

PUBLIC EMPLOYMENT RELATIONS BOARD
FACT-FINDING IN IMAPSSE BARGAINING

IN THE MATTER OF FACT-FINDING BETWEEN

COUNTY OF MONROE

**FACT-FINDING
REPORT**

- AND -

**CSEA (MONROE COUNTY PART-TIME
EMPLOYEES)**

**CASE NUMBER:
M2009-239**

Re: Fact-Finding of Outstanding Bargaining Issues

BEFORE: Stephen P. LaLonde, Impartial Fact Finder

APPEARANCES:

For the Union: Robert L. Leonard, Labor Relations Specialist, CSEA
Donald L. Wallace, President, CSEA Unit 7401
Yolanda Yodice, Vice President, CSEA Unit 7401
Florence Tripi, President, CSEA Region 6

For the County: Peter J. Spinelli, Attorney, Harris Beach
Karlee Bolaños, Attorney, Harris Beach
William A. Lowe, Attorney, Harris Beach
Brayton Connard, Director of HR, Monroe County
Tom Vasey, Labor Relations Manager, Monroe County

B A C K G R O U N D

The County of Monroe (“County”) and CSEA Local 1000 AFSCME, AFL-CIO (Part-Time Employee Unit) (“Union”) met in negotiations for the purpose of determining a successor agreement to their June 1, 2006 – December 31, 2008 Collective Bargaining Agreement (“CBA”). The Parties met for 6 negotiation sessions (May 1, 2009, June 2, 2009, June 11, 2009, June 25, 2009, August 4, 2009 and October 8, 2009). The Union submitted a Declaration of Impasse to the New York State Public Employment Relations Board (“PERB”) on November 19, 2009. Subsequent to the Declaration of Impasse, PERB Mediator Gregory Poland was appointed and met with parties on two separate occasions (January 20, 2010 and March 18, 2010) in an

effort to mediate the Impasse. Mediation efforts proved to be unsuccessful and the undersigned was appointed as Fact Finder on May 4, 2010.

An Initial Pre-Hearing Conference (“IPHC”) was held between the Parties and the Fact Finder on June 24, 2010 at which time the outstanding issues in dispute were identified and confirmed for the purposes of Fact-Finding and procedural issues were clarified. A Fact-Finding Hearing was held on September 10, 2010. It is noted for the record that the Parties allowed three (3) CSEA individuals (2 Labor Relations Specialists and a CSEA unit president) to attend the Hearing solely as observers to gain more experience and familiarity with the process. At that time, the Parties submitted briefs outlining their respective arguments and data in support of their positions. At this Hearing, the Parties summarized and clarified the information contained in their Briefs. It was previously agreed that the Parties would submit post-hearing rebuttal briefs. The Fact Finder received both rebuttal briefs by November 12, 2010 at which time the record was closed.

ISSUES

The Parties brought the following issues to fact-finding:

- Issue #1: Article 2.2 Union Representative Status
- Issue #2: Article 3.3 Union Stewards
- Issue #3: Article 5 Leave of Absence
- Issue #4: Article 6 Grievance Procedure
- Issue #5: Article 7 Miscellaneous Provisions - Bidding
- Issue #6: Article 7 Miscellaneous Provisions - Stand-By & Call-Back
- Issue #7: Article 8 Compensation
- Issue #8: Article 9.2 Complete Agreement
- Issue #9: Article 9.3 Duration & Changes

Each of these issues will be addressed in turn and the relative positions of the Parties will be summarized and presented as each issue is identified.

ISSUE #1: ARTICLE 2.2 - UNION REPRESENTATIVE STATUS

County Position:

Article 2.2 is currently a source of much contention between the Parties outside of the negotiations realm. The current language in this provision states:

The Unions representative status shall continue as long as it represents a majority of the bargaining unit employees, provided that if the County receives evidence that 30% or more of the unit employees are questioning this status, the parties will conduct a secret ballot election conducted by PERB to determine representative status. (Article 2.2)

The County was concerned that "employees did not seem to be involved, and instead, the County was negotiating directly with the CSEA - the self-proclaimed 'administrator' of the County's part-time employees union. Given this serious issue, the County felt that it needed to communicate with its employees." (County Brief, 38). What the County did was to unilaterally determine that they should directly contact part-time members through a survey to ascertain whether or not a representational election should be held. The County indicated that they wanted to ensure that the bargaining unit employees wanted the County to be negotiating with CSEA and that the employees were engaged in the process. The County asserted that their only purpose in contacting the bargaining unit members was to implement the rights of the Parties under this section of the CBA and was solely prompted by their determination that they believed the part-time unit to be defunct. CSEA immediately filed for an Injunction in State Supreme Court to prevent the survey and also filed an Improper Practice charge with PERB. Further analysis of this legal aspect of Article 2.2 will be dealt with in the Fact Finder's discussion section below. Subsequently in negotiations on October 8, 2009, the County proposed that Article 2.2 be modified to state:

"If there is no agreement 120 days after expiration of the contract, AAA will hold an election and CSEA will voluntarily withdraw recognition if more than 50% of the unit does not support the union."

The County contends that the change in language that they propose would keep to the original intent of the Parties when they first negotiated the initial contract in 2006. The intent of the original language, according to the County, was that they were concerned about the amount of interest employees had in the Union right from the start. The County notes that part-time employment in the County is transient and subject to high turnover and that there would not be

much active involvement with the Union. The County notes that the sole intent of Article 2.2 is the concern over whether or not there was sufficient interest in the employees to support Union representation with the County. As it turns out, PERB ruled that the County survey was illegal under the Taylor Law and constituted an Improper Practice. The County noted that PERB also ruled that it would not hold the election required by Article 2.2. If PERB refuses to effectuate the terms of the agreement between Parties, then another party (AAA) should be utilized to carry out these elections. The County opines that the initial reason for the inclusion of this provision was to allow bargaining unit employees to democratically determine their own fate and the County acted in good faith in order to implement that understanding.

Union Position:

The Union contends that the recent actions of the County relative to Article 2.2 have created nothing but trouble and interference in the legitimate operation of the Union and its representational responsibilities. Further, the Union states that the County's actions under this provision and their attempt to directly interfere in Union administration by attempting to directly "survey" the Union membership on whether they still wanted CSEA to represent them was improper and in violation of the Taylor Law. The Union view was sustained by the Administrative Law Judge ("ALJ") ruling that the Improper Practice charge filed by the Union against this interference was correct and the County was found to be in violation. Upon appeal by the County, the PERB board also ruled to sustain the ALJ's finding and make it a formal decision of the Board. The County still refused to accept reality and appealed the PERB decision to the State courts, which will not only delay the inevitable but is continuing to add significant legal costs to the County taxpayers.

Based on the County's recent improper actions relative to Article 2.2, the Union states that it underscores their position that this provision only interferes with legitimate Union administration and the negotiations process as well as seeks to preempt the letter and spirit of the Taylor Law.

According to the Union, the County's proposed modification of the wording of Article 2.2 only serves to compound the interference in Union operations, the negotiations process and further

undermines the legitimate authority of PERB in public employment matters. The County seeks to obtain what the ALJ, PERB Board and eventually the courts will tell them was grossly improper on their part. The County proposal, if accepted, would have the effect of removing representational issues entirely from the purview of PERB and would involve a private entity (at additional cost to County taxpayers) who would be contractually bound to do the County's bidding.

The Union asserts that this provision of the CBA should be removed as the County has clearly demonstrated their intent to employ this language in a non-productive and manipulative manner solely for the purpose of undermining legitimate Union functioning and to disrupt the process of negotiations.

ISSUE #2: ARTICLE 3.3 - UNION STEWARDS

County Position:

The County states, that as a matter of general principle, it is opposed to providing any part-time employee with time off with pay. They note that the concept of release time for stewards was created for full-time bargaining units where stewards do not have time to perform steward duties during the business day because they are working full-time. The County states that part-time stewards do not have the same problems as full-time stewards in other bargaining units. The nature of part-time work allows part-time stewards to have time off during the business day and/or they work only certain days which opens up other days for them to perform their steward functions. The very nature of part-time work makes the Union's request unnecessary. The County notes that they have countered the Union proposal by stating that in situations where steward services were needed during a time when the steward was scheduled to work, that the County may allow that steward to pick up additional work to make up for the time they missed while acting as a steward. The County states that their counter indicates that if a steward was required to perform duties during the steward's regular work hours, then "the steward may be provided with work opportunities to make up the lost time". The County feels that this addresses the need of the Union and represents a viable compromise on this issue.

Union Position:

The Union states that their proposal on this issue is modest and reasonable. They note that no Union officers or stewards in the unit have any released time in which to conduct necessary and required Union business such as representation of members and negotiations. All other bargaining units have released time. The Union asserts that their proposal is only to protect stewards from loss of pay for grievance meetings, hearings or other necessary meetings that are scheduled during the normal work hours of the individual. The County can schedule these meetings for other than the normal work hours in which case there would be no paid released time. The Union opines that the language they are proposing is not the normal type of language that has broad application for the officer or steward "to conduct Union business" as is found in many other CBAs but is restricted language dealing only with specific situations as noted above. The Union rejects the County's proposal (under Article 6) on this matter which says nothing about Union officers and stewards attendance at the specific type of meetings outlined but only references that the grievant will suffer no loss of pay for attendance at these meetings. Not only does it not address the Union proposal but it also "offers" something for a grievant that any grievant already has and is entitled to in the employment environment. The Union's proposal is specific in application and reasonable.

ISSUE #3: ARTICLE 5 - LEAVES OF ABSENCE

County Position:

The County asserts that Article 5 contains various leave provisions but does not contain any provisions for paid leave benefits for situations such as vacation and sick leave. The County states that the purpose of the part-time workforce is to supplement full-time positions and to "fill-in" for absences in the full-time workforce. They further state that the nature of part-time employment already allows part-time employees to take non-work time for vacation purposes or for sick leave. It is just that they are not paid. The County contends, irrespective of their position on paid benefits for part-time employees, that the granting of paid time off for vacation and sick leave would significantly increase personnel costs for the County and also would be

administratively more difficult in scheduling personnel and in filling-in in situations where full-time employees are absent. The County contends that the granting of paid vacation and sick leave to part-time employees could create scenarios where a full-time employee is out on vacation or sick leave and the part-time employee selected to fill-in for that absence is also out on paid leave or calls in sick, forcing the County to hire a third individual to actually cover the work that needs to be done. The County asserts that this is neither administratively practical nor is it affordable given the economic constraints currently placed on the County. The County further notes that the Union proposal of October 8, 2009 withdrew the paid sick leave provision and it should not be addressed in by the Fact Finder. It is the County's contention that the Union proposal for paid time off would constitute a basic change in the understanding between the Parties that was established during the first CBA bargaining agreement arrived at in 2006.

Contrary to the assertion made by the Union that surrounding counties and municipalities offer part-time employees vacation, holiday, or sick leave benefits, the County argues that their own survey of 33 municipalities indicated that 18 of them did not provide paid leave benefits to their part-time employees. The County also references a Bureau of Labor Statistics 2010 survey of employee benefits in the U.S. which demonstrated that the vast majority of part-time workers do not receive any such benefits.

The County recommends that there be no change in Article 5 and that no paid time off benefits be added to the CBA.

Union Position:

The Union contends that is both fair and beneficial for the County to include provisions for paid time off for part-time employees that would cover such areas as vacation and sick leave. The Union asserts that part-time employees are treated as inferior employees by the County solely on the basis of the number of hours that they work as opposed to full-time employees. The Union notes that part-time employees who work close to the 25 hour cutoff for part-time employment, received no paid time off benefits while they may be working with another employee who works at 30 hours per week and is getting paid time off. The Union opines that paid time off benefits

for part-time employees is not only an issue of fairness but is a good employment practice that will serve to increase retention rates of employees and lessens the amount of turnover and the cost of retraining of new employees when an employer has a high turnover rate. They point out that Wegmans, which does provide comprehensive benefits to its part-time employees, has a turnover rate of only 38% whereas the supermarket industry itself has a turnover rate of close to 100%. This is due significantly to the fact that Wegmans provides benefits to its part-time employees thus encouraging them to stay with the organization, which reduces Wegmans' recruitment and training costs. The Union indicates that the surrounding counties all offer their part-time employees prorated time off benefits for positions comparable to the positions and titles in the bargaining unit. The Union's request for paid time off is also prorated based on the number of hours that an individual bargaining unit member works.

Similarly, the Union's proposal for paid sick leave mirrors the arguments presented above and they further argued that there is not only an inequity between part-time and full-time employees but that credible studies have shown that the majority of employees who do not have paid sick leave have gone to work when they are sick thus increasing the chance of spreading contagious illnesses. The Union also notes that while the employment may be part-time, in many situations the part-time job for the individual is their only source of income. It is not merely a supplemental source of income. Again the Union states that their sick leave proposal is based on meeting a minimum number of hours worked the previous year and has a modest provision for the accumulation and carryover of unused sick leave. Calculating the Union proposal it would demonstrate that part-time employees would only be able to earn two paid sick leave days per year. This proposal is not excessive and should be approved.

ISSUE #4: ARTICLE 6 - GRIEVANCE PROCEDURE

County Position:

The County states that the Union is proposing an identical grievance and binding arbitration procedure that is found in existing full-time agreements with other bargaining units. The County is opposed to any change in the grievance procedure for several reasons. The County contends

that the Union has not offered any convincing rationale why this Article of the CBA needs to be changed. The County notes that the existing grievance procedure has been little if ever used and that there is not a history of grievance issues coming forth from the part-time employee unit. The County asserts that the Union has had no negative experience with the existing grievance procedure upon which to base a concern or a proposal for the need for a change in that process.

The County is opposed to the inclusion of binding arbitration as a final step in the grievance process. They note that there is a statutory right to due process embedded in Section 75 and 76 of the Civil Service Law and part-time employees have full access to the Civil Service procedures and due process protections. Arbitration is simply not necessary. The County opines that a binding arbitration step added to the grievance process would only add significant additional personnel costs in a time of economic constraints. Binding arbitration is simply not necessary.

Union Position:

The Union sought the inclusion of final and binding arbitration in the grievance process but withdrew the arbitration proposal during the Fact-Finding process.

However, the Union stresses that the second aspect of their proposal regarding disciplinary notices is not withdrawn. The Union states that they merely want notices of disciplinary actions to be sent to the Unit President at the same time that the County sends or serves them on an employee. To be informed of disciplinary actions against a unit member is a legitimate right of the Union in order for them to meet their representational responsibilities and to advocate for an employee during the disciplinary process.

The Union notes that after an earlier written request for copies of all disciplinary actions was flatly refused by the County, at least one department that had been routinely supplying these copies to the Union abruptly stopped doing so. There was no problem in doing this before.

The Union further states that notification is not only warranted as a matter of course but given the fact that the County is large and unit members are widely scattered throughout the County, notification of disciplinary actions would allow the Union to properly fulfill its legal and representational responsibilities. Also, given the fact that timelines for grievance filing and responses to disciplinary actions are short, notification would be essential to making sure that timely responses are made throughout the discipline process.

ISSUE #5: ARTICLE 7 - MISC. PROVISIONS – BIDDING

County Position:

The Union presented a proposal on bidding with qualifications that would have the result of awarding a full-time CSEA bid vacancy to the senior qualifying part-time bidder in the event no full-time CSEA employees bid on the open position. The County countered this proposal with one that set a seven (7) year full-time equivalent employment which restricts applications to those in a line of promotion with their existing position, has not applied for a similar position in the past 3 years, has satisfactory service in the view of current and past supervisors of the employee, all of which might culminate in the granting of an interview for the position at the sole discretion of the County and in any event the employee shall have no preference rights for any open position.

The County argued that it would be unreasonable for them to be required to go through a complicated bidding process when they have more than 4,500 employees and would require them to coordinate between full-time and part-time collective bargaining agreements. The County asserts that they have a long history of part-time employees becoming full-time employees and knows of no case where a part-time employee could not compete for a full-time position.

The County states that this provision of the CBA should not be changed.

The County does propose a new section be added to Article 7 that would lift the hours cap for part-time employees from the current 25 hour cap on part-time employment to thirty (30) hours. The County opines that if the part-time unit members are interested in earning more money, then raising the cap will allow them to obtain more hours of work to accomplish that goal.

Union Position:

The Union's proposal on bidding regarding full-time positions is an issue of serious concern to the bargaining unit. While the County states that part-time employees can always apply for full-time positions, the Union notes that part-time employees seldom are granted an interview for any open full-time position and the County has subsequently hired individuals from outside with no experience in the position or County operations and done so over part-time employees who were qualified and experienced.

The Union states that their proposal on bidding rights for part-time employees has a number of requirements and qualifications that will protect the County in assuring that they get a competent qualified individual in the position. The Union notes, first and foremost, that their proposal on bidding rights for part-time employees would only have application in situations where an open full-time position had no CSEA full-time unit bidders for that position. Part-time employees would not have preference over full-time employees for any open full-time position. The Union also states that any part-time bidder applying for a full-time position must have successfully completed the probation period in their current position, not been found guilty of any misconduct or discipline in the previous two calendar years of their employment, that they are qualified for the position and that they submit an application for the position during the posting period. The Union asserts that their proposal was made with great consideration for the management concerns of the County. The Union's proposal would only serve to support long-time part-time employees who wish to advance to full-time positions.

ISSUE #6: ARTICLE 7 - MISC. PROVISIONS - STAND-BY & CALL-BACK

County Position:

The County maintains its overall position and philosophical outlook that part-time employees should not be paid for time when they are not working but compensation can be increased when part-time employees work additional hours. The County contends that the Union is looking to increase part-time compensation without employees working additional hours. The concern of the County over the financial impact of the economic downturn and the concern of taxpayers over public employee benefits makes any proposal by the Union to increase benefits with no increase in actual work inappropriate and not acceptable.

The County also notes that the Union presented this proposal late in the negotiations process and doing so can also mean that it was an afterthought and cannot be considered as a *bona fide* priority item. Additionally, the Union is requesting stand-by and call-back pay that is identical to that received by full-time employees and the County continues to maintain that there are clear qualitative and quantitative differences between full and part-time work.

Additionally, the County proposes that a new provision be added to Article 7 to lift the cap on hours for part-time employees to 30 hours per week from the current 25. The County contends that this will address the Union concern that part-time employees are finding it difficult to get adequate amounts of work in their positions. The County proposal would allow part-time employees to be eligible to work up to 30 hours per week which constitutes a 20% increase in work available to part-time employees.

Union Position:

The Union seeks to include stand-by pay and call back pay language in Article 7.

Regarding stand-by pay, the Union proposes to have any employee who is on stand-by credited with .67 of an hour pay at time and a half or compensatory time off at the option of the employee for each eight hours of stand-by or major portion thereof.

On their proposal for call back pay, the Union states that any employee called in to work outside of regularly scheduled hours shall be guaranteed a minimum of three hours pay or compensatory

time off at the rate of time and a half but it shall not apply to hours which immediately precede or follow the employees regularly scheduled work hours. The Union notes that the County has responded to these proposals but that the County's position is such that a part-time employee would receive only one hour of straight time pay for every 12 hours on stand-by while a full-time employee in the same title and job qualifications would be credited with .67 of an hour payment at time and a half or in compensatory time for each eight hours of stand-by or major portion thereof. The Union again notes that the County proposal would only continue an inequitable relationship and treatment of part-time employees.

Regarding the County's proposal to increase the cap on part-time hours from 25 to 30 hours per week, the Union rejects the County proposal as nothing more than an attempt to increase the amount of work that part-time employees do in order to continue to reap the benefits of not paying part-time employees any of the regular benefits (prorated or otherwise) enjoyed by full-time employees. The effect would be to simply make it easier for the County to expand its denial of benefits to part-time employees while having what constitutes a "part-time employee" expanded to the detriment of the bargaining unit.

ISSUE #7: ARTICLE 8 - COMPENSATION

County Position:

The County asserts that the Union proposal on compensation is out of keeping with the salary increases received by part-time employees over the years. The County also notes that the percentage salary increase requested by the Union exceeds the salary increases given by the County to full-time employees. They specifically note that the Sheriff's deputies only received 2.5% per year for their 2009-2012 contract term. The County argues that the Union has provided no justification for such an increase and even if the Union had, the County is not able to pay it. Further, the County claims that their provision on lifting the current cap on part-time hours (currently at 25 hours per week) would amount to a 20% wage increase to part-time employees which the Union has rejected.

The County contends that the state of County finances and the general downturn in the economy are relevant to the discussion of wage increases. They opine that the Union wage proposal is in total disregard of the economic realities facing the County and its citizens. They also note that the Union proposal calls for retroactivity in wage payments but the County points out that its contract settlements with its unionized employees have not included provisions for retroactivity for the last seven years. They further note that any modest increases in wages have generally been in exchange for concessions but points out that the County is offering a wage increase (at a higher rate than what it offered to other employee units) without demands for concessions as the *quid pro quo*.

Additionally, the County opines that overall cost containment measures continue to be necessary in order for the County to maintain a fiscally responsible level of operation. They note that the County has significant economic obstacles that have to be faced and managed. The County argues that projected County budgets anticipate a cumulative budget shortfall of slightly over \$100 million primarily due to the increasing costs of providing mandated services many of which are unfunded mandates. They point out that state and federal aid received by the County from the state and federal governments does not cover these mandates, leaving the County to cover those ever-increasing costs and widening gaps in aid. Much of these increasing mandated costs are attributable to Medicaid and Welfare. The share of sales tax revenues to the County is no longer sufficient to cover these social service costs. The County also points out that unlike schools, cities or towns, the County is heavily (and uniquely) dependent on State and federal grants. The County also notes that a major part of the projected budget shortfalls over the next two years are in large part a product of the continuing high cost of employee benefits for current and retired County employees. They note that pension benefits costs are expected to increase at unprecedented rates beginning in 2011 and employee benefits, in general, have become unsustainable. The County notes that the part-time unit is the only County unit seeking to increase its benefits. They also note that medical insurance premiums continue double digit annual increases and require that employees make health insurance concessions and work with the County to move to different, more cost effective, health insurance plans. All of the above, especially the area of personnel costs are certainly evidence and proof why the County cannot

increase benefits to the part-time unit and must expect all employees to increase their share of the costs for these benefits.

Regarding the Union's proposal for the elimination of Article 8.5 sunset provision, the County argues that this constitutes the interjection of a new issue into the Fact-Finding that was not agreed to by the Parties at the IPHC on June 24, 2010. The County argues that it is improper on the part of the Union to add a tenth issue to the process when the Parties, before the Fact Finder, agreed that there were only nine issues in dispute for the Fact-Finding process. On this basis, the Fact Finder should reject the inclusion of this issue and disregard it completely.

In any event, the sunset clause provision is one that the County has no intention of eliminating let alone altering, as it was proposed and accepted by the Union in the original negotiations for the unit's initial contract in 2006 and was perfectly acceptable to the Union at the time. Only four (4) years have transpired since that time and the Union has presented no convincing evidence or rationale for its elimination. Even if the Fact Finder were to determine that it is properly submitted, it should be denied as having no credible basis for the change.

Union Position:

First, the Union states that Article 8.5 of the CBA must be eliminated. They argue that this sunset provision was placed in the CBA originally as a means to avoid the Triborough Doctrine which prohibits employers from unilaterally altering terms and conditions of employment while negotiating a successor agreement during a time when the previous CBA has expired. Under the Triborough Doctrine, employees on a salary step index system of compensation, while not receiving any increase in base salary during the time of an expired contract negotiations, would still be allowed to progress to the next step of the step and index system that would be in recognition of another year of employment service.

The Union states that employees and other units with similar titles and similar qualifications (i.e., full-time employees) move to the next step during a time when negotiations are still in progress for a successor agreement and are not penalized as are the part-time employees. The elimination

of Article 8.5 sunset provision would do nothing but bring part-time employees to parity of treatment with other bargaining unit employees during the time of an expired contract.

The Union contends that with the continued existence of the sunset clause provision, the County will have no deterrent to placing "draconian" proposals on the negotiation table that will only serve to prolong negotiations and allow the County to penalize part-time workers by avoiding the requirements of the Triborough Doctrine.

Regarding the Union's proposal for wage increases, they note that their proposal was initially for 3.5% for each year of the successor agreement that an employee was on the top step as of January 2009. The Union also notes that their proposal calls for retroactivity of pay increases back to January 1, 2009 and rejects the County position that there can be no retroactivity. They further note that they made no proposal on changing the salary schedule itself but agreed with the County that the salary schedule should remain as it currently is structured. In essence, the Union stated that the acceptance of their proposal would mean that an employee would either move up a step on the salary schedule or get a percentage increase if they were at the top step in the salary structure but no employee would get both. The Union asserts that the County wage proposal would only offer employees stuck at the top step with a single minimal pay increase during the whole multi-year term of the successor agreement and only if the employee has been on top step for at least two (2) years since their last increase. Essentially, the only additional monies being negotiated are for those unit members (not the whole unit) who have been frozen on the top step of the salary schedule

The Union contends that the County proposal represents a clear indication of the disregard and contempt with which the County holds part-time employees. They note that the agreement signed with the deputies called for an increase of 2.5% to their salary structure each year of their contract. This increase was not a one-time payment as the County proposes with the part-time unit but was a benefit to all deputies in the unit as the agreement enabled each of them to not only move up a step on the schedule each year but also move to a step that is 2.5% richer each year than if it was frozen. The County's disdain of its part-time employees is further indicated by the repeated statement by the County all during negotiations and certainly during the Fact-

Finding process that part-time employees were only, and nothing more than, “fill-in” employees filling in for full-time employees who happen to be absent. Not only is this demeaning but it is inaccurate as many of the part-time unit members have set days and hours of work that they perform where it is clear they are not “filling-in” for anyone but have set work positions where they are performing County work (albeit part-time). The Union further rejects the County insinuation that part-time employees are not entitled to benefits of any kind because they have a “lifestyle” choice to be part-time. The Union points out that for many individuals, given the rate of unemployment, their part-time work is the only work they have on which to support themselves. They further reject the County’s oft repeated glib generalization that part-time employees should not be entitled to benefits (especially prorated leave provisions) because they already have these benefits for the hours/days they are not working.

The Union states that the dire financial picture painted by the County's representatives is not reflected in the public statements and documents issued by the County Executive or by analysis of the County’s financial situation in which the County Manager and other officials have made numerous public statements about the ability of the County meet its financial challenges during the economic downturn.

The Union points out that with the combination of the sunset clause provision and the County position on no retroactivity, it would mean that part-time employees, who are not paid that much to begin with, would not be receiving any pay increases for several years. They note that this type of continued attitude on the part of the County toward part-time employees will only contribute to a decrease in productivity and loyalty to the County. The Union requests that the Fact Finder recommend no less than a 2% wage increase for employees on the top step of the salary structure for each year of the successor agreement.

ISSUE #8: ARTICLE 9.2 - COMPLETE AGREEMENT

County Position:

The County has no proposal on Article 9.2 “zipper clause” and states that the zipper clause should remain as is without change or modification.

Union Position:

The Union seeks to remove Article 9.2 that prevents the Union seeking to negotiate any changes in the terms and conditions of employment that have been identified as mandatory subjects of negotiation. In place of the eliminated Section 9.2, the Union proposes the following substitute language:

The parties agree that if the union submits a “demand to negotiate” request with the County for a subject that has been deemed to be a “Mandatory Subject for Negotiations”, the parties will meet for the purpose of negotiations on that matter only.

The Union contends that their proposal would merely require that if the Union submits a demand to negotiate over a subject that has been determined to be a mandatory subject for negotiations, the County and the Union would meet for the purpose of negotiations on that matter and only that matter. The Union avers that it is unfair to deny this bargaining unit a right that has been granted to other bargaining units in the County.

ISSUE #9: ARTICLE 9.3 - DURATION & CHANGES

County Position:

The County’s last proposal to the Union (October 2009) called for a successor agreement to run from January 1, 2010 to December 31, 2012, but at the Fact-Finding hearing the County changed its position on duration and was now seeking a three (3) year term for the agreement to run from January 1, 2011 through December 31, 2013.

Union Position:

The Union seeks a four (4) year term for the successor agreement with effective dates of January 1, 2009 through December 31, 2012.

DISCUSSION & RECOMMENDATIONS

Each of the issues presented above will be discussed in turn and the Fact Finder's Recommendations will follow that discussion.

ISSUE #1: ARTICLE 2.2 - UNION REPRESENTATIVE STATUS

The County's application of Article 2.2 in its action of directly communicating to the members of the part-time bargaining unit regarding a County initiated survey about Union representation has been resoundingly rejected and found to be an improper practice in violation of Sections 209-a.1(a) and 209-a.1(b) of the Taylor Law. An Administrative Law Judge found that the County's actions were in violation of the Taylor Law and subsequently the Public Employment Relations Board upheld the ALJ's determination and also found, in a strongly worded decision, that the County's actions were improper. The County has appealed the PERB determination and the court has not ruled on that appeal to the knowledge of the Fact Finder as of this writing.

The Fact Finder does not, in this Report, interject the Fact-Finding process into the legal appeal of the County's actions relative to Article 2.2 of the CBA. However, the proposal by the County for a revision to Article 2.2 and what it imports to the negotiations and the labor-management relationship is relevant and subject to consideration and review as part of the ongoing negotiations impasse between the Parties.

The County's proposed language on Article 2.2 would constitute a complete rewriting of Article 2.2 (regardless of the outcome of the ongoing legal challenge to the PERB ruling against the County) and would fundamentally alter the commonly understood, if not legally established, principles of Union internal operation, bargaining, authority and self-determination regarding representational status. What the County proposes is a complete substitution of the existing language of Article 2.2. It is noteworthy that the County's proposed change would move the

issue of representational status and the determination thereof clearly into the realm of contract negotiations and out of the hands of the rank-and-file members of the Union when labor laws have clearly and consistently placed such authority in the members' right to Union democracy and self-determination. The County's proposed language would now automatically require a representational vote be held if the Parties continue to negotiate more than 120 days after the expiration of their CBA. The County's action under the existing language of Article 2.2 has been legally challenged and found, to this point in the overall process, to be an Improper Practice and violative of the Taylor Law. The new proposed language presented by the County would have the effect of creating even more "bleed-through" of County direct involvement and control into the heretofore separate and distinct areas of representational status and the contract negotiation process. The inclusion of language in the County proposal that the American Arbitration Association ("AAA") would be the agency to hold any such election would further remove PERB from its legal oversight authority over representational elections. PERB has the legal authority and say over whether a representational election can or should be held. With no disparagement intended, an outside private agency such as the AAA would be under contract to hold the election if asked and certainly would have a monetary incentive to hold such an election. PERB is available (as well as legally authorized) to provide services to the Parties at no additional cost to them. Involvement of an outside agency to hold these elections would be an additional cost to be borne by County taxpayers at a time when the County contends it is financially strapped. Also, given the County's strong concern over the internal operation and viability of the Union and the likelihood that negotiations will extend beyond the expiration date of a CBA, it is an odds-on bet that this provision would be utilized frequently in contract negotiations. Because the County's proposal in Article 2.2 proffers such a fundamental change in the labor-management relationship surrounding representational status and their proposal "bleeds-through" into areas of contract negotiations which have not historically been a part of the general labor-management relationship regarding these two areas, the County's proposal cannot be countenanced.

Considering the litigation that is ongoing surrounding Article 2.2, it is understandable why the Union would want to see the complete elimination of this provision. However, because such litigation is continuing on this provision of the CBA, it is best that the legal process run its

course rather than the Fact Finder make any recommendation on the issue of elimination of Article 2.2, only to find later that the Courts have issued a legally controlling determination that may be at odds with any recommendation or may only result in additional confusion and further litigation. Once the Courts have ruled on the matter, a recommendation is in order depending on the ruling issued.

RECOMMENDATION:

- 1. It is the recommendation of the Fact Finder that Article 2.2 remain *status quo ante* until such time as the Courts have made a final determination on the PERB finding that the County was guilty of an Improper Practice in violation of Sections 209-a.1(a) and 209-a.1(b) of the Taylor Law in the County’s application of that provision of the CBA.**

- 2. If the Courts ultimately confirm that the PERB ruling was proper and justified, it is the Fact Finder’s recommendation that Article 2.2 be removed from the CBA and matters of representational status be addressed through existing and appropriate labor law provisions rather than through an imprecise *ad hoc* provision that will only prove to be a source of further contention, litigation and significant additional costs for County taxpayers and Union members.**

ISSUE #2: ARTICLE 3.3 - UNION STEWARDS

It is clear that the County has the authority to call the time and place of grievance meetings and can call meetings at times before or after the work time of the steward in question. Therefore, calling a meeting during a steward’s work time is a decision completely under the control of the County. In situations where this is done, the Union position on a steward suffering no loss of pay for grievance meetings, hearings or other necessary meetings scheduled during their normal work hours is reasonable and consistent with general labor-management practice in grievance matters and grievance relationships. The proposed language by the County states that a steward “may” be offered an opportunity for additional work hours to make up for the hours lost for grievance and related meetings (emphasis added). This offers the Union nothing on the issue.

This proposal leaves the County completely free to deny a steward any make-up work opportunities at all. Not only is this punitive in labor relations best practices models but it is also inconsistent with the County's oft-stated concern over the viability and internal operation of the Union and their concern that they often have to deal with a CSEA regional representative rather than local CSEA leadership. It is also inconsistent with general labor-management interactions especially for part-time units where the concern is for a relationship that supports jointly addressed issues in a timely and effective manner that promotes a positive relationship rather than creating obstacles which only impair productive interaction.

No evidence was presented that demonstrated that the grievance process was utilized excessively or even to any significant degree. Therefore, given the scheduling options available to the County, it is more than reasonable that a steward required to attend a grievance or related meeting scheduled during their work hours should be paid their normal rate for the time required for such meetings. This will also facilitate the accomplishment of the County's oft-stated concern over the viable functioning of the Union.

RECOMMENDATION:

1. **It is recommended that the following language be added to Article 3.3 of the CBA:**

“Appointed stewards will suffer no loss of pay for grievance meetings, hearings or other necessary meetings scheduled during their normal work hours.

ISSUE #3: ARTICLE 5 - LEAVES OF ABSENCE

The Union's proposal on leaves of absence would result in an increase in personnel costs at a time when there are economic constraints on the County arising from the general state of the economic downturn in the region, State and national levels. Testimony and data submitted is not sufficient to demonstrate a compelling reason at this time for such additional benefits or that there is a compelling trend toward the granting of such benefits. The proposal, at this time and with current circumstances, is not sustainable.

RECOMMENDATION:

- 1. It is recommended that Article 5 remain unchanged from the existing CBA.**

ISSUE #4: ARTICLE 6 – GRIEVANCE PROCEDURE

It is a common practice in effective and progressive labor-management environments for parties to fully communicate and inform each other in discipline matters (if not all other relevant interactions) both to avoid/minimize unnecessary legal complications arising out of a lack of substantive communication but, more importantly, to allow the Parties to efficiently and effectively deal with such issues and bring all matters related to it to a timely and final resolution.

Notification allows the Union to perform its Duty of Fair Representation (“DFR”) legal responsibilities in matters of discipline and discharge and would put any mistakes or failures to act squarely on the Union’s shoulders. In best practice environments, such notifications serve to further insulate management from potential liability claims. Notification to the Union relieves the County of potential liability exposures should an employee bring DFR or statutory claims against the Union and the Union attempts to deflect some, if not all of that liability to the County claiming that the County refused to cooperate in disciplinary matters by not notifying the Union of the disciplinary action thus hindering the Union from fulfilling its legal and representational responsibilities. Whatever the ultimate outcome, the mere exposure will result in increased legal costs to be absorbed by the County taxpayers. Best practice environments eliminate this possibility.

A review of the existing grievance process would cause a reasonable person to wonder what the County is afraid of in notifying the Union when it takes disciplinary action against a unit member. The grievance procedure is almost completely one-sided in that the County controls all steps of the internal process, and one does not have to be an expert in organizational behavior to be able to forecast the probable outcomes in such a process. The abrupt stopping of one County department’s practice of informing the Union only serves as an exemplar of the situation.

Refusal to inform the Union when disciplinary actions are being taken is not the mark of a professional and mature relationship such as found in other labor-management environments where the parties have realized the mutual benefits of informed interactions and where it is recognized as a best practice to timely and fully inform party representatives in these types of matters. In situations where such a professional relationship does not exist, a lack of communication does not reduce problems but tends to foster a more adversarial environment where every action of any kind becomes a major source of contention with everything fought to the bitter end whether utilizing internal means or taking the fight external with the end result that more time, effort and money are spent on most if not all issues at a time when resource allocation and fiscal concerns all mitigate for a more cooperative and professional approach to joint issues. There is a better way.

RECOMMENDATION:

- 1. It is recommended that Article 6 – Grievance Procedure be modified to include the following language:**

In matters involving discipline, a copy of all disciplinary actions will be sent to the Unit President at the same time they are served on the unit member.

ISSUE #5: ARTICLE 7 - MISC. PROVISIONS - BIDDING

The Union seeks opportunities for part-time employees to have access to and limited bidding rights for advancing to full-time positions and proposes that with certain restrictions and conditions, that they are offered these positions. The County’s counterproposal on this issue is transparent in its distributive bargaining intent and would, if accepted, not only give no rights to part-time employees in the area of preference for vacant positions but would impose standards, just for applying for full-time positions, which would render part-time advancement improbable if not virtually impossible.

The County made a great and repeated point during the Fact-Finding process of indicating that if part-time employees wanted to improve their working conditions then applying for full-time

positions was the way to accomplish that. Their counterproposal would now render that option almost impossible to meet and give the County even more leeway in denying part-time employees the opportunity for advancement to full-time positions in spite of platitudes to the contrary.

The County concern over complications and complex coordination between full-time and part-time unit agreements is, as the Immortal Bard once said, an example of “methinks she doth protest too much”. The Union proposal is hardly complex or complicated and coordination between full and part-time unit agreements is a non-issue. The Union proposal merely states that in the event a full-time vacancy goes unfilled by any full-time unit member, a part-time employee who applies (with experience, qualifications and clean discipline record) will be offered the position or it will be determined on the basis of seniority where more than one part-time employee has applied and has the requisite qualifications for the position. If anything is complex, it is the County’s counterproposal on bidding which is a convoluted process with the end result of making part-time employee application for full-time positions more difficult if not impossible. If the Union’s proposal proved to be complicated, it would speak more to managerial competence issues than the “complexity” of the process.

The County’s contention that the Union has “failed to demonstrate a single example where a part-time employee was not able to compete for a full-time opening” is a glib use of semantic gymnastics. The issue is not the ability to “compete” for a position but rather whether part-time employees can have a realistic chance of actually getting a full-time position. The County’s counterproposal considerably reduces, if not eliminates, that chance. It is interesting to note that the County sidestepped the issue of how many part-time employees in the unit actually have obtained full-time unit positions.

Given that the Union proposal on bidding rights would only apply in situations where no full-time unit member applied for the full-time vacancy and only where the part-time employee met the qualifications for the position, it is strange that the County would proffer a convoluted process that would make it even more difficult for a part-time employee (already on the County’s employment rolls and with experience in County workforce operations, if not the actual

positions), and leave the County arguing for a proclivity to look outside for non-employee candidates and incur the additional time and expense of advertising, vetting, hiring and training required at a time when the County contends it must be mindful of its financial situation and husbanding of taxpayers' dollars. The Union's proposal is logical, reasonable and consistent with reducing the costs of personnel hiring and training and does not conflict with the rights of full-time employees.

RECOMMENDATION:

1. **It is recommended that the following language be added to Article 7:**

Employees covered by this contract will have the right to bid on any CSEA full-time position in the County providing the following conditions are met:

1. *There are no qualified full-time CSEA bidders for the position, and*
2. *The bidder has successfully completed probation in his/her current part-time position, and*
3. *The bidder has not been disciplined in the previous two (2) calendar years prior to the bid, and*
4. *The bidder has met all the qualifications for the position at the time of the bid, and*
5. *The bidder submits a proper application for the position.*

If all of the five conditions listed above are met, the full-time position will be offered to the part-time unit bidder or, in the case of multiple part-time bidders, to the bidder with the most seniority.

ISSUE #6: ARTICLE 7 - MISC. PROVISIONS - STAND-BY & CALL BACK

Given the fact that part-time employees have "time off" by virtue of their part-time employment, as the County has oft argued, the issues of stand-by pay and call back pay are appropriate for consideration in this matter. Stand-by and call back provisions add more flexibility to the employer in having employees available at various times when additional workers or needs for coverage arise. Stand-by and call back provisions actually encumber employees to be at the beck and call of the employer during off-work hours. As a *quid pro quo* for this flexibility, it is common practice in collective bargaining agreements to include some type of compensation for the additional hours for which an employee either needs to be available or can actually be called in to work. When employees can be placed on stand-by status or called back by the County, the

“free” time that the County contends is a lifestyle choice by the part-time employee and which constitutes their vacation, leave and sick time, is not “free” in these situations. Stand-by and call back requirements make the employee accountable to the employer during these times and it is proper and general practice to compensate employees to some degree for the period of accountability to the employer that is outside the employee’s normal work hours. Mindful of general fiscal concerns and the fact that these are new provisions to the CBA, a straight time payment is deemed more appropriate at this time rather than time and a half. There is middle ground between the Parties on these points.

RECOMMENDATION:

- 1. It is recommended that a new section be added to Article 7 regarding stand-by pay to read as follows:**

An employee on stand-by will be credited with one hour of straight time pay for every eight hours on stand-by.

- 2. It is recommended that a new section be added to Article 7 regarding call back pay to read as follows:**

An employee called in to work outside of regular scheduled hours (excluding any time contiguous with the beginning or end of their regularly scheduled shift) shall be guaranteed a minimum of three (3) hours of straight time pay by virtue of being called back.

Employees called back under these circumstances shall be required to remain at work for the minimum three (3) hour period unless released by their supervisor or other appropriate County managerial personnel.

Employees called back who work beyond the three (3) hour minimum guarantee shall receive their normal pay rate for that work time.

- 3. It is recommended that the hours cap for part-time employees, currently set at twenty-five (25) hours, remain unchanged.**

ISSUE #7: ARTICLE 8 - COMPENSATION

The County claims that the Union inclusion of the proposal for the removal of the sunset clause provision (Article 8.5) is a new issue that was not agreed to when the Parties identified the issues to be brought to Fact-Finding during the June 24, 2010 Initial Pre-Hearing Conference (“IPHC”) held before this Fact Finder and that, as such, it constitutes an improper action on the part of the Union to interject additional issues that were not agreed to and should be rejected out of hand with no consideration given to the issue of the sunset clause. The County position and claim that the sunset clause issue was not agreed to by the Parties and not presented to the Fact Finder during the IPHC and, therefore, must be barred from consideration, is clearly in error. The Fact Finder went back and reviewed his notes taken during the June 24, 2010 IPHC and found the following regarding Article 8 Compensation:

ISSUE #7: Article 8 Compensation
- Union’s proposal #4 (p.3)
- County’s proposal #6

Both the Union and the County presented the Fact Finder (and previously to each other) with documentation outlining their respective impasse positions in the negotiations. The County’s documentation consisted of a November 30, 2009 letter with attached October 8, 2009 County tentative package settlement offer made to the Union. The letter is addressed to Richard A. Curreri, PERB Director of Conciliation, and sent by Peter J. Spinelli, County negotiator and chief spokesperson. The Union’s documentation consisted of a March 23, 2010 letter from Robert L. Leonard, CSEA Labor Relations Specialist and chief negotiator to Mr. Spinelli. Attached to it was the CSEA March 23, 2010 last package proposal to the County. Referencing the Fact Finder’s notes (*supra*), the Union submission, in pertinent part, reveals the following on proposal #4 on page 3:

UNION PROPOSAL 4: ARTICLE 8:

Remove the “sunset” clause out of Section 8.5

...

These documents were in the hands of the respective Parties well before the Fact-Finding IPHC and were presented and reviewed with the Fact Finder during the IPHC. No objection was raised by the County at that time. Raising such an objection after the fact is inappropriate and unpersuasive. The sunset clause provision is a proper subject for consideration in Fact-Finding.

The County contends that the sunset clause should remain unchanged because when it was first negotiated into the initial CBA in 2006 the County stated that “surely the Union negotiated some benefit for itself in return for the concession”. One might have to look quite hard through the part-time CBA to find the *quid pro quo* for that provision. The County further asserts that it was only negotiated into the CBA four (4) years ago and apparently was perfectly acceptable to CSEA at that time. According to the County, the Union has made no case why it should now be removed. The County quite frankly states that the language of the sunset clause provision does negate the Triborough Doctrine and that was the County’s intent when it was negotiated. It was done to give the County a unique benefit as a public sector employer and that was to prevent step movement increases in a contract that included a step and index salary system, when negotiations extended beyond the CBA expiration date.

The Parties did negotiate and accept the sunset clause provision into the initial CBA. In contract negotiations, one must infer that the Parties knew what they were doing. It is significant to note that the part-time unit (the smallest unit whose members have limited hours of weekly work available to them) have the harshest salary restrictions of any bargaining unit in the County. Combined with the County’s insistence on and history of no retroactivity, the part-time unit is hit doubly hard as compared to other bargaining units. However, given the County’s intransience and trophy status attached to the issue of the sunset clause, it would be fruitless to offer the Parties any type of compromise proposal on this matter. With the purpose of trying to assist the Parties to come to a resolution of the outstanding issues and memorialize a successor agreement, the sunset clause provision in Article 8.5, while properly before the Fact Finder, should remain unchanged.

Moving from the issue of the inclusion of the sunset clause in the Fact-Finding proceedings, we turn to the issue of overall compensation under Article 8.

The County has effectively frozen any step movement (with the sunset clause) or other type of salary increase and has reaped the benefit of retained savings by not making those payments. Taken in partnership with the County's consistent position on non-retroactivity and that the Parties will not agree to any successor agreement until 2011, the County has no liability for increased compensation of part-time employees during the time of the expiration of the previous contract to the signing of a successor agreement. The County has realized a significant savings in part-time employee compensation during 2009 and 2010.

The County contends that the Union's compensation proposal is way out of line with what other bargaining units in the County have or will receive going forward. They note that even the Sheriff's deputies only received 2.5% each year for their 2009-2012 CBA. The County goes on to say that even if the Union's proposal was justified or was more in keeping with other units, the County is not able to pay it. What the facts reveal, is that the County has demonstrated that they are able to pay salary increases of 2.5% projected to at least 2012 in the significantly larger deputies' unit if not other units as well and the salary increases are much more extensive and costly than what the Union seeks here (see below). The County has made it clear in their various proposals that they are disinclined to do or offer much of anything to the part-time unit. However, in the area of compensation, they have shown an ability to sustain modest salary increases. The "no ability to pay" argument cannot be relied on by the County in the situation of the part-time unit (comprising only about 5% of the total workforce) when the County has freely encumbered itself with comparable wage increases in other units with much greater financial impact than would be the case here. This is not to ignore the tight economic times and fiscal responsibility placed on the County at this time. However, the County's offer of only one (1) wage increase during the multi-year term of the successor agreement and only for those employees who have been on the top step for at least two (2) years since their last increase effectively means that the part-time employees (and only that small portion who have been at top step) would receive one raise during the course of the expected multi-year agreement. For employees who have been on the top step at least two (2) years, the County proposes to increase their pay by \$0.30 for wage Groups 1-10 & 38 and \$0.45 for wage Groups 11-16.

The County asserts that they are making generous salary offers to the Union and not asking for any concessions in return. A careful review of the part-time CBA reveals a situation that is more akin to the Union assertion that there is little or nothing left in the contract for the Union to concede. The CBA is a bare bones agreement with little enrichment on which to consider concessions as opposed to other unit CBAs.

The County outlines a number of legitimate concerns about the state of the economy and the fiscal pressures impinging on them. They note the rising costs of social services, notably Medicaid and Welfare, the declining revenues from County sales taxes and the fact that they are significantly reliant on state and federal grant funding to provide many of their programs. All of these factors are true and need to be taken into consideration in any evaluation and recommendation regarding salary adjustments. However, when the County makes a considerable point of calling for cost control in the part-time unit to help the County meet the rising costs of health insurance for employees, they have gone “a bridge too far”. For the County to contend that the Fact Finder must take these medical insurance cost impacts into consideration in any recommendation for compensation increases for the part-time bargaining unit, represents an unprecedented level of distributive bargaining audacity considering that the part-time unit has no health insurance benefits or any other comparable types of benefits as other County employee units enjoy. Coupled with the County’s continued insistence that part-time employees are only “fill-in” employees and are not entitled to benefits as other County employees, the insistence that part-time bargaining unit members bear some of the burden of underwriting the costs of health insurance benefits for other units, and for which they have no entitlement, defies description. Additionally, it should be noted that the County’s proposal on raising the part-time hours cap would substantially decrease the likelihood that any part-time employee would exceed the cap and thus become entitled to even pro-rated benefits. At best, this line of argument by the County regarding controlling health insurance costs for a unit which does not have health insurance and for which the County has repeatedly stated that part-time employees should not be entitled to any benefits lacks gravamen and must be dismissed out of hand.

Both sides in the “state of the fiscal environment” argument are somewhat hyperbolic in their representations especially as it applies to this extremely small unit (only 5% of the County

workforce). The situation is not nearly as flush and rosy as the Union would have one believe nor is it “one step away from a future Control Board” as the County would opine. It is important to also take into consideration the County’s actions in concluding other bargaining agreements within this general fiscal environment. Notably, the County signed an agreement with the MCLEA (deputies) on January 26, 2009 for a 2.5% increase in their salary schedule each year for the four (4) years of the agreement (2009-2012). It is significant that the County agreed to this at a time when the economy was imploding and had been since the fall of 2008. Deputies would have their salary step schedule increased by 2.5% every year of the agreement. Therefore, a deputy moving to the next step in their salary structure would get the step increase which would be enhanced by 2.5%. Anyone not moving a step would still get a 2.5% increase. That is all well and good for the MCLEA unit and undoubtedly they made concessions in other parts of their agreement to achieve it. As stated earlier, there is little or nothing in the part-time agreement on which to concede.

In contrast, the County, in dealing with its smallest bargaining unit, is much more concerned with husbanding fiscal resources. While the salary structure in the much larger deputy unit was enhanced by a 2.5% increase each year, effectively for every member of the unit, the part-time salary structure is to be frozen with no such adjustment. The Union has agreed to freeze the salary schedule and is asking for a “less-than-step” percentage increase only for the minority of its members who are at the top step of their salary schedule and who will not be able to increase their salary by the built-in step increase. The Union’s salary proposal is hardly a “break-the-bank” demand. The sunset clause on compensation combined with the County’s history of no retroactivity has given the County a double windfall savings on salaries with the part-time unit, provides little incentive on the part of the County to conclude negotiations prior to the expiration date of the CBA, and allows the County to freeze, if not roll back, salary increases and step advancement attained in the expired CBA. The County has reaped the financial benefits of this situation for the 2009 and 2010 calendar years under the no retroactivity rubric.

The County’s history of not agreeing to retroactivity in any of its employee contract settlements may be questioned on other grounds (particularly in combination with the sunset clause provision in the part-time unit CBA) but the fact of this consistent approach to finalizing

agreements where the settlement has come after the putative expiration date of the preceding contract is a pattern that must be taken into consideration by the Fact Finder. It is understandable why the Union would propose retroactivity, especially regarding the part-time unit. However, it would constitute a fundamental change in the negotiation pattern between the Parties for the Fact Finder to recommend retroactivity in this situation and, with the overall objective of successful conclusion of a successor agreement, there is insufficient impetus to do so now.

The Union's compensation proposal is limited in scope and is not unreasonable in light of the County's much broader settlements with other larger units and would have a monetary impact that is dwarfed by comparison to the monies expended in the other settlements and their subsequent impact on County taxpayers.

RECOMMENDATION:

- 1. It is recommended that the sunset clause provision in Article 8.5 of the CBA remain unchanged.**

- 2. It is recommended that the compensation for the successor agreement be as follows:**
 - a. No change in the salary schedule structure.**
 - b. No retroactivity of compensation for the 2009 and 2010 calendar years of the Agreement.**
 - c. Employees will move through the steps of the salary schedule beginning January 1, 2011.**
 - d. Employees who have been on the top step of the salary schedule for one (1) year as of January 1, 2011 shall receive a two percent (2%) increase in their 2010 salary effective on their anniversary date.**
 - e. Employees who have been on the top step of the salary schedule for one (1) year as of January 1, 2012 shall receive a two percent (2%) increase in their 2011 salary effective on their anniversary date.**
 - f. Employees who have been on the top step of the salary schedule for one (1) year as of January 1, 2013 shall receive a two percent (2%) increase in their 2012 salary effective on their anniversary date.**

ISSUE #8: ARTICLE 9.2 - COMPLETE AGREEMENT

Article 9.2 (Complete Agreement) is often referred to generically as a “zipper clause” whose intent is to solidify the understanding that the negotiations leading to the agreement addressed all the issues the parties brought to the table and constitutes the complete agreement between them. No other issues are left to be negotiated or are procedurally appropriate for consideration until the negotiations for a successor agreement. The purpose is to prevent ongoing negotiation or re-negotiation from erupting throughout the term of the agreement. It is utilized to “zip up” and close the negotiations process so that a break in the cycle of negotiations can be had and the parties can have an assurance that issues will not have to be addressed again until the appropriate time for negotiating a successor agreement.

In the instant negotiations, the County seeks no change in Article 9.2 while the Union proposes its elimination and replacement with a new Section 9.2.

A review of the proposed substitute language offered by the Union reveals that, as drafted, it is overly broad and would constitute a complete reversal of not only Article 9.2 but also the accepted understanding between parties in a contractual agreement as to what it means to agree to and conclude such an agreement. While there are non-mandatory subjects of bargaining as well as mandatory subjects and the Union proposal only deals with mandatory subjects, their proposal would have the effect of requiring negotiations whenever the Union wants it so long as the issue is one that has been deemed a mandatory subject of bargaining. It is not consistent with the principles of collective bargaining to conclude contractual agreements only to make them subject to one party’s unfettered right to compel the other party to reopen negotiations on matters that were thought concluded with the signing of the agreement. There are exceptions to that principle but only where they are mutually agreed (see below for one such example).

The negotiation of mandatory subjects of bargaining is properly placed within the general negotiation process and there may be times when it arises outside of that process. Should a new mandatory subject of negotiations arise with impact on the Parties or a Party takes some unilateral or otherwise improper action to alter a term and condition, the other party has legal and

administrative options open to it with which to challenge such an action or to compel bargaining on the action/issue. What the Union proposal contemplates is an environment of potentially continual compelled negotiations and, as such, is neither persuasive nor tenable and militates for the continuation of the existing language.

It is understandable on the part of any party to a contract that they do not want to place themselves in a position where they might face a continuing process of negotiations over a contract, individual contract issues or issues not raised and discussed during the negotiation process and that were thought to be resolved at least for the term of the agreement. The Fact Finder takes no issue with that understanding. However, one thing does stand out in Article 9.2 and it is that the current zipper clause language is extremely restrictive on both Parties' ability to deal with exigencies which may arise during the term of the contract. Best practice in constructing zipper clause language is to recognize that circumstances (internal or external) may arise that compel the Parties to address the impact of these circumstances on the CBA and the labor-management relationship. Such language recognizes that the need to open negotiations may arise but it is structured so as to require the agreement of both Parties in order to do so. This protects the rights and understanding of the Parties that the negotiated agreement is the final and complete agreement between them but also provides an avenue, in rare circumstances, for them to jointly amend the agreement should the circumstances require it and they both agree to enter into such negotiation. This prevents either Party from unilaterally compelling the other to reopen negotiations on matters that were settled with the signing of the agreement and also recognizes that it may be in their mutual interest to do so where there is joint agreement. The inclusion of such language does not in any way diminish or negate the Parties' rights regarding the assurance that the contract represents the complete agreement between them. It is simply a recognition between them that in the event of circumstances unforeseen, they have the option (and the reserved right not to utilize the option) should the circumstance arise. The labor-management world is replete with examples where both parties found out that "life is what happens to you while you are making other plans". An absolutist provision only makes adapting to reality that much harder.

RECOMMENDATION:

- 1. It is recommended that Article 9.2 remain unchanged and that the following language be added:**

It is understood and agreed by both Parties that this Agreement represents the complete agreement between them and may only be modified, amended, added to or deleted from by express written agreement of both Parties and only where both Parties have given their prior consent to engage in discussions which may or may not result in any such change.

ISSUE #9: ARTICLE 9.3 - DURATION & CHANGES

Discussion in the compensation section (Article 8 above) finds and recommends that the established policy of no retroactivity be continued into the successor agreement. Considering that there will be no retroactivity for the 2009 and 2010 contract years and that those contract years have come and gone, the duration of the successor agreement should be extended to a five (5) year duration (from January 1, 2009 through December 31, 2013). This will provide contract continuity and, more importantly, allow the Parties to have a relative break from the negotiation cycle and will establish some predictability over the prospective three (3) years of the successor agreement. A shorter duration such as to December 31, 2012 is deemed insufficient for this purpose.

RECOMMENDATION:

- 1. It is recommended that the term of the successor agreement run from January 1, 2009 through December 31, 2013 with the understanding (*supra*) that there is no retroactivity for the 2009 and 2010 contract years.**

* * *

AFFIRMATION

I affirm on my oath that the foregoing is my Fact-Finding Report with Recommendations in the above captioned matter.



Stephen P. LaLonde
Impartial Fact Finder

Dated: December 31, 2010