

In accordance with Section 209 of the Civil Service Law, Article IV, Public Employees Fair Employment Act (the Taylor Law) I was selected by the Patrolmen's Benevolent Association (PBA) and the City Of New York (City) and appointed by the Public Employment Relations Board (PERB) as the Chairman of a tripartite public arbitration panel, together with the panel appointees of the PBA and the City, to decide the terms and conditions of a collective bargaining agreement between them to succeed the predecessor contract which expired on July 31, 2002. Carole O'Blenes, Esq. and Jay W. Waks, Esq. served as the appointees to the panel respectively by the City and the PBA.

As contemplated by the Taylor Law and as expected, Ms. O'Blenes and Mr. Waks, though thoroughly collegial and professional and of important technical assistance to me, were ardent supporters and at times active advocates on behalf of the positions of the party which appointed them.

Hence, this Opinion and its findings of fact and conclusions are mine alone. As is the Award which, however, for validity, must be concurred in by at least one of them.

In sum, the arbitration proceedings consisted of pre-hearing briefs, a pre-hearing conference to set guidelines,

fourteen transcribed hearings, several hearings or meetings on issues of discovery, over 300 voluminous exhibits, twenty-eight witnesses (including many of professional and scholarly distinction; the Mayor; members of the City Council; a former Controller of the State of New York; the City's Budget Director; a former Budget Director; the President of the PBA and the City's Commissioner of Labor Relations); post-hearing briefs and reply briefs as well as extensive correspondence and communications throughout. Overwhelmingly all of that focused on the issue of wages.

As authorized by the parties following the completion of the hearings and the submission of briefs, I engaged in an extensive mediation effort that proved unavailing. My arbitral authority was expressly preserved in the event that mediation failed. Thereafter, preceding this Opinion and Award, the Panel met and deliberated in executive sessions.

The arbitration case was tried with extraordinary skill by counsel for the two national prestigious law firms, Kaye, Scholer LLP and Proskauer Rose LLP, representing respectively the PBA and the City.

All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

Over the almost fifty years I have practiced as an arbitrator in labor management disputes and as a labor relations practitioner in which I have heard and decided some 10,000 grievance cases and dozens of interest cases in New York City, Boston, Chicago, New Haven, and Philadelphia, none have been as comprehensive, as detailed and as well tried as this instant matter.

However, notwithstanding the foregoing, and despite the professional excellence of the case presentations, a specific provision in the Taylor Law produces a result that in my view is an illogical and counterproductive restriction on the Panel's jurisdiction.

That "restriction" is the statutory provision that the Panel's award may not exceed in time and effectiveness a period no greater than two years beyond the end of the prior agreement. Section 209 (vi) reads:

"The determination of the public arbitration panel shall be final and binding upon the parties for the period prescribed by the Panel. But in no event shall such period exceed two years beyond the termination date of any previous collective bargaining agreement." (emphasis added)

Or in this case the Panel's authority to determine conditions of employment may be only for the period August 1,

2002 through July 31, 2004, a period of time that has obviously expired. (The last date of the predecessor contract was July 31, 2002).

In the previous arbitration before a Panel chaired by Arbitrator Dana Eischen, the first under the Taylor Law between these parties, an unsuccessful effort was made to get mutual agreement from the parties for an extension of the contract term beyond the two years. The same unwillingness to mutually agree on an extension of the contract existed this time as well. However, I made no particular effort to get an extension in this case because my reading of the Statute, and more importantly as expressly confirmed by an authoritatively sought opinion from PERB, the two-year limitation is mandatory and may not be extended even by the parties involved. PERB informed me that the words "in no event" mean just that - namely, that under no circumstance, apparently as a matter of public policy, may the two-year limitation be extended, unless the period in excess of two years is expressly approved by the Legislature. Focused on this case that limitation highlights a statutory flaw that restrains me and the Panel from a realistic and comprehensive consideration of the issues in dispute between the parties, what their present relationship is, and

particularly what that relationship should be prospectively beyond 2004.

By deciding the terms of the contract for the expired period 2002 to 2004 the parties, with their present adversarial, indeed regrettably confrontational relationship, are thrust back into virtual immediate bargaining and in all probability into another interest arbitration for a contract for the period August 1, 2004 forward, at great expense and with similar limitations. No time is given them to reassess their positions, make cooperative adjustments, including productivity gains and internal savings, to seek mutual resolution of their disputes and improvement of their relationship away from the immediate pressures of resumed bargaining.

This is not to say that there should be no limitation on the term of the contract that the arbitrator can fashion but rather, the full responsibility of the arbitrator should be to make the parties and their contract at least chronologically current.

Also if I accepted the PBA's basic case that the wages of the men and women of the police bargaining unit are glaringly less than those of the police of other jurisdictions, it would be fiscally irresponsible of me to accommodate that claim by a

large increase in wages over such a short period as two years. Rather, in that circumstance, the increases should be incremental over a longer period. And if I accepted the City's basic case that pattern bargaining is applicable to this matter, the two-year limitation on a period of time that has passed raises questionably I believe, how a three-year contract can be tailored to that two-year limitation and whether it meets the statutory standards.

The flaw is further compounded by its dysfunctional implementation. The last contract expired on July 31, 2002. Almost three years have elapsed during which the parties have not negotiated a new contract and during which the "status quo" has obtained. With no change in conditions of employment the consequences of this delay are counterproductive. Any back pay award will be a lump sum liability of almost a three-year magnitude which may not only disturb the City's budget but may not be understood by taxpayers because of its cash quantity. Also the nearly three-year status quo, without a review of their wages, works understandably to depress morale among the police ranks. And a lessening of morale is hardly in the public interest.

Moreover the lapse of time between the end of the last contract and the fact that four of the last five rounds of

bargaining between these parties went to terminal arbitration suggests, ominously, of the failure of direct collective bargaining under the Statute. It is not my intention nor do I have an interest in affixing blame, but one wonders whether good faith bargaining by both sides took place or whether either or both held to their positions to impasse and engaged in delays, awaiting and relying on the arbitration forum to sustain them. Indeed that kind of "forum shopping" was not contemplated by the Taylor Law when enacted. Originally the Act did not include terminal arbitration for police and fire. The reason, possibly evidenced by what has happened here, is that it was thought that it would chill direct bargaining.

The Taylor Law should discourage both the delays and forum shopping. It should require good faith bargaining to be completed within a time fixed after a contract has expired. And for failure to do so, either by delays or bargaining failures, it should then mandate the terminal step - which in order to encourage direct bargaining could be on a "last best offer" basis.

Finally though I accept the responsibility, the Taylor Law empowers the chairman as the sole impartial judge to determine expenditures of what may well be millions of taxpayer dollars

though he is non-elected and non-accountable. The tripartite nature of the Panel which requires concurrence in an award by at least one of the other members further complicates the process by the possibility of substantive compromises in order to produce that result. Though the arbitrators under the New York City Collective Bargaining Law (which previously applied prior to the last arbitration) are also non-elected and non-accountable, those panels are comprised of three impartial members who can share an analysis of the evidence with a collective but impartial wisdom and experience and without the burden of the two-year rule or the potential need to compromise with partisan panel members.

For all of the foregoing reasons I will render a binding award concurred in by at least one member of the Panel for the prescribed contract period August 1, 2002 through July 31, 2004 because I am mandated by law to do so. But additionally, for consideration of the parties, I shall make a non-binding recommendation for continued negotiations toward a four-year contract that is not constrained by the impediments of the two-year rule.

Before I deal about the facts of this case I feel the need to make some observations, some of which are not particularly flattering. I am distressed at the apparent confrontational

relationship between these parties. Bluntly it is too antagonistic, too angry and too reciprocally suspicious. As the parties no doubt engaged in due diligence in deciding on my appointment they saw in my writings and my policy statements my repeated but respectful advice to four Mayors and several leaders of the police and fire unions that they should not be in chronic dispute. It is simply contrary to the public interest.

Both the Mayor and his administration and the PBA and its members are public servants. They all have the same fiduciary duty to the public - to prevent and fight crime, to maintain civil order and now to prevent and respond first to acts of terrorism. A longer term contract which permits time and methodologies to improve their mutual relationship on a day to day basis - not just in contract negotiations or arbitration would be a fundamental step toward that achievement.

There was not always such adversarialness. In the 1970's during the City's extreme fiscal crisis we saw an uncommon and unusual collaborative and partnership relationship between the City and its major unions of municipal employees. Granted it was formed out of a mutual fear of bankruptcy it nonetheless

served a constructive purpose and provided a lesson and commendable model that unfortunately did not last.

The collaborative effort to avoid bankruptcy and preserve the bargaining contracts took several forms. The unions bought large quantities of City municipal bonds which were then otherwise unmarketable. The unions deferred wage increases indefinitely until the City's economy revived and was back in the public bond market. The City and the unions negotiated on a continuing basis, at the bargaining table and away from the bargaining table, to do more of the essential work with less personnel and less resources to support both the budget and wage increases. That effort was successfully facilitated by the presence and activity of impartial chairmen appointed by the New York City Office of Collective Bargaining. Away from the pressures of the bargaining table in Fire Department negotiations, where I served, we were able to establish such innovative cost savings methods as adaptive response, fire company interchanges, flexible manning, and slippery water. In sanitation the late Walter Eisenberg worked with the City and the Sanitationmen's Union in establishing the gain sharing methodology, reduced personnel on trucks and changes in the garbage collection systems. The late Eva Robbins did similar work increasing productivity among the omnibus local unions

of District Council 37. The unions and the City worked in tandem with the City's financial community, with the Municipal Assistance Corporation and the state government in reviving the City's economy. This activity with the help of skilled mediators and impartial chairmen should be renewed and a longer-term contract would permit consideration of such a structure. I see that too as in the "interest and welfare of the public" within the meaning of subparagraph (b) of Section 209 of the Taylor Law.

There are certain observations about the men and women who serve in the Police Department that are relevant. Those men and women are characterized as the "Finest." It is my view that that is a fact and not a public relations ploy. The fabric of a civil, orderly society based on law, is supported by the police of that society. Each police officer is responsible for preventing crime, apprehending criminals, protecting property and life, preparing for, preventing and responding to acts of terror (with the City on a higher state of alert than elsewhere in the country since the tragedy of 9/11), and maintaining sensitivity to the ethnic, racial and political diversification of its citizenry so that civil and

political rights are protected within the parameters of orderliness.

Yes, there have been some highly visible incidents of poor judgment, use of excessive force and even brutality by some police officers, but I am convinced that these are not only isolated incidents but aberrant, and not representative of the diligent work by police officers carried out hour by hour and day by day. And they do so prepared to put their lives on the line.

While reduction in crime in the City may be a social phenomenon the work of the "cop on the beat" certainly must be credited as contributing to that trend. Especially when currently about 2,400 less police officers are available for regular patrol and response duties. I conclude therefore that police officers are carrying out their multi-faceted jobs well and effectively and are therefore productive at a good level.¹

Credit is to be given also to the Police Commissioner and his staff. Commissioner Ray Kelly, (whom I first met and gained admiration for when we both served in the Dinkins administration) is a man of extraordinary competence, a

¹ On the matter of departmental productivity I deem it immaterial whether the reduction in the compliment of regular police officers was due to a planned budgetary program or results from recruitment difficulties.

profound knowledge of policing policy and tactics, with uncommon leadership qualities. He and his administration are uniquely suited for a new, innovative and mutually beneficial relationship between the Department and the PBA and a longer contract term which grants the opportunity for that development can make that result more probable.

In 1968 a panel headed by former United States Supreme Court Justice Arthur J. Goldberg, appointed by Mayor John Lindsay to make findings and recommendations in contract negotiations between the City, the PBA, the Uniformed Fire Fighters Association, and the Uniformed Sanitationmen's Association, stated that New York City Police Officers should be "among the highest paid in the nation." As the parties knew when I was appointed as Chairman of the instant arbitration Panel, I was a member of the Goldberg panel and indeed wrote its report.²

It should not surprise the parties hereto that my views then are my views today. But the instant arbitration case is not to be decided on personal opinions or ideology but rather on the application of the controlling law - the Taylor Law. As the following will show I have concluded that the standards

² The Goldberg panel, in addition to Justice Goldberg, consisted of Vincent McDonnell, Walter Eisenberg, the Reverend Philip Carey, and myself.

of the Taylor Law compel wage increases for the New York City police officers that should and will move them toward the Goldberg panel objective.

On the merits of the present case my authority and that of the Panel is explicitly prescribed in the standards set forth in the Taylor Law in determining wages (the overriding issue in this case.) The Taylor Law requires that:

(v) the arbitration panel shall make a just and reasonable determination of the matters in dispute. In arriving at such determination, the Panel shall specify the basis for its findings, taking into consideration, in addition to any other relevant factors, the following:

a. comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours, and conditions of the employment of other employees performing similar services or requiring similar skills under similar working conditions and with other employees generally in public and private employment in comparable communities;

b. the interests and welfare of the public and the financial ability of the public employer to pay;

c. comparison of peculiarities in regard to other trades or professions, including specifically, (1) hazards of employment; (2) physical qualifications; (3) educational qualifications; (4) mental qualifications; (5) job training and skills;

d. the terms of collective agreements negotiated between the parties in the past providing for compensation and fringe benefits, including, but not limited to, the provisions for salary, insurance and retirement benefits, medical and hospitalization benefits, paid time off and job security.

I shall refer to the standards set forth in a, b, c and d above respectively as "comparisons," "public welfare and interest and ability to pay," "peculiarities" and "bargaining history."

COMPARISONS

Comparisons must begin with a comparison of the provisions of the New York City Collective Bargaining Law (which obtained earlier) and the Taylor Law which now applies. The former provides comparisons of "characteristics of employment of other employees performing similar work and other employees generally in public and private employment in New York City or comparable communities" (emphasis supplied). The latter calls for a comparison with "other employees performing similar services or requiring similar skills under similar working conditions and with other employees generally in public and private employment in comparable communities."

As the parties know I was an impartial member of both the New York City Board of Collective Bargaining and the State Public Employment Relations Board and administered both statutes. This is not the forum to determine "substantial equivalency" but it appears to me that in this particular case there is a difference. Under the New York City Collective Bargaining Law comparisons need only be made among employees in the City of New York. To do so would be in compliance with that law because by its language it allows for comparisons either with New York City employees or those in comparable communities. The Taylor Law does not provide for an "either-or" option. It requires comparison with employees "in comparable communities" and therefore, at least for this particular case, has a broader scope.

Therefore I agree that although no other municipality in the country is precisely a "comparable community" to New York City, the nearest comparators are the other twenty largest cities. Yet I also accept as consequential the wages of police officers in jurisdictions proximate to New York City such as the counties of Nassau, Suffolk, Westchester and the cities of Yonkers, Newark, Elizabeth and Jersey City and the entities of

the Port Authority, the New York State Troopers and the Metropolitan Transit Authority.

In my judgment the most probative wage comparisons are the direct annual salaries at the maximum levels.

The maximum salary for New York City Police Officers at present is \$54,048. Of the twenty next largest cities in the country the following have maximum salary levels greater than the City of New York as of the year 2004, as indicated:

Austin Texas	\$65,012
Baltimore	\$57,500
Chicago	\$64,962
Columbus	\$55,682
Dallas	\$58,637
Jacksonville	\$55,404
Los Angeles	\$71,090
Phoenix	\$56,098
San Diego	\$65,250
San Francisco	\$76,055
San Jose	\$80,255
Washington D.C.	\$58,569

Therefore more than half of the cities deemed as comparators as of the year 2004 paid direct annual salaries to

their police officers in a greater amount than police officers in the City of New York.

The foregoing is without including a cost of living factor. I accept the testimony in the record of Katherine Abraham, former Commissioner of the Federal Bureau of Labor Statistics, that costs of living in the various cities in different geographical areas should be taken into consideration in making wage comparisons. I believe it is well acknowledged that the cost of living in New York City is among the highest. That further depresses the purchasing power of the wages paid New York City police officers in comparison with most of the other cities.

The foregoing alone would justify a significant wage increase for New York City Police Officers if the Goldberg panel standard was to be attained.

With regard to the jurisdictions in geographic proximity, i.e., Westchester, Nassau, Suffolk, Yonkers, Newark, Elizabeth and Jersey City, and the entities of the Port Authority, the MTA and New York State Troopers, there is relevance to consideration of comparing their wage levels with those of the New York City police officers. That relevance relates not necessarily to Section (a) of the Taylor Law but rather to the statutory reference to the public interest" (b) and to the

reference to "other relevant factors" (v) above. New York City police officers need only look across contiguous borders to see police officers with less duties, less responsibilities and less stress and danger receiving greater pay. From time to time as with the Port Authority and the MTA New York City police officers work side by side with police officers from those authorities and know first-hand the pay differences. This can only depress morale among the New York City Police. And a police force with morale problems is obviously counterproductive to the very public interest and public welfare that that force is charged to protect. So within the statutory meaning of "other relevant factors" and the "public interest" comparisons between direct wages of the New York City Police and the wages in the police of proximate cities and jurisdictions are a consequential consideration in this case.

The 2004 maximum base salaries in the following proximate cities and entities are as indicated:

Elizabeth	\$71,436
Jersey City	\$71,220
Nassau County	\$93,079
Newark	\$69,255
Suffolk County	\$84,545

Westchester County	\$74,125
Yonkers	\$68,579
The Port Authority	\$75,719
New York State Troopers	\$61,106
Metropolitan Transit Authority	\$63,686

I need not factor in cost of living for those cities and entities because they are all in the same geographical area and experience the same cost of living statistics. However, standing alone the salary comparisons put the New York City police officer significantly below the objectives of the Goldberg Panel.

Considering the foregoing comparisons alone I am persuaded that New York City police officers should have salary increases of about 20 percent which should be phased in incrementally over a four-year period, but subject to the other Taylor Law factors, primarily the "financial ability" of the City to make such payment. And for a mandated two-year contract, with the same conditions, a 10% increase would be justified.

However, the City claims that the foregoing comparable differences are sharply reduced if not totally closed by the better benefits available to New York City police officers, namely the pension plan, certain annuities, disability

retirement legislation and medical and health coverage. I do not find that the differential gap is appreciably narrowed by those particular benefits. Virtually all of the other jurisdictions have a 20-year 1/2 pay retirement pension plan. The contribution of the New York City police officer may be less but I do not conclude that the lesser contribution makes a significant difference. The other jurisdictions also have comparable health benefits. The only significant benefit that I see is the supplemental variable annuity available to New York City police officers upon retirement. It vests after six years but is receivable upon retirement. The record before me does not reveal whether other jurisdictions have disability retirement plans for presumed service connected disabilities or injuries such as conditions of the heart, lungs and certain specified illnesses all presumed service connected.

But the fact is that a New York City police officer must reach retirement age or he must become ill or injured or become otherwise disabled in order to gain these benefits. That means that for most of the years of his service, in the absence of illness or disability, he continues to work at a salary level substantially below the police officers in comparable communities or in other relevant entities. So I am not

persuaded that the benefits accorded New York City police officers though obviously generous, but so restricted, are so different from other communities and entities to which comparisons are made as to close the pay gap referred to above.

Moreover, it should be noted that the supplemental variable annuity which I have stated appears to be a significant benefit indigenous to New York City police officers represents no cost to the City. The record indicates that it is fully funded and has been for over a decade and that it is not anticipated that the City will have to make further contributions to it.

I recognize that there may be other differences regarding hours worked, the type of charts used and the relative amounts of overtime. But again, I do not see those differences of sufficient magnitude to close the pay gaps.

Moreover the argument of better benefits for New York City police officers cuts both ways. For example in Boston, a police officer gets additional compensation for attaining certain educational levels (the Quinn Bill), New York City police officers do not get a pay bonus or a pay differential for educational attainments.

Also the cost to the City of the pension system varies radically. At times the assumptions to fund the plans

require more or less financial input from the City. But there have been times when the pension plans have produced available cash for the City's budget. In my own experience the teachers pension plan was so well funded that a change in its assumptions in 1990 permitted the City to realize substantial cash withdrawals which supported wage increases for the teachers. I know that similar actions were taken by earlier mayoral administrations and I take arbitrable notice of the fact that at present the City Actuary may be considering a similar action with regard to the police pension plan which may produce additional revenue for the City.

ABILITY TO PAY

The phrase ability to pay is too simplistic. Clearly if the City is required to make a payment it can and will do so including those unpredicted and unbudgeted. The real question is one of a "delicate balance" between revenues and the apportionment of revenues and, if necessary, variations in budgetary priorities. The City is statutorily obligated to balance its budgets each year and has done so for decades. This has been achieved despite initial budgets which project large deficits.

I have tremendous respect for the process and indeed the pain the City experiences in cutting costs and developing new sources of revenue to insure the required balanced budget. I have personally experienced budgetary crises and participated in the process of dealing with them twice in the 1970's and again in 1990 when respectively I served in the public sector as an impartial member of the New York City Office of Collective Bargaining (and as impartial chairman between the City and the Firefighter and Fire Officers Unions) and as Commissioner of Labor Relations. I am aware of the mounting costs of mandated expenses that the City cannot legally reduce and I am aware of how tax increases can discourage the location and retention of business and professional entities in the City and impede tourism. A "delicate balance" is required to accommodate fair wage increases while maintaining an economy that attracts commerce and visitors.

Obviously it is in the public interest that the City's police force is of top quality and properly paid, for that is a threshold necessity for both those purposes.

On balance, in my view, the cost of running the City, which unique to itself pays for an educational system, a hospital system, Medicaid, welfare, police, fire, parks, sanitation, infrastructure, food and water protection, the

environment, housing, among many others, includes the cost of fair and competitive wages for its employees. The "delicate balance" should leave none short changed.

All City employees are essential because they provide or implement the services promised, mandated and expected. Some like police and fire are critical to the City's welfare because they provide the essential protections that permit other municipal services to function.

The City has ended the most recent fiscal year with what the PBA (and the press) calls "a surplus". The City calls it a "roll-over" toward balancing the budget in the next fiscal year. Whatever called it is revenue in excess of expenses for this fiscal year and it amounts to over three billion dollars.

At this point the City's economy is improving. The two major sources of the City's revenue, real estate and Wall Street have shown solid economic growth with the former escalating in value with attendant tax revenue transactions. Wall Street revenues are volatile but traditional bonuses and security transactions have appeared to return to good levels providing increased tax revenue.

Clearly I cannot and would not predict the future. The Mayor and the Budget Director are tentative about the future

and that is the prudent approach. I will not nor can I substitute my judgment for that of the Mayor, other elected officials and members of his administration in judging what the future economy of the City will be. Just as budget deficits can and have been closed so too can budget surpluses dissipate. I am mindful that an unbalanced City budget could lead to a take-over of the City's finances by the State Financial Control Board. I am also mindful that each one percent wage increase for the police costs the City \$26 million and increases for police have a "global effect" on other municipal employees, particularly firefighters and superior officers.

But my authority and duty is confined to this case and the City's ability to pay this Award. The impact on other negotiations and the ability to pay the results thereof are not before me, and must be left to the collective bargaining process in each instance.

Therefore, in the instant case, I am satisfied that the City has the ability to pay the Award, which for reasons later stated will be tempered by specific productivity improvements and internal savings.

PECULIARITIES

This standard is unique to the Taylor Law and will be dealt with under the topic Bargaining History.

BARGAINING HISTORY

My observations regarding "pattern bargaining" are limited to this case and should not, indeed may not, be construed as a formula or ruling for any other set of negotiations.

The City relies on a history of the use and the application of pattern bargaining to resolve contracts with all its municipal unions. I agree that that approach is commendably designed and appropriate to create stability and equality among the unions to provide budgetary predictability and to eliminate "whip sawing", "one-upmanship", "leap-frogging", and "me too-ism" among the unions which might otherwise be politically compelled to outdo each other. And where unions are willing to bargain on the "pattern," and as history has shown, may even find it advantageous to do so, pattern bargaining is also relevant and valid.

Again due diligence would have disclosed both my views and activities regarding "pattern bargaining" and frankly, its application by me in firefighter mediations and teacher

negotiations. But I find that I need not determine its validity, applicability or enforceability in this proceeding because I conclude that the pattern relied on by the City, namely the contract it negotiated with District Council 37, would not, if applied on to the PBA, result in "a just and reasonable determination of the matter in dispute" within the meaning of (v) above, because it would not reduce the discrepancies in pay between the New York City police officers and those of other jurisdictions that I have deemed comparative.

The Taylor Law mandates the panel to make a just and reasonable determination. If the DC 37 pattern were applied the police officers would receive no wage increase in the first year, but rather \$1,000 in cash; a three percent wage raise in the second year and a two percent increase in a third year which is not part of the two-year contract before this Panel. Indeed considering acknowledged wage increases in other jurisdictions since 2004 it would set the New York City police officers further behind the police officers of those other jurisdictions, or at best leave them as they presently stand.

Accordingly I leave to other cases and other forums the question of whether a three-year contract with a civilian union under the New York City Collective Bargaining Law is

otherwise precedential or applicable to a police union under the Taylor Law. I also leave unanswered questions of whether there may not be other applicable patterns such as the wage increases granted police officers in the other cited jurisdictions; the specific increases accorded police officers elsewhere between the years 2002 and 2004, the precedent of the Eischen Panel, the first under the Taylor Law, and the arrangements in the 1980's which routinely accorded New York City police officers wage increases greater than civilian employees.

(c) above reinforces my foregoing conclusion that the District 37 settlement would not produce a "just and reasonable determination". Inter alia it makes explicit reference as standards for wage increases, "hazards of employment", "physical qualifications", "job training and skills". The job of a police officer clearly includes greater hazards of employment³ specific physical qualifications and specialized job training and skills (including the first six months in the a Police Academy);

Not only do I conclude that (c) sets a special standard for the determination of a police officer's pay but further distinguishes police officers from civilian employees for bargaining unit formations.

³ I take arbitral notice that sanitation men suffer more injuries but not the potential "life threatening" consequences of police activity.

However I do find a "pattern of reciprocity" that I consider significant. By that I mean the practice of the City and the municipal unions to negotiate wage and benefit increases above a budgeted amount in exchange for discernable methods of increased productivity and measurable internal savings. Even if not in the last round of negotiations or in Eischen's arbitration award (where the then pattern was essentially followed) that practice has been present in prior years in contracts negotiated by the City and the PBA. Historically, as now, the City has taken the position that wages above a budgeted amount would be granted only in the case of offsetting increased productivity and/or other savings. My general acceptance of this practice should not surprise the parties. As previously stated I have applied and affirmed it because for me it represents the traditional give and take or quid pro quo of collective bargaining. Specifically, due diligence by the parties with regard to my appointment would have disclosed that as the Labor Relations Commissioner I negotiated in 1990 an agreement with greater wage increases for the teachers union than for others. A 5.5% wage increase for teachers was followed by a 4.5% increase for other civilian unions. The difference was based on two factors. First was the undisputed fact that the salaries of suburban teachers

were discernibly higher than New York City teachers and that City teachers were leaving for suburban jobs. And secondly, significantly, there was a quid pro quo for the wage increase - namely an adjustment of the assumptions of the over funded teacher union pension funds plus additional available state funds to make up most of the wage increase. The "balance" there was a justified wage increase for the teachers supported by internal savings leaving a net shortfall for the City to fund.

This does not mean that I subscribe to the view that all or even a substantial part of the wage increase above a budgeted amount is to be supported by internal savings and productivity improvement. Any such view would make the Taylor Law standard of Ability to Pay moot and meaningless. Indeed that standard presupposes that a wage award may not only be in excess of a pre-budgeted amount, but greater than productivity and internal savings considerations.

But again, in that regard, due diligence would have disclosed my view on the omnibus role of an interest arbitrator. I have repeatedly stated it is not just that of a de novo hearing officer to judge ab initio the merits of the case. He is part of the collective bargaining process indeed

the final step. As such he completes for the parties the bargaining which they could not do directly. He was selected, I believe, to use his expert judgment on what the parties would have agreed to had they been able to do so themselves. That, in my view is what the Taylor Law means by a "just and reasonable determination."

It is my judgment that if the parties had completed the bargaining process and settled the negotiations directly the PBA would have gained wage increases for the police officers above the pattern, and the City would have gained some methodologies or changed conditions of employment to produce internal savings and increased productivity.

And that formula will be the basis of my decision in this case.

I am satisfied that consistent with that pattern of reciprocity. the Panel has the authority to introduce specific productivity and internal savings conditions of employment during the calendar period of the contract jurisdictionally before us - namely on the last day of that contract, July 31, 2004. Otherwise, no other method of including productivity or internal savings would be available to the Panel, and the Panel would be barred (artificially I conclude) from making a full and balanced Award based on its assessment of all the

circumstances present. Indeed, the job of this Panel is to determine what the conditions of employment are and should have been for the contract term August 1, 2002 through July 31, 2004. So, clearly in addition to our authority to make wage increase retroactive, we have the same authority to insert other conditions of employment during that period, including those that will produce internal savings and increased productivity, even though implementation thereof cannot be achieved until during the status quo period in the year 2005.

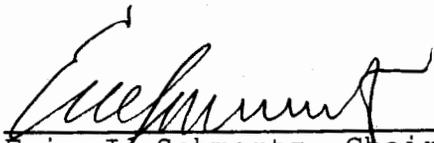
Ideally, because I concluded that over a four year period at least a 20% wage increase was justified, I undertook an intensive mediation effort to produce that result.

Such an agreement would have, in my view, resulted in a full, fair and mutually beneficial agreement, consistent with the statutory standards and I recommend the parties reconsider their position regarding that proposal and voluntarily revisit it.

As to the mandated two year Award, the bargaining unit police officers shall receive two 5% wage increases, the first effective August 1, 2002 and the second 5% (compounded) effective August 1, 2003.

Except for the personal leave day and an increase in rescheduled tours, the productivity improvements and internal savings shall apply to employees newly hired after the date of this Award, but made contractually effective July 31, 2004. Those not yet hired are not yet police officers, and for the first six months after being hired are essentially students in the Academy. They have not yet experienced the dangers, the stress and the responsibilities of incumbent police officers, and therefore at the upcoming beginnings of their careers, shall be slotted at a lesser wage rate for the time in the Academy, and with an adjusted pay schedule as set forth in the Award.

DATED: June 27, 2005


Eric J. Schmertz, Chairman

2. Therefore, the term of the contract before this Panel, and between the above-named parties is August 1, 2002 through July 31, 2004.
3. For the aforesaid periods of time there shall be two across the board, retroactive wage increases. The base annual salary rates of all bargaining unit employees shall be increased by 5% effective August 1, 2002 and further increased by 5% (compounded) effective August 1, 2003, except as provided in paragraph 4(c) for newly hired employees referred to therein.
4. For the aforesaid periods of time, effective July 31, 2004, but to be implemented after the date of this Award, the following changes shall be made in conditions of employment:
 - (a) For increased productivity the one day a year personal leave day is eliminated, but this will not take away any personal leave days accrued as of June 30, 2004;
 - (b) For increased productivity the present contractual right of the Department under Article III, Section 1(b) of the 1995-2000 collective bargaining agreement as modified by

the Award of the Public Arbitration Panel dated September 4, 2002 (the "Collective Bargaining Agreement") to reschedule up to 10 tours, shall be increased to up to 15 tours;

- (c) For internal savings, employees newly hired after the date of this Award shall be paid in accordance with the following schedule of base annual salary rates:

Police Academy (First Six Months of Employment) at	\$25,100 (Annualized)
Upon Completion of Six Months of Employment	\$32,700
Upon Completion of 1 1/2 Years of Employment	\$34,000
Upon Completion of 2 1/2 Years of Employment	\$38,000
Upon Completion of 3 1/2 Years of Employment	\$41,500
Upon Completion of 4 1/2 Years of Employment	\$44,100
Upon Completion of 5 1/2 Years of Employment and thereafter	\$59,588

5. All other terms and conditions of employment as set forth in the Collective Bargaining Agreement, except as modified by this Award, shall continue in full force and effect for the contract period August 1, 2002 through July 31, 2004 and during the subsequent (and present) "status quo" period.

Carole O'Blenes

Carole O'Blenes, Member
Concurring in the Award, including #1,
2, 3, 4(a), 4(b), 4(c) and 5

Concurring opinion to follow ^{CAB}

DATED: June 27, 2005
STATE OF NEW YORK)

ss:

COUNTY OF NEW YORK)

I, Carole O'Blenes do hereby affirm upon my Oath that I am the individual described in and who executed this instrument, which is my AWARD.

Carole O'Blenes

Jay W. Waks

Jay W. Waks, Member
Concurring in the Award, including #1,
2, 3, 4(a), 4(b), 4(c) and 5

Concurring opinion to follow. ^{JW}

DATED: June 27, 2005
STATE OF NEW YORK)

ss:

COUNTY OF NEW YORK)

I, Jay W. Waks do hereby affirm upon my Oath that I am the individual described in and who executed this instrument, which is my AWARD.

Jay W. Waks

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

-----X

In the Matter of the Impasse Between

PATROLMEN'S BENEVOLENT
ASSOCIATION OF THE CITY
OF NEW YORK, INC.,

- and -

THE CITY OF NEW YORK.

CONCURRING OPINION

Case Nos. IA2004-008
M2004-024

-----X

This Concurring Opinion is written for two reasons: first – to clarify why I, as the Panel Member appointed by the City of New York (“City”), concurred in the unanimous Award issued in this case; and second – to express my profound disagreement with the Opinion of the Chair.

The principal basis for my concurrence is that the Award requires important contract modifications in order to generate savings that can be used by the City to fund a large part of the wage increases awarded. The contract modifications include: elimination of leave time, work rule changes sought by the City, an “academy” wage rate and a reduced salary schedule for new hires during the first 5-1/2 years of their employment.¹ These productivity

¹ I was not in favor of the reduced salary schedule for new hires and urged alternative funding mechanisms. Ironically, however, despite the PBA’s contentions that the New York City Police Department (“NYPD”) is experiencing recruitment difficulties, the PBA-appointed Panel Member urged the reduced salary schedule and the Chair accepted that position.

changes will, I am advised, generate savings for the City equal to approximately half the cost of the wage increases awarded to incumbent members of the bargaining unit.

Thus, the Award is consistent with the City's willingness, in this proceeding and throughout this round of bargaining, to consider wage increases in excess of the pattern increases provided that they are funded by productivity savings. As the Mayor testified,

I can only afford so much out of the City budget, and you've got to cooperate and help us find ways so that we can do more with the same work force, and we will give all or most of the savings to you as enhanced compensation. If we don't have productivity increases, we cannot afford to give any more raises. (Tr. 2595)

Equally important, the funding mechanisms included in the Award well illustrate the flexibility available within the parameters of pattern bargaining – the flexibility to accommodate the perceived needs of individual bargaining units, in appropriate circumstances, by negotiating productivity changes that will generate savings to pay for wage increases beyond those provided for in the pattern established for a particular round of bargaining. That flexibility is, and always has been, an integral part of the concept of pattern bargaining – which has been the governing principle in New York City municipal labor relations for decades. The importance of pattern bargaining to the labor relations stability and fiscal viability of the City has been confirmed over the years by countless negotiated agreements (including agreements with the PBA) and in literally dozens of opinions by highly respected panels of experienced arbitrators (including several opinions in arbitrations with the PBA).

The Award is also consistent with the history of pattern bargaining in New York City in that it establishes a uniformed employee pattern for this round of bargaining, with an annual net cost only modestly in excess of the civilian pattern established by the City's

agreement with DC 37. There has been a similar uniformed pattern, modestly higher than the civilian pattern, in a number of bargaining rounds since the fiscal crisis, including the last round of bargaining. Based on the fiscal circumstances of the City, I would have preferred that the civilian pattern be applied to all employees in this round of bargaining. However, in light of the modest amount by which the annual net cost of the Award exceeds the civilian pattern, and given the realities of tripartite panels, I concluded that it was appropriate to concur in the result here, which is within the parameters of pattern bargaining.

I turn now to the Opinion of the Chair.

As a preliminary matter, it bears emphasis that much of the Chair's Opinion is obvious dicta and should be treated as such. By way of example, fully twelve pages at the beginning of the Opinion consist of speculation regarding legal issues not before the Panel, unsolicited opinions on matters about which the parties were given no opportunity to present evidence, and flawed recollections of events dating back to periods literally decades ago when the Chair was involved in municipal labor relations.

Among the most troubling of those dicta is the reference to “an authoritatively sought opinion” from the Public Employment Relations Board (“PERB”) regarding the two-year limitation in the Taylor Law. (Chair Op. at 5; N.Y. Civ. Serv. Law § 209.4(c)(vi)) That so-called “opinion” – apparently requested by the Chair ex parte, and with no participation by any other Panel Member – may (or may not) have been “authoritatively sought”; it certainly was not

“authoritatively” given. Indeed, neither the City nor this Panel Member was shown any such PERB decision or opinion and the Chair does not even identify its precise source.²

The balance of the Chair’s Opinion contains no citation whatsoever to the record and seems premised primarily on the “Goldberg report” – which the Chair says he authored and that was issued fully 37 years ago. As the Chair states in a particularly revealing comment, “It should not surprise the parties hereto that my views then are my views today.” (Chair Op. at 14) Similarly, the Chair notes repeatedly that “due diligence” by the parties (Chair Op. at 10, 14, 28, 31) would have disclosed his long-held “views” on various matters before the Panel – as if the parties should have assumed that, regardless of the record evidence, those “views” would govern. I therefore take this opportunity to disavow in the most unequivocal terms any notion that this arbitration or any other should be decided on the basis of personal opinion or ideology rather than the evidence of record.

The factual and legal errors in the Chair’s Opinion are too numerous to address in their entirety. Some relate to historical matters of no great significance and are noteworthy primarily because they seem to demonstrate a reliance on faulty recollection rather than the record. Others, however, are egregious and hold the potential for making mischief in the future. A few examples are addressed below.

Illustrative is the Chair’s statement that the applicable arbitration criteria in Section 209.4 of the Taylor Law differ significantly from those in the New York City Collective Bargaining Law, at least with respect to “comparisons” of wages. (Chair Op. at 17) Not

² In any event, the construction of the two-year limitation in a case where the parties have agreed to extend the two years was not before the Panel. Although the City expressed its willingness to extend the two-year period for an award of the Panel (Tr. 3464-66, 3474-75), the PBA refused to do so.

surprisingly, no precedent is cited for that conclusion, for there is none. Indeed, I am advised that, in the more than thirty years that both statutes have been in existence, not a single reported arbitral, administrative or judicial decision comports with the position taken by the Chair here.

In fact, the Chair's interpretation of the law is directly contradicted by that of the Chair of the Public Employment Relations Board, Michael R. Cuevas. In 1998, when the State legislature was considering the proposed change in the law that placed New York City police and fire impasse disputes under the Taylor Law, Mr. Cuevas submitted a memorandum to the legislature "in the nature of technical assistance for purposes of evaluating [the bill's] labor relations implications." (Governor's Bill Jacket, L.1998, C.641 at 4-5; a copy of the memorandum is attached.)

That memorandum states unequivocally that "the standards governing the issuance of interest arbitration awards" under the two statutes are "substantially the same, if not identical." It also expressly rejects partisan suggestions made at the time to the contrary:

PERB is aware of news articles in which interested persons or entities state or suggest that placing interest arbitration within PERB's jurisdiction for administration would necessarily result in arbitration awards different from and higher than those which could be expected under the continued administration of impasse panels by New York's Office of Collective Bargaining (OCB). There is, however, simply no factual basis for this conclusion. The standards governing the issuance of interest arbitration awards are substantially the same, if not identical, whether under PERB or OCB.

Among the factual errors, particularly egregious is the Chair's identification of "discrepancies in pay" between New York City police officers and police officers in other large cities based on what he calls "direct annual salaries at the maximum levels." (Chair Op. at 18, 29) In making those comparisons, the Chair compares 2002 New York City salaries with 2004

salaries in other cities. Even more incomprehensible, he compares these “maximum” salaries – referred to as “the most probative wage comparisons” (Chair Op. at 18) – without regard to the length of time that a police officer must be employed in order to reach them.

For example, the Chair concludes that Baltimore pays its police officers more than New York City because Baltimore has a “maximum” salary of \$57,500, whereas the basic maximum salary in New York City is \$54,048. (Chair Op. at 18) According to even the evidence presented by the PBA, however, a police officer in Baltimore must be employed for 24 years before reaching maximum salary – while a New York City police officer reaches maximum after only 5 years. (PBA Exh. 04-73) The same point applies to most of the other large cities as well.³ In other words, the Chair compared the base salary of a New York City police officer after only 5 years of service with the base salary of a Baltimore police officer after 24 years of service, a Chicago police officer after 20 years of service, a Jacksonville police officer after 17 years of service, and so on.⁴

In short, what the Chair refers to as “the most probative wage comparisons” (Chair Op. at 18) do not withstand even superficial analysis; rather, they are belied by the evidence adduced by both parties. Even more remarkable, these patently flawed comparisons are the principal evidentiary basis that the Opinion even purports to identify for its conclusions and recommendations regarding wage increases. (Chair Op. at 21)

³ To mention but a few more examples: in Chicago, maximum salary is not reached until after 20 years of employment; in Jacksonville, not until after 17 years of employment; and in Austin and Dallas, not until after 14 years. (PBA Exh. 04-73)

⁴ According to the PBA’s own exhibit, when the base salary of a New York City police officer who has completed 5 years of service is compared with the base salary of police officers at the same service level in the next 20 largest cities, and when 2002 wage levels are used for all cities, New York City pay exceeds that of 16 of the 20 other cities. (PBA Exh. 04-73)

It should also be noted that, despite allegations by the PBA of a recruitment and retention “crisis” (Tr. 128-89, 2644-69; PBA Exhs. 04-72 at 20-26, 04-130 at 28-34), there is no finding in the Chair’s Opinion that the NYPD is experiencing recruitment or retention difficulties. Nor could there be on this record.⁵ Thus, the only reasonable inference is that, to the extent that there are any “discrepancies in pay,” they are not significant. Certainly, they do not prevent the NYPD from recruiting and retaining qualified police officers in the numbers it needs.

The treatment of retirement benefits in the Chair’s Opinion is equally flawed, both as a logical matter and as an evidentiary matter. Only by completely disregarding the record can it be asserted that the retirement benefits enjoyed by New York City police officers do not differ materially from those of police officers in other major cities. (Chair Op. at 23) In fact, the retirement benefits provided to New York City police officers are vastly superior.

As a result of the Variable Supplement Fund, for example, every New York City police officer who retires after twenty years will receive – in addition to his or her pension – payments of \$11,000 per year (increased to \$12,000 in 2007) for every year of the officer’s life. (Tr. 1144, 1957-58) No other police officers enjoy anything comparable.⁶ (Tr. 1956-57) Overall, according to an uncontroverted analysis presented by a City expert witness, Michael Nadol, a New York City police officer who retires after 20 years receives approximately \$611,000 in net present pension benefit value. (Tr. 1959-64; City Exh. 04-103A) Police in

⁵ The record indisputably demonstrates that during a period of only three years, the NYPD hired fully 6,500 police officers, thereby meeting or exceeding each of its hiring goals. (Tr. 1743-44) And, as the NYPD’s Chief of Department Joseph Esposito testified, “the talent, quality and diversity of our officers has never been higher.” (Tr. 1513)

⁶ The Chair’s Opinion is also incorrect in stating that the VSF has no present cost to the City (see Tr. 3429-31) -- although it is difficult to fathom why that should matter in any event.

other major cities receive on average almost \$215,000 less. (Tr. 1963-64; City Exh. 04-103A) In addition, City police officers and their dependents enjoy post-retirement medical coverage without premium cost sharing – which surpasses the retiree health benefits of all but a few of the other national cities. (Tr. 1949-50; City Exh. 04-103 at 18)

Contrary to the Chair’s reasoning (Chair Op. at 22), these dramatic advantages in retirement benefits are particularly significant given that the vast majority of New York City police officers “retire” after only 20 years of employment (Tr. 1204, 1233; City Exh. 04-62) – virtually all at relatively young ages. Thus, they begin receiving these generous benefits as soon or sooner than it takes police officers in some jurisdictions (such as Baltimore and Chicago) to reach maximum salary. And, they can look forward to receiving the benefits for over half their adult lives. In these circumstances, the Chair’s attempt to discount the importance of these valuable benefits simply makes no sense.

Finally, I agree that the Chair’s “observations regarding ‘pattern bargaining’ . . . should not, indeed may not, be construed as a formula or ruling for any other set of negotiations.” (Chair Op. at 28) This is so for several reasons.

At best, those “observations” are confusing. Clearly, moreover, they do not address (or even appear to take into consideration) the overwhelming record evidence with respect to the important role that pattern bargaining has played in New York City municipal labor relations for over 30 years. (Tr. 765-867) Nor do they include any mention whatsoever of the long line of precedent established by some of the leading arbitrators in the field – in arbitrations under the Taylor Law as well as the New York City Collective Bargaining Law – uniformly ruling that, in New York City municipal labor relations, the principles of pattern

bargaining are controlling in the absence of “unique, extraordinary, compelling, and critical circumstances.”⁷ As stated by the chair of the panel in the last arbitration between the City and the PBA,

The unions representing New York City employees -- prominently including the PBA -- traditionally have participated in pattern bargaining; not necessarily because it always favors their positions but because they seem to recognize that not only is it necessary but it usually best serves the interests of the unions and the employees they represent, as well as the public and the City. The pattern principle allows labor leaders to agree to fair and reasonable settlements, with a level of comfort that they will not later be embarrassed or outdone by a richer settlement achieved by one of the dozens of other municipal unions.

* * *

Primarily because pattern bargaining has brought relative stability to labor relations in New York City, it has been endorsed by nearly every impasse panel that has ever considered the matter, with any exceptions limited to unique, extraordinary, compelling and critical circumstances that cannot be addressed within the parameters of the pattern. I concur with and adhere to the holdings in those prior awards that pattern bargaining generally has served these parties well for decades and that its logic and necessity have usually been recognized by the City, the municipal labor unions and labor neutrals alike.⁸

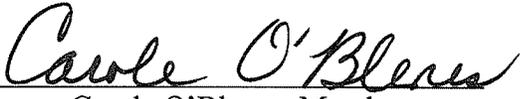
⁷ See, e.g., City Exh. 04-63D: Impasse Between Patrolmen’s Benevolent Ass’n and the City of New York, IA201-027, M201-146, at 5-6 (Sept. 9, 2002) (Neutral Panel Member: Dana Eischen); City Exh. 04-63H: Impasse Between United Federation of Teachers and The Board of Education/City of New York, M201-003, 201-015, at 113 (April 8, 2002) (Panel: Daniel G. Collins; Martin F. Scheinman; Rosemary A. Townley); City Exh. 04-63P: Impasse Between Local 237, IBT and New York City Housing Authority, I-188-86, at 32 (Mar. 20, 1987) (Panel: Paul Yager, Jesse Simons, Carol Wittenberg); City Exh. 04-63N: Impasse Between Uniformed Firefighters Ass’n of Greater New York and City of New York, I-187-86, at 16 (Jan. 6, 1987) (Panel: George Nicolau, Walter Gellhorn, Benjamin H. Wolf).

⁸ City Exh. 04-63D: Impasse Between Patrolmen’s Benevolent Ass’n and the City of New York, IA201-027, M201-146, at 5-6 (Sept. 9, 2002) (Neutral Panel Member: Dana Eischen); City Exh. 04-63C: Impasse Between Patrolmen’s Benevolent Ass’n and the City of New York, I-225-96, at 31 (Sept. 8, 1997) (Panel: Stanley Aiges, Maurice Benewitz, Arnold Zack); City Exh. 04-63A: Impasse Between Patrolmen’s Benevolent Ass’n and the City of New York, I-115-74, at 14-15 (Apr. 30, 1975) (Panel: Robert Coulson, Walter Gellhorn, Emanuel Stein).

Instead, the Chair engages in ruminations about negotiations during the year that he was Labor Relations Commissioner (Chair Op. at 31-32); explains his personal philosophy of judging – which apparently includes divining “what the parties would have agreed to had they been able to do so themselves” (Chair Op. at 33); and invents a new term (“pattern of reciprocity”) to describe what has heretofore been recognized as simply part of pattern bargaining (Chair Op. at 31). Although purportedly derived from a phrase in the Taylor Law, these “observations” seem merely a transparent garb for what the Chair elsewhere acknowledges to be his personal “views” regarding pattern bargaining and for the result he aims to justify. (Chair Op. at 14, 28-29)

Fortunately, the Award itself is the only authoritative outcome of this proceeding. As explained above, it reflects the principles of, and is consistent with, pattern bargaining – which has long been the cornerstone of New York City municipal labor relations and remains so.

DATED: New York, New York
August 3, 2005



Carole O'Blenes, Member

ATTACHMENT

B.R.

A-9867-A



**NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD**

80 WOLF ROAD
ALBANY, NEW YORK 12205
(518) 457-2578

MICHAEL R. CUEVAS
Chairman

MEMORANDUM

December 15, 1998

TO: Hon. James M. McGuire
FROM: *M.R.C.* Michael R. Cuevas, Chairman, NYS PERB
RE: S6436, A9867

Recommendation: No objection

Statutes Involved: Civil Service Law

Effective Date: Immediately upon enactment

Discussion:

As relevant to the Public Employment Relations Board (PERB), the bill would amend Civil Service Law (CSL) sections 212 (by adding a new subdivision 3), 209.2 and 209.4.

The new CSL §212.3 would afford all police departments and organized fire departments the opportunity to request assistance from PERB in the resolution of collective negotiation impasses.

By placing this subdivision in CSL §212, it creates an exception to the provisions of CSL §212.1, by which local governments are able to "opt out" of Article 14 of the Civil Service Law, by adopting their own substantially similar provisions through local law, ordinance or resolution. The effect would be to leave such "mini-PERBs" intact except as to police and fire impasse procedures.

000004

The bill deletes the language in CSL §§209.2 and 209.4 excepting the City of New York from the provisions of those statutes and deletes the now unnecessary language relating to the New York City transit police.

Although PERB takes no objection to this bill, it offers the following in the nature of technical assistance for purposes of evaluating its labor relations implications.

First, PERB is aware of news articles in which interested persons or entities state or suggest that placing interest arbitration within PERB's jurisdiction for administration would necessarily result in arbitration awards different from and higher than those which could be expected under the continued administration or impasse panels by New York's Office of Collective Bargaining (OCB). There is, however, simply no factual basis for this conclusion. The standards governing the issuance of interest arbitration awards are substantially the same, if not identical, whether under PERB or OCB. It cannot be stated with any accuracy that comparability and ability to pay, for example, will necessarily be interpreted or applied any differently by the arbitrators serving under PERB's appointment than those serving under OCB's auspices on impasse panels.

Second, as noted, the proposed amendments to §§209.2 and 209.4 simply delete the current exceptions for the City of New York from that section of the CSL. Those exceptions modify all that precedes them and effected the exemption of both the City's fire department and its police department from the provisions of CSL §209.4. By deleting the exceptions, the bill necessarily extends PERB's §209.4 jurisdiction to the City's fire department as well as its police department. (It would appear that the number (4.) should precede the second full paragraph in §4 of the bill.)

Third, the New York City police and fire departments are within the labor relations jurisdiction of New York's OCB pursuant to §205.5(d) of the CSL. PERB's understanding is that this bill would not disturb OCB's jurisdiction except insofar as PERB would deliver mediation and interest arbitration services pursuant to CSL §209.4, as amended by this bill. OCB would retain its general jurisdiction over the police and fire departments, including all proceedings ancillary to the mediation/arbitration process, e.g., improper practice proceedings.

MRC:mm

000005

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD
BEFORE THE PUBLIC ARBITRATION PANEL

-----X
PATROLMEN'S BENEVOLENT ASSOCIATION : PERB Case Nos.
OF THE CITY OF NEW YORK, INC., : IA2004-008; M-2004-024

- against - : Panel Members:
THE CITY OF NEW YORK : Eric J. Schmertz, Chair
 : Carole O'Blenes
 : Jay W. Waks
-----X

CONCURRING OPINION OF PANEL MEMBER JAY W. WAKS

On June 27, 2005, this Public Arbitration Panel issued its Award, and its Chairman, Eric J. Schmertz, a veteran labor arbitrator who himself served with distinction as the first Commissioner of Labor Relations of the City of New York, issued his Opinion of Chairman. I am submitting to the Public Employment Relations Board this Concurring Opinion to accompany that June 27th Opinion and Award, in order to underscore key substantive points that the Chairman so eloquently expressed in his June 27th Opinion and to address the circumstances that resulted in my joining the City's designated arbitrator in concurring in the Award.

Chairman Schmertz's Opinion expresses a number of highly significant substantive holdings that have decided fundamental issues at the heart of the parties' long-running pay dispute central to their collective bargaining. Each of his key substantive holdings are supported by a solid factual foundation, and each is premised on the voluminous record of this interest arbitration. The strength of each of these holdings serves not only to resolve this case, but as binding precedent for future arbitrations and, hopefully, as a significant guide for good faith collective bargaining from here on out. The issues resolved by each of these key

holdings have been so hotly litigated by the City and the PBA that the Chairman has performed an important service to the parties and to the public they serve in resolving them once and for all. Not among them, however, is a bone he has thrown to the City in the form of unwarranted give-backs that have no basis in fact or this record, are inconsistent with his own key substantive holdings and are ostensibly premised on a made-up “pattern of reciprocity” concept that, the Chairman’s Opinion concedes, would violate the Taylor Law, making it “moot and meaningless.”

Chairman Schmertz’s Key Substantive Holdings

Before reviewing the solid factual foundations of each of the key substantive holdings of the Chairman’s Opinion, their decisive impact fairly can be summarized as follows:

- **New York City’s Police Officers must be “among the highest paid in the nation” (the “Goldberg Panel standard”) but are not, and this standard controls in setting their “just and reasonable” compensation;**
- **In applying this standard to the City’s Police Officers, the Taylor Law requires looking at police officer pay in both the 20 largest U.S. cities and higher-paying local jurisdictions in comparison to that of the City’s Police Officers;**
- **In making the national pay comparisons, cost-of-living adjustments must be made because New York City is as much as 26% more costly to live in than other large cities to which the City compares its Police Officers’ pay;**
- **In making inter-city comparisons of police officer pay, any alleged differences in benefits that may favor the City’s Police are so insignificant as to be irrelevant. Specifically, alleged differences in pension plans, annuities, disability retirement legislation, medical and health coverage, the types of hours worked and charts used, and the relative amounts of overtime are to be disregarded;**
- **A significant wage increase for New York City’s Police Officers is justified *alone* by the national pay comparisons of police officer pay in the 20 largest cities that the City refers to as being national comparators;**

- **A significant wage increase for the City’s Police Officers is justified *alone* by pay comparisons of police officer pay in the highest-paying local jurisdictions;**
- **The City’s Police Officers are the “Finest”, and this status is “relevant” in setting their pay.**
- **The City’s Police Officers may not be compared to other New York City employees, and any such comparison is not relevant.**
- **Compensation accepted by other municipal employees does not constrain the formulation or amount of Police Officer compensation under the Taylor Law.**
- **There is neither merit to nor factual support for the City’s fundamental position that the Panel is obligated to follow the City’s bargaining pattern absent a compelling reason not to, and that position is rejected *in toto*;**
- **Productivity enhancements and savings do not have to match the increases awarded over and above budgeted settlements with other groups of City employees;**
- **The determination of pay raises for the City’s Police Officers and the City’s ability to pay them are not dependent upon and are independent of their impact on negotiations between the City and its other municipal unions. Their “impact on other negotiations” is not relevant in determining the Police Officers’ pay raises;**
- **In viewing the City’s ability to pay raises to its Police Officers, the City’s fiscal year revenues in excess of expenses is all that counts, and the City’s roll-over of that surplus to the next fiscal year is not relevant.**
- **The City always projects large deficits and has balanced its budgets for decades despite unpredicted and unbudgeted payments it may be required to make.**
- **The City has the ability to pay market-level salaries to Police Officers, to correct market pay inequities and to pay the huge increases needed to satisfy the Goldberg Panel standard referred to above; and**
- **Retroactive pay raises of no less than 20% are justified and warranted for New York City’s Police Officers.**

The Record and Its Precedential Value

In departing dramatically from the cloned views of past arbitrators, the Chairman's key substantive holdings are best reviewed against the backdrop of the record amassed during the roughly ten months that these proceedings spanned. In this connection, it is well worth emphasizing, from the vantage point of my thirty-three-year career as labor lawyer, labor litigator and practitioner of innovative and constructive labor relations, in both the public and private sectors, that the record amassed in this case presents the most comprehensive body of evidence and argument ever accumulated anywhere before an interest arbitration panel in regard to the subject of police compensation, and certainly as recognized by the Chairman "none have been as comprehensive, as detailed and as well tried as this instant matter." Indeed, this interest arbitration, only the second such case between the City and the PBA under the Taylor Law, produced a record of testimony, documents, expert reports, exhibits and argument as thorough as that contemplated under the Taylor Law (CSL § 209.4 (c)(iii)) and twice that developed in 2002 during the first such proceeding between these parties.¹

The thoroughness with which the PBA and the City presented their respective proofs and subjected each other's to the careful scrutiny of cross-examination and responsive

¹ Although, on most issues, the PBA took the lead in submitting evidence, as the Chairman explained at the outset, this ordering of presentation reflected a matter of procedural convenience for the Panel, did not reflect any determination that the PBA has the burden of proof or of going forward first or of persuasion and should not be considered to be binding in any manner. By contrast, in the only other interest arbitration between the PBA and the City under the Taylor Law (the 2002 Eischen Panel in PERB Case Nos. IA201-27; M201-146 (NYC Exh. 04-63D)), the proceedings were tri-furcated (and, at certain points, furcated further) with the PBA and the City alternating in taking the lead in presenting evidence in regard to their respective considerations. That all briefing has been simultaneous in both this case and before the 2002 Eischen Panel further demonstrates that the order of presentation is not precedential. The overarching requirement of law is that "the public arbitration panel shall make a just and reasonable determination of the matters in dispute" (CSL § 209.4(c)(v)), following "hearings on all matters related to the dispute" (CSL § 209.4(c)(iii)). The essential point is that each of the parties here was given every opportunity to and did respond fully to the evidence adduced by the other side regardless of which side went first, with the exception of the unfinished matters relating to document discovery discussed below in footnote 6.

arguments serves further to underscore the Chairman's key substantive holdings and their significant precedential value to subsequent negotiations and arbitrations. Of significance, there should be no serious concern in admitting the record of this proceeding in any subsequent pay arbitration involving these parties. That, in the Chairman's view, "[a]ll concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses" bears testimony to the conclusion that his key substantive holdings must control the parties' subsequent rounds of contract negotiations and, should there be another interest arbitration, need not be relitigated *de novo*. Of consequence, the Chairman's key substantive holdings and the expertly developed record over which he presided and which shapes the compensation of today's Police Officers can only serve to hasten the successful outcome of subsequent negotiations and foreshorten any future interest arbitrations.

Justification for the Chairman's Key Substantive Holdings

Turning now to the merits, the central issue raised by the PBA is the "just and reasonable" salary increases, in conformance with CSL § 209.4(c)(v) of the Taylor Law, that the City should be paying its Police Officers commencing with the contract period of August 1, 2002 through July 31, 2004. In response, the Chairman's Opinion has sustained, at every turn, the justifications that support huge raises in New York City Police Officer compensation.

First, from the outset, the PBA insisted that its Police Officers should be "among the highest paid in the nation" (but are not), and Chairman Schmertz's Opinion squarely adopts this standard, and solely this standard, as controlling in the determination of Police Officers' compensation. The genesis of this standard is the October 1968 Report of the Special Panel appointed by Mayor Lindsay, and chaired by former United States Supreme Court Justice Arthur J. Goldberg, "to assist in the critical negotiations between the City and the Patrolmen's

Benevolent Association” as well as separately between the City and other uniformed groups. The Chairman’s Opinion points out that, as a member of the distinguished Goldberg Panel, Mr. Schmertz authored that Report.

Although, in this arbitration, the City agreed that its Police Officers should be paid according to the Goldberg Panel standard (arguing that they already were), there is more to the Goldberg Panel’s findings that is instructive in resolving the current dispute. Thus, in expressing its unanimous view “that substantial wage and benefit adjustments are mandatory” so that Police Officers will be “among the highest paid officers in the nation,” the Goldberg Panel emphasized the “essential” role and “incessant demands” upon the City’s Police Officers as ample justification for “substantial” pay increases (NYC Exh. 04-67):

There can be no doubt that the Police Department is in the forefront of emergency services that are so essential to the protection of life and property in a great metropolis like New York City. We must, therefore, pay rapt attention to the incessant demands made upon our police officers. A citizenry that desires law, order and justice must be prepared to fairly compensate those who are charged with the responsibility of enforcing these essential factors in our daily life.

While true in 1968, these words are even truer today in post-9/11 New York. These words also have become more profound in the wake of recent terrorist bombings in London and elsewhere. Like virtually no other time in its history, New York City must be vigilant to the protection of its citizens, the essential role ably played by its Police Officers.

Moreover, the Goldberg Panel concluded that the “caliber and performance of our police” should be recognized “not only by providing a higher economic status, but by instituting future benefits and improved working conditions that should ensure high morale and guarantee an unprecedented level of devotion to duty.” To emphasize the significance of its holding in

support of huge pay increases for Police Officers, the Goldberg Panel set no comparable standard for paying uniformed workers in other agencies, as valuable as they may be.

Over the next 34 years, until 2002, the City was successful at virtually every turn in frustrating the Goldberg Panel's directions. These City successes, however, were tainted by impasse arbitrations that were "impartial" in name only because they were controlled by the City's own captive agency, the Office of Collective Bargaining of the City of New York. Of considerable significance, during these years, these City successes were impugned by the recommendations to Mayors Koch and Giuliani of their own blue ribbon task forces and experts in written reports which uniformly adopted the Goldberg Panel standard while decrying the sorry state of New York City Police Officer pay when measured against that standard. (*e.g.*, PBA Exhs. 04-79, Tabs 2 & 6). The City, however, did not heed these recommendations and, consequently, the market pay inequities identified by the Goldberg Panel developed and grew far worse.

In the wake of the barbaric 9/11 attacks and the extraordinary post-9/11 pressures and strains on the City's Police Officers that have been discussed with considerable passion by both parties and Chairman Schmertz, the wisdom of the Goldberg Panel's findings -- now adopted by the Chairman's Opinion -- is all the more instructive in correcting the market pay inequities of Police Officers today than the Goldberg Panel could ever have realized in 1968.

Clearly, the Chairman's Opinion places a premium on the complex mix of dangerous and socio-politically sensitive responsibilities of "[e]ach police officer" that, in reality, have only become more complex, more dangerous and more stressful as each Police Officer is now responsible for "preventing and responding to acts of terror (with the City on a higher state of alert than elsewhere in the country since the tragedy of 9/11)." The complexity of post-9/11

pressures, uncertainties and responsibilities, above ground and below, clearly not contemplated some 34 years ago when Chairman Schmertz first formulated the Goldberg Panel standard, serves only to reinforce the vitality of that standard today in controlling the decision to set the compensation of Police Officers. Further, in light of their performance under the firestorm of these overarching pressures and responsibilities, the Chairman's Opinion reaffirms that it is "relevant" in setting that compensation that Police Officers are the "Finest" among employees in serving all those who live, work and visit our City and by comparison with police in other high-paying local and national jurisdictions.

Second, the Chairman's Opinion holds that, in setting Police pay in conformance with the Goldberg Panel standard, the State's Taylor Law requires comparison to police compensation in both higher paying local jurisdictions (advocated by the PBA), as well as in the 20 largest U.S. cities (as the City argued) adjusted for the City's high cost-of-living.

Third, in making national pay comparisons to assess the huge gap in Police Officer pay, the Chairman's Opinion holds that not only must inter-city cost-of-living adjustments be made, but they also must account for the fact that "the cost of living in New York City is among the highest . . . further depress[ing] the purchasing power of the wages paid New York City Police Officers in comparison with most of the other cities."

In this regard, the Chairman's Opinion "accept[s]," without reservation or any room for argument, "the testimony in the record of Katherine Abraham, former Commissioner of the Federal Bureau of Labor Statistics." She testified, and the Chairman's Opinion holds, that inter-city wage comparisons among "the various cities in different geographical areas" must be adjusted to take into account their relative cost-of-living differentials. Commissioner Abraham had tested the methodology, premised on the "rigorously constructed and reliable" data of the

U.S. Bureau of Labor Statistics, to compare the compensation of police officers in the 20 largest U.S. cities adjusted for their cost-of-living relative to Police Officers in New York City. Substantively, “in terms of the real purchasing power of the Police Officers of New York City compared to police officers in these other cities,” Commissioner Abraham testified (in referring to the 20 largest cities relied upon by the City), “that purchasing power of – for New York City Police Officers has fallen from near the middle of the pack in 1990 to 19th out of 21 in 2002 and to the bottom of the list in 2004.” In truth and as all credible evidence revealed, New York City has the third highest cost-of-living (behind only San Francisco and San Jose, CA) and is at least 26% more costly to live in than other cities in the City’s top 20 national comparators. Yet in virtually all the large national cities upon which the City relied, police are paid far more than New York City’s Police Officers. In the end, in accepting wholesale Commissioner Abraham’s testimony, the Chairman’s Opinion rejected the City’s failure in making national pay comparisons to adjust for these cost-of-living differences and rejected *sub silentio* the City’s “deep wage structure” concept that allegedly accounted for its failure.

Fourth, while Chairman Schmertz’s Opinion relies upon a convenient snapshot comparison of only the maximum base salaries of police officers in these national cities, by contrast with the 20-year average of total annual compensation relied upon by the PBA, the pay disparity of the City’s Police Officers compared to those in the City’s sampling of the largest national cities actually is shown to be far worse.² When the adjustment for inter-city differences

² Moreover, in observing that the City’s “argument of better benefits for New York City police officers cuts both ways,” the Chairman’s Opinion recites as one example that, unlike the City’s college-educated Police Officers, Boston’s police receive additional compensation annually for attaining certain education levels. The record here of training pay and terrorism pay that other jurisdictions roll into annual police officer compensation similarly falls into this pay category as do education, location and other pay elements that New York City Police Officers are denied. These essential elements of annual pay make the pay gap with other comparators significantly worse than a simple comparison of maximum base salaries on which the
(continued...)

in the cost-of-living are made in conformance with the testimony of Commissioner Abraham and the Chairman's holding, the percentage increases needed by New York City's Police Officers to receive the same 2004 maximum base salaries referenced by Chairman Schmertz were huge. For example, New York City's Police Officers need a startling 50.5% raise to reach Los Angeles; at least a 44% raise to reach Chicago (and as much as a 50% raise to reach Chicago when the additional 6% retroactive raise for 2003-04 that Chicago police officers were recently awarded is included); and a 32% raise to bridge the average of all the national cities (Chairman's Exh. 1; see PBA Exh. 04-163A&C). And, of course, these gross disparities as of 2004 do not reflect the sizeable pay increases in those cities during this past year that only serve to make the pay of New York City's Police Officers that much worse in comparison to police pay in the City's sampling of national cities.

The conclusion that Chairman Schmertz reaches, based upon this sizable national disparity in police pay, is completely sound: "The foregoing alone would justify a significant wage increase for New York City Police Officers if the Goldberg Panel standard was to be attained." Since the City presented no evidence to this Panel – literally none whatsoever – that the NYC Police are compensated reasonably in comparison to other jurisdictions when necessary cost-of-living adjustments are made, the Chairman's conclusion that the NYC Police would have to receive huge salary increases to be competitive even among the City's selected national comparators is unimpeachable.

²

(...continued)

Chairman focuses. At the very least, these pay elements elsewhere should be included in any comparison of maximum base salaries. The consequence would be that adjusted max base pay in the national cities that the City chose as appropriate comparators would show an even greater disparity over max pay of the City's Police Officers.

Fifth, the Chairman's Opinion further holds decisively that, besides these national comparisons, it is equally relevant to compare the wage levels of New York City Police Officers to their counterparts in "the jurisdictions in geographic proximity, i.e., Westchester, Nassau, Suffolk, Yonkers, Newark, Elizabeth and Jersey City, and the entities of the Port Authority, the MTA and New York State Troopers." The Chairman justifies this holding by focusing on the objective, uncontroverted fact that those other local police officers have "less duties, less responsibilities and less stress and danger receiving greater pay," whether they be in neighboring jurisdictions he has expressly designated among the New York State counties and cities and the New Jersey cities closest to New York City, or in the Port Authority, MTA or State Troopers with whom the City Police work side-by-side.

In referencing these ten local comparators, the Chairman holds that these "salary comparisons put the New York City Police Officer significantly below the objectives of the Goldberg Panel," in terms that fit these local jurisdictions neatly within the Taylor Law's requirement of pay comparisons with comparables (CSL § 209.4(c)(v)a). His holding is much broader, however, in that he determines that pay comparisons with these ten locals also satisfy two additional criteria of the Taylor Law -- namely, they serve the "interests and welfare of the public" (CSL § 209.4(c)(v)b); and, in any event, are "other relevant factors" (quoting CSL § 209.4(c)(v)'s introductory direction by which the Public Arbitration Panel is required to make "a just and reasonable" award on disputed matters). In taking "consequential consideration" of the much higher pay of these locals, the Chairman correctly seizes upon the depressed morale among New York City Police Officers, caused by the huge pay gap, as being counterproductive of the public interest and welfare. Finally, since these 10 police jurisdictions share "the same

geographical area and experience the same cost of living statistics” as New York City, there is this added advantage in making salary comparisons.

The soundness of the Chairman’s Opinion in regard to local comparisons is underscored by more than geography alone or because their police work under the same conditions as the NYC Police. Thus, the four local comparator cities designated by the Chairman are dense urban areas in close proximity to New York City with substantial immigrant, minority and poor populations and other demographics that reflect the City. As even the City’s principal witness (its Labor Relations Commissioner) admitted, many of these local comparators provide to their populations basic services similar to NYC or any of the other large national cities (Tr. 1464-1467). In addition, nothing can alter the fact that Nassau and Suffolk, in particular, are much like the large national cities that the City itself uses for salary comparisons. Each has a population that would rank it as 6th largest among the national cities that the City selected as comparators. Combined, they would rank 4th highest in population and 6th highest in size among police forces (PBA Exh. 04-72 at 6). Of further significance, both fall within the same cost-of-living area as New York City, have huge populations that commute daily to New York City and help fuel the City’s economy through work, purchases and taxes, and have had their own budget crises that could have been resolved handily, had the billions of dollars of budget surpluses that New York City has had been available to them. Both Nassau and Suffolk pay their police significantly more than New York City.

Moreover, the Chairman’s choice of local comparators obviously reflects the evidence that police officers of the Port Authority work side-by-side in the same environment as City Police Officers but under less stressful and dangerous circumstances, and with less responsibilities, testified to by Carl McCall, the former Port Authority Commissioner, Officer

John Llerena, the former New York City Police Officer who joined the Port Authority police for its far superior pay and benefits, and Council Member Christine Quinn whose district covers Port Authority's hubs in Manhattan. Like the City, the Port Authority is called on to provide an amalgam of services in excess of its financial capacity. Like the City, it has tremendous obligations and limited sources of revenue. But, unlike the City, the Port Authority has determined, in paying its police considerably more than the City does, that safety and security are a high-budget priority.

Further, when these local jurisdictions are considered, there can be no issue whatsoever as to the appropriate data on which to compare compensation since the City never challenged any data relating to police officers in local jurisdictions; nor did the City present its own data. Indeed, the City acknowledged that it sent its surveys to most of the locals, just as it sent them to the national cities, and that it received responses from those jurisdictions (Tr. 1658). Yet, it obviously did not obtain any information that could challenge the PBA's compensation data. Since there is no contrary evidence in regard to the compensation of police officers in the local jurisdictions, the PBA's data – demonstrating that the NYC's Police Officers have slid to the bottom of the local rankings and that their pay is sorely below these locals (PBA Exh. 04-72, at 3-5; *see* Chairman's Exh. 1; PBA Exh. 04-163A, B) – is established as factually accurate.³

Of considerable consequence, the Chairman's focus on the 2004 maximum base salaries of these high-paying locals realistically demonstrates a much stronger justification for his

³ This data based on 20-year average direct compensation shows that NYC Police Officers would require, *inter alia*, at least 40% in pay raises to reach the Port Authority police 20-year average annual pay levels (and 50% in raises to receive hourly pay treatment equal to their Port Authority counterparts); NYC Police Officers need raises of at least 21% to reach Newark; 55% to reach Nassau; 60% to reach Suffolk; 32% to reach the State Troopers (adding the 5.5% recent retroactive pay agreement for 2003-04 to the 26.5% pre-existing disparity); and roughly 30% to reach the average of all other locals.

holding that, yet again, “standing alone the salary comparisons put the New York City police officer significantly below the objectives of the Goldberg Panel.” His reliance on just the max base salary data proves that NYC Police Officers actually require raises of, for example, 40% to catch up to the Port Authority; 28% to catch up to Newark; 26% to catch up to Yonkers; 72% to catch up to Nassau; 56% to catch up to Suffolk; roughly 19-22% to catch up to State Troopers in NYC; and roughly 37% to catch up to the average of all the locals that the Chairman has designated to be comparators (Chairman’s Exh. 1; *see* PBA Exh. 04-163A, B).

Sixth, in another decisive holding, the Chairman’s Opinion carefully analyzes -- and rejects -- the City’s contention that its Police Officers have better benefits that “sharply reduced if not totally closed” the pay gap between New York City’s Police Officers and those elsewhere. In the strongest possible terms, the Chairman dismisses this City myth as having no basis in fact: “I do not find that the differential [pay] gap is appreciably narrowed by those particular benefits.” Specifically, the Chairman rejects *in toto* the argument of the City that its Police Officers are better off in terms of “the pension plan, certain annuities, disability retirement legislation and medical and health coverage” and holds that other differences alleged by the City, “regarding hours worked, the type of charts used and the relative amounts of overtime,” also would not be “of sufficient magnitude to close the pay gaps” with police in the City’s 20 national city analysis and in the 10 local jurisdictions that the Chairman’s Opinion holds relevant. In the final analysis, the Chairman holds, “I am not persuaded that the benefits accorded New York City police officers though obviously generous, but so restricted, are so different from other communities and entities to which comparisons are made as to close the pay gap referred to above.” Thus, the Chairman’s Opinion should bring to an end, once and for all, the City’s efforts

to rely on alleged differences in benefits to account for any of these whopping pay gaps suffered by the City's Police Officers.

Seventh, the Chairman's Opinion rejects *in toto* any relevance in comparing the City's Police Officers to other New York City employees. Not only are NYPD Police Officers the "Finest" of City employees, but their skills, responsibilities and services (all "in the forefront of emergency services that are so essential to the protection of life and property" (NYC Exh. 04-67)) are *sui generis*. Likewise, the pay of New York City's Police Officers is *sui generis* in that it should be dramatically ahead of what is being paid police in the other large national cities and the high paying local jurisdictions, having nothing to do with other City employees.

Consequently, as the Chairman also holds, comparing the compensation and pay raises due Police Officers to what has been accepted by civil service unions with different jobs simply is not relevant in making the Goldberg Panel standard a reality.

Eighth, in addressing another hot-button issue, the Chairman's Opinion rejects, without reservation, the City's fundamental position that the Panel must follow some bargaining "pattern" with other municipal unions unless there is some compelling reason not to. Despite the City's argument that "arbitral precedent" (referring to interest arbitrations that were under the control of the City's own Office of Collective Bargaining) compels a pattern conforming award "unless the PBA has proved that there exist 'unique, extraordinary, compelling and critical circumstances'" (City Reply Mem. at 18), the Chairman's Opinion categorically dismisses this position once and for all. Indeed, the Chairman's Opinion holds that there is no "pattern" in existence that could constrain this Panel's decision to award the NYC Police a "fair and reasonable" pay increase that meets the Taylor Law's mandate (that they should be paid as well as "other employees performing similar services or requiring similar skills under similar working

conditions”) and the Goldberg Panel standard (that they should be “counted among the highest paid officers in the nation”). The City’s insistence that its Police Officers should be content to receive over these two years a pitiful 3% in “pattern” salary increases, widening even further the huge pay gap the Chairman has identified in comparison with police in the appropriate national and local jurisdictions, is indefensible. And the Chairman’s holdings, that a pay increase of no less than 20% is warranted for Police Officers and that increases for other City employees should not encumber the necessary market-level pay raises that Police Officers deserve, bear out his point. By rejecting the City’s perennial “pattern” argument and by taking its initial step to bridge this huge pay gap, this Panel’s Award of 10.25%, while not enough, has started down the road towards remedying a terrible injustice to the Police Officers.

The Eischen Panel’s award in 2002, in the Taylor Law’s first NYC Police interest arbitration, broke with the past and established *as a factual matter* that there is no immutable pattern that encumbers the outcome of this Arbitration. The Eischen Panel’s award to the NYC Police of 41% more than DC 37 and at least 23% more than any other unit, followed months later by the City’s own deal with the Firefighters for the same advantage over all other non-uniformed and uniformed groups (while later refusing to give those same terms to the Sergeants, the Detectives and all other superior officers), could not portray better the fact that the City’s insistence on some artifice it calls “pattern” is merely a smokescreen to becloud its refusal to pay the NYC Police a competitive wage.

In truth, the irrefutable facts demonstrate that in the 2000-2002 round of negotiations all other groups of uniformed employees settled on longer contract terms (25% to 32% longer than the PBA) and that the PBA secured pay increases much earlier in its contract term than did these other groups (a payout worth roughly 25% more than the increases the City

negotiated with those other uniformed groups). The PBA's shorter contract also means that, in this and subsequent rounds of bargaining, its Police Officers will receive any negotiated or awarded pay raises that much sooner, and the time value of the raises paid sooner further widens the advantage that the Police Officers will continue to receive in comparison with all other municipal employees. Simple arithmetic using the City's own "net cost of package" methodology applied to the better terms that the PBA secured from the Eischen Panel account for the annualized differentials in pay increases which the record reveals (and I simply have repeated) and which factually demonstrate that the Eischen Panel's award to the PBA did *not* "essentially" follow any pattern. Nor did these highly favorable terms awarded only to the PBA in the 2000-02 round result in "nuclear meltdown", "catch-ups" and "leapfrogging" by the other unions, as direly predicted by the City year after year (in the same "the sky is falling" manner as it always baldly asserts inability to pay premised on huge budgetary deficits that amazingly turn to huge budgetary surpluses (a factor also noted in the Chairman's Opinion)).

The City's reliance on the so-called "pattern bargaining" that the Chairman's Opinion rejects is, in reality, nothing more than lazy bargaining, in which the criteria of the Goldberg Panel standard and the Taylor Law are expected to take back seat to the slavish adherence to the one-size-fits-all increases to which the City and some other group that had its own parochial considerations in mind had already agreed. Moreover, this habit of lazy bargaining is not cost effective bargaining for any employer, including this City. In reality, the City's demand that pattern be followed at all costs is counterproductive of sound business sense, as witnessed in the 2000-2002 round of negotiations where the City settled with most unions on pay increases far greater than those on which it could have insisted under the then weaker

economic conditions.⁴ For this reason alone, hugely successful businesses in the private sector, including those which I have had the benefit of representing, avoid bargaining simply on the basis of applying a cross-occupational pattern. Moreover, the City's extraordinary attempts to deny Police Officers market-level salaries, in lazy reliance on "pattern", have provoked the severe problems of unfairness and morale on which the Chairman's Opinion of June 27th focuses and the recruitment and retention crisis singled out by Chairman Eischen in his 2002 opinion (and likely still exists today). For the City, the reality is that "pattern" is merely an artifice, sometimes referenced by the City in terms of shifting concepts such as "parity of benefits," "parity of costs" or "funds available" in bargaining, created and modified anew in each round of bargaining to justify its giving or withholding increases to certain groups. In the final analysis, "pattern" is an easy, handy-dandy rationale for concluding agreements if both parties should voluntarily agree, but otherwise is counterproductive and costly. The Chairman's Opinion makes clear that so-called "pattern" increases must not trump the controlling principle that New York

⁴ Indeed, in the 2000-2002 negotiations round, where the City voluntarily settled with the leadership of all the other uniformed unions while the PBA was battling the City in the courts for the right to commence its first Taylor Law interest arbitration, the economy was weaker and City's finances more precarious, both before and after 9/11. And yet, in 2001, the City actually settled *en masse* with each of these uniformed groups on a 30-month package, without any give-backs or productivity enhancements, and regardless of the objective merits. The 2001 Uniformed Coalition settlement, in which the PBA did not participate, was some 14.5% greater than the civilian settlement earlier in 2001 (as measured by Commissioner Hanley's 24-month "net cost of package" methodology). The City's settlement with the Uniformed Coalition was a costly tactical effort to dangle pay increases that might block the PBA's aspirations to achieve market-level salaries for its Police Officers in a Taylor Law arbitration. In this sense, the City's attempt to create a uniformed "pattern" and its practical abandonment of the less costly civilian "pattern," likely was far more costly than if it bargained or arbitrated the pay subject with each uniformed group separately on the basis of individual merit. Indeed, the other uniformed groups not only locked in the City to sizeable pay increases during an arguable financial trough but served to set a floor on which the PBA's factual arguments for far greater pay increases would be built and were successfully awarded in that round. In the instant 2002-04 bargaining round, the City's pattern of lazy bargaining was premised on its mantra that Police Officers should be treated no differently than civilian workers, largely office and clerical employees, rather than on individual merit called for under the Taylor Law criteria of CSL § 290.4(v)a-d. If the City continues this lazy bargaining pattern, it likely will apply, by rote, the PBA's pay increases in negotiations with groups that have not yet settled, and again regardless of individual merit.

City Police Officers should be “among the highest paid in the nation” and the fact that huge pay increases are necessary for Police Officers to receive competitive market-level salaries.

In reality, the Chairman’s factual holdings and comparisons support immediate raises of at least 40% to meet the Goldberg Panel standard as of 2004 and to be “just and reasonable” under the Taylor Law. His holdings correctly disregard the City’s argument that there must be some extraordinary, compelling reason (or any other reason) to depart from the City’s concept of bargaining “pattern” as well as the City’s perennial “inability to pay” pleas to avoid any award above the “pattern” concept. Additionally, the strength and logic of his factual holdings, as well as any fair and reasonable reading of the record here, contradict any conclusion that would favor the City’s demands for give-backs, a subject which I will next address. Consequently, the 20% raises that the Chairman’s Opinion finds warranted and the 10.25% salary increases that he awards, while hardly enough, are amply supported by the record in this proceeding without any need for give-backs.

The Lack of Justification for Give-Backs

My major and most vehement point of departure with the Chairman is over his insistence in the Award of give-backs, the magnitude of which the Chairman and the City identified to me for the first time during the final stage of Panel deliberations. There is no supporting evidence in the record (none whatsoever) for these give-backs. They certainly were never sought or substantiated in any City testimony or argument on the record or in some 335 pages of its briefs. They are totally unwarranted, and the PBA would never have agreed to them in collective bargaining. Regrettably, they are permanent unless the City decides to reverse them in subsequent negotiations.

Without restating the detailed evidence that fully supports the Chairman's holding that no less than 20% in retroactive Police pay raises are warranted, it is clear to a certainty that there are no facts that were developed in this record, and I defy anyone to find them, to support any claim, much less any award, of give-backs of any magnitude, and certainly not the procrustean package of reductions that found their way into the Award here. There is simply no basis in either the record or logic for the give-backs awarded.

First, the concept of give-backs is grossly inconsistent with the Chairman's own findings that would justify at least 20% pay raises alone by applying the Taylor Law criteria to the Goldberg Panel standard. After all, the record and the Chairman's holdings have demonstrated a Grand Canyon of pay disparities, a gaping chasm separating the compensation of New York City Police Officers and their fellow police officers doing similar -- but less demanding -- work in comparator local and national jurisdictions. As previously explained, the record shows that Police Officers require wage increases of at least 20% *per year* during the two-year contract period ended July 2004 just to bring their pay up to the 2004 level of, for example, the Port Authority police with whom they work side by side; 14% *per year* to catch up to the Newark police working in a similar but smaller environment just across the Hudson River; over 13% *per year* to catch up to the Yonkers police who work in a bordering microcosmic city; 36% *per year* to catch up to the Nassau and 28% *per year* to match the Suffolk comparators; over 18% *per year* to catch up to the average of the ten local jurisdictions that were selected by the Chairman as appropriate comparators; at least 25% *per year* to catch up to Los Angeles and Chicago; and roughly 16% *per year* to catch up to the average of all of the national jurisdictions selected by the City and relied upon by the Chairman when properly adjusted for cost-of-living differences. This Grand Canyon of pay disparities exists whether we simply compare the max

base salaries of Police Officers here and elsewhere, as does the Chairman's Opinion, or their 20-year average compensation on an annual or on an hourly basis that corrects for differences in paid time off, elements of compensation and actual hours worked. By any comparative measure, market-level pay increases for Police Officers, ranging from 10% to 20% *per year* in each of the two years, would be relatively modest. In the face of these facts and the Chairman's holdings warranting higher pay, give-backs that reduce any aspect of pay of any Police Officers are illogical and destructive.

Second, the increased productivity and savings to the City as Police Officers have increased their workloads, in light of the reduction in their ranks found by the Chairman, also contradicts any alleged need for give-backs. These hearings have shown the substantial savings that New York City has reaped – but refuses to share – since the horrific events of 9/11, as the ranks of its dedicated Police Officers have thinned (by at least the net loss of 2,400 Police Officers on which the Chairman's Opinion has focused) while their workload and productivity have skyrocketed. Yet, in another holding that jumps off the page of the Chairman's Opinion, the remainder of Police Officers have assured that New York City is the #1 safest city in the Nation to live in, to work in and to visit, despite its being the Nation's #1 terrorist target. The City's unwillingness to share these productivity gains – exceeding 10% as the remaining 22,000 Police Officers work that much harder, more resourcefully and more efficiently to cover for the net loss of 2,400 in their ranks – becomes much more indefensible considering the billions in surplus funds (\$1.4 billion in FY '03; \$1.9 billion in FY '04) that were available during the two years of this contract period and the over \$3 billion of surplus (now, more than \$3.5 billion) that

the Chairman's Opinion determined is available in the City's most recent fiscal year.⁵ Moreover, it stands to reason that, aside from the obvious productivity savings by having the thinned ranks of 22,000 Police Officers "doing more with less" (as the Mayor has defined the kind of productivity he is willing to pay for), this dramatic decline in payroll has generated savings of at least \$170,000,000 annually, a conservative estimate that would effortlessly justify a 6.5% pay raise on these savings grounds alone (6.5% = estimated \$170 million in saved payroll costs of 2,400 fewer Police Officers divided by \$26 million per Chairman Schmertz's reference to the City's claim that each 1% raise for its Police Officers costs the City \$26 million). Faced with these levels of productivity and payroll savings, alleged give-backs cannot find any factual justification.

Third, the Chairman's holding that the City has had huge budget surpluses and the ability to pay 10.25% pay increases contradicts any alleged need for give-backs. While the City keeps stressing its financial obligations, it ignores its tremendous assets and growing sources of revenue highlighted in the Chairman's Opinion – far greater than any other city in America – leading large annual surpluses and to the greater than \$3.5 billion surplus in FY 2005, a whopping difference between City revenues and expenditures which the City's Budget Director publicly revealed only after the Panel's June 27th Award was released and to which no astute decision-maker could fail to take into account.⁶ Hence, the City clearly has a much greater

⁵ Further, the Chairman's Opinion holds meaningless the fact that the City considers its budget surplus to be "a 'roll-over' toward balancing the budget in the next fiscal year." The Chairman's Opinion holds that "[w]hatever called it is revenue in excess of expenses for this fiscal year," and this yearly excess is all that counts.

⁶ The City projected a \$2 billion surplus for FY 2005, a staggering excess of revenues over expenditures put in evidence in late 2004 by City Budget Director Page despite his claims of deficits. It jumped another 25% to \$2.5 billion shortly after the hearings concluded. It climbed again to the over \$3 billion which the Chairman cites in formulating his June 27th Opinion. And then it soared to more than a massive \$3.5 billion
(continued...)

ability to pay its Police than many of the comparator cities on the top side of the pay chasm but which, nevertheless, value and pay their police officers far, far more.

Moreover, that ““delicate balance”” to which the Chairman’s Opinion refers – “required to accommodate fair wage increases while maintaining an economy that attracts commerce and visitors” – has been shown on this record to be nothing more than the weighing of politics and priorities in deciding where to spend the City’s vast revenues.⁷ Here, however, the pay level and well-being of its Police Officers, the record conclusively demonstrates, have not been the City’s priority. Unfortunately, the record is clear that the only raises that the City has been prepared to pay Police Officers were literally nothing more than lip service, mere pats on the back, in addition to the meager “pattern” it claimed for civilian employees. Finally, the City’s mantra of poverty as a rationale for opposing market-level pay increases during this PBA

⁶ (...continued)
surplus in a fat \$53.6 billion City budget that Budget Director Page only later revealed in conjunction with his sworn testimony in the PERB fact-finding hearings between the City and the United Federation of Teachers that concluded on June 30, 2005 and now has released publicly (New York City Office of Management and Budget, Financial Plan, Fiscal Years 2005-2009 (released July 6, 2005), *available at* http://www.nyc.gov/html/omb/html/finplan06_05.html). This incredible 175% jump in available surplus, from the \$2.0 billion surplus estimate to the huge \$3.5 billion surplus reality, is unprecedented and was concealed by the City during this proceeding. In this regard, following arguments that spanned months of the hearings, the Chairman granted the PBA’s request for the City to produce internal speaking documents to and from the Office of the Budget Director and others and rejected the City’s assertion of privilege, but conditioned this production on resolution of the City’s claim of confidentiality in regard to virtually every one of these talking documents. The *in camera* review and individual determinations as to each of the documents that the Chairman would have had to perform as time was running out were never performed, and the City’s compliance with this production directive must be left for another day. Nonetheless, the enormity of the City’s budget surplus and of the revelation of its rapid growth during this proceeding and the City’s blatant effort to camouflage this enormity confirms the validity of the Chairman’s decision to give the PBA access to e-mails and other talking documents that would have revealed early in this proceeding, *inter alia*, the facts that bear upon the City’s ability-to-pay defense and its unwillingness to pay despite its ability to pay. In all events, the Chairman’s document production directive clearly has precedential application in the next rounds of labor negotiations and to subsequent arbitrations, as well.

⁷ The Chairman’s holding in this regard – “Clearly if the City is required to make a payment it can and will do so including those unpredicted and unbudgeted” – acknowledges the reality of budgetary politics and priorities and reflects the testimony of Carl McCall, the former New York State Comptroller and Port Authority Commissioner, and current City Council Members David Weprin (Chair of the Council’s Finance Committee) and Christine Quinn, along with the testimonial statements of Mayor Bloomberg and others.

proceeding and the negotiations that preceded it is rebutted not only (i) by the Chairman's findings that City budgets have been balanced "for decades. . . despite initial budgets which project large deficits" and (ii) by the enormity of its budgetary surpluses in all years at issue here reflecting all positive indicators of the City's financial health and growth, but also (iii) by the proof that the Police Officers were awarded naked 11.75% raises for the 2000-02 period, without any give-backs, without any productivity adjustments and without any cataclysmic fallout, in a post-9/11 economy that was weaker than today's and that ended its 2002 fiscal year with a budget surplus of approximately \$680 million (compared to today's over \$3.5 billion surplus). The conclusion is inescapable – the City has an *unwillingness* to pay, unparalleled in relation to any other comparator jurisdiction, not an inability to pay. Absent the inability to pay, and considering the City's vast ability to pay as the Chairman's Opinion holds, give-backs are not warranted.

Fourth, as explained earlier, the Chairman's holding, that Police Officers may not be compared to other municipal employees in setting their pay, nails the lid shut on any "pattern" argument – indeed, the Chairman's Opinion holds that so-called "pattern" is not relevant to Police Officers' pay – and also defeats any claimed need for so-called "pattern conforming" give-backs.

Given the strength of the Chairman's holdings that no less than 20% pay raises for Police Officers are justifiable in reliance on the Goldberg Panel standard applied to the record in this case, that he would award 10.25% as a down payment, that the City has an overwhelming ability to pay and that the City's so-called "pattern" is inapplicable, added to the productivity and payroll savings the reduced numbers of Police Officers have already produced, it was disturbing and disheartening to learn, during the final stage of deliberations, that the City demanded

unwarranted give-backs to make the modest 10.25% pay increases seem palatable and that the Chairman would throw a bone to the City by awarding them.⁸ In the final analysis, the City generated a draconian plan that would slash starting pay by 38% to \$25,100 (from \$40,658) and reduce the first 5½ years of pay by an average of some 17% for new Police Officers beginning in January 2006. Adding insult upon insult in these same deliberations, the City also flat out refused to share its computation of savings that would be achieved through its belated demand for these extraordinary salary cuts for new recruits (although, just three days later at the UFT fact-finding hearings, the City readily produced its PBA costing sheet, masking the impact of the 10.25% raises through reference to alleged savings from items settled over a decade ago).

At least under this City plan incumbent Police Officers as well as the July 2005 graduating class of 1,582 recruits would immediately receive the full benefits of the 10.25% pay raises, and no one would immediately be subjected to these arbitrary pay cuts until the new class of recruits in January 2006 and even then their much reduced pay would pop-up to that 10.25% increased pay level of incumbents in their sixth year of service.

⁸ Ordinarily, in my capacity as a member of this Public Arbitration Panel, I would be circumspect in avoiding public discussion of deliberations. An understanding of these deliberations, however, is essential to the recognition that “reciprocity” played absolutely no role in these deliberations and that the “pattern of reciprocity” minted by the Chairman’s Opinion in his effort to account for give-backs is nonexistent, a point to which I will return shortly. In short, the give-backs were pressed by the City (in the face of a record that cannot support give-backs) and imposed by the Chairman in the sheer exercise of their unadulterated joint power, not as a result of any material exchange. This eleventh-hour power grab certainly did not involve the mutual give-and-take that characterizes true reciprocity. Additionally, I feel no compunction in discussing here certain aspects of deliberations in the light of quotes and other statements on this subject published in the newspapers and attributable to unnamed City officials, to the Mayor and his Administration, or to the Chairman. Each of these published statements appears to be designed to help the City spin the facts in a way that puts the best possible gloss on the drubbing that the City has taken in the Award of 10.25% and in the key substantive holdings of the Chairman’s Opinion. In this connection, my plain purpose is to report on the record, forthrightly and accurately, the facts that are responsive to these parochial statements. In taking this step, I recognize that those who took the initiative to speak to the press in an attempt to color and spin the events during deliberations and its outcome may make that desperate effort yet again. Should that occur or should there be views expressed in any concurring opinion of the City’s member of the Panel or supplemental opinion that warrant further comment, I will supplement this concurring opinion accordingly and hereby reserve that opportunity.

An alternative for new Police Officers which the City also pressed (and the Chairman favored) would have, *inter alia*, permanently increased by 18 the number of working days without any additional pay (by drastically cutting a rookie Police Officer's 20 vacation days in half and by slicing the 11 paid holidays to 3, effective immediately and forever), in addition to slashing immediately (and forever) to 45% the pay for often hazardous night shift work that is performed by many new Police Officers along with imposing the new starting rate of \$25,100. At no point during the arbitration hearings did the City reveal its desire for draconian cuts of such breadth or magnitude. Moreover, throughout these proceedings, the PBA had consistently rejected tamer alternative cuts since all evidence warranted sizeable pay raises alone and give-backs would only serve to further aggravate morale in light of the incredible pressures under which Police Officers will continue to work.

While the key substantive holdings expressed in the Chairman's Opinion were overwhelmingly favorable to the hard-fought positions taken by the PBA in both Taylor Law arbitrations, as the deadline set by the Chairman for the issuance of the Award approached, this Panel member was confronted with the choice of concurring in an Award of 10.25% in pay increases for all Police Officers that would be coupled with alternative packages of give-backs that would never sunset or expire, *either* (A) the draconian, immediate and permanent increases for all new recruits of ten working days and slashing of eight paid holidays as well as drastically slashing their pay for hazardous night hours on top of a 38% cut in starting salary to \$25,100, *or* (B) City-imposed salary reductions that would be temporary until the sixth year of service of new recruits beginning in 2006. Either way, as vicious and objectionable as the City position remained, incumbents would not lose the 10.25% pay raises to which they were entitled and new rookie Police Officers would receive those pay raises at a future point. By concurring in an

award of 10.25% increases that carries with it unexplained, unjustifiable, counterintuitive and counterproductive reductions in starting salaries, the next crop of new Police Officers, as well as the citizens of New York, would be saved from the dire consequences of overwork and the morale problems that would inevitably flow from working hazardous duty hours for little pay and many more days for no additional pay.

There is the additional disturbing factor that the lowering of starting salaries of future recruits beginning in 2006 is well beyond the two-year period, August 1, 2002 through July 31, 2004, over which this Panel legally has jurisdiction. The give-backs are objectionable on this ground, as well. Although the legality of an imposed Award of such future lower salaries and other give-backs is suspect, and certainly has not been adjudicated before PERB or in the courts, there is every indication that, as a practical matter, these reduced salaries would never benefit the NYPD, another point to which I shortly will return.

On these bases, and faced with the Hobson's choice, my concurrence was the only practical and prudent course in recognition of the Chairman's substantive holdings that are so favorable to the PBA and the Police Officers it represents (immediately putting the new 10.25% raises into their paychecks), and subject to my reservations expressed in this Concurring Opinion.

To a large extent, although the City is wholly responsible for these unsupported and insupportable cuts for new Police Officers, the City cannot be accused of inconsistency. The City's witnesses – principally, the NYPD's Deputy Commissioner for Training and its Chief of Personnel – swore under oath in this arbitration that there is no recruiting or retention problem (in relation to the 2003 salary structure that began, not at \$25,100, but at \$36,878 (City Exh. 04-162B)) and then, with this premise in hand, the City pressed for a potpourri of new starting salaries that jumped all around covering the range from \$23,000 to \$28,825 (City Exh. 04-150).

Moreover, in regard to the Chairman's post-hearing mediation efforts openly referenced in his Opinion, it should not be surprising that, armed with that testimony of the NYPD's Personnel Chief and Training Commissioner denying any recruiting problems, the City decided to pursue, and the PBA vehemently rejected, a salary structure for new recruits that would have imposed a \$25,100 starting rate and would have cut the first five salary steps by a greater percentage than the City demanded in the final Award.

Thus, the puzzle is to determine why the City would press a counterintuitive demand to decrease starting salaries or any drastically arbitrary slashing of time off and hazardous duty pay while it tries to attract the highest quality recruits. After all, the documentary evidence shows that the City will be rolling back the calendar by more than 14 years by imposing a starting salary of \$25,100 alone, at least 16% less than it was for "Police Officers hired prior to June 30, 1991" (City Exh. 04-162A).

It seems obvious that, not having been called by the City to testify, the Police Commissioner himself may not have been made aware of the City's demands or at least of their unexplained and unjustified ferocity. No one needs a crystal ball to realize that the shabby \$25,100 starting salary accompanied by the unexplainable slashing of salaries for new recruits during their first five and a half years will likely create a major recruiting challenge for the Police Department. Yet the City's demand for these large cuts in starting salaries obviously were premised on the testimony of the NYPD's Chief of Personnel and Deputy Commissioner for Training that no recruitment problem existed; had they both been candid about the recruitment problems and the crisis that would result from the City's starting salary cuts their testimony supported, the Chairman would not have had the basis to take these cuts seriously. Unlike his deputies, the Police Commissioner himself has condemned the new starting salaries for new

recruits as creating, in his own words, ““a major recruiting challenge””, and he, too, would like to see them hiked (7-13-05 *N.Y. Daily News*; 7-14-05 *N.Y. Sun*).

Aside from the Commissioner’s candor and ample analytical evidence in this proceeding that the NYPD’s recruitment and retention crisis first identified by Chairman Eischen has not abated, the first-hand documentary evidence, virtually all of it generated by City sources, establishes that the current salaries stand as an impediment to quality recruiting. For instance, in 2003, the City’s Labor Relations Commissioner insisted that a full 1.5% of the Eischen Panel’s award of naked 11.75% raises to Police Officers be allocated to raise further the starting salaries of rookies to make NYPD recruitment more attractive; in this light, the City’s insistence two short years later upon an average of 17% reductions just makes no sense in regard to this same recruitment issue. In addition, the City Comptroller concluded in July 2003, smack dab in the midst of the contract period at issue in this proceeding, that “in recent years, the Police Department has had difficulty attracting new officers” (PBA Exh. 04-16). And on February 25, 2005, Mayor Bloomberg’s own Mayoral Commission released a new report, *Review of the Background Screening Process of New Recruits* (PBA Exh. 04-199), which confirms that the City is continuing to have difficulty attracting qualified recruits to the NYPD. The Mayoral Commission revealed, in relevant part, that as many as 16% of recruits in one recent sample it studied and 19% of recruits in another sample should have been disqualified but were not properly screened out. Moreover, this 2005 Mayoral Commission found that in upwards of 49% of background investigations there were deficiencies. Thus, contrary to the City’s assertion that there is no evidence that recruits are being improperly accepted into the Police Academy, this Mayoral Commission concluded that large numbers of those accepted to the Academy could have

been disqualified. In deliberations, the Chairman was unmoved by this information even though the City had never refuted it.

This Mayoral Commission report is not the only up-to-date evidence that corroborates the extraordinary measures that have been taken to fill Academy classes at current salary rates far higher than they will be after the cuts the City has championed. Neither the public nor this Panel can close its eyes to the official NYPD sources of the most recent efforts to change the scores of roughly 10% of qualifying exam questions for recruits who started in January 2005 in order to pass 103 of the 170 who had failed to get a passing score; that the remaining 67 failures were offered a makeup exam; and that another 161 of the 1,757 recruits had to drop out of the Police Academy (7-10-05 *N.Y. Post*). At a time when the NYPD has every reason to be proud that its most recent graduating class is mostly minority and 15.6% female (7-8-05 *N.Y. Times*), the City's insistence on lower starting salaries and on the draconian cuts in this Award not only is counterintuitive, but will be proven counterproductive in attracting the highest quality, college-educated members of under-represented minority communities and females. By pressing for this antediluvian starting salary structure, the City is sending an unfortunate mixed message: the NYPD welcomes minorities and women with open arms to work within the post-9/11 world of incredible pressures, dangers and uncertainties, largely in the City's hot zones, side-by-side with their much better paid colleagues already on the job (5-16-05 *N.Y. Post*; 6-18-05 *N.Y. Post*); but, unlike previous classes of Police Officers, they and their sacrifices in putting their lives on the line each and every day are not worth very much at all.

Additionally, although the NYPD's strong push to diversify its recruitment is commendable, the City's slashing of their starting salaries by some 17% may seem to some to

discriminate against the same minorities and women that the NYPD professes it wants to recruit.⁹ This inverse relationship between increased diversity (as measured by cohorts of minority and female Police Officers) and rookie Police pay reductions is all the more staggering when reviewed historically. Thus, just as the proportions of minority and female Police Officers have strongly improved beginning in the 1990s (referenced by Deputy Commissioner Fyfe and Personnel Chief Pineiro), their salaries have stagnated in comparison with police pay in other jurisdictions, falling farther and farther behind. Whatever its legality under the laws against discrimination, this disparate relationship between diversity and lowered rookie pay is certainly not socially desirable, is destructive of morale and is downright wrong.

In reality, the foolish signal that the City is sending, loud and clear, is that, despite the incredible pressures and dangers of the post-9/11 police job, new Police Officers, be they minorities or white, immigrants or native born, women or men, are not valued more than at a heavily discounted, sub-market pay level. The staggering weight of the consequences of these reduced salaries on recruitment (and in tarnishing the NYPD's image) falls squarely on the shoulders of the City, especially so having professed under oath that it has no recruitment problems at all.

Moreover, the single substantive rationale expressed in the Chairman's Opinion for the reduction of starting pay, that future recruits "are essentially students in the Academy . . . [and] have not yet experienced the dangers, the stress and the responsibilities of incumbent police officers" is categorically contradicted by the City's own witness, Dr. James Fyfe, Deputy Commissioner of the NYPD. Commissioner Fyfe testified with pride of recent examples during

⁹ See, e.g., *Harper v. Godfrey Co.*, 45 F.3d 143 (7th Cir. 1995) (employer's active recruitment of African Americans only to place them at the bottom presented a jury-triable issue of discrimination under 42 USC § 1981).

the 2003 blackout, the 2004 Republican National Convention and the U.S. Tennis Open where recruits in the middle of their Academy training were put out on the street (Tr. 1847-48). The Chairman's singular rationale simply overlooks the reality that, even before their training is completed, new recruits are deployed in emergencies, as well as the reality of their having to work a dangerous job, often in some of the City's worst hot zones, at City-imposed depressed salaries into their sixth year.

The questions, rhetorical as they may be, that these City-imposed cuts raise are frightening to contemplate: Wouldn't an ambitious college-educated candidate, minority or not, of either gender, be more likely to choose a better paying and safer entry-level position in which salaries are higher than those in the first six years of policing the streets of New York City and for which the higher-paying employer has no record of arbitrarily pushing to reduce those salaries to below-market levels? Since these future NYPD starting salaries currently match those of some private sector messengers and clerks, who exactly is likely to be attracted to the police job in New York City? And exactly who, beginning in 2006, will our veteran Police Officers and those who live, work and visit in this City be expecting to back them up in case of terrorism, other dangerous emergencies or troubling situations in our post-9/11 City?

In sum, all that the City must have hoped to achieve by its intransigent insistence on a 38% slashing of the starting salary and on an average of 17% lower salaries for new rookies would be the transparent bragging rights of bean counters that somehow, in the future, the City will have offset a portion of the 10.25% increase awarded in the face of overwhelming proof and the Chairman's Opinion that all Police Officers are entitled to at least twice that raise. To repeat, during deliberations, I raised concerns for recruiting the most highly qualified, diverse, college-educated Police Officers in opposing the cuts, but none moved the City's insistence on these

give-backs or the Chairman's reluctance to drop them; and, in this regard, the press report attributing a contrary comment to the Chairman (7-8-05 *The Chief-Leader*) conflicts with the actual events and is just plain wrong.

By demanding unwarranted pay cuts for the next classes of new Police, the City cannot ever attempt to deflect its blame by claiming that the PBA and the 22,000 Police Officers it represents wanted these cuts. The PBA has opposed all such cuts. The Chairman, however, expressed during deliberations that he would impose the immediate reduction of 18 paid leave days and hazardous night duty pay for all new recruits unless, alternatively, I concurred in an award that would lower their salaries until the sixth year. While I concurred, figuratively at the point of a gun, in an award that avoided the certainty of an award of the more draconian permanent cuts, the City's insistence on these salaries for future hires will backfire.

In the final analysis, the City must come to its senses of its own volition and, long before the 2006 class arrives, seek to restore starting salaries to productive, competitive levels in time to ensure that future classes attract the very highest quality and diverse Police Officers that those who live, work and visit here deserve. The City's restoration of higher starting salaries, however, cannot be achieved by its attempting to take some step backwards with incumbents' pay, and at the expense of violating the Goldberg Panel standard of ensuring that the City's Police Officers are "among the highest paid in the nation." The City cannot attempt to penalize its incumbent Police Officers to pay for the City's own calculated mistake, especially if it values the morale of its Police. Any future City effort to increase rookie pay by reducing incumbent pay "can only depress morale" further (a factor seized upon by Chairman Schmertz in justifying significant raises for incumbent Police). Put succinctly, "severity breedeth fear, but roughness breedeth hate," as Sir Francis Bacon warned over 400 years ago (*Of Great Place, in The Essays*

(1601)). Since there is every justification to raise the pay of incumbent Police Officers far, far higher than does this Award, and no real justification for having slashed the starting pay schedule of new recruits, the City must decide that rookie Police Officer pay is a priority and that it should be set in comparison to the other jurisdictions. Thus, the City alone must reverse the damage it has done, without making the increased compensation of incumbent Police Officers any part of this calculus.

The only other proposition that, in passing, the Chairman's Opinion offers in ostensible support of these give-backs is some concept that he has coined a "pattern of reciprocity" and that, to the Chairman, means negotiation of higher wages and benefits "above a budgeted amount in exchange for discernable methods of increased productivity and measurable internal savings." Yet, in the next breath, the Chairman contradicts himself and concedes that, in reality, this concept would violate the Taylor Law since its application "would make the Taylor Law standard of Ability to Pay moot and meaningless." The Chairman expressly confirms that any "wage award may not only be in excess of a pre-budgeted amount, but greater than productivity and internal savings considerations." Put another way, as the Chairman holds, *not* "all or even a substantial part of the wage increase above a budgeted amount is to be supported by internal savings and productivity improvement." The Chairman's own outright disavowal of this so-called reciprocity pattern is not surprising since it is alien to the professional literature of collective bargaining and certainly is not one that I have encountered in my thirty-three years of very active practice of collective bargaining, labor relations and labor law.

As earlier explained, the Chairman's Opinion rightfully rejected the City's view that "pattern" must govern unless there is otherwise a compelling reason, and this holding also contradicts his newly-minted alternative "pattern" concept. Moreover, he references no mutual

give-and-take that would characterize “reciprocity” and no authority for his wistful masking of give-backs that are nothing more than a sop to the City.

Certainly the idea that collective bargaining may involve “productivity bargaining,” give and take, *quid pro quo*, tradeoffs and the like is universally recognized, but has never been tied to arbitrarily budgeted ceilings. In truth, real productivity bargaining would involve, for example, the mutual or reciprocal exchange of higher compensation for changes in performance or other enhancements of productivity.¹⁰ In this deliberation, however, the one-sided cost-cutting demanded in the unadorned exercise of the City eleventh-hour power grab, backed up by the sentiments of the Chairman, involved no “reciprocity” by “pattern” or otherwise. True productivity bargaining takes time and effort to nurture and develop and is not accomplished over a weekend or at the barrel of a gun as occurred here. Of course, give-backs may be appropriate to consider in times of fiscal emergency (such as during the City’s impending bankruptcy of the 1970s). But such is not today’s situation in which at least twice the 10.25%

¹⁰ For example, during the months of mediation efforts to which the Chairman’s Opinion twice refers, the PBA proposed more effective utilization of non-working time during the work day and other real productivity mechanisms, analogous to arrangements that the City has reached with others. These PBA-documented productivity proposals, taken together, would have generated conservatively 23% to 27% in annual City savings, over and above the 10% productivity boost that the depleted ranks of Police Officers have been achieving, and more than enough to pay for market-based pay increases far, far in excess of the 20% increases that the Chairman found justified. For example, the PBA’s detailed alternative proposals that would have lengthened the regular daily productive hours actually worked by Police Officers by approximately 38%-61% would have had the dual advantage of boosting their morale (by adoption of a more favorable duty chart schedule) and of considerable productivity, deployment and overtime savings to the City (borne out by the City’s own calculations); these are constructive alternatives that should be seriously pursued in the next round of negotiations. But instead of embracing productivity, the City pressed for roll-backs. The City’s shopping list included, *inter alia*, a new pension tier that would have slashed Police Officer benefits and expose them to a longer, more hazardous career before being eligible to collect those reduced benefits; pay reductions for rookies; slashed benefits for all Police Officers, incumbents and new recruits alike, such as compelled five additional work days for incumbents and ten more for new recruits; reduced annual leave days for incumbents by one and by five for new recruits; cut paid holidays by four for new recruits; and also for new recruits, cut night shift pay in half and end the City’s annual annuity contribution. These roll-backs simply were not innovative, not constructive, not designed to enhance police productivity and seemed punitive. Had the City engaged in constructive productivity bargaining, it could have led to a stabilizing four-year contract to which the Chairman’s Opinion refers and that he championed in mediation.

increases being awarded would be justified in the face of a strong, growing City economy that for years has generated billions upon billions of dollars of budget surpluses.

As a factual point, in the relationship between the PBA and the City there has been no pattern of reciprocal give-backs controlled by some amount arbitrarily set in the City's budget. The Chairman's Opinion cites to none; nor does he reference anything in the huge record of this case as proof of any such pattern. Instead, he relies on his own reading of UFT negotiations with the Board of Education some 15 years ago and having nothing to do with the PBA. Indeed, in the only other PBA/City interest arbitration under the Taylor Law, the Eischen Panel awarded naked 11.75% increases; and Chairman Eischen did not award any give-backs and specifically rejected the City's efforts to have Police Officers work 10 additional appearances annually to cover some of the impact of these raises. In trying to distinguish the *give-back-free* precedent of the Eischen arbitration, the Chairman must have recognized *sub silentio* that it contradicts his newly minted theory, and thus, avoids any mention of it in this context. Consequently, in addition to its illegality that the Chairman himself recognizes, no such "pattern of reciprocity," even as conjured by the Chairman, exists for Police Officers.

Moreover, by hinging his definition on "a budgeted amount," the Chairman's Opinion has linked all wage increases to a figure that would be entirely arbitrary and clearly subject to manipulation by the City. If his concept was actually lawful or even existed, it would provide a very strong, diabolical incentive to the City to minimize peremptorily the "budgeted amount," below any realistic level, in anticipation that an interest arbitrator would be inclined to give the City benefit roll-backs and productivity increases in exchange for "wage and benefit increases *above* a budgeted amount." The reality is that "each and every year" the Mayor already puts in "unrealistically low numbers for collective bargaining," a fact the City elicited on cross-

examination of Council Member Weprin, Chair of the City Council's Finance Committee (Tr. 2485-86). Additionally, any such "pattern of reciprocity" concept that would require give-backs from the Police Officers to pay for pay increases over and above the meager set-asides that the City intentionally budgets would render a nullity the Taylor Law's requirement that the City bargain in good faith. At best, the Chairman's concept, besides concededly being unlawful, is much too flawed for practical application and would provide additional reason for the City to play games with the budget for Police raises.

In short, the so-called "pattern of reciprocity" concept is a fiction, invented for this occasion, in an effort to rationalize the Chairman's last minute desire to throw the City something no matter how undeserved and unjustified it may be and that finds no support whatsoever in the fulsome record developed in this case and in the key substantive holdings of the Chairman's Opinion itself.

In the final analysis, there is no credible justification for these give-backs. The key substantive holdings of the Chairman's Opinion, justifying nothing less than 20% pay raises that he had wanted to award in recognition of the City's huge ability to pay, controverts any consideration of give-backs, much less any award of give-backs, especially at harsh levels never before mentioned in the record of this arbitration proceeding. Plainly and simply, these undeserved give-backs are a bone that the Chairman has thrown to the City, and handing them out represents nothing more than the misplaced sentiment of the Chairman. "But sentiments do not decide cases; facts and the law do," Circuit Judge John G. Roberts (nominee to the United States Supreme Court) recently warned. *U.S. v. Jackson*, No. 04-3021, 2005 U.S. App. LEXIS 14951, at *52 (D.C. Cir. July 22, 2005) (dissenting). The overwhelming facts here compel pay

raises of a multiple of 10.25%; and the law -- the Goldberg Panel standard applied to the Taylor Law -- compels nothing less.

The Advantage Of The Taylor Law's Tripartite Arbitration Process

As a final point, the Chairman's criticism of the Taylor Law's tripartite process is misplaced. The fact that the parties' face-to-face negotiations have failed is not an argument for scrapping the tripartite process of public arbitration that, as a matter of sound public policy, the State of New York has imposed upon the City and the PBA. Instead, it is an argument for continuing the process of collective bargaining, if necessary, well into deliberations of the public arbitration panel after each side's proofs have been fully vetted, as they have been in this case. In fact, the Taylor Law encourages continued negotiations while matters are under deliberation (CSL § 209.4(c)(iv)).

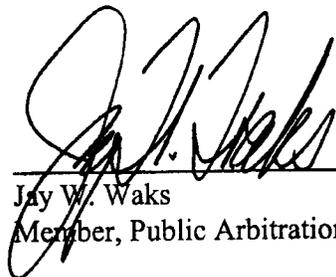
Although, after only two rounds, this PERB interest arbitration process may not be perfect, it has shown itself to be a step in the right direction, as witnessed by the award of **23% in pay increases** over these two initial rounds and its reversal of the injustices that the Police Officers previously faced under the impasse procedures of the City's Office of Collective Bargaining.¹¹ But for the unjustifiable award of give-backs, the Chairman's Opinion has the potential of advancing the cause of collective bargaining between the City and its Police Officers. Its key substantive holdings justifying no less than 20% in additional raises and clarifying the ground rules for future negotiations are the culmination of a process, as the Chairman's Opinion recognizes, in which the two party-appointed arbitrators provided professional assistance to the Chairman even as they advocated positions on behalf of each of their parties. Hopefully, these

¹¹ The Police Officers' 23% in pay raises awarded over four years (August 1, 2000 - July 31, 2004) represent the four compounded 5% increases of the Eischen and Schmertz Panels plus the extra 1½% awarded by the Eischen Panel.

key substantive holdings will have a salutary effect in promoting the early resolution of their next collective bargaining agreement that already is twelve months in arrears.

In short, the huge responsibility of and commitment to policing the City of New York, so essential to its life, property and financial health – greater than in any other city of this Nation – have been carried out courageously and selflessly despite the increasing pressures, uncertainties and demands of our post-9/11 City. Nothing less is expected of our Police Officers, and they should expect nothing less of the City than huge market-based pay increases to match the roughly 40% advantage of the high-paying local and national comparators. Only raises of this magnitude, without give-backs, will ensure that the pay of New York City’s Police Officers satisfies the Goldberg Panel standard and rightfully begins to reflect their job responsibilities and their commitment. And only then would they be recognized “as being among the highest paid in the nation.”

Dated: New York, New York
August 3, 2005



Jay W. Waks
Member, Public Arbitration Panel