STATE OF NEW YORK PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of the Interest Arbitration between

BUFFALO PROFESSIONAL FIREFIGHTERS ASSOCIATION, INC., LOCAL 282

and

CITY OF BUFFALO, NEW YORK

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

OPINION

AND

AWARD

ON

REMAND

Before Interest Arbitration Panel:

Thomas N. Rinaldo, Esq., Chairperson

Sean P. Beiter, Esq., Public Employer Member

Dan Cunningham, Employee Organization Member

The New York State Public Employment Relations Board, pursuant to the New York Civil Service Law, Section 209.4, designated the Chairperson and the Public Employer and Employee Organization Panel Members in a revised designation dated August 17, 2010.

This proceeding has a somewhat complicated history. Initially, the Parties convened before a Panel Chaired by the Chairperson herein but with different Public Employer and Employee Organization Members. Hearings were held on four dates in 2004 and two dates in 2005. On July 18, 2005, the Panel issued its Opinion and Award. The Public Employer Panel Member joined the Award and issued a concurring opinion. The Employee

Organization Member issued a dissent.

The Panel's 2005 Opinion and Award noted that the Award was for the two year period to run from July 1, 2002 to June 30, 2004. The Award itself granted the Firefighters ("Union") wage increases of 2.1% for the first year of the Award and 3.4% for the second year of the Award. On the matter of health insurance, the Award incorporated the terms of a June 6, 2004 Memorandum of the Agreement that the Parties had executed on June 30, 2004, which Memorandum had been rejected by the Union membership. It is also noted that there were other provisions on the Award as follows:

1. A new 17.1 (Rates of Pay) was added to the Parties' Agreement regarding temporary assignment. (Union Proposal 5)
2. A new Article was added to the Collective Bargaining Agreement for IOD claims to replace a March 31, 1993 Memorandum of Agreement for IOD cases. (City Proposal 4)
3. A new Article was added to the Collective Bargaining Agreement for drug and alcohol testing to replace a June 26, 1995 Drug Testing Policy for the Buffalo Fire Department. (City Proposal 5)

The Union, after the Award was issued in 2005, commenced a proceeding in New York State Supreme Court to vacate the Award. The Award was vacated by State Supreme Court, Erie County to the extent of its wage and health insurance provisions. An appeal was taken of this determination to the Appellate Division, State Supreme Court, Fourth

Department. The Fourth Department (50 AD3d 106, February 1, 2008) reversed Supreme Court's vacating of the wage portion of the Award and affirmed the decision of State Supreme Court to vacate the health insurance portion of the Award. The New York Court of Appeals (13 NY3d 803, October 15, 2009), ruled that the Fourth Department had incorrectly vacated only the health insurance portion of the Award. According to the Court of Appeals, the Panel "did not consider the issue of wages in isolation," since the Panel noted that "it was rejecting the City's wage proposal, but that it would generate savings for the City on the health insurance portion of the arbitration award." The Court of Appeals observed that the Parties agreed that "the separate portions of the arbitration award were so interdependent [that] no part thereof could be vacated without affecting the merits of the remainder of the award." Accordingly, the Award was vacated "in its entirety" by the Court of Appeals.

On Remand, the City is represented by the law firm of Goldberg Segalla, LLP by Matthew C. VanVessem, Esq., of Counsel, and the Union has been represented by Creighton, Johnsen & Giroux, by E, Joseph Giroux, Jr., Esq., of Counsel. Hearings were held on May 26, 2010, June 28, 2010, July 2, 2010 and September 20, 2010.

After all proceedings were completed and post hearing briefs filed the Panel met in executive session on October 20 and October 26, 2010. Substantial disagreement still existed between the parties and this decision was written by the Chairman with the expectation that one other Panel member would sign so that a majority decision could be issued.

The Parties were given a full opportunity before this Panel to produce witnesses and present documentary and other evidence in support of their respective positions, as well as the opportunity to cross-examine witnesses appearing on behalf of the Parties. This Opinion and Award on Remand constitutes the results of the Panel's consideration of the evidence presented within the context of the criteria set forth in Section 209.4 of the Civil Service Law. The Panel, prior to the issuance of the instant Opinion and Award, has engaged in substantial deliberations. The Award constitutes the decision of the majority of the Panel.

Specifically, it is noted that the evidence and the Parties' positions were considered against the criteria set forth in Section 209.4 of the Civil Service Law, including, but not limited to a comparison of wages, hours and conditions of employment of other employees performing similar services or requiring similar skills under similar working conditions; the interest and welfare of the public and the financial ability of the public employer to pay; the peculiarities in regard to other professions such as hazards, educational qualifications, training and skills; and the terms of collective agreements negotiated between the Parties in the past providing for compensation and fringe benefits.

By way of pertinent background, the Panel would also note an Award issued November 19, 2010 by Arbitrator Dennis J. Campagna (PERB Case No. A2004-261). Arbitrator Campagna in a December 19, 2008 Interim Decision found that the June 6, 2004 Memorandum of Agreement on health insurance between the City and the Union's President, since it was not ratified by Local 282, did not achieve the status of a binding agreement. In

the Interim Decision, Arbitrator Campagna also found that the City's implementation of a single Carrier Health Insurance Plan, without the Union's consent, which occurred on or about July 1, 2004, deprived the bargaining unit members of a benefit to choose among three health insurance providers and violated the Parties' Agreement. In the November 19, 2010 Award, Arbitrator Campagna directed the City to reimburse Union members and retirees who retired on or after July 1, 2004, for health insurance contributions made by said members and retirees from that date forward and from the date of his Award "to make 100% of all health insurance contributions for members and retirees." Arbitrator Campagna further set forth a process to allow Union members and retirees to seek reimbursement for co-pays and out-of-pocket expenses that would not otherwise have been made if the City had not eliminated Independent Health and Univera. He stayed the implementation of his Award as it applied to Union members who retired on or after July 1, 2004, based on the final disposition of the City's appeal of a nearly identical Award on health insurance involving the City and the Buffalo PBA that was issued by Arbitrator Jeffrey Selchick.

POSITION OF THE UNION

It is noted that the Union maintains that at the presentation of its case on June 28, 2010, before this Panel, it was able to establish that the City had not accurately predicted its future financial condition before the first Panel and had in fact exaggerated costs to the City

for increases in wages and it underestimated the savings that the City would realize by a re-engineering of the Fire Department, which re-engineering including the closing of several fire companies. The Union claims that, at the June 28, 2010, hearing it presented evidence sufficient to persuade the Panel that the City has sufficient funds to address any back pay award. In addition, the Union claims it presented evidence that the City's presentation before this Panel contains an incorrect claim that the City had saved nothing from the implementation of the health insurance Agreement that the Panel had adopted in the original Award.

Further, the Union claims that the City's "rebuttal" presentation on September 20, 2010, was one in which the City claimed that it had a large General Fund balance but nevertheless had allocated all of that money and therefore had no funds to address any back pay award to the Union. It is the Union's position, however, that the City did not bring forward evidence that the Union's estimate or calculation of health care savings was in any way inaccurate or inflated.

In setting forth its position before this Panel, the Union notes that Arbitrator Campagna, in the area of temporary assignments, has issued an arbitration Award interpreting the Parties' Agreement such that the first Panel's Award on Union Proposal 5 (Pay on Temporary Assignments) was already a mandate visited on the City. The Union thus notes that it has withdrawn its Proposal 5.

On the issue of parity, the Union asks that this Panel "revisit" this topic. It is the

Union's position that the City, when it made its initial presentation in this proceeding in which it argued that parity between the PBA and the Union should be "broken," "over estimated the savings to be realized by the Police contract and exaggerated the cost of granting parity to the Firefighters." Furthermore, the Union maintains that "savings from health insurance" realized by the City have "been substantial."

The Union brings to the Panel's attention that the Bantle Arbitration Award between the Parties was overlooked by the first Panel and that the Bantle Award reflected that "the panel felt constrained to maintain parity with Police even where the Firefighters had shown they were entitled to a larger wage increase." Parity, in other words, the Union claims, was maintained in the Bantle Award even though it was "to the detriment of the Firefighters." The Union urges the Panel to "look at what actually happened and compare it to the City's estimates and predictions presented at the original hearings." The Panel, by doing so, according to the Union, "will find that an award of parity is warranted."

A comparison of what the City claimed its future financial condition would be as to what actually occurred, the Union maintains, "demonstrates that the City's estimates were wrong and predication of dire financial conditions did not materialize." The City, according to the Union, also "incorrectly predicted the cost of parity." Rather than experience substantial decreases in its General Fund, the City, the Union maintains, saw its General Fund balance grow from $18 million in 2002 to over $117 million by 2007. The balance has grown to a point where it is "now over $138 million," the Union further claims. The "total

unreserved balance," according to the Union, "also grew every year and is now almost $110 million."

Additionally, the Union asserts that, contrary to the predication of the City and the Control Board in the initial hearings, state aid has not remained stagnant but has increased every year. Taxable property value, according to the Union, contrary to the City's claim that it was declining, "has increased in every year from 2002 until 2009." In other words, the Union argues, the financial condition of the City "was never as bad as it presented to this Panel in order to justify its position."

As to the City's claim of savings from the police contract based on restructuring, the Union responds that the predicated savings was not reached. In fact, the Union puts forth, although "the City predicated it would reap the greatest benefit from the Police re-engineering, it actually spent more." In addition, the Union claims that the "City overestimated the cost of parity by underestimating the reduction in the number of firefighters that would have occurred because of the restructuring of the fire department and the closing of fire companies." The Union points to the Buffalo Fiscal Stability Board's review of the City's financial plan wherein the Control Board, the Union asserts, "recognized that the City, by closing various fire companies, would generate millions of dollars in savings, far exceeding the estimated cost for parity raises."

On the re-engineering issue, the Union claims that the Panel in its initial Award rejected parity because of its belief that the Police had entered into an Agreement with

various re-engineering concessions that would not be matched by Firefighters. The Union contends, however, that re-engineering in the Fire Department has resulted in more savings to the City than any re-engineering in the Police Department. The City is accused by the Union of using confusing vocabulary, as seen by the use of "fire initiative," when in fact the restructuring of the entire Fire Department was "re-engineering." In any event, the Union claims, "the City cannot hide the savings resulting from the restructuring of the Fire Department." It notes the reduction in the number of Firefighters and the attendant increase in work loads. It is the Union's position that even by "using the City's own methodology for estimating the cost of parity, except using the actual number of firefighters not estimates, results in saving of $4,824,682.00 rather than a cost of $21,772,465.00 as estimated by the City." The Panel is thus urged to maintain parity and to "grant a $5,000 raise effective July 1, 2002 and a 3.4% raise effective July 1, 2003."

On the issue of IOD, the Union notes that the Panel adopted the City's proposal in its initial Award regarding new Injured on Duty Policies with the exception of adding a provision that addressed the outcome if the Commissioner failed to make a decision. The Award on IOD, according to the Union, "made substantial changes to the existing IOD policy." It maintains that the benefits lost to members of the Union have been brought forward to the Panel's attention. As to the City's claim that substantial changes in the adoption of the new IOD has not caused it to realize any savings, leads the Union to argue that "the Panel should not adopt the proposal in its new Award."

As to other proposals before the Panel, the Union claims that the City presented no evidence as to its proposals involving "manpower, minimum staffing and drug and alcohol policy." In fact, the Union puts forth, the City "has achieved and exceeded the manpower objectives it originally proposed." It notes also that the City did not implement the drug and alcohol testing policy set forth in the initial Award. The Union notes that, "[w]hile the firefighters have not objected to a drug testing policy and worked under a policy for years, the policy adopted by the original panel had, as pointed out, several shortcomings." The Panel is urged by the Union to "leave in place the existing policy allowing the parties to negotiate any changes in its ongoing negotiations." On the issue of health insurance, the Union maintains that, "[i]f this Panel adopts the health insurance MOU as it initially did, the Panel should adopt it in its entirety, including the provision regarding Police Parity, which was hand-written in the MOU." Any Award, according to the Union, should incorporate the remedy provisions of the Selchick PBA Award and Arbitrator Campagna's Award between the Parties herein on health insurance.

The Union maintains that the City "simply ignores the savings from health insurance" it has realized, "coyly stating that there might have been savings but 'that amount cannot be calculated'." It is clear, according to the Union, that the City recognizes "that health insurance is tied to wages," but, the Union complains, the City "wants to avoid a discussion of the actual savings." According to the Union, the savings can be calculated and "are significant."

In setting forth its position, the Union has also asked the Panel to take into account that "the City's refusal to implement the wage increases granted by this Panel in its original award, has resulted in the City enjoying the savings from switching to a single health insurance provider from July 1, 2004 until the present." In claiming that no savings have been recognized, the City, the Union maintains, overlooks "that it is not the actual cost of the City that matters but the relative cost to what it would have paid if it had not switched [health insurance]." Furthermore, the Union claims that the City has calculated savings on health insurance on various occasions in the past. It maintains that the City's Mayor "must have been relying on City estimates of the savings" when offering testimony that by switching to a single health care provider the City "saved $6.1 million in 2004-05 and over $10 million per year in future years." A chart prepared by the Union, the Union notes, which was based on an estimate by the New York State Insurance Department as to an average increase in community rated plans, would confirm that there where "substantial savings" realized by the City when it went to a single provider. The "total amount of savings for the Firefighters only for the period 2004 to 2009," the Union maintains, "is almost $17.0 million."

Addressing the City's claim that no award of wage increases should be made due to the passage of time and liability for back wages, the Union maintains that the Panel is now "in a unique situation in the true sense of the word," in that "[i]t is faced with making a determination regarding a past period . . . that, because of the passage of time, will have a significant impact when the award is issued." Nevertheless, the Union maintains, though the

circumstances might be "unique, the cost of the Award is no different than if the Panel had issued the Award before, during or after the 2002-2004 period." The Union puts forth that "[a]ny increase to base wages in an interest arbitration award by its very nature will continue into the future as part of the contract." The only "difference," according to the Union, is that the City now "have to pay for the increased wages in a lump sum ..., instead of over a period of years." In addition, the Union maintains that the financial impact must be considered "the same, except for the savings to the City from having the use of the money since the 2002-2004 period."

The Union also addresses the "current financial ability to pay" of the City. Noting that the City has resisted looking at its current financial ability, the Union claims that the City has taken "contradictory positions that (1) this Panel should not consider its current financial ability to pay in awarding a wage increase for 2002 to 2004, but (2) this Panel should consider its current financial ability to pay any back pay resulting from the award because it would have to be paid from current money." According to the Union, the "current financial status" of the City must be considered "relevant for two reasons: 1) to show that the City's original predications were wrong and 2) to contradict that the City's position that it cannot pay a back-pay award." The Union emphasizes its position that it is the City that has been the cause of the long delay and it should not now be allowed to "capitalize on it." In addition, the Union maintains that the City does have the "financial ability to pay the back-pay award." The Union takes note of the General Fund balance of the City "at the end of

2009" in the amount of $138.0 million. The City, the Union contends, "also has re-engineering money." The Union concludes that "the City currently has enough to pay any back pay award, even if that was a parity award."

The Union asserts that the City's evidence that a fund balance would be used to address future budget shortfalls "doesn't fit with the City's Four Year Financial Plan issued approximately three months earlier predicting no use of such funds." The Union also takes note of remarks made by the City's Mayor that the City is over its financial crisis. The Union contends that "the City's arguments to this Panel that it cannot pay for any back-pay award and that this Panel should award a zero pay increase (allowing it to recoup $10.0 million from the Firefighters) are unreasonable and based on misleading information."

POSITION OF THE CITY

Before this Panel, the City claims that "its proposals submitted for the years 2002-2004 were the most appropriate proposals before this Panel and that the same or some slight variation of the City's original proposals must be awarded with the issuance of a new Award by this Panel." Any Award based on the Union's proposals, the City puts forth, would not be "supported by the record and would be financially devastating to the City." No reasons exist, the City argues, for the Union to be granted wage parity with the PBA "as the wage increase for the PBA for 2002 was specifically given by the City in return for the PBA

agreeing to a number of contractual and work rule changes that would allow the City to restructure and to save money while maintaining the same level of service." It is the City's position that the Union "was and continues to be unwilling to agree to any contractual changes that will allow the City to restructure its operations so as to maintain the level of service while saving costs."

The City takes notes of the wage freeze attendant to the Buffalo Fiscal Stability Authority Act and the creation of the Buffalo Fiscal Stability Authority Control Board. The wage freeze took effect, the City observes, on April 21, 2004, and was reaffirmed in 2005 and 2006. It notes that in June 2007 the wage freeze ended but without any finding that the City's fiscal crisis had ended. According to the City, it "bears emphasis that the City advised, in its May 2007 submission to the BFSA [Control Board], that paying multiple years of salary or step increases which accrued during the time period of the wage freeze, 'will utilize the projected surplus'." Thus, the City claims "it has been the City's consistent position that the salary increases sought by the unions in the aforementioned legal proceedings, and the wage increases sought by Local 282 in the instant proceeding, because of the recurring, compounded nature of the expense, cannot be implemented, and will only serve to expend drastically or eliminate the reserves built by years of wage suspensions, employee attrition and BFSA borrowing." The City observes that the Union was given a total of 5.5% in wages provided for in the original Award retroactive to July 1, 2007. On the question of health insurance, the City notes that its proposal on health insurance is once again before this Panel

and "[t]he City maintains that this Panel should consider an award, as modified to reflect existing conditions, health insurance benefit changes as sought in proposal 3."

The City observes in the fiscal year ending July 30, 2004, $48 million was spent for health insurance coverage for City employees and retirees, which the City claims placed "a significant strain on the City's budget." It notes that, before July 1, 2004, the health insurance plans offered were "community rated" since the City could only offer "community rated" coverage if coverage was offered from multiple carriers. By moving all of the employees and retirees to a single carrier, the City contends, it then had the option of using an "experience rate" where premiums would be determined solely by the utilization of benefits by the employees of the City and retirees. The City notes, after consultation with experts, that it reached the belief that savings would be achieved by moving to the single health insurance carrier with the "experience rating." The City proffers that "such savings did occur in fiscal year 2004-2005, [but] dramatic increases in health insurance costs, here and across the country, negatively affected the savings for the City and its employees in following years." These significant increases, according to the City, have resulted in "minimizing the expected budgetary savings initially projected with the switch to a single carrier." The City contends that "no member or retiree from Local 282 or any covered dependent experienced a diminution of coverage as a result of the change to a single health insurance provider in July, 2004" and that "[c]o-payments and deductibles on whole either remained the same or decreased." The City has also claimed that, to the extent that the new

coverage "did not cover something to the same extent that the previous coverage did, the City has agreed to self-insure the provision of that benefit." It cannot be said, the City proffers that, the change to a single carrier resulted "in any detriment to members of Local 282" but "it is also evident that the savings projected were largely illusory as the costs of health care benefits continue to rise at a rate much higher than inflation."

The City identifies the observation of the Court of Appeals that the Panel's Award of a wage increase to the Union was based in part on the Panel's belief that the health insurance would result in savings to the City. The City claims that "the small savings" it realized "was eliminated by July 1, 2005." The City advances its "view that City Proposal 3, which included cost-sharing provisions with Local 282 members, among other needed changes, must be affected in order to permit the City to remain financially viable" and that "these changes should be retroactive to coincide with the term of the Award and any wage increase that this Panel may be contemplating."

Turning to wages and other issues, the City focuses on its financial ability to pay and identifies a Four-Year Financial Plan adopted by the Control Board for fiscal years ending 2004 to 2007. It claims in a 2006-2007 fiscal year, the City could not "expect to receive any additional assistance from the BFSA [Control Board] in the form of deficit borrowing." According to the City, "[a]ny increase awarded by this new Panel will create an additional gap in the City's financial plan, and this gap must be addressed by a recurring action - it cannot be plugged using one time revenue, such as an allocation of reserves or the union's

hoped-for increase in State aid."

The City also notes that it agreed with the PBA that there would be no lay offs and that an Arbitrator has ruled that under its Agreement with the blue collar units no layoffs can occur. Thus, the City contends that, to the extent that the City "needs to cut expenses by laying off personnel, its only options are to layoff white collar employees or firefighters, given the number of employees in each unit." The City also claims that it has cut services in other City departments "to the bone" and his sought to eliminate services, as seen "most notably" in "transferring its park system to the County of Erie." The City notes that the park system has been returned to it in many respects it can be seen that "an outside non-profit still helps run the system."

As to state aid, the City claims that "recent state aid has been cut, with less aid expected in the coming years." The City contends that the "State no longer has the financial ability to bail out the City" and "[s]ince 2008 the State has significantly reduced its aid to Buffalo and the City does not expect [nor project] increases in coming years." The City also references the fact that its bond rating "is not at the highest investment grade" and that if the rating bodies lowered the City's ratings "the City for all intents and purposes, would be the equivalent of bankrupt." The City claims that its financial condition still must be considered "fragile." Hence, the City claims that the Panel "must reject and any all BPFFA proposals that would have an effect of adding any additional expenses to the City's budget" and, in this vein, claims it "simply does not have the money, nor is it able to obtain the money, to pay for

increases sought by Local 282 for its wages and benefits without further slashing personnel or services, or both."

PANEL'S AWARD

The Panel observes that the two chief objects of its attention are the Union's proposals for wage increases (Union Proposal 1, 2) and the City's health insurance proposal (City Proposal 3). Before addressing these areas, however, the Panel would note, in view of the ruling of the Court of Appeals vacating the first Panel's entire Award, that there is a need to address the Parties' other proposals that were awarded by the first Panel. Those proposals were Union Proposal #5 (Temporary Assignments- Rates of Pay), City Proposal #4 (IOD Procedure), and City Proposal #5 (Drug and Alcohol Testing). The Panel observes that the Union has withdrawn its Proposal 5, leaving for consideration the City's IOD and Drug and Alcohol Testing proposals. The Panel finds no reason why its earlier Awards on the IOD procedure and the Drug and Alcohol Testing should not stand. The Award on these proposals did not form any part of the ruling of the Court of Appeals vacating the entire Award and, after viewing the Award on these proposals in light of the Parties' presentations before this Panel, the Panel, as noted, finds no reason why the Awards as to these proposals should not stand. The Panel specifically states that it has taken into account all of the statutory criteria under Civil Service Law §209.4 in adhering to the first Panel's Awards on

these proposals.

Award on IOD Procedure (City Proposal 4)

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

Section 1- Intent and Definitions

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

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

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

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

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

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

A. A member or anyone acting on his/her behalf, who claims a right to benefits under G.M.L. § 207-a either because of a new illness or injury or the recurrence of a prior illness or injury, shall make written notice and application for those benefits within ten (10) business days of when the

firefighter reasonably should have known that the illness or injury would give rise to the claim of entitlement to § 207-a benefits. The member shall have the continuing right to supplement or amend his notice and application with any information obtained subsequent to the filing of such notice and application. Any dispute arising over an alleged failure of the member to file notice and application within the time limits set forth herein shall be subject to the dispute resolution procedure provided for in Section 6 of this Article.

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

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

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

Section 3 - Status Pending Determination of Eligibility for Benefits

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

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

Section 4 - Benefit Determinations

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

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

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

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

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

Section 5 - Assignment to Light Duty

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

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

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

Section 6 - Dispute Resolution Procedure

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

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

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

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

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

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

Section 7 - Disability Retirement

A. Consistent with § 207-a, the City may file an application on the member's behalf for retirement under Sections 363 or 363-c of the New York State Retirement and Social Security Law. Any injured or sick member who

is receiving § 207-a benefits shall permit reasonable medical inspections in connection with such an application for accidental disability retirement or performance of duty disability retirement.

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

Section 8 - Continuation of Contract Benefits

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

Section 9 - Outside Employment

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

Section 10 - Hazardous Exposure

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

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

Section 11- Exclusivity of Procedures

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

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

Award on Drug and Alcohol Testing (City Proposal #5)

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

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

B. The City shall administer reasonable suspicion, post accident, return to duty, and follow up alcohol and controlled substances testing. The City shall also require pre-employment controlled substance testing from conditional new hires, at the individual's expense. The City shall administer, on an annual (calendar year) basis, an amount of random controlled substances tests equal to 25% of all employees in the bargaining unit in the Fire

Department. The City shall administer, on an annual (calendar year) basis, an amount of random alcohol equal to 10% of all employees in the bargaining unit in the Fire Department. Employees will be selected for random testing by a computer program containing employee social security numbers. Employees that are on leave (for any reason, including, but not limited to sick or IOD leave) or serving a disciplinary suspension may be tested while they are on leave or suspension if they are selected for random testing. Employees that are not on duty when selected for random testing will be tested when they next report for duty.

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

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

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

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

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

G. The City agrees that it will not discipline an employee for a breath alcohol test that is below .04 or a controlled substances test results below the levels established by the United States Department of Transportation

and/or the Federal Highway Administration. The term positive controlled substances test as it is used in this document shall mean a positive test under the levels established and used by the United States Department of Transportation and/or the Federal Highway Administration. A positive alcohol test as it is used in this document shall mean a result of .04 or higher on a breath alcohol test.

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

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

b. In all other cases, the following procedure will apply:

i) 1st Positive -Following notification of an employee's first positive alcohol or controlled substances test result, the employee shall be referred to a substance abuse professional. The employee shall also be suspended from duty without pay until such time that the employee submits to and passes a return to duty test. The employee may utilize available paid time off during this period. If the return to duty test results are positive, the test result will be considered a second positive under this Agreement. If an employee refuses to submit to a return to duty test within a thirty (30) day period following the employee's suspension, the employee will be terminated.

ii) 2nd Positive - Following notification of a second positive alcohol or controlled substance test result, the employee shall be immediately discharged.

iii) Any time off required for treatment shall be without pay; however, an employee may use any available accrued time off.

iv) The City shall not be responsible for the cost of any treatment. Health Insurance benefits may be available.

v) If a Substance Abuse Professional recommends that an employee participate in a treatment program, successful completion of that program is required as a condition of continued employment. The employee must agree to execute a release allowing the City to obtain information concerning the employee's attendance only in such a program. In the event the City learns that an employee has failed to attend one scheduled appointment in such a treatment program, it will advise the employee to consult with the Union. Unless good cause is shown, an employee will be discharged for missing two scheduled appointments.

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

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

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

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

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

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

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

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

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

CITY OF BUFFALO FIRE DEPARTMENT POLICY ON ALCOHOL AND SUBSTANCE ABUSE

Introduction

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

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

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

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

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

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

Definitions

For purposes of this Policy:

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

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

The term "illegal drugs" means all controlled substances, narcotics and other drug-related materials whose use without specific medical authorization is a criminal offense under State or Federal law, especially including

marijuana, cocaine, opiates, amphetamines and phencyclidine (PCP).

Rules

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

1. Reporting to work or working with an illegal drug in the employee's system.

2. Reporting for work or working with a blood alcohol concentration of .04 or greater.

3. Unlawful consumption of an illegal drug or consumption of alcohol during working hours, or on City premises at any time.

4. Unlawful manufacture, distribution, dispensing or possession of an illegal drug on City premises at any time. Possession of alcohol on City premises at any time.

5. Refusing to submit to a test to scientifically determine the concentration of alcohol or presence of illegal drugs in the employees system.

Violations of the Rules

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

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

Testing

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

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

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

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

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

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

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

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

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

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

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

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

Referral Program

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

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

* * *

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

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

CERTIFICATE OF RECEIPT

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

_____ _____

Date Signature

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

_____ _____

Date Signature

WAGE INCREASES (UNION PROPOSALS 1 AND 2)

Union's Proposals

BPFFA PROPOSAL # 1

SUBJECT: ARTICLE III, SALARIES and HOURS of WORK

THE BPFFA PROPOSES THE FOLLOWING:

The following salary or wage increases shall be implemented:

Effective	Percentage Increase
7/1/02	3.4%
7/1/03	3.4%

BPFFA PROPOSAL # 2

SUBJECT: ARTICLE III, SALARIES and HOURS of WORK

THE BPFFA PROPOSES THE FOLLOWING:

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

Award on Wage Increases

The Panel notes the first Panel's Award rejecting Union Proposal #2 that sought a retroactive $5,000 across-the-board increase in base wages and salaries, to be effective on the first day of the two year period covered by this Award. The first Panel found that "[n]o retroactive $5,000 across the board increase in base wages or salaries, as sought by the Union

in Proposal 2, will be awarded." The Panel adheres to that portion of the first Panel's Award, specifically stating that all statutory criteria under Civil Service §209.4 have been considered in arriving at this conclusion.

As to the award on wage increases, the first Panel for the first year of the Award awarded a 2.1% increase in base annual salaries and for the second year of the Award it awarded a 3.4% increase in base annual salaries.

The Union's position before the first Panel and also this Panel is that its wage increase proposals were needed to maintain parity with the PBA. In rejecting this argument of the Union, and in justifying its Award of a 2.1% increase and 3.4% increase in wages, the first Panel stated:

> Three criteria that are found in the statutory factors the Panel must consider emerge as key components of the analysis of the Union's wage increase proposals. These criteria are parity, the City's ability to pay, and the nature of the duties undertaken by firefighters. The largest battle in this proceeding finds the Union arguing that its proposals are more than supported by the concept of parity and the City arguing, along with the Authority, that parity cannot be given the weight it has in the past because of the City's inability to address any wage increases because of the conditions that produced the Control Board.
>
> Clearly, the record amply demonstrates that, for over 30 years, the concept of parity has basically carried the day when it came to addressing questions of wage increases. That is to say, interest arbitration panels have uniformly followed the wage increases achieved by the PBA when addressing the Union's proposals on wage increases. The historical precedent regarding parity caused Arbitrator Foster to remark over ten years ago that "[t]here can be little doubt that the parties, both historically and currently have sought to treat police officers and firefighters uniformly ..." Arbitrator Lewindowski subsequently commented that "[t]he parties have a long history of using parity to set wage and benefit salaries for the unit and the PBA." Arbitrator Pohl in

2000 likewise commented that "the criterion of parity between those two units [PBA and Firefighters] is the most relevant factor to apply" and that parity should prevail "[a]bsent any plausible explanation" to support a contrary conclusion.

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

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

Subsequent to the creation of the Authority, the City, according to clear record evidence, has balanced its budgets only by the deficit borrowing by the Authority. Thus, in fiscal year 2003 to 2004, the Authority borrowed $7.81 million dollars for the City, and, in fiscal year 2004 to 2005, the Authority borrowed $19.054 million dollars for the City. The City's current bond rating by both Standard & Poor's and Moody's are currently at the minimum

investment grade. Any lower rating by these agencies would in all likelihood keep the City from entering the short-term borrowing market to address payroll obligations while waiting to receive property taxes.

The fiscal crisis facing the City is unprecedented. There is a genuine limitation on the City's ability to pay that was not in existence at the time the past interest arbitration awards were issued. Despite the clear pattern of parity shown in the record, the circumstances presented by the City's fiscal crisis are such that the Panel is constrained to break the pattern of parity to some extent. In arriving at this conclusion, the Panel is not at all unmindful of the professionalism required of members of the Union and the extremely dangerous work they face each day. The public depends as much on the Union members as it does on their counterparts in the PBA for protection of life, limb, and property. Members of the Union, like their counterparts in the PBA, are faced with the possibility of life-threatening situations each and every time they perform their firefighting duties. These observations concerning hazards and professionalism are not offered for the sake of paying lip service to the statutory factors, but must and will be taken into account by the Panel. The Panel's conclusion that the City's fiscal condition prevents what in the past has been a routine application of parity does not support the conclusion that no wage increases are appropriate.

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

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

> additional monies for members of the Union in conjunction with the Award on Union Proposal 5.
>
> Specifically, as to the Union's Proposals 1 and 2, the Panel is awarding a general wage increase of 2.1% in the first year and a general wage increase of 3.4% in the second year. The Panel's Award on general wage increases, for the second year, seeks to place the Firefighters on track for parity. No retroactive $5,000 across the board increase in base wages or salaries, as sought by the Union in Proposal 2, will be awarded.
>
> In terms of the first year increase of 2.1%, the Panel is aware that this is a year not covered by the Control Board. As to the second year, the Authority, the Panel notes, has imposed a wage freeze, but it is the Panel's belief that, within a reasonable period after the adoption of the Award, the 3.4% increase should and can be addressed.

This Panel would first observe that it has taken into account all evidence offered by both Parties presented to the first Panel and to this Panel as well as all of the criteria set forth in Civil Service Law §209.4. The Panel will adhere to the finding of the first Panel that, for the two year period in question, parity between the Firefighters and the PBA need not be obtained. This Panel remains of the mind that the Union has not made the significant operational concessions made by the PBA, which the first Panel found to be an essential part of the *quid pro quo* between the PBA and the City, which has never been part of the dynamics of the relationship between the Parties herein as to the two year period covered by this Award.

The Panel is also mindful of the language it utilized in the initial Award that took into account its now discredited Award on health insurance. As seen above, the first Panel's reference to the health insurance portion of its Award on the issue of wages was limited to

one sentence ("in setting forth its conclusion that the City's position on proposals 1 and 2 will not be accepted across the board, this Panel would point out that the Award will generate some saving to the City by the Panel's Award on City Proposals 3 and 4."). This Panel observes that the remarks of the first Panel were not so much set forth as justification for the wage increases awarded but as part of the justification for rejecting the City's position that no wage increases be awarded for the two year period in question. Moreover, the Panel, as seen above quoted, observes that the first Panel took into account much more than any savings predicted by the health insurance portion of the Award. Thus, the Panel, while noting that the "fiscal crisis" faced by the City was "unprecedented" and that there was therefore "a genuine limitation on the City's ability to pay" nevertheless took into account the "professionalism" of Union members and "the extremely dangerous work they face each day." It likened the peril faced by Firefighters with the peril faced by their brothers and sisters on the police force. The Panel takes arbitral notice of the fact that Buffalo Firefighters have lost their lives in the line of duty since the first Panel issued its Award. The first Panel stated that its reference to the hazards of the job was more than "for the sake of paying lip service to the statutory factors, but must and will be taken into account by the Panel." This Panel, too, also finds this aspect of the statutory criteria to be a critical component of its rationale. Moreover, the first Panel found that the "City's fiscal condition ... does not support the conclusion that no wage increases are appropriate." No part of the presentation before this Panel allows for a different conclusion than arrived at by the first Panel regarding wage

increases. While the Panel will not follow parity, it emphasizes that there are reasons in support of wage increases, all based on the statutory criteria of §209.4, beyond the first Panel's isolated comment about savings to be generated by health insurance, which, this Panel again emphasizes, was proffered in support of rejecting the conclusion that the City's claim that no wage increases should be awarded. Accordingly, the Panel will follow the first Panel's Award on wage increases.

AWARD ON WAGE INCREASES

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

HEALTH INSURANCE (CITY PROPOSAL 3)

City's Proposal

City Proposal 3
September 19, 2003
Subject: **Health Insurance**

Proposal:

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

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

A. Independent Health Encompass C 1, or

B. Community Blue III

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

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

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

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

A. The employee must retire from the New York State Retirement System and begin, as well as continue, receiving pension payments immediately following the employee's retirement from City service; and

B. The employee must have had at least ten (10) years of continuous, full-time service with the City immediately proceeding the date of retirement.

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

Award on Health Insurance (City Proposal #3)

The Panel finds the City's Proposal 3, which the first Panel did not address, is now the health insurance proposal before it in light of the judicial finding that the first Panel improperly considered the 2004 MOA on health insurance as a basis upon which to issue an Award. Taking into account all statutory criteria set forth in Civil Service Law 209.4, the Panel finds that there is insufficient justification to award the City its proposal. The Panel finds that, if awarded, the City's proposal would conflict at a practical level with the remedial portions of Arbitrator Campagna's Award on health insurance, identified above. The status quo on health insurance for the two year period covered by this Award should prevail.

AWARD ON REMAINING ISSUES

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

DATED: 4/11/2011

THOMAS N. RINALDO, CHAIRPERSON

SEAN P. BEITER, ESQ.
PUBLIC EMPLOYER MEMBER

~~CONCUR~~/DISSENT

DANIEL CUNNINGHAM
EMPLOYEE ORGANIZATION MEMBER

CONCUR/~~DISSENT~~

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the matter of the Interest Arbitration between

BUFFALO PROFESSIONAL FIREFIGHTERS
ASSOCIATION, INC. LOCAL 282 of the
INTERNATIONAL ASSOCIATION OF FIREFIGHTERS,

And

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

THE CITY OF BUFFALO, NEW YORK

Concurring Opinion of Public Employee Panel Member Daniel Cunningham

As the Public Employee Panel Member representing the Buffalo Professional Firefighters Association, Inc., Local 282, ("Firefighters Local 282") and its members, I file this opinion concurring with the Award of the neutral and impartial Chair of the Panel, Thomas Rinaldo, on the remand proceeding. I write this separate concurrence because in my view, the evidence before the panel supports not only the extremely modest wage increase that the impartial Chair finds, but an even greater wage increase for Firefighters of the City of Buffalo ("City") that would begin to bridge the chasm of wage and benefit disparity that exists between Firefighters and the other uniformed employees – Police Officers – of the City. Although I believe that a greater increase in wages is justified when one considers the evidence before the panel, it was clear that the Public Employer Panel Member would not agree to even the extremely modest 2.1% and 3.4% increases for July 1, 2002 and July 1, 2003 that the original panel had imposed. I am concurring in the Chairperson's Award, despite my strong belief that the evidence and

consideration of the factors we are to consider justifies a greater increase, to move beyond the impasse between the Firefighters Local 282 and the City that has existed for the last ten years and more particularly since the issuance of the original award and ensuing litigation. I do so with the hope that we can move onto the next interest arbitration period and those years beyond with good faith negotiations, but with trepidation since the City's Panel Members dissent implies that the City will continue litigation in an effort to deprive Firefighters of even the modest 5.5% wage increase for the two years covered by this Award.

The Taylor Law provides that an interest arbitration panel consider distinct criteria in reaching it a just and reasonable decision. The factors include:

a. Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours, and conditions of employment of other employees performing similar services or requiring similar skills under similar working conditions;

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

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

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

I have carefully considered each of these factors, as well as other relevant factors and conclude that the award is "reasonable" although as I have previously stated, I

believe that a larger wage increase would be reasonable and just when considering these factors.

Without reciting in detail the entire history of this proceeding, a broad outline is important. The Firefighters' last wage increase (2.25%) prior to the original panel's decision was in July 2001, almost 10 years ago. This award covers the period July 1, 2002 to June 30, 2003. The original panel issued its decision and award on July 18, 2005. It awarded 2.1% for July 1, 2002 and 3.4% July 1, 2003. When the original panel issued its award, the Buffalo Control board had imposed (April 2004) a wage freeze and the City did not implement the wage provisions of the award. Firefighters Local 282 challenged the award in New York State Supreme Court, where it was vacated. The City appealed to the Appellate Division Fourth Department, which upheld the lower Court's decision, but only with respect to the original panel's imposition of the "single payer" health insurance. With this decision, the City, in February 2008, implemented the 2.1% and 3.4% retroactive to July 1, 2007, the date the Control Board lifted the wage freeze. The City, however, requested permission to appeal the Appellate Division's decision. Permission was granted, and in October 2009, the Court of Appeals vacated the entire award, finding that it was improper to vacate only a portion of the award. The Court of Appeals determined that the Appellate Division correctly found that health insurance was not a matter in dispute before the panel. The interest arbitration was remanded to the panel. There was no limitation on the panel, that is, the panel was not charged, with reissuing a decision based on the original record. In addition, the City made no application or motion to the Court that the panel be limited in its consideration to the record of the original proceeding.

In 2010, I was appointed the Public Employee Panel Member, replacing the original Public Employee Panel Member and the panel reconvened. After presentations by both the City and Firefighters Local 282, the City removed its Public Employer Panel Member and replaced him with its advocate throughout these proceedings (at both the original hearings and the City and Firefighters presentations before the remand panel).

During the period between the original decision and the remand, an arbitrator issued a decision finding that the City's implementation of the "single payer" health insurance plan that was adopted by the original panel. was a violation of the collective bargaining agreement. That arbitrator, however, held a remedy in abeyance in view of the adoption of that plan by the original panel and the legal proceedings involving that award. There is no doubt that health insurance could be considered by this panel. It was considered. However, it became apparent that the City's proposal that was before the original panel could not be implemented since the plans which it proposed were no longer offered by the insurance carriers. The original panel had imposed the 2004 health insurance Memorandum of Understanding ("MOU") that had not been ratified by the membership. The MOU, in fact, provided that the Firefighters would be provided with any health benefit that the Buffalo Police received, either in negotiations or arbitration. In fact, the Firefighters arbitration award on health insurance provides just that, since it is modeled on a police arbitration decision also finding that the single payer plan violated their collective bargaining agreement.

The original decision in a one line comment, noted that adopting single payer plan would generate some savings to the City. I have searched the record of the original proceeding and find no evidence in that record to support that statement. More

importantly, the City, in its presentation before this panel, emphatically stated that there was no savings from the single payer plan, which the City still maintains for all represented employees. While I disagree with that statement, it illustrates that, in fact, the City can well afford the extremely modest wage increases in this award, as the City's surpluses have steadily grown over the years, despite paying these wages since July 1, 2007, and its claim that its single payer health insurance plan has not resulted in savings.

The history of negotiations and interest arbitration awards between the City and both its uniformed departments – police and fire – has been maintenance of relative wage and benefit parity. That long history of wage parity was true, even when an interest arbitrator found that the Firefighters deserved a larger increase in wages than had been gained by the police. During the period covered by this award, the City negotiated a $5,000 increase in base wage for the police effective July 1, 2002 and a 3.4% increase effective July 1, 2003 (there were also 3.4% wage increases for police for the years July 1, 2004, 2005 and 2006; these increases were frozen by the Control Board and did not take effect until successive years beginning July 1, 2007). The $5,000 increase represents a 9.8% increase if applied to the base Firefighters' salary. This is substantially higher than the 2.1% awarded by this Panel. While the 3.4% for the second year is the same percentage increase as the police, it obviously produces less of a dollar raise, since the police increase is calculated on a base salary that was increased by 9.8% in 2002, rather than the 2.1% increase awarded to the Firefighters.

The award also creates a disparity in benefits, as the Chairperson continues to award the City its entire proposal for Injured on Duty ("IOD"). While Firefighters does not object to the procedural changes to IOD, it does object to that portion that deprives

Firefighters of contractual benefits other than health insurance and wages, including longevity, after ninety (90) days on IOD. During the period covered by this award and the period subsequent to this award, the police continued to enjoy, until 2009, their full contractual benefits, while on IOD. The City's attempts to eliminate those benefits for police in 2009, is subject to a pending arbitration proceeding. In my view, the Chairperson's granting the City this reduction in benefits generates and has generated savings to the City. While I believe that the contractual benefits should be continued, I cannot reject and dissent from the Chairperson's Award, which will only result in further stalemate between the parties. Certainly savings generated by this concession on IOD benefits should have been used to fund an even greater wage increase for Firefighters.

The Chairperson's rejection of parity in this award rests on two components:

1. The claim that "reengineering" by the police primarily in the form of 1 officer patrol cars generated savings and there has been no concomitant "reengineering" in the fire department; and

2. The City's fiscal situation does not support parity.

I respectfully reject both of these propositions. As the Public Employee Panel Member, I am concerned with the safety of the Firefighters I represent. The dangers inherent in the job and amplified by Buffalo's environment and house construction are too well documented by the serious injuries and deaths in the period between the issuance of the original award and today. The Chairperson certainly recognizes these dangers and hazards. While the Police Benevolent Association was able to negotiate one officer patrol cars and measures to insure the safety of officers operating under those conditions, the Firefighter cannot safely and timely perform his or her duties and meet their responsibilities to the citizens of this community with decreased manning on fire

apparatus responding to an emergency request. On the other hand, during the period covered by this award, there were fire company closings, which have generated annual savings to the City. The number of Firefighters is significantly lower than it was in 2002. That is indeed the equivalent of "reengineering" and provides the City with ample financial resources and savings to pay a greater wage increase. That reengineering and decrease in manpower has resulted in increased responsibilities and responses for current Firefighters also justifying a greater wage increase.

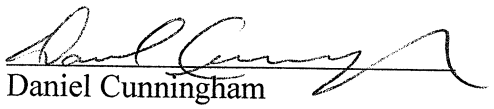
I also reject the contention that the City's financial condition dictates against a higher wage increase that if not maintaining parity, at least minimizes the wage gap between the two uniformed services. The evidence before the panel shows that the City's reserves have been growing, despite tax reductions, and despite the fact that since July 1, 2007 (effective date), Firefighters have been receiving the wage increases this award grants.

Despite my disagreements with the Chairperson, however, I am concurring with his award. The City and the Public Employer Panel Member have taken the insulting position that no wage increase should be granted despite having been given their proposals on IOD policy (which, as I noted above takes away contractual benefits for those Firefighters whose injury is serious enough that they are out of work for more than 90 days) and drug and alcohol testing. They urge that at most, the Firefighters should be given a "one time stipend."

Since July 1, 2002, Firefighters have received an increase in wages of 5.5%, effective July 1, 2007, as a result of the original panel's award. Those wage increases should take effect on the respective dates of July 1, 2002 and July 1, 2003, both of which

occur before the wage freeze. It is, however, for this panel, after in consideration of the enumerated statutory factors, as well as, other relevant factors, to render a reasonable and just award. The record certainly supports these modest wage increases for the two years covered by this award. The City's claim that there be no wage increase (that is, take away the 5.5% that Firefighters have been receiving since July 1, 2007) or a one time stipend, is not only unreasonable, but it is also unjust. My concurrence is based on the fact that without a resolution of this period, the parties are unable to move forward and resolve the following 7 years, 2004 to 2011.

Respectfully submitted,



Daniel Cunningham
Public Employee Panel Member
Buffalo Professional Firefighters, Inc.
IAFF Local 282

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of the Interest
Arbitration Between

CITY OF BUFFALO, NEW YORK,

Employer,

and the

PERB CASE NO.
IA-2003-020;
M-2003-160

BUFFALO PROFESSIONAL FIRE FIGHTERS
ASSOCIATION, INC., LOCAL 282,

Union.

Before the Interest Arbitration Panel:

Thomas N. Rinaldo, Esq., Neutral
Sean P. Beiter, Esq., for the City of Buffalo
Daniel Cunningham for the Buffalo
Professional Fire Fighters Association, Inc.,
Local 282

DISSENT OF THE CITY OF BUFFALO, NEW YORK

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INTRODUCTION

As the Public Employer Panel Member representing the City of Buffalo, New York, I hereby strongly dissent from the Opinion and Award of the Chair of this Panel in which he is joined by the Employee Organization Panel member. For the purposes of clarity, I will refer to this Award as "Rinaldo II" and refer to the vacated award issued on July 18, 2005 in this matter as "Rinaldo I." Rather than helping the parties resolve any disputes between them, the Rinaldo II Award issued by the majority will do nothing but trigger further litigation, perhaps from both parties. That is not the intent of section 209 of the New York Civil Service Law.

THE MAJORITY IS ACTING CONTRARY TO THE REASONING OF THE COURT OF APPEALS

The majority of the Rinaldo II Panel has completely failed to carry out its duty upon the remand of this matter from the New York Court of Appeals. In *Buffalo Professional Firefighters Association, Local 282 v. Masiello*, 13 N.Y. 3d 803 (2009), the Court of Appeals vacated the wage award issued in Rinaldo I which was reinstated by the Fourth Department after being vacated at Special Term. In reaching this decision, the Court of Appeals noted that:

> the Appellate Division erred in vacating only the health insurance portion of the arbitration award. *The arbitration panel did not consider the issue of wages in isolation.* Indeed, the arbitration panel explained that it was rejecting the City's wage proposal, but that it would generate savings for the City on the health insurance portion of the arbitration award. As the parties agree, the separate portions of the arbitration award were so interdependent, no part thereof could be vacated without affecting the merits of the remainder of the award.

(emphasis added). **The majority of the Rinaldo II Panel nullified the ruling of the New York Court of Appeals by reinstating the wage portion of the Rinaldo I Award, in total and without modification, even though the majority of the Rinaldo II Panel did not grant the City any concession in the area of health insurance.**

The outcome of this proceeding as decided by the majority of the Rinaldo II panel puts the parties in the same position that they were in prior to the ruling of the New York Court of Appeals in *Buffalo Professional Firefighters Association, Local 282, supra.* This outcome is peculiar as the areas of health insurance and wages were considered so interdependent by the Rinaldo I Panel that the New York Court of Appeals ruled that vacating the Rinaldo I Award on health insurance required that the Rinaldo I Award on wages also be vacated. The result of this proceeding (Rinaldo II) is identical to the result that the Court of Appeals vacated.

On remand, the Rinaldo II Panel offers no rationale to justify why it is issuing the same award on wages as Rinaldo I, while making no award on the subject of health insurance. The Rinaldo I Panel previously found these issues to be related and justified rejecting the City wage proposal of no wage increase by stating that the City would generate savings from the health insurance portion of the Award. As the majority in Rinaldo II does not now have a health insurance portion of the Award, it now has lost its justification for awarding the same wage increase as the Rinaldo I Panel awarded previously.

I find this determination by the majority in Rinaldo II to be illogical, unjustified, and contrary to the ruling of the New YorkCourt of Appeals.

THE PANEL ERRED IN RE-OPENING THE RECORD

The Term of this Award is July 1, 2002 to June 30, 2004. The original hearing was held on November 8, 2004, November 9, 2004, November 15, 2004, November 16, 2004, January 3, 2005, and January 17, 2005. In other words, the entire original hearing was conducted after the time period for which the Rinaldo I Panel would issue an Award had ended. The Rinaldo I Panel already had the benefit of hindsight.

The original award was not vacated due to some error in the hearing process; it was vacated at Special Term because the Court determined that in drafting the Rinaldo I Award, the Rinaldo I panel did not state with sufficient specificity that the statutory criteria were considered in reaching the Award on wages and health insurance. The ultimate appellate rulings were based upon the decision of the Rinaldo I Panel, not upon the conduct of the hearing. Therefore, there was no reason for the Rinaldo II Panel to re-open the record and accept evidence and argument concerning, among other things, subsequent fiscal and operational developments. Those matters are for future panels addressing subsequent years to consider – it was inappropriate for the Rinaldo II Panel to consider these factors in issuing the Rinaldo II Award..

There is no basis in the law or on the facts to reopen the record in this matter. The Award of a Compulsory Interest Arbitration Panel is limited by law to a period of two (2) years. *See* Civil Service Law §209(4)(c)(vi). Even with the consent of the parties, a Compulsory Interest Arbitration Panel is limited by law to issuing a four (4) year award. Civil Service Law §209(4)(c)(vi). In considering fiscal information, health insurance costs, and other events that occurred outside of the statutory two year period, this Panel will be invading the province of subsequent Compulsory Interest Arbitration Panels for

the periods of July 1, 2004 through June 30, 2006, July 1, 2006 through June 30, 2008, and July 1, 2008 and June 30, 2010. The outcome might be that four compulsory interest arbitration awards are issued based upon the same data, when clearly the Taylor Law contemplates that a different set of data must be analyzed by a new Panel with each new interest arbitration award. To hold otherwise results in chaos and improper tactics, as either employers or employee organizations may seek to delay compulsory interest arbitration proceedings for years until there is a (perceived) more favorable fiscal or economic climate.

Additionally, events that occurred after June 30, 2004 are not relevant to this proceeding. If firefighters were required to respond to more calls in 2009, that may be grounds to support an argument that firefighters should be given a raise in 2009, but it is irrelevant to whether or not firefighters receive a wage increase in 2002. Similarly, while drastic increases in the City's Pension bill in 2008 may be an argument against granting a wage increase in 2008, but it is not relevant to the question of whether the firefighters should (or can) be given a raise in 2002.

To the extent and solely for the purposes of receiving Court decisions that resulted in this remand, the Rinaldo II Panel was correct to re-open the record; however, any further re-opening of the record is inappropriate. As the Panel Chair cogently explained on the first day of hearings in this matter, "that would open a door I do not want to go in." (*See generally*, Hearing Transcript, May 6, 2010, p. 71). Despite that initial ruling of the Panel Chair, the Chair allowed the Union to submit new financial information to the Rinaldo II Panel, which required the City to make a presentation in rebuttal. **It was clear error to do so on remand in this case.**

THE MAJORITY EXCEDED ITS AUTHORITY IN ADDRESSING THE APPLICATION OF THE WAGE FREEZE ADOPTED BY THE BFSA ON APRIL 21, 2004.

On April 21, 2004, the Buffalo Fiscal Stability Authority ("BFSA" or "Control Board"), by Resolution 04-35 ("Wage Freeze Resolution"), enacted a wage freeze finding that the City's revised Financial Plan was out of balance and that the City's financial condition had not improved. The Wage Freeze Resolution conveyed the following pertinent factors as the rationale for instituting the wage freeze:

> WHEREAS, on October 21, 2003, the BFSA approved a four year financial plan (the "Revised Financial Plan") designed to assist in resolving the fiscal crisis facing the City; and
>
> WHEREAS, BFSA has continued to review the economic conditions of the City and Covered Organizations; and
>
> WHEREAS, the BFSA Approved Revised Financial Plan is already out of balance, and the City is projecting multiple increases in recurring expenditures, **primarily relating to recurring personnel-related costs which will have a material impact on the financial plan going forward**, as well as the current year budget; and
>
> WHEREAS, the City is projecting an increase in the 2004-2005 gap more than $20 million over the $26 million gap projected in the BFSA approved financial plan, and the projected cumulative gap over the next Financial Plan exceeds $250 million; and
>
> WHEREAS, the increase in the City's gap is likely to have a negative impact on the resources it will be able to make available to all Covered Organizations in the 2004-2005 fiscal year and thereafter; and
>
> WHEREAS, BFSA determined in its September 16, 2003 Report on the City's Proposed Financial Plan that **employees and retirees represent the largest cost to the City, representing 90 percent of all spending** . . . .

The BFSA reaffirmed the wage freeze in June 2005 and June 2006 (Resolutions No. 05-49 and 06-40, respectively), as the Control Board indicated that "no wage or salary adjustments shall be deemed authorized until acknowledged and approved separately by the Buffalo Fiscal Stability Authority." On June 5, 2007, the BFSA unanimously passed Resolution 07-21, which ended the wage freeze with respect to all City employees and employees of covered organizations under the BFSA Act. To this end, the resolution stated that "the BFSA hereby determines that the fiscal crisis will have sufficiently abated for the City's 2007-08 fiscal year to warrant a lifting of the wage freeze, and the wage freeze (Resolution 04-35) is hereby lifted effective July 1, 2007 . . . ." Notably, in lifting the wage freeze, Resolution 07-21 did not determine that the fiscal crisis had ended. Rather, it determined that the City's revised 2008-11 Four-Year Financial Plan and budget submitted by the City for a single fiscal year, 2007-08, was consistent with the BFSA Act.

In 2004, while the proceedings were still pending before the Rinaldo I Panel in this matter, Local 282 commenced a special proceeding seeking a declaration that the wage freeze adopted by the BFSA did not apply to an award of the panel in this matter as the term of the award would "pre-date" the creation of the BFSA and the adoption of the wage freeze. The proceeding was dismissed at Special Term as Local 282 had failed to commence the proceeding within four (4) months of the adoption of the wage freeze, and in *Foley v. Masiello*, 38 A.D.3d 1201 (4th Dept. 2007), the Appellate Division affirmed that decision, finding that the proper vehicle for challenging the BFSA's administrative determination in adopting the wage freeze is a proceeding pursuant to CPLR Article 78,

and therefore, Local 282's Petition was time barred under the four (4) month statute of limitations applicable to CPLR Article 78 proceedings.

The matter of whether the wages included in the Panel's award in PERB Case IA2003-020; M-2003-160 are frozen by the wage freeze has already been the subject of litigation between these parties, and the Courts ruled against Local 282. This matter has already been decided and the doctrine of *res judicata* prohibits Local 282 from litigating the same issue again. Moreover, if Local 282's claim regarding the application of the wage freeze to the Award in this matter was not timely in November 2004, such claims are still time barred.

Further, the application of the wage freeze to this Award is beyond the jurisdiction of the Rinaldo II Panel, and the Rinaldo II Panel has no basis in offering an opinion regarding its applicability. Under section 209 of the Civil Service Law, the Rinaldo II Panel's jurisdiction is limited to making a determination as to the wages, benefits, and working conditions of the unit.

THE CITY'S DIRE FISCAL CONDITION AS SET FORTH IN THE RECORD DOES NOT SUPPORT THE WAGE INCREASES AWARDED BY THE MAJORITY

In 2003, the State of New York declared that the City of Buffalo is in a "state of fiscal crisis." This fiscal crisis did not develop overnight: for quite some time the City has been plagued by decreasing property values and a decreasing population which limited the City's ability to generate revenues. The declared fiscal crisis continues to this day.

As the City's population declined, as a whole, it also became poorer. Meanwhile, the costs of providing services in the City continued to increase. This combination of

increasing, recurring costs and decreasing self-generated revenues has been apparent to the City for some time, and year after year, the City lobbied the State for legislative reforms to address the City's underlying structural deficit. The State's response was to ignore the underlying causes of the City's deteriorating financial position and to increase State financial aid to the City to cover the City's recurring budget gaps. This increase in State aid is evident in the record on remand and in the original record. (*See generally* City Remand Exhibit 3). For years prior to 2003, the City of Buffalo was dependent upon aid from the State of New York in order to balance its budget. The significantly increased aid from the State since 2003 has likewise helped the City's bottom line, but those one-shot non-recurring revenue boosts have not solved the core structural problem of ever-increasing recurring expenses, largely attributable to personnel and related costs. More important, despite that increased aid over the past few years, the City's long term projections show depletion of reserves for reasons including increasing, recurring expenses and declining State aid. (*See* Hearing Transcript, September 20, 2010, pp. 25-26; 29-30).

Given the dire financial position of the City over the period of the proposed award, there is no justification for any wage increase at all, let alone the 2.1% wage increase effective July 1, 2002 and 3.4% effective July 1, 2003.

HEALTH INSURANCE

At the time of the Rinaldo I Panel hearing in 2004 and 2005, the City had a proposal concerning health insurance that it had submitted to the Rinaldo I Panel for consideration (City Proposal 3). However, in an agreement reached with the Union on June 6, 2004 concerning a single City health insurance carrier, the City agreed to

withdraw that proposal. In 2004, the Union challenged the validity and enforceability of that agreement. That challenge was ultimately successful, and, as noted, the Rinaldo I Award as to health insurance was vacated by the Court of Appeals. A contract arbitration conducted by Arbitrator Dennis Campagna between the parties addressed the matter of health insurance between the parties. Arbitrator Campagna concluded that the City violated the parties' contract when it switched to a single health insurance carrier as of July 1, 2004.

Since the Court of Appeals vacated the entire Rinaldo I Award, the City's proposal on health insurance is once again before the Rinaldo II Panel. At the hearing, the Union did not contest the fact that the subject of health insurance is now before the Rinaldo II Panel. The City maintains that the Rinaldo II Panel should have issued an award that addressed the subject of health insurance.

Despite both parties agreeing that the subject of health insurance is before the Rinaldo II Panel, the majority inexplicably refuses to address the subject of health insurance in its Rinaldo II Award. That is incomprehensible: virtually all interest arbitration awards address the subjects of wages and health insurance. In this case, the Court of Appeals remanded this matter back to the Rinaldo II Panel because the subjects of wages and health insurance are interdependent; however, the majority in Rinaldo II re-issues the same Rinaldo I wage award and awards no relief whatsoever to the City on the subject of health insurance. **There is no justification for this totally irrational result.**

The majority makes much of an Award by Arbitrator Campagna in a grievance arbitration over the subject of the City's change to a single carrier. While the Rinaldo I award allowed the City to change to a single health insurance carrier in exchange for the

5.5% wages awarded by the Rinaldo I Panel, the result of the Campagna Award in a grievance arbitration is that it will now cost the City a significant amount of money as a remedy for changing to the single health insurance carrier. In the Rinaldo I award, the Rinaldo I Panel justified the 5.5% in wages that it awarded by the fact that the City would save money from the Panel's award on health insurance. Now, the City has incurred additional costs due to the change to a single carrier, so the Rinaldo II Panel has no savings from an award on health insurance to justify its award on wages. **The majority of the Rinaldo II Panel's result is illogical.**

WAGE AND OTHER CITY PROPOSALS

If the majority in Rinaldo II is not making any award to the City on its health insurance proposal, following the rationale of the New York Court of Appeals, it should:

1. include another City proposal in the Rinaldo II Award that would provide the City some cost savings; or
2. award less than the 5.5% awarded by the Rinaldo I Panel.

The majority in Rinaldo II did neither. This result is irrational, illogical, not justified in the record, and is inconsistent with the finding of the New York Court of Appeals in *Buffalo Professional Firefighters Association, Local 282, supra.*

In the Fiscal Year that ended June 30, 2003, the first year of this Award, City Expenditures totaled $366,872,000. The most significant component of City expenditures was Public Safety (Police and Fire), which accounted for $136,643,000, or 37.2% of City expenditures. In the Fiscal Year that ended June 30, 2004, the second year of this Award, City expenditures were reduced to $385,911,000. Expenditures on Public Safety were $131,927,000, which accounted for 34.2% of City's expenditures.

The focus with regard to City expenses in this decade must center on pension and health care costs. From 2000-01 to 2004-05, the City's health care costs increased by $18.3 million, which equates to a 65% increase. (City Exhibit 5). Over the two (2) year period of this Award, health care costs for the City increased by $13.78 million, which equates to a 39.8% increase. (City Exhibit 5). Unfortunately, the increase in pension costs has been even more dramatic. From 2000-01 to 2004-05, the City's pension costs increased by $23.91 million, which equates to a 315% increase. (City Exhibit 5). Over the two (2) year period covered by this Award, pension costs decreased by $2.98 million in the first year but then increased by $4.6 million in the second year, for an overall increase of $1.62 million or 15.6%. For the 2004-05 Fiscal Year, the City's cost for a firefighter's pension increased by $7,000 over the previous year. (R. 1/3/05, p. 18).

The City continues to operate with a structural deficit. Its recurring revenues cannot keep pace with its recurring expenses. The City's problems are rooted in the long-term weakness of the region's demographics and economy, which have suffered both population and job losses over the past four decades. The State Comptroller observed the while "Mayor Masiello has taken steps in the right direction", the problems faced by the City are longstanding, and that the City is not in a position to deal with the continuing budgetary imbalance alone. (BFSA Exhibit 12)

The State of New York has "found and declared that the City is in a state of fiscal crisis, and that the welfare of the inhabitants of the City is seriously threatened." The State created a Control Board that oversees and monitors City finances through approval of the City's four (4) year financial plans and the provision of deficit borrowing. The City has been forced to cut back on the level of services provided to the community.

Further, the City has continued to experience pressure on the expense side. Dramatic increases in health care and pension costs have hit the City's budget hard.

The Rinaldo II Panel's consideration of the "interests and welfare of the public and financial ability of the [City] to pay" should have only lead to one result: the Award should not have included any economic increases for members of the unit.

CONCLUSION

Section 209(4) (c) (4) of the Civil Service Law provides that, when deciding upon an award, an interest arbitration panel is to consider four distinct criteria, namely:

1. the wages, hours and conditions of employment of similar public employees working under similar conditions;

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

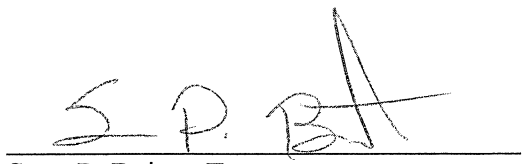
3. the nature and hazards associated with the public employment at issue; and

4. the terms of the parties' prior collective bargaining agreement.

When all of these factors are considered for the period of this Award, the only just result is a finding that the City cannot afford to fund any economic increase for members of this unit. The City's on-going fiscal crisis outweighs all other factors, particularly in view of the State's massive financial difficulties, and the City's unresolved structural budget gap. The Award of the majority in Rinaldo II is not in the interests and for the welfare of the public, and it further aggravates the City's structural deficit by adding additional recurring expenses in the form of a wage increase and fails to even address the exponentially rising costs of health care benefits.

Therefore, on behalf of the City of Buffalo, I dissent from the Award of the majority of this Panel in Rinaldo II.

DATED: Buffalo, New York
February 16, 2011



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