's Award will also result in additional monies for members of the Union in conjunction with the Award on Union Proposal 5.

Specifically, as to the Union's Proposals 1 and 2, the Panel is awarding a general wage increase of 2.1% in the first year and a general wage increase of 3.4% in the second year. The

Panel's Award on general wage increases, for the second year, seeks to place the Firefighters on track for parity. No retroactive \$5,000 across the board increase in base wages or salaries, as sought by the Union in Proposal 2, will be awarded.

In terms of the first year increase of 2.1%, the Panel is aware that this is a year not covered by the Control Board. As to the second year, the Authority, the Panel notes, has imposed a wage freeze, but it is the Panel's belief that, within a reasonable period after the adoption of the Award, the 3.4% increase should and can be addressed.

AWARD ON WAGE INCREASES

1. Effective July 1, 2002, the base annual salaries of bargaining unit personnel should be increased to an amount equal to 2.1%.
2. Effective July 1, 2003, the base annual salaries of bargaining unit personnel should be increased by an amount equal to 3.4%.

TEMPORARY ASSIGNMENTS - RATES OF PAY **(UNION PROPOSAL #5)**

Union Proposal #5 seeks to delete Section 17.1 of Article XVII of the Parties' Agreement, which reads:

Whenever an employee is temporarily assigned to perform the duties of a higher rank, he shall be paid the per diem difference between his rank and the maximum

level of the rank in which he is performing, exclusive of longevity.

In its place, the Union seeks to add a new Section 17.1, as follows:

Whenever an employee is temporarily assigned to perform the duties of a higher rank, the member shall be paid at the maximum hourly rate of the rank in which he is acting, and he shall be paid at such rate for each hour in which he acts in the higher rank.

Position of the Union

The Union notes that, under the current Contract language, the City pays the higher rate only for the first eight hours worked. According to the Union, work shifts are either nine hours or fifteen hours, depending upon whether it is the night or day shift, and no reason exists as to why an individual should not be paid the highest rate for the hours worked.

Position of the City

According to the City, the Union's proposal is "purely economic - it will cost the City more money every time that it appoints an employee to act in a higher title." The City, therefore, resists this proposal because of its fiscal crisis and its belief that there is no "additional productivity attached to the proposal."

Discussion

The Panel believes that, upon examination, there is no reason why a Firefighter working out-of-title should only be paid for eight hours for this work when, depending upon the shift, the Firefighter is working either nine or fifteen hours at the higher rank. It is patently unfair, the

Panel finds, to limit the out-of-title payment to the first eight hours. Accordingly, the Panel's Award will accept Union Proposal #5.

AWARD ON TEMPORARY ASSIGNMENTS

The Parties shall delete Section 17.1 of their Agreement and add in its place the following:

17.1 Rates of Pay

Whenever an employee is temporarily assigned to perform the duties of a higher rank, the member shall be paid at the maximum hourly rate of the rank in which he is acting, and he shall be paid at such rate for each hour in which he acts in the higher rank.

HEALTH INSURANCE

The City agreed to withdraw its health insurance proposal (City Proposal #3) based on its understanding that it had reached an agreement with the Union on June 6, 2004, regarding health insurance. Before July 1, 2004, the health insurance plans that the City offered to its employees were "community rated," which meant that premiums were determined by the utilization of benefits by an entire community and not one employer or one group. For so long as the City continued to offer coverage from multiple carriers to employees and retirees, it was confined to "community rated" coverage. Movement to a single carrier would allow the City the option of utilizing an "experience rated plan," which would mean that premium costs would be determined only by a utilization of benefits by City employees and retirees. In 2003, the City began to meet with representatives of various health insurance carriers to assess the feasibility of moving to a single health insurance carrier. In May, 2004, the City was able to reach agreements with all of

its unions save for the PBA and the Union herein to move to a single health insurance carrier.

On June 6, 2004, the City and the Union executed a memorandum of agreement in which, the Union agreed to a single health insurance carrier.

Subsequently, the Union took the position that the Memorandum of Agreement was null and void, apparently because it was not ratified by the Union's membership. The City has taken the opposite position, claiming that no reservation of right for ratification was made in the Memorandum of Agreement by the Union. In any event, the Union has since filed three grievances over changes to the health insurance plans and both Parties have filed charges with the New York State Public Employment Relations Board. The grievances and the PERB charges are still pending.

The Parties' positions vis-à-vis health insurance have been set forth by the Parties, particularly during discussions in executive sessions. It was also mentioned during the course of the hearing that the majority of the Panel believes it appropriate to put the health insurance issue to rest for the Parties. The Panel finds that there is sufficient evidence before it to allow it to conclude that the cost savings realized by the City in a movement to a single carrier as well as the record evidence that such movement does not prejudice in any measurable way the right of the Union membership to receive the same level of health care that was in place before the Memorandum of Agreement was executed and the changes were accepted by the Union when they entered into June 6th agreement with the City. In fact the agreement provides:

“that it is the express understanding of the parties that there shall be no diminution in the health insurance coverage available to members of Local 282 under this Agreement as compared to the coverage, riders, co-pays, and other benefits available under the parties' CBA and agreements prior to the date of this Agreement, except that Local 282 agrees to allow the City to elect to offer options through this one-carrier system”

AWARD ON HEALTH INSURANCE

Health insurance will be provided by the City under the terms of the June 6, 2004 Memorandum of Agreement executed by the Parties effective June 30, 2004 or as soon thereafter as it may be implemented.

IOD PROCEDURE (CITY PROPOSAL #4)

This proposal by the City seeks to replace the existing IOD Procedure Agreement.

Position of the City

The City claims that its proposal will give it greater ability to “monitor and manage individuals who have been injured on duty, to make it more difficult for an individual to abuse or take advantage of the system.” Thus, the City contends that its proposal, by requiring employees to give immediate notice of an injury on duty and the specifics thereof, will limit the ability of a Union member to convert a non-work related injury into an IOD claim. The City also claims the procedure, by granting it the right to make an initial determination of eligibility for IOD status, will constitute a significant change from the present situation whereby the City has a need to prevail in a hearing before a neutral paid by the City. The City observes that such hearings are time consuming. Further, its proposal, the City asserts, requires an employee to use paid leave time pending a final determination as opposed to the present situation whereby an employee receives the IOD benefits while awaiting the hearing. Under the present situation, the City

observes, no incentive exists “to speed the process along.” Further, the City notes that even when it has successfully challenged a claim via a hearing, it has not always been able to obtain a complete recovery of money or sick time from the individual. In addition, the City claims that the new procedure will allow it to control costs by requiring employees to report to light duty assignments.

The City finds justification in its proposal by a comparison with the Rochester Collective Bargaining Agreement. The City also emphasizes what it perceives to be the cost saving features of its proposal. Further, the City claims its proposal contains “the elements of due process and fundamental fairness sufficient to protect the rights of firefighters legitimately injured in the line of duty.” Abuse, however, the City argues, will be “more difficult” if its proposal is accepted.

Position of the Union

The Union notes that, under the proposal, none of its members could receive any IOD benefits, which are statutory in nature, until the City’s Commissioner of Human Resources makes a determination that there is an entitlement to benefits. The Union claims that, although the Commissioner would be required to make a determination within fifteen business days after receipt of an IOD application, no conferral of benefits occurs if the Commissioner does not make a timely benefit determination. The procedure is also lacking, according to the Union, because there is no appeal right if no determination is made and thus “the Commissioner can effectively deny benefits by not making a determination.”

The Union also rejects the proposal because it provides for a waiver of benefits if an application is not filed within ten business days after injury, even though the statute does not provide for such a waiver. The Union opines that a member could fail to meet the ten day filing

requirement because of hospitalization. Additionally, the Union objects to the City's proposal because it contains a limitation of the duration of light duty assignments although no such restrictions are found in the statute. The appeal rights in the statute, according to the Union, are broader than those found in the City's proposal. The Union also claims that the City's proposal provides for no right of appeal if the City does not agree to the panel of arbitrators to resolve appeals.

Discussion

The Panel, upon examination of the Parties' present IOD Procedure and the City's proposal, finds that the City's proposal does not create any danger that members of the Union who have a *bona fide* entitlement to IOD benefits will be denied such benefits under the City's proposal. The City's proposal, however, will curb abuses of the present procedure. On this point, the Panel would hasten to add that it is very clear that not all Firefighters have abused the current Agreement but nevertheless abuses have and will continue to occur should the current IOD Agreement remain in place. The Panel also finds that the City's proposal does not amount to a waiver or loss of statutory rights, and that, in fact, the City's proposal is consistent with the statute.

The Union has raised a genuine concern regarding the consequences associated with the possibility that the Commissioner might not make a decision within fifteen days. As the Union has accurately noted, a failure by the Commissioner to make a decision within fifteen days, under the City's proposal, does not carry with it any consequences; benefits could be effectively denied simply by the Commissioner not making a decision.

Accordingly, the Panel finds it necessary to modify the City's proposal in Section 4

("Benefit Determinations"). More specifically, the Panel will add Paragraph E to Section 4, to read as follows:

If the Commissioner fails to make a determination of eligibility within fifteen (15) days after receiving an application for §207-a benefits, then the member's 207-a application will be deemed to be approved in all respects. The member shall continue to receive 207-a benefits unless and until the City seeks to discontinue such benefits under the provisions of paragraph A of Section 6.

AWARD ON CITY PROPOSAL #4

The March 31, 1993 Memorandum of Agreement concerning procedures for "IOD" cases is deleted and replaced with the following new Article of the Collective Bargaining Agreement.

Section 1- Intent and Definitions

A. This procedure is intended to implement the express language of § 207-a of the General Municipal Law and is not intended to reduce any benefits that firefighters are entitled to pursuant to G.M.L. § 207-a, including any benefit, requirement, or limitation under statute or case law the effective date of which is subsequent to the enactment of this Policy.

B. The parties hereto specifically acknowledge that the purpose of this agreement is to enact procedural requirements for the provision of G.M.L. § 207-a benefits in the Buffalo Fire Department. The enactment of this policy is in no way intended to alter the coverage available under G.M.L. § 207-a for any particular type of injury/illness, nor does it supercede any applicable case law concerning when coverage applies or is available.

C. For the purposes of this procedure, "business day" shall mean Monday through Friday excluding any holiday when City Hall is closed for regular business.

D. For the purposes of this procedure, "member" shall mean any employee of the Buffalo Fire Department who is covered under the provisions of G.M.L. § 207-a.

E. For the purposes of this procedure, "Commissioner" shall mean the Commissioner of Human Resources, or his designee.

Section 2 - Notice of Disability or Need for Medical or Hospital Treatment

A. A member or anyone acting on his/her behalf, who claims a right to benefits under G.M.L. § 207-a either because of a new illness or injury or the recurrence of a prior illness or injury, shall make written notice and application for those benefits within ten (10) business days of when the firefighter reasonably should have known that the illness or injury would give rise to the claim of entitlement to § 207-a benefits. The member shall have the continuing right to supplement or amend his notice and application with any information obtained subsequent to the filing of such notice and application. Any dispute arising over an alleged failure of the member to file notice and application within the time limits set forth herein shall be subject to the dispute resolution procedure provided for in Section 6 of this Article.

B. The member shall provide a medical authorization for the Commissioner to obtain copies of those medical records from his/her treating physician or other health care provider which pertain to the illness/injury claimed. The City will provide the member, without cost to the member, a copy of the records and reports provided to the City pursuant to the authorization. The medical authorization shall contain a confidentiality statement prohibiting the use or release of the member's medical records except for purposes authorized by this Procedure including any hearing undertaken pursuant to Section 6, and shall be specifically limited to the illness or injury for which benefits are claimed pursuant to Section 2(a).

C. The Commissioner's Office shall also fill out a report notifying the Retirement System of the member's claim for on-the-job injury upon the Commissioner's receipt of the member's claim.

D. The failure to satisfy any time limits specified above shall render a notice of filing untimely and shall preclude an award of any benefits pursuant to § 207-a of the General Municipal Law; provided, however, that the Commissioner shall have the discretionary authority to excuse a failure to provide notice or file a report upon good cause shown. Any alleged failure to satisfy the time limits under this section shall be subject to the dispute resolution procedure set forth in Section 6.

Section 3 - Status Pending Determination of Eligibility for Benefits

A. The member shall be placed on sick leave pending determination of his/her eligibility for § 207-a benefits.

B. If the member's 207-a application is approved by the Commissioner, the City shall reimburse the member for all leave time expended during the determination period.

Section 4 - Benefit Determinations

A. The Commissioner shall promptly review a member's application for § 207-a benefits and shall determine his eligibility within fifteen (15) business days after the Commissioner receives the application.

B. In determining the application, the Commissioner may require a more detailed statement from the member than that contained on the application. The Commissioner may take statements from witnesses and may send the member to a physician or physicians of its choice for examination at the City's expense.

C. The determination will be made in writing to the firefighter, and copied to Local 282, setting forth in detail any and all reasons for the determination. In the event that the application is denied, the City will simultaneously provide the member, without cost, a copy of all medical or other information produced or acquired by it, in connection with the member's application and determination for § 207-a benefits. The City will continue to provide the member with additional medical information subsequently produced or acquired.

D. Denial of § 207-a benefits is appealable, at the member's option, pursuant to the terms of Section 6 of this policy. The Commissioner's determination shall include notice and instructions to the member regarding how to initiate the appeal process.

E. If the Commissioner fails to make a determination of eligibility within fifteen (15) days after receiving an application for §207-a benefits, then the member's 207-c application will be deemed to be approved in all respects. The member shall continue to receive 207-a benefits unless and until the City seeks to discontinue such benefits under the provisions of paragraph A of Section 6.

Section 5 - Assignment to Light Duty

A. As authorized by the provisions of Subdivision 3 of Section 207-a, the Department, acting through the Commissioner, may assign a disabled member specified light duties, consistent with his/her status as a firefighter.

B. The Commissioner, prior to making a light duty assignment, shall advise the member receiving benefits under § 207-a that his/her ability to perform a light duty assignment is being reviewed. The member may submit to the Commissioner, any document or other evidence in regard to the extent of his/her disability. The Commissioner may cause a medical examination or examinations of the member, to be made at the expense of the City. The physician selected, the

member and his/her physician, shall be provided with the list of duties and activities associated with a proposed light duty assignment, prior to any implementation of the same. The City's physician shall make an initial evaluation as to the ability of the disabled member to perform certain duties or activities, given the nature and extent of the disability. If the member's physician does not agree that the member is medically able to perform the light duty assignment, he/she must express, in writing, those elements of the light duty assignment which the employee cannot perform and the specific medical reasons which preclude the member from performing the duties.

C. If there is a disagreement between the City's physician and the member's physician as to the member's fitness to perform one or more portions of the duties of the light duty assignment, those portions cannot be assigned until the dispute is resolved pursuant to Section 6. It is understood that assignment to light duty is temporary and that a member so assigned does not have any entitlement to a continued light duty assignment for an indefinite duration of time. In no event shall the firefighter be held in such light duty assignment for a period of more than one (1) year and six (6) months. Members on light duty shall not be allowed to work overtime in such position. Nothing contained herein shall require the Department to create light duty assignments.

Section 6 - Dispute Resolution Procedure

A. In the event that the City denies an application for § 207-a benefits, seeks to discontinue Section 207-a benefits, there is a dispute about whether a member is capable of performing a specific light duty assignment, there is an issue with respect to outside employment, there is an issue regarding whether a member has waived his/her benefits, or any other dispute concerning continued entitlement to § 207-a benefits, the matter will be submitted directly to binding arbitration pursuant to Article XXIII of the Collective Bargaining Agreement.

B. An arbitrator shall be appointed from a panel mutually agreed to by the parties, based upon a rotating schedule of availability. In the event that the parties are unable to mutually agree on a panel then each party shall submit the names of three arbitrators who are on the labor panel of the New York State Public Employment Board and those arbitrators shall serve a term of two years. Said panel shall be subject to review and change as needed. A hearing shall be held within thirty (30) days of appointment except that the deadline may be extended upon mutual consent in writing the date that the member's application is denied. The arbitrator shall render a decision within ten (10) days of the hearing date. The arbitrator's determination shall be based upon the submissions made at hearing, and the parties shall not be permitted to submit post-hearing briefs or arguments, unless mutually agreed to.

C. The parties shall have the option, upon mutual consent and whenever practicable, to submit their respective evidence and positions to the arbitrator upon a stipulated record and written arguments, without necessity of hearing. In this case, such submission shall be made to the arbitrator on or before day thirty (30), measured from the date of the Commissioner's initial determination.

D. Should the arbitration process extend beyond ninety (90) days measured from the date of the Commissioner's initial determination, the member shall be placed on interim 207-a leave until such time as the arbitrator makes a final determination. Any leave time advanced pursuant to this paragraph shall be recouped by the City, in the event that the arbitrator finds that the member's application for benefits should be denied.

E. Should the arbitrator's decision award the member § 207-a benefits, the member shall be restored any accruals expended during the hearing process.

F. The determination of the arbitrator shall be final and binding on the City and the member, but shall not preclude further review at a subsequent date based upon new or supplemental medical or other information. The cost of the arbitration shall be borne equally by the City and the member. The costs of any transcript, or medical testimony shall be borne by the person/party requesting the same.

Section 7 - Disability Retirement

A. Consistent with § 207-a, the City may file an application on the member's behalf for retirement under Sections 363 or 363-c of the New York State Retirement and Social Security Law. Any injured or sick member who is receiving § 207-a benefits shall permit reasonable medical inspections in connection with such an application for accidental disability retirement or performance of duty disability retirement.

B. Salary payments provided by § 207-a (1) shall terminate upon the employee being retired pursuant to an accidental disability retirement or a performance of duty disability retirement as set forth in the Retirement and Social Security Law. Upon such retirement pursuant to accidental or performance of duty disability retirement, the member may also be entitled to those benefits provided for under § 207-a (2). The City reserves the right to make a determination independent of the findings of the New York State Comptroller as to whether the member is entitled to § 207-a benefits, including those benefits available under § 207-a (2). Notwithstanding his/her retirement status, the

member shall be entitled to appeal any denial of, or failure to process, a request for § 207-a (2) benefits to binding arbitration pursuant to Article XXIII of the Collective Bargaining Agreement.

Section 8 - Continuation of Contract Benefits

A. For the first ninety (90) days of leave pursuant to § 207-a, a member will continue to accrue all contract benefits. After ninety (90) days, the member shall not accrue any contract benefits except for wages, applicable longevity and health insurance; however, nothing contained herein shall operate to restrict any benefit available under G.M.L. § 207-a.

Section 9 - Outside Employment

A. If, as a result of an investigation, the Commissioner determines that a member has engaged in paid outside employment while simultaneously receiving salary pursuant to § 207-a, the Commissioner shall provide written notice of such determination. The notice shall specify in detail any and all reasons and the factual basis for those reasons for the determination. The member may appeal the determination pursuant to Section 6 herein. The arbitrator shall have the authority to determine the amount of benefit to be reimbursed, if any, and

direct the manner in which such reimbursement shall be made. The member must provide the City, upon request, with a W-2 form or tax returns or other proof other than sworn statements. The member may redact irrelevant information from the income tax information requested by the City, e.g., spousal income. Additionally, the City shall have the right to discipline the member pursuant to Article XXIV of the Agreement.

Section 10 - Hazardous Exposure

A. A member who reasonably believes he/she may have been exposed to a health hazard, e.g., AIDS, Hepatitis-B, biological or chemical toxins, etc., as a result of the performance of his or her duties, shall file a hazardous exposure incident form at the time of the exposure. If the member is unable to file such form, the City shall cause the same to be completed on his/her behalf. The City will maintain the exposure form in the member's personnel file.

B. If a member claims a job-related injury due to exposure to a health hazard, then he or she must comply with the requirements of this Article.

Section 11- Exclusivity of Procedures

A. These procedures are the sole exclusive procedures for determining a member's eligibility for benefits under § 207-a.

B. Either party may file a grievance for a violation of these procedures, pursuant to Article XXIII of the CBA. In that case, the scope of the arbitrator's authority will be solely to determine whether the procedures were complied with or violated.

DRUG AND ALCOHOL TESTING **(CITY PROPOSAL #5)**

Position of the City

Under this proposal, the City seeks to delete the June 6, 1995 Drug Testing Policy of the Buffalo Fire Department and replace it with a new Article in the Collective Bargaining Agreement incorporating the City's proposal. Experience with the existing policy, according to the City, has shown its flaws. The most notable flaw, the City argues, is that, if an individual is tested early in the year, the individual will know that he or she will not be tested again for the remainder of the year. A true random testing program, the City posits, would create an ongoing deterrent to the use of illegal drugs or alcohol while on duty. The City also observes that, under the existing policy, it cannot test individuals out on leave and the existing policy further permits testing only for controlled substances but not for the presence of alcohol while a Firefighter is on duty.

In the City's estimation, its proposal will "tighten-up" the policy now existing and make it more "cost effective."

Position of the Union

According to the Union, the City does not perform testing because it claims it lacks funds. Thus, the Union argues that it would make "little sense to expand on current testing protocol that has worked well when the City does not now test." It should be left to negotiations, the Union argues, as to whether there should be changes to the existing procedure. Further, the Union maintains that police are not subject to alcohol testing and yet carry firearms. The Union finds no compelling reason for the change.

Discussion

The Panel has reviewed the record evidence concerning the City's proposal and the existing policy in place between the Parties. In the Panel's estimation, the City's proposal, in fact, does not present a radical change from the existing policy but does "tighten-up" the policy on several significant points. First, the Panel finds it highly appropriate to add alcohol testing to the policy. The fact that alcohol testing is not called for in the PBA Agreement can be seen as a shortcoming to that Agreement and not a reason not to include alcohol testing in the policy between the Parties herein. Further, the policy as proposed by the City eliminates the possibility that a member of the Union, who is tested early in the year, will know that there will be no further testing for the remainder of that year. Similarly, the Panel is convinced that there is a genuine need to subject IOD status employees to testing in a manner consistent with the policy proposed by the City.

On balance, the Panel finds the policy proposed by the City to be supported by substantial reasons and, further, that there is no persuasive reason to continue the "status quo."

**AWARD ON DRUG AND ALCOHOL
TESTING (CITY PROPOSAL #5)**

The Parties will delete the June 26, 1995 Drug Testing Policy of the Buffalo Fire Department and replace with the following new Article of the Collective Bargaining Agreement:

A. Employees shall be referred to a Substance Abuse Professional through the City's Employee Assistance Program ("EAP").

B. The City shall administer reasonable suspicion, post accident, return to duty, and follow up alcohol and controlled substances testing. The City shall also require pre-employment controlled substance testing from conditional new hires, at the individual's expense. The City shall administer, on an annual (calendar year) basis, an amount of random controlled substances tests equal to 25% of all employees in the bargaining unit in the Fire Department. The City shall administer, on an annual (calendar year) basis, an amount of random alcohol equal to 10% of all employees in the bargaining unit in the Fire Department. Employees will be selected for random testing by a computer program containing employee social security numbers. Employees that are on leave (for any reason, including, but not limited to sick or IOD leave) or serving a disciplinary suspension may be tested while they are on leave or suspension if they are selected for random testing. Employees that are not on duty when selected for random testing will be tested when they next report for duty.

It is agreed that the City will provide a representative of the Union with the number of employees tested for controlled substances and alcohol on a random basis quarterly.

C. The City agrees that it will provide its supervisors with at

least one hour of training in the detection of alcohol/controlled substance use each year.

D. Use of Hospital/Police Blood Tests: In the event that police/medical officials administer a blood test, the results of that test may be used to find a violation under this policy (on-duty incidents).

E. The City agrees that in the collection and processing of samples, appropriate precautions will be followed to maintain the chain of custody. Employees will be directed to provide at least 45 ml of urine, and the split sampling procedure (30 ml/15 ml) will be followed. In the event of a positive test, an employee may request that the split sample be tested: if the split sample tests negative, the City will pay for the cost of the test; if the split sample tests positive, the employee will pay for the cost of the test.

F. An employee who is taking prescription or over-the-counter medications which may result in symptoms, impairments, or limitations similar to alcohol or controlled substance use must bring this matter to the immediate attention of the Commissioner of Human Resources. This information will be maintained as confidential by the City and shall only be used where necessary for safety or performance reasons.

G. The City agrees that it will not discipline an employee for a breath alcohol test that is below .04 or a controlled substances test results below the levels established by the United States Department of Transportation and/or the Federal Highway Administration. The term positive controlled substances test as it is used in this document shall mean a positive test under the levels established and used by the United States Department of Transportation and/or the Federal Highway Administration. A positive alcohol test as it is used in this document shall mean a result of .04 or higher on a breath alcohol test.

H. Employees testing positive for alcohol or the controlled substances marijuana, cocaine, opiates, phencycline (PCP), and amphetamines shall be subject to discipline on the following basis:

- a. ACCIDENT: In the event of a positive controlled substance test following an accident involving the loss of life or serious property or vehicle damage, the employee will be subject to discipline up to and including immediate discharge.

- b. In all other cases, the following procedure will apply:
- i) 1st Positive -Following notification of an employee's first positive alcohol or controlled substances test result, the employee shall be referred to a substance abuse professional. The employee shall also be suspended from duty without pay until such time that the employee submits to and passes a return to duty test. The employee may utilize available paid time off during this period. If the return to duty test results are positive, the test result will be considered a second positive under this Agreement. If an employee refuses to submit to a return to duty test within a thirty (30) day period following the employee's suspension, the employee will be terminated.
 - ii) 2nd Positive - Following notification of a second positive alcohol or controlled substance test result, the employee shall be immediately discharged.
 - iii) Any time off required for treatment shall be without pay; however, an employee may use any available accrued time off.
 - iv) The City shall not be responsible for the cost of any treatment. Health Insurance benefits may be available.
 - v) If a Substance Abuse Professional recommends that an employee participate in a treatment program, successful completion of that program is required as a condition of continued employment. The employee must agree to execute a release allowing the City to obtain information concerning the employee's attendance only in such a program. In the event the City learns that an employee has failed to attend one scheduled appointment in such a treatment program, it will advise the employee to consult with the Union. Unless good cause is shown, an employee will be discharged for missing two scheduled appointments.

I. MRO: The City will retain the services of a Medical Review Officer. All positive test results from the laboratory will be sent to the MRO for review and confirmation. It is agreed and understood that the MRO shall follow established DOT procedures and guidelines.

J. It is understood that a failed test for alcohol or controlled substances can be any of random, reasonable suspicion, post accident, return to duty, or follow up tests. It is further understood that a failed controlled substance test need not be for the same controlled substance in order to progress through the disciplinary procedure.

K. It is agreed that all employees are required to submit to alcohol and controlled substances testing as a condition of his/her employment. If an employee refuses to submit to such a test, he will be advised to consult with the Union if time and circumstances permit. In the event that this employee continues to refuse to submit to testing, he/she will be subject to discipline up to and including discharge for insubordination.

L. Information concerning alcohol and controlled substance test results shall be handled confidentially by the City.

M. To the extent that any part of this Agreement may conflict with any provision of the collective bargaining agreement, the provisions of this Agreement shall be controlling.

N. Discipline issued pursuant to this Agreement may be submitted to grievance arbitration under the terms of the collective bargaining agreement solely for the issues of whether the employee has violated the Alcohol and Controlled Substance Rules and whether the City was in compliance with the terms of this Article.

O. This Agreement shall have no effect on any other City rules or orders.

P. Whenever possible, each provision of this Article shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Article is held to be prohibited by or invalid under applicable law, such provisions will be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Article.

Q. The City will issue a Policy on Alcohol and controlled Substances. A copy of which is attached hereto.

**CITY OF BUFFALO FIRE
DEPARTMENT POLICY ON
ALCOHOL AND SUBSTANCE
ABUSE**

Introduction

Every employee should be aware that one of the City of Buffalo Fire Department's chief objectives is to provide a safe, healthful and pleasant working environment for our employees. Employees also expect one another to be in suitable mental and physical condition while at work. This means keeping the workplace completely free of the presence and effects of impairing substances.

We all know that alcohol can cause job impairment. Our society has also seen an increase in the use of illegal drugs. These substances can create similar problems in the workplace, and in addition, their use is a violation of the law. The City does not wish to inquire into the private conduct of employees, but we cannot tolerate unsafe and possibly criminal activities which can manifest themselves in the workplace.

Employees make their own individual life-style choices, and are responsible for their own health and well-being on their own time. However, these individual choices cannot be permitted to jeopardize our work together. All employees are required by the City to report to work on schedule, alert and in proper condition to perform their duties, and to remain in that condition throughout the work day.

A Compulsory Interest Arbitration Panel for the City and the Buffalo Professional Firefighters Association, Inc., Local 282 has issued an award setting forth procedures for alcohol and controlled substance testing. You should be aware that pursuant to this agreement, alcohol and controlled substance violations will result in discipline up to and including an employee's discharge.

In light of the serious penalties associated with alcohol and controlled substance violation, if an employee has a problem with alcohol

or drug use which could lead to a violation, the employee must do whatever is necessary to see that a violation does not occur. If the employee needs professional help, then it is the employee's responsibility to obtain that help and resolve the problem. The City does offer reasonable assistance in this regard, as discussed in this Policy, but it is the employee's responsibility to recognize the problem and ask for such assistance.

Please read this Policy carefully and completely. Any questions should be addressed to the Commissioner of Human Resources.

Definitions

For purposes of this Policy:

The term "working hours" means the employee's entire shift or workday, from the time the employee first reports for work until his or her work is done for the day, including lunch and break times.

The term "City premises" means all City property including offices, work locations, eating areas, parking lots, desks and City vehicles and trucks.

The term "illegal drugs" means all controlled substances, narcotics and other drug-related materials whose use without specific medical authorization is a criminal offense under State or Federal law, especially including marijuana, cocaine, opiates, amphetamines and phencyclidine (PCP).

Rules

All employees must report to work on schedule, alert and in proper condition to perform their duties and must remain in that condition throughout the work day. Therefore, the following conduct is strictly prohibited:

1. Reporting to work or working with an illegal drug in the employee's system.
2. Reporting for work or working with a blood alcohol concentration of .04 or greater.

3. Unlawful consumption of an illegal drug or consumption of alcohol during working hours, or on City premises at any time.
4. Unlawful manufacture, distribution, dispensing or possession of an illegal drug on City premises at any time. Possession of alcohol on City premises at any time.
5. Refusing to submit to a test to scientifically determine the concentration of alcohol or presence of illegal drugs in the employees system.

Violations of the Rules

Any employee who violates any of the Controlled Substance Rules contained in this policy will be removed from duty and then be referred to a Substance Abuse Professional ("SAP") for evaluation, and the SAP will determine what assistance, if any, the employee needs in resolving substance abuse issues. Before an employee may return to duty, he/she must pass a return to duty test for controlled substances. The employee may be required to enter a rehabilitation program and/or submit to follow-up testing.

VIOLATIONS OF THESE RULES WILL RESULT IN DISCIPLINE OR DISCHARGE AS SET FORTH IN THE ATTACHED AGREEMENT.

Testing

All bargaining unit employees of the City of Buffalo Fire Department are subject to testing to scientifically determine the presence and level of alcohol and illegal drugs in their system. Testing will be done on a pre-employment, post-offer basis, a random basis, a post-accident basis and may be directed when a supervisor concludes that there are reasonable grounds to suspect the employee has violated one of the Rules set out in this policy.

In the event that an employee has been in an accident involving the loss of life or an accident where a traffic citation has been issued, he/she should remain at the scene of the accident and available for testing unless he/she must leave the scene to provide first aid or medical assistance to another or in order to receive first aid or medical assistance.

Additionally, employees may also be tested on a return to work or follow-up basis.

Random testing will be unannounced and spread periodically throughout the year. A number of employees equal to twenty-five percent (25%) of employees in the bargaining unit at the Fire Department must be tested for controlled substances each year. A number of employees equal to ten percent (10%) of employees in the bargaining unit at the Fire Department must be tested for alcohol each year. Because each employee has the same chance of being selected for testing every time the random tests are conducted, it is possible that one employee may be tested more than once in any calendar year, while others may not be selected for testing for a number of years. Employees will be selected for random testing by a computer program containing employee social security numbers.

Depending on the circumstances and the violation, the employee will be directed to permit collection of a sample of urine or breath for analysis by a laboratory. Collections will be carried out as privately as possible, and will use methods required by the Department of Transportation to ensure the integrity of the sample provided. Tamper-proof methods of storage shall be used, a secure chain of custody shall be maintained, and laboratory analyses will use methods which have been demonstrated to produce specifically accurate and reliable results. If you would like more information about the testing of chain of custody procedures, please see the Commissioner of Human Resources.

Additionally, if there has been an accident or if a traffic citation has been issued, law enforcement officials may require the collection of urine, breath, blood, or another body substance.

Employees will be permitted to justify positive test results by providing evidence of a doctor's prescription or some other legitimate explanation to an independent medical review officer ("MRO"). If an employee satisfies the MRO that there is a legitimate, lawful explanation for the confirmed positive test result, the MRO will report a negative test result and the City will not learn of the initial confirmed positive test result. Analysis results and all other documents pertaining to the testing process will be maintained as confidentially as possible.

If an employee tests positive for alcohol or controlled substances, it will be

treated as a violation of the Rules. The employee will be removed from duty, referred to a SAP for evaluation, and will be subject to discipline or discharge as provided in the attached agreement.

In the event that an employee remains employed and is ultimately returned to duty, the employee must satisfactorily complete a return to duty test.

Testing will be done at the City's expense, and time spent by employees for testing purposes will be paid time.

All employees must agree to submit to the testing process, including the collection and analysis of samples, as a condition of their employment with the City. A refusal to submit to testing when directed will be deemed a refusal to comply with City requirements and will result in the employee's discipline up to and including immediate discharge.

To ensure your safety and the safety of your coworkers, the employee is encouraged to inform the Commissioner of Human Resources if they are taking medically prescribed drugs or are ingesting a substance for a legitimate reason that may manifest itself as an apparent violation of the Controlled Substance Rules.

Referral Program

As you can see, it is essential for all employees to remain drug free while they are in the workplace. The City does have an Employee Assistance Program, and employees who have a substance abuse problem and sincerely wish to correct it, both for personal health reasons and to prevent a violation of the controlled substance rules, are encouraged to request confidential assistance through this program.

Employees who have a problem that could result in a violation of the controlled substance rules are strongly encouraged to seek voluntary assistance before a disciplinary situation arises, cooperate fully with all requirements of the program of professional help that is established, and do whatever is necessary to prevent any disciplinary situations from arising thereafter.

* * *

It is the City's policy and objective to provide a safe, healthful and pleasant working environment for our employees. This means keeping the

workplace completely free of the presence and effects of impairing substances.

We hope that together we can make the City of Buffalo Fire Department a safe and drug free place to work and live.

CERTIFICATE OF RECEIPT

I hereby certify that I have received a copy of the City of Buffalo Fire Department's current Policy on Alcohol and Substance Abuse.

Date

Signature

_____ was provided a copy of the City of Buffalo Fire Department's current Policy on Alcohol and Substance Abuse on , but refused to sign and return the Certificate of Receipt.

Date

Signature

AWARD ON REMAINING ISSUES

Any items other than those specifically addressed by this Award remain "status quo" as they existed under the 1984 - 86 Collective Bargaining Agreement and all subsequent interest arbitration awards.

In summary then, the majority of this Panel is awarding the City of Buffalo Firefighters a total pay raise of 5.5% during the worst fiscal crisis the City has faced; awarding additional benefits to the Union in proposal No. 5; adopting a Health Insurance program that the Union accepted in an agreement reached with the City on June 6, 2004; accepting the City's IOD procedure that guarantees that no Firefighter will lose benefits and finally is accepting a drug and alcohol proposal that protects not only the general public but the safety of all firefighters who might be subjected to a firefighter reporting for work under the influence of drugs or alcohol. The Chairperson of this panel has met his statutory responsibility to reach a fair and impartial award despite the reluctance of the City to sign such an award and a strong dissent filed by the Union.

DATED:

THOMAS N. RINALDO, CHAIRPERSON

EDWARD PIWOWARCZYK,
PUBLIC EMPLOYER MEMBER

CONCUR/DISSENT

JOSEPH FOLEY
EMPLOYEE ORGANIZATION
MEMBER

CONCUR/DISSENT