

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of the :  
Interest Arbitration :

- Between - :

PERB Case No. IA-2014-009;  
M2014-027

THE CITY OF NEW YORK :

"City" or "Employer" :

- and - :

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

"PBA" or "Union" :  
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**APPEARANCES**

**For the City**

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**For the PBA**

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**BEFORE:   HOWARD C. EDELMAN, NEUTRAL PANEL MEMBER**  
**JAY WAKS, PUBLIC EMPLOYEE PANEL MEMBER**  
**ROBERT LINN, PUBLIC EMPLOYER PANEL MEMBER**

## BACKGROUND

The City of New York ("City") and the Patrolmen's Benevolent Association ("PBA") are signatories to a four year Collective Bargaining Agreement which expired on July 31, 2010. Negotiations and mediation efforts to produce a successor labor contract were unsuccessful. Consequently, and pursuant to Section 209.4 (c)(v) of the Civil Service Law of the State of New York ("Taylor Law"), the undersigned panel was constituted to hear and decide the matter. Absent agreement of the parties, we are precluded from issuing an Award for more than two years. Since none was forthcoming our determination covers the period August 1, 2010-July 31, 2012.

Hearings in this dispute were held before us on fourteen dates in the period March 2015 to June 2015. Thereafter the parties submitted briefs and reply briefs. In addition, the panel met in executive session on four occasions in October 2015. This Opinion and Award follows.

## POSITIONS OF THE PARTIES

### PBA

The PBA asserts, initially, that the 22,000 police officers in its unit excel at the most complex and challenging policing job in the United States. Witnesses for both parties, including Mayor de Blasio, recognize that their job has become more complicated and dangerous over the past decade, it observes.<sup>1</sup> Given this mutual understanding of the work police officers do in the face of extremely trying circumstances, the PBA insists that wage increases the panel orders must be market based and must far exceed the so-called pattern negotiated between the City and most of its uniformed service unions. This is so for the following reasons, according to the PBA.

First, the Taylor Law requires the panel to consider a "comparison of wages, hours and conditions of employment of other ~~employees~~ performing similar services or requiring similar skills under similar working conditions...in comparable communities," the PBA notes.<sup>2</sup>

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<sup>1</sup> PBA Exhibit 15-42.

<sup>2</sup> NY Civil Service Law §209.4(c)(v)(a).

In this context, it cites the testimony of Dr. Richard Hurd, Associate Dean and Professor of Labor Studies at Cornell ILR, that "New York City Police Officers are substantially underpaid relative to the labor market and it's not even close." (466).<sup>3</sup> Support for this position is seen in the comparison between City police officers and those of surrounding communities, including jurisdictions that include the five boroughs, the PBA submits.

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<sup>3</sup> Numbers in parentheses ( ) refer to pages in the transcript, unless otherwise indicated.

**Local Jurisdictions 2010 Police Officer Annual Hourly  
Pay Basic Max 20-Year Average**

Jurisdiction	Basic	Rate Hour	20-Year Average	20-Year Average/Hour
Suffolk	\$108,608	\$66.75	\$120,126	\$73.82
Nassau	\$107,319	\$66.70	\$105,070	\$65.94
Westchester	\$91,554	\$52.23	\$99,757	\$57.24
Pt. Authority*	\$90,000	\$51.22	\$103,044	\$58.64
Jersey City	\$86,909	\$51.64	\$84,474	\$50.18
Newark	\$84,914	\$45.10	\$83,960	\$44.59
NYS Troopers	\$84,739	\$48.15	\$103,186	\$58.79
Elizabeth	\$83,015	\$44.44	\$86,158	\$46.14
Yonkers	\$82,741	\$49.60	\$90,319	\$54.15
MTA	\$80,780	\$42.88	\$85,030	\$45.13
<b>NYC</b>	<b>\$76,488</b>	<b>\$40.58</b>	<b>\$82,129</b>	<b>\$43.58</b>
<b>Average Without NYC</b>	<b>\$90,058</b>	<b>\$51.90</b>	<b>\$96,112</b>	<b>\$55.46</b>
<b>NYC Below Average</b>	<b>\$13,570</b>	<b>\$11.32</b>	<b>\$13,983</b>	<b>\$11.88</b>
<b>Total Raise NYC Needs to Reach Average</b>	<b>17.7%</b>	<b>27.9%</b>	<b>17.0%</b>	<b>27.3%</b>

\*As of the prior contract period (2009); new salary scales pending agreement.

Thus, the PBA concludes, its members are short-changed anywhere from 17.0% to 27.3% depending on how wages are computed and anywhere from 19.9% to 31.4% if 2012 figures are utilized instead of the 2010 numbers listed above. Increases of this magnitude are consistent with the findings of the Goldberg panel

that NYC police officers wages should be among the highest in the nation, the PBA insists.<sup>4</sup>

Nor does the City's expansion of "wages" to "total direct compensation" warrant a different conclusion, the PBA posits. In citing the City's own exhibits (9 and 10), 2014 figures demonstrate that officers earn 18.5% less on a 20 year average and 28.9% less on a 20 year average per hour when compared to New York metropolitan area communities, the PBA notes. This is so even if only three "cherry-picked" jurisdictions are selected (MTA, Port Authority and New York State Troopers) and one per cent raises are assumed for 2013 and 2014. The 20 year direct compensation for New York City's finest would be only 82.4% of the average of these jurisdictions and far less when computed on an hourly basis. Similar results flow from the analyses conducted by the Citizens Budget Commission, whose President testified on behalf of the City, the PBA points out. In sum, it urges, all the evidence "leads to the same conclusion:

NYC police officers are paid far less than the Port Authority police officers and are exceedingly behind

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<sup>4</sup> PBA Exhibit 15-14.

police officer pay in the other local jurisdictions (brief, p. 25)."

Moreover, the local jurisdictions listed in its charts are the most appropriate comparators, the PBA argues. Referring again to Professor Hurd's testimony, it insists that "common sense" dictates this view because:

- 1) the NYPD works side by side with other forces in the local market;
- 2) the NYPD works regularly day-to-day with police departments in the surrounding areas (426, 431).

Also, the PBA notes, Katharine Abraham, former Commissioner of the U.S. Bureau of Labor Statistics, opined that it is "pretty standard" to define a local labor market as "an economically integrated area," an approach similar to the way the Federal Office of Management and Budget defines a metropolitan statistical area (1344).

Other factors support this conclusion, according to the PBA. It is easier for a worker to find out about job options and conditions of employment in a local area, as opposed to a distant one; and there is a financial and psychic cost to relocation (436). According to Joseph Dunne, former First Deputy

Commissioner of the NYPD, when police officers look elsewhere, they are "staying in the region and are going to Nassau, Suffolk [and] small departments in New Jersey and Upstate...where police exams are given in the City or other NYS areas and only about six per cent of applicants took the test elsewhere." Finally, on this issue, the PBA refers to New York City Labor Commissioner Robert Linn's testimony [on behalf of the PBA] at the first PERB Interest Arbitration that New York City and surrounding communities are appropriate comparators pursuant to the Taylor Law criteria (1934).

Nor is there any justification for paying NYC officers less than their counterparts in these communities, as the PBA sees it. All witnesses who had knowledge of police work in those jurisdictions affirm the greater burden placed on members of this bargaining unit, it notes. Former Special Operations Divisions Commanding Officer William Morange indicated his unit would receive requests from the Port Authority police for assistance because the NYPD was more capable of addressing the problem (981), the PBA observes.

Even if the comparators utilized are the twenty largest cities in the United States, New York City officers still fare quite poorly, in the PBA's view. This is so because these jurisdictions enjoy substantially lower cost of living rates than does New York, according to the Union. According to the Union, national cities' data adjusted for inter-city of living differences using the BLS data from the CPI (Consumer Price Index) reveals the following:

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**National Cities 2012 Police Officer Annual and Hourly  
Pay Basic Max and 20-Year Average Adjusted for Cost of  
Living (BEA/BLS 2012)**

City	Base Wage	Wage per Hour	Base Wage (CPI Adjusted)	Wage Per Hour (CPI Adjusted)
Austin	\$134,121	\$73.45	\$121,017	\$66.28
Boston	\$79,648	\$44.40	\$99,667	\$53.87
Charlotte	\$94,496	\$50.32	\$90,936	\$48.42
Chicago	\$113,929	\$66.39	\$108,532	\$63.27
Columbus	\$111,462	\$62.58	\$113,163	\$63.52
Dallas	\$107,217	\$57.37	\$103,723	\$55.61
Detroit	\$72,809	\$40.16	\$72,792	\$40.15
El Paso	\$103,014	\$54.91	\$93,037	\$49.60
Fort Worth	\$112,342	\$59.88	\$105,816	\$56.39
Houston	\$85,760	\$45.28	\$92,134	\$48.89
Indianapolis	\$93,954	\$50.54	\$98,789	\$53.14
Jacksonville	\$95,669	\$54.73	\$91,573	\$52.39
Los Angeles	\$97,322	\$55.45	\$100,744	\$55.28
Memphis	\$78,251	\$37.12	\$87,974	\$41.73
Philadelphia	\$80,263	\$43.43	\$88,374	\$47.90
Phoenix	\$109,078	\$56.23	\$120,694	\$62.39
San Antonio	\$96,735	\$50.75	\$109,966	\$57.70
San Diego	\$86,691	\$48.16	\$97,182	\$54.00
San Francisco	\$127,848	\$67.43	\$140,952	\$74.36
San Jose	\$105,193	\$53.92	\$107,262	\$54.97
NYC	\$76,488	\$40.58	\$82,129	\$43.58
<b>Average Without NYC</b>	<b>\$99,290</b>	<b>\$53.63</b>	<b>\$102,066</b>	<b>\$54.99</b>
<b>NYC Below Average</b>	<b>\$22,802</b>	<b>\$13.05</b>	<b>\$19,937</b>	<b>\$11.41</b>
<b>Total Needs to</b>	<b>29.8%</b>	<b>32.1%</b>	<b>24.3%</b>	<b>26.2%</b>

This disparity is heightened when figures are updated to reflect 2012 compensation, the PBA notes. In fact, it alleges, wage increases since 1990 have outpaced NYC Officers' in every other major city, except Detroit, a far cry from the Goldberg standard. This time frame is significant, it insists, because beginning in the 1990's, police wages here began to fall substantially below those in local and national jurisdictions.

The PBA challenges the utilization of any cost of living measures but the BEA/BLS index which is included in its Exhibit 15-115 and 15-115A. Indeed, it suggests, all responsible economists and labor relations experts agree that New York is the most expensive city in the United States where prices can exceed national averages by anywhere from fifty to one hundred percent.<sup>5</sup> The PBA maintains that these individuals, while producing results with slight variations, base their findings on economists who believe that real wages (adjusted for cost of living differences across jurisdictions) should apply, rather than nominal wages. Indeed, it argues, the most

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<sup>5</sup>The PBA also cites findings by Arbitrators Schmertz and MacKenzie for this proposition. PBA Exhibits 15-7; 15-6.

experienced and well regarded expert is Dr. Abraham who concluded that the BEA/BLS data is far more reliable than any other measure.<sup>6</sup>

Acknowledging the City's reliance on ACS (American Community Survey) data, the PBA submits that the BEA/BLS housing figures are much more reliable because:

1. ACS dramatically and improperly lowers housing costs in NYC than does BLS data.
2. The CPI figures are subject to a much more rigorous, field-tested methodology than ACS which relies on written questionnaires.
3. The CPI does not include public housing units because those tenants do not pay market rent.

Other factors also support the PBA's view, it suggests:

1. Even though Professor Hurd's data included only the five boroughs, as opposed to larger MSA's (Metropolitan Statistical areas), the NYC data encompasses the places where police officers must live.<sup>7</sup>
2. Even if these other MSA's were considered, New York would still endure a high cost of living.

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<sup>6</sup> PBA Exhibit 15-115

<sup>7</sup> Though PBA members may live in some New York State counties outside the City, the other MSA's include Connecticut or Pennsylvania where officers may not reside.

3. The City's claims that Drs. Hurd and Abraham and others concerning "free" health insurance and transportation for NYC police officers are either wrong, or misleading or woefully out of context.

Most important, the PBA argues, from a collective bargaining perspective, is that prior interest arbitration awards have adopted BLS data even though some of the same experts who testified in this proceeding appeared in other NYC-PBA cases. Thus, it concludes, when relevant cost of living measures are applied, officers here are grossly underpaid, whether or not comparators are nearby or similar jurisdictions, or national cities.

The PBA argues that the City's comparability data presentation should be rejected for several reasons.

First, it alleges, the City's figures are based on 2014 data. Since the Panel may not determine terms and conditions of employment beyond July 31, 2012, the comparisons advanced by the City are fatally flawed, it insists. Equally unpersuasive is 2010 and 2012 nominal wage data, the PBA argues, because these figures are not adjusted for cost of living differences.

As to fringe benefits, the PBA asks the panel to give them no consideration or, in the alternative, less weight than wage comparisons for the following reasons.

First, it notes, pension benefits are usually statutorily mandated and not subject to collective bargaining. Consequently, they should be excluded from any consideration in this dispute.

Second, the PBA asserts, there is no evidence fringe benefits are a material factor in police officers' employment decisions. Professor Hurd's testimony demonstrates that "a young recruit considering a career in policing...what they'd be interested in is...the first priority...pay...and the job, and then benefits might be considered as part of the package. (498)." Police witnesses support this view, it observes.<sup>8</sup> Similar opinions were voiced by panel Chair Eric Schmertz, the PBA suggests, in the 2002 interest arbitration.<sup>9</sup>

Pension comparisons are also very unreliable even if they are entitled to any weight, according to PBA

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<sup>8</sup> See testimony of retired Chief Dunne (1011-12), retired First Deputy Police Commissioner John Timoney (689), Police Officer Ryan Scirillo (1142) and John Jay Professor Eugene O'Donnell (827-28).

<sup>9</sup> PBA 15-7.

witness Brad Heinrichs, CEO of Foster and Foster who has analyzed some 900 pension plans across the country. He contends that any such comparison is "dangerous" and that, "You have to be an actuary to even attempt it (3012, 3062). City witnesses Michael Nadol, Christopher Erath and Robert Linn are not actuaries, the PBA points out. Indeed, it observes, former City Chief Actuary Robert North warned of conflating pension costs with pension benefits when he wrote that proposals for determining annual employer contributions "are not necessarily appropriate for determining the economic value of benefits, the value of benefit revisions or other purposes."<sup>10</sup> In the PBA's words, then:

By admitting there is no connection between a given year's contribution and the value of benefits, the City has conceded that its entire analysis is fatally flawed in that fringe benefit costs are not a proxy for the value of those benefits (brief, p. 77).

Similarly, the PBA argues, annual pension costs include unfunded liabilities. Also required is that the actuary assess turnover rates, potential future salary increases, disability rates, mortality rates and retirement rates. In addition, the actuarial

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<sup>10</sup> PBA 15-264.

value of the asset of the fund must be determined in addition to other calculations (3017-3022). What this all means, the union submits, is that unfunded liabilities bear little relationship to benefits and, therefore, distort a comparability analysis. Indeed, it maintains, Commissioner Linn said as much in 1987, when he stated that inclusion of unfunded liabilities paid on behalf of retirees is fraught with "distortions" (PBA Exhibit 15-203).

In this context, the Union also argues that different actuarial assumptions vary across jurisdictions. For example, it notes that the City's Chief Actuary recently reduced the expected rate of return of the Police Pension Fund from 8% to 7% which increases the annual funding requirement by 14% of payroll or 482 million dollars (3029). In fact, some cities do not contribute the appropriate annual contribution to their police pension funds, the PBA observes (3027). Also, unlike New York, some cities cited by the City bargain annual rates of pension contributions. Furthermore, the PBA points to Nadol's recall that even where unfunded pension liabilities differ, cities pay down this obligation over a varying number of years (2258).

As if there were any doubt regarding the dubiousness of including pension costs when comparing jurisdictions, the PBA argues that the City's purported 2014 pension costs for police officers is vastly overstated. Noting that the Police Pension Fund include all NYPD ranks and that superiors earn more than rank and file officers, it argues that the inclusion of superiors' salaries grossly inflates the costs of the pension that the City is attributing to the PBA unit. This overstatement is compounded by the reduction in pension benefits for officers hired in 2009 and again after April 1, 2012, the PBA notes. Forty percent of them are in the new tiers while virtually none of the superiors are. Given this evidence, the PBA submits that the true pension cost is approximately 25% of wages rather than the City's estimate of 67 percent. Indeed, it suggests, the 25% figure does not reflect normalization, which is necessary to compare pension costs across jurisdictions. Moreover, it alleges, this figure will be further reduced to 16% as more post-April 2012 officers swell the ranks of the bargaining unit.

Equally misleading is the City's analysis of health benefits among comparable jurisdictions for

numerous reasons, according to the Union. It maintains there is no basis to include retiree health premiums as a component in per capita cost for employing police officers.

Also, the PBA argues, the City's eleven year costing model overstates the costs of its [PBA's] proposal. Similarly, the City has inflated its savings to claim pattern conformance, as the Union sees it.

In addition, the PBA suggests that the City spent less than six of nine local jurisdictions in 2014 to provide health benefits to active and retired police officers. Similarly, it argues, City witnesses have claimed, "There is no basis for an assumption that costs to the City are equal to the value of health insurance..."<sup>11</sup> Other management witnesses have conceded that their analysis of health costs does not account for differences in:

- formularies and prescription drugs;
- employee deductibles;
- out-of-pocket retiree costs;
- regional differences in health care costs.

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<sup>11</sup> PBA Exhibit 15-239.

Nor has the PBA ever endorsed the use of total cost across comparator jurisdictions, it insists. In this context, it cites Commissioner Linn's testimony regarding his role in the 2002 interest arbitration round. The PBA notes that its brief in that proceeding specifically rejected benefit comparisons among different geographical units because they had no "rational connection to the actual value to employees or to the setting of salary levels (emphasis in the original)."<sup>12</sup>

Also unsound are the City's attempts to establish that retirement benefits in NYC exceed those elsewhere, the PBA alleges. This is so, it stresses, because that analysis excludes local jurisdictions, details a single set of circumstances among many and fails to recognize that officers hired in Tiers 2 or 2R will have the same or lesser benefits than most of those hired elsewhere. Further, the PBA notes, the analysis excludes the many Officers who receive disability retirement benefits and makes no reference to survivor benefits or "drop" plans (2325).<sup>13</sup>

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<sup>12</sup> PBA 15-202.

<sup>13</sup> A drop plan permits an officer to receive his/her retirement benefit and to continue working without counting later service toward retirement.

Finally, on this issue, the PBA submits that the City did not normalize pension costs as a percentage of pay only. Such a process would appropriately remove the unfunded liability and other costs that move over time and would more accurately reflect the true value of retirement benefits to police officers, it urges. For these and related reasons the PBA asks the panel to give no weight to the City's data regarding comparative retirement benefits in different geographical areas.

Also incomplete is the City's net take home pay analysis, in the Union's view. That examination does not account for inter-city cost of living differences and deductions which reduce an officer's net pay, it alleges. Thus, the PBA indicates, state, local tax and FICA deductions are not included while at least seven of the City's comparators (six Texas municipalities and Jacksonville, FL) have no income tax.

In light of these factors the PBA concludes that its comparators are more relevant than the City's and that its analysis of all jurisdictions (regardless of which comparators are utilized) is entitled to far more weight than the City's.

The PBA then turns to "ability to pay," another Taylor Law criterion. It suggests that the City has substantial resources to fund a market based wage for its members. Citing the testimony of Jonathan Rosenberg, former Executive Director of Budget in the NYC Comptroller's office, it maintains:

- over eight billion dollars is available in fiscal year 2016 to grant market based wages;
- this figure results from
  - a) unplanned tax revenues.
  - b) overestimation of debt service.
  - c) overestimation of general reserve revenues.
  - d) implementation of PEGS (Program to Eliminate the GAP).
  - e) re-estimation of prior year expenses.
  - f) surplus funds in the Retiree Health Benefit Trust Fund (883-896).

Moreover, the trend is towards greater revenues and better overall economic performance, the Union argues. It notes that from May 2015 to August 2015<sup>14</sup> revenue increased by \$814 million for FY 2015; and is expected to increase by \$191 million for FY 2016, \$422 million for FY 2017, \$425 million for 2018 and \$425 million for FY 2019.<sup>15</sup> Indeed, Scott Stringer, City

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<sup>14</sup> I permitted the PBA to update City budget projections to June 25, 2015, the last day of hearings.

<sup>15</sup> Changes since the May 2015 Financial Plan. PBA 15-276 [appended to brief].

Comptroller, has issued rosier predictions regarding the City's fiscal outlook.<sup>16</sup>

Moreover, the Union maintains that the City's strong economic performance is likely to continue into the foreseeable future. In this context, it refers to statements by Mayor de Blasio and Dean Fuleihan, OMB Director.<sup>17</sup> These remarks and accompanying data portend increasing future revenue and billion dollar surpluses, the PBA suggests. Therefore, it concludes, rather than an "inability to pay," the City has an "unwillingness to pay." Indeed, it notes my comment in another New York metropolitan area interest arbitration proceeding that the "ability to pay does not turn on whether that amount is presently budgeted..."<sup>18</sup> Consequently, the PBA asks me to reject what it regards as the City's specious claims of an inability to pay the desired increases.

Criterion 209.4(c)(v)(c) of the Taylor Law requires the panel to compare peculiarities of the jobs in question including "hazards of employment; physical qualifications, educational qualifications,

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<sup>16</sup> Comments on NYC's Fiscal Year Adopted Budget (July 30, 2015), PBA 15-277 [appended to brief].

<sup>17</sup> Cite omitted.

<sup>18</sup> Staten Island Rapid Transit Authority v. Local 1440, United Transportation Union TIA 2010-034; M2010-155.

mental qualifications and job training and skills." By any measure, these "peculiarities" require the panel to compare NYC's finest to other police officers, not civilian workers, sanitation workers, correction officers, firefighters, or to police superior officers, the PBA avers. Citing Arbitrator MacKenzie's holding that firefighters and correction officers and Arbitrator Schmertz's holding that a DC-37 settlement should not set "a special standard for determination of a police officer's pay,"<sup>19</sup> the Union insists that only an "apples to apples" comparison is valid. Other arbitrators in New York State jurisdictions, including this Chair, have reached similar conclusions, the Union maintains.

To prove the uniqueness of police officer duties, the PBA claims that numerous experts in law enforcement have testified that its members have substantially different and more challenging police work than in other jurisdictions (614, 635). Highlighting these differences are, among others, the greater call volume in NYC than Miami and Philadelphia, the greater number of calls during evening and night hours, the difficulty of dealing

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<sup>19</sup> PBA Exhibits 15-6; 15-7.

with repeated domestic disputes, numerous drug, organized and street crime situations, and the special protection required for the United Nations ambassadors and the international sites.<sup>20</sup> Most compelling, in the PBA's view, is the recall of Detective Steven McDonald, whose life and that of his family was irrevocably altered when he was paralyzed from the neck down when a teenager who he was questioning shot him in the head (271).

By contrast, the Union asserts that no City witness made any case for comparing the job of an NYC police officer to any other City worker, uniformed or not. As such, it concludes, the overwhelming evidence leads to the conclusion that PBA members have a unique role within the City which sets them apart from other workers.

Furthermore, the PBA suggests, the responsibilities of NYC officers have increased substantially over the years as their ranks were trimmed. New York City is the number one terrorist target, when years ago such threats did not exist. Even arguably non-terrorist threats have increased, including chemical, biological, radiological, nuclear and hazardous material ones, it observes.

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<sup>20</sup> Citations omitted.

Police officers now receive training in responding to active shooters as opposed to the past when they were required to respond to an emergency call. Other new training has occurred, including dealing with anti-opiate drug use, using electronic defibrillators and responding to persons with highly infectious diseases, the Union notes.

Apart from the increased duties cited above, other stressors make both the work and home life of a police officer more difficult, the Union insists. These include heightened public scrutiny, fear of being sued or called to account without a legitimate basis, all of which create a more difficult environment for a NYC officer. Yet, it maintains, these extra duties are being required despite inadequate staffing. As PBA President Patrick Lynch testified:

...[w]hen you don't have enough...boots on the ground, it makes it that much more difficult for police officers.

...if there's not enough staffing in the police precinct will the police department be able to effectively continue the renaissance of the City and keep a lid on...crime (147).

President Lynch's sentiments have been echoed by community leaders, including State Assemblyman David Weprin (2582) and Manhattan Borough President Gale Brewer (309), the PBA notes.

In sum, on this point, the PBA asserts that its members are in a crucial profession unlike any other; a profession which has become more difficult and complex and whose burdens fall singularly upon its officers. Thus, it asks the panel to award its wage proposal and thereby achieve the Goldberg standard of being among the highest paid officers in the nation.

The interests and welfare of the public also require that police officers here be among the highest paid in the nation, according to the PBA. As former Mayor Michael Bloomberg noted in the prior interest arbitration proceeding ... "[P]ublic safety is the foundation of our City's prosperity."<sup>21</sup> High-ranking NYPD officials and members of past mayoral administrations have echoed this sentiment, the Union observes. Particularly telling, in its view, is a reduction in crime that "previously [was]

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<sup>21</sup>MacKenzie tr. 1053-54.

unimaginable."<sup>22</sup> Indeed, as former Commissioner John Timoney recalled:

If you told me in 1989 what was about to happen [reduction in crime] in the next two and one-half decades, I would have committed you to Bellevue Hospital...(659).

In fact, the PBA contends the dramatic 73% decline since 1994 results from more committed police officers. While superior officers and new systems and techniques deserve some of the credit, it is the "boots on the ground" which are primarily responsible for making the City a much safer place (98). Without such efforts residents and businesses would have moved out and tourism would have declined, the Union argues.<sup>23</sup> Also, neighborhoods became safer and flourished as crime declined, resulting in a better quality of life and high real estate values, the Union contends.<sup>24</sup> A prominent example of this resurgence, according to John Dyson, is the lawlessness in Times Square which has been replaced by a thriving neighborhood and anchored by Disney Corp. investments in the area (1055-57).

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<sup>22</sup> Quoting Mayor de Blasio (PBA 15-5).

<sup>23</sup> 283, 1047.

<sup>24</sup> PBA 15-36; (1063).

The transformation of the City, fueled largely by a reduction in crime, has had a dramatic increase in City revenues, according to the PBA. Noting Mayor de Blasio's press release in March 2015, the PBA points to a \$3.7 billion increase in tax revenues. Fundamental fairness requires that police officers be amply rewarded for their role in improving the quality of life and economic vitality in the City, it concludes.

The PBA acknowledges the City's assertion that the pattern of settlements here requires the panel to award the same increases in this dispute. It asks the panel to reject this argument for several reasons.

First, it notes, the Taylor Law mandates a comparison between NYC officers' wages and those "performing similar services under similar working conditions in comparable communities." The phrase "comparable communities" means local jurisdictions both in and outside the City, the PBA argues, since beginning in 2000 dispute resolution mechanisms have come under the purview of the New York State PERB instead of the New York City Office of Collective Bargaining. Noting that unlike the Taylor Law, the NYCCBL refers to "other employees generally in public

or private employment in New York City or comparable communities, the PBA further argues that any recounting of the history of negotiations prior to 2000 is irrelevant. Thus, the PBA asserts, the Taylor Law requires comparisons with others in the police officer rank in local police jurisdictions, not with other City workers or police supervisors.

Also, the PBA maintains, the New Jersey cities it cites have similar demographics to New York; and Nassau and Suffolk combined have larger populations and police force sizes than many of the large national cities upon which the City relies.

The difference in language between the Taylor Law and the City's Collective Bargaining Law supports this view, the PBA submits. Specifically, it suggests, the Taylor's "comparable communities" delineation is far more expansive than the NYCCBL's reference to "other employees performing similar work and other employees generally in public or private employment in New York City or comparable communities."<sup>25</sup> Arbitrator Schmertz

emphasized this difference when he wrote the following, the PBA notes:

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<sup>25</sup> NYCCLB - Section 12-311c(3)(b)(i).

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 it because by its language it allows for comparison either with New York City employees or those in comparable communities. The Taylor Law does not provide for and "either-or" option. It requires comparison with employees in "comparable communities" and therefore, at least for this particular case, has a broader scope (emphasis in the original)."<sup>26</sup>

Consequently, Arbitrator Schmertz rejected the City's claim that the DC-37 contract (non-uniformed personnel) should be applied to police officers, the Union observes. Additionally, the PBA cites the requirement in the Taylor Law that the panel consider hazards of employment, physical qualifications, educational qualifications, mental qualifications and job training skills,<sup>27</sup> a requirement not found in the NYCCBL.

To highlight the importance of these distinctions, the PBA cites Mayor Rudolph Guiliani's letter urging a veto of the bill transferring jurisdiction to PERB.

This possibility [of garnering larger increases] has fueled the PBA's latest attempt to circumvent the realities of parity and pattern bargaining in New York City through amending the Civil Service Law

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<sup>26</sup> PBA 15-7.

<sup>27</sup> Ibid

even though it is these two principles that have served to stabilize the collective bargaining process in New York City.<sup>28</sup>

Arbitrator MacKenzie affirmed this view when, after every single other uniformed union had settled for the pattern, she opined "...strict adherence to the pattern urged by the City...would not result in a just and reasonable determination," the PBA indicates.

Furthermore, the PBA argues that the City's concept of a controlling pattern is self-serving, for it allows the employer to select a targeted union and then insist that all others conform to the terms of the ensuing agreement without regard to such Taylor Law criteria as comparable community pay scales for individuals performing similar work. In this context, it observes, not until March 23, 2015, long after interest arbitration was invoked here, did the City offer the so-called "uniform pattern (1984, 87)."

Given these circumstances, the PBA insists that adopting the City's pattern proposal would have a twofold deleterious effect by (a) permitting the City to avoid paying the market wages the Taylor Law demands and (b) permitting the City to manipulate it [pattern] for its [City's] own purposes as to length

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<sup>28</sup> PBA Ex. 15-18.

and differential, if any, to be applied to police officers.

Equally unpersuasive in the PBA's view, is the City's claim that deviating from the pattern would wreak havoc on labor relations. Suggesting that the City has used this argument in the three prior interest arbitration rounds, the PBA cites the following data:

Round	City Claimed Union Sorting Pattern	Net Cost of Pattern	Net Cost of PBA Award	Percentage PBA Award above Pattern
Eischen	Uniformed Unions	10.03%	12.35%	23.13%
Schmertz	DC 37	4.17%(3 years)= 2.78%(2 years)	6.01%(2 years)	116%
MacKenzie	USA	6.24%	7.41%	18.75%

In these cases arbitrators awarded increases exceeding the City pattern by as little as 18.75% and as much as 118%, according to the PBA. Yet, it concludes, the labor relations' paradigm did not crumble; instead other unions bargained for additional (though not truly "catch up") items in subsequent rounds or re-opened their contracts to achieve parity at max pay by the end of the contract year, with police officers.

In sum, the PBA suggests, "The panel should not be intimidated by the City's warnings." (brief, p. 170).

The PBA makes a series of non-base wage proposals, which, it contends, are necessary to help

provide officers market based compensation. They are summarized below.

1. a) Education Pay - differentials of 10% for an Associates Degree, 60 college credits or military service; 15% for a bachelor's degree or 120 credits; 20% for a Master's or post-Graduate degree.  
  
b) Training and experience pay for officers who do not receive the differential in (a) of 10% upon completion of programs accepted by the Union and the NYPD.

Noting that better educated and trained officers contribute to better policing, the PBA asks the panel to adopt these proposals.<sup>29</sup>

2. Terrorism Differential - 10% increase in recognition of the increased or enhanced workload, training and heightened risks resulting from terrorism threats and related incidents.

This proposal is justified since New York City and its officers are the number one target of terrorists and others seeking to inflict widespread harm here, the PBA avers, noting that other NYS and national jurisdictions grant a similar differential.

3. Patrol Assignment Differential Pay - A differential of 12% of base pay to Officers with eight or more years of service and who perform a patrol function.

Recognizing that patrol is the backbone of the job and the face and ears of the Department requires a corresponding differential, the PBA asserts.

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<sup>29</sup> PBA 15-182; 15-108.

4. Vacations

- (a) Equalizing vacations for officers hired between July 1, 1998 and June 30, 2008 to pre-July 1, 1998 levels.
- (b) Permitting officers to donate part or all of his/her accumulated time exclusive of sick leave, to another officer in his/her command subject to the approval of their commanding officer.

Early years on the job tend to be most stressful for officers, according to the Union. Yet, it notes, pursuant to the MacKenzie Award those hired on or after July 1, 2008 had their vacation days halved, despite working side by side in the same difficult position as more senior bargaining unit members, the PBA points out. It also suggests that though some days were recaptured in later rounds, the days should be equalized with more senior officers.

5. Work Schedule

- (a) The adoption of a "modern" chart of ten or twelve hour tours or any combination thereof which would result in fewer appearances while maintaining the current 2088 hours.
- (b) The creation of a joint labor-management committee to devise the components of the "modern" chart.
- (c) Sharing the savings created by the new chart among all active police officers.

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As the Union sees it, the ten hour chart would provide significant benefits and operational efficiencies to officers and the Department. For example, according to John Gerrish, former Commanding Officer of OMAP, it would better match resources with

operational needs; i.e., more cars could be deployed during peak crime hours (720-25).

Also, the Union argues, there would be fewer breaks since appearances would be reduced,<sup>30</sup> thereby increasing productivity. Moreover, it reasons, while the City did not offer evidence as to how the ten hour tour would result in greater costs, the Independent Budget Office estimated increased productivity of 5 to 10%. Finally, on this proposal, the PBA notes that a number of local and national jurisdictions have adopted the 10 or 12 hour tours.

6. Home Confinement While on Sick Leave

Making permanent the program adopted in 2008 which limits home confinement to an officer's regular tour makes sense, the PBA insists, since experience under the pilot program has been positive and improves officer morale.

7. Payment for Holiday Work

Seeking Martin Luther King as a paid holiday, the PBA argues for this proposal, which is in the Sanitation Agreement and recognizes the significance of this day in a multi-cultural work force and in the City.

8. Prohibition Against Self Help

The NYPD may not recoup any monetary overpayment unless:

a) The officer is notified in a writing which includes a detailed analysis of the amount sought and the reasons therefore.

b) The officer may respond to the notice within 30 days after receipt.

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<sup>30</sup> The PBA does not seek an increase in the number or length of breaks in the ten hour tour.

- c) The Department shall reply within 30 days thereafter.
- d) If the Department still believes the recoupment is incorrect it may reduce the officer's pay accordingly so that no more than 10% of net pay, minus court ordered child support payments, is withheld in any single pay period.

This proposal is necessary, the PBA suggests, because in less than nine years the Department has had to recoup over \$12 million. In a number of cases, it asserts, no prior notice of withholding has been provided and in virtually no case was the overpayment due to police officer error.

9. Longevity Pay

- a) After 22 years of service an additional \$2,000, increased by gwi's (general wage increases) and which is pensionable.
- b) 15 year and 20 year longevity adjustments to be made pensionable upon completion of 20 years of service.

The PBA argues this proposal is justified because newer officers are in less beneficial retirement tiers. To retain their valued service and that of those hired prior to 2009, the PBA seeks its adoption.

10. Health and Welfare Fund

Effective August 1, 2010 an additional annual \$200 per active officer and retiree, which sum is increased by future general wage increases.

Increasing the current fund by \$200 will ensure its financial health, the PBA maintains.

11. Annuity.

Convert the current \$522 annual payment to 2% of basic maximum salary.

Applying a percentage to the annuity, as opposed to a flat dollar amount, guarantees that this benefit does not decrease in value as time goes on, the PBA alleges.

12. Uniform Allowance - 2% of basic maximum salary.

The current allowance - \$1,000 - has not changed since 1989, the PBA notes. However, the costs of uniforms and required equipment has increased significantly since then. Accordingly, it asks that this proposal be awarded.

13. Sick Leave Incentive Program

The PBA makes the following proposal: The Department shall adopt an annual program for limited use of non-line duty sick leave in accordance with the below listed chart, awarding to each police officer the amount indicated for using the corresponding number of sick days.

Utilization (Days)	Payout
4	\$100
3	\$200
2	\$400
1	\$800
0	\$1600

This proposal will increase morale and incentivize officers to report for duty rather than use their sick leave.

14. Seniority

Seniority shall be the primary factor in the selection of shifts, discretionary assignments, vacation picks and in the awarding of overtime.

Seniority is a common method in granting these types of benefits, the Union maintains. Moreover, such an objective system will increase the confidence Officers have when these assignments are awarded.

15. Job Related Parking Privileges

a) On-duty officers shall be provided with no cost, reasonably situated parking facilities.

or

b) Article XVI, Section 2 of the Collective Bargaining Agreement shall be subject to the grievance procedure set forth in Article XXI.

Either the City has to provide reasonably situated no cost parking or it has to be required to live up to its current agreement regarding parking, in the PBA's view.

16. Interest

Interest at the rate of 3% where the wages, longevity, etc. have been due and owing for 30 days or more and where each exceeds \$5 in value.

Such a result would expedite the collective bargaining process, as the PBA sees it.

Finally, with respect to all of its supplemental proposals, the PBA contends they are meritorious, as indicated above. Moreover, it alleges, the City has

provided no rationale for their rejection.

Accordingly, it seeks their adoption as presented.

City

The City contends a "just and reasonable" Award can only be achieved by adopting its proposal. Numerous officials, including Mayor de Blasio, testified that all municipal unions must be treated equitably, the City points out. "Pattern bargaining," it argues, "represents a recognition of the importance of all the people who work for the City of New York (2046). That recognition has resulted in civilian and uniform settlements for 83% of the work force, it observes. This is especially significant, it opines, given the recent firefighter settlement which continues wage parity with police officers begun in 1898.<sup>31</sup>

Breaking this pattern would wreak havoc on the entire system of labor relations in the City, it insists, by destroying a collaborative, respectful approach to collective bargaining. Noting that there are some 337,000 represented public employees in this jurisdiction, all of whom provide vital services to the citizenry, the City contends that all must be treated equitably.

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<sup>31</sup> That settlement has not been ratified.

Deviations from this form of treatment occurred in 2009, the City suggests, when the former administration abandoned its own pattern of 4% and 4% raises resulting in the cessation of meaningful collective bargaining with its unions (2889). Consequently, it notes, not a single contract was resolved when Mayor de Blasio took office on January 1, 2014. Only when internal equity was maintained were City unions re-acquainted with the principles laid out in the 1968 Goldberg report which issued separate reports for police, fire and sanitation workers, all recommending the same wage increases.<sup>32</sup> Also, as Arbitrator Glushien opined in 1980, if one union

can break the pattern which has governed everyone else, it would be rewarded for its obduracy. And it would create a catastrophic potential.<sup>33</sup>

Internal equity (the pattern) continued until 2000, though a uniform differential applied in 1980-82, 1982-84 and 1984-87 rounds of bargaining (1739-43). In fact, the City notes, the 1987-90 contract was settled first by the PBA, with others following suit (1746).<sup>34</sup> Moreover, for 1990-91 an interest

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<sup>32</sup> PBA Exhibits 15-14.

<sup>33</sup> City of New York and Local 3, October 8, 1980.

arbitration panel imposed the civilian pattern upon police officers (1747).

The City acknowledges that the first arbitration panel under the Taylor Law ordered an Award which exceeded the pattern. However, it urges, the break occurred because the panel was constrained to issue a two year Award, while other unions had accepted the same raise over thirty months.<sup>34</sup> In the City's words, "...the ideal award would have resulted in complete equity between the PBA and the other uniformed unions." (brief, p. 18). Though the net cost exceeded the uniformed pattern, it maintained vertical parity with superior police officers and horizontal parity with other uniformed personnel, the City observes.

In the 2002-04 round the issue of parity among the uniformed ranks did not arise since only the DC 37 contract had been settled at the time, the City notes. As to the MacKenzie panel (2004-06 round), other settled unions had "reopeners" at the time that Award was issued. Therefore, the City suggests, the issue of internal equity was a non-factor since those unions could and did reopen their contracts after the PBA

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<sup>34</sup> City Exhibit 8.

Award was issued. Notably, the PBA did settle 2006-08 and 2008-10 contracts which were truly pattern conforming, the City claims (1757, 2879-80). In sum, it urges, internal equity among uniformed unions was maintained for 30 years preceding the 2000-02 round and thereafter. As the City sees it, then, for some 50 years not a single voluntary settlement or interest arbitration award endorsed or supported the notion that one uniformed union should get more than any other.

Furthermore, the City argues, its proposal in this dispute is consistent with internal equity. Faced with the absence of any settled contract, the City was nonetheless able to settle agreements which retained the 4% and 4% raises garnered in the 2008-10 round and provided for a payout of those increases over time so it could absorb their economic impact in a reasonable manner, it submits. By reaching this compromise, the UFT, whose contract had expired in 2009, recognized the necessity for internal equity, the City asserts. As a result of this agreement, which expires in 2018, other unions, uniformed and not, adopted conforming contracts, it posits, except that the uniformed personnel received a 1%

differential above the civilian package. Ultimately, it notes, 83% of the represented work force has agreed to this settlement.

To deviate from this pattern would do significant damage to labor relations generally and its relationship with the other uniformed personnel specifically, according to the City. Giving the PBA more would heighten acrimony between it and the other uniformed leaders and would render it unlikely that voluntary settlements could be achieved in the future, according to the City.

A review of the 2000-02, 2002-04 and 2004-06 rounds justifies a pattern conforming award here, as the City sees it, because:

1. In 2000-02, the internal equity was maintained but because the panel was restricted to a finding of two years instead of 30 months, the net cost exceeded what the other unions agreed. After contentious bargaining, those that had settled (SBA and DEA) ultimately accepted what they previously agreed to.
2. In 2002-04, the Schmertz panel awarded two 5% raises but severely reduced the starting step for new officers at a savings of 4.24 per cent. Consequently, superior officers did not benefit from this change.<sup>35</sup> Thus, a

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<sup>35</sup> Superior officers promote through the ranks so a reduced entry level salary for PBA members does not affect them.

number extended their contracts, others modified their salary schedules, added work days and time to each day, etc.

3. In the 2004-06 round Sanitation settled first for raises of 6.24%. In 2007, while the PBA and the City engaged in negotiations and interest arbitration for the 2004-06 round, the UFA and other uniformed unions settled for 4% and 4% plus 1.47% of additional funding for the 2006-08 round and then 4 and 4% + 1.59% of additional funding for the 2008-10 round.

As a result of this round, non-PBA unions received raises consistent with the MacKenzie finding, with painful concessions, including compression of the differences in the police ranks, so much so that in some cases PBA members were making more than their superiors.

4. In the 2006-08 and 2008-10 rounds, the PBA accepted the patterns that had been previously established by the uniformed unions, via a 2006-10 Agreement.

What all this means, according to the City, is that bargaining among uniformed unions is inextricably intertwined. To restore a sense of confidence among these unions it is necessary for this panel to award pattern conforming wage and benefit increases for the 2010-12 round, the City insists. In its words:

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It is a truism that pattern bargaining allows labor leaders in a multi-unit world the security to be able to step forward and reach an agreement without fear of being victimized because a later-settling union out did it. (Brief, p. 42).

A larger than pattern award would have other deleterious effects, the City suggests. It has great social and economic needs and constraints, including cleaning the streets, educating children, improving the infrastructure, caring for those unable to help themselves and improving the overall quality of life. To spend reserves on labor costs is to render these laudable goals nearly impossible, according to the Mayor (1412).

The City acknowledges it has undergone an economic recovery in the last four years. However, as Budget Director Dean Fuleihan noted:

Even if there is no recession over the next few years and we continue in this weak recovery, if we do not invest in the City, if we do not take urgent action to improve the situation of almost one in two citizens who are at or near poverty, we will have failed them and the City (2454).

In light of these factors, the City insists it cannot meet or come close to meeting the PBA's demands. Even the recovery is fraught with danger, given the low rate of growth in 2015, very poor growth in Japan and

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prognostications of a "sharper slowdown in China."

(Dardia testimony, at 2553-54). Thus, it concludes,

to accept the PBA's claim of continued economic growth

would be "sheer folly" (brief, p. 50), especially since NYC's tax revenues are particularly volatile.<sup>36</sup> The volatility of revenue projections is especially great here, the City suggests. This is so because our tax base is highly concentrated among few areas - notably Wall Street.<sup>37</sup> Similarly, it notes, the top 1% of residents pay approximately half of personal income taxes. Many of them earn Wall Street bonuses. Thus, the City reasons, a decline in the finance industry would have a huge impact on its revenue and reserves. Real estate revenues are similarly unpredictable, it insists. Overall, it argues, predictions by the PBA of continued economic growth are unfounded and without sound support. Indeed, if the 2001 recession were replicated, predictions of increased tax revenue would be astoundingly incorrect, it concludes. This precipitous revenue decline occurs in all recessions, the City posits,<sup>38</sup> a decline which the PBA has failed to predict in the past.<sup>39</sup>

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<sup>36</sup> See 2008 and 2009 projected growth rate of 2.20% and 2.70%, respectively when there was a contraction of .30% and 2.80%, respectively. City Exhibit 14.

<sup>37</sup> City Exhibit 15.

<sup>38</sup> City Exhibit 15.

<sup>39</sup> City Exhibit 15, 2538-39.

In sum, on this issue, the City asks the panel to be cognizant of a possible recession in the near term. To do otherwise would leave it with Hobson's choices of freezing hiring, eliminating social service contracts with outside vendors, headcount reductions through attrition and tax increases (2541-42).

It is true it has the power to tax, the City notes. However, it argues, the current tax burden is at a historically high level - 9.8%. Not since the 1970's fiscal crisis has the burden been so high. As such, it insists, when (not if) the next recession arrives, its ability to raise taxes will be severely restricted. Also of concern is dwindling Federal and State aid, down from a high of 38% of revenues in 1980 to less than 28% in 2013, the City notes (2462). Even less outside assistance will be available in the event of an economic turndown, it predicts.

Under these circumstances, the City contends its current financial plan is realistic by projecting gaps of \$1.572 billion in FY 2016, \$1.967 billion in FY 2018 and \$2.881 billion in FY 2018. When matched against the cost of the PBA's proposals which exceed \$5.3 billion and \$14,876 billion if applied to all

uniformed personnel, the absurdity of the PBA's position becomes clear, according to the City.

Furthermore, the City argues, its financial plan projects realistic gaps and assumes the application of the pattern to unsettled groups. Any deviation ordered by this panel, as the City sees it, would imperil that plan.

In addition, it has already made a considerable investment in upgrading the police, the City alleges, by adding:

- \$29 million for enhanced training;
- \$21 million for replacing all bullet proof vests over five years old;
- \$14 million for Operation Summer All Out initiative;
- \$9 million for body cameras;
- \$89 million for technology upgrades;
- \$140 million for the mobile device initiative;
- \$101 million for the upgrade in Housing Authority security;
- \$20 million for network upgrades;
- \$13 million for training;
- \$500 million in additional police capital improvements.

These expenditures demonstrate an ongoing commitment to improving the Department to the benefit of its members and the public whom they serve, the City submits.

Challenging the PBA's assumptions of growing surpluses, the City insists that they are necessary to balance subsequent years' shortfalls. In fact, it suggests, PBA witnesses conceded as much (Rosenberg testimony, 884-85). Prudence, then, requires it to maintain a meaningful surplus to balance future budgets, a requirement mandated by law, the City concludes.

The City also asks the panel to reject the PBA's arguments in favor of abandoning the uniformed pattern. For the Union to prevail, the City opines it [PBA] must establish unique and critical circumstances which would justify doing so.<sup>40</sup> No such factor exists here. Rather, the City argues, any disparity between New York Police Officers' compensation and those in nearby jurisdictions can be addressed in the normal course of bargaining. This is so, it stresses, because it expends over \$178,000 per year to compensate a police officer. A number of benefits

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<sup>40</sup> City Exhibit 9.

this sum funds could be diverted to direct compensation and could still provide PBA members with an excellent fringe benefit package.

This is why, the City alleges, the PBA attempts to exclude fringe benefits from any comparative analysis of relevant jurisdictions. Such an attempt is misguided and ignores economic realities today, it urges. Moreover, the Taylor Law requires the panel to consider the full compensation package received by officers, including "insurance and retirement benefits, medical and hospitalization benefits." <sup>41</sup> According to the City, that package includes:

(adjusted to 2014 including the pattern)

health benefits - full individual and family coverage with no employee premium and superior benefits;

welfare fund - \$1,579 per employee;

retiree health plan - same as active employees until Medicare eligible: 100% reimbursement for Medicare Part B for retirees and dependents;

pension benefits - 50% of final average pay after 20 or 22 years of service depending on date of hire;

variable supplement fund - guaranteed benefit of \$12,000 per retiree;

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<sup>41</sup> NYS Civil Service Law Section 209(4)(c)(v)(d).

annuity - \$522 per officer per active year of service that provides a supplemental annuity or lump sum upon retirement;

social security - full coverage and payment of 6.2% of wages as the City's share;

transportation - free passage on subways, buses and Long Island Railroad and Metro North trains.<sup>42</sup>

These benefits are very generous, the City insists. In some cases, they surpass comparable payments in all or nearly all other national cities. They total some \$94,000, in excess of direct compensation of \$83,976 (excluding overtime). These figures, it argues, represent the true cost of funding for police officers, as set forth in the Taylor Law. Citing the testimony of Stephen Berger, former Executive Vice-President of GE Capital, "Anyone who believes that total cost does not matter has never actually had to make a payroll (2427)." Even PBA witnesses acknowledge the necessity of including fringe benefits in employee costs, the City posits (528-533). Nor should the panel be persuaded by Professor Hurd's claim that prospective hires do not focus on benefits when choosing police jobs, in the City's view. This is so because of the Taylor Law's inclusion of fringe

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<sup>42</sup>City Exhibit 10.

benefits as part of overall compensation and Professor Hurd's acknowledgement in the UFT factfinding hearing that professionals look at retirement benefits and the like before accepting new jobs (501-03). Similarly, the City suggests, the Goldberg standard advanced by the PBA discussed fringe benefits at length (189). Thus, the City concludes, any meaningful comparison of relevant jurisdictions must include all forms of compensation, direct and indirect.

That analysis demonstrates that police officers are properly compensated, as the City sees it. It asserts that since 2000 its relative fringe benefit costs compared to national and local comparators has increased sixfold, from 16% above the national average to 110% above it; and from 6% above the local average to 38% above.

Equally baseless is the PBA's claim that pension contribution should not be considered in an examination of comparator benefits, as the City sees it. Pension contributions have remained high for many years.<sup>43</sup> Also, these rates ("CAFR rates") represent a real cost, however much they may vary, the City urges. In fact, they have averaged over 60% of wages for a

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<sup>43</sup> City Exhibit 8.

substantial period of time, it notes. Thus, and consistent with Taylor Law criteria, they must be given substantial weight in this proceeding, according to the City.

The wage and benefit cost structure must be compared against national cities, not local jurisdictions, in the City's view. This is so because, according to the City:

- only larger cities have similar demographics and fulfill similar human needs;
- "local markets" as championed by Professor Hurd, is not a phrase contained in the Taylor Law. "Comparable communities" i.e., national cities, is;
- most local jurisdictions have tiny police forces and few dense urban environments;
- the police officer per 1,000 citizens ratio here is approximately twice that in Nassau, Suffolk and Westchester Counties;<sup>44</sup>
- These counties are far wealthier than NYC.<sup>45</sup>

Nor do these other communities' pay set the market rate, for NYC police officers, according to the City. It has no trouble recruiting and keeping

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<sup>44</sup> City Exhibit 10

<sup>45</sup> Ibid.

recruits because wages are higher elsewhere. Rather, any recruitment/retention problems result from the delay in processing applications and certifying individuals as fit for service, it alleges.

The City acknowledges that the Port Authority and MTA's overall compensation to police officers exceeds police officers' here. However, it argues, the Port Authority is "close to a for profit enterprise, the labor market has no bearing on wages there and it is highly politicized."<sup>46</sup>

As to national comparators, the city notes it ranks third among cited cities and 149% above that average (excluding NYC) (1694-95), as reflected in this chart:

	A	B			A+B=C	B/A	
	20 Year Average Total Direct Comparison	Fringe Benefits			Total Benefit Costs	Total cost	Benefits as % of Direct Comp
		Health	Retiree Health	Pension & FICA			
National Average (w/o NY)	\$75,099	\$11,899	\$6,645	\$26,590	\$45,135	\$120,234	60.1%
New York City	\$63,976	\$14,718	\$16,742	\$63,254	\$94,714	\$178,680	112.8%
NYC as % of Avg	111.8%	124%	252%	236%	210%	148.6%	

Moreover, the City insists, its relative standing among national cities has improved over the last 15

<sup>46</sup> See testimony of former Port Authority Executive Director Stephen Berger (2049) and Stanley Brezenoff (2439-40).

year by increasing from 17% above the national average to 46% above for total compensation costs.<sup>47</sup>

Even if only direct compensation is examined, the City compares favorably to national comparators, by being 13% above that average (as of July 31, 2010) and 14% (as of July 31, 2012) if the pattern is applied, according to the City. Similar results exist on a per hour basis, it suggests. These differences reach as high as 26% if social security is factored in,<sup>48</sup> it observes.

Also to be considered is the quality of the benefits offered, the City maintains. Its defined benefit pension plan is superior to virtually all other national comparators, including post April 2009 hires, it argues. Examples of the superior benefits, are, according to the City:

- one year Final Average Salary ("FAS");
- overtime included in FAS;
- smallest employee contributions, 0-3.55% while others range between 5 and 14%;
- no minimum age requirement for full pension;

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<sup>47</sup> City Exhibit 20.

<sup>48</sup> New York City is only one of two national jurisdictions which participates in Social Security.

- VSF benefit of \$12,000 per year, far in excess of the only three cities which provide a supplemental payment.<sup>49</sup>

Dr. Erath's illustration of an officer who joins the force at an early age and retires when first eligible for a full pension demonstrates the comparative value of these benefits, the City urges.<sup>50</sup>

In this context, the City criticizes the testimony of PBA expert Brad Heinrichs that different plans contain different "assumptions," thereby rendering its [City's] analysis highly misleading. Rather, the City maintains, even if Heinrich's "normalization" process is utilized, its normal cost is 25% compared to the national average of 14.7%, or 75% higher. Also invalidating Heinrich's conclusions is his failure to take into account the present value of payments (3299). When that error is corrected, NYC's pensions are worth 151% of the national average, even if the rest of Heinrich's analysis is credited, the City alleges (3294-95).

For these reasons, the City concludes that its fringe benefit package, both as to cost to the employer and benefit to the employee, is richer than

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<sup>49</sup> City Exhibit 12.

<sup>50</sup> Ibid.

the national cities' average. Also, it argues, even if local jurisdictions are considered, it fares well. Total compensation exceeds the local average by 6%, and health benefits exceed those in other locales, such as the MTA and the State of New York, it contends. Furthermore, the City claims, since 2002 NYC's standing among local jurisdictions has improved since overall compensation has risen 158% while the average rose 104%.<sup>51</sup> Consequently, it concludes, the Taylor Law criteria mandate a ruling consistent with its proposal.

As to cost of living adjustments, the employer concedes that New York City can be an expensive place to live. However, it insists, a number of the components which make for a high CPI index here are inapplicable to police officers. This is so, it stresses, because members of the bargaining unit enjoy free public education, no health premiums for individuals and their families and free transportation on the MTA's mass transit and commuter rail systems (2333-42). As to housing, an admittedly high cost item in the City, the employer suggests that the PBA's index overstates its impact by not including diverse

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<sup>51</sup> City Exhibit 20.

areas in the five boroughs, as well as the six outside counties in which officers may live.

Other factors render the PBA's CPI figures suspect as they apply to this dispute, according to the City. Characteristics of the local work force, climate, commuting patterns, amenities of the area and other criteria are also at work, it contends. Indeed, sound and unrebutted evidence suggests that other than BLS-CPI data should be used, it urges, including Federal Locality Pay (2106-07), BLS Occupational Pay Relatives and CPS Differentials (2109-13; 2317-18). These data reveal that national cities' wage levels were anywhere from 89.2% to 93.6% of New York's while, according to Professor Hurd, the cost of living in the comparator cities was 71.3% of New York's. Thus, it urges, one cannot simply adjust pay by CPI differentials, yet that is what he did. In fact, it insists, the great majority of employers who utilize some cost of living data in setting salaries do not rely upon BLS-CPI figures. In prior arbitration proceedings the PBA used similarly misleading indexes, the City suggests.

The PBA's cost of living adjustments are also flawed for the following reasons, the City maintains:

1. The Aten study relied upon by the PBA exaggerates differences between New York and other cities because it includes only the five boroughs here and metropolitan areas larger than the cities' borders elsewhere;
2. The BLS itself has cautioned against using local indices for comparative purposes (2325-28);
3. Individual components (e.g., medical, apparel, education, food and beverage, recreation) vary greatly;
4. Food prices are lower in New York and other large cities than Professor Hurd claimed;
5. Even Professor Abraham's normalization of health costs is flawed because the national average is still above the zero cost of premiums for police officers (3281).

Taking these factors into account means that a wage differential index is a more meaningful comparison of compensation, the City posits. Applying this index yields the following calculations, according to City experts.

**% by Which Overall City Compensation Exceeds  
National Average**

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Federal Locality Pay Index - 44%  
BLS Occupational Pay Relations - 38%  
CPS Differential Index - 42%<sup>52</sup>

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<sup>52</sup> City Exhibit 10.

Other elements need be considered when comparing total compensation here to other locales, as the City sees it:

- a) far more opportunity to promote into the higher ranks here than elsewhere, even on a proportional basis;
- b) Raises in this unit have exceeded the increases in the CPI and the ECI ("Employment Cost Index");
- c) Its proposal, when combined with actual raises since 2000, exceed increases in the national and local CPIs.

For these reasons the City asks me to adopt its wage proposal as presented.

Concerning other PBA demands, the City seeks their rejection as follows:

A. Work Schedules - increasing tour length and reducing the number of appearances deprives the Department of needed flexibility in deploying its force and increases overall costs by 17.48% (2820-23).

B. Terrorism Workload and Safety Risk Premium

This proposal was rejected in the three previous interest arbitration proceedings and there is no new evidence to support it now.

C. Longevity

The 2.09% cost of this proposal is not justified.

D. Annuity and Uniform Allowance

Converting flat dollar payments to percentages is costly and guarantees increases as wages go up. No other uniformed union has these stipends tied to wages.

E. Health and Welfare Fund

This is another economic demand which no other bargaining unit receives. Consequently, it is not justified.

F. Sick Leave Incentive Program

There is no evidence such a program would reduce sick leave usage and no other uniformed union enjoys this program.

G. Patrol Assignment Differential Pay

There is no evidence that current patrol levels are inadequate and this proposal is simply a hidden form of a pay increase. Thus, it should not be adopted.

H. Home Confinement on Sick Leave

This was instituted on a pilot program and the parties should be left to make it permanent if they wish.

I. Vacation and Payment for Holiday Work

These are too costly to be implemented.

J. Prohibition Against Self-Help

The current procedure gives Officers appropriate notice of impending recoupment of overpayment. There is no need to change it.

K. Seniority

This proposal increases overtime costs and impedes the Department from choosing the best suited individual for the assignment in question.

L. Parking Privileges

There is no evidence in the record to support this proposal.

Accordingly, the City asks the panel to adopt its wage proposal and reject the PBA's non-wage demands.

**DISCUSSION AND FINDINGS**

Several introductory comments are appropriate. There is no doubt New York City's "finest" are just that. Police must keep the peace by apprehending those wanted for the commission of crimes. They are also charged with preventing crime by being watchful and alert to situations which may produce criminal activity.

At the same time, the City's police officers are also under the watchful eyes of numerous entities. These include District Attorneys, Federal prosecutors, elected officials, the Civilian Complaint Review Board and others. Indeed, in an age of cell phones, virtually every act of commission and omission is subject to ongoing scrutiny. Police officers walk a

dangerous tightrope between protecting the public and being sensitive to ongoing oversight.

These comments should not be dismissed as empty rhetoric. I speak for the entire panel in appreciation of the demanding task facing PBA members.

This does not mean, however, that the panel is free to award raises sought by the PBA. As all are aware, we derive our jurisdiction and authority from the Taylor Law. Section 209.5(v) lists some of the criteria we must apply in reaching a "just and reasonable" result. They are:

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 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.

This section of the statute lists no other criteria but does permit the panel to consider other relevant factors. Thus, the list is not all-inclusive, but instructive.

Criterion (a) is perhaps the most heavily litigated of all four. It requires us to make a "comparison of the wages, hours and conditions of employment of other employees under similar working conditions...in comparable communities."

Much of the hearing testimony and evidence was devoted to this issue. The City asserted that the most comparable jurisdictions are within New York City, including but not limited to law enforcement groups within its confines. The Union countered by insisting that appropriate comparators are different agencies, some of whose law enforcement groups work side by side with New York City police officers and other locally based jurisdictions.

I have reviewed the record carefully on this issue. Based upon that review I find that New York City law enforcement groups are the most valid comparators for

the purpose of deciding what increases should be granted PBA members. This is so for a number of reasons.

First, obviously, these groups function within the same geographical jurisdiction. Police officers and other law enforcement groups here are assigned to identical localities. They face the same stresses, albeit on a supervisory level, as the individuals who work in their commands. Stated simply, there is no more "comparable" community than the City itself.

Also, there is the historical nexus between the PBA and other City law enforcement units to consider. Pattern bargaining among these groups has existed for a number of years. In those instances where the PBA attained more than other uniformed groups for the same time period, they have, through re-opener provisions, matched the PBA's. In other rounds, such as 2006-10, the PBA agreed to raises given the other uniformed unions, as well as other items not received by them, though the parties disagree as to whether these were funded by concessions. Stated simply then, regardless of who went first, the net costs of PBA agreements was the same as the net costs of other uniformed groups for similar periods of time.

Other factors point to the same results. The pattern of settlements reflects an internal equity among law enforcement groups. In the 2002-04 round the PBA achieved compensation improvements beyond what other groups achieved, though starting pay for new hires was substantially reduced. This occurred so that existing officers' raises could be increased. Superior unions could not lower their starting pay since their ranks were comprised of those promoted from the PBA's. Consequently, the superior officers gave up other economic items so as to mirror the wage increases achieved by the PBA.

What this all means is that there has existed a long term pattern of raises in PBA and non-PBA law enforcement groups within the City. That pattern should not be disturbed here, I find.

The PBA argued strenuously that the statutory change from OCB to PERB requires the panel to discount raises won by other City groups. I do not agree. It is true, of course, that the NYCCBL referred to comparisons between the unit at issue and other New York City groups. It is equally true that the Taylor Law, as a State statute, does not reference New York City bargaining units. However, that omission does

not mean any comparison to units within New York City is barred. Far from it. Just as, say, wage increases in the PBA unit in Nassau County may be analyzed in light of raises given superior officers there, so, too, may increases for the NYC PBA be viewed in the context of economic improvements awarded to superior officers here.

This is not to say that the NYC non-uniformed groups are an appropriate comparator to the police officers in the same jurisdiction. As noted above, Section 209(V)(c)(a) of the Taylor Law requires a comparison between the unit at issue with "other employees performing similar services or requiring similar skills under similar conditions...in comparable communities."

While DC 37 civilian personnel and teachers perform important duties, it cannot be said they perform in similar circumstances or must possess similar skills in similar circumstances. However, that surely cannot be said of other law enforcement groups. Sergeants, detectives, lieutenants and captains must possess the same skills as the men and women they supervise. They work in the same locales and are generally grouped in the same way (precincts,

units, etc.) as their subordinates. Even fire officers, who need not possess the identical skills as police officers, provide similar services. They are entrusted with protecting the safety of the public. They perform life saving functions<sup>53</sup> as do police Officers. They, too, are an appropriate comparator, I find. Thus, the record reveals that six law enforcement units within New York City have settled contracts for 2010-2012. All have settled for the same package: one percent in the first year of the contract and one percent in the second year of the contract.

The comparator analysis does not end there. While data for New York City law enforcement units is the most relevant, similar statistics for non-New York City units are also of value. Here, the parties vigorously disagreed as to which non-NYC units are most appropriate for analysis. The City contended that national cities should be utilized for this purpose. The PBA insisted on local jurisdictions in the metropolitan area.

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<sup>53</sup> Since the Firefighters' tentative settlement has not been ratified as of this writing, they are not an appropriate comparator in this case.

I have also reviewed the record carefully on this issue. While local comparators are entitled to some weight, the more relevant communities are national cities, I find. This, too, is so for a number of reasons.

The Taylor Law requires a comparison of those with similar skills/services/working conditions in comparable communities. The statute does not limit "comparable communities" to New York State. It leaves arbitrators free to decide which communities are most similar to New York City.

Large national cities are most similar to New York City, I am convinced. They encompass a cross section of residents from the very poor to the very wealthy. More important, they provide a vast array of services such as education, sanitation, firefighting, special services, housing, welfare, libraries and other public necessities and amenities.

Smaller, generally wealthier jurisdictions do not provide a similar level of services. Generally, though not always, they ensure public safety but other services are provided by different governmental entities (2007).

This is not to say that local jurisdictions have no relevance here. Nassau and Westchester counties are contiguous counties. Many police officers live there as well as in Suffolk County, another high paying jurisdiction. Smaller towns and villages within these counties also pay their police officers wages well above New York City's. However, these communities, even the larger counties, do not provide the level of services New York City does. What really exists, then, is a paradox of sorts. Large cities, which make for difficult police work, tend to pay their Officers less than more affluent suburbs where law enforcement duties are arguably less onerous.

The reliance by the PBA on local jurisdictions is further diminished by recruiting history. It is one thing if New York City's police officers are flocking to the suburbs for higher pay. It is quite another if the outflow is minimal. The latter is the case here. From 2009 to 2014 fewer than 100 officers have left the City under these circumstances. Qualified applicants here exceed vacancies by the thousands. The process from initial interest in a post in the City to entrance into the Academy takes some three to four years.

That being said, the data among national cities places New York in a relatively favorable light. Of twenty major cities in the United States, New York ranks fifth in total direct costs. City Exhibit 20.

The PBA suggested that the trickle to other, higher paying jurisdictions results from the recession in which relatively few openings arose in the suburbs, the City's recoupment of training costs from municipalities whose new hires were trained by New York and its [City's] practice of not divulging the personnel records of those leaving its employ to municipal agencies elsewhere. These arguments, though relevant, are outweighed by other factors.

Chair MacKenzie found national cities to be a more appropriate comparator than local suburbs. She wrote, "When factors such as diversity and density of populations and neighborhoods...are taken into account the demographics of large urban jurisdictions more closely approximate New York City than do suburban counties or communities."

Also, it is unlikely New York City will undergo a drain of qualified applicants or officers to suburban areas. As noted above, the outflow has been minimal. Nor is there any reasonable likelihood that lower

salaries here will result in a reduction in qualified applicants. Thus, what remains is the PBA's speculation that comparative wages impairs the City's ability to recruit and retain qualified officers. That speculation is not borne out by substantive evidence, I find.

The PBA contended that the comparative compensation figures offered by the City are fatally flawed because they do not reflect differences in the cost of living among national jurisdictions. There certainly is some merit to this contention. Whether BLS/CPI figures are utilized or allegedly more accurate measures such as the federal locality pay system, Mercer's Geographic Salary differential, BLS or Occupational Pay Relatives, there is no doubt New York City and its environs is an expensive locale in which to live. This is so even when public transportation and health premiums are excluded.<sup>54</sup>

This factor, however, is minimized by two elements. The first is New York's fringe benefits outlay for police officers. Just as it costs more for the average worker to live in this area, it also costs more for the City to provide health and pension

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<sup>54</sup> Police officers here do not pay for either item.

benefits to its officers. As City Exhibit 20, Page 3A demonstrates, as of the end of 2014, New York's direct compensation and fringe benefit cost, computed on a twenty year average was 189 per cent above the national cities cited. Thus, even if the PBA's cost of living data and testimony is credited,<sup>55</sup> the higher cost of living here is dwarfed by the 189 per cent figure.

The PBA contended that fringe benefit costs comparisons have no place in an interest arbitration proceeding. I respectfully disagree. Criterion (a), above, refers to wages, hours and conditions of work. The fringe benefits an employee receives are certainly a condition of his/her employment. Moreover, the Taylor Law specifically refers to "insurance and retirement benefits." Section 209.5(v)(d).

In addition, fringe benefits are generally accepted as valid in determining the worth of the overall economic package an employee receives. The Goldberg report lists "fringe benefits as one such factor." Professor Hurd referred to health insurance

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<sup>55</sup> See accounts of Professors Richard Hurd and Kathleen Abraham, both respected economists.

and retirement benefits as a necessary component of employer provided benefits (530).

The Union also argued that retirement costs are extremely volatile and depend on elements unrelated to collective bargaining, such as assumption rates on investments. In this context, it asserted that New York City's retirement contribution rate will substantially decrease as new hires replace retirees, since the former are in Tier 2R which provides lesser benefits than those hired before April 1, 2012.

There is some merit to these assertions. Retirement contribution rates will certainly decline as time goes on. However, that does not substantially alter the conclusion reached above. For example, if retirement costs were reduced by, say, 25% from \$178,690 to approximately \$130,000, New York would still rank 3<sup>rd</sup> among the twenty national cities cited.

The Union also insisted that reference to 2014 data is improper because the term of this Award ends on July 31, 2012. While viewing conditions as they currently exist makes common sense, if the data were restricted to 2012 and earlier, New York would still have higher retirement contributions on a percentage basis since fewer Officers would be in Tier 2 or 2R as

of that date. Frankly, any way one looks at it, overall compensation, including health insurance and retirement benefits place PBA members near the top of the twenty national cities listed.

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# 20 Year Direct Compensation (7/31/2012)

National Jurisdictions - 20 Year Average Career Compensation Per Hour Worked  
Data as of 7/31/2012

Jurisdiction	Base	Longevity	Shift Diff	Holiday Pay	Uniform Allow	Other	Total Direct Comp	Net Hours Worked per Year	Total Direct Comp per Hour Worked
Austin	\$73,654	\$950	\$1,800	\$307	\$0	\$1,798	\$78,508	1,816	\$43.24
Baltimore	\$58,612	\$0	\$401	\$322	\$0	\$389	\$59,725	1,927	\$31.06
Boston	\$62,230	\$501	\$3,631	\$4,148	\$800	\$3,570	\$74,879	1,825	\$41.07
Chicago	\$79,069	\$0	\$0	\$1,398	\$1,800	\$0	\$82,267	1,729	\$47.69
Columbus	\$66,420	\$756	\$851	\$2,807	\$903	\$0	\$71,737	1,892	\$38.03
Dallas	\$63,106	\$456	\$1,420	\$0	\$0	\$4,560	\$69,542	1,862	\$37.43
Detroit	\$45,154	\$0	\$309	\$217	\$1,100	\$0	\$46,780	1,854	\$25.23
El Paso	\$55,062	\$456	\$1,017	\$3,061	\$0	\$1,004	\$60,600	1,923	\$31.56
Fort Worth	\$66,415	\$456	\$950	\$2,190	\$325	\$945	\$71,281	1,923	\$37.15
Houston	\$51,550	\$494	\$776	\$786	\$2,000	\$7,969	\$63,575	1,943	\$32.88
Indianapolis	\$57,627	\$2,219	\$654	\$0	\$855	\$382	\$61,736	1,869	\$33.08
Jacksonville	\$53,961	\$450	\$1,012	\$886	\$0	\$1,511	\$57,820	1,747	\$33.17
Los Angeles	\$73,944	\$1,717	\$0	\$0	\$974	\$3,044	\$79,679	1,787	\$44.72
Memphis	\$49,470	\$383	\$300	\$1,984	\$356	\$2,258	\$54,752	2,008	\$27.30
Milwaukee	\$63,950	\$213	\$0	\$353	\$300	\$280	\$65,095	1,866	\$34.96
Philadelphia	\$59,073	\$2,359	\$2,897	\$2,835	\$1,000	\$0	\$68,165	1,922	\$35.51
Phoenix	\$68,688	\$728	\$828	\$2,906	\$1,150	\$7,044	\$81,344	1,928	\$42.21
San Antonio	\$57,647	\$2,935	\$2,100	\$2,913	\$936	\$4,118	\$70,648	1,852	\$38.21
San Diego	\$73,476	\$0	\$1,439	\$3,579	\$900	\$4,268	\$83,662	1,847	\$45.35
San Francisco	\$109,431	\$0	\$3,064	\$5,256	\$779	\$3,779	\$122,309	1,803	\$67.92
San Jose	\$91,908	\$0	\$0	\$0	\$675	\$5,440	\$98,023	1,946	\$50.47
Washington DC	\$65,523	\$635	\$1,000	\$2,045	\$900	\$0	\$70,102	1,891	\$37.16
<b>Avg without NYC</b>							\$72,374		\$38.88
<b>New York</b>	<b>\$70,098</b>	<b>\$5,076</b>	<b>\$2,946</b>	<b>\$3,168</b>	<b>\$1,000</b>	<b>\$0</b>	<b>\$82,288</b>	<b>1,889</b>	<b>\$43.87</b>
<b>NYC as % of Avg</b>							114%		113%
<b>NYC Rank</b>							4 of 23		6 of 23

"Other" includes additional premiums such as retention incentives, education incentives, training and certification pays, etc. See wage charts in Appendix for more detail.

It is also noteworthy that in addressing ability to pay (see discussion below), the PBA went well beyond 2012 to demonstrate the City can pay the raises it seeks. Indeed, were the City's fiscal condition frozen as of 2012 for analysis purposes, the PBA's economic projections would be far less sanguine.

Nor is the record much different if, as the PBA claimed, only local comparators should be analyzed. Again, as of July 31, 2014, New York places fourth out of ten local jurisdictions<sup>56</sup> on a twenty year average.

It is true, of course, that direct compensation to police officers here is 84% of the local average, which suggests that police officers deserve a 16 per cent raise to catch up to their local counterparts. This result though, is devoid of any inclusion of fringes which represent, though not on a one-for-one basis, significant economic benefits to police officers here. Nor can any cost of living adjustment be applied to this data since all or virtually all of the comparators fall within the same cost of living index for this area.

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<sup>56</sup> Elizabeth, New Jersey, MTA, Nassau, MTA, NYS Trooper, Port Authority, Newark, Suffolk, Yonkers (City presentation, p. 25).

The PBA also cited the three prior interest arbitration awards which awarded it higher wages than what the City insisted was the pattern. The first, for the 2000-02 round was rendered by Arbitrator Dana Eischen; the second for 2002-04 by Arbitrator Eric Schmertz; the third for 2004-06 by Arbitrator Susan MacKenzie. All are well-respected labor relations neutrals. All wrote incisive, thoughtful Awards which are entitled to careful consideration here. However, they do not warrant a finding in this case which exceeds the established, uniformed pattern.

In the Eischen round, most of the uniformed groups had settled before his decision was rendered. The other groups agreed to two increases of five per cent each over a period of thirty months. Significantly, Arbitrator Eischen believed that his pattern should apply to the PBA. However, he was constrained to issue an Award no longer than two years.<sup>57</sup> As a result he awarded the same two five per cent raises, but over 24 months.

It is true, of course, that the net cost of this Award exceeded the uniformed pattern. However, it was

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<sup>57</sup> As noted above, unless the parties agree otherwise, an Interest Arbitration Award in New York State may not exceed two years.

rendered, as Arbitrator Eischen stated, "...fully consistent with...the recognized principles of parity-conformity and pattern - consistency which have characterized the collective bargaining relationship of the City of New York and its unions, including the PBA, for many decades." at p. 4.

The Schmertz finding was significant for the lack of a pattern. When it was rendered only DC 37 had settled. That agreement, obviously, included no law enforcement personnel or groups.

The Taylor Law requires a comparison of other units performing similar duties, with similar skills, etc. While the same jurisdiction - New York City - was involved, the work of DC 37 members was and is not similar to the work of police officers. As Arbitrator Schmertz put it, "The job of a police officer clearly includes greater hazards of employment, specific physical qualifications and specialized job training and skills" [than DC 37 employees], at p. 30. However, Arbitrator Schmertz also noted that the Eischen Award was essentially pattern conforming because it ordered offsets (notably the reduced starting wage) to the cost of the economic package he imposed.

There remains the MacKenzie Award to consider on this issue. Her determination exceeded the pattern previously negotiated by uniformed personnel, in part because a special adjustment was needed to increase starting salaries since the Schmertz decision had lowered it by some \$10,000, thereby making it more difficult to recruit qualified applicants. Nonetheless, as the PBA correctly noted, even when the increase in starting wages is discounted, Arbitrator MacKenzie's finding exceeded the uniformed pattern.

There is no way to reconcile the MacKenzie Award above the pattern with this one, which is pattern conforming. What can be said, however, is that this determination achieves the essential purpose of Arbitrator MacKenzie, though more slowly. She indicated that New York City's finest should be restored to the economic position where they once were, at or near the top of all cities nationwide. I agree with her view, and all the data cited above supports this goal, albeit more slowly than the PBA would like. However, the upward relative position of police officers must take into account the pattern bargaining that has occurred here for many years.

What this augurs for the future is not for me to say. Whether, as the City suggested, the PBA accepts the rest of the pattern settlements for a period extending beyond July 31, 2012 or whether the PBA seeks interest arbitration for 2012-2014 is clearly a choice it must make. Nonetheless, the record reveals that the settlements achieved by other uniformed personnel, including all superior police unions and the fire officers is consistent with and supported by Criterion (b) of Section 209(V)(c) of the Taylor Law.

In this context, the facts here reveal that NYPD officers' total compensation has improved over its national comparators since approximately 2002, when total compensation includes health and retirement benefits, which is required by the criteria set forth in the Taylor Law. Indeed, even among local comparators, NYC's ranking has remained consistent. Thus, I conclude, my determination is fully consistent with criterion 209(V)(c)(a) for the reasons indicated herein.

The remaining criteria do not mandate a different finding. Criterion(b) is "the interest and welfare of the public and the financial ability of the public employees to pay."

The interest and welfare of the public in this case require labor relations stability as well a trained police force that ensures the safety of the citizens of New York. As to the former, there is no doubt this result contributes substantially to labor relations stability. It maintains the concept of pattern bargaining, at least among uniformed personnel. It promotes an overall framework of settlement while, at the same time, allows for individual bargaining units to fashion agreements which meet their own needs. Nor does it reduce the ability of the police force to safeguard the public.

With respect to the ability of the public employer to pay, I agree with the PBA that the City can afford to pay reasonable increases. While prudent economic planning is necessary to avoid future downturns, the City's current fiscal condition is good. The evidence reveals that the adopted budget for fiscal year 2016 (PBA Exhibit 15-275) projects increases in revenue estimates for FY 2015, 2016, 2017 and 2018, totaling 2.27 billion dollars. Obviously estimates are subject to change and unforeseen circumstances could substantially reduce this figure. Nonetheless, it is clear the City conservatively plans

future revenue and there is no basis in this record to conclude these estimates will not be met.

This is not to say that the City has the ability to pay the market based wage increase sought by the PBA - approximately 17 per cent or some 5.3 billion dollars. Obviously, awarding increases of this magnitude would create enormous pressure on other uniformed unions to match these raises in the next round of bargaining.

On the other hand, every party to this proceeding would be shocked were the panel to award 17 per cent increases to the PBA. While I need not speculate as to what level of wage improvements above the pattern would be deemed fair by the Union, there is little doubt in my mind, given the extensive economic analysis offered by the PBA, that the City could fund them consistent with Criterion (b).

The City argued it has the right, indeed the obligation to set fiscal priorities consistent with its mission to improve the lives of all New Yorkers.

It also suggested PBA projections of increased revenue have been grossly overstated in the past. Both observations have merit, but as I have indicated in other interest arbitrations, "ability to pay" should

not be confused with "desire to pay." Also, the revenue projections cited above come from the City, not PBA experts. Thus, I am convinced, Criterion (b) favors the Union, not the Employer.

Criterion (c) is usually given short shrift by interest arbitrators. It is difficult to find other trades or professions which have similar hazards of employment, physical qualifications, mental qualifications or job training and skills.<sup>58</sup> Stated simply, neither party has convinced me that this criterion favors its position.

Criterion (d) favors the City, I find. It specifies and includes, beyond salary, the fringe benefits of insurance and retirement, medical and hospitalization coverage and paid time off.

These benefits are generous for police officers. While they are comparable to those received by other New York City workers in general and law enforcement personnel specifically, they exceed those in other geographic areas and match up well against local comparators. Suffice it to say, there exists a generous non-wage, economic package for members of

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<sup>58</sup> "Educational qualifications," also listed in this criteria may well be replicated in other trades and professions.

this bargaining unit, regardless of the comparators utilized, or even when they are viewed in isolation, without analysis of others' fringe benefits.

The Taylor Law criteria and the analyzed data leads to a single conclusion, I find. The pattern settlements for law enforcement units previously achieved should be applied here. They will improve the relative standing of New York City police Officers when viewed in light of national cities, the most logical comparator consistent with the Taylor Law's criteria. Accordingly, I direct that for the first contract year - 2010-2011 - a one per cent increase shall be granted. An additional one per cent increase shall be granted for the second year - 2011-2012.

It is also worth noting that these raises will result in retroactive pay of \$8,000 or more for each officer. Indeed, if the pattern is imposed or agreed to for the period August 1, 2012 - July 31, 2014, retroactive compensation over \$6,000 per employee will be paid, followed by additional payments thereafter.

Thus, while the increases are modest, officers will receive substantial back pay.

How shall these increases be implemented? This matter is more complex than it initially appears. It

is true that the other uniformed unions settled for a raise of 11.69 per cent each, but over seven years. Only two of that seven applies here. Also, a terminal benefit was implemented, which costs anywhere from .59 per cent to .61 per cent for these groups. However, that benefit is not payable during the term covered by this Award.<sup>59</sup> Thus, while my finding is essentially pattern conforming, it cannot mirror the wages or benefits in the others.

Taking into account these factors leads to the following determination:

Effective August 1, 2010, wages shall be increased by one per cent.

Effective August 1, 2011, wages shall be increased by an additional one per cent.

These figures do not permit the addition of the \$1,000 bonus. As the others have done, that payment is subsumed within the rate increase. However, the savings which results from converting the lump sum to the rate (approximately .09 per cent) is recaptured below.<sup>60</sup>

There remains the other items in dispute to consider.

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<sup>59</sup> It is payable on February 1, 2015 to the other uniformed groups.

<sup>60</sup> See discussion of uniform increase.

**Term of Award**

There is no agreement for a term longer than the statutory duration which may not exceed two years. Accordingly, the term of the Award is August 1, 2010 through July 31, 2012.

**Work Schedules**

It would be improper to impose the ten hour tour, as requested by the PBA, without the mutual consent of the parties. This is so because this tour change would have major impact upon the operations of the Police Department. Thus, while I believe there may be substantial savings available under a ten hour tour system, I shall direct the parties only to convene a committee to study the issue within ninety days after the issuance of this Award. It shall make recommendations to the City and the PBA within one year after its creation.

**Terrorism Workload and Safety Risk Premium**

Unfortunately, these elements are part of a police officer's job. Also, this proposal has been rejected by three previous arbitrators. I find no new evidence to warrant its adoption now. The PBA's request is, therefore, denied.

### **Night Differential**

The concept of night differential centers on the premise that officers' lives are disrupted when they work evenings or nights. It does not make labor relations sense to grant it for non-working time, such as sick, vacation or personal leave. Consequently, it must be rejected

### **Annuity**

It is true that the annuity allowance has not been altered for many years. However, I am convinced, it should be increased when the overall settlements permit. That is not the case here. Also, the annuity grows over time as a result of prudent investing. Thus, this is not a static figure, though the amount contributed by the City is. Accordingly, the proposal is rejected

### **Uniform Allowance**

This allowance has not been raised in many years. Obviously the cost of cleaning or replacing uniforms has increased over this period of time. Therefore, I shall direct that, effective August 1, 2011, the uniform allowance shall be raised to \$1050. This increase is paid for in large measure by the lack of the terminal benefit included in this Award.

### Education Pay

The goal of compensating employees for increased education or training is laudable. However, I can find no way to provide a meaningful sum which is both pattern conforming and applicable to all bargaining unit members. Consequently, the PBA's proposal must be rejected.

### Parking

The expired Collective Bargaining Agreement demonstrates the intent of the Department to provide parking to officers within the limited availability of space in the City. It makes sense for the PBA to have an avenue to discuss with the Employer the steps that have been effectuated to carry out this intent. Consequently, I shall direct no change in the provision related to parking except that the PBA shall have the right to utilize the grievance procedure to air complaints about inadequate parking short of proceeding to arbitration.

### Patrol Assignment Differential Pay

Patrol assignments may well be more demanding than other kinds. However, it too, is "part of the job." This proposal is, therefore, rejected.

## Home Confinement

The pilot program initiated in 2004 has, by all accounts, worked. Therefore, the program is to remain as written, but it shall be extended department-wide and shall no longer be considered a "pilot."

### Sick Leave Home Confinement Elimination

Paragraph "a," "b," "c," and "d" of the side letter between James F. Hanley and Patrick J. Lynch concerning Patrol Guide Procedure 205-01 and 205-45 in regard to sick leave and home confinement shall become permanent and the following text from the side letter shall be incorporated into Section 1 of Article X - Leaves of the full-text collective bargaining agreement between the parties as new paragraphs "c," "d," and "e."

c. Eligible employees, who request sick leave for an injury or illness, shall no longer be subject to home visitation and confinement, outside the hours of the employee's regularly scheduled tour of duty, except where the convalescence for the injury or illness requires home confinement in the opinion of the Department's Medical Division, after consultation with the employee's personal physician.

d. The following employees are not eligible to participate in the program:

- 1) Any Employee who is designated as "chronic sick,"
- 2) Any Employee who is on modified assignment,
- 3) Any Employee who is on dismissal probation,
- 4) Any Employee who is on suspension.

e. 1) For purposes of this agreement the "designated absence rate" is the average lost days, including both line

of duty and non-line of duty sick leave, per member of service in the PBA bargaining unit for Fiscal Year 2007-2008, which equals 11.56 days per year.

2) The Department, on the first day of each month, will review Police Officer availability for the preceding 365 days. In the event that Police Officer average sick leave for the entire PBA bargaining unit exceeds the designated absence rate for the preceding 365 day period by more than 10%, the previous Patrol Guide home visitation and confinement policies will be placed into effect the following day. Such procedures will remain in effect for the remainder of the month. Provided however, the Police Commissioner in his own discretion may permit the new procedures to remain in effect.

3) The following month another review of sick leave usage for the preceding 365 days will occur. When a monthly review results in a return to a level at or below the "designated absence rate" plus 10% the Department will resume the new visitation and confinement procedures the following day (the second day of the month).

### Vacation Selection

It makes sense to permit officers to select vacations by seniority. Also, this feature is consistent with current practice. Thus, I shall direct that police officers shall be permitted to select vacation based on their seniority (date of appointment to the NYPD) within their squad or

command, whichever is appropriate and subject to Operations Order No. 40 issued on October 16, 2014.

**Vacation Donation**

Donating vacation days is, as framed below, a non-cost item. Consequently, I find, police officers shall be permitted to donate vacation days to other members of the bargaining unit for medical or similar personal emergencies incurred by the recipient, provided:

1. There is no impact on the Final Average Salary of the donor or donee who retires;

and

2. Neither the donor or donee is in his/her final year of service with the NYPD;

and

3. Approval is granted by the commanding officer, which approval shall not be unreasonably denied.

**Recoupment**

The Department has a right to recoup overpayments. However, since they result from management errors, the recoupment must not unduly burden the officer and must give him/her a mechanism to question the amount sought. Accordingly, the following language shall be included in this Award:

When there is an overpayment to a police officer, the Police Department shall promptly notify the police officer, in writing. Such writing shall contain a detailed explanation of when the police officer received the alleged overpayment, the amount and calculation of the alleged overpayment, the amount that the Department believes the proper payment should have been, and the reasons why the Department believes the amount received was an overpayment and notify the police officer of his right to contest the overpayment within 15 days of receipt of that writing. The police officer shall have 15 days from receipt of such notice within which to contest that overpayment, and that objection shall be in writing.

If the police officer does not contest the overpayment in writing within 15 days from the receipt of the overpayment notice, the Department may commence recoupment the second pay period immediately following the 30<sup>th</sup> day after receipt by the police officer of the Police Department's initial written notification of overpayment.

If the police officer does contest the overpayment in writing within 15 days from receipt of the overpayment notice, and if the Department intends to proceed with any recoupment, the Department shall respond in writing within 15 days of receiving the written objection, explaining in detail why it disagrees with the police officer's stated objection the Department may then commence recoupment the second pay period immediately following the 30<sup>th</sup> day after receipt by the police officer of the Police Department's initial written notification of overpayment.

For this purpose, no more than 7.5% of the police officer's gross pay (minus court ordered child support payments) may be withheld from the police officer's regular

paycheck, per pay period, unless the police officer and the Department agree in writing to a different percentage or payment schedule.

If the Department has official notice of an officer's intention to leave the Department such that full recoupment may not be made pursuant to the 7.5% formula and subject to the above procedure, the Department may withhold pay from the officer's paycheck in equal amounts so that full recoupment is achieved by the time the officer leaves the Department.

Though all other proposals are rejected, failure to award any should not be construed as a determination that a specific item lacks merit or would not be appropriate in the future.

In sum, the Award set forth herein is consistent with the Taylor Law criteria analyzed above. While providing for modest wage increases, it improves officers' relative standing, taking into account appropriate comparators and the entire package of economic benefits granted police officers. It is so ordered.

## AWARD

### 1. Term

The term of this Award is from August 1, 2010 through July 31, 2012.

### 2. Wages

Effective August 1, 2010, wages shall be increased by one per cent.

Effective August 1, 2011, wages shall be increased by an additional one per cent.

### 3. Parking

The current provisions of the Collective Bargaining Agreement shall remain in full force and effect except that the PBA shall have the right to avail itself of the grievance procedure, exclusive of the right to arbitration, with respect to claimed violations of this provision. This provision shall be implemented on January 1, 2016.

### 4. Home Confinement

The current procedures initiated in 2008 shall remain in full force and effect, except that the program shall no longer be deemed a "pilot" and all references in the procedure to "pilot" shall be deleted.

## Sick Leave Home Confinement Elimination

Paragraph "a," "b," "c," and "d" of the side letter between James F. Hanley and Patrick J. Lynch concerning Patrol Guide Procedure 205-01 and 205-45 in regard to sick leave and home confinement shall become permanent and the following text from the side letter shall be incorporated into Section 1 of Article X - Leaves of the full-text collective bargaining agreement between the parties as new paragraphs "c," "d," and "e."

c. Eligible employees, who request sick leave for an injury or illness, shall no longer be subject to home visitation and confinement, outside the hours of the employee's regularly scheduled tour of duty, except where the convalescence for the injury or illness requires home confinement in the opinion of the Department's Medical Division, after consultation with the employee's personal physician.

d. The following employees are not eligible to participate in the program:

- 1) Any Employee who is designated as "chronic sick,"
- 2) Any Employee who is on modified assignment,
- 3) Any Employee who is on dismissal probation,
- 4) Any Employee who is on suspension.

e. 1) For purposes of this agreement the "designated absence rate" is the average lost days, including both line of duty and non-line of duty sick leave, per member of service in the PBA bargaining unit for Fiscal Year 2007-2008, which equals 11.56 days per year.

2) The Department, on the first day of each month, will review Police Officer availability for the preceding 365 days. In the event that Police Officer average sick leave for the

entire PBA bargaining unit exceeds the designated absence rate for the preceding 365 day period by more than 10%, the previous Patrol Guide homes visitation and confinement policies will be placed into effect the following day. Such procedures will remain in effect for the remainder of the month. Provided however, the Police Commissioner in his own discretion may permit the new procedures to remain in effect.

3) The following month another review of sick leave usage for the preceding 365 days will occur. When a monthly review results in a return to a level at or below the "designated absence rate" plus 10% the Department will resume the new visitation and confinement procedures the following day (the second day of the month).

5. **Recoupment**

The following language shall become effective on July 31, 2012, and shall be implemented on January 1, 2016:

When there is an overpayment to a police officer, the Police Department shall promptly notify the police officer, in writing. Such writing shall contain a detailed explanation of when the police officer received the alleged overpayment, the amount and calculation of the alleged overpayment, the amount that the Department believes the proper payment should have been, and the reasons why the Department believes the amount received was an overpayment and notify the police officer of his right to contest the overpayment within 15 days of receipt of that writing. The

police officer shall have 15 days from receipt of such notice within which to contest that overpayment, and that objection shall be in writing.

If the police officer does not contest the overpayment in writing within 15 days from the receipt of the overpayment notice, the Department may commence recoupment the second pay period immediately following the 30<sup>th</sup> day after receipt by the police officer of the Police Department's initial written notification of overpayment.

If the police officer does contest the overpayment in writing within 15 days from receipt of the overpayment notice, and if the Department intends to proceed with any recoupment, the Department shall respond in writing within 15 days of receiving the written objection, explaining in detail why it disagrees with the police officer's stated objection. The Department may then commence recoupment in the second pay period immediately following the 30<sup>th</sup> day after receipt by the police officer of the Police Department's initial written notification of overpayment.

For this purpose, no more than 7.5% of the police officer's gross pay (minus court ordered child support payments) may be withheld from the police officer's regular paycheck, per pay period, unless the police officer and the Department agree in writing to a different percentage or payment schedule.

If the Department has official notice of an officer's intention to leave the Department such that full recoupment may not be made pursuant to the 7.5% formula and subject to the above procedure, the Department may withhold pay from the officer's paycheck in equal amounts so that full recoupment is achieved by the time the officer leaves the Department.

6. Vacation Selection

Article XVI shall be amended as follows, effective July 31, 2012 and shall be implemented effective January 1, 2016.

Police officers shall be permitted to select vacation based on their seniority (date of appointment to the NYPD) within their squad or command, whichever is appropriate, and subject to Operations Order No. 40 issued on October 16, 2014.

7. Vacation Donation

Article XVI shall be amended as follows, effective July 31, 2012 and shall be implemented, effective January 1, 2016.

Police officers shall be permitted to donate vacation days to other members of the bargaining unit for medical or similar personal emergencies incurred by the recipient, provided:

1. There is no impact on the Final Average Salary of the donor or donee who retires;

and

2. Neither the donor or donee is in his/her final year of service with the NYPD;

and

3. Approval is granted by the commanding officer, which approval shall not be unreasonably denied.

8. **Ten Hour Tours**

A committee composed of an equal number of City and PBA representatives shall be created to study the possible implementation of a ten hour tour within ninety days of the issuance of this Award. This committee shall make recommendations to the City and PBA after a one year review of relevant information. This provision is effective on July 31, 2012, with an implementation date of March 15, 2016.

9. **Uniform Allowance**

Effective August 1, 2011, the uniform allowance shall be increased to \$1,050.

10. **Other proposals**

Other proposals whether or not addressed herein are rejected. Failure to award a proposal shall not be construed as a determination that a specific item lacks merit or would not be appropriate in the future.

DATED: November 13, 2015

Howard C. Edelman  
HOWARD C. EDELMAN  
NEUTRAL MEMBER

STATE OF NEW YORK     )  
                                  ) s.:  
COUNTY OF NASSAU     )

On this 13<sup>TH</sup> day of November 2015, before me personally came and appeared Howard C. Edelman to me known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

MARY HALBERSTADT  
NOTARY PUBLIC, STATE OF NEW YORK  
NO. 01HA6101786  
QUALIFIED IN NASSAU COUNTY  
COMMISSION EXPIRES NOVEMBER 17, 2016

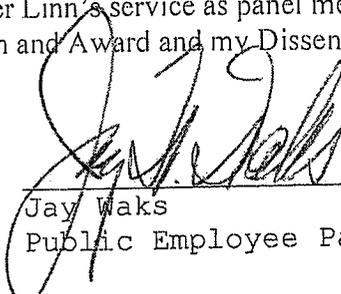
Mary Halberstadt  
NOTARY PUBLIC

NYC/PBA Interest Arbitration  
IA-2014-009; M2014-027

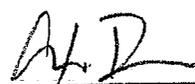
Concur \_\_\_\_\_

Dissent  Subject to the PBA's reservation of and without prejudice to its objection to Howard Edelman's and Commissioner Linn's service as panel members, I dissent from and am not joining in the Opinion and Award and my Dissenting Opinion will follow.

DATE: November 13, 2015

  
\_\_\_\_\_  
Jay Waks  
Public Employee Panel Member

On this 13TH day of NOVEMBER 2015, before me personally came and appeared Jay Waks to me known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

  
\_\_\_\_\_  
NOTARY PUBLIC

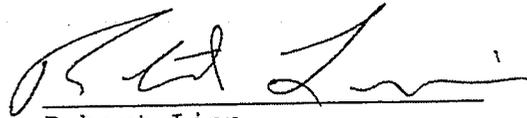
**ALEXANDER DRUM**  
NOTARY PUBLIC, State of New York  
No. 01DR0176837  
Qualified in Kings County  
Certificate Filed in New York County  
Commission Expires Nov. 5, ~~2018~~ 2019

NYC/PBA Interest Arbitration  
IA-2014-009; M2014-027

Concur ✓

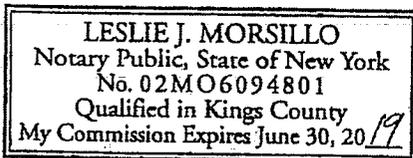
Dissent \_\_\_\_\_

DATE: 11/13/15



Robert Linn  
Public Employer Panel Member

On this 13th day of November 2015, before me personally came and appeared Robert Linn to me known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.



NOTARY PUBLIC

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

-----X  
IN THE MATTER OF THE INTEREST ARBITRATION :  
: :  
                                  between :  
: :  
THE PATROLMEN’S BENEVOLENT ASSOCIATION :       PERB Case No. IA2014-009;  
OF THE CITY OF NEW YORK, INC., :       M2014-027  
: :  
                                  and :  
: :  
THE CITY OF NEW YORK :  
-----X

**DISSENTING OPINION OF PANEL MEMBER JAY W. WAKS**

The Patrolmen’s Benevolent Association of the City of New York, Inc. (“PBA”) has proved that the 23,000 Police Officers it represents are sorely underpaid by the City of New York (“City” or “NYC”) and would require increases of at least some 20% during the 2010-2012 contract period to restore their pay to fair market rates, just as it had proved successfully in its prior PERB interest arbitrations under the State’s Taylor Law. In each of the prior cases, the interest arbitration awards incrementally moved Police Officer pay towards market, although not enough to close the gap that remains inasmuch as market pay has escalated during the interim periods.<sup>1</sup> Unlike those efforts, and in an abrupt about-face that cannot be legitimately justified by any evidence in this record, this Panel majority has turned back the clock, awarding two, paltry 1% increases, despite the Chair’s finding that the City has the ability to pay far more,<sup>2</sup> pushing our NYC Police Officers further behind market, unjustifiably exacerbating their

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<sup>1</sup> Those arbitration panels awarded six general wage increases as of the commencement dates of each of the respective contract years at issue: 5%; 5%; 5%; 5%, 4.5%; and 5%.

<sup>2</sup> See Opinion at 83; Section II.B.2, infra.

staggeringly low morale,<sup>3</sup> and attempting to punish them with a decision that makes a travesty of the State's Taylor Law. The Opinion and Award here is *neither* "just" *nor* "reasonable" despite the Taylor Law's demand that it be both. My outrage at this Panel's odious decision and callous mistreatment of the City's 23,000 Police Officers cannot be overstated. I will explain why.

On November 13, 2015 this Public Arbitration Panel issued its Opinion and Award authored by its Chair, Howard C. Edelman, Esq. ("Opinion"), in which the City's Panel Member, Commissioner of the City's Office of Labor Relations ("OLR") Robert W. Linn, Esq., concurred. The Opinion is the tragic result of a proceeding that, it turns out, was tainted from the outset. Commissioner Linn had an irreconcilable conflict that should have disqualified him from serving, and the Chair failed to disclose potential conflicts (or, at least, deny their existence) which failure places his neutrality (and its appearance) in question and casts an enormous shadow over his Opinion.

The City appointed Commissioner Linn as its Panel member. From roughly 1999 into 2004, when he was in private practice after his first tenure as OLR Commissioner, Commissioner Linn represented the PBA as its lawyer and chief negotiator and, in the first PERB interest arbitration under the Taylor Law between these parties, testified as the PBA's principal expert witness on comparability issues and in opposition to the naked imposition of the City's pattern settlement with all other unions representing uniformed services.<sup>4</sup> Indeed, Commissioner Linn's

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<sup>3</sup> See PBA15-184-6 at 7, 10-11 (PowerPoint presentation regarding NYPD Uniformed Member of Service Survey Results); PBA15-251 at 49 (NYPD Uniformed Member of Service Survey Results); Tr. 1168:10-19, 1170:22-1171:11 (Morris).

<sup>4</sup> Commissioner Linn's services to the PBA spanned 1999 (prior to the PBA's initial PERB interest arbitration against the City) into 2004 (in planning for the PBA's second PERB interest arbitration). It is not surprising that he was referred to as "Robert W. Linn, Esq." in communications regarding his PBA work. Although Commissioner Linn was not certain of the precise dates, he testified that his work for the PBA was "something in that period." Tr. 1774:11-16 (Linn).

testimony followed his advocacy on behalf of the PBA in regard to the court proceeding by which the Taylor Law's jurisdiction over impasses between the City and the PBA was upheld and by which the straightjacket of lock-step pattern settlements imposed under the City's own Collective Bargaining Law was removed.<sup>5</sup> Commissioner Linn, who was and remains a member of the bar, thereafter continued to participate with the PBA's legal team in formulating its legal strategy in regard to the initial impasse proceeding. The PBA has continued to implement that same legal strategy in the three subsequent Taylor Law interest arbitrations, including this one. The PBA moved to disqualify Commissioner Linn from serving as the City's Panel member in light of his blatant conflict in violation of his ethical responsibilities to his former client, the PBA. Over my dissent, the Panel, with Commissioner Linn casting the deciding vote (over the PBA's vigorous objection), determined that it lacked jurisdiction even to consider the issue.<sup>6</sup>

Additionally, only after his appointment, and only when the PBA raised the issue during the first pre-hearing conference, the Chair disclosed that he had contributed to Mayor de Blasio's election campaign.<sup>7</sup> At that pre-hearing conference, the Chair assured the parties that he would disclose any additional matters that might affect his ability to decide the disputed issues fairly. The Chair's commitment to disclose potential conflict issues is a simple acknowledgment of his obligations as a neutral arbitrator.<sup>8</sup> The Chair, however, declined to respond substantively when

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<sup>5</sup> See PBA15-205 (April 26, 2001 Affirmation of Robert W. Linn).

<sup>6</sup> My 16 page dissenting opinion (February 12, 2015) from the Panel majority's vote to reject its jurisdiction is appended hereto (Appendix).

<sup>7</sup> Before Mayor de Blasio testified, the Chair again acknowledged his contributions to the Mayor's election campaign, and assured the parties that his contributions would not affect his objectivity. See Tr. 1397:18–1398:17.

<sup>8</sup> See Weinrott v. Carp, 32 N.Y.2d 190, 200 (1973) (“it is incumbent on an arbitrator to disclose any relationship which raises even a suggestion of possible bias”); Matter of Siegel (Lewis), 40 N.Y.2d 687, 690 (1976) (“if there has been a failure to disclose an existing or past financial business, family, or social relationship between the arbitrator and a party as is likely to affect the arbitrator's impartiality . . . [t]he  
(continued...)

the PBA inquired further as to any additional business that he had obtained from the City during the pendency of this proceeding and prior to the issuance of his Opinion.<sup>9</sup> The Chair's refusal to respond leaves open the possibility that he became involved in additional (undisclosed) business with the City during the course of this proceeding. His failure to disclose such matters on his own violated his duty to "make known any relationship direct or indirect that [he had] with any party to the arbitration, and disclose all facts known to [him] which might indicate any interest or create a presumption of bias."<sup>10</sup> That, in turn, called into question his ability to maintain the neutrality (and its appearance) necessary to serve on the Panel and decide this case.

The Opinion arising from the participation of two compromised Panel members produced a predictably tainted result. The trifling 1% annual pay increases that the Chair has awarded in each year of the August 1, 2010 to July 31, 2012 PBA contract do not even keep pace with the

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consensual basis for the choice then would be lacking"); *see also e.g.*, Code of Professional Responsibility for Arbitrators of Labor-Management Disputes of the National Academy of Arbitrators Section 2(B)(3) ("Prior to acceptance of an appointment, an arbitrator must disclose to the parties or to the administrative agency involved any close personal relationship or other circumstance . . . which might reasonably raise a question as to the arbitrator's impartiality."). The ongoing disclosure obligations imposed upon the Chair by this State's highest court is not diminished one iota by their absence in the formal rules of the State's Public Employment Relations Board ("PERB"), although PERB should affirmatively impose ongoing disclosure obligations on neutral arbitrators.

<sup>9</sup> Post-hearing, the Chair said that he had "nothing to hide." But he never revealed that which he did not need to hide. Nor did he provide a substantive response to the PBA's successive requests (November 4, 9, and 10, 2015) for further information in regard to his relationship with the City during this proceeding and related communications, including those that were *ex parte*. The request regarding *ex parte* communications was consistent with the Chair's pre-hearing directive that he would not engage in them. *See* Tr. 6:5–15 (Jan. 9, 2015). Consequently, prior to the issuance of his final Opinion, the PBA objected to his continued service and requested that he disqualify himself. The Chair was quick to respond to that request, denying it within two hours after it was made without providing any justification.

<sup>10</sup> *J.P. Stevens & Co, Inc. v. Rytex Corp.*, 34 N.Y.2d 123, 129–30 (1974); *see also In the Matter of the Arbitration between City School Dist. of Oswego and Oswego Classroom Teachers Ass'n*, 100 A.D.2d 13, 18–19 (4th Dep't 1984) (vacating award based on arbitrator's failure to disclose indirect relationship with union); Code of Professional Responsibility for Arbitrators of Labor-Management Disputes of the National Academy of Arbitrators Section 2(B)(4) ("If the circumstances requiring disclosure are not known to the arbitrator prior to acceptance of appointment, disclosure [of circumstances that might reasonably raise a question as to the arbitrator's impartiality] must be made when such circumstances become known to the arbitrator.").

rate of inflation during that two-year period (4.79%),<sup>11</sup> let alone make any progress toward correcting the wide disparity in pay that existed (and still exists) between NYC Police Officers and their counterparts in both local and national police jurisdictions, including, in particular, those police jurisdictions of the NY-NJ Port Authority, the MTA and New York State Troopers operating within the City often side-by-side with the City's own Police Officers.

The Chair's primary justification for limiting NYC Police Officers to 1% increases is that they are consistent with a "pattern" established by the City with other City workers, including police supervisors, to suit those workers' needs (but absent any City evidence or argument that any of them are being paid below market). In ruling that pattern is supreme, the Chair has stripped NYC Police Officers of their right to have the PBA advance its own members' particular needs in collective bargaining and, upon impasse, in this statutory interest arbitration, instead relegating them to pay increases negotiated by other union leaders to suit their own members' separate needs. The Chair's pattern-adherence ignores the unique circumstances of NYC Police Officers that the State's Taylor Law mandates must form the basis for the Panel's award. Moreover, the Chair wears "pattern" like a straightjacket, declining to award PBA its other proposals that he concedes are supported by the evidence and laudable simply because he cannot find a way to fit them into the City's claimed pattern or because the City opposes them.

In short, the Opinion is based on a fundamental misreading of the Taylor Law, is contrary to the evidence consisting of live testimony from thirty-nine witnesses over fourteen days and more than three hundred exhibits, and is inconsistent with the three prior non-pattern conforming

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<sup>11</sup> See PBA15-115 at 4; Tr. 429:12–19 (Hurd). The Chair declined my request to include a reference to that fact in outlining the PBA's position in his Opinion. That is symptomatic of the Opinion, which frequently ignores un rebutted PBA evidence and misstates PBA positions, some examples of which are touched upon in this Dissenting Opinion.

awards issued under the Taylor Law by PERB interest arbitration panels. It is patently unfair to the PBA and the nearly 23,000 Police Officers it represents, and tries to push a treacherous course that will set back labor relations between the parties to the dangerous days prior to 2000 when pattern bargaining was imposed under the City's own Collective Bargaining Law. Worse still, it will further lower already depressed morale among the City's Police Officers as they continue to grapple with the heightened safety and security they provide to the tens of millions of people who live in, work in, and visit the City, and the business base here.

Simply put, the Award fails the Panel's mandate to achieve a "just and reasonable determination of the matters in dispute."<sup>12</sup> Instead, it makes a mockery of this proceeding, the only apparent purpose of which was to provide cover for a predetermined outcome. Therefore, I must dissent, vigorously.

I submit this Dissenting Opinion subject to the PBA's reservation of and without prejudice to its objection to the Chair's and Commissioner Linn's service on the Panel. In this Dissenting Opinion, I specify the basis for my findings as required by N.Y. Civ. Serv. Law § 209.4(c)(v). Further, should the City Panel member submit a concurring opinion that warrants further comment, I reserve the right to supplement this opinion.

**I. A Pattern Established by the City with Other City Workers Does Not Control the Pay of NYC Police Officers Under the Taylor Law**

The Chair goes astray right from the outset. He both misstates the PBA's position and betrays his own bias when he says that "the PBA insists that wage increases the panel orders must be market based and must far exceed the so-called pattern negotiated between the City and

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<sup>12</sup> N.Y. Civ. Serv. Law § 209.4(c)(v).

most of its uniformed service unions.”<sup>13</sup> The PBA never took a position in bargaining or in this proceeding that its pay should be determined by reference to any “so-called pattern negotiated between the City and most of its uniformed service unions.”<sup>14</sup> The idea that pay increases must adhere to a so-called pattern is a City obsession. The Chair apparently shares that obsession, which colors every aspect of the Opinion.<sup>15</sup> So I start by explaining why the City’s contracts with other City workers do not control the PBA’s contract terms under the Taylor Law, and then I explain how the Chair has worked backwards from a predetermined conclusion by misapplying the Taylor Law criteria and ignoring the evidence.

**A. Pattern Amounts to Nothing More than a Means To Perpetuate the Below-Market Pay of NYC Police Officers**

NYC Police Officers are a distinct bargaining unit represented by their elected PBA leadership. There is no reason why those Police Officers should be bound by supposedly pattern pay raises negotiated by the City with other City workers based on their unique circumstances and negotiated by their union leadership without any input from the PBA. In the City’s view, accepted by the Chair, collective bargaining negotiations effectively end once any uniformed union has resolved its contract, after which all other uniformed unions are bound to a contract with the same net cost. And, in that view, the Taylor Law has no meaning whatsoever because

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<sup>13</sup> Opinion at 3.

<sup>14</sup> Id.

<sup>15</sup> The Chair is so enamored of the pattern that he makes reference to his calculation of retroactive pay that he claims would be owed to NYC Police Officers, as if pattern pay raises control their yet-to-be negotiated contract covering years beginning in 2012. See Opinion at 85. Yet, no subsequent contract period had been the subject of negotiations between the parties, and certainly was not (and could not be) the subject of this proceeding. The Chair’s predisposed conclusion in that regard is both unsupported by evidence and outside this Panel’s authority, which is limited to the two-year period 2010–2012. Further, it is abhorrent that the Chair chose to include this gratuitous and unsupported reference to matters that might be cited by the City in an effort to prejudice a future round of collective bargaining between these parties.

any collective bargaining dispute must be resolved in favor of the claimed pattern within the City, *i.e.*, in favor of the City, without regard to the Taylor Law criteria.

The concept of a pattern is itself a self-serving construct of the City designed to perpetuate below-market pay for NYC Police Officers. It is defined by the City to mean whatever the City chooses it to mean to suit the City's interests in any particular round. The City's claimed pattern has varied in length; it has been variously two years, three years, five years, and most recently, seven years.<sup>16</sup> In previous bargaining rounds, the City has sought to bind the PBA to a civilian pattern while in others it has claimed that there is a uniformed differential — although the size of any such differential has varied from round to round.<sup>17</sup> And when it suits its convenience, the City has abandoned the pattern altogether, as it did with the United Federation of Teachers (“UFT”) and other unions in the previous round of bargaining.<sup>18</sup>

But the most cynical and pernicious aspect of the City's pattern bargaining construct is that it allows the City to select the union(s) — typically the weakest link(s) in collective bargaining, with which it negotiates the so-called pattern — and then to insist that all other unions follow suit in lock-step, regardless of how the pay of their members compares to their counterparts in comparable communities, *i.e.*, compared to market realities. As Commissioner Linn previously put it when he represented the PBA:

Unlike Police Officers, many other City workers such as sanitation workers, police captains, and fire fighters are paid well in relation to their ranks elsewhere. Under the current [pattern] bargaining approach, the workers paid above the

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<sup>16</sup> See Tr. 1917:3–21 (Linn).

<sup>17</sup> See Tr. 1917:22–1918:21, 1791:6–21 (Linn).

<sup>18</sup> See Tr. 1918:22–1919:9 (Linn). Although the City ultimately gave the UFT annual pay raises that matched those received by other City workers in the prior round, UFT members do not receive them until 2020 and without interest. So the pay raises received by UFT members were less valuable than those received by other City workers many years earlier. See Tr. 1646:7–1649:2 (Linn).

market are usually the first and most eager to settle. Their settlement is then used to bludgeon into submission those employees with below market salaries.<sup>19</sup>

That is precisely why Commissioner Linn advised the PBA to reject the pattern established by the City's contracts with all uniformed unions in the 2000–2002 round.<sup>20</sup> Instead, he advocated that the PBA receive a market-based wage increase of 21.93% over the two-years of that contract even though all the other uniformed unions already had received a cumulative wage increase worth 9.20% in the same bargaining round.<sup>21</sup>

Regrettably, in this round, Commissioner Linn returned to the City's practice of negotiating a pattern with other workers already being paid at or above the market and then using it to try (successfully with the Chair's acquiescence) to bludgeon into submission NYC Police Officers who are substantially underpaid. The City never offered NYC Police Officers a raise until it had established the so-called civilian pattern with the UFT and DC 37. Then it only offered NYC Police Officers raises for the PBA's 2010–2012 contract period that were consistent with the first two years of those seven-year civilian contracts (which the City conveniently constructed to provide for 0% and 1% pay increases in the two years that would parallel the PBA's open contract period, with the larger pay increases delayed until the later years of the contracts).<sup>22</sup> At no time during the parties' months-long negotiation and mediation process did the City deviate from that position, even in the face of the PBA's evidentiary arguments to substantiate market-based pay increases (well above the City's settlements with others). It did so only after this Panel was appointed and then only a mere six weeks prior to the

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<sup>19</sup> PBA15-196 at 145; Tr. 1808:3–25 (Linn).

<sup>20</sup> See Tr. 1784:10–24 (Linn).

<sup>21</sup> See Tr. 1786:19–1787:7 (Linn); PBA15-196 at 134.

<sup>22</sup> See Tr. 1981:17–1982:21, 1984:5–18 (Linn); PBA15-114-06B.

scheduled beginning of the hearing when the City purported to amend its impasse proposal submitted to PERB to provide for a 1% pay increase in each year of the contract based on pay increases provided in the first two years of the City's seven-year contracts negotiated in the interim with other uniformed unions.<sup>23</sup>

**B. The Taylor Law Does Not Authorize the Chair's Reliance on the City's Pattern**

Even more regrettably, the Chair endorses the City's conduct by treating its contracts with other City workers (or more accurately, the first two years of those seven-year contracts, and gratuitously the following two years as well<sup>24</sup>) as being dispositive of the outcome of this proceeding. More disheartening is the Chair's subservience to pattern in the face of the City's own admission that it has reserves to pay 4% to its Police Officers.<sup>25</sup> But there is no basis in the Taylor Law for pattern (or, in this case, a piece of pattern) to be controlling. Resolving collective bargaining disputes by reference to patterns of cost (or benefits) established by the City with other City workers is a vestige of the New York City Collective Bargaining Law ("NYCCBL"), the language of which previously had governed collective bargaining impasses between the parties and had been seized upon by City negotiators, NYCCBL-appointed arbitrators and the City's own lapdog agency, the Board of Collective Bargaining, to impose pattern upon the PBA bargaining unit automatically, for convenience, and regardless of the merits.

Commissioner Linn has fully acknowledged that "the language [of the Taylor Law] is quite a bit different from what you'll see . . . [in] the New York City Collective Bargaining Law,

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<sup>23</sup> See Tr. 1987:8-15 (Linn).

<sup>24</sup> See n. 14, *supra*.

<sup>25</sup> See PBA15-77 at 43; PBA15-187 at 232.

which . . . we [the PBA] used to be covered by in these proceedings.”<sup>26</sup> The Taylor Law, unlike the NYCCBL, makes no provision for determining wages based on a pattern established by the City with other unions.

The NYCCBL expressly provided that wages paid to NYC Police Officers be compared with those of “other employees performing similar work and other employees generally in public or private employment in *New York City* or comparable communities.”<sup>27</sup> In other words, the NYCCBL explicitly authorizes the comparison of workers with different jobs within New York City. The Taylor Law, on the other hand, does not give this Panel any such option. Instead, it requires that wages paid to NYC Police Officers be compared with “other employees performing similar services or requiring similar skills under similar working conditions” in “comparable communities,” *i.e.*, police officers in comparable communities.<sup>28</sup>

The last two Taylor Law arbitration panels presiding over collective bargaining impasses between these parties have made that point graphically. In the arbitration to resolve the PBA’s 2004-2006 contract, Chair Susan T. Mackenzie noted this key distinction between the Taylor Law and the NYCCBL: “The Taylor Law does not, however, include the City Law’s requirement of a comparison to ‘other employees in New York City.’”<sup>29</sup> And in the arbitration to resolve the PBA’s 2002–2004 contract, Chair Eric J. Schmertz explained the significance of this critical 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 comparison either

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<sup>26</sup> PBA15-197 at 22:7–13; see also PBA15-196 at 10–11.

<sup>27</sup> NYCCBL § 12-311c.(3)(b)(i) (emphasis added); see also PBA15-196 at 11.

<sup>28</sup> N.Y. Civ. Serv. Law § 209.4(c)(v)(a).

<sup>29</sup> PBA15-6 at 2.

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.<sup>30</sup>

Indeed, the City fully acknowledged the death knell of pattern bargaining arising from the shift to the Taylor Law from the NYCCBL. On December 3, 1998, Mayor Giuliani wrote a letter to Governor Pataki urging him to veto the then-pending legislation to bring NYC Police Officers under the Taylor Law because “[a]n unavoidable consequence of this privilege will be the destabilization of labor relations in the City and the *end of pattern bargaining*.”<sup>31</sup>

Moreover, there was good reason to end pattern bargaining as it applied to the City’s Police Officers. As Police Commissioner Bratton (then former Police Commissioner after his first tenure in that role) told Governor Pataki, “this legislation is clearly the most effective way of addressing the drastic pay disparity between New York City police officers and those of surrounding communities,” which had not been addressed “in a fair and appropriate manner” by the City under the NYCCBL.<sup>32</sup> Commissioner Bratton continued: “This legislation is now necessary to ensure that New York City police officers will receive an objective analysis of their right to compensation for the dangerous and difficult mission they perform on behalf of the citizens of the City of New York.”<sup>33</sup>

The City did not prevail in its lobbying effort to kill this change. As the City itself had foretold, the enactment of the legislation providing that unresolved collective bargaining disputes

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<sup>30</sup> PBA15-7 at 17 (emphasis in original).

<sup>31</sup> PBA15-18 at 2 (emphasis added). Mayor Giuliani further stated that the legislation represented “the PBA’s latest attempt to *circumvent the realities of parity and pattern bargaining in New York City . . .*” Id. This statement is a further City concession that, once covered by the Taylor Law, pattern would play no role in setting Police Officers’ pay in interest arbitration.

<sup>32</sup> PBA15-114-40A at 1.

<sup>33</sup> Id. at 1–2.

between these parties would be decided under the Taylor Law ended the imposition of pattern on the PBA unit. But, in this proceeding, the Chair treats that legislation as if it had been repealed by relegating NYC Police Officers to the City's claimed pattern, misapplying the Taylor Law criteria, and ignoring the evidence that would increase the pay of Police Officers by at least some 20% to reach uniformly higher market rates set in other police jurisdictions.

**C. The Chair's Award Stands as the Sole Outlier Since PBA/City Collective Bargaining Impasses Have Been Governed by the Taylor Law**

Not only did the City understand that reliance on pattern would end when resolution of collective bargaining disputes with the PBA was brought under the Taylor Law, but the three prior PERB arbitration panel awards have underscored that fact. Each was premised solely upon the Taylor Law criteria and each was not pattern conforming. This Panel's Award is the sole outlier despite the Chair's attempt to obscure that fact.

The first PERB interest arbitration resulted in an award issued by Chair Dana E. Eischen resolving the PBA contract for 2000–2002 with a net cost that exceeded the uniformed pattern by 23.13%.<sup>34</sup> While conceding “that the net cost of this [Eischen] Award exceeded the uniformed pattern,” the Chair explains that the PBA received the same 5% general wage increases in each year of the contract that the other uniformed unions received, but over a shorter period of time (24 months instead of the 30 months that applied to all other uniformed unions).<sup>35</sup> But Chair Eischen had another option. He could have given the PBA lower general wage increases over a 24-month period with the same net cost as the 5% general wage increases that other uniformed unions received over 30 months — in other words, a pattern conforming deal. Instead, Chair Eischen chose to award the PBA a non-pattern conforming award, an award independent of

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<sup>34</sup> See City Ex. 8 at 102–03.

<sup>35</sup> Opinion at 78.

pattern, explaining that a “fair and reasonable Award need not be inflexibly rigid” and “need not adhere slavishly to a ‘one-size fits all’ pattern.”<sup>36</sup> The City Panel Member’s dissent from Chair Eischen’s award bears witness that even the City immediately recognized that Chair Eischen had blasted a huge hole in its pattern argument.

The second PERB interest arbitration resulted in an award issued by Chair Schmertz resolving the PBA contract for 2002–2004 with a net cost that exceeded the City’s claimed pattern by 116%.<sup>37</sup> The Chair claims that the “Schmertz finding was significant for the lack of a pattern” because “[w]hen it was rendered only DC 37 had settled,” while the uniformed unions, including superior police ranks had not.<sup>38</sup> That is not what the City told the Schmertz panel before it issued its award. At that time, the City insisted that the panel impose a so-called pattern established by the City’s agreement with the civilian union DC 37 and threatened devastating consequences for labor stability should the panel decline that invitation. Chair Schmertz rejected the City’s argument and declined to impose pattern pay increases on NYC Police Officers because doing so “would not reduce the discrepancies in pay between the New York City police officers and those of other jurisdictions that I have deemed comparative.”<sup>39</sup>

The Chair also misstates Chair Schmertz’s decision and betrays his misunderstanding of Chair Eischen’s award when he (Chair Edelman) claims that “Arbitrator Schmertz also noted that the Eischen Award was essentially pattern conforming because it ordered offsets (notably the reduced starting wage) to the cost of the economic package he imposed.”<sup>40</sup> Chair Eischen

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<sup>36</sup> PBA15-8 at 11.

<sup>37</sup> See City Ex. 8 at 105.

<sup>38</sup> Opinion at 79.

<sup>39</sup> PBA15-7 at 29.

<sup>40</sup> Opinion at 79.

did not order reductions to the starting wage or any other offsets, and Chair Schmertz never (mis)characterized the Eischen award in that manner.

The third PERB interest arbitration resulted in an award issued by Chair Mackenzie resolving the PBA contract for 2004-2006 with a net cost that exceeded the uniformed pattern by 18.75%.<sup>41</sup> Prior to that award, every other uniformed union had accepted a uniformed pattern. Chair Mackenzie nevertheless expressly rejected the City's contention that her award adhere to the City's pattern. Instead, applying the Taylor Law criteria, she stated that the award was justified so "that wage increases continue the appropriately incremental process of returning the salary levels of New York City police officers to a position commensurate with the status of the NYPD as the premier police force in the nation," and further stated that "[s]trict adherence to the pattern urged by the City would not meet those objectives and would not result in a just and reasonable determination."<sup>42</sup>

As even the Chair concedes, "[t]here is no way to reconcile the Mackenzie Award above the pattern with this one, which is pattern conforming."<sup>43</sup> Nevertheless, the Chair proffers the incredible claim that this Panel's Award "achieves the essential purpose of Arbitrator Mackenzie, though more slowly" to restore NYC Police Officers "to the economic position where they once were, at or near the top of all cities nationwide."<sup>44</sup> The Chair does not and cannot explain how his Award furthers that admittedly essential purpose he claims to adopt. As I explain below, NYC Police Officers would need a pay raise in excess of 20% to reach just the average pay of police officers in local and national jurisdictions, and would need an even more

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<sup>41</sup> See City Ex. 8 at 109–10.

<sup>42</sup> PBA15-6 at 8.

<sup>43</sup> Opinion at 80.

<sup>44</sup> Id.

significant raise to be “counted among the highest paid officers in the nation,” a goal first articulated by the Special Panel chaired by Justice Arthur J. Goldberg in 1968 and adopted by Chairs Schmertz and Mackenzie.<sup>45</sup> In the light of day, this Panel’s Award (unjustifiably) stalls the progress that Arbitrator Mackenzie and her predecessors made in an effort to reach that essential goal.

The Chair’s statement that “[p]attern bargaining among these groups has existed for a number of years”<sup>46</sup> is nothing more than the expression of the City’s self-fulfilling prophecy, made all the worse by the City’s manipulation of its fictional costings. For certain, pattern bargaining has not been the practice for the NYC Police Officer unit in the past fifteen years (at least since the Taylor Law first covered them).

Furthermore, nothing required the City to agree to amended contracts with other uniformed unions after the Mackenzie Award resolving the PBA’s 2004–2006 contract far exceeded the pattern. The re-opener provisions in certain uniformed unions’ contracts clearly were not “me-too” agreements; they required the City only to negotiate — not to automatically grant or even agree to any particular terms. The resulting terms were a function of the City’s insistence that members of uniformed unions receive the same net cost to the City in order to maintain the illusion of pattern. In any event, the amended contracts that other uniformed unions received after the Mackenzie award did not match the PBA’s award in that round. The undisputed evidence shows that only one of fourteen uniformed unions (COBA) received the

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<sup>45</sup> See PBA15-14 at 5; PBA15-6 at 8; PBA15-7 at 14.

<sup>46</sup> Opinion at 65.

same pay increases as the PBA at all levels of the salary scale and for that entire two-year contract period.<sup>47</sup>

Moreover, the evidence demonstrates that the City's pattern-premised costings of collective bargaining agreements are based on dubious calculations that are subject to manipulation by the City to reach its preordained conclusion that would permit it to boast that all its labor contracts during a bargaining round fit the same cost pattern.<sup>48</sup> For example, the City witnesses could not explain how the City calculated a settlement credit in the City's costing of its agreement with the PBA covering the August 1, 2006 through July 31, 2010 period.<sup>49</sup> The fact is that this settlement credit, as well as others, was arbitrarily assigned a cost that fit the City's pattern.

In the same contract, the City ascribed values (of 0.55% and 0.40%, respectively) to its agreement to increase automatically its longevity payments for NYC Police Officers and its payments to the PBA's health and welfare fund by the same percentage wage increases in that contract and future PBA contracts.<sup>50</sup> Even though that agreement provided for 4% annual pay raises that would automatically increase longevity and fund payments by the same 4%, the City's costing did not use those figures to arrive at a value for the automatic longevity increases or fund improvements. Instead the City used artificially low 1.25% pay raises to cost the

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<sup>47</sup> See City Ex. 8 at 112.

<sup>48</sup> Mayor Bloomberg admitted as much in the City's 2013 PERB Fact-Finding proceeding with the UFT when he testified that "every union is different." When asked whether settlements with other unions for the same contract period were "pattern conforming," Mayor Bloomberg conceded that was so "[i]n a macro sense," but "[t]his number is very misleading because there are other things built in . . . . So the concept that it's — they're very comparable is really a fiction for something that tries to reduce a complex thing to a simple number, and that isn't realistic." Transcript of UFT and City Fact-Finding at 737 (June 12, 2013).

<sup>49</sup> See Tr. 1966:21–22 (Linn), Tr. 2955:25–2956:23 (Fuchs).

<sup>50</sup> See PBA15-224; PBA15-226; Tr. 2959:16-2960:3 (Fuchs).

escalator provisions.<sup>51</sup> As a result, the true cost of the PBA's 2006–2010 contract with the City necessarily was far higher than that reported by the City because the City assumed wage increases substantially below those to which it had agreed. And because no other union received provisions that granted its members those automatic escalators in both longevity payment increases and increases to the health and welfare fund in the amount that would equal all future percentage general wage increases, the PBA's agreement for 2006–2010 necessarily broke "pattern" and cost the City far more than its agreements with other uniformed (and civilian) unions during that period. Indeed, the Sergeants' Benevolent Association requested that the City reopen its contract for that period precisely because the PBA had received a more generous deal, but the City refused on the ground that the escalators had been funded in the PBA agreement even though the cost of that provision necessarily was understated.<sup>52</sup>

Similarly, the City's contract with the UFT covering this round contains provisions that the City chose not to cost at all, including \$10 million to increase starting salaries and additional compensation for various titles such as \$15,000 per year for "Peer Validators," \$7,500 per year for "Teacher Ambassadors," \$20,000 per year for "Master Teachers," and up to \$7,500 per year for "Model Teachers."<sup>53</sup> So too, the UFT agreement is more costly than the City reports and, as a consequence, the uniformed differential (of 1% in only one year of the seven-year contracts) is less generous than the City reports. The list of pattern and parity disparities goes on and on, including the \$1,000 Defibrillator Pay Differential that firefighters alone receive.<sup>54</sup>

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<sup>51</sup> See Tr. 2962:23–2968:11 (Godiner and Fuchs).

<sup>52</sup> See Tr. 2977:3–7, 2979:5–6 (Fuchs); PBA15-262.

<sup>53</sup> See Tr. 1972:4–1978:8 (Linn); PBA15-232.

<sup>54</sup> See PBA15-197 at 127:11–15; PBA15-196 at 78.

A more fundamental point, in how the City has skewed its costings in its favor, is its application of its so-called 11-year model, arbitrarily adopted and applied to suit the end-result the City desires. Aside from the above example of the City's having plucked imaginary 1.25% pay raises as undervalued substitutes for the actual 4% increases (by which the City facilitates its claim of "pattern" for other uniformed units when compared to the City's 11-year costings it attributes to the PBA unit), that City model is one-sided and manipulated by the City in so many other ways, some of which are: it leaves headcount flat as if the scheduled expansion by well over 1,300 new Police Officer positions never existed; it uses a pension inflator that carries at least three times the cost to the City than would the true cost of the considerably reduced pensions applicable to nearly half of Police Officers hired since 2009 (and growing, as those under the pre-2009 more generous pension programs reach the twenty-year mark, retire, and must be replaced by new Police Officers subject to the far reduced, less costly pension programs); and, to cap it off, that model is arbitrarily premised upon that unjustifiably short eleven-year period the City chose to minimize savings that continue for decades.

In short, the City's persistent manipulation of the so-called "pattern" in each round serves to demonstrate that pattern itself is a straw man or artifice entitled to no serious consideration in this case.

## **II. The Chair Misapplies the Taylor Law Criteria**

The Chair's obsession with pattern contaminates all his findings regarding the Taylor Law criteria. In sum, none of the Taylor Law criteria to which this Panel is confined (and I address below) support the Chair's fixation with pattern.<sup>55</sup> The Chair's findings are both

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<sup>55</sup> The Chair's passing reference to "other relevant factors" (Opinion at 64) certainly cannot mask the unqualified rejection of pattern under the specific Taylor Law criteria applicable to this case, as explained above and in this section.

contrary to the Taylor Law and to the evidence. They amount to nothing more than the Chair's transparent attempt to justify his preordained conclusion that pattern must prevail.

**A. The Chair Misapplies the Taylor Law Comparability Criterion (Section 209.4(c)(v)(a))**

The Taylor Law comparability criterion demands that pay increases awarded to NYC Police Officers be determined by comparison to the pay of other police officers in comparable communities; *i.e.*, that NYC Police Officers receive a market-based wage.<sup>56</sup> Whether compared to the pay of police officers in local police jurisdictions as the Taylor Law demands or the real wages of police officers in the twenty largest national cities, the evidence demonstrated that NYC Police Officers' pay is substantially behind their peers, which merits a raise far in excess of what the Chair has awarded them. The Chair fails to apply the comparability criterion faithfully. Instead, in service of the pattern, the Chair reads the comparability criterion out of the Taylor Law.

**1. The Chair Fails to Compare NYC Police Officers' Pay With That of Other Police Officers as the Taylor Law Requires**

As its opening factor, the Taylor Law requires the Panel to compare "the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services or requiring similar skills under similar working conditions and with other employees generally in

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<sup>56</sup> There is nothing remarkable about the Taylor Law requiring or Police Officers deserving a market wage. Recently the Office of Court Administration asked the Commission on Legislative, Judicial and Executive Compensation to recommend pay raises for New York State judges to bring them closer to market. See Andrew Keshner, *OCA Asks Pay Commission for Parity with US Judges*, N.Y.L.J., Dec. 1, 2015, available at <http://www.newyorklawjournal.com/id=1202743560218/OCA-Asks-Pay-Commission-for-Parity-With-US-Judges?slreturn=20151113155333>. The article notes that a judicial pay increase is justified because, according to the National Center for State Courts, New York State trial judges currently rank 47th among 50 states in pay with "adjustments for regional cost of living." *Id.* Similarly another independent economic analysis "showed the value of state judicial salaries was 'significantly less' than those in other states and on the federal bench." *Id.*

public and private employment in comparable communities.”<sup>57</sup> The evidence demonstrated that police officers are the only other employees who perform similar services, requiring similar skills, under similar working conditions to NYC Police Officers. Therefore, the Taylor Law requires police officer-to-police officer comparisons.

That is why the last two PERB arbitration panels were careful to base their awards on police officer-to-police officer comparisons, rather than comparisons with other City workers, including uniformed City workers of any rank, or private employees. As Chair Mackenzie explained: “Police officer duties are distinct not only from those of ‘civilian’ employees, but also from those of other uniformed forces such as firefighters and corrections officers whose positions similarly involve substantial physical risk.”<sup>58</sup> Chair Schmertz likewise concluded that the Taylor Law criteria set “a special standard for the determination of a police officer’s pay” apart from other City workers.<sup>59</sup> Numerous other PERB interest arbitration panels similarly have found that police officer-to-police officer comparisons are paramount, and therefore, police officer-to-police officer comparisons, not comparisons of police officers to other workers in the same jurisdiction, control in setting police officer pay under the Taylor Law.<sup>60</sup> Indeed, in his

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<sup>57</sup> N.Y. Civ. Serv. Law § 209.4(c)(v)(a).

<sup>58</sup> PBA15-6 at 5.

<sup>59</sup> PBA15-7 at 30.

<sup>60</sup> See, e.g., Village of Larchmont and Larchmont Police Benevolent Ass’n, Inc., IA 201-036, M201-207, at 37 (June 25, 2003) (Sands, Solfaro, Toomey) (“by far the most relevant comparisons are to other police and not to non-police employees of this or any other employer”); Massena Police Protective Ass’n v. Village of Massena, IA 96-33; M 96-217, at 42 (Mar. 23, 1998) (Rinaldo, Peets, Deperno) (“This Panel must also consider the physical and mental qualifications necessary to perform all the responsibilities and duties inherent in the work of the PBA bargaining unit, including the considerable training necessary to function as a police officer, as well as the dangerous nature of the work, thereby setting the unique terms and conditions of employment of a police officer apart from other public and private sector employees”); State of New York and Police Benevolent Ass’n of State Troopers, IA95-034, M95-334 at 75, 77-78, 88-89 (June 24, 1997) (Scheinman, Kurach, McCormack) (panel was required to “place a greater emphasis on other police officers rather than the other employees employed by the State” because “[m]any other  
(continued...)

own decisions, the Chair consistently applied the Taylor Law comparability criterion to require that great weight be afforded to “a comparison between police compensation [in the jurisdiction at issue] and other similarly situated communities,” rather than to compensation received by other workers in the same jurisdiction.<sup>61</sup>

But, in this proceeding, the Chair circumvented that long line of Taylor Law precedent, including his own and those of Chairs Mackenzie and Schmertz in the most recent parallel cases between the same parties here. Instead of comparing NYC Police Officers’ “wages, hours and conditions of employment,” with those of police officers in comparable communities, the Chair pursued an agenda whereby he compares annual percentage pay raises received by the NYPD’s

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employees simply do not face the type and degree of hazards faced by police officers and are not required to possess the combination of physical and mental skills police officers must acquire”); Village of Briarcliff Manor Policemen’s Benevolent Ass’n, Inc. and Village of Briarcliff Manor, IA2010-043, M2010-093, at 14 (Apr. 5, 2013) (Siegel, Grant, Zuckerman) (“The Panel Chair finds that the peculiarities of the profession mandate a direct comparison with police officers”).

<sup>61</sup> Village of Floral Park and Floral Park Police Benevolent Ass’n, IA98-017, M97-300, at 15-16 (Apr. 1, 1999); see also Village of Bronxville and Bronxville Police Taylor Act Committee, IA-2003-019, M-2003-104, at 15 (Sep. 22, 2004) (pay of other Village workers was “not entitled to more weight than the 3.75% per cent pattern for Police Officers in other Westchester County communities”); Village of Westhampton Beach and Westhampton Beach PBA, IA-200-002, M099-280, at 12 (July 14, 2000) (“while wage improvements of other units in the Village have some relevance to this dispute, greater weight should be given to what law enforcement officers receive in other East End communities”). Indeed, there are at least thirteen other decisions in which Chair Edelman relied consistently upon the Taylor Law’s comparability criterion to set wages, hours and employment conditions in line with those of police in comparable jurisdictions, to the exclusion of comparisons with that of other municipal jobs or patterns. See Town of Haverstraw and PBA, IA12-002, M11-371 (2013); New Castle and Police Association of New Castle, IA05-021, M04-381 (2007); Town of Mount Pleasant and Mount Pleasant Police Welfare and Benevolent Organization, IA-2002-03, M-2002-276 (2004); Town of East Hampton and East Hampton Town PBA, IA-202005, M-002-043 (2003); Town of Bedford and PBA of the Town of Bedford, Inc., IA200-022 (2001); Village of Lynbrook and Lynbrook PBA, IA200-016, M200-055 (2001); Village of Southampton and Southampton Village PBA, IA98-029, M98-082 (2000); Town of Yorktown and Yorktown PBA, IA98-037, M98-224 (1999); Village of Floral Park and Floral Park PBA, IA98-017, M97-300 (1999); Town of Orangetown and Orangetown PBA, IA97-001, M96-082 (1999); Village of Malverne and Malverne PBA, IA96-022, M96-055 (1997); Town of Mt. Pleasant and Mount Pleasant PBA, IA92-005, M92-012 (1993); Village of Floral Park and Floral Park PBA, IA88-33, M88-386 (1989).

own superior officer ranks with annual percentage pay raises offered to NYC Police Officers by the City. The Chair's analysis is contrary to the Taylor Law for two fundamental reasons.

*First*, there is absolutely no evidence to support the Chair's conclusion that NYC Police Officers and NYPD detectives, sergeants, lieutenants and captains perform similar services, requiring similar skills under similar working conditions as the Taylor Law demands. The City introduced no evidence whatsoever of any similarity between the NYC Police Officer's job and that of their supervisors. Moreover, the Chair ignored all evidence showing that it is NYC Police Officers, not their supervisors, who are on the streets day in and day out, preventing crime and apprehending criminals. It is NYC Police Officers, not their supervisors, who are the hour-by-hour face of the NYPD (and the City itself) and whose interactions with the public are, in fact, subjected to ever greater scrutiny and second-guessing of their split second decisions by the media-savvy public, federal and state courts, District Attorneys and U.S. Attorneys, Civilian Complaint Review Board, other monitors, and City Hall. And, it is NYC Police Officers, not their supervisors, whose lives are at risk day-in and day-out and who increasingly have become terrorist targets.

Witnesses with storied careers in the NYPD testified to that effect. For example, retired First Deputy Police Commissioner John Timoney (and former Philadelphia Police Commissioner and Miami Police Chief) testified about the distinct services, skills and working conditions that characterize a NYC Police Officer's job as compared with a captain's job:

[T]he captains are not out there in the street. It's the cops that are making the arrests. They're out there. It's not captains getting shot at. It's not captains that are involved in tussles on the street corner with some guy armed with a knife. It's cops. . . . It's not captains that are getting accused of using unnecessary force and facing possible jail. It's cops. So, the cops get the credit [for reducing crime].

It's that simple. That's whose done it and, to try and argue otherwise is to be either a fool or disingenuous.<sup>62</sup>

Retired Chief of Patrol William Morange similarly distinguished the job of NYC Police Officers from that of their supervisors:

Patrol officers really, they are the person that's out in the street all the time. They prevent crime by just [being] in the communities alone. . . . [W]hen Mayor Giuliani first came in and he wanted to bring crime down in the city, it was the patrol officers that did the bulk of the work. I know as myself at that time . . . I was a chief. It was very easy for me just to say what we needed done, but it was the patrol officer that went out day in and day out and made the city as safe as it is today.<sup>63</sup>

*Second*, even assuming, *arguendo*, NYC Police Officers and their supervisors did perform similar services, requiring similar skills, under similar working conditions, there is no basis in logic or evidence to compare annual percentage pay raises, rather than “wages, hours and conditions of employment” as the Taylor Law specifically commands. If police officers in one jurisdiction (here, NYC Police Officers) are vastly underpaid compared with police officers in other jurisdictions (as they are), it would make no sense whatsoever to compare their annual pay raises in an effort to ensure uniformity of pay raises. That would just perpetuate existing pay disparities.<sup>64</sup>

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<sup>62</sup> Tr. 675:14–676:2 (Timoney).

<sup>63</sup> Tr. 963:8–964:2 (Morange). On the same page of the Opinion, the Chair declares both that NYC firefighters “are an appropriate comparator” to NYC Police Officers and that “they are not an appropriate comparator in this case.” Opinion at 68 & n.53. As such, it is impossible to tell what the Chair is saying. Suffice it to say that there is no evidence that would support a finding that firefighters are an appropriate comparator for NYC Police Officers. The City did not even attempt to demonstrate that firefighters perform similar services, requiring similar skills, under similar working conditions. That is not surprising in light of Chair Mackenzie’s express finding to the contrary in the last interest arbitration between these parties: “Police officer duties are distinct not only from those of civilian employees, but also from those of other uniformed forces such as firefighters and correction officers whose positions similarly involve substantial physical risk.” PBA15-6 at 5. Indeed, Chair Mackenzie did not hesitate to award NYC Police Officers higher percentage pay increases than firefighters had received for the same period.

<sup>64</sup> See Tr. 428:12–16 (Hurd).

As Chair Mackenzie found in the last arbitration between these parties, “pattern bargaining in the 1970s occurred when not only New York City police officer salaries were ranked at the top nationally, but salaries of other New York City uniformed forces, including firefighters and sanitation workers, were ranked at the top as well.”<sup>65</sup> In that context, it would not be surprising if uniformed workers received parallel annual percentage rate increases, which would maintain them in the same position relative to their peers in other jurisdictions.<sup>66</sup> But, as Commissioner Linn demonstrated when he testified for the PBA, beginning in 1990, NYC Police Officers’ pay had fallen substantially behind that of police officers in other jurisdictions, while the same was not true of other City workers, including police captains.<sup>67</sup> There is no evidence that situation has changed. Indeed, the City admitted that it did not analyze how other City workers’ pay compares with their peers in comparable communities.<sup>68</sup>

The Chair’s reliance on annual pay raises accepted by police supervisors without regard to the relative compensation of their peers in comparable communities, by necessity, results in pattern pay increases. As applied to our City’s 23,000 Police Officers, however, it becomes a sham masquerading as Taylor Law analysis designed to justify awarding NYC Police Officers the same general percentage wage increases that other workers receive. It is the sort of strict adherence to pattern bargaining without consideration of external market conditions that Commissioner Linn has said in the past had been “singularly devastating and unfair to NYC

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<sup>65</sup> PBA15-6 at 5.

<sup>66</sup> During that prior period, for example, the panel chaired by Justice Goldberg recommended the same annual pay raises to police officers, firefighters, and sanitation workers. See PBA15-14.

<sup>67</sup> See Tr. 1799:6–1801:13 (Linn); PBA15-196 at 73–84.

<sup>68</sup> See Tr. 1802:7–1803:11, 2006:18–2007:6 (Linn). Indeed, it is not surprising that, if the pay of other units of City workers (including uniformed supervisors) is at or above market, they would readily uniformly accept the same percentage increases.

Police Officers” and resulted in “inexcusably low pay for NYC Police Officers.”<sup>69</sup> It is unfortunate to say the least that the City insists on treating its Police Officers this way and that the Chair has endorsed it. Simply put, the City built a pattern upon the union(s) with the weakest case, and the Chair simply rubber-stamped it here. There is nothing “just and reasonable” about the outcome it has produced.<sup>70</sup>

**2. The Evidence Concerning the Pay of Police Officers in Local Police Jurisdictions Demands that a Just and Reasonable Award Include a Substantial Pay Raise for NYC Police Officers**

Although the Chair further claims to look at what he describes as “similar statistics for non-New York City units,”<sup>71</sup> his analysis of that information is flawed. The evidence demonstrated that the situation remains as Commissioner Linn described it in 2002: “New York City police salaries are a laughingstock; throughout the nation everyone knows that city cops are underpaid.”<sup>72</sup> The Chair engages in a series of obfuscations and diversions to hide that fact.

**a. The Chair Ignores the Evidence that Shows that Local Police Jurisdictions in and Near the City are the Most Appropriate Comparators under the Taylor Law**

Abundant evidence demonstrated that police officers in the cities (Yonkers, Jersey City, Newark, and Elizabeth), counties (Suffolk, Nassau, and Westchester) and police jurisdictions (Port Authority, MTA, and New York State Troopers), which surround or operate within the City are the most appropriate comparators for NYC Police Officers. It is essential to make comparisons with the local police jurisdictions because they operate in an economically

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<sup>69</sup> PBA15-196 at 143, 150.

<sup>70</sup> N.Y. Civ. Serv. Law § 209.4(c)(v).

<sup>71</sup> Opinion at 68. Although the Chair claims to look at “similar statistics,” the Chair does not look at annual percentage pay raises for police officers in any local jurisdiction or national city. The parties did not even present evidence on that issue.

<sup>72</sup> PBA15-1 at 4.

integrated area, which forms part of the same local labor market. As a result, people interested in law enforcement careers have access to information about the various job opportunities available in the local police jurisdictions and will not incur relocation costs to accept them.<sup>73</sup> Consistent with this, the evidence showed that NYC Police Officers who leave the NYPD for other law enforcement jobs overwhelmingly accept positions in local jurisdictions.<sup>74</sup> Further establishing that the labor market for police is local, the evidence demonstrated that the NYPD gives the police exam almost exclusively in or around the City or at or near military bases or college campuses where people from New York City or the surrounding areas may be located.<sup>75</sup> Finally, if the Chair were sincere in his position that compels him to look within the City for a comparable market, he should have seized upon the Port Authority and MTA police and New York State Troopers who regularly augment, within the City boundaries, the work of NYC Police Officers but at far higher pay.

The Chair nevertheless concludes that “[l]arge national cities are most similar to New York City.”<sup>76</sup> The Chair claims that is so because the national cities “encompass a cross section of residents from the very poor to the very wealthy” and provide a “vast array of services such as education, sanitation, firefighting, special services, housing, welfare, libraries and other public necessities and amenities.”<sup>77</sup> The Chair cites no evidence and the City did not submit any

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<sup>73</sup> See Tr. 432:7–20, 433:3–16, 436:2–20 (Hurd); Tr. 1344:6–9, 1339:20–1340:6 (Abraham). The fact that they are in the same local labor market obviates the need to adjust pay in the local jurisdictions for cost of living differences. See Tr. 447:6–9 (Hurd); Tr. 1336:5–12 (Abraham). As I explain below, the Chair’s analysis of police officer pay in national cities is compromised by his abject failure to account for the wide range of differences in cost of living across national cities. See Section II.A.3, *infra*.

<sup>74</sup> See Tr. 221:3–5 (Lynch); Tr. 985:11–986:5 (Morange); Tr. 1011:11–20 (Dunne); PBA15-159; PBA15-160.

<sup>75</sup> See Tr. 441:18–442:5 (Hurd); PBA15-115 at 11.

<sup>76</sup> Opinion at 69.

<sup>77</sup> *Id.*

concerning the diversity of the populations or the services demanded in either the local police jurisdictions or large national cities. All the record shows is the undisputed evidence that NYC has the largest and most diverse population. In any event, it strains belief to assert that the higher-paying police jurisdictions of Newark, Yonkers, Jersey City, and Elizabeth do not have similarly diverse demographics and do not provide a similarly broad array of services. Is it reasonable to assume, *ipse dixit*, that those cities are any less diverse or provide fewer services than, for example, Columbus, El Paso, Phoenix, or San Jose? The Chair also conveniently ignores the unrebutted evidence that Yonkers, Newark, Jersey City, and Elizabeth all have population density comparable to the ten largest national cities, and that Jersey City alone would be second to San Francisco after NYC in population density.<sup>78</sup>

Although the Chair downplays the counties surrounding the City because they may be wealthier and provide fewer services than the City, he ignores the fact that Nassau and Suffolk, the highest paying local police jurisdictions, would each be ranked among the top ten national cities by population.<sup>79</sup> Commissioner Linn put it well when he testified in 2002 that it would be “ridiculous” to give Nassau and Suffolk “no weight in the analysis” because “any analysis that says that you should not look to the 5,000 police officers working for a population of 2.7 million, much like the police force and size of Chicago and say, don’t even consider them but consider El Paso, that’s quite a comparability analysis.”<sup>80</sup> In this proceeding, Commissioner Linn himself

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<sup>78</sup> See Tr. 445:14–21 (Hurd).

<sup>79</sup> See PBA15-265 at 9–10.

<sup>80</sup> PBA15-197 at 88:7–19.

grudgingly conceded that Nassau and Suffolk should have “[s]ome weight in this proceeding,” as well.<sup>81</sup>

The Chair does not make any findings with regard to the appropriateness of using police officers employed by the Port Authority, MTA, and New York State Troopers as comparators. There is no question that they provide similar services, requiring similar skills under similar working conditions to NYC Police Officers. Indeed, it is far beyond being ironic that the Chair justifies consideration of NYC police supervisors based on the fact that they “function within the same geographical jurisdiction,”<sup>82</sup> but discounts to a place of insignificance the importance of police officers employed by the Port Authority, MTA, and New York State Troopers who work side-by-side with New York City Police Officers in the same geographic jurisdiction and who confront the same vast array of socio-economically diverse communities as they perform their law enforcement duties within the City itself.<sup>83</sup>

Equally misguided is the Chair’s attempt to justify reliance on national cities, rather than local police jurisdictions, based on his conclusion that NYC Police Officers are not “flocking to the suburbs for higher pay.”<sup>84</sup> As an initial matter, the evidence shows that NYC Police Officers who leave for other policing jobs overwhelmingly accept employment with higher-paying local police jurisdictions — not national cities.<sup>85</sup> For example, after 9/11 when the Port Authority hired additional police officers, 311 former NYC Police Officers accounted for almost the entire

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<sup>81</sup> Tr. 1833:6–7 (Linn).

<sup>82</sup> Opinion at 65.

<sup>83</sup> See Tr. 431:18–432:6 (Hurd); Tr. 982:22–983:4 (Morange); 1006:2–12 (Dunne); Tr. 1934:15–16 (Linn).

<sup>84</sup> Opinion at 70.

<sup>85</sup> See Tr. 221:3–5 (Lynch); Tr. 985:11–986:5 (Morange); Tr. 1011:11–20 (Dunne); PBA15-159; PBA15-160 (NYPD’s Total Uniform Resignations).

Port Authority academy class.<sup>86</sup> So evidence concerning attrition does not justify looking to national cities, rather than local police jurisdictions, as comparators.

In any event, the Chair’s conclusion regarding attrition to local jurisdictions both misstates and ignores evidence. Contrary to the Chair’s statement that “fewer than 100 officers have left the City” for other police jobs from 2009 to 2014, the City’s own evidence shows that in 2014 alone more than 100 NYC Police Officers left for other policing jobs.<sup>87</sup> Moreover, that figure has more than doubled since 2009 when the effects of the Great Recession took effect. In each of the five years preceding the Great Recession more than 200 NYC Police Officers left for other policing jobs.<sup>88</sup> During the same five year period an average of at least 400 to 600 additional NYC Police officers left the NYPD each year for a variety of other reasons, including for private employment or to switch to the other City, state or federal agencies.<sup>89</sup> The attrition numbers plainly are trending back toward the pre-Great Recession figures especially as some of the local police jurisdictions increase hiring after imposing hiring freezes for much of the period that the Chair considers.<sup>90</sup>

The evidence also showed that the City has taken steps to impose significant barriers to dissuade NYC Police Officers from leaving for higher-paying local jurisdictions, barriers that confirm the City’s concern with attrition and migration. For example, the City has pressed aggressively to recover funds under N.Y. General Municipal Law § 72-c for the cost of training

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<sup>86</sup> See Tr. 1014:3–1015:18 (Dunne); PBA15-180.

<sup>87</sup> See City Ex. 18 at 30.

<sup>88</sup> See id.; PBA15-160

<sup>89</sup> See PBA15-160, showing that a total of 3,095 NYC Police Officers voluntarily departed the NYPD for any reason over those five years preceding the Great Recession.

<sup>90</sup> See PBA15-51; Tr. 1151:10–14 (Surillo).

NYC Police Officers who leave the NYPD even when they do not accept policing positions.<sup>91</sup> Between July 2012 and September 2014, the City pursued reimbursement of training costs from over 20 different local jurisdictions in the amount of more than \$1.7 million.<sup>92</sup> Notably, the City sought to recover \$169,174 from Suffolk County for 6 former NYC Police Officers and \$460,594 from Nassau County for 17 former NYC Police Officers.<sup>93</sup> The City also sought \$161,181 from Yonkers and \$20,923 from Westchester County.<sup>94</sup>

Even more insidiously, for the past twelve years (since 2003), the NYPD has refused to share personnel files with other municipal, county, state, and federal employers adding another artificial barrier to dissuade NYC Police Officers from leaving for higher-paying jurisdictions.<sup>95</sup> As a result, other police forces, including the Port Authority, eliminate NYC Police Officers as candidates because they are unable to verify and examine the officer's prior employment.<sup>96</sup>

The Chair acknowledges that the effect of the Great Recession and these artificial barriers to exit are "relevant" in assessing the attrition rate of NYC Police Officers to other local police

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<sup>91</sup> For example, the NYPD sought \$51,770.97 as reimbursement for a former NYC Police Officer who became a firefighter in the Village of Pelham. See PBA15-53. According to the minutes of the Village of Pelham Board of Trustees, the Village felt "that it should not pay for the training of a police officer who had been hired as a firefighter," but deemed it "less costly to settle for a portion of what the City sought than to enter into open-ended litigation" especially because "there are other municipalities that are in a similar situation who are settling with the NYPD." PBA15-52 at 4-5.

<sup>92</sup> See PBA15-138.

<sup>93</sup> See PBA15-138. Including villages and towns, the NYPD has sought to recover over \$200,000 from local police jurisdictions in Suffolk County, and over \$800,000 from local police jurisdictions in Nassau County. See id.

<sup>94</sup> See id. Including villages and towns, the NYPD has sought to recover over \$180,000 from local police jurisdictions in Westchester County. See id.

<sup>95</sup> See Tr. 2687:15-20 (Julian); Tr. 1015:19-1016:16 (Dunne); Erika Martinez and Zach Haberman, *NYPD Kills Cop's Bid to Join FBI*, THE NEW YORK POST, Aug. 9, 2004.

<sup>96</sup> See Tr. 1013:12-1014:4 (Dunne).

jurisdictions, but claims that they “are outweighed by other factors.”<sup>97</sup> The Chair neither identifies those “other factors” nor explains how they affect his determination of the weight to be afforded to police officer pay in local police jurisdictions.

**b. NYC Police Officers are Substantially Underpaid Compared with Police Officers in Local Police Jurisdictions**

The PBA presented comparisons of NYC Police Officer pay with police officer pay in ten local police jurisdictions for both 2010 (the beginning of the contract period) and 2012 (the end of the contract period). For each of those years, the PBA compared pay at Basic Maximum (“Basic Max”) and based on the 20-year average.<sup>98</sup> And for both measurements, the PBA compared police officer pay on an annual and an hourly basis.<sup>99</sup> NYC Police Officers ranked dead last in each of the 80 separate comparisons of NYC Police Officer pay with police officer pay in the local jurisdictions that the PBA presented.<sup>100</sup> As shown in the chart below, just to reach the average pay of the police officers in the local police jurisdictions in 2012, NYC Police Officers would require a pay raise of approximately 20–21% on an annual basis and approximately 30–31% on an hourly basis.

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<sup>97</sup> Opinion at 71.

<sup>98</sup> Basic Max refers to the maximum that a police officer can reach on the base pay scale. See Tr. 447:16–448:20 (Hurd). The 20-year average measures the average pay that police officers receive over a 20-year career. See Tr.; 448:21–24 (Hurd). These computations include all components of total direct compensation — not only base salary, but all of the following to the extent provided in each jurisdiction: longevity pay; shift differential; holiday pay; uniform/equipment allowance; training pay; education pay; language pay; physical fitness stipend; and geographic pay. See PBA15-115 at 16; Tr. 451:16–452:11 (Hurd). These comparisons at Basic Max and 20-year average, as well as the components of total direct compensation that have been included, are the same as those analyzed and advocated by Commissioner Linn when he represented the PBA in the earlier PERB interest arbitration against the City.

<sup>99</sup> See Tr. 447:10–449:3 (Hurd).

<sup>100</sup> See Tr. 462:15–22 (Hurd).

**Local Jurisdictions 2012 Police Officer Annual and Hourly Pay  
Basic Max and 20-Year Average<sup>101</sup>**

<b>Jurisdiction</b>	<b>Basic Max</b>	<b>Basic Max/ Hour</b>	<b>20-Year Average</b>	<b>20-Year Average/Hour</b>
Suffolk	\$108,608	\$66.75	\$120,144	\$73.84
Nassau	\$107,319	\$66.70	\$101,003	\$63.37
Westchester	\$96,188	\$55.19	\$103,462	\$59.37
Port Authority*	\$90,000	\$51.22	\$103,044	\$58.64
Jersey City	\$91,755	\$54.52	\$89,161	\$52.96
Newark	\$89,866	\$47.72	\$88,723	\$47.12
NYS Troopers**	\$84,739	\$48.15	\$103,186	\$58.79
Elizabeth	\$88,499	\$46.14	\$91,815	\$47.88
Yonkers	\$85,242	\$51.10	\$93,025	\$55.78
MTA	\$86,531	\$45.93	\$91,481	\$48.56
<b>NYC</b>	<b>\$76,488</b>	<b>\$40.58</b>	<b>\$82,129</b>	<b>\$43.58</b>
<b>Average Without NYC</b>	<b>\$92,875</b>	<b>\$53.34</b>	<b>\$98,504</b>	<b>\$56.63</b>
<b>NYC Below Average</b>	<b>\$16,387</b>	<b>\$12.76</b>	<b>\$16,375</b>	<b>\$13.05</b>
<b>Total Raise NYC Needs to Reach Average</b>	<b>21.4%</b>	<b>31.4%</b>	<b>19.9%</b>	<b>29.9%</b>

\* As of the prior contract period (2009); new salary scales pending agreement

\*\* As of the prior contract period (2010); new salary scales pending agreement

To be “counted among the highest paid officers in the nation” relative to police officers in the local jurisdictions at the end of the contract period (in 2012), NYC Police Officers would require an even more substantial raise. To reach the average of the three highest paid local police jurisdictions, NYC Police Officers would need a pay raise of approximately 32-36% on an annual basis and approximately 50-55% on an hourly basis.

The City’s own data showed the same vast pay disparity between NYC Police Officers and police officers in local jurisdictions. As City witness and advisor to the de Blasio Administration on labor issues, Stanley Brezenoff, aptly put it when he agreed that total direct compensation (base salary plus all other components of salary) paid to NYC Police Officers

<sup>101</sup> PBA15-265 at 6. The Chair included only the 2010 data in the Opinion. See Opinion at 5.

trails that paid to police officers in local jurisdictions: it is “hard to argue with arithmetic, the numbers are the numbers.”<sup>102</sup>

Indeed, based on the City’s own data which assumed that NYC Police Officers received two additional annual 1% pay increases in 2013 and 2014, NYC Police Officers would require an 18.5% raise on an annual basis and a 28.9% raise on an hourly basis just to reach the average pay of the local police jurisdictions in 2014.<sup>103</sup> And based on the same data and assumptions, NYC Police Officers would need an annual raise of 19.53% to reach the level of Port Authority police officers, 19.19% to reach the level of MTA police officers, and 25.28% to reach the level of New York State troopers in 2014. On an hourly basis, NYC Police Officers would need a raise of 28.28% to reach the level of Port Authority police officers, 19.43% to reach the level of MTA police officers, and 35.22% to reach the level of New York State Troopers.<sup>104</sup>

These pay disparities are particularly appalling in light of the undisputed evidence that the job of NYC Police Officers is substantially more complex and difficult than that of police officers in the local jurisdictions. If anything, NYC Police Officers should be more highly compensated — not less, in relation to police officers in the local jurisdictions.

Numerous witnesses with law enforcement experience in both New York and the local jurisdictions made the point. Retired NYPD First Deputy Police Commissioner Joseph Dunne

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<sup>102</sup> Tr. 2056:19–2057:4 (Brezenoff); see also Tr. 2117:2–9 (Nadol) (“our [the City’s] findings are roughly consistent with those introduced” by the PBA); Tr. 2300:8–16 (Nadol) (“if you’re looking at the cash direct compensation and not benefits, they [NYC Police Officers] are at the low end of that range”).

<sup>103</sup> See City Ex. 10 at 35 (showing 20-year average data for local jurisdictions); City Ex. 9 at 62–65, 67–69, 71–73 (showing 20-year average per hour data for local jurisdictions). In proffering its analysis as of 2014, the City considered data from the same local jurisdictions as the PBA, except Westchester County, for which the City claimed it could not obtain data.

<sup>104</sup> The report prepared by the Citizen’s Budget Commission also confirmed that NYC Police Officers are paid substantially less and work more hours than Port Authority police officers. See PBA15-248; Tr. 2627:15–2632:16 (Kellerman).

who recently served as Chief Security Officer of the Port Authority Police Department testified that Port Authority police officers are “fine, good police officers” who “work hard,” but “there is simply no comparison to the responsibilities and work that’s required of our NYPD officers.”<sup>105</sup> Among other things, unlike NYC Police Officers, Port Authority police officers do not police neighborhoods and rarely respond to calls for service. Retired NYPD Chief Morange who recently served as the MTA’s Director of Security testified that MTA police officers also are paid more and have fewer responsibilities than NYC Police Officers.<sup>106</sup> And former NYC and current Nassau County Police Officer Ryan Surillo testified that police officers in Nassau County have fewer responsibilities, less stress, and face less danger than lower-paid NYC Police Officers.<sup>107</sup>

Both law enforcement professionals and the lay public understand that NYC Police Officers should be paid more for a more difficult and complex job than police officers in local jurisdictions.<sup>108</sup> As Manhattan Borough President Gale Brewer testified:

If asked how they thought NYC police officers’ salaries and benefits stacked up against those of the Port Authority police departments in neighboring jurisdictions, most people, residents and tourists alike, would expect that the NYPD [with] its unique responsibilities and challenges to be highly compensated. And sadly, they’d be wrong. Our officers are paid less than many of their peers and the gap is widening.<sup>109</sup>

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<sup>105</sup> Tr. 1004:8–1005:25 (Dunne).

<sup>106</sup> See Tr. 977:2–15, 978:8–18, 979:5–17, 980:14–25, 981:13–22 (Morange).

<sup>107</sup> See Tr. 1140:25–1141:10, 1144:15–20, 1145:9–17, 1146:14–20, 1147:10–23 (Surillo).

<sup>108</sup> See Tr. 981:13–22, 983:25–984:8 (Morange); Tr. 1007:10–15 (Dunne); see also Tr. 2584:15–2585:5 (Weprin); Tr. 277:13–23 (Steven McDonald) (“Compared with the surrounding communities we do so much . . . police work and we do it so well that people come to us to learn how to do it . . . I’m just so proud at times like September 11th, but there are times when you don’t hear what we do. You don’t know about us because it doesn’t find its way on the front of a newspaper or TV report or a radio report.”).

<sup>109</sup> Tr. 294:18–295:5 (Brewer).

In fact, the watchdog Citizens Budget Commission sees the disparity of responsibility the same way.<sup>110</sup>

The Chair himself notes the “paradox” by which “[l]arge cities, which make for difficult police work, tend to pay their Officers less than more affluent suburbs where law enforcement duties are arguable less onerous.”<sup>111</sup> That “paradox” is nowhere more pronounced than in NYC where its Police Officers are paid substantially less even than police officers with less onerous duties in the surrounding urban jurisdictions and in the police jurisdictions that operate within the City itself. But the Chair does nothing to correct this paradox, leaving in place an egregious inequity that cannot be justified under the Taylor Law.

**c. The Chair Perverts the Comparability Analysis by Comparing the Supposed Annual Fringe Benefit Costs of NYC and Other Police Jurisdictions**

In the face of this evidence, the Chair proclaims that, considering only local comparators, “as of July 31, 2014, New York places fourth out of ten local jurisdictions on a twenty year average.”<sup>112</sup> At the outset, the Chair should have rejected the use of City data for years after the two-year 2010–2012 contract period at issue in this proceeding. How NYC Police Officers compare with police officers in comparable communities in 2014 may be a question for future collective bargaining. 2014, however, is outside the statutory scope of “matters related to this

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<sup>110</sup> See Tr. 2633:7–19 (Kellerman) (“Well, I don’t want to minimize the responsibilities of Port Authority police, but they have a much smaller area of jurisdiction. They only cover certain, specific facilities. Obviously, the New York City Police Department has the entire city to cover, and so it has a higher, more intense degree of responsibility in many ways.”).

<sup>111</sup> Opinion at 70.

<sup>112</sup> Opinion at 77.

dispute” (limited as it is to the 2010–2012 contract period) and, thus, irrelevant to this proceeding.<sup>113</sup>

In any event, what the Chair is purporting to compare are total annual employer costs, including the purported annual cost in 2014 of providing pension and health benefits to police officers. That total cost analysis presented by the City and wholesale adopted by the Chair has no legitimate place in a Taylor Law comparability analysis. In fact, it perverts the comparability analysis by incorporating information concerning employer fringe benefit costs that have nothing to do with the value of those fringe benefits to police officers, aside from being premised upon comparisons akin to apples and kumquats.

**i. The Taylor Law Does Not Authorize the Panel to Consider Fringe Benefit Costs**

The Chair justifies consideration of fringe benefit costs by his blind reference to the Taylor Law’s comparability criterion.<sup>114</sup> Yet, significantly, although the comparability criteria in other (non-applicable) sections of the Taylor Law (and the NYCCBL) expressly refer to fringe benefits, the Taylor Law comparability criterion applicable to NYC Police Officers does not. Thus, unlike the provision applicable to resolving collective bargaining disputes between the City and the MTA workers, which requires an impasse panel to compare “the wages, hours,

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<sup>113</sup> N.Y. Civ. Serv. Law §§ 209.4(c)(iii), (c)(vi). Further, the City’s data on which the Chair relies assumes pay raises for NYC Police Officers for a contract that has not been resolved, while not making any assumptions regarding pay raises that might be awarded to Port Authority police officers who have been working without a contract since 2009 and NYS Troopers who have been working without a contract since 2010. That is just one example of how the City manipulates data at every turn in its effort to argue NYC Police Officer pay in its most favorable light relative to comparators. The Chair justifies use of 2014 data by noting that “the PBA went well beyond 2012 to demonstrate the City can pay the raises it seeks.” Opinion at 77. In doing so, the Chair ignores the fundamental difference between the comparability analysis, which considers the pay of NYC Police Officers during the contract period, and the ability to pay inquiry, which, for practical purposes, considers the time period when the City will be required to pay retroactive awards. Finally, the Chair’s further comment that the City’s fiscal condition in 2012 was “far less sanguine” (*id.*) than it is now, is unsupported by any evidence.

<sup>114</sup> See Opinion at 73.

*fringe benefits*, conditions and characteristics of employment,”<sup>115</sup> the provision applicable to NYC Police Officers requires an impasse panel to compare only “the wages, hours, and conditions of employment.”<sup>116</sup> It is a well-settled principle of statutory construction that where the Legislature “includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the Legislature] acts intentionally and purposefully in the disparate inclusion or exclusion.”<sup>117</sup> The Chair’s contrary conclusion flies in the face of that well-settled principle.

The Chair fares no better with his citation to Section 209.4(c)(v)(d) as support for his reliance on the City’s evidence regarding alleged fringe benefit costs.<sup>118</sup> That provision instructs the Panel to consider “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

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<sup>115</sup> N.Y. Civ. Serv. Law § 209.5(d)(i) (emphasis added). The NYCCBL contains the same language in its comparability criterion. *See* NYCCBL § 12-311.c(3)(b)(i). No one should be more familiar with the critical Taylor Law distinctions between the Section 209.4(c)(v) criteria applicable to NYPD Police and the Section 209.5(d) criteria applicable only to transit workers than the Chair himself. Compare Chair Edelman’s decision under the separate Taylor Law criteria in 209.5(d) limited to Transit collective bargaining impasses in NYC — MTA Bus Co. and Local 1179, TIA-2012-022, M2012-214 (2013) (Edelman); NYC Transit Auth. and Subway-Surface Supervisors Ass’n, TIA-2013-008, 009, 010, M-2012-368, 369, 370 (2013) (Edelman); MTA and MTA Police Dep’t Commanding Officers Ass’n, TIA2013-033, M2013-067 (2014) (Edelman); Staten Island Rapid Transit Operating Auth. and Local 1440, TIA2010-034, M2010-155 (2012) (Edelman) — with cases decided by Chair Edelman under Section 209.4(c)(v) cited in n. 58, supra. In sum, the Chair has shown no regard for these all too obvious Taylor Law distinctions.

<sup>116</sup> N.Y. Civ. Serv. Law § 209.4(c)(v)(a).

<sup>117</sup> I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987); Rivers v. Birnbaum, 102 A.D.3d 26, 35 (2d Dep’t 2012); see also Nguyen v. Holder, 24 N.Y.3d 1017, 1022 (2014) (Grafteo, J., concurring) (“When the Legislature includes a condition in one section and excludes it from another within the same statute, there arises an ‘irrefutable inference’ that the omission was intentional.”); Patrolmen’s Benevolent Ass’n of the City of New York v. City of New York, 41 N.Y.2d 205, 208–09 (1976) (where “statute describes the particular situations in which it is to apply, ‘an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded’” (citation omitted)).

<sup>118</sup> See Opinion at 73, 84. The Chair incorrectly cites Section 209.5(v)(d) of the Taylor Law (id. at 73), besides giving the distinct impression throughout his Opinion that he has (erroneously) relied upon Taylor Law Section 209.5. As previously explained, Section 209.5 applies only to Transit bargaining disputes. It has absolutely no application here. Perhaps that is a source of the Chair’s confusion.

for salary, insurance and retirement benefits . . . .”<sup>119</sup> Pension benefits provided to NYC Police Officers are determined by the Legislature. They are not subsumed within “the terms of collective agreements negotiated between the parties in the past.”<sup>120</sup> By extension, neither is the cost of those pension benefits that have been set by State legislation. In addition, Section 209.4(c)(v)(d) plainly refers to past agreements “between” the disputant parties themselves. It says nothing about comparing fringe benefits with those received by other workers elsewhere. Further, the Chair does not cite any past agreements between the City and the PBA that supposedly justify his consideration of fringe benefit costs. Consequently, Section 209.4(c)(v)(d) also does not support the Chair’s consideration of fringe benefit costs.

**ii. The Chair Ignores Evidence that Fringe Benefit Costs Are Not Material to Police Officers’ Employment Decisions**

Moreover, the evidence plainly demonstrates that fringe benefits are not material to NYC Police Officers’ employment decisions. Each of Commissioner Timoney, Commissioner Dunne, and Officer Surillo testified to that effect.<sup>121</sup> In the words of Commissioner Timoney, “I never thought about retirement or what benefits lay ahead.”<sup>122</sup> Similarly, Commissioner Dunne testified that “I didn’t think about the pension when I was a 21-year old kid, and I don’t know that many youngsters think about the pension.”<sup>123</sup> And Eugene O’Donnell, a former NYC Police Officer and a professor at John Jay Criminal College, testified that, for his students, “salary is dispositive.”<sup>124</sup> For that reason, when law enforcement agencies recruit prospective candidates at

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<sup>119</sup> N.Y. Civ. Serv. Law § 209.4(c)(v)(d).

<sup>120</sup> Id.

<sup>121</sup> See Tr. 689:17–23 (Timoney), Tr. 1011:21–1012:19 (Dunne), Tr. 1142:2–18 (Surillo).

<sup>122</sup> Tr. 689:17–23 (Timoney).

<sup>123</sup> Tr. 1011:21–1012:19 (Dunne).

<sup>124</sup> Tr. 827:21–828:3 (O’Donnell).

John Jay, they generally don't "come in and talk about pension and other things. They give their salary and they put it right up front and it's in bold. They don't try to sell the benefits because I don't think the average 20-something person is focused on that."<sup>125</sup>

The Chair distorts Professor Hurd's testimony beyond recognition when he says that "Professor Hurd referred to health insurance and retirement benefits as a necessary component of employer provided benefits."<sup>126</sup> Consistent with the testimony of the law enforcement witnesses, Professor Hurd testified "that entry level workers are primarily interested in the pay that they're going to receive," and that, although they might also consider "whether there is a benefit package that is decent, . . . [i]t is unlikely that they would get into a detailed analysis of the differences in benefits between one public sector employer and another public sector employer because that analysis is very complex."<sup>127</sup> The portion of the transcript that the Chair plucks out of context refers to Professor Hurd's testimony on cross-examination about an academic article comparing the private sector and the public sector and observing that the public sector generally offers better benefit packages than the private sector.<sup>128</sup> The differences between public sector and private sector employment have no bearing on the Taylor law issues before this Panel.<sup>129</sup>

All that evidence is consistent with Chair Schmertz's observation in the previous interest arbitration that the promise of a future pension is not very meaningful to a NYC Police Officer who must work for twenty years at a below market wage to receive it:

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<sup>125</sup> Tr. 828:3–12 (O'Donnell); see also Tr. 394:24–395:14 (Green).

<sup>126</sup> Opinion at 73–74.

<sup>127</sup> Tr. 503:2–5, 525:5–14 (Hurd); see also Tr. 498:22–499:19 (Hurd).

<sup>128</sup> See Tr. 531:18–532:18 (Hurd).

<sup>129</sup> In any event, Professor Hurd never endorsed a comparison of annual fringe benefit costs to the employer as a means to compare the relative value of fringe benefits to employees as the Chair has done.

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 [pension] 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.<sup>130</sup>

The City did not present any contrary evidence to suggest that fringe benefits play a material role in police officers' employment decisions. There was no basis for the Chair to accept the City's attempts to insert fringe benefit costs into the comparability analysis and to place them on an equal footing with total direct compensation.

**iii. The Chair's Consideration of Annual Fringe Benefit Costs to the Employer is Not a Meaningful Basis for Comparison of The Relative Value of Fringe Benefits to Police Officers**

More importantly, the Chair's adoption of the City's total cost analysis is wholly incompatible with the Taylor Law's comparability criterion. The City presented data concerning the purported 2014 per capita cost of employing a police officer, including the police officer's salary and the cost of providing fringe benefits to that officer in the City and the local and national comparators. This is the fourth time the City attempted to sell its total cost comparability analysis. For good reason, none of the previous three PERB arbitration panels endorsed the City's analysis.

In breaking new ground by his wholesale adoption of the City's total cost comparability analysis, the Chair ignores the undisputed evidence, including the testimony of Brad Heinrichs, the sole pension actuary to testify, who explained authoritatively and in great detail, why the City's total cost analysis is actuarially unsound and useless as a basis for comparison, and instead

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<sup>130</sup> PBA15-7 at 22.

leads to a “distorted view.”<sup>131</sup> The reasons that total annual fringe benefit costs bear no relationship to the value of those fringe benefits are manifold and undisputed.

*First*, some portion of annual pension costs is attributable to unfunded liabilities, which liabilities, in turn, are attributable to many divergent factors that have no bearing on the value of pension benefits to police officers. For example, unfunded liabilities may be caused by investment returns falling short of actuarial assumptions, including those regarding the assumed rate of return on fund assets, which increase the funding requirement in future years, but have no impact on the value of pension benefits.<sup>132</sup> Unfunded liabilities also may be caused by underfunding of the pension plan in certain years, which also increases the funding requirement in future years, but has no impact on the value of pension benefits.<sup>133</sup>

Even aside from the fact that they have nothing to do with the value of pension benefits, costs associated with unfunded liabilities further distort any purported comparison of fringe benefits across jurisdictions because different jurisdictions amortize their unfunded liabilities over different time periods. Thus, even assuming *arguendo* that two jurisdictions have the same amount of unfunded liabilities, a jurisdiction paying down its unfunded liabilities over 30 years will incur a lower annual pension cost with respect to that unfunded liability than a jurisdiction paying down its unfunded liability over 20 years.<sup>134</sup> Comparing the resulting annual costs as a measure of pension value (or even of the jurisdiction’s economic burden) makes no more sense

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<sup>131</sup> Tr. 3062:19–22, 3064:6–9, 3067:13–16 (Heinrichs).

<sup>132</sup> See Tr. 3026:22–3027:5 (Heinrichs); Tr. 1858:23–1860:13 (Linn).

<sup>133</sup> See Tr. 3027:10–25 (Heinrichs).

<sup>134</sup> See Tr. 2258:12–16 (Nadol).

than comparing the value of two homes based on annual mortgage payments for mortgages that are being paid off over a different number of years.<sup>135</sup>

*Second*, the myriad actuarial assumptions that underlie the determination of annual pension contributions differ markedly across jurisdictions further rendering any attempt to compare annual pension costs meaningless. Those different actuarial assumptions can dramatically impact annual funding requirements, with no corresponding impact on the value of pension benefits.<sup>136</sup> Moreover, even within a jurisdiction, they can change from year-to-year or within the same year. As one simple example, beginning in fiscal year 2011, the City's Chief Actuary changed the assumption regarding the expected rate of return on the City's Police Pension Fund ("PPF") assets from 8% to 7%. That single change increased the annual funding contribution for the PPF by 14% of payroll or \$482 million.<sup>137</sup>

*Third*, different cities set pension funding requirements differently. Some cities contribute the actuarially recommended amount and some contribute more or less than the actuarially recommended amount.<sup>138</sup> In still other jurisdictions, including five of the six Texas cities that are among the City's national comparators, the pension funding requirement is fixed by negotiation with the union without regard to an actuarial determination of amounts necessary to fund future obligations.<sup>139</sup> These different funding methodologies used by different jurisdictions, often to minimize current budgetary costs (and mask the real cost to those cities), further render useless any purported comparison of total pension costs across jurisdictions.

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<sup>135</sup> See Tr. 3035:11–22 (Heinrichs).

<sup>136</sup> See Tr. 3029:7–15 (Heinrichs); Tr. 1890:4–15 (Linn); Tr. 2227:2–15 (Nadol).

<sup>137</sup> See Tr. 3041:11–14 (Heinrichs).

<sup>138</sup> See Tr. 3027:10–25, 3063:3–3064:2 (Heinrichs).

<sup>139</sup> See Tr. 3064:14–22, 3065:14–18 (Heinrichs); see also PBA15-264 at 29.

The distorting effects of comparing total costs, including fringe benefit costs, are demonstrated by the vast overstatement of the City's pension costs in 2014, which the City estimated to be approximately 67% of a Police Officer's salary.<sup>140</sup> Mr. Heinrichs demonstrated that removing the unfunded liabilities reduced that estimate by about 23% and adjusting the expected rate of return on fund assets from 7% to 8%, which would be necessary for comparison with other pension plans that generally employ an 8% assumption, would reduce that estimate by another 14%. But those are not the only reasons why the City's stated pension costs are vastly overstated. The City's PPF includes all members of the NYPD regardless of rank, but the City's calculation of its annual pension costs does not distinguish between its (lower) costs for NYC Police Officers and its (higher) costs for superior officers.<sup>141</sup> The City's pension costs for its Police Officers are significantly lower than for police superior officers due to State legislation that reduced the pension benefits for NYC Police Officers hired on or after July 1, 2009 in Tier 3 of the pension system, and reduced them even further for NYC Police Officers hired on or after April 1, 2012 in Tier 3 R (sometimes referred to as Tier 6) of the pension system.<sup>142</sup>

The Chair incorrectly refers to these as Tiers 2 and 2R, demonstrating his further confusion and misunderstanding of the pension Tiers.<sup>143</sup> NYC Police Officers hired before July 1, 2009 (and all other police officers in New York State) are in Tier 2 of the pension system. The pension benefit reductions for recently hired NYC Police Officers are stark. For example, NYC Police Officers in Tiers 3 and 3R must work 22 years to be eligible for a service retirement and 25 years to be eligible for a service retirement with cost of living adjustments, while Tier 2

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<sup>140</sup> See Tr. 1873:22–1874:3 (Linn), Tr. 2214:10–14 (Nadol).

<sup>141</sup> See Tr. 2229:11–25 (Nadol).

<sup>142</sup> See Tr. 3036:11–3039:12 (Heinrichs); PBA15-264 at 20–22.

<sup>143</sup> See Opinion at 74.

provides for service retirement after 20 years. Likewise, under Tier 3, pension benefits are based on a final average salary calculated over the last three years of service with each year capped at 110% of the prior two years and, Tier 3R, final average salary is based on the last five years of service with each year capped at 110% of the prior four years, whereas in Tier 2 final average salary is based on the last year of service capped at 120% of the previous 12 months' pensionable earnings. In addition, the normal retirement benefit (50% of final average salary) for NYC Police Officers in Tiers 3 and 3R is reduced by 50% of the primary Social Security benefit that the NYC Police Officer receives at age 62, whereas the normal retirement benefit is not reduced for NYC Police Officers in Tier 2. Finally, under Tiers 3 and 3R, the accidental disability retirement benefit is 50% of final average salary less 50% of amounts received from Social Security, whereas in Tier 2 the accidental disability benefit is 75% of final average salary with no offset for Social Security.<sup>144</sup>

A conservative estimate of 40% of NYC Police Officers are in the recently created Tiers 3 and 3R (sometimes referred to as Tier 6) of the pension system and subject to those reduced benefits, while virtually none of the superior officers are in those pension Tiers. Accounting for the Tier differentials reduces the City's per capita annual pension cost even further. The result of all these adjustments is that the City's true normal pension cost for 2014 (the amount needed to fund the next year of an active NYC Police Officer's pension benefit and a closer approximation of the value of that benefit to the Police Officer) is closer to 25% of a Police Officer's salary.<sup>145</sup> That calculation does not even attempt to normalize all the City's conservative actuarial

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<sup>144</sup> See PBA15-264 at 20.

<sup>145</sup> See PBA15-264 at 18.

assumptions for comparison with other jurisdictions, which, according to actuary Heinrichs, likely would reduce the estimate still further.<sup>146</sup>

Significantly, the City's true pension cost will continue to decrease as the proportion of NYC Police Officers hired on or after April 1, 2012 who are in Tier 3R increases.<sup>147</sup> When all NYC Police Officers are in Tier 3R, the City's pension costs will be reduced to approximately 16% of a Police Officer's salary.<sup>148</sup> The City already has reaped substantial cumulative savings of \$118 million from these pension changes, and ultimately will obtain more than \$31 billion in savings over the course of the next thirty years.<sup>149</sup>

The employer's annual cost of providing health benefits to active and retired police officers also does not provide a basis for comparing the relative value of those benefits to police officers. Indeed, the City's own evidence demonstrated that its supposed 2014 costs of providing health benefits to both active and retired NYC Police Officers was nearly 17% below the average

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<sup>146</sup> See Tr. 3097:6–9, 3471:24–3472:14 (Heinrichs). To make some assessment of the relative value of pension benefits across jurisdictions based on costs, it would be necessary to eliminate unfunded liabilities and normalize all the actuarial assumptions used by each jurisdiction, which is a monumental task that the City did not even attempt to accomplish. See Tr. 3088:17–3089:4, 3089:8–21, 3090:14–18, 3470:11–3471:16 (Heinrichs).

<sup>147</sup> See Tr. 3044:24–3045:6 (Heinrichs).

<sup>148</sup> See PBA15-264 at 18. In costing certain PBA proposals, even the City itself assumed that pension costs attributable to a NYC Police Officer in Tier 3R of the pension system would be only 20.7% of that Police Officer's salary. See Tr. 2952:11–2953:6 (Fuchs and Godiner); see also Tr. 2229:11–25 (Nadol).

<sup>149</sup> See PBA15-264 at 24R. The Chair concedes that “[t]here is some merit to these assertions” that the City's pension costs will decrease as the percentage of NYC Police Officers in the newer, lower cost Tiers increases, but claims that a 25% reduction in those costs would not materially alter the City's standing in total cost of employing a police officer relative to national cities. Opinion at 74. Putting aside the fact that the total cost comparability analysis is useless for all the reasons I have explained, the City ignores the impact of the many other factors that result in the vast overstatement of the City's supposed 2014 per capita pension cost. A reduction of the City's annual pension cost from the City's claimed 67% of a Police Officer's salary to 16% of a Police Officer's salary when all NYC Police Officers are in Tier 3, would amount to a 76% reduction in the City's claimed annual pension costs. That would have a more dramatic reduction in the City's standing in total costs especially after the figures for national cities were adjusted for inter-city cost of living differences as they must if a meaningful comparison across national cities were ever possible. See Section II.A.3.a, *infra*.

corresponding costs of local police jurisdictions.<sup>150</sup> Of course, the City is not offering to augment the health benefits provided to NYC Police Officers based on that City-generated data. In other words, the City agrees that its health costs are not a proxy for the value of health benefits.

The evidence that fringe benefit costs are not a proxy for their value is confirmed by the City's own statements and its witnesses. In a February 2012 report outlining proposed changes in actuarial assumptions affecting the determination of employer contributions to the PPF, the City's own Chief Actuary warned about the danger of conflating pension costs with pension value when he stated that the proposed changes "are appropriate for determining annual employer contributions to [the PPF] but *are not necessarily appropriate for determining the economic value of benefits, the value of benefit revisions or other purposes.*"<sup>151</sup>

In addition, even the City's witnesses who presented the City's total cost comparability analysis in this proceeding admitted that annual fringe benefit costs are not a proxy for the value of those benefits to police officers. Commissioner Linn, for example, agreed that "there can be increases in pension contributions that have wholly nothing to do with the change of increased benefits that would not affect a pension payout to a police officer."<sup>152</sup> Indeed, Commissioner Linn reached that conclusion as early as 1987 in his first tenure as the City's Labor Commissioner (then called "Director"). At that time, he criticized a recommendation to increase Police Officer pay by the Mayor's Advisory Committee on Police Management and Personnel Policy because of "distortions" caused by the inclusion of unfunded liabilities in the total cost

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<sup>150</sup> See City Ex. 10 at 35; Tr. 1817:11–1818:6 (Linn).

<sup>151</sup> PBA15-264 at 47 (emphasis added).

<sup>152</sup> Tr. 1861:3-8 (Linn); see also Tr. 2224:13–19, 2225:6–11 (Nadol); PBA15-239 at 11, ¶ 27; 24–25; Tr. 2378:25–2379:3, 2380:8–2381:21 (Erath).

comparability analysis on which it was based.<sup>153</sup> Consistent with that view, Commissioner Linn testified for the PBA in 2002 about the “very strange results [that occur] when you throw in the employer’s cost of pension as an element of compensation in the comparison,” expressed the “view that the appropriate comparison of compensation . . . is the direct compensation analysis,” and stated that “any full analysis would take a look not at the cost, but would compare what are the benefits.”<sup>154</sup> Yet the Chair accepts wholesale the City’s total cost comparability analysis, which is based on those very strange results, ignores the appropriate total direct compensation analysis, purports to compare fringe benefit costs of employers across jurisdictions rather than their value to police officers, and side-steps Commissioner Linn’s admission in 1987 about the distortions that it creates and the decisions in the last two PERB arbitrations that outright refused to rely upon the City’s total cost analysis.

In light of the overwhelming record evidence, the City candidly admitted in its post-hearing submissions that annual fringe benefit costs are not a proxy for their value to police officers.<sup>155</sup> So if it is undisputed that total annual costs, including fringe benefit costs, in any given year is not a proxy for the value of wages and benefits to police officers, then what useful

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<sup>153</sup> PBA15-203 at 4; Tr. 1886:21–1887:7 (Linn). Commissioner Linn explained that the total cost comparability analysis showed that San Francisco provided the most generous compensation to its police officers because it had underfunded its pension plan in previous years, which created unfunded liabilities that it was then paying off. See PBA15-203 at 4 n.\* Plainly, that said nothing about the value of the pension benefits that San Francisco police officers were receiving relative to the value of pension benefits that police officers in other cities were receiving.

<sup>154</sup> PBA15-197 at 94:4–7, 106:8–11, 111:25–112:3; see also Tr. 1860:14–1861:2 (Linn).

<sup>155</sup> See Reply Memorandum on Behalf of the City of New York at 44. Instead, the City claimed that total costs are a measure of the economic burden on the City of employing a Police Officer. See id. If that were its purpose, then the City should have presented it for consideration in assessing the City’s ability to pay NYC Police Officers a market wage. But there was no need to do that because the City’s costings of the parties’ proposals already take account of fringe benefit costs. And, as the Chair found, the City has the ability to afford pay increases well in excess of those that the Chair awarded to NYC Police Officers. See Opinion at 82.

purpose does it serve in a comparability analysis? Plainly, if the Chair is truly interested “in determining the *worth* of the overall economic package an employee receives,”<sup>156</sup> the total cost analysis he adopts serves no useful purpose. It is simply another pretense employed by the City and the Chair to justify an outcome that pattern must prevail.

**3. The Evidence Concerning the Real Wages of Police Officers in the Twenty Largest National Cities Demands that a Just and Reasonable Award Include a Substantial Pay Raise for NYC Police Officers**

Even if police officers in the twenty largest national cities by population (after NYC) are considered as comparators, the evidence demonstrated that the real wages of NYC Police Officers lag substantially behind. This disparity alone should have resulted in a substantial pay raise for NYC Police Officers to achieve a just and reasonable result. The Chair fails to reach that conclusion because he purports to compare the total cost, including (unreliable) fringe benefit costs, of employing police officers in the national cities. The Chair compounds his error by comparing nominal wages, rather than real wages adjusted for inter-city cost of living differences.

**a. NYC Police Officers are Substantially Underpaid Compared with the Real Wages Received by Police Officers in the National Cities**

As the Chair concedes, the evidence demonstrated that there are differences in cost of living between NYC and national cities and the cost of living in NYC is among the highest.<sup>157</sup> According to the Mercer 2014 Cost of Living City Rankings, NYC is the most expensive city in the United States.<sup>158</sup> Mayor de Blasio agreed that NYC “is a very expensive place,” and the City

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<sup>156</sup> Opinion at 73 (emphasis added).

<sup>157</sup> See Opinion at 72 (“there is no doubt New York City and its environs is an expensive locale in which to live”).

<sup>158</sup> See PBA15-24.

Council stated in a 2013 report that “New York City living costs exceed the national average in all categories, with Manhattan ranking in the top 10 in all major categories.”<sup>159</sup>

It stands to reason that each dollar of pay earned by a NYC Police Officers is worth less than a dollar of pay earned by a police officer in a city with a lower cost of living because the NYC Police Officer’s dollar purchases fewer goods and services. As a result, comparing nominal wages across national cities does not yield a true comparison of the relative value of those wages. Or, as Commissioner Linn put it when he testified for the PBA in 2002, a comparison of nominal wages “obviously . . . tells a totally distorted story.”<sup>160</sup> Even in this proceeding, Commissioner Linn conceded that “when you look at national cities, clearly, New York is more expensive, and you need to look at that” and “make some inter-city cost of [living] adjustments.”<sup>161</sup> To make a true comparison of pay across national cities, pay must be adjusted to account for these inter-city cost of living differences to reflect the real wage and permit an assessment of what pay in national cities would purchase based on the dollar cost in NYC.<sup>162</sup> In addition to Professors Hurd and Abraham (plus Commissioner Linn), other eminent economists

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<sup>159</sup> Tr. 1451:8–10 (de Blasio); PBA15-115 at 30 (*quoting* New York City Council, “The Middle Class Squeeze: A Report on the State of the City’s Middle Class” at 13–14 (February 2013)); PBA15-115A, Tab 8.

<sup>160</sup> PBA15-197 at 80:18–19.

<sup>161</sup> Tr. 1694:21–23, 1841:15–17 (Linn).

<sup>162</sup> See Tr. 468:20–469:12, 480:7–9, 480:13–16 (Hurd); Tr. 1332:16–1333:9 (Abraham). Commissioner Linn made the same point when he testified for the PBA in 2002. See PBA15-197 at 25:4–25:19 (when comparing NYC Police Officer pay to “what other large cities” pay police officers, “you would have to make some type of correction for the different costs of living and the different compensation levels at the different places” because “say[ing] that the salaries in El Paso, Texas [are] at a certain level and therefore New York City should be at that level is comparing apples and oranges”); PBA15-196 at 15 (“Clearly the comparison of any large U.S. city to NYC must be adjusted for very large differences in cost of living if the comparison is to be useful.”).

have opined that real wages, not nominal wages, are the true measure of the relative value of wages across different locations.<sup>163</sup>

Moreover, that economic principle is not mere academic theory. It is supported by evidence of police officers' practical experience, including that of former NYC and current Chicago Police Officer Kim Conte who testified that she resigned her position as a NYC Police Officer shortly after she graduated from the Police Academy to join the Chicago Police Department because of the higher salary she earns and the lower cost of living in Chicago.<sup>164</sup>

To adjust nominal wages paid to police officers in national cities for inter-city cost of living differences, the PBA deferred to an authoritative study published by economists at the U.S. Government's Bureau of Economic Analysis ("BEA"), which is based on the data from the U.S. Government's Bureau of Labor Statistics ("BLS") that is used to calculate the Consumer Price Index.<sup>165</sup> Katharine Abraham, a former BLS Commissioner and member of President Obama's Council of Economic Advisors and a nationally preeminent labor economist who holds dual professorships in Economics and Survey Methodology at the University of Maryland, testified about the essential need to adjust for inter-city cost of living differences and the high reliability of the BLS data and the BEA/BLS Index constructed with that data to do so. In her judgment, the BEA/BLS Index is "not just a valid, but the best available index to use for comparing the value of a dollar in pay in different cities."<sup>166</sup>

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<sup>163</sup> See PBA15-115 at 28–29 (*quoting* Gwartney, Stroup, Macpherson, *Microeconomics: Private and Public Choice* 251 (15th ed. 2015); Benjamin, Gunderson, Lemieux, and Riddell, *Labor Market Economics* 570 (McGraw-Hill Ryerson 6th ed. 2010); Ehrenberg and Smith, *Modern Labor Economics — Theory and Public Policy* (Pearson Education 2015)); PBA15-115A at Tab 3, Tab 5, Tab 6.

<sup>164</sup> See Tr. 1033:10–1036:9 (Conte).

<sup>165</sup> See Tr. 472:10–15 (Hurd).

<sup>166</sup> Tr. 3213:24–3214:8 (Abraham).

The BEA/BLS Index is the successor to indices used by the PBA in the three prior PERB interest arbitration proceedings between the parties to make inter-city cost of living adjustments, including the one used by Commissioner Linn in 2002, each of which relied upon a similar methodology and BLS data. In the two most recent interest arbitrations, both Chairs Schmertz and Mackenzie expressly found that, before comparing national pay to that of NYC Police Officers, inter-city cost of living differences must be considered. Chair Schmertz concluded:

I accept the testimony in the record of Katharine Abraham, former Commissioner of the Federal Bureau of Labor Statistics, that cost 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.<sup>167</sup>

Chair Mackenzie also found that “[v]ariations in cost of living can have a significant impact on wage or compensation comparisons.”<sup>168</sup>

As it did with the local jurisdictions, the PBA compared NYC Police Officer pay with the real wages (*i.e.*, after adjustment for BEA/BLS inter-city cost of living differences) paid to police officers in the twenty largest national cities in 2010 and 2012, measured at Basic Max and the 20-year career average, on both an annual and hourly basis. As demonstrated in the below table, just to reach the average real wage of police officers in the national cities in 2012, NYC Police Officers would require a raise of approximately 24-30% on an annual basis and approximately 26-32% on an hourly basis.

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<sup>167</sup> PBA15-7 at 19.

<sup>168</sup> PBA15-6 at 5.

**National Cities 2012 Police Officer Annual and Hourly Pay Basic Max and 20-Year Average Adjusted for Cost of Living (BEA/BLS 2012)<sup>169</sup>**

City	Basic Max	Basic Max/ Hour	20-Year Average	20-Year Average/Hour
Austin	\$134,121	\$73.45	\$121,017	\$66.28
Boston	\$79,648	\$44.40	\$96,667	\$53.87
Charlotte	\$94,496	\$50.32	\$90,936	\$48.42
Chicago	\$113,929	\$66.39	\$108,532	\$63.27
Columbus	\$111,462	\$62.58	\$113,163	\$63.52
Dallas	\$107,217	\$57.37	\$103,723	\$55.61
Detroit	\$72,809	\$40.16	\$72,792	\$40.15
El Paso	\$103,014	\$54.91	\$93,037	\$49.60
Fort Worth	\$112,342	\$59.88	\$105,816	\$56.39
Houston	\$85,760	\$45.28	\$92,134	\$48.89
Indianapolis	\$93,954	\$50.54	\$98,789	\$53.14
Jacksonville	\$95,669	\$54.73	\$91,573	\$52.39
Los Angeles	\$97,322	\$55.45	\$100,744	\$55.28
Memphis	\$78,251	\$37.12	\$87,974	\$41.73
Philadelphia	\$80,263	\$43.43	\$88,374	\$47.90
Phoenix	\$109,078	\$56.23	\$120,694	\$62.29
San Antonio	\$96,735	\$50.75	\$109,966	\$57.70
San Diego	\$86,691	\$48.16	\$97,182	\$54.00
San Francisco	\$127,848	\$67.43	\$140,952	\$74.36
San Jose	\$105,193	\$53.92	\$107,262	\$54.97
<b>NYC</b>	<b>\$76,488</b>	<b>\$40.58</b>	<b>\$82,129</b>	<b>\$43.58</b>
<b>Average Without NYC</b>	<b>\$99,290</b>	<b>\$53.63</b>	<b>\$102,066</b>	<b>\$54.99</b>
<b>NYC Below Average</b>	<b>\$22,802</b>	<b>\$13.05</b>	<b>\$19,937</b>	<b>\$11.41</b>
<b>Total Raise NYC Needs to Reach Average</b>	<b>29.8%</b>	<b>32.1%</b>	<b>24.3%</b>	<b>26.2%</b>

To be “counted among the highest paid officers in the nation” relative to the real wages to police officers in the national cities, NYC Police Officers would require an even more substantial raise. To reach the average of the three highest paid national cities, NYC Police Officers would need a raise of approximately 55-64% on an annual basis and 56-70% on an hourly basis.

<sup>169</sup> PBA15-265 at 8. I reproduce this table because columns on the chart shown on page 10 of the Chair’s Opinion are mislabeled in a way that misrepresents the data.

The Chair's meager 1% raises do nothing to remedy this enormous pay gap with police officers in the national cities.

**b. The Chair's Reliance on Nominal Wages of Police Officers in National Cities Presents a Totally Distorted Picture**

Despite the foregoing evidence, the Chair finds that comparing "overall compensation, including health insurance and retirement benefits place PBA members near the top of the twenty national cities listed."<sup>170</sup> The Chair's conclusion is based on his (discredited) purported total cost (including fringe benefit costs) comparability analysis, which is no more legitimately applied to national cities than it was to local police jurisdictions.<sup>171</sup> The Chair's analysis is flawed for that reason alone.

But the Chair makes another critical error in his consideration of police officer pay in the national cities. He accepts the City's data regarding *nominal wages* paid to police officers in national cities, which Commissioner Linn admitted in 2002, "obviously . . . tells a totally distorted story."<sup>172</sup> Yet, in this proceeding, the City offered and the Chair accepted uncritically that totally distorted story as a basis to justify maintaining NYC Police Officers at a substantially below market wage.

For example, the chart reproduced by the Chair on page 76 of the Opinion shows only nominal wages paid to police officers in national cities in 2012 without any adjustments for inter-city cost of living differences.<sup>173</sup> That chart purports to show that NYC Police Officers

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<sup>170</sup> Opinion at 75.

<sup>171</sup> See Section II.A.2.c, *supra*.

<sup>172</sup> PBA15-197 at 80:18–19.

<sup>173</sup> Here again, the Chair seems confused as to the import of the data. The chart follows the Chair's conclusion regarding NYC Police Officers' standing relative to police officers in national cities measured by "overall compensation, including health insurance and retirement benefits." Opinion at 75. But the chart reproduced on the following page does not provide data regarding health insurance and retirement  
(continued...)

rank fourth in annual nominal wages and sixth in annual nominal wages per hour worked. In 2000, it happened that NYC Police Officers ranked seventh in a comparison of nominal wages per hour worked among national cities.<sup>174</sup> But Commissioner Linn understood that was a meaningless comparison because NYC Police Officers ranked nineteenth in a comparison of real wages after inter-city cost of living adjustments, which, in his then-expert opinion, was the true measure of total direct compensation.<sup>175</sup> The latter comparison, not a comparison of nominal wages, formed a basis for Commissioner Linn's strong advocacy of a pay increase in excess of 21% for the 2000-2002 PBA contract.

In 2012, NYC Police Officers rank eighteenth (behind only Detroit and Memphis) based on the same measurement (20-year career average per hour after adjustment for inter-city cost of living differences) considered by Commissioner Linn when he testified for the PBA. Thus, NYC Police Officer salaries still remain a "laughingstock" as Commissioner Linn once described them.<sup>176</sup> Yet the Chair refuses to do anything about it.

The Chair admits that there "is some merit to [the PBA's] contention" that nominal wages of police officers in national cities must be adjusted to account for inter-city cost of living differences and that "there is no doubt New York City and its environs is an expensive locale in which to live."<sup>177</sup> But the Chair contends that inter-city cost of living differences are offset

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benefits. It only purports to show total direct compensation (salary including all its components), and the nominal wage data is not adjusted for inter-city cost of living differences.

<sup>174</sup> See City Ex. 20 at 3A; PBA15-196 at 41.

<sup>175</sup> See PBA15-196 at 48.

<sup>176</sup> PBA15-1 at 4.

<sup>177</sup> Opinion at 71.

because “it also costs more for the City to provide health and pension benefits to its officers.”<sup>178</sup>

The Chair betrays a fundamental misunderstanding of the need for inter-city cost of living adjustments. The Chair has got it backwards.

It may be correct that health care is more expensive in NYC than in many national cities.<sup>179</sup> But that just means that a dollar paid for healthcare in NYC yields less value than the same dollar paid for healthcare in other national cities. So the fact that NYC purportedly pays more to provide health care to police officers than national cities pay does *not* mean that NYC Police Officers receive a more valuable health benefit than do police officers in national cities, which further establishes the folly of purporting to compare fringe benefit costs to measure relative compensation value. Even if there were any purpose to comparing the cost of (disparate) fringe benefits, those costs also should be adjusted to account for inter-city differences. It is simply nonsensical for the Chair to conclude (as he did) that differences in fringe benefit costs across national cities somehow justify ignoring inter-city cost of living differences when comparing the pay of NYC Police Officers and police officers in national cities.

The Chair also points out that NYC Police Officers’ standing relative to national comparators has improved with regard to the total annual costs of employing a police officer since 2002.<sup>180</sup> In other words, the City supposedly spent more relative to national comparators to

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<sup>178</sup> Opinion at 71–72. The Chair also misreads the evidence when he claims that a City exhibit shows that the total annual cost of employing a NYC Police Officer exceeds the average total annual cost of employing a police officer in the national cities by 189%. Opinion at 72. In fact, that City exhibit claims that the cost of employing a NYC Police Officer in 2014 exceeded the average cost in national cities by 146%. See City Ex. 20 at 3A. Of course, that does not account for the vast overstatement of the City’s purported 2014 pension costs, which I have explained above. In any event, for reasons explained elsewhere in my opinion, the total annual cost of employing a police officer in any given year is useless as a basis for comparing the relative value of compensation across jurisdictions.

<sup>179</sup> See Tr. 2276:9–14 (Nadol).

<sup>180</sup> See Opinion at 81.

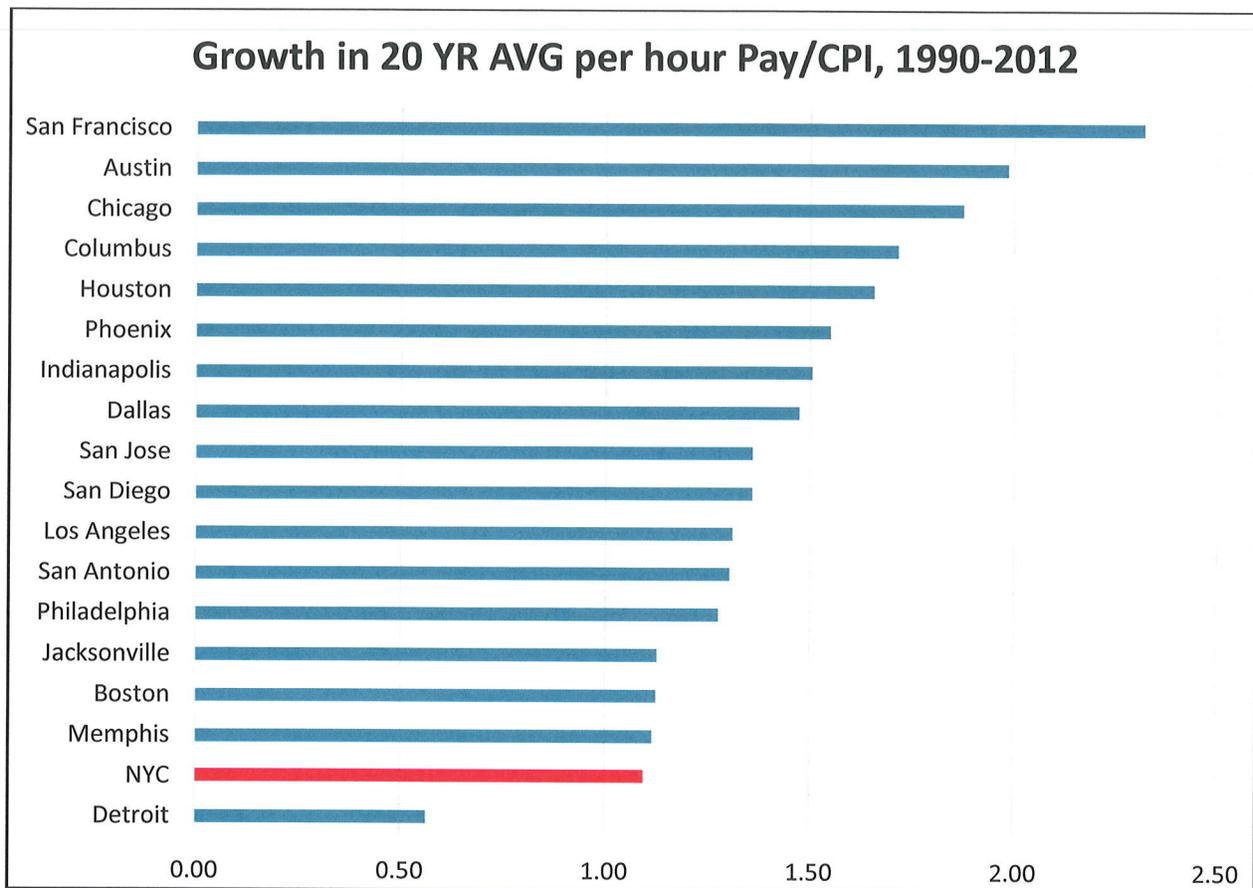
employ a NYC Police Officer in 2014 than it did in 2002. Because, as I have explained above, total annual costs of employing a police officer is meaningless as a basis for comparison, the City's standing in that regard relative to 2002 likewise is meaningless.<sup>181</sup> In any event, even if he used a meaningful (apples-to-apples) measure of comparison, there is no basis for the Chair to choose the cherry-picked date of 2002 against which to assess improvement. As the evidence demonstrated and Commissioner Linn agreed when he testified for the PBA in 2002, the huge pay disparity between NYC Police Officers and their national comparators began to develop in the 1990s.<sup>182</sup> The evidence showed that wage increases received by police officers in the twenty largest national cities since 1990 (except in Detroit) have outpaced those provided to NYC Police Officers relative to the increase in cost of living in each city (as measured by the increase in the BLS's CPI).<sup>183</sup>

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<sup>181</sup> Even if NYC Police Officers had improved their standing somewhat relative to police officers in national cities since 2002, that largely would be due to the three non-pattern conforming interest arbitration awards that they received since that time.

<sup>182</sup> See Tr. 153:16–25 (Lynch); PBA15-196 at 29–32, 34–42, 53, 137, 143–44.

<sup>183</sup> See PBA15-265 at 18.



In light of this uncontested fact, it stands to reason that the purchasing power afforded by NYC Police Officers’ pay has not caught up with their national counterparts. And it puts the lie to the Chair’s naked assertion that the paltry 1% pay increases he has awarded “will improve the relative standing of New York City police officers when viewed in light of national cities.”<sup>184</sup>

**B. The Chair Misapplies Taylor Law Section 209.4(c)(v)(b)**

Section 209.4(c)(v)(b) requires the Panel to consider the “interests and welfare of the public and the financial ability of the public employer to pay.”<sup>185</sup> The Chair concludes that “Criterion (b) favors the Union, not the Employer.”<sup>186</sup> But the Chair’s statement rings hollow

<sup>184</sup> Opinion at 85.

<sup>185</sup> N.Y. Civ. Serv. Law § 209.4(c)(v)(b).

<sup>186</sup> Opinion at 84.

because his award is contrary to the public interest even though the City plainly is able to pay its Police Officers a market wage or, at a minimum, to make substantial, incremental progress in closing the huge pay disparity that exists. At the least, the Chair’s finding that the City has the ability to pay supports this conclusion.<sup>187</sup>

**1. The Public Interest Demands that the City Pay its Police Officers a Market Wage**

The Chair states that “[t]he interest and welfare of the public in this case require labor relations stability as well [as] a trained police force that ensures the safety of the citizens of New York.”<sup>188</sup> Neither of the Chair’s conclusions with respect to the public interest he has identified is supported by the evidence.

**a. The Chair’s Award is Destructive to Collective Bargaining in the City**

The Chair engages in unwarranted self-congratulation when he says that “this result contributes substantially to labor relations stability” because “[i]t maintains the concept of pattern bargaining, at least among uniformed unions.”<sup>189</sup> The Chair’s circular reasoning simply assumes that there is a virtue to pattern bargaining in the face of a proven market pay disparity. Yet, the evidence does not support his conclusion.

In each PERB interest arbitration between these parties, the City has warned of dire consequences for collective bargaining should the panel issue a non-pattern conforming award to the PBA. The evidence demonstrated that the City’s ever-increasing apocalyptic predictions regarding the effects of non-pattern conforming awards on labor relations have never come to pass despite the three prior non-pattern conforming awards that the PBA has received. After the

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<sup>187</sup> See Section II.B.2, *infra* ; Opinion at 82–84.

<sup>188</sup> Opinion at 82.

<sup>189</sup> Opinion at 82.

first such round that concluded with Chair Eischen's above-pattern award to the PBA, none of the other uniformed unions settled their contracts with the City in the next round pending the outcome of the PBA's interest arbitration. After the second such award (Schmertz), each uniformed union settled its contract with the City in the next round with a reopener provision. And, in this round, after the PBA received its third straight non-pattern conforming award (Mackenzie), virtually all of the other uniformed unions settled their contracts with the City without a reopener clause, locking themselves in for lengthy periods ending during the years 2017 to 2019.<sup>190</sup>

Conclusively, the evidence demonstrated that the uniformed unions are willing to settle on their own terms for their own units, without regard to the status of the PBA's contract. That no doubt is due to their recognition that each union must advance its own interests, rather than tie itself to the fate of other unions that might have different interests.<sup>191</sup> That is the way collective bargaining should work.

NYC Police Officers are a distinct bargaining unit represented by the PBA and its elected leadership. It is axiomatic that every union bargains for its own members based on their particular circumstances and to suit their particular needs. For that reason, NYC Police Officers should not be required to defer to settlements negotiated by union leaders who do not represent them or their interests and whose members work different jobs and have different needs. Nor should NYC Police Officers be compelled to relinquish their right to negotiate the terms of their own collective bargaining agreement through their chosen bargaining representatives. Rubber

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<sup>190</sup> See Tr. 2924:10; 2925:15 (Campion); City Ex. 8 at 111.

<sup>191</sup> See City Ex. 23, Tab 11 (screen shot from DEA website explaining that the reason that it settled its contract with the City without waiting for the outcome of this proceeding is because “[r]ecent history has shown all of us that what may be in the PBA’s best interest unfortunately is not in our best interest”).

stamping the City's proposal for pay increases as the Chair has done here is not what the Legislature intended when it amended the Taylor Law in 1998 to bring NYC Police Officers within its purview.<sup>192</sup>

There also is no evidence to substantiate the Chair's unsupported statement that pattern bargaining permits "individual bargaining units to fashion agreements which meet their own needs."<sup>193</sup> The City's pattern certainly does not permit the PBA to meet its members' needs. That is why an impasse was declared and this proceeding ensued. As former Police Commissioner Kelly told the City Council before the last interest arbitration between these parties: "The whole issue of pattern bargaining has to be re-examined, because it's not working very well [for] the Police Department."<sup>194</sup>

The Chair's award renders PBA/City bilateral negotiations a nullity and nullifies the Taylor Law and this 14-month proceeding,<sup>195</sup> which, applying the Chair's view, merely served to confirm the pattern created between the City and other City workers. The bargaining relationship between these parties will remain broken so long as the City refuses to consider, or even discuss, the data embodied in the Taylor Law criteria. If the City first constructs new labor agreements with City workers paid at or above the market, and then imposes that pre-ordained "pattern" on NYC Police Officers without regard for any meaningful input by the PBA (other than to flagrantly disregard the PBA's proffered evidence of a severe market pay disparity), the

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<sup>192</sup> See Patrolmen's Benevolent Ass'n of the City of New York v. City of New York, 97 N.Y.2d 378 (2001).

<sup>193</sup> Opinion at 82.

<sup>194</sup> PBA15-107.

<sup>195</sup> The parties designated their Panel members in September 2014. The Opinion was issued fourteen months later.

concept of collective bargaining becomes a mockery and meaningful labor negotiations between these parties will never resume. The Chair's award encourages the City to do just that.

**b. The Chair's Opinion Jeopardizes Morale and Puts Public Safety and the Public Interest in Question**

It cannot seriously be questioned that, as the Goldberg Panel found, "[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" because 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."<sup>196</sup> As the Chair himself noted in another PERB interest arbitration:

[T]he interests and welfare of the public dictate that police officers, who are charged with safeguarding the residents and their property, be reasonably compensated. Were wages in Bedford to fall substantially below those in comparable communities, police officer morale would surely decline with an unavoidable impact upon the quality of services performed.<sup>197</sup>

Chair Schmertz (himself a former OLR Commissioner) made the same point with respect to NYC Police Officers:

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

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<sup>196</sup> PBA15-14 at 5.

<sup>197</sup> Town of Bedford v. Police Benevolent Ass'n of the Town of Bedford, Inc., IA2000-022, at 13-14 (Nov. 15, 2001) (Edelman, Longo, Solfaro), PBA15-15; see also State of New York and Police Benevolent Ass'n of New York State Troopers, IA95-034, M95-334, at 85-86 (June 24, 1997) (Scheinman, Kurach, McCormack) ("the public's interest and welfare is . . . served by a police force that is stable and whose morale is high" and "we are persuaded that a wage package which deviates dramatically from the type of salary increases provided to other police officers in comparable jurisdictions, or which leaves the State's Troopers earning significantly less than police officers in comparable jurisdictions, does not serve the interests and welfare of the citizens of New York State"), PBA15-31.

among the New York City Police. And a police force with morale problems is obviously counter productive to the very public interest and public welfare that that force is charged to protect.<sup>198</sup>

The Chair blithely asserts that his Opinion does not “reduce the ability of the police force to safeguard the public.”<sup>199</sup> In doing so he shows callous indifference to the incredible accomplishments of NYC Police Officers in reducing and preventing crimes and warding off the threats of terrorism, and, in turn, their contribution to the City’s thriving economy, and simply shuts his eyes to the evidence.

As Mayor de Blasio has remarked, NYC Police Officers have produced results in reducing crime that “previously were unimaginable,” leading most recently to a 4.6% reduction in major crimes in 2014 as compared with 2013, and “the lowest number of homicides since the modern policing era began in 1993.”<sup>200</sup> Retired Commissioner Timoney likewise testified that “what has happened since 1994 has been nothing short of startling and unprecedented and any other superlative you could think [of] to describe the crime decline.”<sup>201</sup>

The data in support of that testimony is compelling evidence that NYC Police Officers have far outpaced the nation in making this City the safest big city in the country. Since 1990, NYC has experienced more than twice the rate of decline in crime than the nation as a whole. Between 1990 and 2013, homicides in NYC declined by 85%, such that as a percentage of national crime, NYC has gone from representing 10% of all homicides to just 2% of all homicides. Similarly, during that period, robberies in NYC declined by 81%, such that as a percentage of national crime, NYC has gone from representing 16% to 6% of all robberies.

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<sup>198</sup> PBA15-7 at 20.

<sup>199</sup> Opinion at 82.

<sup>200</sup> PBA15-5 at 1.

<sup>201</sup> Tr. 659:7–14 (Timoney).

Likewise, motor vehicle theft in NYC has declined by 95%, such that, as a percentage of national crime, NYC has gone from representing 9% to 1% of all motor vehicle thefts.<sup>202</sup>

Further, the dramatic and previously unimaginable reduction in crime brought about by the efforts of NYC Police Officers, in the words of Mayor de Blasio “has really had an extraordinar[y] impact on people’s lives in the City.”<sup>203</sup> The Chair ignores the evidence that shows just how extraordinary that impact has been for the millions of people who live in, work in, and visit the City, and for the City’s growing and thriving economy. Indeed, “real estate taxes, income taxes, sales taxes are pouring through the windows of the City’s treasury because of the change of policing that lowered crime 77 and a half percent.”<sup>204</sup>

Moreover, NYC Police Officers have achieved remarkable results in counterterrorism, protecting the world’s “number one target” of terrorism, as the NYPD’s Deputy Commissioner of Intelligence and Counterterrorism, John J. Miller, explained to the City Council last year:

Since September 11, 2001, there have been 18 terrorist plots against New York City, targeting the New York Stock Exchange, Citigroup headquarters, the Brooklyn Bridge, John F. Kennedy Airport, Times Square, Ground Zero, the subway system, major synagogues, and other sites, and most recently, NYPD personnel. But so far, they have been thwarted at nearly every turn by the efforts of the NYPD and our local and federal partners.<sup>205</sup>

In short, the safety and security that NYC Police Officers provide is essential to the economic growth and prosperity of the City,<sup>206</sup> and that relationship is inextricable. Indeed, from the unique vantage point of his distinguished career in City and State government, having served

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<sup>202</sup> See PBA15-124.

<sup>203</sup> Tr. 1436:18–23 (de Blasio); see also Tr. 1433:8–15, 1433:19–1434:2, 1434:23–1435:4, 1519:25–1520:13 (de Blasio), PBA15-188.

<sup>204</sup> Tr. 1059:20–25 (Dyson).

<sup>205</sup> PBA15-39 at 1.

<sup>206</sup> See Tr. 1047:21–25 (Dyson); Tr. 293:22–294:4 (Brewer).

in both Democratic and Republican administrations — as former Deputy Mayor for Finance and Economic Development and Chairman of the Mayor’s Council of Economic Advisors in the Giuliani Administration, and as Commerce Commissioner of the State of New York and Chairman of the State’s Urban Development Corporation in the Carey Administration and Power Authority in the Carey and Mario Cuomo Administrations — John S. Dyson testified, “[t]he City’s own economy is thriving because, in this period, we have had safe streets, and people want to come visit the safest big city in the world. They want to live in the safest big city in the world. They want to work in the safest big city of the world.”<sup>207</sup>

Undisputed evidence demonstrated that the reduction in crime that NYC Police Officers have achieved is the key to the successful revival of previously collapsing or depressed neighborhoods in the five boroughs from Greenpoint and Williamsburg in Brooklyn to Harlem and the Flatiron District in Manhattan.<sup>208</sup> As Assemblyman Peter Abbate put it: “There are no more South Bronxes. There are no more dangerous Williamsburgs or Bushwicks anymore. And that’s what’s built up the real estate.”<sup>209</sup> Indeed, Mayor de Blasio has acknowledged that there is a direct correlation between the reduced crime and security that NYC Police Officers have brought about and rising property values in NYC, all of which has led to ever increasing revenues in the form of increased real estate taxes.<sup>210</sup>

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<sup>207</sup> Tr. 1073:22–1074:4 (Dyson); see also PBA15-25 at 63 (“police officers are just some of the many people critical to our growing economy, and they help to make up the backbone of our society”).

<sup>208</sup> See Tr. 629:14–20 (Timoney); Tr. 987:3–12 (Morange); Tr. 1003:5–17 (Dunne); Tr. 1058:4–7, 1059:9–12, 1063:21–1064:3 (Dyson).

<sup>209</sup> Tr. 2411:4–9 (Abbate); see also Tr. 1057:15–1059:25 (Dyson) (“the courage of the individual members of the police force” made the turn-around of run-down neighborhoods such as Greenpoint, Williamsburg, and Bedford-Stuyvesant); Tr. 1101:6 (Dyson) (“It’s not just only Manhattan.”).

<sup>210</sup> See PBA15-36 and PBA15-114-38; see also PBA15-35; Tr. 1063:21–1064:3 (Dyson) (“It is a result of people being safe and feeling as if I can live there with my family, and we have had these astonishing increases in real estate prices, which means an astonishing increase in the City’s real estate tax also.”).

In addition, the evidence demonstrated that the safety and security that NYC Police Officers provide has created a business climate that has attracted businesses to relocate and invest in the City, and allowed the City to retain other businesses.<sup>211</sup> Because the City is safe, businesses are able to attract quality employees and are confident that customers will patronize them.<sup>212</sup> It is no secret as Mayor de Blasio has said that the City “is getting safer all the time. And that is ultimately how business leaders make their decision, how people make their decisions — of where to move, to live — people make decisions about where to invest.”<sup>213</sup>

Furthermore, in recent years, NYC has attracted record numbers of tourists due to its well-deserved reputation as “the safest big city in the world.”<sup>214</sup> The tourism industry is a crucial part of the City’s economy.<sup>215</sup> In 2014, “New York City welcomed 56.4 million visitors to New York City, beating the projection of 55 million visitors by the end of 2015,” which “resulted in an estimated \$61.3 billion in economic impact and \$3.7 billion in City tax revenues, as well as supported 359,000 tourism related jobs.”<sup>216</sup> The Administration recently announced a new initiative to increase the number of tourists visiting the City annually by more than 10 million to 67 million by 2021, which “would result in significant economic gains for the City of New York, solidifying the tourism industry as a major engine for the City — including generating more

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<sup>211</sup> See Tr. 1126:20–1127:10, 1128:14–23, 1129:9–25 (Weinstock); Tr. 1055:2–5, 1055:23–1056:6, 1057:3–6 (Dyson) (“It took good policing . . .”).

<sup>212</sup> See Tr. 1116:16–24 (Robles-Roman); Tr. 1053:12–18, 1087:4–15 (Dyson) (the City “shouldn’t deny that the change of the City’s economy is a consequence of the policing and the boom of various sectors of the economy, will produce in the future, as it has for four of the last five years, a huge increase in the City’s fisc . . . .”); Tr. 1081:12–16 (Dyson) (“Now, as the comptroller says, four out of the five years, the City has grown faster than the state and nation, which is a sea change in the City’s financial structure and the City’s financial well-being.”).

<sup>213</sup> PBA15-5 at 16; see also Tr. 1521:7–17 (de Blasio).

<sup>214</sup> Tr. 1065:14–18 (Dyson); see also Tr. 94:10–19 (Lynch); Tr. 629:3–6 (Timoney).

<sup>215</sup> See PBA15-32 at 256; PBA15-37 at 14.

<sup>216</sup> PBA15-38 at 2.

tourism-related jobs and visitor spending.”<sup>217</sup> The success of that initiative is critically dependent on NYC Police Officers’ continued ability to maintain NYC as the safest big city in the world.

NYC Police Officers have achieved these previously unimaginable results, producing the extraordinary impact on people’s lives and the City’s economic fortunes, despite facing the most difficult and complex policing and counterterrorism challenges that arise in the nation’s largest and most diverse city and despite the unprecedented and increasing level of scrutiny, second-guessing, and outright hostility that they face in some quarters of the public and government. There is no other City job, neither in the ranks of police supervisors or in any other agency, which realistically entails the extraordinary degree of scrutiny that NYC Police Officers face day in and day out.<sup>218</sup> A NYC Police Officer’s daily activities are subject to review (and routinely second-guessed) by five district attorneys, two United States Attorneys, the NYPD Internal Affairs Bureau, and the Civilian Complaint Review Board (which now has a prosecutorial function), in addition to being the target of the heightened scrutiny of a federal monitor and the judiciary, and criticism by some in City Hall (some of whom have condemned *en masse* the job performed by our Police Officers).<sup>219</sup> The City Council recently created another layer of oversight when it established the Office of the Inspector General for the NYPD to investigate, review, study, audit, and make recommendations regarding the operations and practices of the NYPD, which, in practice, will target the two-thirds of the NYPD who always are on the front

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<sup>217</sup> Id.

<sup>218</sup> See Tr. 119:6–9 (Lynch).

<sup>219</sup> See Tr. 108:7–25, 118:3–20, 119:5–120:5 (Lynch); Floyd v. City of New York, 959 F. Supp. 2d 668, 677 (S.D.N.Y. 2013).

lines, our NYC Police Officers.<sup>220</sup> And the NYPD itself has dramatically increased the self-reporting obligations of Police Officers through body-worn cameras and heightened incident reporting requirements.<sup>221</sup>

The advent of cell phones, social media and the unrelenting twenty-four hour news cycle have contributed greatly to the scrutiny and second-guessing that NYC Police Officers face.<sup>222</sup> And, in the image-driven national dialogue about policing, “photos or videos swiftly become the measure by which complex situations are judged and understood.”<sup>223</sup> In that environment, NYC Police Officers are increasingly met with hostility and even physical violence by activists who have been galvanized by the relatively rare scenes of violence or abuse that have “gone viral.”<sup>224</sup>

The threat of losing their jobs, freedom, or financial security because of the scrutiny and second-guessing that might follow their every action saddles an incredible amount of stress upon NYC Police Officers.<sup>225</sup> The unique hazards that NYC Police Officers face add to their stress. In addition to the ever present risks, including their all too frequent deaths, in carrying out their traditional crime fighting and prevention responsibilities, NYC Police Officers increasingly have become targets of terrorists, agitators, and others seeking to harm and kill NYC Police

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<sup>220</sup> See Tr. 115:3–12 (Lynch); PBA15-67.

<sup>221</sup> See Tr. 114:2–11, 122:10–18 (Lynch); PBA15-68; PBA15-69.

<sup>222</sup> See Tr. 305:11–13 (Brewer); Tr. 786:10–24, 802:13–24 (O’Donnell).

<sup>223</sup> Tr. 305:14–20 (Brewer).

<sup>224</sup> See Tr. 802:13–24 (O’Donnell); Tr. 694:21–695:2 (Timoney); Tr. 1020:8–18 (Dunne).

<sup>225</sup> See Tr. 619:17–620:23 (Timoney); Tr. 784:22–785:4 (O’Donnell). As if all that were not enough, the City Council recently amended the Administrative Code to expand civil liability by providing a private right of action against individual NYC Police Officers and the NYPD for alleged “biased-based profiling.” See NYC Admin. Code § 14-151(c). Among other things, that legislation permits courts to award attorneys’ fees to a prevailing plaintiff. See NYC Admin. Code § 14-151(d)(3). NYC Police Officers already were subject to a “cottage industry” of frivolous lawsuits. See Tr. 623:10–624:625:12 (Timoney); PBA15-70.

Officers.<sup>226</sup> The severity of this threat is illustrated by the sad reality of the recent attacks and attempts on the lives of NYC Police Officers and their horrendous cold-blooded murders. In October 2014, a “lone wolf” terrorist who “sought to ‘terrorize’ the Police Department and focused on ‘jihad’ against the police and the United States,” attacked two NYC Police Officers with a hatchet.<sup>227</sup> In December 2014, two NYC Police Officers were shot and killed in an execution-style ambush in Brooklyn. In February 2015, the FBI arrested three alleged terrorists, one of whom “expressed his intent to buy a machine gun and shoot police officers and FBI agents . . . .”<sup>228</sup> In April 2015, two women were arrested and charged with planning terrorist attacks, including planning to explode a bomb at a police officer’s funeral.

In light of the realities of the burdens, stresses, and hazards faced by NYC Police Officers, morale is dangerously low. In a recent NYPD commissioned poll, 45% of Police Officers agreed that they “would leave the Department if [they] had the opportunity.”<sup>229</sup> Career members of the service testified that they would dissuade friends and family from joining the NYPD today. Commissioner Timoney testified that, twenty years ago, he would have told his son “you’ve got to join the NYPD,” but he “would not tell [his] son that today.”<sup>230</sup> Commissioner Dunne also testified that, although his son is a Police Officer, today “I might try to talk [him] out of it” because “[w]e are in a very, very difficult environment policing

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<sup>226</sup> See PBA15-55; PBA15-56; PBA15-57.

<sup>227</sup> PBA15-39 at 6.

<sup>228</sup> PBA15-40.

<sup>229</sup> See PBA15-251 at 49. In the same poll, 57% of NYC Police Officers reported that they do not feel their actions in the field will be supported by their next level supervisor and 29% strongly believe that. See Tr. 1168:10–19, 1170:22–1171:11 (Morris); PBA15-184-6 at 7. Similarly, 70% of Police Officers agree that the fear of being sued keeps them from taking lawful action to curb criminal activity; and, 85% of Police Officers agree that the threat of CCRB complaints prevents them from being proactive on the street. See PBA 15-184-6 at 10, 11; see also Tr. 1174:15–1176:6 (Morris); Tr. 408:22–409:4 (Green).

<sup>230</sup> Tr. 604:7–11 (Timoney).

throughout the country where we are making tremendous demands of our police” and “I can’t recall times being worse for the public perception of the police and how some people view them and how they are portrayed often in the . . . media.”<sup>231</sup> And Patti McDonald, the wife of Police Officer (now Detective) Steven McDonald, who was paralyzed after he was shot by youthful criminals he was apprehending, testified that, when their son, Conor, called to tell them that he wanted to be a Police Officer, “my first reaction was, like, are you kidding me? This is not what I planned. I have the utmost respect for the police department, and no disrespect, but I lived with Steven in this situation. I know the risks and the danger.”<sup>232</sup> The below market pay that NYC Police Officers receive just exacerbates their feeling that the job that they have been doing remarkably well is underappreciated and disrespected, a conclusion highlighted by the Chair’s Award.

Mayor de Blasio is surely correct when he calls policing a “noble calling” and a “heroic choice,” acknowledges that “the City owes a tremendous debt of gratitude for what the NYPD members have done over the last decade or so,” and otherwise lauds the courage and bravery of NYC Police Officers.<sup>233</sup> But that praise rings hollow when the City will not reward its Police

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<sup>231</sup> Tr. 1020:8–18 (Dunne).

<sup>232</sup> Tr. 281:18–282:5 (Patti McDonald). These views represent a threat to recruiting in light of the “tradition of multigenerational police families,” which has been “one of the back bones of the department.” Tr. 298:20–299:2 (Brewer). The chair ignores other warning signs regarding the City’s ability to recruit the most highly-qualified candidates to meet the demands of the most complex and demanding policing job, including the dramatic and steady decline in applicants taking the police exam, and the City’s acknowledged difficulties recruiting ethnic and racial minorities and women to join the NYPD. See PBA15-50; PBA15-249 at NYC-437722-23; Tr. 1121:4–20 (Robles-Roman); Tr. 1598:25–1599:2 (Tucker); Tr. 2685:22–2686:10, 2695:11–17 (Julian); see also Tr. 817:2–15 (O’Donnell) (“it is the worst kept secret that policing New York City is an inferior paid job. It’s well known. And actually I have to say . . . that students will talk about the NYPD as a safety job now, as a place they can go until they get something else. They’re well aware that Port Authority, Suffolk, Nassau, Yonkers, some other departments . . . are much more competitive in terms of the wages that they pay.”).

<sup>233</sup> PBA15-42; Tr. 1429:4–8 (de Blasio).

Officers with a market-based wage. This Panel's Award will further depress morale and jeopardize the previously unimaginable success that NYC Police Officers have achieved in reducing crime and the consequent, extraordinarily beneficial impact on people's lives and the economic health of the City.

## **2. The City Has the Ability to Pay its Police Officers a Market Wage**

It is an understatement to say that “the City can afford to pay reasonable increases” and that “the City's current fiscal condition is good.”<sup>234</sup> The City's economy is stronger than it has ever been. The City is in the midst of an economic renaissance brought about in large part by the safety and security that its Police Officers have provided, which has established the environment necessary for businesses to expand in, people to enjoy and work in, and tourists to visit the City. The evidence demonstrated that in fiscal year 2016 alone, the City is expected to enjoy more than \$8 billion in surpluses and reserves from which it could pay NYC Police Officers the market wage that they have earned.<sup>235</sup> Moreover, the Chair's claim that awarding NYC Police Officers a 17% increase over two years would cost \$5.3 billion is exaggerated. That is the City's estimate for the cost over its four-year financial plan, including the ongoing raises from 2010 through FY 2019 — not the cost in a single year. In any event, it is abundantly clear, as even the Chair found, that the City can afford to pay its Police Officers substantially larger pay increases than those awarded by the Chair to satisfy the City's self-serving pattern: “While I need not speculate as to what level of wage improvements above the pattern would be deemed fair by the

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<sup>234</sup> Opinion at 82, referencing the Taylor Law's criteria in Section 209.4(c)(v)(b): “With respect to the ability of the public employer to pay, I agree with the PBA that the City can afford to pay reasonable increases.”

<sup>235</sup> See PBA15-179 at 51; Tr. 894:15–897:16 (Rosenberg); see also Tr. 1074:5–8 (Dyson) (“So my conclusions are that the City has no financial excuse for keeping police compensation below that of the surrounding communities and the Port Authority.”).

Union, there is little doubt in my mind, given the extensive economic analysis offered by the PBA, that the City could fund them.”<sup>236</sup>

The City’s evidence consisted of its speculation regarding a future economic downturn that even it is not predicting in the near future and its stated desire to direct resources to other priorities. As the Chair correctly states in rejecting that argument, “‘ability to pay’ should not be confused with ‘desire to pay.’”<sup>237</sup> But his pattern Award allows City Hall to do just that, devote its resources to its political agenda. If the City will not pay its Police Officers a market wage in the current economic climate, there is no reason for Police Officers to believe it ever will.

### **C. The Chair Misapplies Taylor Law Section 209.4(c)(v)(c)**

Considering Taylor Law Section 209.4(c)(v)(c), the Chair states: “It is difficult to find other trades or professions which have similar hazards of employment, physical qualifications, mental qualifications or job training and skills.”<sup>238</sup> Abundant evidence proves the Chair right about that, but he fails to grasp the significance of his finding. It is certainly true that, because of the nature of crime and terrorism prevention and response and the need to make split-second life and death decisions without supervision, NYC Police Officers require unique training and skills to perform a job that is fundamentally different and uniquely hazardous compared to the jobs of other City workers.<sup>239</sup> That is precisely why NYC Police Officers should not be compared with

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<sup>236</sup> Opinion at 83. Moreover, having agreed with the PBA as to the City’s ability to pay, the Chair’s lone concern in referencing the City’s costing of a market-based pay increase circles back to his fixation with bargaining units other than the PBA’s (other units far removed from this Taylor Law case), and his argument that it “would create enormous pressure on other uniformed unions” to demand more. Opinion at 83. What the Chair has conveniently overlooked is that no unit other than NYC Police Officers have ever mounted the evidence to support market-based pay increases and that the City is no stranger to exercising its ability to say “no,” as the evidence amply demonstrates. See Section II.A.1, supra.

<sup>237</sup> Opinion at 83–84.

<sup>238</sup> Opinion at 84.

<sup>239</sup> See Tr. 236:6–24 (Lynch); Tr. 297:10–14 (Brewer); Tr. 699:6–20 (Timoney).

other City workers, and why pay increases received by other City workers have no bearing under the Taylor Law on the pay that NYC Police Officers should receive.

Although the Taylor Law requires police officer-to-police officer comparisons, the only reasonable conclusion supported by the evidence is that NYC Police Officers have a far more challenging, complex, and dangerous job than any other police officers.<sup>240</sup> There is no city with as large and diverse a population as NYC and no police officers who face the staggeringly high call volume and dangerous, varied, and emotionally-draining assignments that NYC Police Officers face.<sup>241</sup> That is precisely why Justice Goldberg and his fellow Special Panel members concluded that NYC Police Officers should be “counted among the highest paid officers in the nation.”<sup>242</sup>

Taylor Law Section 209.4(c)(v)(c) is hardly a factor that the Chair should suggest be “given short shrift.”<sup>243</sup> Understood and applied properly, as did Chairs Schmertz and Mackenzie, it points strongly in favor of the PBA’s proposal for market-based wages. The Chair’s failure or refusal to grasp that betrays his blinders in favoring the City’s pattern argument.

#### **D. The Chair Misapplies Taylor Law Section 209.4(c)(v)(d)**

The Chair states that “Criterion (d) favors the City” because it supposedly “specifies and includes, beyond salary, the fringe benefits of insurance and retirement, medical and

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<sup>240</sup> See Tr. 294:14–17 (Brewer) (“the challenges faced by the NYPD in safeguarding New York dwarf those of other U.S. cities”); Tr. 614:13–17 (Timoney) (“[I]t’s just a simple fact that there is nothing more unique, more complex more challenging than [policing] New York City. There . . . is no close second.”); Tr. 617:18–19 (Timoney) (“the challenges in New York City are matched nowhere else in America”).

<sup>241</sup> See Tr. 304:7–17 (Brewer); Tr. 627:18–629:20, 635:3–13, 634:7–20 (Timoney); Tr. 962:3–22, 969:15–25, 972:5–21 (Morange); Tr. 1005:20–22 (Dunne).

<sup>242</sup> PBA15-14 at 5.

<sup>243</sup> Opinion at 84.

hospitalization coverage and paid time off.”<sup>244</sup> I have explained earlier why the Chair is hopelessly misguided in that respect.<sup>245</sup>

### **III. The Chair’s Denial of Other PBA Proposals is Unwarranted**

Because the Chair’s desire to impose a pattern-conforming award is all-consuming, the Chair has placed himself in the awkward position of continuously having to reason backwards from the straitjacket of pattern. As explained above, the Chair repeatedly arrives at conclusions that are contrary to the plain language of the Taylor Law and the evidence. Nowhere is this more obvious than in the Chair’s outright rejection of the other PBA proposals that he deems to be “cost items,” despite evidence that, the Chair acknowledges, would persuade the Chair to grant those proposals in other circumstances.

For example, although the Chair concedes that “[t]he goal of compensating employees for increased education or training is laudable,” he declines to award the PBA’s proposal for education pay because he “can find no way to provide a meaningful sum which is both pattern conforming and applicable to all bargaining unit members.”<sup>246</sup> The evidence plainly supported the merits of the PBA’s proposal. College educated Police Officers are less likely to be fired, receive complaints, or take sick time, and are more likely to receive commendations and be promoted.<sup>247</sup> Moreover, the skills and challenges required to navigate today’s increasingly complex policing environment and sophisticated crime-fighting tools require a higher level of

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<sup>244</sup> Opinion at 84.

<sup>245</sup> See Section II.A.2.c, *supra*.

<sup>246</sup> Opinion at 89.

<sup>247</sup> See Tr. 999:3–12 (Dunne).

education.<sup>248</sup> That is why many other national cities and local jurisdictions provide some form of education pay to police officers.<sup>249</sup> But the City does not, to the detriment of its Police Officers and the public they serve. The Chair's slavish devotion to the pattern has resulted in his ignoring any solution, while crediting the evidence that plainly supports the PBA's proposal.

Similarly, the Chair denies the PBA's proposal for a more modern work schedule of longer tours even though he believes that "there may be substantial savings available under a ten-hour tour system."<sup>250</sup> The Chair is correct that adopting ten-hour tours would result in substantial savings to the City, sizable enduring savings that could be applied to substantial pay increases for NYC Police Officers. John Gerrish who is particularly well-situated to address issues regarding the impact of changes in tour-length from his unique vantage point as the former Chief and Commanding Officer of the NYPD's Office of Management and Planning, testified that the City would gain increased productivity with ten-hour tours, which would result in fewer appearances, without any loss in the total number of hours worked annually. Because there would be fewer appearances using a ten-hour tour, there also would be fewer breaks and fewer hours of daily mustering in and out (before and after daily tours of duty on the streets).<sup>251</sup> The Department would benefit by receiving considerably more on-street policing hours per year from each police officer (all paid at straight-time), which a conservative estimate showed would be the full-time of equivalent of adding 744 to 920 new Police Officers (a real productivity savings of

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<sup>248</sup> See PBA15-182 at 51; PBA15-184-22 at 17, 20-23; Tr. 301:12-305:8, 308:3-4 (Brewer); Tr. 610:10-13 (Timoney); Tr. 2710:24-2711:9 (Julian).

<sup>249</sup> See PBA15-115 at 17; PBA15-155A.

<sup>250</sup> Opinion at 87.

<sup>251</sup> See Tr. 735:2-20 (Gerrish).

roughly 4%).<sup>252</sup> An analysis by the City's Independent Budget Office confirmed that adopting ten-hour tours would result in estimated productivity savings of 5%.<sup>253</sup>

The evidence also plainly demonstrated that moving from the current 8 hour 35 minute tour to a ten-hour tour would result in additional significant benefits and operational efficiencies (and dramatically reduce payment for daily overtime). It would permit the Department to better match police resources with workload demands than the current tour by staggering tours to ensure maximum staffing at peak times, and also provide flexibility for additional resources to be allocated to specific commands and areas as needed.<sup>254</sup> Equally significant, a ten-hour tour would improve the morale of the City's Police Officers. By requiring fewer appearances, while maintaining the same number of annual hours, NYC Police Officers would have more days off and more time to decompress and to spend with their families.<sup>255</sup> In addition, they would realize savings in daily commuting.<sup>256</sup>

Despite his own view that ten-hour tours would result in substantial savings and despite the abundant evidence supporting the benefits associated with the PBA's proposal for ten-hour

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<sup>252</sup> See Tr. 748:4–750:9 (Gerrish); Tr. 1225:6–14, 1226:25–1227:22 (Morris).

<sup>253</sup> See PBA15-109. I note that the City claimed a cost of 17.48% if ten-hour tours were adopted. See PBA15-257. The City's calculation was based on the (highly erroneous) assumption that NYC Police Officers would be working 34.46 fewer tours per year and therefore providing less coverage, necessitating the hiring and retention of 4,106 additional Police Officers. See *id.* The PBA's proposal was quite clear, as were the PBA's witnesses, that Police Officers would be working the same number of hours per year, providing the same level of coverage, and actually providing more coverage at peak hours by working the ten-hour tours. The City's costing is disingenuous, in that it deliberately misstates the PBA's proposal.

<sup>254</sup> See Tr. 725:7–729:16, 775:9–776:21 (Gerrish).

<sup>255</sup> See Tr. 1147:10–23 (Surillo).

<sup>256</sup> See Tr. 1231:20–1232:16 (Morris); PBA15-184-39. The benefits of ten-hour tours were confirmed by retired Commissioner Timoney who testified regarding his experience with them as Police Chief in Miami, and by independent studies regarding the experience with them in Tucson, Arizona, Detroit, Michigan, and Arlington, Texas. See Tr. 705–08; PBA15-156; PBA15-193.

tours, the Chair declines to award the proposal “without the mutual consent of the parties.”<sup>257</sup>

The Chair cites to no evidence to contradict the testimony of Chief Gerrish, other PBA witnesses and the documentary evidence they introduced. And the City offered no concrete evidence — only the City’s unwillingness to consider the proposal based on unsupported speculation offered by a City witness. The Panel is required to decide the disputed issues based on the evidence introduced during the hearing. Instead, with respect to the PBA’s proposal for ten-hour tours, and the roughly 4% in productivity savings that could easily justify further increases in pay or benefits, the Chair has permitted the City veto power in contradiction of the evidence.<sup>258</sup>

With regard to the PBA’s annuity proposal, the Chair concedes that “it is true that the annuity allowance has not been altered for many years.”<sup>259</sup> The evidence demonstrated that the annuity benefit paid in a flat dollar amount of no more than \$522 per year amounted to 2% of a NYC Police Officer’s salary in 1971, while it currently amounts to 0.68%.<sup>260</sup> The Chair nevertheless denied the PBA’s proposal on the ground that the annuity benefit “should be increased when the overall settlements permit.”<sup>261</sup> In other words, although he implicitly concedes that the PBA’s annuity benefit proposal has merit, the Chair refuses to award it because it does not fit the pattern that the City created with other City workers for this bargaining round.

The Chair’s treatment of the PBA’s proposals for a terrorism, workload, and safety risk premium and a patrol assignment differential is especially offensive. The Chair dismisses these

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<sup>257</sup> Opinion at 87.

<sup>258</sup> The Chair’s award establishes a committee to study the issue and make recommendations to the City. See id. But the evidence submitted in this proceeding should control — not a committee half of whose members will be City representatives who can veto any recommendation regardless of the evidence as the Chair has permitted the City to do here.

<sup>259</sup> Opinion at 88.

<sup>260</sup> See Tr. 1250:15–1251:12 (Morris).

<sup>261</sup> Opinion at 88.

proposals because they are “part of a police officer’s job.”<sup>262</sup> In doing so, the Chair ignores a mountain of evidence demonstrating that the job of a NYC Police Officer has dramatically evolved in recent years and become infinitely more hazardous in light of the terrorist threat. The tragic recent events in Paris and San Bernardino serve as a reminder (as if one were needed) that the threat is metastasizing. The courage and bravery of NYC Police Officers has prevented numerous acts of terrorism and shielded the City and its residents from this burgeoning threat.<sup>263</sup> And the 23 NYC Police Officers who died on 9/11, the 86 NYC Police Officers whose subsequent deaths are causally related to 9/11, and the 741 NYC Police Officers whose disabilities thus far have been are causally connected to 9/11 are the most painful testaments to the risks that terrorism poses to NYC Police Officers.<sup>264</sup>

To combat terrorism, NYC Police Officers have been required to assume new and significant counterterrorism responsibilities — in addition to their traditional police work and assumption of responsibilities that had previously been the province of other specialized federal, state, and local emergency service and public safety agencies.<sup>265</sup> In light of those additional responsibilities, NYC Police Officers undergo new and additional training.

These new responsibilities, training, and risks were not part of the bargain of becoming a police officer until 9/11, but wages are still cemented in the pre-9/11 era.<sup>266</sup> Several police

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<sup>262</sup> Opinion at 87, 89.

<sup>263</sup> See PBA15-39 at 1.

<sup>264</sup> See Tr. 1204:10–25 (Morris).

<sup>265</sup> See PBA15-64; PBA15-65, PBA15-114-26, PBA15-140.

<sup>266</sup> See Tr. 631:6–11 (Timoney) (“this [counterterrorism training] is something I never, ever, ever had to deal with as a cop. It just didn’t. It had no effect on my life whatsoever. I didn’t have one minute of terrorism training in my time in the job going through the ranks.”). Moreover, a reported recent change in counterterrorism tactics will put Police Officers even more directly in the line of fire. Thus, it was recently reported that “[o]rdinary patrol officers, often armed with only a handgun and likely to arrive first at scenes like the one that unfolded Friday at a Planned Parenthood clinic in Colorado Springs are  
(continued...)

forces in New York State and others around the country have compensated officers in recognition of the new responsibilities, training and risks associated with terrorism.<sup>267</sup> There is no justifiable reason based on the evidence why the City does not further compensate NYC Police Officers who remain exposed on the front line of the battle against terrorism in the City that is the number one target for terrorists.

As for the patrol assignment differential, the evidence demonstrated that NYC Police Officers have the busiest and most unpredictable jobs in the NYPD and the brunt of crime prevention and response falls on their shoulders, putting their lives at risk now more so than ever before.<sup>268</sup> And their numbers have fallen dramatically since 2000, making their jobs increasingly difficult. There are nearly 4,000 fewer NYC Police Officers as of November 1, 2014 than there

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now expected to head into an unfolding attack and confront the perpetrators without waiting for more heavily armed backup.” J. David Goodman and Al Baker, *The City’s First Line of Defense, on the Beat and in Terrorist Attacks*, THE NEW YORK TIMES, Dec. 2, 2015 at A22, A29. As a former NYPD hostage negotiator said: ““You’re going in knowing that you’re going to have losses . . . This is not your typical situation, where the idea is “no hostages get lost, no cops get lost.” This is a whole new game plan.”” Id. Aside from the increased risks to Police Officers, this tactical shift also further complicates the jobs of Police Officers: “The training, quietly implemented in tandem with the addition of a new permanent counterterrorism force, comes at a time when officers are under increasing pressure to de-escalate confrontations and moderate their use of force during arrests. The dual mission — a quick turn to deadly force when confronting terrorists; a less aggressive posture in everyday interactions — could present complex challenges for patrol officers, many of whom are among the youngest and least experienced on the street.” Id. This tactical shift provides even more support for the PBA’s proposal for terrorism pay and a patrol assignment differential to incentivize veteran Police Officers to remain on patrol.

<sup>267</sup> See PBA15-184-25; PBA15-184-26; PBA15-184-27; PBA15-155A.

<sup>268</sup> See Tr. 961:24–962:21, 963:11–964:2, 969:15–25 (Morange); Tr. 675:15–676:2 (Timoney); Tr. 98:11–16 (Lynch); Tr. 1161:24–1162:13 (Morris). The October 20, 2015 murder of Police Officer Randolph Holder, 33 years of age, while he courageously performed his duty in East Harlem — the fourth NYC Police Officer murdered in eleven months, the second Police Officer death during the pendency of this case, and the sixth recently shot in the line of duty and the eighth since the expiration of the prior PBA contract — serves as another tragic reminder of basic facts at the heart of this case: there is not a City job, within the NYPD or elsewhere in the City, as unsafe and unpredictable in its danger, complex, pressure-filled, heavily scrutinized and second-guessed in just the past handful of years (if not in just the shorter timeframe since this Panel was empaneled), more than during any preceding period.

were in 2000.<sup>269</sup> And that reduction in workforce has had a dramatic effect on individual precincts, lowering the staffing level in some by nearly 40% as compared with the 2000 staffing levels in the same precincts.<sup>270</sup>

The City's failure to recognize the critical function that patrol officers play in crime prevention and to incentivize veteran NYC Police Officers who have earned the trust of the communities that they patrol to remain on patrol by offering them a patrol assignment differential is shortsighted.<sup>271</sup> It is fine for the City to say that, in the current climate, Police Officers must be policing smarter and doing more with less. They have, and they should be paid accordingly. The Chair's failure to grant the PBA's proposal is contrary to the evidence and logic, aside from being shortsighted.

The uniform allowance paid to NYC Police Officers intended to provide for their out-of-pocket expense in purchasing their NYPD uniforms and equipment has not increased since 1989. That \$1,000 amount has not kept pace with inflation or the increased cost of required equipment. In 1989, the uniform allowance of \$1,000 amounted to approximately 2.3% of basic maximum salary. Prior to this Panel's Award, the uniform allowance amounted to approximately 1.3% of basic maximum salary.<sup>272</sup> The Chair's \$50 increase in the uniform allowance to \$1,050 barely does anything to remedy that situation. In light of the Panel's Award, the uniform allowance remains approximately 1.3% of a NYC Police Officers basic maximum salary, including the two annual 1% pay increases that they will receive.

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<sup>269</sup> See Tr. 1183:16–1185:8 (Morris); PBA15-184-8; PBA15-184-9.

<sup>270</sup> See Tr. 1185:9–1186:21 (Morris); PBA15-184-10; PBA15-184-11.

<sup>271</sup> See Tr. 974:14–976:8, 984:14–985:10 (Morange); Tr. 1010:5–1011:5 (Dunne); see also Tr. 1611:11–20 (Morris); Tr. 1539:14–1540:12, 1611:10–17 (Tucker).

<sup>272</sup> See Tr. 1249:23–1250:9 (Morris).

Worse still is the Chair's cryptic comment that the small increase in the uniform allowance "is paid for in large measure by the lack of the terminal benefit included in the Award."<sup>273</sup> The "terminal benefit" refers to a benefit received by other City workers in which those workers' accrued leave time can be paid out in a lump sum upon retirement instead of their being required to take accrued leave time until their deferred retirement dates. Elsewhere, the Chair claims that this terminal benefit provided to other workers "costs anywhere from .59 per cent to .61 per cent for these groups."<sup>274</sup> The meager \$50 increase in the uniform allowance does not cost the City anywhere near .59 to .61 percent. The only reasonable reading of the Chair's cryptic comment, therefore, is that — champion of the pattern that he is — he is assuming that NYC Police Officers eventually will receive the terminal benefit that other City workers have received in this round, and he is counting on delayed implementation of that benefit for NYC Police Officers as savings to the City.

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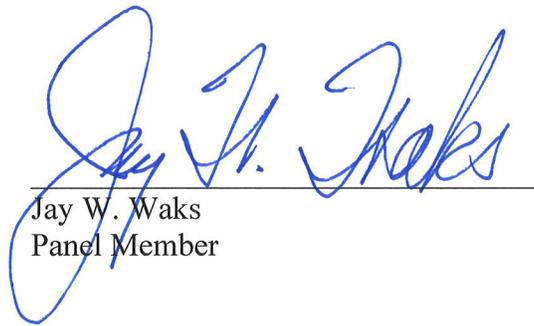
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<sup>273</sup> Opinion at 88.

<sup>274</sup> Opinion at 86.

In concluding his Award, the Chair has ruled that: "Failure to award a proposal shall not be construed as a determination that a specific item lacks merit or would not be appropriate in the future."<sup>275</sup> With the Chair's reservation in mind, I trust that, barring the City's epiphany at the bargaining table that Police Officers deserve to be paid at market (especially in light of the critical mission they perform), a future panel more faithful to the Taylor Law and the evidence will see fit to award fair market pay and these other proposals.

Dated: New York, New York  
December 17, 2015



Jay W. Waks  
Panel Member

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<sup>275</sup> Opinion at 100.

# APPENDIX

NEW YORK STATE PUBLIC EMPLOYMENT  
RELATIONS BOARD TAYLOR LAW § 209.4(c)  
PUBLIC ARBITRATION PANEL

-----X  
IN THE MATTER OF THE INTEREST ARBITRATION :

between :

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

and :

THE CITY OF NEW YORK. :  
-----X

PERB Case No. IA2014-009;  
M2014-027

**DISSENTING OPINION OF PANEL MEMBER JAY W. WAKS**

The Panel Majority's decision declining to exercise jurisdiction over the merits of the PBA's motion to disqualify the PBA's former lawyer, Commissioner Linn, as the City's designated Panel Member, is contrary to the plain terms of the Taylor Law and the PERB Rules.<sup>1</sup> Moreover, by failing to reach the merits of this threshold ethical issue raised by the PBA's motion, the Panel Majority's decision leaves a dark cloud over Commissioner Linn's service as a Panel Member that will taint this proceeding and any award that the Panel ultimately issues. Therefore, I dissent.

The basis for the PBA's motion can be stated succinctly. This PERB interest arbitration is the fourth involving these parties. The PBA contends that Commissioner Linn was the PBA's lawyer, including in the first such PERB interest arbitration and in preparing for the second PERB interest arbitration. In that capacity, he helped craft the PBA's legal strategies and

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<sup>1</sup> It is important to note that the Panel Majority denied the PBA's motion solely because of the Panel Majority's perceived lack of Panel jurisdiction, not on its merits, which the Panel Majority does not reach. Only because it rejected its jurisdiction has the Panel Majority denied the PBA's request to present its motion to disqualify Commissioner Linn. Majority Opinion at 4. This Panel has not held evidentiary hearings in regard to the jurisdictional issue or on the merits.

arguments for establishing that New York City Police Officers are entitled to market-based pay increases in light of the criteria delineated in the Taylor Law. Because the Taylor Law criteria have not changed since the Legislature adopted them, the PBA has used the same legal paradigm that Commissioner Linn helped to create in subsequent PERB interest arbitrations and will use it again in this fourth PERB interest arbitration.

The City's action in designating the PBA's former lawyer as the City's Panel Member is unprecedented. But being unprecedented certainly does not shield Commissioner Linn from Panel scrutiny under New York State's law governing the ethics of attorneys. If nothing else, Commissioner Linn's unprecedented designation only should serve to heighten the Panel's scrutiny. New York Rule of Professional Conduct 1.9(a) applies in that circumstance and provides:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

N.Y. Rule of Prof. Conduct 1.9(a), *codified at 22 NYCRR Part 1200*. The PBA's motion to disqualify Commissioner Linn under New York Rule of Professional Conduct 1.9(a) falls squarely within the Panel's jurisdiction.

I agree with the Panel Majority to the extent that it states that this Panel's jurisdiction is defined by the Taylor Law and by PERB Rules, and that the Legislature's intent in that regard is expressed in the "unambiguous language of a statute [which] alone is determinative." Majority Opinion at 16 (quoting *Theroux v. Reilly*, 1 N.Y.3d 232, 239 (2003)). The Panel Majority, however, fails to apply those principles to the unambiguous language of the relevant provisions.

The plain language of the Taylor Law itself vests the Panel with jurisdiction to consider the PBA's motion to disqualify Commissioner Linn. Under the Taylor Law, the Panel has the

jurisdiction to consider “*all matters related to* the dispute.” N.Y. Civ. Serv. Law § 209.4(c)(iii) (emphasis added). The Panel Majority’s analysis does not attempt to grapple with the controlling language in Section 209.4(c)(iii); it simply reads this language out of the Taylor Law.

Instead, the Panel Majority focuses on the word “dispute” in isolation in PERB’s letter designating the Panel and concludes that “[i]t is unlikely that the term ‘dispute’ is utilized differently in the rules or statutes from that contained in the designation letter.” Majority Opinion at 14. But the Panel’s jurisdiction is not confined to the “dispute,” (*i.e.* the collective bargaining dispute between the parties). If that is what the Legislature intended, the Taylor Law would have directed the Panel to “hold hearings on the dispute,” a phrase that never appears in the governing provision. In reality, the Panel’s legislatively-conferred jurisdiction extends to “hearings on *all matters related to* the dispute,” and there are no restrictions on that broad grant of authority. N.Y. Civ. Serv. Law § 209.4(c)(iii) (emphasis added). The Panel Majority’s observations regarding the term “dispute,” therefore, do not support its determination on the critical issue of the Panel’s jurisdiction over “all matters related to the dispute.”

The Panel also has the jurisdiction to consider the PBA’s motion under the authority conferred on the Panel by the PERB Rules. PERB Rule 205.8 provides that once a public arbitration panel is designated, as this Panel has been, the panel is vested with “exclusive jurisdiction and control” over “[t]he conduct of the arbitration panel,” and mandates that “[t]he conduct of the arbitration panel shall conform to applicable law.” 4 NYCRR § 205.8.

The PBA’s motion plainly concerns “matters related to the dispute” under the Taylor Law, and “the conduct of the arbitration panel” under PERB Rule 205.8. In his prior legal representation of the PBA, Commissioner Linn helped craft and worked directly with the client and its other PBA counsel in pursuing the very legal strategy and arguments that the PBA used in

its first PERB interest arbitration against the City, has used in two subsequent interest arbitrations, and will use again in this fourth interest arbitration against the City. By the very nature of his prior representation of the PBA, Commissioner Linn has access to confidential PBA information and strategic thinking that could be used, for example, in questioning witnesses or during Panel deliberations.

Significantly, the Panel Majority confirms the point when it relies on the Panel Chair's comment during the argument on this matter:

Presumably, if I believe that during the course of deliberations Mr. Linn sought to raise arguments that, I'll put it this way, that Mr. Waks believed were part of the attorney/client relationship that he had with the PBA, that I could simply say, sorry Bob, I can't consider this.

Majority Opinion at 17 (quoting Transcript (1/9/15) at 32); *see also* Majority Opinion at 21 (“the Panel, specifically, the Chair, has at his disposal adequate safeguards to prevent Mr. Linn from utilizing presumably confidential communications with his former client which would present a ‘clear danger’ to a just and fair resolution of this dispute”).

By conceding that Commissioner Linn's prior representation of the PBA in the first interest arbitration between the parties and thereafter could lead to his ethically improper reliance in this proceeding on confidential PBA information obtained during the course of his prior representation, the Panel Majority implicitly confirms that the PBA's motion to disqualify Commissioner Linn concerns “matters related to the dispute” and “the conduct of the arbitration panel” — *i.e.* “what the Panel does.” Majority Opinion at 17. That conclusion — clearly implied by the Chair's own example (and the City's similar statement in oral argument<sup>2</sup>) — is all

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<sup>2</sup> At oral argument on this jurisdictional issue, the City's counsel similarly conceded that Commissioner Linn's prior representation of the PBA could ethically impact these proceedings and require a Panel remedy: “if there's an evidentiary issue, for example, Bob Linn wants to  
(continued...)

that is required to establish that the Panel has jurisdiction to decide the merits of the PBA's motion to disqualify its former lawyer, Commissioner Linn.

Put another way, the Panel Majority concedes that the Panel Chair has the jurisdiction to address ethical breaches of attorney-client confidentiality ostensibly by disregarding information arising from Commissioner Linn's ethical breaches. Although the Panel Majority does not say so explicitly, its statements amount to a recognition that the Panel has the jurisdiction to ensure that the Panel's conduct "conform[s] to applicable law" in the form of New York Rule of Professional Conduct 1.9(c), which provides:

A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

- (1) use confidential information of the former client . . . to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or
- (2) reveal confidential information of the former client . . . except as these Rules would permit or require with respect to a current client.

N.Y. Rule of Prof. Conduct 1.9(c), *codified at 22 NYCRR Part 1200*.

The Panel Majority does not explain why it would have jurisdiction to address a potential ethical breach by Commissioner Linn arising from his prior PBA representation by applying ethical Rule 1.9(c), but not by applying Rule 1.9(a). Nor does the Panel Majority explain why the Panel's conduct must conform to Rule 1.9(c) to the extent that subsection applies, but not to Rule 1.9(a) to the extent that subsection applies. In fact, the Panel's conduct cannot "conform to applicable law" as long as Commissioner Linn's very participation as a Panel Member violates

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testify and wants to say, you know, back in 2002 Jay Waks told me; and if it was concluded that that was an attorney/client communication, I think Howard would have the authority to exclude that, if that was part of his testimony." Hearing Tr. (1/9/15) at 94-95.

New York Rule of Professional Conduct 1.9(a), which applies to his service in that capacity. Thus, the Panel Majority's own reasoning belies its assertion that "the phrase 'applicable law'" as used in PERB Rule 205.8 would exclude "any statute unrelated to labor relations matters generally and the Taylor Law specifically." Majority Opinion at 15. That supposed exclusion is not found anywhere in the language of Rule 205.8, the Taylor Law itself, or anywhere else. It is nothing more than the Panel Majority's fabrication to avoid its jurisdiction.

In sum, where, as here, the Panel has jurisdiction to consider a matter, it must refer to any source of applicable law necessary to decide the matter. That is precisely the teaching of *Matter of Heilman (Casella)*, 188 A.D.2d 294, 294 (1st Dep't 1992) where the First Department held that "[t]he question of the legality of the parties' agreement was properly before the arbitrator who had a sound basis for finding that the agreement was one to sell a law practice and was violative of the ethical prohibitions against dividing fees." The Panel Majority attempts to distinguish *Heilman* on the ground that it involved "the arbitrator's authority to interpret the agreement of the parties." Majority Opinion at 22. But, just as the *Heilman* arbitrator's jurisdiction to consider the parties' agreement required him to consider applicable ethical rules governing attorney conduct, so too this Panel must consider applicable ethical rules governing attorney conduct, including Rule 1.9(a), even if that might lead to the disqualification of a Panel Member.

As noted above, the determination of this Panel's jurisdiction depends on the plain language of the Taylor Law and PERB Rules. The Panel Majority, however, reaches its conclusion by relying largely on claimed grounds that have nothing to do with the plain language of the governing provisions of the Taylor Law and PERB Rules. In doing so, the Panel Majority improperly considers extrinsic matters to contradict the plain language of the governing

provisions. In any event, those arguments do not support the Panel Majority's conclusion that the Panel lacks jurisdiction over the PBA's motion.

It is ironic that the Panel Majority would find support for its denial of jurisdiction in the fact that PERB designated the Panel. As the Panel concedes, PERB itself, through its Director of Conciliation, previously had "informed the parties it does not have jurisdiction in this matter". Majority Opinion at 16; *see also id.* at 4, 7. That the "Panel's duty to act in accordance with the Taylor Law does not exist before it is constituted [by PERB], only after" (*id.* at 16), does not explain the independent jurisdiction of the Panel (once designated) under Section 209.4(c)(iii) and PERB Rule 205.8. Indeed, PERB's undisputed jurisdiction to designate a public interest arbitration panel is set forth in a separate section of the Taylor Law (Section 209.4(c)(ii)) and a different PERB Rule (PERB Rule 205.7).

*Hanley v. Curreri*, 16 Misc. 3d 1130(A), 2007 WL 2418803 (Sup. Ct. Albany Cnty. Mar. 17, 2007) on which the Panel Majority relies, stands for nothing more than the unremarkable proposition that PERB has the sole authority to designate a public interest arbitration panel. The Panel Majority misconstrues the holding in several respects, which may be due to confusion over the procedural posture of the case and the different proceedings involved. A brief clarifying discussion follows.

In *Hanley*, the City sought to compel PERB to designate a public interest arbitration panel after the PBA declined to participate in the selection of a neutral arbitrator based on its contention that two arbitrators on the striking list provided by PERB were not, in fact, neutral, *i.e.*, not "disinterested" in the language of the Taylor Law (Section 209.4(c)(ii)). The court denied the City's petition even though the designation of a public interest arbitration panel "is specifically a function of PERB" because PERB was "not a named party, and the Court cannot

compel PERB's agent . . . to perform an act when a duly constituted board does not exist." *Id.* Subsequently, PERB's then-Director of Conciliation decided to reject the PBA's objection to the two arbitrators on the striking list and ordered the parties to engage in the striking process based on the list of arbitrators originally circulated. *See Matter of City of New York and PBA of the City of New York, Inc.*, 40 PERB ¶ 8001, 2007 WL 7566486 (May 21, 2007). The Board affirmed that decision. *See* 40 PERB ¶ 3010, 2007 WL 7565373 (June 27, 2007).

Understood in its proper context, the Board's statement on that appeal that "our review is necessary for there to be a final order which can be appealed judicially" (*id.*) is neither "instructive," as the Panel Majority contends, nor otherwise applicable to the facts of this case. Majority Opinion at 19. In *Hanley*, PERB's Director of Conciliation decided the merits. Judicial review of that decision required a final PERB order. Here, by contrast, it is undisputed that PERB informed the parties that it lacked jurisdiction to consider the merits of the PBA's ethical objection to Commissioner Linn. *See* Majority Opinion at 4, 7, 16. There never has been and never will be a merits ruling by PERB because it denies it has jurisdiction to issue one. Importantly, nothing in the *Hanley* decisions issued by the Supreme Court, PERB's Director of Conciliation or its Board addresses the jurisdiction of an interest arbitration panel once it has been designated by PERB, which is the issue before this Panel.

The Panel Majority also states that the "lesson of [*Hanley*] is that while a party cannot unilaterally designate a neutral, it certainly may designate its own member." Majority Opinion at 20. That is a curious lesson to draw in light of the Panel Majority's concession in the same paragraph that *Hanley* had nothing to do with the appointment of a party appointed arbitrator. *Id.* More importantly, even the *Finger Lakes* case on which the Panel Majority relies — for the proposition that a party has the right to pick its own bargaining representatives — observes that

that right is not unfettered. In *Matter of Finger Lakes Community College and County of Ontario*, 40 PERB ¶ 4596 (Nov. 7, 2007), the Board stated that it “has upheld an employer’s use of a bargaining unit member on the employer’s negotiating team, in the absence of a showing that the selection was a result of ill will or was a *conflict of interest*.” The Panel Majority notes the existence of an “exception,” but dismisses it with the assurance that the Panel Chair “has at his disposal adequate safeguards to prevent Mr. Linn from utilizing presumably confidential communications with his former client which would present a ‘clear danger’ to a just and fair resolution of this dispute.” Majority Opinion at 21.

Although maintaining it has no jurisdiction over a Panel Member’s ethical breach, the Panel Majority nevertheless proposed one purported safeguard for addressing the ethical issues that inevitably will arise from Commissioner Linn’s prior representation of the PBA — that the Panel Chair will not consider confidential PBA information disclosed by Commissioner Linn during Panel deliberations. Majority Opinion at 17. That ostensible “safeguard” is woefully inadequate to prevent the “clear danger” that Commissioner Linn’s continued participation as the City’s designated Panel Member poses to a just and fair resolution of this dispute for three basic reasons to which the Panel Majority has turned a blind eye in its effort to justify denying jurisdiction over this ethical issue.

*First*, there is no “safeguard” that the Panel Chair can rely upon — short of Commissioner Linn’s disqualification — that would be consistent with Rule 1.9(a)’s purpose as a “prophylactic measure [that] frees clients from apprehension that information imparted in confidence might later be used to their detriment, which, in turn ‘fosters the open dialogue between lawyer and client that is deemed essential to effective representation.’” *Tekni-Plex, Inc. v. Meyner and Landis*, 89 N.Y. 123, 131 (1996) (citation omitted). To that end, the “rule of

disqualification fully protects a client's secrets and confidences *by preventing even the possibility* that they will subsequently be used against the client in a related litigation.” *Id.* (emphasis added).<sup>3</sup> The Panel Majority's proposed “safeguard” ignores New York Court of Appeals authority and deprives the PBA of its right to be free even from the possibility that confidential PBA information obtained by Commissioner Linn during the City/PBA's first interest arbitration and thereafter will be used against the PBA in this proceeding, and effectively gives Commissioner Linn an unfettered license to breach.

*Second*, the Panel Majority's proposed “safeguard” is unworkable. It relies on me alone to police Commissioner Linn and assumes that breaches of PBA confidential information will be readily apparent. In light of his prior representation of the PBA, Commissioner Linn is well-versed in all aspects of the PBA's legal strategy and legal arguments for establishing that New York City police officers are entitled to market-based pay increases under the Taylor Law criteria that this Panel must consider. Indeed, he helped to craft them when he represented the PBA in the City/PBA's first interest arbitration under the Taylor Law. Even acting with the best intentions, there is no way for Commissioner Linn to compartmentalize that knowledge and ensure that it is not used adversely to the PBA in these proceedings. Nor is there any way for the Panel to determine definitively whether any particular question posed or comment offered by Commissioner Linn during these proceedings, or any idea he imparts to counsel for the City, is based on confidential PBA information or background that Commissioner Linn obtained as the

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<sup>3</sup> See also *Cardinale v. Golinello*, 43 N.Y.2d 288, 295-96 (1977) (under Rule 1.9(a), “[i]rrespective of any actual detriment, the first client is entitled to freedom from apprehension and to certainty that his interests will not be prejudiced in consequence of representation of the opposing litigant by the client's former attorney”).

PBA's lawyer. The Panel Majority's proposed remedy could embroil the Panel in endless disputes on the issue.

*Third*, it will be impossible to “unring the bell” in the inevitable event that Commissioner Linn utilizes confidential PBA information. Although the Panel Chair may attempt to disregard any such inadmissible information that might be introduced or discussed, it cannot be accomplished in practice. For example, studies have shown that “judges do not ignore inadmissible information when making substantive decisions in either civil or criminal cases” likely because “they are unwittingly influenced by inadmissible information and . . . they cannot ignore it much of the time.” See Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. Pa. L. Rev. 1251, 1323 (2005); Edna Sussman, *What Lurks in the Unconscious: Influences on Arbitrator Decision Making*, Alternatives to the High Cost of Litigation Vol. 32, No. 10 at 149 (Nov. 2014) (discussing influences that might have subconscious effect on arbitral decision-making).

Further, the forum in which the proceeding is pending is in the best position to decide the issue efficiently and to provide a remedy, if appropriate. As the Court of Appeals held in *Erlanger v. Erlanger*, 20 N.Y.2d 778, 779 (1967), “disqualification in a particular matter should be sought in the court in which the action is pending . . . .” That holding is dictated by common sense. It makes little sense for a party to seek to disqualify its attorney from representing its adversary in a pending proceeding by commencing an ancillary proceeding in another forum.

While acknowledging *Erlanger*, and also acknowledging that “it is arguably possible to analogize this Panel to a ‘court,’” the Panel Majority simply states without explanation that “We decline to do so.” Majority Opinion at 21-22. The logic underlying *Erlanger*, however, is

particularly germane to the circumstances in which the City and Commissioner Linn have placed the 22,000 New York City Police Officers that the PBA serves, who have been working without a contract for almost five years (and who paid Commissioner Linn's bills when he was the PBA's attorney). The Panel Majority's decision puts the PBA in an impossible position. It can commence an ancillary proceeding that could take years, with appeals, to resolve and thereby delay further resolution of an already delayed collective bargaining agreement. Alternatively, it could forego the protection of Rule 1.9(a) and its right to be "free from the apprehension, naturally arising under the circumstances . . . that [Commissioner Linn's] prior representation [of the PBA] would inure to [its] current adversaries' advantage." *Decana, Inc. v. Contogouris*, 27 A.D.3d 207, 207 (1st Dep't 2006). The PBA should not be put to that choice especially when the PBA is not responsible for creating this controversy. Stated simply, that the PBA may have alternative remedies does not give the Panel Majority a safe-harbor to sidestep, as it has, its legislatively-conferred jurisdiction to consider the PBA's motion.

In the end, the Panel Majority has decided to shirk its responsibility by attempting to write an exception, called "labor relations," into New York Rule of Professional Conduct 1.9(a), where none exists.<sup>4</sup> Yet, Rule 1.9(a) is blind to the lawyer's expertise, and Commissioner Linn simply does not get a free pass under Rule 1.9(a) because he now opposes a labor union, his former client.

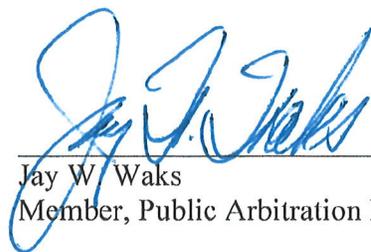
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<sup>4</sup> The Panel Majority contends that accepting jurisdiction over "the PBA's motion would encourage a party to seek the ouster of a Panel member and would hamper the selection of a party's choice, especially in a small local municipality," thereby "invit[ing] labor relations chaos." Majority Opinion at 24. In particular the Panel Majority argues that "[s]maller jurisdictions often see reversals of service by Panel members" where "[i]t is not uncommon for a Union official to join the ranks of management within the same governmental agency." *Id.*

The Panel Majority also has gone to great lengths to conjure up the potential for “chaos” that may result in future arbitrations if it actually did its job here — by removing a Panel Member who previously represented the adverse party in an interest arbitration. In essence, the Panel Majority has resorted to fear, not logic, to back into a decision that ignores the plain language of Rule 1.9(a) and has left the PBA in the position of having to present its case to a Panel, one member of which previously helped to orchestrate the PBA’s strategy in an identical proceeding. The upshot is that, by not enforcing Rule 1.9(a), the Panel Majority has invited parties in future interest arbitrations to hire their adversary’s prior lawyer, and thereby gain insight into privileged and confidential information.

In rejecting Panel jurisdiction as it has — in the face of the PBA’s request that the Panel disqualify Commissioner Linn because his “conduct” as a Panel Member does not “conform to [the] applicable law” and in the face of the Panel’s statutorily clear authority to consider “all matters related to the dispute” — the Panel Majority has done a real disservice to the PBA, its 22,000 members and the cause of justice.

Dated: New York, New York  
February 12, 2015



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Jay W. Waks  
Member, Public Arbitration Panel