

In the Matter of Interest Arbitration:

DISTRICT OF COLUMBIA FIRE AND
EMERGENCY MEDICAL SERVICES
DEPARTMENT

and

INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS, LOCAL 36, AFL-CIO

| PERB Case No. 13-I-01

| Interest Arbitration

| Compensation and
| Non-Compensation Items

Before Ira F. Jaffe, Esq., Impartial Arbitrator

APPEARANCES:

For the Department:

Dean S. Aqui, Esq.
Repunzelle Bullock, Esq.
(Office of Labor Relations and Collective Bargaining)

Dwayne C. Jefferson, Esq.
(District of Columbia
Office of the Attorney General)

For the Union:

Devki K. Virk, Esq.
Daniel A. Zirbel, Esq.
(Bredhoff & Kaiser, PLLC)

BACKGROUND

This interest arbitration between the International Association of Firefighters, Local 36, AFL-CIO (“IAFF” or the “Union”) and the District of Columbia Department of Fire and Emergency Medical Services (“DCFEMS” or “Department”) arises out of a bargaining impasse with respect to a number of Compensation and Non-Compensation (working conditions) items. This proceeding takes place pursuant to the District of Columbia Comprehensive Merit Personnel Act (“CMPA”) impasse resolution procedure,

District of Columbia Code § 1-617.17, as well as the Rules of the District of Columbia Public Employee Relations Board (“PERB”) and the Ground Rules agreed to by the Parties. The undersigned has been selected by the Parties and appointed by the PERB to arbitrate the dispute pursuant to the CMPA. The Parties waived the requirements of D.C. Code § 1-617.17 relative to the undersigned’s time for submission of this Opinion and Award.

Arbitration hearings were held in this matter on November 12, 13, 14, 18, and 19, 2013. Pursuant to an Arbitration-Mediation Confidentiality Agreement (“AMCA”) executed by the Parties, mediation efforts were conducted on November 19, 2013, which proved unsuccessful in resolving or narrowing the Parties’ dispute. In accord with the AMCA, the Parties were given an opportunity to submit Final Offers on the disputed contractual provisions by December 30, 2013, and each Party subsequently filed post-hearing briefs on January 17, 2014. The Award in this matter is due on February 20, 2014.

Applicable Ground Rules

The Parties agreed to a number of ground rules at the outset of the negotiations which have culminated in this proceeding. Those ground rules establish, inter alia, that:

6. IMPASSE PROCEDURE

Impasse resolution shall be conducted pursuant to the District of Columbia Official Code §1-617.17(1)(2) and (3).

The Board shall rule on the items at impasse that concern working conditions on an item-by-item basis, except that compensation issues shall be decided on a total package basis. Item-by-item shall be defined as the entire article on a particular issue and not individual sections, sentences, or other portions of an article.

Summary of the Parties’ Bargaining History

The Parties have enjoyed a long history of collective bargaining, and negotiated a

series of agreements culminating in their collective bargaining agreement for the period of 1991 through 1995. The experience of the Parties thereafter was described by

Arbitrator Hugh D. Jascourt:

In 1996 negotiations for a new contract began but ended in impasse in 1997 (U ex 66) By that time a Control Board had taken over certain City functions and because the City's Office of Labor Relations and Collective Bargaining (OLRCB) told the Union it had not been yet been give authority by the Control Board to negotiate a pay increase, the Union went to Congress and obtained a wage increase effective December 1997. When the Union was again unsuccessful in dealing with OLRCB in 1998 it again went to Congress and again successfully lobbied Congress for a 1998 pay raise.

Local 36, International Association of Firefighters, AFL-CIO and The District of Columbia, Fire and Emergency Medical Services Department, PERB Case Nos. 01-I-02 and 01-I-04 (Arbitrator Hugh D. Jascourt, March 6, 2002) ("Jascourt Award"). The Parties subsequently engaged in bargaining, but reached impasse on a number of issues, including wages. The Jascourt Award, which is discussed more fully later herein, resulted in a collective bargaining agreement covering Fiscal Years ("FY") 2001-03.

The Parties subsequently negotiated a collective bargaining agreement for FY 2004-07, which expired on September 30, 2007 ("2004 Agreement"). In or about May 2011, the Parties entered into a memorandum of agreement which provided in relevant part that:

WHEREAS, the Parties, the District of Columbia Government ("District") and its Fire and Emergency Medical Services Department ("Agency") (collectively, the "Employer") and the District of Columbia Firefighters Association, Local 36, International Association of Firefighters, AFL-CIO ("Union"), have engaged in negotiations for a successor collective bargaining agreement to the Agreement that covered fiscal years 2004, 2005, 2006 and 2007 ("Prior Agreement"), and;

WHEREAS, on February 24, 2010, the Parties' negotiations resulted in a tentative agreement, that would have covered fiscal years 2008, 2009 and 2010; however, the tentative agreement was rejected by the Union membership on May 12, 2010; and

WHEREAS, on March 10, 2010, the Union provided notice of its intent to engage in bargaining for fiscal years 2011, 2012 and 2013;

NOW, THEREFORE, the Parties agree as follows:

1. The terms of the Prior Agreement shall be retroactively extended to cover fiscal years 2008, 2009, and 2010, ending on September 30, 2010. It is understood that there will be no change in compensation or benefits for fiscal years 2008, 2009, and 2010.

2. The Parties shall, within five (5) business days following ratification of this Agreement by the Union's membership, jointly advise the Public Employee Relations Board ("PERB") that PERB Case Nos. 08-N-03 and 08-N-04 have been resolved and should be dismissed. It is understood and agreed that dismissal of these two cases shall be without prejudice to any Party's position with regard to the negotiability of the matters at issue in these two cases, and all Parties expressly reserve their rights to raise and to litigate such matters in connection with future negotiations.

Overview of the Items at Impasse

The Parties submitted different Last Best Final Offers ("LBFOs") with respect to the following Articles:

1) Article 18 - Overtime

The Union's LBFO seeks to memorialize its interpretation of the status quo under the existing provisions of the Agreement by adding language specifying the payment of time and one-half rates for all work in excess of 42 hours in a workweek (averaged over a four workweek period).

The Department's LBFO seeks to change Article 18 to provide for the payment of overtime at time and one-half rates only as required by the FLSA, except that for bargaining unit members whose duties include fire suppression overtime pay shall be received for hours of work in excess of 48 hours in a workweek (averaged over a four workweek period).

Both Parties agreed that the dispute in connection with this Article is part of the Parties' compensation proposals.

2) Article 19 - Transfers

The Department's LBFO seeks to change the existing Article 19 by eliminating existing language relative to providing a follow-up more detailed explanation for an

involuntary transfer or reassignment, when requested, where the initial reason for the transfer or reassignment was given simply as “efficiency of the service.”

The Union’s LBFO seeks no change to the existing Article 19 provisions.

Both Parties agreed that the dispute in connection with this Article is a non-compensation item.

3) Article 40 - Health

The Department’s LBFO seeks two changes to Article 40. First, the Department’s LBFO seeks to add a new provision to Article 40 that would have the effect of removing disputes regarding performance of duty (“POD”) from coverage under the negotiated grievance and arbitration provisions of the Agreement and making the statutory appeals procedures the exclusive process for resolution of such matters. Second, the Department’s LBFO seeks to amend the Drug Testing provisions of Article 40 to expand the Department’s ability to make mid-term unilateral changes to the Drug Testing policies, to recognize coverage under the Child and Youth, Safety and Health Omnibus Amendment Act of 2004”, D.C. Law 15-353, D.C. Official Code § 1-620.31 et seq. (2006 Repl.), and to preclude bargaining with respect to the application of that law to the Department’s drug testing program.

The Union’s LBFO seeks a limited change to the existing Article 40 provisions regarding drug testing to conform to the situation that the Union asserts is in existence at the present time.

Both Parties agreed that the dispute in connection with this Article is a non-compensation item.

4) Article 42 - Wages

The Union's LBFO would provide wage increases in the following amounts as of the following dates:

April 1, 2012: 3.0% increase

April 1, 2013: 3.5% increase

April 1, 2014: 3.5% increase

The Department's LBFO would provide wage increases in the following amounts as of the following dates:

April 1, 2013: 3.0% increase

October 1, 2014: 3.0% increase

October 1, 2015: 3.0% increase

October 1, 2016: 3.0% increase

Both Parties agreed that the dispute in connection with this Article is part of the Parties' compensation proposals.

5) Article 43 – Technician Pay

The Department's LBFO would make no change to the language of Article 43 of the existing Agreement. While those provisions fails to mention specifically the differentials authorized therein, the differentials that are currently being paid to Technicians, Arson Investigators, and Firefighter-Paramedics (and have been so paid since at least FY 2007) are: Technicians (i.e., 5% of Class 1, Step 1 pay), Arson Investigators (i.e., 10% of Class 1, Step 1 pay), and Firefighter-Paramedics (i.e., 10% of Class 1, Step 1 pay).

The Union's LBFO would increase the differential provided to Firefighter-

Paramedics (i.e., members who have achieved a level of NREMT-I or above) to 15% of the Class 1, Step 1 salary. The increased differentials for Firefighter-Paramedics would become effective as of April 1, 2014.

Both Parties agreed that the dispute in connection with this Article is part of the Parties' compensation proposals.

6) Article 45 – Hours of Work/Schedule/Leave
Article 45A – Leave

The dispute regarding this Article was the single most significant and contentious dispute in this case. The existing Article 45 provisions recognize a four platoon work schedule of one 24-hour shift on duty, followed by three consecutive 24-hour periods off ("24/72 schedule"). The Department took the position that the existing Article 45, Section B provisions are not mandatory subjects of bargaining and that the Department enjoyed the right under the CMPA to unilaterally establish or unilaterally change the number of platoons and the number of hours a day and numbers of shifts. Accordingly, the Department's LBFO would repeal Article 45 in its entirety and replace the portions of Article 45 that address leave accruals with a new Article 45A that solely addresses questions of leave accrual. The leave accruals provided for in the proposed new Article 45A vary from those contained in the prior Article 45.

The Department also announced its intentions, once free from the contractual restraints of Article 45, to convert to a three platoon model, consisting of three scheduled day shifts of 12 hours, followed by three scheduled night shifts of 12 hours, followed by three scheduled days off ("3/3/3 schedule"). The Department envisioned that no furloughs would take place, notwithstanding the planned transition to three platoons from four platoons, that attrition would eventually result in the Department becoming right

sized for a three platoon operation, and that use of additional days off (“Kelly days” or “paddle days”) would result in employees being scheduled under the three platoon model to work an average of 48 hours per week over a four week cycle (prior to the use of contractual leave). While, as noted, the Department insisted that no reductions in force (“RIFs”) or reduction in hours (“furloughs”) would take place as a result of a transition from four platoons to three platoons, no language was contained in the Department’s LBFO that memorialized that commitment.

The Department’s LBFO also provides that, effective upon implementation of the three platoon operation, bargaining unit members would receive a 14.3% increase in pay (reflective of the 14.286% increase in the average workweek from 42 hours to 48 hours).

The Union’s LBFO would make no changes in Article 45, but was presented as an “asterisked” proposal that provided that the Article 45, Section B, language was subject to the ultimate outcome of a pending challenge to the negotiability of Article 45, Section B, which provides for a 24/72 schedule staffed on a four platoon model.

The Parties disagreed as to whether the LBFOs regarding Article 45 should be treated as a compensation or a non-compensation item.

The Parties agreed that the Department’s Article 45A proposal should be treated as a part of the Parties’ compensation proposals.

7) Article 47 – Legal Plan

The current Agreement provides for employer contributions towards the Legal Plan in the amount of \$5.04 per pay period. This amount was last increased effective October 1, 2006.

The Department’s LBFO proposes no change to these provisions.

The Union's LBFO proposes that the amount of employer contributions increase, effective April 1, 2014, to \$5.85 per pay period.

Both Parties agreed that the dispute in connection with this Article is part of the Parties' compensation proposals.

8) Article 48 – Optical and Dental Benefits

The current Agreement provides for employer contributions towards the Optical Plan in the amount of \$9.56 per month and towards the Dental Plan in the amount of \$47.20 per month. These amounts were last increased effective October 1, 2006.

The Department's LBFO proposes employer contributions towards the Optical Plan of \$9.45 per month and employer contributions towards the Dental Plan of \$46.72 per month.¹

The Union's LBFO proposes that there be no changes to the current terms of Article 48.

Both Parties agreed that the dispute in connection with this Article is part of the Parties' compensation proposals.

9) Article 52 – Pay Corrections

The Department's LBFO proposes that no changes be made to the provisions of Article 52 of the existing collective bargaining agreement.

The Union's LBFO proposes that new language be added to Article 52 providing that, upon a final determination that an employee is entitled to backpay, the Department submit the required forms and information within thirty (30) days after receipt from the

¹ While the Department's proposal is for monthly premiums of \$9.45 for Optical and \$46.72 for Dental, the proposal asserts that this is the status quo under the existing collective bargaining agreement. A copy of the collective bargaining agreement itself, as well as documentation from the Optical and Dental Plan providers, however, which were included as exhibits in the arbitration, suggested that the Union's claim that the contribution rates contained in its LBFO reflects the status quo is correct.

employee of the required documentation (including interim earnings and other potential offsets) and that backpay be paid within sixty (60) days of receipt from the employee of such required documentation.

Both Parties agreed that the dispute in connection with this Article is a non-compensation item.

10) Article 55 – Effective Date

The dispute in connection with Article 55 relates to the term of the Agreement.

The Department's LBFO proposes that the Agreement continue through September 30, 2017, a term that mirrors its wage proposal.

The Union's LBFO proposes that the Agreement continue through September 30, 2014, a term that mirrors its wage proposal.

The Parties disagreed as to whether the LBFOs regarding Article 55 should be treated as a compensation matter or a non-compensation issue. Regardless of its characterization, however, both Parties recognized that the term of the Agreement and the wage provisions were linked.

Relevant Statutory and Regulatory Provisions

Section 1-617.02, Labor-Management Relations Program Established; Contents;

Impasse Resolution, of the District of Columbia Code states in relevant part that:

(a) The Public Employee Relations Board (hereinafter in this subchapter referred to as the "Board") shall issue rules and regulations establishing a labor-management relations program to implement the policy set forth in this subchapter.

(b) The labor-management relations program shall include:

(1) A system for the orderly resolution of questions concerning the recognition of majority representatives of employees;

(2) The resolution of unfair labor practice allegations;

(3) The protection of employee rights as set forth in §1-617.06;

(4) The right of employees to participate through their duly-designated exclusive representative in collective bargaining concerning terms and conditions of employment as may be appropriate under this chapter and rules and regulations issued pursuant thereto;

(5) The scope of bargaining;

(6) The resolution of negotiation impasses concerning matters appropriate for collective bargaining; and

(7) Any other matters which affect employee-employer relations.

(c) Impasse resolution machinery may include, but need not be limited to, the following:

(1) Mediation;

(2) Fact-finding;

(3) Advisory arbitration;

(4) Request for injunction;

(5) Binding arbitration;

(6) Final best offer binding arbitration; and

(7) Final best offer binding arbitration item by item on noncompensation matters.

(d) If, after a reasonable period of negotiation concerning the terms and conditions of employment to be incorporated in a collective bargaining agreement, further negotiation appears to be unproductive to the Board, an impasse shall be deemed to have occurred. Where deemed appropriate, impasse resolution procedures may be conducted by the Board, its staff or third parties chosen either by the Board or by the mutual concurrence of the parties to the dispute. Impasse resolution machinery may be invoked by either party or on application of the Board. The choice of the form(s) of impasse resolution machinery to be utilized in a particular instance shall be the prerogative of the Board, after appropriate consultation with the interested parties. In considering the appropriate award for each impasse item to be resolved, any third party shall consider at least the following criteria:

(1) Existing laws and rules and regulations which bear on the item in dispute;

(2) Ability of the District to comply with the terms of the award;

(3) The need to protect and maintain the public health, safety and welfare; and

(4) The need to maintain personnel policies that are fair, reasonable, and consistent with the objectives of this chapter.

Section 1-617.17, Collective Bargaining Concerning Compensation, of the D.C.

Code states in relevant part that:

(a) Collective bargaining concerning compensation is authorized as provided in §§1-602.06 and 1-617.16. Such compensation bargaining shall preempt other provisions of this subchapter except as provided in this section. The principles of §1-611.03 shall

apply to compensation set under the provisions of this section.

(b) As provided in this section, the Mayor, the Board of Education, the Board of Trustees of the University of the District of Columbia, and each independent personnel authority, or any combination of the above (“management”) shall meet with labor organizations (“labor”) which have been authorized to negotiate compensation at reasonable times in advance of the District’s budget making process to negotiate in good faith with respect to salary, wages, health benefits, within-grade increases, overtime pay, education pay, shift differential, premium pay, hours, and any other compensation matters. No subordinate agency shall negotiate a collective bargaining agreement.

. . .

(f) (1) Collective bargaining for a given fiscal year or years shall take place at such times as to be reasonably assured that negotiations shall be completed prior to submission of a budget for said year(s) in accordance with this section.

(A) (i) A party seeking to negotiate a compensation agreement shall serve a written demand to bargain upon the other party during the period 120 days to 90 days prior to the first day of the fiscal year, for purposes of negotiating a compensation agreement for the subsequent fiscal year. . . .

(B) Negotiations among the parties shall continue until a settlement is reached, or until 180 days after negotiations have commenced.

(2) If the parties have failed to begin negotiations within 90 days of the end of the annual notice period, or have failed to reach settlement on any issues 180 days after negotiations have commenced, then an automatic impasse may be declared by any party. The declaring party shall promptly notify the Executive Director of the Public Employee Relations Board in writing of an impasse. The Executive Director shall assist in the resolution of this declared automatic impasse by selecting an impartial person experienced in public sector disputes to serve as a mediator. If the mediator does not resolve the declared automatic impasse within 30 days, or any shorter period designated by the mediator, or before the automatic impasse date, the Executive Director, upon the request of any party, shall appoint an impartial Board of Arbitration to investigate the labor-management issues involved in the dispute, conduct whatever hearing it deems necessary, and issue a written award to the parties with the object of achieving a prompt and fair settlement of the dispute. The last best offer of each party shall be the basis for such automatic impasse arbitration. The award shall be issued within 45 days after the Board has been established. The award shall contain findings of fact and a statement of reasons. The award shall be final and binding upon the parties to the dispute.

(3) If the parties reach an impasse on any issues in negotiations before the declared automatic impasse date, any party shall promptly notify the Executive Director of the Public Employee Relations Board in writing. The Executive Director shall assist in the resolution of this impasse by selecting an impartial person experienced in public sector disputes to serve as a mediator. If the mediator does not resolve the impasse within 30 days, or any shorter period designated by the mediator, or before the automatic impasse date, the Executive Director, upon the request of any party, shall appoint an impartial Board of Arbitration to investigate the labor-management issues involved in the dispute, conduct whatever hearing it deems necessary, and issue a written award to the parties with the object of achieving a prompt and fair settlement of the dispute. The last best offer of each party shall be the basis for this impasse arbitration. The award shall be issued within 45 days after the Board has been established. The award shall contain findings of fact and a statement of reasons. The award shall be final and binding upon the parties to the dispute.

(3A) If requested by both parties or ordered by the Executive Director of the Public Employee Relations Board, a mediator or Board of Arbitration appointed pursuant to paragraphs (2) or (3) of this subsection shall consider non-compensation matters at impasse at the same time it considers compensation matters at impasse.

(4) If the procedures set forth in paragraph (1), (2), (3), or (3A) of this subsection are implemented, no change in the status quo shall be made pending the completion of mediation and arbitration, or both.

...

(g) Multi-year compensation agreements are encouraged. No compensation agreement shall be for a period of less than 3 years.

...

(i) (1) The Mayor shall transmit all settlements, including arbitration awards, to the Council within 60 days after the parties have reached agreement or an arbitration award has been issued with a budget request act, a supplemental budget request act, a budget amendment act, or a reprogramming, as appropriate; except that when a settlement, including an arbitrator's award, has been fully funded by an enacted budget request act, supplemental budget request act, or budget amendment act or an approved reprogramming request, the Mayor shall submit the settlement, including an arbitrator's award, with a certification that the settlement, including arbitrator's award, is fully funded by the previously enacted budget measure or approved reprogramming. The budget request act, supplemental budget request act, budget amendment act, or reprogramming shall fully fund the settlement for the fiscal year to which it applies.

(2) At the same time the Mayor transmits a settlement, including any arbitration award, pursuant to paragraph (1) of this subsection, the Mayor shall also transmit a financial plan that includes proposed funding for both actual and annualization costs of settlements for future fiscal years contained in a multi-year compensation agreement.

(3) The Mayor shall fully support the passage of settlements by every reasonable means before all legislative bodies, except that the Mayor is not required to support Council approval of an arbitrator's award, or to support Council approval of a settlement negotiated by the Board of Education, the Board of Trustees of the University of the District of Columbia, or other independent personnel authority, unless the Mayor participated in the negotiations.

(j) A settlement, including an arbitrator's award, shall take effect on the 30th calendar day, excluding days of Council recess, after the Mayor and the Council enact the budget request act, the supplemental budget request act, or the budget amendment act, or approve the reprogramming, as appropriate, that contains the funded settlement, unless prior to the 30th calendar day, the Council accepts or rejects the settlement, including an arbitrator's award, by resolution. In the case of a settlement, including an arbitrator's award, submitted after the enactment of budget legislation or the approval of a reprogramming that fully funds the settlement, including arbitrator's award, the settlement, including arbitrator's award shall take effect on the 30th calendar day, excluding days of Council recess, after the Mayor transmits the settlement, including arbitrator's award, to the Council with the Mayor's certification that the settlement, including arbitrator's award, has been fully funded in previously enacted budget legislation or an approved reprogramming, unless prior to the 30th calendar day, the Council accepts or rejects the settlement, including arbitrator's award, by resolution. If the Council rejects a settlement, including an arbitrator's award, then the settlement

shall be returned to the parties for renegotiation, with specific reasons for the rejection appended to the document disclosing the rejection of the settlement.

(k) The Mayor shall fully fund in future fiscal year budget requests, any settlement, including an arbitrator's award, for future fiscal years contained in a multi-year compensation agreement that has been approved pursuant to this section. Any settlement, including an arbitrator's award, that has been approved pursuant to this section shall be included in either the District budget request or in any supplemental budget request and shall be fully supported by the District by every reasonable means before Congressional bodies.

(l) Notwithstanding any provisions of subchapters XXII, XXIII, or XXVII of this chapter to the contrary, the health, life, and retirement programs authorized by these subchapters are proper subjects of collective bargaining under this section.

...

(n) (1) Notwithstanding any other provisions of law, the District is authorized to establish the compensation of District employees and to negotiate with the exclusive representative of the appropriate bargaining unit concerning the compensation rules for employees' overtime work in excess of the basic non-overtime workday, in accordance with this subchapter and the Fair Labor Standards Act of 1938, approved June 25, 1938 (52 Stat. 1060; 29 U.S.C. §201 et seq.).

(2) This subsection shall be retroactively effective as of the fiscal year beginning October 1, 2004.

Section 1-611.03, Compensation Policy; Compensatory Time Off; Overtime Pay,

of the D.C. Code states in relevant part that:

(a) Compensation for all employees in the Career, Educational, Legal, Excepted, and the Management Supervisory Services shall be fixed in accordance with the following policy:

(1) Compensation shall be competitive with that provided to other public sector employees having comparable duties, responsibilities, qualifications, and working conditions by occupational groups. For the purpose of this paragraph, compensation shall be deemed to be competitive if it falls reasonably within the range of compensation prevailing in the Washington, D.C., Standard Metropolitan Statistical Area (SMSA); provided, that compensation levels may be examined for public and/or private employees outside the area and/or for federal government employees when necessary to establish a reasonably representative statistical basis for compensation comparisons, or when conditions in the local labor market require a larger sampling of prevailing compensation levels.

(2) Pay for the various occupations and groups of employees shall be, to the maximum extent practicable, interrelated and equal for substantially equal work in accordance with this principle, dental officers shall be paid on the same schedule as medical officers having comparable qualifications and experiences.

(3) Differences in pay shall be maintained in keeping with differences in level of work and quality of performance.

....

(d) Notwithstanding any other provisions of law or regulation, effective April 15, 1986, any employee who is covered by the provisions of the Fair Labor Standards Act of 1938 (29 U.S.C. §201 et seq.)("FLSA"), and is eligible to earn compensatory time may receive compensatory time off at a rate not less than 1 and one-half hours for each hour of employment for which overtime compensation is required under the FLSA, in lieu of paid overtime compensation.

(1) If the work of an employee for which compensatory time off may be provided includes work in a public safety activity, an emergency response activity, or a seasonal activity, the employee may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If the work of an employee does not include work in a public safety activity, an emergency response activity, or a seasonal activity, the employee may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986.

(2) Any employee who, after April 15, 1986, has accrued the maximum number of hours of compensatory time off allowed under paragraph (1) of this subsection shall, for additional hours of work, be paid overtime compensation.

(e) Notwithstanding any other provision of District law or regulation, effective on the first day of the first pay period beginning one month after November 25, 1993, entitlement to and computation of overtime for all employees of the District government, except those covered by a collective bargaining agreement providing otherwise, shall be determined in accordance with, and shall not exceed, the overtime provisions of section 7 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §207. No person shall be entitled to overtime under this section unless that person is either entitled to overtime under the Fair Labor Standards Act or is entitled to overtime under the personnel rules of the District of Columbia as they existed at the time of enactment of this section.

(f) (1) Uniformed members of the Metropolitan Police Department at the rank of Inspector and above shall not receive overtime compensation for work performed in excess of a 40-hour administrative workweek, excluding rollcall.

(2) (A) Except as provided in subparagraph (B) of this paragraph, uniformed members of the Fire and Emergency Medical Services Department at the rank of Assistant Fire Chief and above shall not receive overtime compensation for work performed in excess of 40 hours in an administrative workweek and in excess of 48 hours in a workweek for those uniformed members of the Fire and Emergency Medical Services Department at the rank of Assistant Fire Chief and above in the Firefighting Division.

(B) For fiscal years 2011, 2012, and 2013, uniformed members of the Fire and Emergency Medical Services Department at the rank of Battalion Fire Chief and above shall not receive overtime compensation for work performed in excess of 40 hours in an administrative workweek and in excess of 48 hours in a workweek for those uniformed members of the Fire and Emergency Medical Services Department at the rank of Battalion Fire Chief and above in the Firefighting Division.

(3) Uniformed members of the Metropolitan Police Department at the rank of Inspector and above and uniformed members of the Fire and Emergency Medical Services Department at the rank of Assistant Fire Chief and above shall not be suspended for disciplinary actions for less than a full pay period.

(4) (A) For fiscal years 2011, 2012, and 2013, and except as provided in subparagraph (B) of this paragraph, no officer or member of the Fire and Emergency

Medical Services Department who is authorized to receive overtime compensation under this subsection may earn overtime in excess of \$ 20,000 in a fiscal year.

(B) This paragraph shall not apply to a member of the Fire and Emergency Medical Services Department who is classified as a Heavy Mobile Equipment Mechanic or a Fire Arson Investigator Armed (Canine Handler).

(C) Notwithstanding any other provision of this paragraph, the exemption to the overtime limitation for the Fire Arson Investigator Armed (Canine Handler) set forth in subparagraph (B) of this paragraph shall apply retroactively to fiscal year 2011.

Section 7(k) of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 207(k), states in relevant part that:

(k) Employment by public agency engaged in fire protection or law enforcement activities

No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if –

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of

(A) 216 hours, or

(B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

COMPENSATION ITEMS

1) Article 18 – Overtime

The current language of Article 18 as set forth in the 2004 Agreement is as follows:

Section A: Overtime

It is agreed that, to the extent permitted by law, all overtime worked by employees in Salary Classes 1 through 7 shall be paid 1-1/2 times the regular hourly rate.

To the extent permitted by law, overtime shall apply to all call back, work on assigned days off, court appearances on off duty time which results from an employee's official duty, and continuation of duty.

Section B – Distribution

The Employer will make every effort to ensure that the opportunity for overtime shall be distributed and rotated equally among employees. The Employer also agrees to maintain a roster for all employees, indicating overtime worked and overtime refused, and such roster will be made available to the Union. The Union may consult with the Employer concerning the administration of this provision.

Section C - Minimum Pay

To the extent permitted by law, all employees shall be entitled to a minimum of four (4) hours overtime pay for call backs, unless an employee's regularly scheduled tour of duty intervenes, in which case an employee shall be paid overtime from the time he/she assumed duty until the start of the regularly scheduled tour of duty.

Section D - Employee Option

At the Employee's option, he/she may choose compensatory time instead of overtime, such compensatory time will be earned on a time and a half basis. If not used within four pay periods, all accrued FLSA compensatory time shall be paid to the employee at the applicable rate.

The LBFOs of the Department and the Union seek no changes to Sections B, C, or D, of Article 18. The proposed language for Article 18, Section A, in the Department's LBFO is as follows:

Section A – Overtime

Overtime shall be governed by the Fair Labor Standards Act and any District of Columbia Budget Request Act or any Budget Support Act approved or deemed approved.

To the extent permitted by law, overtime shall apply to all call back, work on assigned days off, court appearances on off duty time which results from an employee's official duty, and continuation of duty. Members whose duty includes fire suppression shall be paid overtime for all hours worked in excess of 48 hours averaged over a four-week period.

The proposed language for Article 18, Section A, in the Union's LBFO is as follows:

Section A – Overtime

It is agreed that, to the extent permitted by law, all overtime worked by employees in Salary Classes 1 through 7 shall be paid 1-1/2 times the regular hourly rate. To the extent permitted by law, overtime shall apply to all call back, work on assigned days off, court appearances on off duty time which results from an employee's official duty, and continuation of duty. Members whose duties include fire suppression shall be paid overtime for all hours worked in excess of 42 hours averaged over a four-week period.

Background

The Parties currently disagree as to the interpretation of the existing language of Article 18. The Union maintains that, pursuant to an arbitration award issued by Arbitrator Andrée Y. McKissick on March 21, 2009 ("McKissick Award"), the current language of Article 18 is understood to provide that Firefighter-EMTs will be paid at the rate of time and one-half their regular rate of pay after 42 hours worked per workweek. The McKissick Award directed back pay for the bargaining unit on a class basis retroactive to 2001. The Department, however, challenges the validity of the McKissick Award and has yet to comply with the interpretation of Article 18 adopted in that decision or to provide the back pay directed by that Award. The Department appealed initially to the PERB, which declined to grant the Department's request for review of the McKissick Award. The matter then proceeded to the Superior Court for the District of Columbia, which denied the Department's appeal of the PERB's decision. An appeal of the decision of the Superior Court is currently sub judice at the Court of Appeals for the District of Columbia.

Amy McCarthy, Ph.D., who testified on behalf of the Union regarding economic issues, stated that fire departments in five comparator cities located in the Northeast Corridor of the United States (Boston, Massachusetts; New York City, New York; Newark, New Jersey; Philadelphia, Pennsylvania; and Baltimore, Maryland) all

uniformly pay overtime premium pay at the rate of time and one-half the regular rate of pay for hours worked in excess of the basic workweek. She noted that, in Philadelphia, firefighters are paid at the rate of time and one-half the regular rate of pay for hours worked in excess of 40, even though the workweek is, on average, 42 hours. She further noted that, among the unionized fire departments in the jurisdictions surrounding the District of Columbia, both departments (Montgomery County and Prince George's County) pay overtime premiums at the rate of time and one-half the regular rate of pay for hours worked in excess of the basic workweek. She opined that, in a unionized setting, it would be quite unusual to have no time and one-half entitlement in excess of the FLSA at all, as the Department proposed in its initial LBFO.

The Department's Chief, Kenneth B. Ellerbe, testified that the D.C. Council had, via the Budget Support Act, restricted the amount of overtime pay which any one Department employee could earn in one year to \$20,000, or an average of 36 hours per pay period and had placed other restrictions on the Department's use of overtime. He admitted that the Department could seek and had sought waivers of these restrictions, but that it has tried to avoid doing so where possible.

Andrew Beaton, Senior Management and Program Analyst for the Department, testified that the Department had been subjected to such restrictions due to what certain members of the D.C. Council had viewed as excessive overtime payments to some members of the Department. He indicated that changing the thresholds for payment of overtime will significantly reduce overtime payments made by the Department, thereby addressing the concerns of those Council members.

Contentions of the Department

The Department's proposal more closely resembles the intent of the FLSA to permit fire departments a degree of flexibility in calculating their overtime liability and should be awarded on that basis.

In addition, although the Department's proposals as to overtime are admittedly less generous than those proposed by the Union, the Union's proposal may not be awarded. Pursuant to the PERB's determination that the Department retains its statutory management right to establish a tour of duty, as discussed further below, the Department has made clear its intention to establish a 48-hour weekly tour of duty. While the Union may seek to negotiate the number of hours worked beyond the basic workweek which will trigger liability for overtime pay, the Union's proposal here, which sets the trigger for overtime at 42 hours of work, attempts to negotiate overtime pay for hours of work within the basic workweek. Its proposal, therefore, is impermissible.

Contentions of the Union

Clearly, the Department's Article 18 proposal is intended to allow the Department to escape criticism and oversight from the D.C. Council without changing the demands that it places on individual members of the bargaining unit. By defining the workweek at 48 hours under its scheduling proposal, the Department would decrease its labor costs by forcing bargaining unit members to work six additional hours each week without incurring overtime obligations.

It is evident that the standards for overtime pay set forth in the FLSA represent a floor, rather than a ceiling, and that the Parties are permitted to negotiate overtime pay provisions which are more favorable to employees than the terms of the FLSA itself.

Beginning with the Parties' collective bargaining agreement for FY 1991-1994, this bargaining unit received one and one-half times their regular rate of pay for all hours worked in excess of their basic average workweek of 42 hours. After this provision was abrogated by an order of the District of Columbia Financial Control Board in 1996, the Union proposed, during the negotiations which culminated in the Jascourt Award, to add the phrase "to the extent permitted by law" to the overtime payment provisions of Article 18. This language was added as part of the Jascourt Award, and the McKissick Award makes clear that, currently, members of the bargaining unit are entitled to receive one and one-half times their regular rate of pay for all hours worked in excess of their basic average workweek of 42 hours.

The Union, therefore, seeks to maintain the status quo with its Article 18 proposal, adding only a reference to the current overtime trigger of 42 hours in order to memorialize and clarify that trigger. By contrast, the Department's LBFO simply defers to the FLSA and to District of Columbia Budget Request Acts and Budget Support Acts. As a result, the Union understands the Department to have proposed to account for hours worked in excess of 42, but less than 48, through its proposed 14.3% wage increase (an increase proportionally equivalent to the six hour per week increase in the average workweek proposed by the Department which would effectively pay those hours at straight time rates), to pay straight time rates for hours worked in excess of 48 but less than 53, and to pay an overtime premium only for any hours worked over the FLSA threshold of 53. Given the current language of the agreement, the Parties' bargaining history, the overall fiscal health of the District, and the record evidence regarding the frequency with which the Department assigns overtime and the quantities in which it

assigns such work, the Department's proposal is simply unreasonable.

Discussion and Opinion

Unless and until the McKissick Award's interpretation of Article 18, Section A, is overturned, the provisions of the Parties' Agreement currently require that overtime be paid at time and one-half the regular hourly rate for all call back work, work on assigned days off, court appearances on off duty time resulting from the employee's official duty, and continuation of duty. Moreover, both of the LBFOs maintain the present language of Article 18, Section A, to that effect.

What is unknown at this time is whether the present four platoon model will be maintained for the life of the collective bargaining agreement directed herein or whether the Department will enjoy the ability to change from the present four platoon (42 hours per workweek on average) model to either a three platoon (48 hours per workweek on average) or some other model. If the present four platoon model remains in place for the duration of the new collective bargaining agreement, whether due to contractual restriction or managerial discretion or otherwise, no reason was shown to change the existing overtime provisions of Article 18, Section A, to provide for the payment of overtime based upon a 48 hour trigger, rather than the existing 42 hour trigger. Stated differently, the Department's LBFO that seeks to change the trigger for time and one-half payments for overtime from the existing 42 hours per workweek (on average) to 48 hours per workweek (on average) is not linked by its terms to any change in the existing four platoon 42 hours per workweek work schedule. If adopted, it would go into effect even if the existing work schedules remain unchanged, reducing the amount of compensation provided to bargaining unit members who work overtime.

If a three platoon, 48 hours per workweek (on average) schedule is implemented during the term of the new collective bargaining agreement, then the effects of the divergent LBFOs must be considered. Given the four platoon model of one 24-hour shift on, followed by three 24-hour shifts off, the current provisions of Article 18 provide that overtime rates are paid when eligible bargaining unit members work over 42 hours in a workweek (on average over a four workweek period). A Firefighter-EMT who works 48 hours a workweek (on average over a four workweek period) under the present Agreement receives 51 hours of straight time pay for that work – 42 hours at straight time and 6 hours at time and one-half for a total of 51 hours. The Union's LBFO will preserve that pay, whether the pay is earned by 48 hours of work under the present four platoon model or 48 hours of work under a three platoon model. The Department's LBFO will result in that same Firefighter-EMT receiving only 48 hours of pay for that work. Thus, if implemented in combination with the change to a three platoon, 48 hour workweek, the Department's Article 18 LBFO will be equivalent to a reduction in hourly pay of 6.25%. Thus, despite the fact that the Department's planned 14.3% increase in average hours of work per week is nominally matched by a 14.3% increase in pay in the Department's LBFO, that 14.3% pay increase will effectively produce an increase of only 8.05% in wages if both the platooning change and the change in Article 18 are implemented. The Union's LBFO, on the other hand, ensures that if the Department is able to convert to a three platoon model during the term of the collective bargaining agreement under consideration, then bargaining unit employees receive fair compensation for the extra hours of work and less desirable work schedules, rather than subsidizing the changeover to a less desirable schedule by loss of overtime pay.

The Department's argument that the Union's LBFO with respect to Article 18 conflicts with its claimed management right to unilaterally change tours is unpersuasive. The claimed right to establish when employees are scheduled to work does not additionally entail any unilateral right to determine what employees are to be paid when working the particular tour hours. The Union's LBFO simply preserves the pay that employees are presently entitled to receive contractually when they agree or are required to work 48 hours (or any other number of hours over 42 hours) on average over a four workweek period.

While the Article 18 LBFO will be adopted as part of the overall disposition of the respective compensation packages, rather than on its independent merit, to the extent that the Article 18 LBFO impacts on the overall selection of compensation package, the LBFO of the Union is preferred to that of the Department. Applying the four statutory criteria contained in Section 1-617.02(d) of the D.C. Code, as well as other relevant considerations, I find that the Union's Article 18 LBFO is preferable to that of the Department. There are no existing laws and regulations and rules that require selection of either LBFO. The Department's assertion that public policy supports providing overtime premium rates of pay only in situations that are required by Section 7(k) of the FLSA is rejected. Not only does the record reveal that negotiated collective bargaining agreements in comparator fire departments typically pay overtime at time and one-half rates well before the 53 hour threshold contained in Section 7(k) of the FLSA, but the D.C. Code Compensation Policy provisions themselves contemplate that such additional pay may be bargained. In fact, the Department's own LBFO provides for the payment of time and one-half pay in excess of the minimum required by the FLSA; the Department's

LBFO simply would provide for a different trigger than that contained in the Union's LBFO or the current Agreement. No showing has been made that the District is unable to comply with a collective bargaining agreement that, essentially, continues provisions that have been in place for decades. There was no showing that adoption of either LBFO is necessary to protect and maintain the public health, safety and welfare. Nor was there a showing that fair, reasonable, and consistent personnel policies are supported by adoption of the Department's Article 18 LBFO instead of that of the Union. The Union's LBFO will continue the existing provisions to a much greater extent than the Department's LBFO and avoid an inappropriate reduction in real hourly pay.

2) Article 42 - Wages

As noted previously, the Union's LBFO for Article 42 would provide wage increases of 3.0% (effective April 1, 2012); 3.5% (effective April 1, 2013); and 3.5% (effective April 1, 2014), whereas the Department's LBFO would provide 3.0% wage increases effective April 1, 2013, October 1, 2014, October 1, 2015, and October 1, 2016.

Background

The record contained information regarding the historical bargaining of wage adjustments between the Department and the IAFF since at least FY 2001, as well as the wage adjustments bargained between the District and Compensation Units 1 & 2 for the same period. Some more limited information about the wage adjustments bargained between the District and the FOP were also provided. In addition to these internal comparators, somewhat more limited evidence was introduced regarding wages for fire department employees in fire departments in the surrounding Washington, D.C. Standard Metropolitan Statistical Area ("SMSA") and regarding wages for fire department

employees in selected Northeast Cities.

The Jascourt Award

As noted above, the most recent interest arbitration between the Parties was held in December 2001 and culminated in an Award issued on March 6, 2002 that provided for a FY2001-03 Agreement. DCFEMS-IAFF Local 36, PERB Case Nos. 01-I-02 and 01-I-04 (Hugh D. Jascourt, Arbitrator) (2002) (“Jascourt Award”).

The issues in dispute in the Jascourt Award were Wages, Overtime, Reductions-in-Force, and Health. The Parties agreed that only Wages would be viewed as a compensation matter, thus effectively allowing Arbitrator Jascourt to decide the Wages and Overtime LBFOs of the Parties independently of one another. The bulk of the Award was devoted to a discussion of the standards and comparators applicable to selection between the two Wages LBFOs. In addition to a copy of that Award being introduced into the record in this case, substantial testimony and argument was offered relative to the Jascourt Award.

Both Parties’ LBFOs in that matter provided for 4% wage increases as of October 1, 2000, October 1, 2001, and October 1, 2002. The Union’s LBFO also provided for a mid-year increase of 4% effective April 1, 2001; that mid-year increase was not part of the Department’s LBFO.

After consideration of the record evidence, Arbitrator Jascourt found that the Union’s proposed LBFO on Wages was more appropriate and ordered its adoption. Arbitrator Jascourt reviewed the following comparators: a) fire department wages in the Washington, D.C. SMSA for paid firefighters (Alexandria, Anne Arundel County, Arlington County, Baltimore City, Baltimore County, Fairfax County, Howard County,

Montgomery County, Prince George's County; and Prince William County); b) fire department wages in 30 major United States cities; c) fire department wages in Baltimore, Boston, New York City, Newark, and Philadelphia (which were referenced as "Northeast Cities"); and d) wages paid to the police in the District.

With respect to police wages, Arbitrator Jascourt found that there was no basis for applying parity. He noted the presence of legislated parity from 1929 to 1981 when the CMPA became effective. Arbitrator Jascourt concluded that a prior interest arbitration award involving the FOP had ended parity and that there were differences in the pay rates applicable to police and fire employees in the District during the years in which the control board was in existence. He found that parity principles were not applicable in light of the failure to focus on total compensation and in light of the fact that the Party who was asserting application of the parity principle – the IAFF – did not base its proposal on reattaining parity with the FOP.

In terms of the local jurisdictions, Arbitrator Jascourt concluded that the local jurisdictions were not comparable because they were suburban departments, but noted that to the extent they were valid comparators the important consideration was one that maintained the historical relationship between the wages paid to District fire department employees in comparison to the fire department employees of other comparable local jurisdictions. He found that adoption of the Union's LBFO on wages would better maintain that historical relationship.

With regard to the comparator status of wage rates in the 30-city study, Arbitrator Jascourt found those wage rates not relevant because they lacked what he found to be the important characteristics of housing density, resident population density, and percentage

of pre-1939 housing (factors that had been urged by the Union's expert witness in that arbitration as significant relative to defining comparable jurisdictions). He also found, however, that to the extent that the 30-city study data was relevant as a comparator, the Union's LBFO was "better" because it "less erodes the historical pay relationships." Arbitrator Jascourt found that the Northeast salaries were "the closest comparator" to the District based upon the density and pre-1939 housing statistics (which Arbitrator Jascourt found related to the comparability of the firefighting work in the District and the Northeast cities) and focused upon the percentage adjustments in wages during the periods 1994-2001 and 1998-2001 and found that for both periods, the District lagged wage gains in every city other than New York City for the period 1994-2001 and lagged all of the cities other than Philadelphia for the period 1998-2001 (regardless of whether the Union's LBFO or the Department's LBFO were adopted). Arbitrator Jascourt relied upon this information to demonstrate that the Union's LBFO was more justifiable than that of the Department.

Arbitrator Jascourt further found that the District had the ability to pay, noting a post-arbitration hearing voluntary settlement with the FOP bargaining unit that entailed significantly greater costs than those involved in the IAFF bargaining unit.

The Parties' Bargaining History After the Jascourt Award

The Parties reached voluntary agreement for the FY2004-07 period, entering into a full term collective bargaining agreement that provided for wage increases of 3.75% (effective April 1, 2004); 2.0% (effective October 1, 2004); 2.0% (effective April 1, 2005); 4.0% (effective October 1, 2005) and 4.0% (effective October 1, 2006). Despite some similarity between the wage increases negotiated for the IAFF bargaining unit and

the Compensation Units 1 & 2 bargaining units, there was no showing as to the comparators used by the bargaining parties in arriving at the wage increases contained in their FY 2004-07 Agreement.

Since October 1, 2006, there have been no wage scale increases for the bargaining unit. Thus, for the 12 year period October 1, 2000 through September 30, 2011, wages for the IAFF represented employees have increased by only 31.75% - an average rate of increase (non-compounded) of 2.65%. The Union's LBFO on wages would provide an increase, effective April 1, 2012, ending what would be a 5½ year period in which no wage increases would have been granted. The Department's LBFO on wages would not provide a wage increase until April 1, 2013, resulting in a 6½ year period of wages remaining unchanged.

Internal Comparators

By comparison, during the period FY2001-11, the wage increases bargained between the District and Compensation Units 1 & 2 totaled 36.25% (non-compounded). In the same period, those same bargaining units received a total of 3.75% in additional salary scale increases for Class/Compensation Project or Salary Scale construction adjustments, for a total salary increase of 40.0% (non-compounded). For FY 2007, FY 2008, FY 2009 and FY 2010, the Compensation Unit 1 & 2 members received wage increases respectively of 3%, 3.25%, 4.0%, and 4.0% (each as of the first day of those fiscal years), for a total, non-compounded increase in pay of 14.25%. During those same years, the IAFF represented members received no wage increases whatsoever.

Additionally, since FY 2011, the District has negotiated the following increases for Compensation Units 1 & 2: 3.0% increases (effective April 1, 2013; October 1, 2014;

October 1, 2015; and October 1, 2016) and an additional 1.5% in FY 2014 for a Class/Compensation Project adjustment. Thus, notwithstanding the significant difference in negotiated wage increases between the IAFF bargaining unit and the Compensation Units 1 & 2 during the periods FY 2001-10 and FY 2007-10, the Department's wage proposal for the IAFF bargaining unit for the period FY 2011 through FY 2017 fails to even equal the wage scale bargains granted by the District to Compensation Units 1 & 2, even prior to considering the effects of the proposed change in overtime rules which would effectively reduce the value of its wage proposal by an additional 6.25%.

The record evidence regarding wage adjustments negotiated between the District and the FOP began in FY 2004 and ended as of FY 2008. During that period, the District and the FOP negotiated pay increases of 4.0% in each of FY 2004, 2005, 2006, and 2007, and an increase of 5.0% in FY 2008, for increases of 21.0% (non-compounded) for those five years. The comparable negotiated wage increase for the IAFF bargaining unit was 15.75% (non-compounded).

Comparators in the SMSA

The record here was devoid of evidence by either Party regarding the wage increases negotiated or granted, in the case of those jurisdictions in the SMSA that do not have collective bargaining over wages, during the period from October 1, 2006 (the last wage increase for the bargaining unit) to the present. The record does not permit quantitative comparison of the amount to which the historical standing of wages by the Department within the SMSA has fallen during the period since FY 2007.

The Department's economic expert, Parris Sims, a Senior HR Compensation Specialist in the District's Department of Human Resources, testified that she had

prepared a study of compensation for FY 2014 for fire union positions on the basis of industry practices, local comparables, and professional compensation practices. She utilized as comparators the fire departments located within the SMSA jurisdictions. Ms. Sims indicated in her study that she had selected these jurisdictions because they met the criteria set by D.C. Code § 1-611.03, because sufficient reliable data was available for each, and because they were among the largest fire departments within the region and thus likely to impact the market for firefighter jobs.

In her study, Ms. Sims wrote that she had considered the Department's salary range to be competitive if it was within 10% of the market median based upon compensation industry standards. For each of the ranks of firefighter/EMT, sergeant, lieutenant, and captain, she considered the following data in her analysis: minimums, midpoints, and maximums for annual wages; actual average annual wages; hours worked per year; average hourly wage; minimum hourly wage; maximum hourly wages; and number in class. She found that, in comparison to these jurisdictions, the Department's average hourly wages (which have not been increased since October of 2006) were greater than the average hourly wages of all jurisdictions in all ranks surveyed by at least 5% (and as much as 13%) except for the sergeant rank, where the Department's average hourly wage is approximately 5% below the actual regional average. On this basis, Ms. Sims concluded that the Department's compensation for bargaining unit members was competitive with the jurisdictions within the SMSA despite the seven years of unchanged wages for these employees.

However, both the data provided and the methodology used by the District contained a number of severe deficiencies. Most notably, the District's analysis did not

provide a comparison of the historical relationship between the Department's compensation and that of any other jurisdictions. Moreover, Ms. Sims herself reported skepticism regarding the accuracy of certain of the data contained in the Local Government Personnel Association (LGPA) Annual Survey, which compiles submissions from human resources professionals in the surveyed jurisdictions and from which she sourced the data used in her study, but stated that she had not had enough time to verify the accuracy of the data with the actual jurisdictions. In addition, she acknowledged that she had made imprecise comparisons between the Department's Firefighter-EMTs and their counterparts in other jurisdictions (e.g., comparing a Sergeant in the Department to a Lieutenant or Captain in another fire department). Ms. Sims also acknowledged that she had used discretion in making certain of the comparisons (e.g., comparing the pay of the Department's Sergeant-Paramedics entitled to technician pay with non-paramedic sergeants or officers in other jurisdictions).

Dr. McCarthy focused in her presentation on only 5 of the SMSA jurisdictions: Montgomery County, Prince George's County, Arlington County, Fairfax County, and the City of Alexandria. She noted that firefighters in the Virginia jurisdictions lacked collective bargaining rights, and presented findings that Washington, D.C. was 256% above the median of the Local Jurisdictions with regard to resident population density, 536% above the median of the Local Jurisdictions with regard to daytime population density, 363% above the median of the Local Jurisdictions with respect to housing density, and 608% above the median of the Local Jurisdictions with respect to pre-1939 housing.² Dr. McCarthy further determined that, based on a 20-year average of

² Although those factors were cited to Arbitrator Jascourt and cited by him when determining which group of comparators were comparable to the Department, there was no showing that any or all of these factors

compensation at FY 2014 compensation rates intended to approximate average earnings over a 20-year career, a Firefighter-EMT in Washington, D.C. would earn, under the Department's proposal, 10.9% more than the median compensation per hour for the Local Jurisdictions, as well as less base salary plus longevity and direct compensation than would a firefighter in Fairfax County or Arlington County, and higher compensation per hour than a firefighter in any of the Local Jurisdictions other than Prince George's County. Dr. McCarthy additionally determined that, based on a 20-year average of compensation at FY 2014 compensation rates intended to approximate average earnings over a 20-year career, a Firefighter-EMT in Washington, D.C. would earn, under the Union's proposal, 18.6% more than the median compensation per hour for the Local Jurisdictions, as well as less base salary plus longevity and direct compensation than would a firefighter in Fairfax County or Arlington County, but higher compensation per hour than a firefighter in any of the Local Jurisdictions.

Comparators in the Northeast Corridor

Dr. McCarthy testified that she believed that a) Boston, Massachusetts, b) New York City, New York, c) Newark, New Jersey, d) Philadelphia, Pennsylvania, and e) Baltimore, Maryland (together, "Northeast Corridor Cities") are the most appropriate jurisdictions to which to compare Washington, D.C for purposes of determining appropriate wages and working conditions. She made this judgment based on her assessment that the most significant factors in determining comparable jurisdictions in fire/emergency services within a general geographic region are (in addition to overall population) housing density, population density, percentage of housing built before 1939, daytime population and daytime population density. Dr. McCarthy acknowledged that

correlate with wage levels or even with job function in any way.

she identified these cities in large part because Arbitrator Jascourt had identified them as appropriate comparators in his Award; the record reflects that many of the factors identified by Dr. McCarthy supporting the appropriateness of these cities as comparators to the District are the same as those identified in the Jascourt Award for that purpose.

Dr. McCarthy utilized a measure that she termed “compensation per hour,” which accounts for base salary, longevity pay, shift differentials, uniform and maintenance allowances, holiday pay, scheduled hours of work, and several classifications of time not worked, including vacation hours, holiday hours, and personal leave hours. The “compensation per hour” measure did not account for the extra pay received by the Department’s Firefighter-EMTs (as well as those in some of the other Northeast Corridor Cities surveyed), non-scheduled overtime, sick leave, as well as a number of other compensation situations which are either unusual in nature or do not occur automatically. She also noted that her analysis did not account for or note the year of service within each of the jurisdictions which she examined at which a Firefighter or Firefighter-EMT would reach the highest salary available to him or her on the pay schedule of his or her department, and compared compensation across journeyman Firefighter positions, without addressing the compensation of officers.

Among her many findings, Dr. McCarthy determined that a Firefighter-EMT with 20 years of service in Washington, D.C. as of FY 2014 would earn the following compared to his or her colleagues in the Northeast Corridor Cities:

Wages	% Above or Below Median Base Salary Plus Longevity	% Above or Below Median Total Compensation	% Above or Below Median Compensation Per Hour
Current CBA	-15.7%	-20.0%	-22.6%
Union Proposal	-6.9%	-11.8%	-14.6%

Department Proposal	-0.7%	-5.9%	-20.3%
---------------------	-------	-------	--------

(The higher base salary and total compensation numbers for the Department's proposal, when compared to the Union's proposal, is a result of the inclusion in this analysis of the increased number of hours worked as a result of the proposed change from a 42 hour schedule to a 48 hour schedule.)

Dr. McCarthy provided a limited comparison of the Department's historical standing relative to other jurisdictions with regard to wages. She discussed briefly wage comparisons prepared by Joseph Kilgallon, the Union's economic expert in the Jascourt arbitration, for use in that interest arbitration. The wage comparisons reflect that, according to Mr. Kilgallon's analysis, the Union's wage proposal as submitted to Arbitrator Jascourt would have placed the "cost per hour" of compensation for a member of this bargaining unit averaged over a twenty year career at 14.6% below the median cost per hour for a bargaining unit member in the Northeast Corridor Cities under the compensation arrangements in place at the time. As noted above, the Union's compensation proposal in this proceeding would place this bargaining unit at 20.9% below the median compensation per hour for the Northeast Corridor Cities based on a 20-year average of compensation. When juxtaposed, those two facts are suggestive of a decline in relative wages between the Department's employees and those of the surrounding local fire departments in the SMSA during the period following the Jascourt Award.

The record reflects the significant impact of annual scheduled hours of work on the optics of the Parties' respective wage proposals. Under the Union's proposed compensation package, the annual scheduled hours of work of a Firefighter-EMT in the

Department would remain at 2,190 hours per year, while under the Department's expressed intention to transition to a tour of duty to three 12-hour day shifts, followed by three 12-hour night shifts, followed by 3 calendar days off duty (discussed below), the annual scheduled hours of work of a Firefighter-EMT would increase to 2,496 hours per year. To the extent contained in the record here, the following are the annual scheduled hours of work of a firefighter in the jurisdictions put forward by the Parties as comparators:

Jurisdiction	Annual Scheduled Firefighter Hours of Work
Montgomery County	2,503
Prince George's County	2,190
Fairfax County	2,912
Arlington County	2,912
Alexandria County	2,912
New York City	2,088
Boston	2,190
Newark	2,190
Philadelphia	2,190
Baltimore	2,451

William Montross, Esq., a consultant for the District's Office of Labor Relations and Collective Bargaining, testified that he did not believe that the Northeast Corridor Cities were appropriate comparators for the Department, as the Department did not draw employees from those areas and does not typically lose many employees to fire departments in those areas. Mr. Montross also testified that Dr. McCarthy's analysis did not account for the fact that the Department's Firefighter-EMTs must achieve more years of service before earning longevity pay than do their counterparts at fire departments in the Northeast Corridor Cities, and noted that many of the fire departments in the Northeast Corridor Cities utilize single-role firefighters rather than the dual-role Firefighter-EMTs employed by the Department. Each of those distinctions, however,

illustrates simply that the differential between pay in the Department and pay in the Northeast Corridor Cities is even greater than was set forth in the analysis performed by Dr. McCarthy since, all other things being equal, one would expect dual-role fire professionals to be more highly paid than single-role fire professionals.

Consumer Price Index

Mr. Montross explained that he had compared the wage increases received by the Union from FY 2001 through FY 2011, as well as the Union's wage proposal for FY 2012 through 2014, to the percentage change in the Consumer Price Index for Urban Wage Earners and Clerical Workers ("CPI-W") for the Washington-Baltimore Area and the percentage change to the Employment Cost Index ("ECI") for wages and salaries for state and local governments over the same period. He noted that he had estimated the percentage changes in CPI-W and ECI for FY 2013 and 2014 due to the unavailability of data for those years. Mr. Montross stated that, based on his comparison, the total percentage increase in wages for the bargaining unit over the 14-year period in question had outpaced both CPI-W and ECI, regardless of whether calculated as a simple percentage change or compounded.

Mr. Montross also testified that he had compared the wage increases received by the Union from FY 2001 through FY 2011, as well as both the Union's wage proposal for FY 2012 through 2014 and the Department's wage proposal for FY 2012 through 2014, to the wage increases received by Compensation Units 1 & 2 (not including an additional 5.25% raise for certain members of that bargaining unit) over the same period of time. He explained that Compensation Units 1 & 2 would receive a total wage increase of 39.25% (47.04% compounded), the Department's proposal would result in a total wage

increase for the bargaining unit of 34.75% (40.68% compounded), and the Union's proposal would result in a total wage increase for the bargaining unit of 41.75% (50.70% compounded).

The record revealed that, from FY 2001 through FY 2011 (a period preceding this Agreement for which data is known and need not be estimated), the IAFF bargaining unit received pay increases of 31.75% (non-compounded) whereas, during this same period, the CPI-W (Washington-Baltimore) increased 31.69% (non-compounded) and the ECI (Wages/Salaries State/Local Governments) increased 28.76%.

The District's Fiscal Health

The record reflects that the District currently possesses a bond rating of "AA-" from Standard & Poor's, a rating of "Aa2" from Moody's, and a rating of "AA-" from Fitch. All of these ratings are equal to or higher than the highest ratings that the District has received from these agencies since 1992, and the District's own Office of the Chief Financial Officer has stated that, based on the District's bond ratings, budgetary surplus and its cumulative fund balance, the District has one of the strongest financial positions of any city in the United States.

Contentions of the Department

The Arbitrator must look to the provisions of D.C. Official Code §§ 1-611.03 and 1-617.02 in determining which of the two compensation proposals to adopt. Pursuant to these standards, it is clear that the Department's compensation proposal is the more appropriate. It represents prudent government spending and protects the public welfare and public treasury by utilizing only the District's discretionary funds without intruding onto funding which is restricted in use or otherwise committed to ensure the District's

continuing fiscal health. The Union's compensation package, by contrast, would require additional revenue to be raised or additional funds to be raided, particularly in light of the retroactive pay it seeks.

The Department's compensation package has clearly been developed by reference to appropriate comparators. The terms of D.C. Code § 1-611.03 require that firefighter compensation "be competitive with that provided to other public sector employees having comparable duties, responsibilities, qualifications, and working conditions by occupational groups," and that "compensation shall be deemed to be competitive if it falls reasonably within the range of compensation prevailing in the Washington, D.C., Standard Metropolitan Statistical Area (SMSA) . . ." barring the application of a narrow exception which would permit the use of comparators outside of the Washington, D.C. SMSA. While District law previously encouraged the Department and the Union to also look to firefighter compensation in the nation's 30 largest cities by population, the D.C. Council has chosen to repeal this provision in favor of the current statutory scheme. In addition, the fact that the Department has entered into mutual aid agreements with fire departments in the surrounding jurisdictions allows an inference that that duties, responsibilities, qualifications, and working conditions of firefighters in those jurisdictions are similar to those of Firefighter-EMTs in the Department. Moreover, an overwhelming majority of the Department's new hires have come from the Washington, D.C. metropolitan area. Therefore, the most appropriate comparators are local comparators.

The Union's use of the Northeast Corridor Cities as comparators, by contrast, is clearly inappropriate. First, there has been no showing that the comparators used by

Arbitrator Jascourt in his Award are per se appropriate here, nor has there been any showing that the Parties have especially relied on such comparators in their bargaining either before or after the issuance of the Jascourt Award. Moreover, Dr. McCarthy's comparison of "working conditions" reveals her fundamental misunderstanding of the meaning of that term here. The D.C. Code, at section 1-617.17(f)(ii), refers to working conditions as a subject for negotiations in collective bargaining. Dr. McCarthy, however, apparently viewed working conditions to refer to characteristics – i.e., housing density, population density, and the extent of housing built before 1939 – which are not the product of negotiations and were not shown to be determinants of compensation in the District or elsewhere. Her search for comparators on the basis of those factors, therefore, was misguided and not appropriate for this proceeding. Her analysis also failed to properly account for the impact of the timing of longevity pay increases for Firefighter-EMTs in the Department relative to the Northeast Corridor Cities.

In addition, even if Dr. McCarthy's analysis were valid, the terms of D.C. Code § 1-611.03 are clear that:

. . . compensation levels may be examined for public and/or private employees outside the area and/or for federal government employees when necessary to establish a reasonably representative statistical basis for compensation comparisons, or when conditions in the local labor market require a larger sampling of prevailing compensation levels.

The Union has not made any showing here that the use of comparators beyond the SMSA jurisdictions is necessary to establish a reasonably representative statistical basis for compensation comparisons or that conditions in the local labor market require a larger sampling of prevailing compensation levels. In fact, the record reflects that the District's use of the SMSA jurisdictions as comparators provides sufficient basis upon which to determine the competitiveness of the District's compensation package and contains no

evidence of conditions in the local labor market which might require a larger sampling of prevailing compensation levels. In the absence of such showings, the use of comparators located outside of the Washington, D.C. SMSA is clearly inappropriate and statutorily prohibited.

In comparing its wage proposal to the compensation provided by the SMSA jurisdictions, it is clear that the Department's proposal provides compensation competitive with its local comparators. Ms. Sims testified as to her opinion, based on industry standards, that compensation should be considered competitive if it fell within 10% of the market median. The results of the Department's wage study reveal that, by the definition proffered by Ms. Sims, the compensation currently offered by the Department is already competitive among the SMSA jurisdictions for nearly all positions and on nearly all measures, and that the Department's wage proposal will further improve the District's relative position. Even Dr. McCarthy's analysis found that the District's wage proposals would be competitive on most measures relative to the Local Jurisdictions.

Moreover, the Department's proposed compensation package keeps firefighter wages competitive, does not threaten programs that address the District's growing population, and makes good public policy by better promoting firefighter retention.

Contentions of the Union

The Union's overall compensation package should be selected by the Arbitrator. It consists of reasonable base wage increases in three years of the proposed four-year term with no wage increase in the remaining year for a total increase of 10% over the four year term, a slight increase in the Department's legal benefit contribution rate,

an improvement in the differential paid to paramedics, and the maintenance of the status quo as to all other compensation issues. The Department's compensation package, however, would upend the status quo with regard to wages, overtime, scheduling, term, and other matters. As a whole, the Department's compensation proposal is clearly unreasonable, particularly in light of the record evidence of the District's strong fiscal position.

The Department seeks to adopt for this bargaining unit the base wage increases paid to Compensation Units 1 & 2, a proposal which would erode the bargaining unit's wages relative to other bargaining units in the District as well as to other firefighters, whether in the Northeast Corridor Cities or the SMSA jurisdictions. The Department and the Union have never before followed Compensation Units 1 & 2 in determining bargaining unit wages; rather, this bargaining unit, as public safety professionals, has traditionally received more in base wage increases than Compensation Units 1 & 2.

By contrast, the Union's proposal would better maintain the Department's standing as to compensation among its comparable jurisdictions – those located in the Northeast Corridor Cities. It is clear that the fire departments of the Northeast Corridor Cities, rather than the Local Jurisdictions or the SMSA jurisdictions, are the appropriate comparators to the Department for purposes of wages. As Dr. McCarthy established and Arbitrator Jascourt similarly found, the fire departments of the Northeast Corridor Cities share similar characteristics with the Department with respect to the factors that directly affect the amount and nature of the work performed, such as overall population, population density, daytime population and population density, housing density, and the extent of pre-1939 housing. Moreover, the record reflects that Washington, D.C. fell

within 25% of the Northeast Corridor Cities median with respect to every factor examined by Dr. McCarthy. By contrast, the District varies wildly in its relationship to the medians for the same factors relative to the Local Jurisdictions.

The Department provides no real basis to critique the use of the Northeast Corridor Cities as comparators beyond its misplaced arguments regarding the requirements of the D.C. Code. While Mr. Montross attempted to differentiate the largely single role firefighters employed by most of the departments of the Northeast Corridor Cities from the Department's dual role Firefighter-EMTs, his comparison makes clear that, given the additional duties and responsibilities of the Department's Firefighter-EMTs, the members of this bargaining unit deserve additional compensation. In addition, Mr. Montross, in his attempt to define additional comparator cities for the District, did not sufficiently demonstrate why his comparator cities are similar to the District and did not present any evidence as to differences in compensation between the Department and the fire departments of those cities. Moreover, the Department's own study of appropriate comparators relied wholly on data from the LGPA Annual Survey despite the presence of obvious errors in that data; in fact, the Department made no effort to verify data that even its human resource specialist believed to be inaccurate. In addition, the Department's analysis involved a misleading, unnuanced, and unreliable comparison of compensation across the SMSA jurisdictions and should not be given any weight.

Under nearly every measure, the District lags behind the five fire departments of the Northeast Corridor cities – in some cases, nearly 30% behind the median in compensation per hour as calculated over a 20 year average. Moreover, the Department's position relative to compensation as compared to its sister departments in the Northeast

Corridor Cities has eroded since the early 2000s. The Union's proposal would provide modest movement towards closing that gap; for example, it would still leave the Department 21% behind the median in compensation per hour as calculated over a 20 year average.

Given that the District has prospered despite the recent recession and that it continues to enjoy ongoing fiscal health, it is only appropriate that this proceeding result in a slight closing of this compensation gap. The Department's wage proposal, by contrast, would increase this gap.

Notably, the Union's proposal would require that retroactive pay be granted to all members in active duty status on the effective date of the increase, while under the Department's proposal, firefighters who have retired or separated from service will receive nothing. The Department's proposal would deprive these individuals of the pay to which they would otherwise be entitled for work that they have already performed.

In addition, it should be noted that the Department's linkage of a 14.3% wage increase with the implementation of a 12-hour shift – a clear vestige of the Department's missing Article 45 proposal – leaves open the possibility that the Department might implement a 3/3/3 schedule consisting of shifts of lengths other than 12 hours, thereby depriving the bargaining unit of the promised wage increase.

Discussion and Opinion

After careful consideration of the matter, I find that the Union's LBFO regarding Article 42 should be adopted over the LBFO of the Department. A summary of the principal reasons for this holding follows.

The initial question is one of comparators and standards. The most significant

comparators in this case are the internal comparators of the District's bargains with Compensation Units 1 & 2 and the Fraternal Order of Police as well as the external comparators of the wages, hours, and working conditions enjoyed by similarly trained, skilled, and ranked fire professionals of comparable years of service working in the paid fire departments in the Washington, D.C. SMSA. Since the end of the parity relationship between police and fire in the 1980s, there has been no showing of exact linkage between the wage increases negotiated for the IAFF bargaining unit and those bargained for the FOP or Compensation Units 1 & 2. Nor was there any showing of any precise linkage between the wage increases bargained for the IAFF bargaining unit and those bargained or imposed in any of the surrounding SMSA jurisdictions.

No rationale has been advanced for the IAFF bargaining unit receiving significantly lower wages than other District employees over both the recent past and the period since the Jascourt Award. The knowledge, skills, effort, and responsibilities required of the Firefighters has increased with the requirement that they be dual trained and perform dual role service as both Firefighters and EMTs. The financial conditions that affect the Department equally affect the remainder of the District. The anti-terrorism functions assumed by Firefighter-EMTs has become greater since FY 2001. Yet, if one examines the relative wage standing of the Firefighter-EMTs with the employees in Compensation Units 1 & 2 and the FOP, it is clear that the IAFF bargaining unit's historical relationship in terms of its compensation standing with those other groups of District employees and with those fire professionals working in the same SMSA has diminished significantly. The record revealed that during the period encompassing FY2001-11, the percentage wage increases provided to this bargaining unit were 8.25

percentage points behind than those that the District provided to Compensation Units 1 & 2. For the period that information was placed in the record relative to the FOP (FY 2004-08), the percentage wage increases provided to this bargaining unit were 5.25 percentage points behind those that the District provided to the FOP. The economic circumstances surrounding ability to pay were presumably the same for the District in connection with those other employee groups as it was with respect to the Department. No rationale was provided in the record in this arbitration that would explain this significant difference in wage movement. The record is devoid of other matters that were traded off in lieu of wage adjustments for the IAFF or other matters that were conceded by the other internal comparators for higher wages. As noted, the record is devoid of significant changes in the relative worth of the jobs in question that would explain or justify the significant differences. The record is also devoid of any evidence that the labor markets in terms of recruitment and retention was so different for the different groups of employees that it would explain the significant differences in wage movement.

In terms of comparisons with the wage levels of professional paid fire professionals in the surrounding jurisdictions, the record fails to provide any detailed historical comparisons. The testimony of the Department and the Union both focused on snapshots of the current wage levels and hours worked. The Department stressed hourly compensation, an approach that has some validity but masks the significant differences in overall salaries associated with the significant differences in hours, particularly in those fire departments where there is no collective bargaining. What was shown by the record, however, is that the career pay for Department fire professionals has dropped further behind the median similar figure for comparator local departments in the SMSA than was

the case in 2001. Further, even under the Union's LBFO, the bargaining unit employees will have received no general wage increases at all from October 1, 2006 to April 1, 2012 – a period of 5½ years. The record revealed no evidence of any other local department that went without any pay increases during this time period.

I agree with the Department that comparisons with fire department compensation in the 30-city survey or in the Northeast Corridor Cities are misplaced in this case. Neither group has been shown historically – before or after the Jascourt Award – to have played any significant role in bargaining wages for the IAFF bargaining unit. The criteria cited by Arbitrator Jascourt that led him to place greater weight in those comparators (e.g., level of pre-1939 construction) were not shown to be criteria that correlate with wage levels generally in the industry. Nor given the provisions of D.C. Code § 1-611.03 does it appear that these comparators are to be given any significant weight in the wage determination process. It may not be amiss to note as well that the difference in wage proposals in the Jascourt arbitration may well have been resolved in precisely the same fashion without emphasis upon either the 30-city or the Northeast Corridor City comparators.

The Department, however, overemphasizes the degree to which Section 1-611.03 dictates the criteria to be considered with regard to the compensation proposals submitted in this proceeding. Those provisions establish a compensation policy for the District, but do not explicitly provide for that policy to be the exclusive criteria for evaluating a compensation proposal. There has been no showing that it is the policy of the District to deny wage increases in all situations in which the existing wage levels are at or near the median wage levels for the same job titles in the surrounding SMSA jurisdictions. If that

were the case, then collective bargaining over wages would be restricted, if not as a practical matter eliminated, with wage change for District employees defaulting to whatever changes are effected by the surrounding jurisdictions through either collective bargaining (where present) or, in the absence of collective bargaining, by unilateral determination. To the contrary, Section 1-617.02(d) is the provision of the CMPA that contains the criteria that a third party impasse neutral is to consider in resolving each impasse item, including compensation matters. Section 1-617.02(d) lists four criteria that must be considered by the impasse neutral, but does not preclude consideration of other factors, particularly factors that have historically be utilized in interest arbitrations both involving the District and elsewhere in the public sector. Those generally utilized interest arbitration factors include, among others, maintenance of historical pay relationships, internal and external equity going forward, and consideration of total compensation and working conditions, as well as hourly wage rates. Many interest arbitrators have observed that the Award should reflect what the Parties may well have voluntarily agreed to if they had bargained at arms' length and in good faith. It is my view that, given the totality of the record evidence, the Union's LBFO with respect to Article 42, and its compensation package overall, is closer to that position than the LBFO of the Department. If one focuses solely on the period through FY 2014, as to which there are proposals from both parties, the Union's LBFO is for an overall pay increase of 10.0%, over a four year period, with the wage increases slightly backloaded, whereas the District's LBFO is even more backloaded and after considering its overtime proposal may well be negative in terms of its overall effect on compensation even after years of zero wage increase and real wage loss. This represents the wage adjustments scheduled

after 5½ years of wage stagnation and real wage loss (after taking into account inflation).

The Union's LBFO has additional advantages over that of the District. First, it helps mitigate against the adverse effects that inflation has had on real wages for the IAFF bargaining unit. As noted, the IAFF salaries since FY 2001 have not kept pace with inflation, just as they have not kept pace with those of other District employees or those of fire professionals in the surrounding jurisdictions. While these gaps will not be wholly closed by either LBFO, the Union's proposal will help improve the situation and that of the District may well worsen the problems. Second, selection of the Article 42 LBFO is a decision not simply with respect to wages, but also a selection of the total compensation package and also, as a practical matter, of contract term. By adopting a shorter term and having bargaining take place much earlier than 2017, it affords the opportunity to revisit and address the very significant Article 18 and Article 45 issues at an earlier point in time and also allows the Parties to timely address the issue of adjustments in contributions under Article 48 for Dental and Optical benefits, as none have been made since October 2006. Third, the District has offered no comparators in support of its LBFO other than the fact that it mirrors (but falls slightly short) of the bargain reached with respect to Compensation Units 1 & 2. Thus, the affirmative support for embracing the District's wage proposal is relatively weak. To the extent, however, that the wage adjustments for Compensation Units 1 & 2 and/or the FOP provide a compelling framework for future wage increases, that framework may be considered as well in the bargaining for FY 2015 and beyond.

For all of these reasons, I adopt the Article 42 LBFO of the Union.

3) Article 43 – Technician's Pay/Paramedic Pay

Article 43, Technician's Pay/Paramedic Pay, of the 2004 Agreement provides as follows:

TECHNICIAN'S PAY/PARAMEDIC PAY

Any position currently designated by the Department as a Technician or Firefighter/Paramedic shall be incorporated as a position with a regular rate of pay on the Fire Service Salary Schedule at the current rate of pay, subject to all wage increases provided through this Agreement. As such, all "differentials" or "other" forms of pay for a Technician or Firefighter/Paramedic, which existed under past agreements, shall be included in the base pay and all "differentials" or "other" forms of pay which are paid solely due to these designations, other than base pay, shall be abolished. It is understood that Arson Investigators shall be treated as technicians and compensated at the same level as Firefighter/Paramedics under this Agreement.

The Department shall develop appropriate position descriptions and position titles for the new technician class commensurate with existing classification rules and procedures and consistent with the provisions of this Agreement. Salary schedules for these positions shall be developed by agreement of the parties consistent with the terms of this Article, prior to the effective date of this Agreement. Only those employees designated by the Department as and actually serving as Technician or Firefighter/Paramedic shall be eligible to be paid at that rate on the Fire Service Salary Schedule.

Background

While the language of Article 43 does not make explicit reference to the amount of the rate to be paid to Technicians or Firefighter-Paramedics, there was no dispute that the existing differential is 5% of pay at the entry rate (Class 1, Step 1) for Technicians and 10% of pay at the entry rate (Class 1, Step 1) for the Firefighter-Paramedics and the Arson Investigators.

The Department's LBFO would make no change to the existing provisions of Article 43.

The Union's LBFO initially sought to change the differentials provided under Article 43 to a percentage of the individual rate of pay (i.e., the Class and Step) received by the Technician or Firefighter-Paramedic. The Union's final LBFO, however, proposed no change to the pay differential for Technicians (5% of Class 1, Step 1 pay) or Arson Investigators (which would remain at 10% of Class 1, Step 1 pay), but proposed to

both decouple Arson Investigator and Firefighter-Paramedic pay and increase the differential for Firefighter-Paramedics to 15% of Class 1, Step 1 pay.

Position of the Department

No reason was shown to increase the differentials for Technicians, the Arson Investigators, or the Firefighter-Paramedics.

The Department's LBFO should be adopted and that proposed by the Union should not.

Position of the Union

The differential for the Firefighter-Paramedics should be granted. The record revealed that there are significant recruitment and retention problems for this group of highly trained fire professionals. Additional compensation should both ease recruitment and also provide greater incentives for some of the Firefighter-EMTs to take and complete Paramedic training.

The Union's LBFO should, therefore, be granted.

Discussion and Opinion

The record revealed significant vacancies among Firefighter-Paramedics. According to the verbiage of Article 43, members of the bargaining unit receive a Technician or Paramedic differential not simply for being trained to work in those capacities, but only when the qualified individuals actually work in those functions. There was no assertion that this item is a matter of significant cost that would outweigh the obvious benefits of increasing the number of trained Firefighter-Paramedics available for duty.

The statutory criteria set forth in Section 1-617.02(d) support adoption of the

Union's LBFO. The protection and maintenance of the public health, safety and welfare will be enhanced by the ability to recruit and retain greater numbers of trained Firefighter-Paramedics (from the outside and from within). The Department argued that the shortage is sufficiently severe that, absent hiring additional Paramedics, some of the ambulances may be taken out of service solely as a result of a shortage of qualified personnel. There are no existing laws, rules, or regulations cited that would be affected by or bear upon the disposition of this item. There was no showing that the modest cost of this proposal was such that the District would be unable to comply with the terms of the Award. Finally, providing for a modest increase in pay due to a need to recruit and retain appropriate skilled employees is fair, reasonable, and consistent with the manner that such issues are often resolved in bargaining.

For those reasons, the Union's LBFO with respect to Article 43 is adopted.

4) Article 45 – Hours of Work/Schedule/Leave

The current language of Article 45 of the 2004 Agreement is as follows:

HOURS OF WORK/SCHEDULE/LEAVE

Section A – General

Nothing in this Article shall be construed to prevent the Employer from taking any action that constitutes management's right under D.C. Official Code (2001 ed.) § 1-617.08, provided, however, that in taking such action the Employer shall comply with the requirements of Article 6 of this Agreement.

Section B - Tour of Duty

- (1) The basic workweek for members working in the Fire Fighting Division shall be 42 hours averaged over a 4-week period.
- (2) The work schedule for members working in the Fire Fighting Division shall be 24 hours on duty and 72 hours off duty.

Section C - Sick Leave

Bargaining unit employees in the Fire Fighting Division shall earn sick leave at the rate of 4.5 hours per bi-weekly pay period.

Section D - Annual Leave

Bargaining unit employees in the Fire Fighting Division with less than three (3) years of service shall earn annual leave at the rate of 4.5 hours per bi-weekly pay period;

Bargaining unit employees in the Fire Fighting Division with three (3) years but less than fifteen (15) years of service shall earn annual leave at the rate of 7.0 hours per bi-weekly pay period.

Bargaining unit employees in the Fire Fighting Division with fifteen (15) or more years of service shall earn annual leave at the rate of 9.0 hours per bi-weekly pay period.

Section E - Leave Balances Upon Transfer Or Reassignment

A member who is transferred or reassigned from a 40-hour-per-week position to a 42-hour-per-week position shall have his/her accrued sick leave balance increased by taking the number of hours times 1.125 to reflect the higher earning rate.

A member who is transferred or reassigned from a 42-hour-per-week position to a 40-hour-per-week position shall have his/her accrued sick leave balance decreased by taking the number of hours multiplied by .889, or the number of hours divided by 1.125 to reflect the lower earning rate.

A member who is transferred or reassigned from a 40-hour-per-week position to a 42-hour-per-week position shall have his/her accrued annual leave balance increased by taking the number of hours times 1.125 to reflect the higher earning rate.

A member who is transferred or reassigned from a 42-hour-per-week position to a 40-hour-per-week position shall have his/her accrued annual leave balance decreased by taking the number of hours multiplied by .889, or the number of hours divided by 1.125 to reflect the lower earning rate.

Section F: Maximum Annual Leave Carried Forward

The maximum number of annual leave hours that can be carried forward into any leave year shall be 264 hours for bargaining unit members of the Fire Fighting Division.

The Department has proposed that the language of Article 45 as set forth in the 2004 Agreement be eliminated entirely and proposes in its place the following language, which it refers to as "Article 45-A":

LEAVE

Section A - Sick Leave

Bargaining unit employees in the Operations Division shall earn sick leave at the rate of 4.5 hours per bi-weekly pay period.

Section B - Annual Leave

Bargaining unit employees in the Operations Division with less than three (3) years of

service shall earn annual leave at the rate of 4.5 hours per bi-weekly pay period;

Bargaining unit employees in the Operations Division with three (3) years but less than fifteen (15) years of service shall earn annual leave at the rate of 7.0 hours per bi-weekly pay period;

Bargaining unit employees in the Operations Division with fifteen (15) or more years of service shall earn annual leave at the rate of 9.0 hours per bi-weekly pay period.

Section C - Leave Balances Upon Transfer Or Reassignment

Leave balances will be calculated based on the relevant work schedule and assignment.

Section F: Maximum Annual Leave Carried Forward

The maximum number of annual leave hours that can be carried forward into any leave year shall be 264 hours for bargaining unit members of the Fire Fighting Division.

The Union seeks to maintain the existing language of Article 45 as set forth in the 2004 Agreement.

Background

As a preliminary matter, the Parties have agreed that their respective participation in this proceeding is without prejudice to any rights which each might have or any positions which each might take or have taken with regard to the negotiability of the Union's proposals relative to Article 45.

In light of the Department's challenge to the negotiability of certain items addressed within Article 45, the PERB's decision in favor of the Department's position, and the stated position of each of the Parties that it plans to fully pursue all avenues of appeal as to the PERB's decision until all practical options for appeal are exhausted, the undersigned requested that the Parties submit their proposals for Article 45 in the alternative ("asterisked") to account for all reasonably expected outcomes of the negotiability dispute. The intention of the undersigned was to allow the Parties to fully address the merits of their Article 45 proposals in this proceeding rather than to do so incompletely and find that, after the final resolution of the negotiability dispute, a return

to the bargaining table or impasse resolution procedures could address those issues left following the resolution of the negotiability dispute by the PERB and the courts. The undersigned, both in a conference call and in e-mail communications, instructed the Parties prior to submission of the final LBFOs as to his preference that the award on Article 45 be provisional (i.e., asterisked), with enforcement contingent upon a final determination of negotiability. Further, the submission of the asterisked proposal was explicitly noted not to waive either Party's positions regarding negotiability and, if the Department's position on non-negotiability is ultimately upheld, then it was noted that the interest arbitration award preserved all rights and defenses of the Parties relative to any impact and implementation bargaining flowing from any change actually implemented to the platooning and work schedules.

The Union has resubmitted its prior proposal as asterisked, meaning that IF the terms of Article 45, Section B, are finally found not to be negotiable, then that provision will be treated as a nullity in light of the Department's stated refusal to voluntarily include it in the Agreement at issue in this impasse. Notwithstanding the guidance provided prior to the submission of the LBFOs indicating a preference for the asterisked approach, the Department submitted a revised final LBFO that did not include an asterisked or alternative feature.

Battalion Fire Chief Brian K. Lee testified regarding the development of the current 24 hours on/72 hours off, four platoon tour of duty which the bargaining unit Firefighter-EMTs currently work. He explained that, in 1965, the Department had adopted and implemented a three platoon service delivery model. Under that model, the tour of duty consisted of three ten-hour day shifts, followed by three fourteen-hour night

shifts, followed by three calendar days off. This model resulted in an average workweek of 57 hours, which the Department reduced to a 48 hour workweek through the use of additional days off that were referred to as paddle or Kelly days.

Battalion Chief Lee further testified that, from 1986 to 1989, the Department implemented an experimental tour of duty consisting of an on-duty period of 24 hours followed by an off-duty period of 48 hours, but still utilizing a three platoon model. Under this 24/48 tour of duty, the Department would still use Kelly days in order to maintain an average workweek of 48 hours. The 24/48 tour of duty also permitted individual firefighters to arrange, by informal agreement with colleagues, to stagger their respective arrivals at and departures from work so as to stagger relief.

Battalion Chief Lee explained that, beginning in September of 1989, the Department reduced the average workweek for firefighters to 44.8 hours while maintaining a three platoon model. It did so by increasing the number of scheduled Kelly days for each firefighter.

In the mid-1980s, a number of lawsuits had been filed against the District that alleged that the Department had discriminated against African American firefighters in its hiring and promotional practices. These lawsuits were consolidated into a single class action proceeding entitled Hammon v. Barry, Civ. A Nos. 84-0903 (CRR), 85-0782 (CRR). In November of 1990, the parties to that proceeding – two classes of firefighters (one Caucasian and the other African American), the Union, the District, certain retired firefighters, and the representative of a deceased firefighter – executed a settlement agreement resolving that matter and appointing a Special Master to oversee the implementation of the terms of their agreement. In an opinion dated November 6, 1990

and amended on November 13, 1990, United States District Judge Charles R. Richey issued an order implementing, with modest changes, a consent decree agreed to by the parties to the proceeding and dismissing the class action. Judge Richey's opinion stated in relevant part that:

[T]he Settlement Agreement provides for: about 180 immediate promotions (based upon an attached schedule) to fill most outstanding vacancies; the creation of a new (fourth) platoon of firefighters with many new Sergeant, Lieutenant, and Captain positions; the development and administration of fair promotional examinations to fill some outstanding and all future vacancies. In return for the foregoing, the City avoids any finding of liability and enhances the public safety by improving Fire Department working conditions and morale and making long overdue promotions. Finally, all parties avoid the risks and costs of proceeding to trial.

Hammon v. Barry, 752 F.Supp. 1087, 1090 (D.D.C. 1990) (internal citations omitted).

The settlement agreement specified that:

A fourth platoon will be instituted by June 1, 1991, with the result that 24 new Sergeant positions, 56 new Lieutenant positions and 9 new Captain positions will be created.

Id. at 1003. The consent decree itself provided that:

This Consent Decree shall remain in effect for three years from the date of its approval. Upon expiration of the three year period, the Decree shall expire on its own without any further motion by the parties. Should all events contemplated by this Decree occur prior to the expiration of three years, any party may move the Court for an order that the Decree should be deemed to have expired, and the Court may so order.

Id. at 1110.

Battalion Chief Lee testified that, by Special Order No. 24, Series 1991 (05/31/1991), the Department added a fourth platoon and thereby increased the size of its workforce by at least 300 employees. At the same time, the Department also instituted a tour of duty of 24 hours on duty followed by 72 hours off duty, and increased the average workweek from 44.8 hours to 45 hours. He further explained that, in 1993, the Department had by negotiated agreement with the Union reduced the firefighter workweek to 42 hours, and that the combination of the 24/72 tour of duty, the four platoon model, and the 42 hour workweek had eliminated the need for Kelly days.

Thomas Tippet, a retired member of the Department, former Interim Fire Chief, and a former Union president, explained that the Department and the Union had initially explored changing to 24-hour shifts in the mid-1980s in response to concerns regarding increases in both workload and overtime use. The Department and Union agreed, as part of their collective bargaining agreement for FY 1985 through 1987, to implement on an experimental basis a work schedule of 24 hours on-duty followed by 48 hours off-duty for a period of approximately one and a half years. During this time, a joint labor-management committee made findings as to possible issues of concern associated with the experimental schedule. Mr. Tippet testified that, while the committee had initially expected to encounter problems related to fatigue (including its impact on the use of annual leave and sick leave), the committee found that the previously-increasing rate of use of sick leave had decreased, that overtime use had declined, and that fatigue had not led to additional vehicle accidents or on-the-job injuries. The results of a survey distributed by the Department in April of 1987 regarding the experimental schedule reflected that an overwhelming majority of respondents indicated that they preferred to remain on the experimental schedule.

Mr. Tippet stated that in the course of negotiating their subsequent term agreement, the Parties agreed to maintain the 24/48 tour of duty and to reduce the average workweek to 44.8 hours with the use of Kelly days. He testified that in order to obtain the schedule and the changes to the workweek, the Union had given up a personal leave day and a uniform allowance which it had previously obtained, and had agreed to reduced the annual leave and sick leave accrual rates for bargaining unit members.

Mr. Tippet testified that, in order to accommodate the fourth platoon mandated

by the settlement agreement in Hammon v. Berry, the Department's schedule was modified to the 24/72 tour of duty with an average workweek of 44.8 hours. He explained that, during negotiations for the Parties' FY 1991-94 collective bargaining agreement, the Union had obtained a reduction in the average workweek to 42 hours and had, in exchange, accepted reduced wage increases and further reductions in annual leave and sick leave accrual rates.

Battalion Chief Lee testified that the pension earnings of a Firefighter-EMT hired after 1980 are based on the salary of that individual in his or her three highest-earning years. He admitted that any salary increase for Firefighter-EMTs, including the Department's proposed 14.3% increase, would benefit employees at retirement by boosting their salaries.

Mr. Beaton testified regarding the Department's intention to shift from a four platoon service delivery model to a three platoon service delivery model. He stated that under the current four platoon model, Firefighter-EMTs are scheduled to work an average workweek of 42 hours for each of the weeks within each 28-day cycle described in Section 7(k) of the FLSA and are scheduled to work a total of 2,184 hours each year. Mr. Beaton explained that the Department plans for each Firefighter-EMT to be away from work, through the use of planned leave time, for 457 of those hours each year – or approximately 21% of their scheduled hours of work, leaving only 1,727 actual work hours per Firefighter-EMT per year.

Mr. Beaton described the three platoon 3/3/3 model to which the Department sought to transition. Under this tour of duty, the average Firefighter-EMT workweek in a 28-day cycle equates to 57 hours for 10 four-week cycles and 54 hours for 3 four-week

cycles during the period of a year. In order to correspond to the Department's proposed average Firefighter-EMT workweek of 48 hours, the 3/3/3 tour of duty requires schedule adjustment through the use of Kelly days to reduce each Firefighter-EMT's scheduled hours of work from an average of 57 or 54 hours to an average of 48 hours per week. Mr. Beaton admitted that under the 3/3/3 tour of duty, Firefighter-EMTs would still use various types of planned leave, reducing the hours that they would be available to work, but noted that Firefighter-EMTs would be scheduled to work 2,496 hours per year and, even assuming that approximately 21% of those hours were lost to leave, each firefighter would still be expected to work over 1,950 hours per year.

Mr. Beaton explained that the Department utilizes a "seat hour" staffing concept that accounts for all hours in the course of a year in order to plan for Firefighter-EMT staffing of fire trucks, ambulances, other emergency response vehicles, as well as for other operational positions. He further explained that to staff one seat (e.g., a Firefighter-EMT paramedic in a rescue engine or a driver in a ladder company) 24 hours per day, 365 days per year requires a fungible hypothetical Firefighter-EMT to be present at work for 8,760 hours in that year – each seat requires 8,760 seat hours for full coverage. He further noted that certain requirements relative to the certification and/or rank required by the duties associated with a particular seat further complicate the issue of seat coverage.

Mr. Beaton testified as to the following calculations regarding the seat hours required in order to fully staff the Department's operational units:

Unit Type	# of Seats/Unit	# of Units	# of Seats	# of Hours/Day	# of Days/Year	# of Seat Hours/Year
Paramedic Engine Company	4	21	84	24	365	735,840
Engine Company	4	12	48	24	365	420,480
Truck Company	5	16	80	24	365	700,800
Rescue Squad	5	3	15	24	365	131,400
HazMat Squad	5	1	5	24	365	43,800
Ambulance	2	25	50	24	365	438,000
Fire Boat	5	1	5	24	365	43,800
Foam Unit	1	2	2	24	365	17,520
Air Support Unit	1	2	2	24	365	17,520
DFC	2	1	2	24	365	17,520
BFC	2	7	14	24	365	122,640
EMS Supervisors	1	7	7	24	365	61,320
Safety Officer	1	1	1	24	365	8,760
ELO (OUC)	1	2	2	24	365	17,520
FLO (OUC)	1	1	1	24	365	8,760
Totals		102	318	24	365	2,785,680

He explained that the Department had calculated that under the four platoon model, 1,624 Firefighter-EMTs (including four non-bargaining unit Deputy Fire Chiefs and 28 non-bargaining unit Battalion Fire Chiefs) were needed to staff the 318 seats identified above, requiring each platoon to be staffed by 406 Firefighter-EMTs. Mr. Beaton further explained that the Department had calculated that under the three platoon model, 1,413 Firefighter-EMTs (including three non-bargaining unit Deputy Fire Chiefs and 21 non-bargaining unit Battalion Fire Chiefs) were needed to staff the 318 seats, requiring each platoon to be staffed by 471 Firefighter-EMTs. Thus, 14.9% fewer employees are needed under a 3/3/3 model than under the present arrangement. After accounting, however, for the additional pay associated with the additional hours of work that each of the 3/3/3 Firefighter-EMTs and officers will need to work, as well as the Department's commitment to only reduce the working force by attrition, it is apparent that there will be no monetary savings in the foreseeable future by the conversion. To the contrary, the Department may incur significantly more in salary costs after any conversion to a 3/3/3 model than before.

Mr. Beaton, who served as the Department's Chief of Staff from 2008 to 2010, testified that the Department had been subjected to significant oversight by the District of

Columbia Council because it repeatedly exceeded its budget for overtime premium pay. He admitted that vacancies, both temporary (an employee's absence from a scheduled day of work) and permanent (an unfilled position), contribute significantly to the Department's use of overtime.

Mr. Beaton also admitted that the Department has, while utilizing the four platoon model, met or come close to meeting nearly all of its Key Performance Indicators ("KPIs"), which are used to measure the Department's overall performance, though he noted that the Department had also recorded its lowest KPI scores while utilizing the four platoon model. KPIs include measures such as the Department's average time to arrive at an EMS call, the average time for a paramedic to arrive at a high priority EMS call, and the average response time of an ambulance to an EMS call.

Mr. Beaton testified that the Mayor's Office had directed the Department, in the spring of 2010, to eliminate one of its platoons due to economic constraints, but admitted that the platoon elimination had not in fact occurred.

Chief Ellerbe stated that he anticipated that the Department would deploy the additional officers available as a result of the elimination of the fourth platoon by:

- filling any existing vacancies of the remaining platoons based on time in grade, length of service, additional training or certifications, and time on the job;
- accepting volunteers for new assignments; and
- by assigning any other remaining personnel to Battalions as fill in officers based upon the previously established criteria.

He further testified that the Department would consider increasing the number of officers assigned to the Training Academy to support increased training of personnel.

Chief Ellerbe testified that he believed that he had the legal ability to unilaterally direct the Department to convert from a four platoon model to a three platoon model regardless of the outcome of the Department's bargaining with the Union. He testified that neither he nor his predecessors had done so previously because the relevance of the Department to homeland security issues had been highlighted only relatively recently; he further stated that such a unilateral change had not been made in an effort to avoid the heated confrontation between the Department and the Union which would be expected to be the consequence of taking such action. Chief Ellerbe further acknowledged that the D.C. Council would likely have to approve the change prior to implementation because it would impact the manner in which the Department would deliver services to the residents of the District.

Chief Ellerbe acknowledged that 24-hour shifts were the norm in the majority of large fire departments in the United States, including within the Northeast. He admitted that the Department had, since he began his service as Fire Chief, been able to bring overtime use to a historic low sufficient to meet the Department's overtime budget while on a four platoon model with a 24/72 tour of duty without closing fire stations, significantly reducing service, or conducting a reduction in force. He further admitted that the length of the workweek had historically been a subject of collective bargaining the Department and the Union dating back to at least the Parties' 1986 collective bargaining agreement.

Chief Ellerbe admitted that the Philadelphia Fire Department utilized a 42-hour workweek with a four platoon model and a tour of duty of two days on duty, two nights on duty, and four days off, but testified that the responsibilities of the Department were

significantly different in light of its unique portfolio of responsibilities and Washington, D.C.'s status as a target for terrorist attacks.

Battalion Chief Lee testified that the Department has a liberal policy toward permitting Firefighter-EMTs to voluntarily swap shifts amongst themselves. He also testified that, operationally, it was not possible to shift some members of the bargaining unit to a 12-hour shift while keeping others on a 24-hour shift, as doing so would hinder the Department's ability to deploy personnel across its various apparatus.

The Union introduced into evidence the Department's Grade.DC.Gov scores for May through October of 2013, throughout which time the Department was utilizing the four platoon model. The Department was graded for these periods as follows:

May 2013	June 2013	July 2013	August 2013	September 2013	October 2013
A+	A+	A-	A	A	A

As part of the Department's wage analysis, the District's Department of Human Resources determined that 23% of Department personnel reside in the District, 59% reside in Maryland, and 10% reside in Northern Virginia, for a total of 92% of Department personnel residing within the Washington, D.C. metropolitan area.

The Department's witnesses identified a number of rationales for the transition to a three platoon model.

- Issues Relative to Homeland Security

The Department's witnesses asserted that Washington, D.C. is viewed as a top tier terrorist target along with other major cities, including New York, Chicago, Los Angeles, and Houston and identified a homeland security rationale as the most compelling reason for the change to the 3/3/3 tour of duty and three platoon model, asserting that the use of a three platoon model would significantly increase the Department's daily force

multiplication capacity. While under the four platoon model, only one platoon of Firefighter-EMTs is on duty every 24 hours (with another planning to report for duty thereafter), the three platoon model would result in one platoon of Firefighter-EMTs on duty, with another platoon planning to report for duty within the next 12 hours. By definition, 33% of the Department's total force would be on duty at any one time, and approximately 67% of the Department's total force would report for work on any given day. As a result, the total number of Firefighter-EMTs available to work should the on-duty platoon continue on duty because of some unplanned emergency or other exigent event is effectively doubled. Moreover, because of the increased number of working shifts in the same period of time under the 3/3/3 tour of duty and the three platoon model, the Department would increase its recall capacity during unplanned emergencies or other exigent events in which might impact the ability of a significant percentage of its forces to perform their duties. Despite the fact that the change to the three platoon model would result in a reduction in the Department's total number of FTEs, the Department's witnesses speculated that, under the 3/3/3 tour of duty and the three platoon model, the Department could expect that a large percentage of its total off-duty force would be able to quickly be brought to bear on a situation, but disputed that a similar response could be expected from off duty Firefighter-EMTs working a four platoon 24/72 schedule.

- Alleviation of the Department's Paramedic Shortage and Other Staffing Issues

The Department's witnesses also asserted that the three platoon model would improve the Department's ability to fully staff and, potentially, increase ambulance coverage through the increase in Firefighter-EMT paramedics available for work per platoon. The Department has experienced an extreme and ongoing shortage of qualified

paramedics and, despite the Department's efforts, the current influx of paramedics into the Department is insufficient to keep pace with paramedic attrition. They noted that, in order to comply with national EMS certification standards, it takes a minimum of 12 months to hire, train and actually deploy firefighter paramedics into operations and that even with the Department's Training Academy working at full capacity with both day and night training classes, it was projected that it would take at least two years for the Department to fully staff four platoons.

The Department's witnesses also maintained that it had or soon would have duty-ready ambulance vehicles held out of service only because of a lack of manpower, and asserted that the redistribution of Firefighter-Paramedics from the fourth platoon would better enable the Department to staff up those ambulance vehicles when necessary, as well as to place additional units into service to respond to mass casualty events, unannounced mass gatherings, weather events, or other emergency situations and to implement a peak-hours redeployment plan which had previously been blocked by the D.C. Council due to concerns as to whether the Department had sufficient ambulance vehicles and paramedics to successfully implement the plan.

In addition, the Department's witnesses stated that the change from a four platoon model to a three platoon model would give the Department an excess of personnel who would be available for re-assignment onto the three remaining platoons, supplementing the normal staffing of the platoon with extra officers, technicians, Firefighter-Paramedics, Firefighter-EMTs, and others, allowing for better management of temporary vacancies and training functions.

- Cost Savings

The Department's witnesses asserted that a transition to a three platoon model will result in long-term cost savings to the Department. With the elimination of one platoon, the overall number of FTEs required to staff the Operations Division would be decreased, permitting the Department's total FTE count to be reduced without reducing its operational service capacity, though at least part of the Department's anticipated reduction in FTE count would be attributable to the six extra hours of work per week per FTE which would result from the 48 hour average workweek which the Department sought to implement – time that the Department would need to pay for at either straight time or time and one-half rates (depending upon the terms of Article 18 at the time that any such change in work schedules is implemented).

The Department's witnesses were inconsistent as to whether the Department intended to achieve cost savings by encouraging additional attrition in light of the elimination of the fourth platoon. They at various points asserted both that the Department expected attrition to reduce its ranks with significant eventual cost savings of approximately \$60,000 per eliminated FTE, and that the excess capacity of firefighters per platoon arising from the elimination of the fourth platoon would allow the Department to fill vacancies, reduce the Department's overtime pressures, and deploy firefighters for training on critically needed skills enhancements.

The record was not clear as to the Department's current number of permanent vacancies nor as to how many of the vacancies would be filled by former members of the fourth platoon or eliminated because they related to positions that had been part of the fourth platoon. However, the Department's witnesses admitted that a significant portion

of the estimated cost savings from the reduction in FTEs flowing from the elimination of the fourth platoon would be neutralized by the Department's significant number of permanent vacancies (i.e., unfilled FTE positions).

In addition, the Department asserted that a 3/3/3 tour of duty with 12-hour shifts would allow the Department to more efficiently and cost-effectively schedule training within a Firefighter-EMT's regular tour of duty than under a 24/72 tour of duty, and would also increase training hours for new Firefighter-EMTs on probationary status and increase their exposure to more experienced colleagues.

- Reduction of Safety and Fatigue Risks

The Department claimed that the reintroduction of a 12-hour shift length would enhance the safety of Department personnel and the public by decreasing fatigue and incidences of personnel injury and miscues. The record reflects a small number of complaints from D.C. residents which indicated that Department personnel had appeared disheveled and less than optimally alert in responding to early morning calls. In support of its claim, the Department's witnesses asserted that the use of a three platoon model is consistent with the use of a 12-hour shift as recommended by a report issued by the District's Task Force on Emergency Medical Services on September 27, 2007. The Task Force's report stated in relevant part that:

The Mayor and Chief shall work together to come with a recommendation to the Council to implement shorter shifts for all employees and other recommendations to ensure the goal of having alert and awake employees who can provide competent patient care.

This recommendation also included a footnote, which stated, "It is the sense of the Task Force that the Mayor and Chief should consider schedules that avoid having employee work more than 24 consecutive hours, especially with additional hours on ambulances."

Various of the Department's witnesses testified as to their belief that a 12-hour

shift would allow for more adequate rest time resulting in decreased sick leave usage, a decrease in work-related injuries, and improved emergency fire and emergency medical services, particularly during the overnight hours, with an emphasis on the increased demands placed on those Firefighter-EMTs primarily responsible for responding to EMS calls.

The Department's witnesses also asserted that, by reintroducing the 12-hour shift, it would move towards recognized safety thresholds – including U.S. Department of Transportation CDL guidelines for the use of the Department's emergency response vehicles – and would be more compliant with current industry standards, such as the results of recent healthcare industry sleep deprivation studies suggest a correlation between working too long without a break and diminished skills and alertness, particularly when assigned to 24-hour rotating shifts. The Department introduced into evidence a June 2007 report sponsored by the International Association of Fire Chiefs, which states in relevant part at page 66 that:

In general, fixed shifts cause the least disruption to circadian rhythms, provided that workers maintain the same sleep and wake cycle on their rest and work days....

Rotating shifts are a means to deter workers from combining fixed daytime commitments with their nighttime shift work. Studies on shift workers have shown it takes about 21 consecutive days for circadian rhythms to fully adjust to night shift. Most rotating shift schedules make changes too rapidly to allow circadian adjustment to the new work pattern.

The June 2007 report also states at pages 55-56 that:

The city of Austin changed EMS staffing to distribute shorter shifts to the busiest sites. They reported their staff survey findings that led to the change. Prior to the change when 24 hour staffing still was in effect, most paramedics felt the demands for overtime were excessive, and one-third reported working more than 24 hours without sleep in a single week. The majority felt that 24 hour shifts resulted in a decrement in their abilities, and most (72%) reported that 12 hours was the maximum time that it was safe to take calls at the busiest stations.

....

The pre-hospital EMS continuum includes the emergency room. Discussions of

emergency room staffing patterns generally compare 8 versus 12 hour work lengths, as busy shifts longer than 12 hours are associated with unacceptable fatigue and recognized decrements in performance. The 12 hour threshold for declining performance of critical tasks has been confirmed in other studies of medical personnel. Twelve consecutive hours also is the maximum duration that the Institute of Medicine recommends nurses work during a 24 hour period.

(internal citations omitted). Battalion Chief Lee testified that he was unsure as to whether the change described in the report for the city of Austin also involved a change in the average workweek of EMS personnel.

The Union introduced evidence, including the testimony of Captain Edward Smith, the Union's President, which reflected that the City of Toronto Fire Services had implemented a trial program in 2006 whereby its firefighters, who had worked a combination of 10- and 14-hour shifts with an average workweek of 42 hours, were transitioned to a schedule of 24-hour shifts while maintaining the same average workweek of 42 hours, and that, in a 2009 report, a joint labor-management committee had noted the success of the trial program and recommended that Toronto Fire Services and the Toronto Professional Fire Fighters' Association negotiate the permanent adoption of the 24-hour shift schedule. After the introduction of this evidence, Battalion Chief Lee testified that he had corresponded with David Sheen, Division Chief for Staff Services at Toronto Fire Services, who had confirmed that the firefighters of that department were single role and were not responsible for operating ambulance units.

The Union also introduced into evidence a study sponsored by the Canadian Defense Research and Development Division that compared the following five firefighter schedules:

Schedule 1	Schedule 2	Schedule 3	Schedule 4	Schedule 5
A 28-day cycle: • Four (10 hr) day shifts • Six days off	A 28-day cycle with a 24-hr Sunday: • Four (10 hr) day shifts • Six days off	A 3-day/3-night schedule: • Three (10 hr) day shifts	A 24-hr/72-hr proposed schedule: • 24 hours on	A 24-hr proposed schedule: • 24-hrs on • 24-hrs off

<ul style="list-style-type: none"> • Four (14 hr) night shifts • Four days off • Three (10 hr) day shifts • Three (14hr) night shifts • Four days off 	<ul style="list-style-type: none"> • Three (14 hr) night shifts • Five days off • Two (10 hr) day shifts • 14 hrs off • One (24 hr) work period • 10 hrs off • Two (14 hr) night shifts • Four days off 	<ul style="list-style-type: none"> • Three (14 hr) night shifts • Six days off. 	<ul style="list-style-type: none"> • 72 hrs off 	<ul style="list-style-type: none"> • 24-hrs on • 120-hrs off
--	---	---	--	--

The Canadian Defense Research and Development Division study concluded that “[w]ith respect to sustaining cognitive performance in the face of nocturnal alarms, clearly schedule 4 is the best schedule and schedule 5 is the second best.”

The Department introduced into evidence an article published in Volume 54, Number 2, of the Journal of Occupational and Environmental Medicine entitled “Fatigue Risk Management in the Workplace.” The Department sought to highlight certain sections of the study that addressed, among other things:

- the impact of sleep deprivation on neurobehavioral performance;
 - the connection between nurses working extended shifts (12.5 hours or longer) and suffering an increased risk of occupational injury, making medical errors or suffering decreases in vigilance;
 - initiatives pursued in the fields of medical education and highway transportation to limit the workweeks of medical residents and drivers, respectively; and
 - the impact of particular tasks on alertness as well as the tendency for concentration and productivity to decline in the early afternoon, during the early hours of morning and toward the end of any given shift.
- Timely Processing of Reports

The Department’s witnesses asserted that the implementation of the four platoon model had resulted in an unexpected increase in the length of time it took for the

Department to become aware of, investigate, and resolve critical incidents, as the 72 hour gap between the end of a Firefighter-EMT's shift and the beginning of his or her next shift resulted in a delay in the generation of written reports and their processing the chain of command. They further stated that the shift to three platoons would reduce the systemic barriers to the prompt processing of such reports by scheduling Firefighter-EMTs to be on duty for six out of every nine calendar days, rather than for one out of every four calendar days as under the four platoon model, increasing the Department's administrative efficiency by up to one-third.

- Coordination with the Tour of Duty for Single Role Paramedics

The Department's single-role paramedics represented by AFGE Local 3721 are organized into four platoons and have a 42-hour workweek, with a tour of duty of two days on duty, two nights on duty, and four days off. The Department's witnesses claimed that, notwithstanding the current organization, workweek, and tour of duty of the single-role paramedics, it would be relatively easy to transition the single-role paramedics to a three platoon model 3/3/3 tour of duty at an appropriate time after the conversion of this bargaining unit to such a tour of duty, with the possibility that the single-role paramedic position might be eliminated entirely at some point in the future. The Department's witnesses also asserted that the use of a three platoon model would allow the shifts of Firefighter-EMTs to be aligned with those of the single-role paramedics, who are already on 12-hour shifts.

- Promoting Family Time

Battalion Chief Lee asserted that he viewed shifts of 12 hours to be more conducive to promoting time with family, not withstanding the fact that the Department

indicated that it was its plan to implement 12-hour shifts in conjunction with a longer average workweek. He noted that he did not believe that an additional six hours of work per week would be detrimental to family time and that the implementation of 12-hour shifts meant that Firefighter-EMTs could expect to be home for at least some portion of every working day (ignoring issues related to school and work schedules of other family members).

Mr. Tippett testified that he had worked in the Department for 18 years with a 3/3/3 tour of duty, 48-hour workweek, three platoon model, and that he had found the situation to have had a negative impact on his home life both due to the Department's progressively increasing workload and the fact that the 3/3/3 tour of duty gives firefighters an average of 14 consecutive Saturday-Sunday days off in the course of a year, but acknowledged that he had also worked a second job for the majority of his career with the Department. Mr. Tippett also noted that a Firefighter-EMT's commuting time is increased significantly under a 3/3/3 tour of duty, and that with a 24-hour shift, Firefighter-EMTs would see a significant increase in consecutive Saturday-Sunday days off in the course of a year.

The PERB's Negotiability Decision

On November 26, 2013, the PERB issued its decision in Local 36, International Association of Firefighters, AFL-CIO v. District of Columbia Department of Fire and Emergency Medical Services, PERB Case No. 13-N-04, Opinion No. 1445 (November 26, 2013) (the "Negotiability Decision"). In the Negotiability Decision, the PERB addressed the Union's appeal of the Department's assertion of non-negotiability as to several proposals made by the Union in the course of the Parties' term negotiations.

Among the proposals at issue in the Negotiability Decision, only one – regarding the Union’s proposed language for Article 45 – has been addressed by the Parties in this proceeding.

With regard to the Union’s proposed language for Article 45, the PERB wrote the following:

D. Hours of Work, Schedule, and Leave

Proposal 13: The Union proposes the following as Article 45, Section B of the agreement.

(1) The basic workweek for members working in the Fire Fighting Division shall be 42 hours averaged over a 4-week period.

(2) The work schedule for members working in the Fire Fighting Division shall be 24 hours on duty and 72 hours off duty.

(Appeal Ex. 3 at 24).

Respondent: The Respondent contends that Proposal 13 is non-negotiable on two grounds. First, the D.C. Code defines “basic workweek” as “an average workweek of 48 hours in the case of officers and members of the Firefighting Division of the District of Columbia Fire Department.” D.C. Code § 5-1304(a)(3). “[T]he Union’s proposal replaces the codified standard of ‘an average workweek of 48 hours’ to ‘42 hours averaged over a 4-week period.’ ... Accordingly, the Union’s proposal regarding the basic workweek is *per se* non-negotiable.” (Br. for Resp’t at 12).

Second, management has the sole right “to establish the tour of duty.” D.C. Code § 1-617.08(a)(5)(A). Tour of duty refers to the hours an employee works. (Br. for Resp’t at 13) (citing D.C. Code §§ 1-611.03, 1-612.01, 5-501.02). Accordingly, “the Board has held and the D.C. Court of Appeals has affirmed that management has the right under the CMPA to determine an employee’s Hours of Work, and that proposals by a union which seek to abrogate that right are non-negotiable.” *D.C. Fire & Emergency Servs. Dep’t and AFGE, Local 3721*, 51 D.C. Reg. 4158, Slip Op. No. 728 at p. 4 n.11, PERB Case No. 02-A-08 (2003). The Respondent also claims that the D.C. Court of Appeals held that the basic work week is not negotiable in *Drivers, Chauffeurs & Helpers Local Union No. 639 v. District of Columbia*, 631 A.2d 1205, 1216 (1993). “As the Department has not waived its exclusive rights to not bargain over this issue, the Union’s proposal is non-negotiable under PERB case law.” (Br. for Resp’t at 14).

Union: Regarding the Agency’s first argument, the Union asserts that the adoption of the CMPA in 1979 expressly overrode section 5-1304, passed by Congress in 1950. D.C. Code § 1-632.03(a)(1)(X) (codifying CMPA, D.C. Law 2-139, § 3203, 25 D.C. Reg. 5740 (Mar. 3, 1979)).

The Union responds to the Agency’s second argument by disputing the meaning of “tour of duty” and arguing that the meaning of the term does not include matters in Proposal 13, i.e., work schedule or the length and frequency of shifts. Section 1-617.08(a)(5)(A) and (B)’s reference to “tour of duty” in the singular along with “[t]he mission of the agency, its budget, its organization” suggest to the Union that the Council

contemplated a single tour of duty for each agency. The Union argues that because the CMPA also uses the terms hours, hours of work, and basic workweek, those terms cannot be synonymous with tour of duty. The Union asserts that tour of duty denotes something distinctly different from basic workweek and hours of work. (Br. for Pet'r at 19). It states that "[c]onstrued within this framework, the 'tour of duty' most sensibly designates the agency's overall calendar of operation-the general periods during which it will need employees to work" (Id). Proposal 13, the Union maintains, does not affect the Agency's calendar of operation and is therefore negotiable.

Board: The Petitioner is correct that the Agency's claim based upon D.C. Code § 5-1304(a)(3) "is quickly dispatched." (Br. for Pet'r at 12). Section 1-632.03(a)(1)(X), adopted in 1979, provides prospectively that section 5-1304 shall not apply to police or firefighters. "[I]t is axiomatic that a specific statute enacted later in time is given effect over an earlier law generally covering the same subject matter." *Speyer v. Barry*, 588 A.2d 1147, 1163 (D.C. 1991).

The Agency's claim based upon D.C. Code § 1-617.08(a)(5)(A) is more substantial. The Union's efforts to propose a meaning of tour of duty that does not encompass Proposal 13 has two problems. First, the term is used by D.C. statutes and PERB cases in the senses the Union denies. Tour of duty is used to refer to the tour of duty of an individual employee. *See* D.C. Code § 1-612.01(b) ("tours of duty shall be established to provide, with respect to each employee ..."); D.C. Code § 5-501.02(0) & (F) ("[A] biweekly rate shall be divided by the number of hours constituting the biweekly tour of duty in order to derive an hourly rate."); *FOP/Metro. Police Dep't Labor Comm. v. Metro. Police Dep't*, 60 D.C. Reg. 9186, Slip Op. No. 1388 at p. 2, PERB Case No. 11-U-O I (2013) ("Sgt. Horace Douglas ... was advised that his scheduled tour of duty ... would be changed from 7:30 a.m. through 4:00 p.m. to 2:30 p.m. through 11:00 p.m.") *AFGE, Local 3721 (on behalf of Chasin) v. D.C. Fire & Emergency Med. Servs. Dep't*, 59 D.C. Reg. 7288, Slip Op. No. 1251 at p. 4, 10-A-13 (2012) ("Capt. Hernandez reminded Grievant that the July 25 Letter of Direction specified his tour of duty as 8:15 a.m. to 4:45 p.m."). And, most importantly for this case, the term includes hours of work, work schedules, and shifts. *D.C. Fire & Emergency Servs. Dep't and AFGE, Local 3721*, 51 D.C. Reg. 4158, Slip Op. No. 728 at pp. 2-3, 4 n.11, PERB Case No. 02-A-08 (2003). *See also Metro. Police Dep't and FOP, Metro. Police Dep't Labor Comm. (on behalf of Dolan)*, 45 D.C. Reg. 1468, Slip Op. No. 394 at p. 2, PERB Case No. 94-A-04 (1994) ("The Arbitrator decided a grievance that challenged MPD's decision to temporarily alter the tour of duty of ... staff members ... by changing their hours of work on Fridays.").

Second, the meaning the Union proposes as a substitute for the way the term is actually used is implausible. It is difficult to see when one would speak of an "agency's overall calendar of operation" or why the Council would need to address that subject in several statutes. In view of the above, the Board finds that Proposal 13 infringes on a management right and is non-negotiable.

The PERB subsequently ordered that:

3. The following Union Proposals are non-negotiable.

....

Article 45, Section B-Hours of Work/Schedule/Leave

4. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

On December 17, 2013, the Union submitted to the PERB a Motion for

Reconsideration of, inter alia, the PERB's November 26, 2013 determination that the Union's proposals as to Article 45 were non-negotiable. As of the date of this Award, the Parties have not advised as to the disposition of this motion. However, the Parties have represented that, regardless of the disposition of the December 17, 2013 motion for reconsideration, the negotiability issue and the PERB's final ruling is likely to be the subject of further appeals.

Contentions of the Department

The Union's inclusion of language regarding tour of duty in its Article 45 proposal renders that proposal fatally flawed. It is undisputed that the Department has asserted its management right to determine the tour of duty; that the Union has nonetheless pursued its tour of duty proposal; that the Department has declared such proposal to be non-negotiable; that the Union has challenged the declaration of non-negotiability; and that the PERB has determined the Union's tour of duty proposal to be non-negotiable. Notwithstanding these facts, the Union persists in including its tour of duty proposal in its final offer. However, as its final compensation proposal contains what has been found to be a prohibited and illegal term, the Arbitrator is constrained from ruling in favor of the Union's compensation proposal. See Patent Office Professional Association v. Federal Labor Relations Authority, 26 F.3d 1148 (D.C. Cir. 1994) (holding that an interest arbitrator lacks authority to award a proposal over which a party claims it has no duty to bargain). Here, where the Department has consistently maintained that it has a statutory management right to set the tour of duty, the Arbitrator exceeds his jurisdiction (and, by extension, that of the PERB) if he seeks to issue a ruling as to those issues regarding which the Department has asserted non-negotiability. The

Department's refusal to bargain over those issues means that the Parties have not reached impasse on those issues. See D.C. Code § 1-617.17(f)(2) (defining "impasse").

Moreover, the Arbitrator lacks authority to render a provisional decision, as the Department has not agreed to place the issues within Article 45 as to which it has asserted non-negotiability before the Arbitrator. The Department has consistently informed the Arbitrator of the pending PERB proceeding and has consistently opposed the notion of the Arbitrator ruling on issues declared to be non-negotiable by the PERB. The Union, however, has insisted on placing before the Arbitrator language which the PERB has determined to be non-negotiable, rendering its package of compensation proposals fatally tainted by the inclusion of what is an illegal proposal.

Contentions of the Union

Article 45 is properly deemed part of the compensation package of proposals here. The Parties have a long history of negotiating the provisions in this article together with compensation issues. Particularly in light of the close link between hours of work, the configuration of the work schedule, and compensation, it is clear that these issues should be considered together. Moreover, the Department's attempt to separate the sections of its former Article 45 proposal into a scheduling non-proposal and a clearly compensation-related leave proposal, which the Department may believe would have the effect of allowing the former to be addressed on its own, is clearly prohibited by the Parties' Ground Rules.

The Department's revised "Article 45-A" proposal omits detailed provisions regarding the calculation of leave accruals in those instances when members move between operational positions with 42-hour, shift-based workweeks and daywork

positions with more traditional office schedules. These provisions are not only contained in the 2004 Agreement, but were in the District's own prior proposals in this proceeding. This unreasonable withdrawal of terms serves as further evidence that the Department's compensation proposal should be rejected as unreasonable.

In addition, because the Department has chosen to withdraw its Article 45 proposal and replace it with its Article 45-A proposal, the Parties' proposals as to hours of work, scheduling, and leave no longer correspond. In the absence of a corresponding proposal from the Department addressing these issues and in light of the Arbitrator's stated intention to provide a provisional ruling as to those issues in Article 45 which the Department asserts to be non-negotiable, the Union's compensation proposal is more appropriate and should be chosen.

Most significantly for the Union, the Department's clear intention to change the current schedule for Firefighter-EMTs from a 24/72 schedule with an average workweek of 42 hours to a 3/3/3 schedule with an average workweek of 48 hours would ultimately result in the elimination of 203 bargaining unit positions.

The Union and the Department have a long history of bargaining over hours of work and scheduling dating back to the 1980s. Over the course of this history, the hours in the basic workweek for this bargaining unit have only decreased. Moreover, since the 1980s, the Parties have agreed to changes in tour of duty and work schedules for which the Union paid with other concessions (often of significant monetary value). The Department's plan to implement the 3/3/3 schedule with a 48-hour workweek aims to undo these bargains, and to do so without returning to the Union the value it traded to obtain the terms which the Department seeks to eliminate.

In addition, the record does not reflect any connection between the use of a 24/72 schedule and the concerns which the Department claims it wishes to allay by abandoning the 24/72 schedule. The Department has successfully used a 24-hour schedule since the implementation of a pilot program during the term of the Parties' collective bargaining agreement for FY 1985-1987. The impact of the 24-hour schedule was reviewed by a joint labor-management committee, which found it to be overwhelmingly popular among the bargaining unit and found that positively influenced the Department's performance. At the arbitration hearing, Mr. Beaton admitted that the Department had met or come close to meeting its performance metrics while utilizing the 24/72 schedule; similarly, the record reflects that the Department has received overwhelmingly positive ratings from the public for its performance in periods where it utilized the 24/72 schedule. The record reflects that a majority of large fire departments around the country utilize a 24-hour shift. It also reflects that the question of scheduling should not be a binary choice between 24/72 and 3/3/3; for example, the Department's single role paramedics work a 42-hour workweek with a schedule of two day shifts, two night shifts, and four days off.

Even the Department's witnesses acknowledge now that the change will not result in any immediate economic benefit to the District. In fact, the Department will realize limited economic benefits from the change to a 3/3/3 schedule until the bargaining unit is permitted to shrink from what the Department appears to project will be an increased rate of attrition due, in no small part, to the implementation of the 3/3/3 schedule itself. However, the shrinkage of the bargaining unit appears to be directly contrary to the Department's stated primary goal of increasing its capability to bring its forces to bear on major emergency situations. The Department's witnesses attempted to explain that force

multiplication and other rapid response approaches to major emergency situations are based on the ability to deploy a large percentage of the Department's force to address such a situation. However, they ignore the reality that by taking steps to decrease the size of the bargaining unit even as the Department seeks to make a greater percentage of the bargaining unit available for deployment at any one time, the Department has significantly reduced the total manpower which can be deployed in response to an emergency. In addition, the Department has not made any showing that it is unable to appropriately engage in force multiplication when necessary with this bargaining unit on a 24/72 schedule. For these reason, the Department's leading argument for changing to a 3/3/3 schedule is simply not credible.

Moreover, the Department's change to the 3/3/3 schedule is also in part an effort to rectify an overtime use problem of management's own making. Because the Department is experiencing vacancies in, among other areas, its paramedic ranks, the Department has been forced to permit or require members of the bargaining unit to work significant amounts of overtime to provide coverage for what would otherwise be unfilled paramedic seats. The Department has also further exacerbated its staffing issues by declining to fill permanent FTE vacancies in the bargaining unit. By eliminating a platoon, the Department seeks to reassign the members of the fourth platoon to fill the vacancies. In addition, the lengthening of the average workweek to 48 hours will further reduce the Department's overtime issues. However, the Department's inability to recruit effectively (perhaps due to the long-stagnant level of compensation provided to this bargaining unit), its self-inflicted staffing difficulties, and its inability to properly manage its overtime budget does not provide a compelling reason to change the work schedule of

this bargaining unit.

The Department raised other rationales for the change to a 3/3/3 schedule, but none are persuasive. It asserts that it will be able to staff additional units – ambulances, for example. However, the testimony of the Department’s witnesses on this issue was couched in terms of capability rather than commitment. The Department argues that it is changing to a 3/3/3 schedule because the consent decree and settlement agreement resolving Hammon v. Barry has sunset. However, given that the decree and agreement have not been binding for over 15 years, the Department must provide a better reason than simply “because we can.” To the extent that the Department has claimed that it will enjoy increased training efficiencies with a switch to a 3/3/3 schedule, the record does not reflect problems with training under the existing 24/72 schedule. In a workplace subject to collective bargaining, the fact that work could be performed more efficiently or less expensively absent the terms of the collective bargaining agreement are not a valid argument for ignoring the Parties’ bargain, particularly here given the history underlying the use of the 24/72 schedule. Finally, while the Department’s witnesses implied that a benefit of transitioning to the 3/3/3 schedule would be to incentivize bargaining unit members to reside closer to the District, no evidence was presented to indicate that the change would actually do so, notwithstanding the real world impact of more frequent commutes under the 3/3/3 schedule.

The Parties each presented various studies addressing the health and fatigue risks and/or benefits of various shift and schedule configurations. The record reflects, however, that rotating day/night schedules are especially likely to cause fatigue. Moreover, despite the Department’s expressed concern regarding fatigue, there is no

evidence that increasing the workweek by six hours will do anything other than increase fatigue for Firefighter-EMTs.

For all of these reasons, the Department's proposed change to the 24/72 schedule should be rejected.

Discussion and Opinion

After careful consideration of the various legal and labor relations and operational arguments raised by the Parties, I find that on the basis of the record evidence, the Union's LBFO with regard to Article 45 should be adopted on an asterisked basis.

A summary of the principal reasons for this holding follows.

It should be noted at the outset that I decline to rule on the legal question of the negotiability of Article 45, Section B. It is well established that determinations of negotiability are not submitted to interest arbitrators for determination and that, under the CMPA, such matters are reserved for the PERB and, in the event of any appeals of such rulings, for the courts. In fact, the principal purpose behind the development of the "asterisked" or conditional LBFO was to address two different situations – one in which the final determination by the PERB and/or the courts on negotiability found the proposal negotiable and the other in which it did not. While there was a desire and need to reserve the Parties' rights to engage in any impact and implementation bargaining in the event that the Department ultimately changes the platooning or work schedules of bargaining unit members in ways that affect them adversely, there was no practical way that those issues could be addressed in this proceeding in light of the broad discretion enjoyed by the Department should the matter ultimately be found not to be negotiable and the fact that, in that instance, a change could conceivably be made from the existing 24/72 tour of

duty and the four platoon model to some platooning or scheduling arrangement different from the 3/3/3 three platoon rotating shift model. It is also possible that, even if the Department enjoys the legal discretion under the CMPA to unilaterally change the number of platoons or deviate from the 24-hour shift or both, it will ultimately opt not to do so, either as a consequence of the exercise of managerial discretion or because of a lack of approval for such a significant change by the Mayor and/or the Council. The Union's LBFO has the advantage of preserving the Department's legal rights to make unilateral changes if it is ultimately found by the PERB and/or the courts to enjoy the right to do so under the CMPA, while at the same time addressing the situation of the appropriate platoon and work schedule if the determination of hours of work is ultimately found to be a mandatory subject of bargaining.

The other factors that persuade me that it is more appropriate to adopt the Union's asterisked proposal over that of the Department include the following: 1) the desirability from the vantage point of the bargaining unit members of the present platooning and scheduling arrangement; 2) the record evidence reflecting that the Union made concessions in bargaining to achieve this arrangement and the fact that no similar concessions were offered in return as part of any effort to deprive the Union of the benefit of its bargain; 3) the serious potential safety concerns associated with a permanent rotating 3/3/3 shift relative to circadian rhythm-related effects; 4) the failure of the Department to demonstrate actual problems with its ability to fulfill its critical mission under the current arrangement which has been in effect since 1991, as many of the Department's concerns proved to be somewhat speculative and based upon assumptions whose validity was not demonstrated based upon the totality of the record evidence

adduced in this proceeding; 5) the lack of evidence of significant cost-savings underlying the transition if, as the Department repeatedly represented in the interest arbitration, it will not engage in any reductions in force or furloughs related to the change from four to three platoons; if anything, unless balanced by high attrition, the additional hours worked by each incumbent employee each week will increase the Department's labor costs for the foreseeable future; 6) the potential for tremendous disruptions (and litigation and risk) if the Department, notwithstanding its oral representations in the interest arbitration, began to reduce in force large numbers of employees coincident with a transition to a three platoon arrangement; it is worthy of note that the Department's LBFO makes no mention of any "no RIF" or "no furlough" commitment; 7) the fact that the remaining term of this Agreement is sufficiently short that any limitation on the Department's ability to immediately shift to a 3/3/3 three platoon arrangement will be delayed only for a modest time, by which date it may be anticipated that greater clarity will have been achieved on both the legal and the myriad of managerial and operational considerations surrounding such a significant change; and 8) to the extent that this issue is a compensation issue, the other significant compensation items overwhelmingly support the adoption of the Union's LBFO compensation package and under the CMPA and the Parties' Ground Rules, it is clear that the compensation package must be chosen as a whole from the Department's LBFO or the Union's LBFO.

The Parties treated Article 45 as a compensation article. To the extent that this is correct, the selection of the LBFO would be made in the context of the overall package of compensation items – a determination that, in this case, supports the selection of the Union's LBFO. To the extent Article 45 involves a non-compensation issue, the result is

the same. Whether adopted as part of a package or adopted as an independent issue, it is clear that the Union's LBFO represents the more appropriate terms to adopt as part of the Parties' Agreement.

For all of these reasons, I adopt the Union's LBFO relative to Article 45 and reject the Department's LBFO relative to Article 45/45-A.³

5) Article 47 – Legal Plan

Background

The premiums paid by the Department towards the Legal Plan were last increased effective October 1, 2006, to the present level of \$5.04 per pay period. The Department's LBFO would continue this amount without change through the end of this Agreement (which the Department proposes to be September 30, 2017). The Union's LBFO proposes an increase of 16% to this figure to \$5.85 per pay period, effective April 1, 2014.

Dabney Scott Hudson, a Firefighter-EMT and the Union's Second Vice President, testified regarding the Union's proposal for Article 47. Among his duties as a Union officer, he is responsible for administration of the legal benefit plan negotiated by the Union and serves as a primary contact for Union members regarding benefit questions.

For many years the law firm of Robert A. Ades & Associates, P.C. has been the

³ The following represents a formal expression of the asterisk: "Should the PERB's decision in Local 36, International Association of Firefighters, AFL-CIO v. District of Columbia Department of Fire and Emergency Medical Services, PERB Case No. 13-N-04, Opinion No. 1445 (November 26, 2013) remain in force after all rights of appeal are exhausted or should the Parties agree that Article 45, Section B, is not negotiable, then Section B of Article 45 will be deemed null and void. The remainder of Article 45 will remain in effect absent joint agreement to modify or eliminate some or all of those provisions. Should, after all rights of appeal are exhausted or by agreement of the Parties, the Union's LBFO as to Article 45, Section B, be determined to be negotiable, then the adoption of the Union's LBFO as to Article 45 will become final in the sense that it will no longer be conditional. This ruling is without prejudice to any rights which each Party might have or any positions which the Parties might take or have taken with regard to the negotiability of any impact and implementation bargaining proposals that may be made relative to Article 45 in the event that the current 24/72 schedule required by Article 45, Section B, is changed."

provider of legal services to members on an array of issues such as wills, credit/consumer matters, and family law matters. Utilization has increased since October 1, 2006, and more than half of all bargaining unit members presently use the services of the plan. Mr. Hudson stated that Robert A. Ades & Associates, P.C. had advised the Union that the number of hours spent by its lawyers on behalf of bargaining unit members had continued to increase despite the frozen contribution rate, resulting in a drop in the effective hourly rate earned by the firm (to 2003 levels) for its work on behalf of the bargaining unit members. Mr. Hudson related that the law firm had also informed the Union that it could not assure the Union that it would continue to provide services to bargaining unit members at the same level in the absence of contribution increases. A letter from the law firm to Captain Smith to the same effect was also introduced. Although Captain Smith admitted that the letter had been sent at the Union's suggestion for purposes of this proceeding, he testified that he had had numerous conversations with representatives of the Ades Law Firm regarding the difficulty in providing the same level of benefits to the bargaining unit in light of the stagnant contribution rate and increasing utilization rate, and that the letter had been intended to memorialize these discussions.

Mr. Hudson further testified that the Union's proposed increase in the legal benefit contribution was made with the assumption that the utilization of the legal benefit plan by the bargaining unit would remain constant. Captain Smith testified that the Union and the Ades Law Firm were parties to a three-year term agreement for the firm to provide legal services to members of the bargaining unit, and that the agreement would automatically renew at the conclusion of the term absent notice from the Union or the firm terminating the relationship. Captain Smith further testified that the current

agreement was due to expire by the end of 2013, that the termination notice period for the agreement was approaching, and that he had not yet received notice from the law firm of any intent to terminate the relationship. The total annual payments have remained relatively constant at approximately \$220,000. During FY 2013, the most recent year for which data was introduced, a total of approximately 4,500 attorney hours and 3,500 paralegal hours were spent on cases covered by the Legal Plan. If one imputes an hourly rate for paralegals of one-half the rate for attorneys, the overall attorney rate for work under the plan was \$35.09 per hour in FY 2013, as compared with a similarly calculated attorney rate of \$36.17 in 1991 and \$40.20 for FY 2007. Moreover, the average utilization rate has been between 50% and 55% of the bargaining unit since FY 2005 – a significant increase from the utilization rate at the inception of the Legal Plan, when utilization for the first decade ranged from approximately 30% to 40%.

Contentions of the Department

The Department's proposal for Article 47 seeks to maintain the status quo through language with identical effect to that found in the corresponding article within the 2004 Agreement.

Contentions of the Union

The Union's proposal for Article 47 seeks an increase in the contribution rate to the legal benefit plan of \$ 0.81 per member per pay period, equivalent to an increased cost of slightly over \$20 per member over the four year term proposed by the Union in this proceeding.

Discussion and Opinion

There is little question that the selection of the LBFOs regarding Article 47 is an

issue that, in the context of the much more significant unresolved compensation items, will be resolved on the basis of the overall package, rather than its independent merit. The annual cost of the proposed increase is approximately \$35,000, and the Union's LBFO would impose that cost for only the final six months of the new collective bargaining agreement (based upon the term advocated by the Union's LBFO – a term that is adopted by the Award in this case). The merit or lack thereof of the proposed premium increase will have little overall weight in the decision to select the Union's LBFO package on compensation items or that of the Department.

If it could be established that the same level and quality of legal care would be provided and received without any increase, then continuing the FY 2007 premium structure into the future would certainly not be problematic. The effects of unfairness in such an arrangement would be borne solely by the Legal Plan itself, not by the Department or covered employees. Alternatively, at some point the Legal Plan will be unable to obtain the promised level of benefits and services at rates that are simply too low for the work being demanded. At that point, either rates will have to increase or services will have to be reduced.

If it were clear that the Ades Law Firm would continue to provide the promised level of benefits through the term of the collective bargaining agreement at the \$5.04 per pay period contribution rate, then the Department's LBFO with respect to Article 47 would be found more appropriate. Conversely, if the Ades Law Firm was sincere in its threat to not renew its relationship with the Legal Plan when its contract expired (and the record did not reveal whether at the end of 2013 when the prior 3 year contract expired it was renewed or was held open), then the increase sought by the Union in its LBFO

appears appropriate in light of the number of years in which rates have not been changed and the relatively low attorney hourly rate for Legal Plan covered services.

While a close call, I find that the Union's LBFO is more appropriate and that preservation of the historical longstanding satisfactory relationship with the Ades Law Firm justifies the relatively modest increase in contributions after the lengthy period of stagnation.

6) Article 48 – Optical and Dental Benefits

The dispute in regard to this Article is even more modest than the dispute surrounding Article 47 discussed above. The LBFOs of both the Union and the Department purport to make no change to the existing premium rates for the Optical and Dental Plans for the life of the new collective bargaining agreement. The differences between the two LBFOs are two-fold. First, they would hold the existing rates constant for different periods as a result of the different durations contained in the Parties' Article 55 LBFOs. Second, the two proposals have slightly different rates incorporated, although each asserts that it is the existing rate.

The printed contract book, as well as the policy renewal presentation document, makes clear that the correct existing rate for the Dental Plan is \$47.20 per month, a rate maintained at the cost of recent decreases in benefits through a plan design modification. To the extent that the Union's LBFO more accurately reflects the status quo than the Department's, I find the Union's LBFO regarding Article 48 is more appropriate.

7) Article 55 – Effective Date

There was dispute as to whether this item should be treated as a compensation item, whose resolution was linked to the treatment of the compensation package as a

whole, or as a non-compensation item, to be addressed on its own independent merits.

The only dispute regarding Article 55 relates to term: the Union's LBFO seeks a four year collective bargaining agreement (FY 2011-14) whereas the Department's LBFO seeks a seven year collective bargaining agreement (FY 2011-17).

Whether viewed as a matter of compensation or as a non-compensation item, it is clear that the Union's LBFO should be accepted. A summary of the principal reasons follows.

The fact that the Compensation Unit 1 & 2 agreements extend through FY 2017 clearly supports adoption of the longer term. Further, it is preferable from a budgeting perspective, as well as from the vantage point of stability, to adopt a contractual term that will not result in the commencement of bargaining only a matter of months after the issuance of the Award in this matter. Both of those factors militate in favor of adoption of the Department's LBFO.

On the other hand, there are compelling reasons why the shorter term proposed by the Union in this case is more appropriate. First, it matches the period of the Union's wage proposals which were adopted as part of the overall compensation package. Second, the resolution of the Article 45, Section B/platooning situation is uncertain and if there are changes made to the present four platoon model and 24/72 schedule, it may well implicate impact and implementation and other bargaining such that having a shorter term may well prove beneficial to both Parties when seeking an appropriate solution to those potentially significant and complex issues. At this time, there are both legal uncertainties regarding the ability of the Department to unilaterally implement a change to a three platoon model and practical uncertainties regarding whether the Council or the

Mayor will support such a change, if legally permitted, and what ultimate form of schedule may be implemented, whether the stated intent not to furlough any incumbent employees will be honored, and how the issues of Kelly days may be addressed. Third, the LBFOs lock in the contributions towards Dental and Optical for the term of the Agreement and no change has been made in those contribution rates since FY 2007. Unlike certain other bargaining units, the IAFF Agreement contains no automatic escalator for those premium amounts and provides for reductions in benefits if the amount of premiums proves to be insufficient to pay for the existing plan of benefits. Having an opportunity to study and revisit the situation prior to FY 2018 (or whenever the bargaining for the successor contract ends) is a positive (albeit a much less significant one than the first two reasons in support of a shorter term in this case). Fourth, the term of the Agreement under the Union's LBFO is a four year term. Under the Department's LBFO, the Agreement would be for a seven year term. The term urged by the Union is similar to that which the Parties have bargained historically whereas the term urged by the Department is unprecedented in terms of the Parties' relationship relative to the duration of successor collective bargaining agreements.

For all of these reasons, whether as part of the overall compensation package or as an independent non-compensation item, the Union's Article 55 LBFO is adopted.

Overall Compensation Package

As provided for in the CMPA and the Parties' Ground Rules, the final best offer selection process with respect to compensation items is to occur on an overall package basis. For the reasons noted previously in connection with the individual compensation items, and which need not be repeated at this juncture, I am persuaded that the Union's LBFO with respect to all compensation package items is to be adopted in this case.

Adoption of the Union's LBFO regarding Article 18 and 42 will provide for partial recoupment of the wage slippage that resulted from the lack of any wage increases during the period after October 1, 2006 and prevent a cut in overtime pay at a time when there is no actual change in schedule. The Department's LBFO on these articles, by contrast, would actually exacerbate the present situation since the change in overtime definition will actually reduce overall compensation. The Article 45 situation is unknown and very significant to both Parties. By adopting the Union's LBFO, an asterisked/in the alternative provision has been adopted that covers both the situation of change (if legally permitted) and the status quo if it is not. Moreover, by adopting the Union's shorter term, the Parties will be able to revisit this matter in a timely fashion and not be locked in until 2017 with respect to these important items. While less significant, the Union's LBFOs relative to Legal Plan, Optical and Dental Plans, and Technician pay are also the more appropriate of the alternatives.

For all these reasons, as well as those discussed earlier in connection with each of the individual compensation items, I adopt the compensation package set forth in the Union's LBFO.

NON-COMPENSATION ITEMS

8) Article 19 – Transfers

Background

The current language of Article 19 as set forth in the 2004 Agreement is as follows:

TRANSFERS, REASSIGNMENTS, AND DETAILS

For the purposes of this agreement the terms: ‘Transfer’ shall mean any action by the employer that assigns an employee to an agency within the District of Columbia Government other than the agency where the employee was originally employed. “Reassignment” shall define the movement of members from assignment to assignment within the Fire and Emergency Medical Services Department. “Detail” shall define the temporary movement of members where it is expected that a member will return to his/her original assignment.

Section A: Employer Rights

It is recognized that the Employer has the right to transfer, reassign or detail employees, however, (i) transfers, reassignments and details shall not be used as a form of reprisal or discipline except where permitted by the parties’ agreements with respect to disciplinary procedures, and (ii) transfers, reassignments and details shall not be made in a manner that is arbitrary, capricious or inconsistent with Article 4 (Equal Employment Opportunity) of the Agreement.

Section B: Procedures

(1) Notification

a. The Department shall provide six (6) days advance notification to any bargaining unit member who is to be transferred or reassigned.

b. Quarterly, the Department will advise the Union in writing of any transfers, details or reassignments which became effective in the preceding quarter.

(2) Involuntary Transfers and Reassignment

When an employee is transferred or reassigned other than at his or her request, and the employee believes that the transfer or reassignment may be illegal or improper under the terms of this Article, the employee shall, upon written request, be informed by a superior of the reason for the transfer or reassignment. An explanation will be provided to the requesting employee and, if the explanation is “efficiency of the service,” further explanation shall be provided by the Department upon request of the requesting employee.

(3) Voluntary Reassignments

It is recognized by the Employer and the Union that employees have the right to

request reassignment from one assignment to another. The Union also recognizes Management's rights under Article 5 of this Agreement. In view of the aforementioned, the following criteria are established regarding voluntary reassignment requests:

(a) Requests may be made for positions or assignments which are available or become available in the near future.

(b) Requests shall be in writing on Department Form 10 to the designated Departmental official(s).

The request shall contain the following information:

i) reasons for the request;

ii) time in grade;

iii) any educational qualifications relevant to the position;

iv) current and previous assignments; and

v) any other qualifications of the member relevant to the position.

(c) Requests shall be endorsed and forwarded in a timely manner.

(d) Requests shall remain valid for the calendar year submitted.

i) When more than one employee has requested to be reassigned to a particular position, in determining which request will be granted the Employer shall consider the criteria identified in Section (3)(b) of this Article.

ii) Mutual exchanges of assignment between members of the same salary class shall be permitted upon a determination that the employees are qualified for the assignments requested and concurrence of the appropriate bureau head.

iii) Form 10 shall be returned to the member within thirty (30) days of its submission with all endorsements and attachments.

The Union's LBFO would leave Article 19 unchanged.

The Department's LBFO initially proposed two substantive changes to Article 19: 1) the removal of the language in Article 19, Section A, providing that "transfers, reassignments, and details shall not be used as a form of reprisal or discipline except where permitted by the parties' agreements with respect to disciplinary procedures"; and 2) removal of the language in Article 19, Section B(2), that if the explanation provided to an employee who has requested an explanation for an

involuntary transfer or reassignment is “efficiency of the service” then further explanation shall be provided upon request as to the reason for the involuntary transfer or reassignment. The Department’s LBFO also proposed the following non-substantive changes: to label the unlettered introductory paragraph as Section A, reletter Section A as Section B, and keep the original Section B lettered as a second Section B.

Contentions of the Department

The Department’s Article 19 LBFO appropriately continues the obligation to provide an affected employee upon request with the reason for his or her involuntary transfer or reassignment. The Union’s LBFO, by contrast, would force the Department to offer a second reason for an employee’s transfer if the initial reason for such transfer is determined to be for the efficiency of the service, which could make the initial reason appear pretextual and open the Department to potential legal liability.

Contentions of the Union

The Union’s proposal for Article 19 seeks to retain the existing language of Article 19 as set forth in the 2004 Agreement. The Department’s proposal to eliminate the language of Article 19.B)(2) requiring an additional explanation upon request where the initial explanation for the transfer of an employee is “efficiency of the service” is an attempt by the Department to deviate from the status quo in order to permit it to hide behind pretextual boilerplate when it wishes to transfer an employee for improper purposes. The record contained evidence of a recent improper and retaliatory involuntary transfer of Captain Smith by Chief Ellerbe. IAFF Local 36 – DC FEMS, FMCS Case No. 12-00031-A (Arbitrator Leonard M. Wagman) (2012). The Department’s LBFO was not shown to be appropriate and the existing Article 19 language should be maintained in

its entirety.

Discussion and Opinion

The sole reason advanced by the Department for the proposed change to the provisions of Article 19 was that by being required to provide a more detailed explanation in support of the justification of “efficiency of the service,” if requested, the Department would become liable to a charge that the initial justification was pretextual. This is unpersuasive for several reasons. First, the clear purpose of the contractual provision is to deter the Department from initially providing a general response to an employee who has requested an explanation as to the reason for an involuntary transfer or reassignment that states simply “efficiency of the service.” Second, there is no showing as to why an arbitrator or other decision maker would conclude that the reason for an involuntary transfer or reassignment is pretextual simply because of a follow up request to an initial general explanation that provided truthful details as to the reasons for the transfer or reassignment. The award of Arbitrator Wagman in the Smith case did find the reasons advanced by the Department unpersuasive and evasive, but that award was issued in the context of a number of facts that persuaded Arbitrator Wagman that the motives of Chief Ellerbe and the Department were suspect.

In sum, the record has not shown that the existing contractual language had led to inappropriate results or that there is a real problem that needs to be addressed by the proposed change. Nor was there a showing that any of the statutory criteria would be satisfied by selecting the Department’s Article 19 LBFO over that of the Union. There was no showing that change to the existing Article 19 language was supported by existing laws and rules and regulations; that the District would be unable to comply with an

Award that kept the existing Article 19 language in tact without change; that the proposal was necessary to protect and maintain the public health, safety, and welfare; or that the change is needed to maintain personnel policies that are fair, reasonable, and consistent with the objectives of the CMPA.

For all of these reasons, the Union's Article 19 LBFO which makes no change to the existing provisions of that Article is adopted.

9) **Article 40 – Health**

Background

The current language of Article 40 as set forth in the 2004 Agreement is as follows:

HEALTH

Section A:

Each member of the Department shall be given an annual physical examination in order to keep abreast of his/her physical condition. This physical examination is to include urinalysis, blood tests, and any other appropriate tests to determine if any symptoms of contagious or infectious disease or drug abuse are present.

Section B:

Bargaining unit employees in the performance of their regular duties may be exposed to contagious or infectious diseases or hazardous materials. To deal effectively with said potential risks:

(1) Any time that the Employer acquires any information indicating that one or more firefighters have been exposed to a contagious or infectious disease or hazardous material in the performance of his/her duties, the Employer promptly shall notify the employee of that fact and shall furnish to the employee whatever information the Employer possesses with respect to all relevant circumstances surrounding the incident. Additionally, any member exposed to a contagious or infectious disease or hazardous material shall be provided, by the Department, with all information available regarding the health effects of such exposure and, where appropriate, the Department shall contact appropriate professionals and/or specialists who may be able to provide the employee with information regarding health effects of an exposure.

(2) The Employer shall provide medical consultation, advice and treatment to any firefighter exposed to a contagious or infectious disease or hazardous material in the performance of his/her duties. An employee who, in the performance of his/her duties, has reason to believe he/she has been exposed to a contagious or infectious disease or hazardous material, shall, at his/her request, be provided appropriate medical testing and treatment.

(3) Protective clothing and equipment provision shall be addressed by the Joint Safety Committee.

(4) The Fire Department shall consult with the Union prior to the issuance of rules, regulations, orders or guidelines for dealing with infectious or contagious diseases and hazardous materials.

Section C - Drug Testing

The Department's drug testing procedure is currently specified in Bulletin 1-A, dated July 1989.

The Department shall determine the component of its workforce that shall be required to participate in a mandatory drug testing program. The parties recognize that any new or modified procedures shall be the subject of mutual agreement between the parties.

It is jointly understood that involvement of any on-duty member of the Department in an accident while operating any Department vehicle shall provide sufficient cause for immediate drug screening in accordance with Federal Department of Transportation guidelines.

The LBFOs of the Department and the Union propose to change only the provisions relating to Drug Testing (Article 40, Section C) and in the case of the Department's proposal to add a new section dealing with Performance on Duty ("POD") cases.

The Department's LBFO contains the following proposed language for Article 40, Sections C and D:

Section C –POD Decisions

The parties agree that performance of duty decisions shall not be subject to grievance or arbitration, but be governed by applicable sections of the District of Columbia Code, and such sections shall supersede the provisions of this Article.

Section D – Drug Testing

1. The Department's drug testing procedure is set forth in Bulletin 5 and as provided for by the "Child and Youth, Safety and Health Omnibus Amendment Act of 2004", D.C. Law 15-353, D.C. Official Code §1-620.31 et seq. (2006 Repl.) The parties agree that the provisions of the law are not negotiable but referenced here only for the convenience of the parties.

2. The Department shall determine the component of its workforce that shall be required to participate in a mandatory drug testing program. The parties recognize that any new or modified procedures shall be the subject of mutual agreement between the parties.

3. It is jointly understood that involvement of any on-duty member of the Department in an accident while operating any Department vehicle shall provide sufficient cause for immediate drug screening in accordance with Federal Department of Transportation guidelines.

4. With respect to providing members with an opportunity for rehabilitation following a positive test, the provisions of Bulletin 1-A, dated July 1989 shall govern.

The Union's LBFO contains the following proposed language for Article 40,

Section C:

Section C - Drug Testing

The Department's drug testing procedure is currently specified in Bulletin 5 (2007), except that, with respect to providing members with an opportunity for rehabilitation following a positive test, the provisions of Bulletin 1-A, dated July 1989, shall govern.

The Department shall determine the component of its workforce that shall be required to participate in a mandatory drug testing program. The parties recognize that any new or modified procedures shall be the subject of mutual agreement between the parties.

It is jointly understood that involvement of any on-duty member of the Department in an accident while operating any Department vehicle shall provide sufficient cause for immediate drug screening in accordance with Federal Department of Transportation guidelines.

Background

Battalion Chief Lee testified that performance of duty ("POD") decisions are made by Board Certified Occupational Health Physicians at the District's Police and Fire Clinic. He explained that the Department seeks new language in Article 40 that would exclude POD decisions from the grievance and arbitration process because the Department views such decisions as medical in nature and not appropriate for review through those processes. The Department acknowledged, however, that such decisions had been subject to the grievance and arbitration processes since at least the 1980s. Employees would still be afforded a statutory avenue of appeal for POD decisions, but would be required to use that appeals process if the Department's LBFO is granted. No explanation was provided as to why review under the statutory processes of POD

decisions was not inconsistent with the nature of those determinations, but allowing arbitral review of those POD decisions would be inappropriate.

Battalion Chief Lee further testified that the Department had sought changes to Article 40's language regarding drug testing to bring the language of the Article into compliance with the terms of the Child Youth Health and Safety Omnibus Amendment Act of 2004 ("CYHSA") and its implementing rules, the terms of which the Department believe to be nonnegotiable and applicable to this bargaining unit. Evidence was introduced reflecting that the Union and the Department have differing positions as to whether and to what extent CYHSA applies to career firefighters or others in the Department.

The record reflected that the drug testing provisions of the Health article (then numbered as Article 37) were at issue in the Jascourt Award arbitration in 2001 as well. In reaching his determination that the Union's LBFO should be adopted on drug testing, Arbitrator Jascourt found that the drug testing procedures were collectively bargained and should be protected against unilateral change by the Department, with the Union's right to engage in impact and implementation bargaining over adverse effects preserved in the event of a subsequent change to those procedures.

Contentions of the Department

The Department's Article 40 proposal includes the terms sought by the Union and seeks to conform to the Department's obligation to comply with Chapter 39 of the D.C. Personnel Manual, which sets forth rules enforcing CYSHA. At least one arbitrator has ruled that the Department's single role paramedics are subject to CYSHA, and has done so on grounds which suggest that this bargaining unit would be subject to CYSHA as

well. Therefore, a provision in a collective bargaining agreement which in some way excluded this bargaining unit from CYSHA would likely be impermissible.

In addition, the Department seeks to remove POD decisions from the grievance and arbitration process based upon the medical nature of the POD determinations made by physicians at the Police and Fire Clinic. For all of these reasons, the Union's proposal should be rejected and the Department's proposal accepted.

Contentions of the Union

The Union's LBFO for Article 40 deviates from the current language of Article 40 as set forth in the 2004 Agreement only to clarify and update certain language as to current drug testing procedures. The Department has in fact included a reference to Bulletin 5 in its final offer. However, the Department's other proposed changes to Article 40 are inappropriate and should not be accepted.

The Department gives no reason for its attempt to remove the bargaining unit's right to grieve POD decisions other than to assert that such decisions are medical in nature. It provides no evidence of excessive grievances, administrative burdens or other rationale. Moreover, the record indicates that the issues associated with POD decisions are not exclusively medical in nature, given the issues involved in the six arbitration awards contained in the record and pertaining to POD decisions.

As to the Department's attempt to include a reference to CYSHA and to assert its non-negotiability, the record contains evidence that the Union has consistently challenged the applicability of CYSHA to the bargaining unit and has maintained that the provisions of any drug testing program for bargaining unit members is negotiable. This is a presently unresolved issue and interest arbitration is not an appropriate forum to obtain a

definitive answer to the legal question of a provision's negotiability.

For all of these reasons, the Department's Article 40 LBFO should be rejected and that of the Union accepted.

Discussion and Opinion

I find that the Union's LBFO relative to Article 40 is adopted and that the Department's LBFO relative to Article 40 must be rejected. A summary of the principal reasons for this holding follows.

No showing was made as to why POD decisions specifically or decisions that are based in whole or in part upon medical opinions should be excluded from the negotiated grievance and arbitration procedures. Such cases are routinely decided by labor arbitrators, both generally and in disputes between the Department and the Union, and there has been no showing that use of the grievance and arbitration process, in lieu of the available statutory processes, has created any problems. It is commonplace for there to be multiple avenues for District and federal employees to appeal claims of denials of statutory rights. Thus, while there may be elections of remedies based upon the choice of forum, the fact that there may exist a statutory appeals process provides no basis to bar a particular claim from being grieved and arbitrated based upon the election of the affected employee. Finally, there has been no showing that anything has changed relative to POD determinations during the period since the end of the 2004 Agreement that would merit a change from the longstanding practice of allowing denials of POD and use of employee leave to cover periods of absence from work to be grieved and arbitrated.

The question as to the effects of the CYSHA on the Drug Testing provisions that are to be incorporated in Article 40 is somewhat closer, but there are a number of reasons

why I am persuaded that the Department's LBFO relative to drug testing is neither reasonable nor appropriate. The Parties expressed opposite positions as to the applicability of the CYSHA to the bargaining unit and as to the requirements of the CYSHA to the extent that it applies to the bargaining unit. Neither Party, however, provided any legal authority to bolster their positions in this regard. Further, the Department's LBFO goes beyond the CYSHA and would force advance agreement on the part of the Parties to "any new or modified procedures recognized by the industry" without any indication of how that would be established, what the existing "procedures recognized by the industry" consist of, or why any future bargaining (including impact and implementation bargaining) rights can or should be waived over the objection of the Union with respect to future changes by the Department made unilaterally to its mandatory drug testing program. In light of all of these issues, including consideration of the fact that the chosen contract term will mean that bargaining will again commence shortly with respect to a successor collective bargaining agreement, I find that the statutory and other relevant factors support a determination that the Union's LBFO with respect to the drug testing portion of Article 40 be adopted over that presented by the Department.

Given the finding that both the POD provisions urged by the Department in its LBFO should be rejected and the finding that the Drug Testing provisions urged by the Union in its LBFO should be credited over that urged by the Department, it is clear that upon examining Article 40 as a whole, it is the Union's LBFO which must be adopted.

10) Article 52 – Pay Corrections, Effective Dates and Back Pay

The current language of Article 52 as set forth in the 2004 Agreement is as

follows:

PAY CORRECTIONS, EFFECTIVE DATES AND BACK PAY

- (1) The Employer shall make applicable changes in an employee's pay in a timely manner.
- (2) The parties agree that the effective date for pay for promotions shall be the date that the promotion was ordered by the Fire Chief, as reflected in the personnel action form.
- (3) The parties further agree that the effective date for pay for service step increases shall be the first day of the first full pay period containing the member's anniversary date.

The effective date for technician's pay is outlined in Article 21 of this Agreement.
The Department's LBFO seeks to maintain the existing language of Article 52.

The Union's LBFO proposed the following language for Article 52:

PAY CORRECTIONS, EFFECTIVE DATES AND BACK PAY

- (1) The Employer shall make applicable changes in an employee's pay in a timely manner.
- (2) Upon a final determination that an employee is entitled to backpay, the Department shall submit the required forms and information to the Department of Human Resources (or other agency responsible for payment) within thirty (30) days after receipt from the employee of the required documentation (including interim earnings and other potential offsets). Backpay shall be paid within sixty (60) days of receipt from the employee of such required documentation.
- (3) The parties agree that the effective date for pay for promotions shall be the date that the promotion was ordered by the Fire Chief, as reflected in the personnel action form.
- (4) The parties further agree that the effective date for pay for service step increases shall be the first day of the first full pay period containing the member's anniversary date.
- (5) The effective date for technician's pay is outlined in Article 21 of this Agreement.

The language of proposed subsection (2) is new. The other provisions were simply renumbered, but no other changes were made.

Background

Captain Smith testified that, on a number of occasions, the Department has not promptly issued back pay to affected bargaining unit members, even when the Union, the Department, and the affected employee are in agreement as to the amount owed and the

Department's obligation to pay. He identified several situations in which the Department's delay in issuing back pay had spanned more than 60 days after payment had been ordered by an arbitration award. Captain Smith also stated that the Department's pay delays had been the subject of several D.C. Council hearings. Chief Ellerbe testified that he did not recall many D.C. Council hearings being called regarding any pay problems within the Department.

Charles Hottinger, a Lieutenant and First Vice-President of the Union, testified regarding his attempts to assist members of the bargaining unit with tracking and resolving pay problems with the Department. He testified that he had dealt with numerous pay problems since taking office in January of 2011, including issues with step increases, delayed longevity payments, leave accrual problems, issues related to compensatory time, issues related to the payment of paramedic premium pay and technician premium pay.

Lieutenant Hottinger testified that Lieutenant Derek Brachetti has still not received payment of a step increase which he earned on January 2, 2011, despite filing the appropriate paperwork with the Department to notify management of the issue and having his documentation approved by his Captain and his Battalion Chief. Lieutenant Hottinger testified that Lieutenant Brachetti had never received notification from the Department regarding the disposition of his claim.

Lieutenant Hottinger also testified regarding Firefighter-EMT paramedic Ward Caddington, who despite performing duties as a certified paramedic since January of 2011, had never been paid his paramedic premium pay. Lieutenant Hottinger testified that after speaking with the Assistant Fire Chief of Services and testifying about

Firefighter-EMT paramedic Caddington's situation before the D.C. Council, he was informed that the Department was working with the District's Department of Human Resources to resolve the issue, but that Firefighter-EMT paramedic Caddington has not yet received his premium.

Lieutenant Hottinger identified a number of other bargaining unit members who have had difficulty obtaining earned compensation or compensation ordered by an arbitration award from the Department. He also testified that, on those occasions where the Department has made late payments to bargaining unit members, the bargaining unit members did not receive interest for any period of delay. He also acknowledged that it was likely that agencies within the District government other than the Department likely had some role in at least some of the payment delays he had observed.

Daryl Staats, the Department's Fiscal Officer, testified regarding the process of obtaining back pay for bargaining unit members. He explained that he begins the process by identifying a funding source for the back pay and informing the entity requesting the information of the funding source, if any. That information is then sent to the Public Safety Payroll Department, which is housed within the Metropolitan Police Department, for further processing. He testified that the Office of Payroll and Retirement Services may also become involved, depending on the amount of the back pay at issue, but that he does not know of any point in the process where the District's Department of Human Resources would normally become involved. Mr. Staats also testified that he would not ordinarily receive any of the paperwork filed by the bargaining unit member regarding a claim for pay.

Battalion Chief Lee testified that, as of the interest arbitration hearing, he knew of

only one back pay obligation with which the Department had not yet complied, and testified that the arbitration award which led to that obligation was under appeal. However, Mr. Staats testified that he was aware of several outstanding back pay issues. Battalion Chief Lee also provided further explanation regarding the processing of pay corrections, testifying that after a request for pay correction is processed by the Department, it must be sent to an external personnel authority – the District’s Department of Human Resources, the Office of Payroll and Retirement Services, or another agency. He explained that, at that point, the processing of the pay correction is wholly outside the control of the Department.

The record also reflects that the current collective bargaining agreement between the District and Compensation Units 1 & 2 contains the following provision:

**ARTICLE 12
BACK PAY**

Arbitration awards or settlement agreements in cases involving an individual employee shall be paid within sixty (60) days of receipt from the employee of relevant documentation, including documentation of interim earnings and other potential offsets. The responsible Agency shall submit the SF-52 and all other required documentation to the Department of Human Resources within thirty (30) days upon receipt from the employee of relevant documentation.

Contentions of the Department

While the Department’s Article 52 LBFO maintains the status quo, the Union seeks to introduce into the pay correction process an unrealistic deadline to address delays arising outside of the Department over which the Department has no control. The Department lacks the ability to force the external entities within the District government who are tasked with responsibility for the processing of back pay awards for FEMS to act any more quickly than they are already doing. Employees who are entitled to awards of back pay are made whole by means of a retroactive award and interest to the extent

permitted by law.

Moreover, the record is unclear at best as to whether this is a significant problem. Even the Union was only able to cite a modest number of situations in which prompt payment is not made and the Department's witnesses testified that this is a problem in a much smaller number of cases.

For all of these reasons, the Union's Article 52 LBFO should be rejected and the Department's LBFO adopted.

Contentions of the Union

The Union's LBFO for Article 52 seeks to add non-binding deadlines to the pay correction process in order to provide structure and guidance to an oft-utilized process which often drags on for years on end without resolution, rather than seeking to impose penalties or interest for late payment. Moreover, the current collective bargaining agreement between the District and Compensation Units 1 & 2 contains language similar to that proposed here by the Union. There is no reason for the members of this bargaining unit to be treated differently on this administrative issue than the members of Compensation Units 1 & 2.

The Department's Article 52 LBFO should, therefore, be rejected and the Union's LBFO accepted.

Discussion and Opinion

The record in this case has shown more than a mere handful of cases in which the Department has failed to make individuals whole by either promptly effecting pay increases associated with promotions or making employees whole for other pay owed to the employees. According to the record evidence, the failure to make proper wage

payments to employees lasts far longer than what is reasonable, even after taking into account the decision of the District to shift some of the Department's responsibility in this regard to other District entities. The record revealed multiple situations in which pay or differentials had not been paid years after they first became due.

The Arbitrator has some doubt as to whether the Department – which apparently is not honoring the existing requirements to make changes to pay in a timely manner – will honor new more definite timeframes for making those pay changes. Nevertheless, the changes proposed by the Union appear relatively benign – they do not involve any new penalties for failure to make payment in a timely manner in accord with Article 52 and provide for a “fix” to the situation that is both measured and is consistent with provisions that the District bargained with other unions to address similar problems.

The Arbitrator is sympathetic to the arguments of the Department that it lacks practical control over the actual implementation of pay adjustments after it has completed and submitted its paperwork. Nevertheless, the District has the ability to address such administrative matters and to comply with both the prior language of Article 52 and revised, more definite language recognizing the Department's obligation to implement final determinations of back pay within sixty days of its receipt of all necessary paperwork to make those payments.

The statutory criteria are better served by adopting the Union's LBFO relative to Article 52. The existing laws, rules, regulations and contractual provisions require the making of timely pay adjustments. While some changes may be needed for the Department to comply with the award relative to Article 52, there can be no question of the District's ability to do so. The focus upon the ability of the District is appropriate in

light of both the statutory language itself and the fact that the District is the entity that can choose to grant the Department the power to implement pay adjustments or, alternatively, direct that the entities with that authority comply with bargained-for time parameters.

There was no indication that the District is unable generally to comply with the provisions of Article 12 of the Compensation Units 1 & 2 agreements. The record evidence established that adoption of more specific time frames in light of the difficulties that have been shown under the more general limitation in Article 52 was fair, reasonable, and appropriately tailored to address the particular demonstrated need.

For all of these reasons, the Union's LBFO on Article 52 is adopted.

AWARD

The following terms are adopted as the FY 2011-14 Agreement between the District of Columbia Department of Fire and Emergency Medical Services and the International Association of Firefighters Local 36, AFL-CIO:

1) The Last Best and Final Offer of the Union regarding Articles 18, 19, 40, 42, 43, 45, 47, 48, 52, and 55, as filed on December 30, 2013, and as described above, is adopted.

2) The provisions of Article 45, Section B, adopted as part of the Union's Last Best and Final Offer regarding Article 45 are subject to the following "asterisk" conditions:

"Should the PERB's decision in Local 36, International Association of Firefighters, AFL-CIO v. District of Columbia Department of Fire and Emergency Medical Services, PERB Case No. 13-N-04, Opinion No. 1445 (November 26, 2013) remain in force after all rights of appeal are exhausted or should the Parties agree that Article 45, Section B, is not negotiable, then Section B of Article 45 will be deemed null and void. The remainder of Article 45 will remain in effect absent joint agreement to modify or eliminate some or all of those provisions. Should, after all rights of appeal are exhausted or by agreement of the Parties, the Union's LBFO as to Article 45, Section B, be determined to be negotiable, then the adoption of the Union's LBFO as to Article 45 will become final in the sense that it will no longer be conditional. This ruling is without prejudice to any rights which each Party might have or any positions which the Parties might take or have taken with regard to the negotiability of any impact and implementation bargaining proposals that may be made relative to Article 45 in the event that the current 24/72 schedule required by Article 45, Section B, is changed."

3) In all other respects the provisions of the prior Agreement are continued without change except as mutually agreed to by the Parties.

February 20, 2014



Ira F. Jaffe, Esq.
Impartial Arbitrator