1925

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
COMPULSORY ARBITRATION

CITY OF JACKSON

-and-

Case No. L91 A-0305

JACKSON FIRE FIGHTERS,
LOCAL 1306, IAFF, AFL-CIO

FINDINGS, OPINION AND ORDERS
OF ACT 312 ARBITRATION PANEL

Background. This Act 312 arbitration was heard by a panel consisting of arbitrator Paul E. Glendon, chairman appointed by the Michigan Employment Relations Commission (MERC); Joseph W. Fremont, Director of Labor Relations Services for the Michigan Municipal League, the City's delegate; and Union delegate Robert Woodman, a Captain in the Jackson Fire Department and an officer in the Union. Representing the parties at hearings and on briefs were attorneys Dennis B. DuBay, for the City, and Ronald R. Helveston, for the Union.

By stipulation on file with the MERC, the parties waived all time limits applicable to these proceedings, both statutory and administrative. The chairman presided at a pre-hearing conference on November 19, 1992 and nine hearings, beginning March 29, 1993 and ending August 23, 1993, all at the Jackson City Hall, at which the parties presented testimony and voluminous documentary exhibits. In keeping with agreed-upon deadlines, they presented last offers of settlement on all issues except manning on February 1, 1994. The manning issue was the subject of separate and subsequent last offers of settlement for the following reasons.

The City took the position that minimum manning is not a mandatory subject of bargaining, and the parties requested the panel to decide that question preliminarily, after the close of hearings but before submission of last offers of settlement. The chairman agreed to that request, and the parties filed briefs and reply briefs on that question. The chairman issued an Interim Ruling in the City's favor on December 10, 1993, based on two deci-

sions of the MERC in cases between the Detroit Fire Fighters Association and the City of Detroit (1992 MERC Lab Ops 82 and 698). City delegate Fremont concurred in that ruling; the Union's delegate dissented.

The chairman vacated that Interim Ruling at the Union's request on April 25, 1994, after the Michigan Court of Appeals overturned the second of the two MERC decisions upon which it was based, in *City of Detroit v Detroit Fire Fighters Association*, Court of Appeals Docket No. 161019. The parties then were invited to submit supplemental briefs on the arbitrability of the manning issue in light of the Court of Appeals decision. They did so, and the chairman issued a Second Interim Ruling, on May 27, 1994 that the "panel has the authority to make a decision and enter an order regarding the continuation of a minimum manpower requirement in or its elimination from the parties' 1991-94 agreement." Union delegate Woodman concurred; the City's delegate dissented.

The parties presented last offers of settlement on the manning issue on June 21, 1994 and filed post-hearing briefs on all issues before the panel on August 9, 1994. Discussion, findings and orders on all remaining issues (a few were resolved or withdrawn since then) are set forth below, following the decision on comparable communities.

Comparable Communities. Section 9 of Act 312 (MCL 423.239) requires that the panel base its findings on certain "factors" enumerated therein, as follows::

> (a) The lawful authority of the employer.
> (b) Stipulations of the parties.
> (c) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.
> (d) 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 and with other employees generally:
> (i) In public employment in comparable communities.
> (ii) In private employment in comparable communities.
> (e) The average consumer prices for goods and services, commonly known as the cost of living.
> (f) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
> (g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
> (h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment

through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

As in most Act 312 cases, one of the most significant of these factors here is Section 9(d). Unless parties agree completely on what are "comparable communities," the application of Section 9(d) must be preceded by a decision (usually by the chairman) on that question. In this case, the parties agree that five Michigan cities -- Adrian, Battle Creek, Bay City, East Lansing and Muskegon -- are "comparable" to the City of Jackson.

In addition to those five, the Union proposes eight others: Allen Park, Garden City, Lincoln Park, Port Huron, Saginaw, Southgate, Trenton and Wyoming. Its primary rationale for those eight cities is that they all were selected as comparables by arbitrator Donald Sugerman in the last Act 312 arbitration between these parties (MERC Case No. L85 D-430, award dated January 8, 1987). It argues comparables selected in one Act 312 arbitration should continue to be used in the next between the same parties absent significant change in relevant circumstances, in order to promote stability in collective bargaining. In support of this position it cites decisions by other Act 312 arbitrators: Mark Glazer in *City of Port Huron -and- Port Huron Fire Fighters*, MERC Case No. D86 D-1105, and *City of Birmingham -and- Birmingham Firefighters, Local 1248*, MERC Case No. D84 E-1618, and Elaine Frost in *City of Ann Arbor -and- Ann Arbor Firefighters Assn.*, MERC Case No. D86 E-1120.

The Union contends the City showed no significant changes warranting additions to or deletions from the Sugerman list, but merely referred to the 1990 census as an event intervening between 1987 and 1991 without identifying particular changes documented therein that might necessitate selection of a new list of comparables. The Union further contends population changes documented in the 1990 census actually make the Sugerman list more, not less, appropriate for the contract period of July 1, 1991 through June 30, 1994. (The parties agreed that three-year period would be the term of the new agreement whose terms are to be established in this proceeding; the predecessor agreement having expired June 30, 1994.) It also repeated Sugerman's analysis of the various factors that went into his selection and insisted they still apply.

The City argues no city in a county that is part of the Southeastern Michigan Council of Governments (SEMCOG) should be considered comparable to Jackson, because of population growth (past and anticipated) in those counties contrasted with declining population in Jackson County. It thus opposes Port Huron (in St. Clair County) and Allen Park, Garden City, Lincoln Park, Southgate and Trenton (in Wayne County) on that basis. It further argues the five Wayne County cities are not comparable to Jackson because of dramatic differences in population, personal income and industrial activity between Wayne and Jackson counties. In support of the latter argument, the City relies on findings by the chairman in another Act 312 case, *City of Jackson -and- Fraternal Order of Police*, MERC Case No. L86 D-320, in which three of the Wayne County cities now proposed by the Union were rejected as "integral, albeit rather small, parts of the uninterrupted urban patchwork that makes up the Detroit metropolitan area . . . significantly influenced by metropolitan Detroit wages and employment . . . innately dissimilar to the City of Jackson, which despite its relatively modest size is the largest city and must be considered the dominant economic and social influence in Jackson County." The City contends cities chosen by arbitrator Sugerman in 1987 should not be selected in this case without current evidence of true comparability. The City also opposes the two non-SEMCOG cities proposed by the Union, Saginaw and Wyoming, because their populations are too much larger than Jackson's (86% and 71%, respectively) to be considered comparable.

In addition to the five agreed comparable cities and instead of the cities proposed by the Union, the City proposes seven other allegedly comparable communities: the cities of Holland, Norton Shores, Owosso, Portage and Traverse City, and neighboring townships of Leoni and Summit. It argues they all are comparable to Jackson under traditional Act 312 criteria of population, community population as a percentage of county population, land area and population density, total SEV (state equalized valuation of real and personal property within the community), and rates of SEV growth.

Findings. The chairman cannot agree with the Union that the Sugerman comparables should be adopted completely and to the exclusion of all other communities in this case. This panel should base its decisions on current evidence, including relevant evidence of comparability, and its decisions must be its own, not merely adherence to the findings of a

previous Act 312 arbitrator. Furthermore, the stated rationale of stability in collective bargaining is something of a myth when applied to these parties, whose relationship the chairman has observed, regretfully, to be characterized more by rancor, recrimination and *in*stability than by stability. The Sugerman comparables obviously did not lead them to stability in bargaining, and giving lip service to that admirable but artificial goal instead of conducting an independent analysis of comparability in this case would not change the objective reality of their collective bargaining relationship.

The starting point for that analysis is examination of the five cities the parties agree are comparable to Jackson under criteria most indicative of true comparability, from which the parameters for consideration of other purportedly comparable communities can be derived. The chairman adopts these ten criteria for that purpose: population, community population as a percentage of county population, land area (in square miles), per capita personal income, median household income, percentage of population in poverty, level of unemployment, total 1991 SEV, residential SEV as a percentage of that total, and number of authorized positions for sworn fire fighting personnel.

Of the fifteen additional communities proposed by the parties, only two fit within the range of comparability thus derived on a majority of the criteria: Port Huron, matching nine of ten criteria (and very close on the tenth, with 23.1% of St. Clair County population compared to 24.2% for the lowest of the five agreed comparables, Adrian); and Saginaw, which matches seven of ten. However, the chairman agrees with the City that the large disparity between Saginaw and Jackson on the most relevant criterion -- population -- is enough to disqualify Saginaw notwithstanding the majority match. Holland and Trenton matched five of the ten criteria. Trenton is rejected, not only for lack of a majority match but also for the reasons stated in the chairman's decision in the 1986 Jackson police case and quoted above. Holland is accepted, however, because it very nearly matches under a sixth criterion -- number of fire fighters -- with twenty-five fire fighters (supplemented by thirty paid on-call volunteers) compared to the low of twenty-seven in Adrian. But it will not be considered a comparable community with respect to the manning issue because of its mixture of full-time and volunteer personnel.

For the foregoing reasons, the seven comparable communities to be considered by the panel under Section 9(d) of Act 312 are Adrian, Battle Creek, Bay City, East Lansing, Holland (except for manning), Muskegon and Port Huron.

CITY ISSUE NO. 1: MANNING (ECONOMIC)

Section 8.1 of the expired agreement provides for minimum per-shift manning, as follows:

> Section 8.1. The City shall at all times maintain a minimum complement of fifteen (15) 24-hour fire fighters on duty on each shift.
>
> (a) The Memorandum of Understanding between the parties, dated January 17, 1978 as amended November 24, 1980, regarding implementation of the manpower requirement of this Section, is attached hereto as Appendices B, B-1 and B-2 and incorporated herein by reference.

In pertinent part, Appendix B provides that all fire fighters called in from off-duty to maintain minimum manpower as required in Section 8.1 and "not acting" are to receive twenty-four hours' pay at an hourly rate equal to 1.5 times the amount determined by dividing the annual rate of a four-year fire fighter as of July 1, 1982 (which was $23,368, the parties stipulated) by 2080 hours. It also provides for an "acting rate" of $14.00 and additional payments for drivers, captains and assistant chiefs. The City's last offer of settlement on this issue proposes two changes: to reduce per-shift minimum manpower from fifteen to twelve 24-hour fire fighters, and to revise the pay formula for "not acting" fire fighters called in to maintain minimum manning to read as follows:

> Current salary shall be divided by 2,912 hours which shall determine the hourly rate. That hourly rate shall be multiplied by 1.5 and that number shall be multiplied by 24 hours.

The Union's last offer of settlement on this issue is to maintain the status quo.

The City contends the proposed reduction in per-shift minimum manning is consistent with the real needs of the Jackson Fire Department, noting that the vast majority of runs in the department are for emergency medical services (EMS), for which the department is licensed only as a "first responder." It emphasizes that an ambulance also responds to every EMS call, that ambulance personnel are solely responsible for providing emergency

medical services and transporting patients (although a fire fighter may accompany the ambulance to hospital), and that fire fighters on an EMS run can be called away for other duty after an ambulance arrives. The City points out that the department responded to an average of only 119 structure fires per year from 1989 through 1993, and that of 3,272 total incidents in 1992 all but 120 were handled by one company (a four-person unit). It also presented statistical evidence demonstrating that each shift responded to an average of only 42 structure fires per year from 1982 through 1991, approximately half of them required no hose line for extinguishment, and another twenty percent required only a single hose line, and that there was a per-shift average of only 11.5 extra alarm fires during that same period.

In addition to arguing that actual fire fighting demands on bargaining unit members are relatively small, the City asserts that their safety is assured -- no matter how many of them are on duty or respond to a particular fire scene -- by a safety program, including full use of "incident command" principles and procedures and compliance with all National Fire Protection Association (NFPA) standards regarding pump, hydrant and hose testing, communicable and infectious diseases, self-contained breathing apparatus, ladders and hazardous materials ("haz-mat") response. It notes that the Union's own expert witness, fire consultant John Devine, characterized the department's efforts in these respects as "a remarkable safety program." For these reasons, the City contends that maintenance of the minimum manpower status quo cannot be justified on safety grounds, and asserts that the Union's argument to the contrary is based on outdated, irrelevant studies of fire fighting practices in situations (mostly metropolitan) not proven comparable to circumstances in Jackson and lacks any evidence that the safety of members of this bargaining unit would be threatened or diminished by reducing minimum per-shift manning from fifteen to twelve 24-hour fire fighters. It further contends that the Union's argument really has more to do with the level of service provided by the Jackson Fire Department than with fire fighter safety, and that level-of-service decisions should be left to the citizens of Jackson and City management.

The City finds further support for its manning position in evidence related to factors (c) and (d) under Section 9 of Act 312. The City contends it lacks the financial ability to

meet costs of additional manpower that would be needed to maintain per-shift minimum of fifteen fire fighters without recurrent overtime or, alternatively, the costs of continuing excessive overtime for call-ins to maintain such manning at current total employment levels (ten below authorized staffing). It notes that it has the highest "relative tax effort" among the comparable communities, with maximum allowable millage for property taxes plus a City income tax, ranks very low in total SEV, and ended the 1992-93 fiscal year with an "undesignated general fund balance" of $27,234, far less than the approximately $1.5 million recommended by auditors for prudent fiscal management and preservation of the City's bond rating. As for factor (d), the City points out that none of the comparable communities has a contractual per-shift minimum manpower requirement and that even with a reduction of the Section 8.1 requirement to twelve fire fighters per shift it still will compare favorably to actual per-shift staffing in those communities, both in simple numbers and in terms of population, SEV and land area per fire fighter, and will have total department staffing well in excess of the average in all communities proposed as comparable by both parties.

The Union contends the City failed to present convincing evidence to justify reducing minimum manpower levels below the long-standing contractual requirement of fifteen on duty per shift. To the contrary, the Union asserts, the continuation of that requirement is necessary in light of the fire fighters' heavy workload and risks to their safety if manpower were to be reduced. While the workload for actual fire fighting has been fairly constant since 1986 (averaging 123 structure fires annually), the Union points out that the number of EMS runs increased by more than fifty percent during that same period, and that during 1993 the department averaged nine non-structure fire runs per day, each of them taking one company out of a station for some period of time. Thus it argues that if minimum per-shift manning were reduced to twelve fire fighters, the department's ability to respond to fires immediately with eleven fire fighters, as it does now, would be seriously jeopardized, as would the safety of the fire fighters responding in numbers below that level. In support of these safety claims, the Union points to testimony by consultant Devine, who said he had researched many studies on fire safety and found none recommending less than four fire fighters per engine and ladder truck. He also "found that the minimum complement

when responding to even the minimal level of hazard such as a residential structure should be no less than twelve fire fighters."

The Union also cites some of the studies Devine mentioned, as well as NFPA staffing recommendations. In particular, it points to staffing studies in the Dallas and Seattle fire departments showing more injuries in three-member than in four-member fire fighting companies; the recommendation in Section 10, Chapter 4 of the NFPA Fire Protection Handbook for a minimum of twelve fire fighters, one chief officer, two pumpers and one ladder truck for fires at "low hazard occupancies;" and the Tentative Interim Amendment to NFPA Standard 1500 (July 1993) calling for at least four members to "be assembled before initiating interior fire fighting operations" with an exception only for "rare and extraordinary circumstances when, in the member's professional judgment, the specific instance requires immediate action to prevent the loss of life or serious injury."

The Union also points to testimony from Jackson Fire Chief Donald Braunreiter, who acknowledged that fire ground operations must be conducted sequentially rather than simultaneously with fewer fire fighters at the fire scene, which makes for slower and less effective fire suppression. In this connection, the Union also cites explanatory notes to NFPA Standard 1500 stating that during emergencies "the effectiveness of companies can become critical to the safety and health of fire fighters."

The Union complains that the panel cannot make a fully informed judgment about how safe and/or effective fire fighting operations in the Jackson Fire Department would be if minimum per-shift manning were reduced from fifteen to twelve fire fighters on duty at all times, because the City did not explain how the reduced force would be deployed. (At hearings, the City presented evidence for a ten-member on-duty force, that being the level of staffing then contemplated under Chief Braunreiter's proposed reorganization, but now merely asserts, in its brief, that it will be possible to respond with ten to twelve fire fighters with a minimum on-duty force of twelve.) Thus the Union concludes that while there is ample evidence to show safety risks from cutting per-company staffing from four to three and initial response staffing below twelve (both of which would unavoidably result from a reduction of on-duty manning to twelve fire fighters), the City has produced no evidence

showing that bargaining unit members will be as safe under its proposed twelve-member staffing as under current and long-standing minimum manning.

The Union contends the City's proposal finds no justification under Section 9(c) of Act 312, because it would reduce the level of service and thus be contrary to the interests and welfare of the public, and because the City failed to demonstrate any real inability to pay for maintenance of the minimum manning status quo. It points out that the City's general fund balance increased 31% from 1991-92 fiscal year-end to the end of the 1992-93 fiscal year, leaving a balance of $1,082,604 going into fiscal 1993-94, contrary to the City's 1992-93 budget projection of a year-end general fund balance of only $918, and that the City has not experienced a general fund deficit in the past ten years. It also points to commentary in the 1992-93 audit about improved economic climate and employment levels in the Jackson area, to the City's decision to levy below-maximum millage in 1993-94 (6.79 of a possible 7 mills), to City income tax collections in 1992-93 almost $200,000 higher than projected in the budget, and to the City's consistent underestimating of year-end general fund balances over the past five years (with positive variances ranging from $285,238 in 1991-92 to $1,081,686 in 1992-93). In the City's view, this evidence clearly demonstrates that the City did have the financial ability to meet the costs of fifteen-person minimum per-shift staffing during the first two years of the contract here in dispute, and its estimate of a substantial decline in the general fund in the third year (with a budgeted year-end balance of only $11,502) cannot be considered reliable.

As for staffing levels in comparable communities, the Union argues members of this bargaining unit have a heavier workload than their counterparts in most of the comparable communities, especially with regard to emergency responses, and staffing comparisons must be made with that fact in mind. According to the Union, merely comparing staffing levels, without knowing all relevant circumstances and without accounting for differences in population, workloads and other variables in other communities, is not a sound basis for establishing appropriate manning levels in the Jackson Fire Department. But if such comparisons are to be made, it argues the most appropriate community is Bay City, which is closest to Jackson in population, land area, SEV, and fire suppression workload and has greater total staffing than the Jackson Fire Department, a lighter total workload (with

substantially fewer EMS runs) and on-duty staffing of fifteen. Thus the Union contends a proper application of factor (d) also favors continuation of the status quo under Section 8.1 of the agreement.

Findings. The Union is right on all counts. Chief Braunreiter acknowledged that reduced staffing levels are likely to result in sequential rather than simultaneous fireground operations and reduced speed and effectiveness of fire suppression activities. That cannot be considered advantageous to the citizenry, so the first factor in Section 9(c) of Act 312, "the interests and welfare of the public," favors the Union's position on this issue.

As for the second factor in Section 9(c), the City's financial ability to meet the costs of maintaining a minimum manning level of fifteen 24-hour fire fighters on duty per shift, its claim of *in*ability is not convincing. Since the contract term here at issue already has expired, the panel knows not only what the City projected its financial condition would be but what it actually was, at least in the first two of the three years in question. As the Union emphasized, the City ended fiscal year 1992-93 with a general fund balance of more than a million dollars. Granted, that is somewhat less than the ideal as recommended by the City's auditors. Granted further, the "undesignated" general fund balance was much less than that: $27,234, to be exact. But of the "designated" portion, $665,218 were "designated for subsequent year's expenditures," and history indicates that designation was an unduly conservative exaggeration of the City's actual financial condition. At fiscal 1991-92 year-end, the City so designated $487,687 of its $828,621 general fund balance and projected a 1992-93 year-end balance of $918. But instead of declining by almost $829,000 in 1992-93, as projected, the general fund balance actually *increased* by more than $250,000. Records for the previous four years show a similar pattern.

This is not to suggest that the City tried to mislead the panel or the Union, or that it is inept in matters fiscal and budgetary. To the contrary, the chairman well understands that municipal budgeting is not an exact science, that it is prudent to be conservative in projecting revenues and expenditures, and that if the audited figures turn out better than the original budget that is cause for congratulation, not denigration. Nevertheless, the evidence before this panel clearly shows that the City *actually had* the financial ability to meet the costs of maintaining the status quo under Section 8.1 of the agreement in the first

two years of the contract period and provides no convincing reason to believe it lacked such ability in the third year. Thus both factors in Section 9(c) favor the Union's position on this issue.

So does Section 9(d). The range of population, land area, SEV, and other variables among the six comparable communities is so broad that comparison of staffing levels alone can tell the panel little about the appropriateness of reducing per-shift, on-duty staffing from fifteen to twelve. It makes more sense to compare Jackson with those comparable communities to which it bears the most resemblance. As the Union asserts, the one most like Jackson is Bay City in terms of population (37,446 and 38,936 respectively), land area (11 and 10.4 square miles), and total SEV ($344.4 million and $319.2 million). Despite having fewer fires -- an average of 191 per year from 1990 through 1992 reported to the Michigan Fire Incident Reporting System (MFIRS), compared to a yearly average of 243 in the Jackson Fire Department -- and 15% fewer emergency runs in 1992, Bay City's on-duty, per-shift manning is exactly the same as the status quo in Jackson: fifteen 24-hour fire fighters. To that extent, factor (d) favors the Union's position.

The two next closest comparable communities in terms of population, land area and total SEV are Muskegon and Port Huron. In Port Huron, which is somewhat smaller than Jackson in population and land area but reported a slightly higher average number (251) of fire incidents to MFIRS in 1990-92, on-duty, per-shift manning is fourteen, which also favors the Union's position. In Muskegon, which is slightly larger than Jackson in terms of population and substantially larger in land area and total SEV, manning is significantly lower: nine 24-hour fire fighters on duty at all times, which favors the City's position.

The other comparable communities -- Adrian, Battle Creek and East Lansing -- diverge more significantly from Jackson in terms of population, land area and total SEV, but some comparisons with those three cities are appropriate. Battle Creek's population is approximately 70% larger than Jackson's and it had 58% more MFIRS fire incidents in 1990-92, and its per-shift manning of twenty-five is 60% higher than Jackson, which may be said to favor the Union's position, as does its ratio of fire fighters to population: one to every 2,240 residents in Battle Creek, compared to 2,496 in Jackson. Adrian and East Lansing rank much higher on the latter criterion, with one fire fighter for every 4,419 and

4,250 residents respectively, but actually have more fire fighters per fire station (five and 5.5, respectively) than Jackson. As to those two cities, therefore, the evidence cannot be said to favor either party's position. Nor can a comparison of Jackson with all six of the comparable communities according to ratio of fire fighters to population, because Jackson is the median community by that measure (three cities higher and three lower) with either fifteen or twelve fire fighters on duty per shift.

In its totality, the comparable community evidence clearly does not favor the City's position. Three of the four cities which can be said to favor either party's position favor the Union -- including the one most like Jackson and with which comparative staffing analysis is thus the most appropriate. Only one favors the City, and such broader comparisons as seem appropriate do not favor either party. For these reasons, it must be concluded that factor (d), as applied to the relevant evidence before this panel, favors the Union's position.

Two other applicable factors, both cognizable under Section 9(h) of Act 312, are fire fighter safety and the burden of demonstrating a convincing basis for change. As the Union argues, the party seeking to change a long-established contractual requirement must carry the burden of proving necessity for such a change. The City having failed to carry that burden as to either of its main reasons for reducing minimum per-shift staffing -- ability to pay and comparative staffing levels in comparable communities -- it must be concluded that this factor also favors the Union.

So does safety. Although the research findings, expert testimony of fire consultant Devine and NFPA recommendations relied upon by the Union may not apply directly and exactly to circumstances in the Jackson Fire Department, they convincingly establish that in general reducing initial response and per-company manning, both of which would be a necessary consequence of cutting per-shift manning from fifteen to twelve, adversely affects fire fighter safety. That is enough to shift the burden to the City to show there would *not* be adverse consequences for the safety of Jackson fire fighters after such a reduction, and notwithstanding assiduous adherence to incident command principles and procedures and other features of its admirable safety program, the City has not carried that burden either. Instead, it emphasized the relatively small number of structure and serious fires

that occur in Jackson every year. One must be thankful for that, of course, but such statistics really are beside the point. Ideally, there would be no serious fires, in which case the department's fire fighting capacity would be underutilized in the extreme. However, preparedness for dangers that may never materialize is the very essence of fire department operations and planning, and given the large number of emergency responses made by the Jackson Fire Department every year and numerous occasions when multiple companies are engaged simultaneously, the likelihood of significantly depleted manpower for initial response to any serious fire that does occur -- and of concomitant risks to the safety of the fire fighters who do respond -- cannot be ignored.

For the foregoing reasons, the chairman concludes that all of the statutory factors applicable to this issue -- (c), (d) and (h) -- favor the Union's position. Accordingly, the City's proposal to amend Section 8.1 of the agreement must be rejected.

The parties have a further disagreement about the second half of the City's proposal on this issue. The Union argued the proposal to change the minimum-manning call-out pay formula should not even be considered, because it was not addressed in the City's position statements or during the hearings, but nevertheless stated it would accept that part of the proposal, but only with retention of the status quo under Section 8.1. The City objected to the Union's purported partial acceptance of its manning proposal, asserting that it was a unified, all-or-nothing offer, and also noted that members of the bargaining unit initiated litigation earlier this year claiming the existing Appendix B pay formula is illegal. The City's primary objection is well founded: whether or not it had the right to propose amendment to Appendix B without previously having raised that possibility, it did so as part of a single proposal from which the Union could not pick and choose various elements. Therefore, even if it did *not* have that right, the result of rejection of the City's manning proposal in its entirety is the same as would be the refusal to consider that part of the proposal.

Order: Section 8.1 and Appendix B shall not be amended as proposed by the City, but shall remain the same in the 1991-94 agreement as they were in the expired agreement.

CITY ISSUE NO. 2: PARITY (ECONOMIC)

Section 6.2 of the expired agreement provides for pay parity between members of this bargaining unit and corresponding ranks in the Jackson Police Department, as follows:

> Section 6.2. Parity. The parity relationship between corresponding ranks of employees in the Fire Department and Police Department shall be continued for the duration of this Agreement. Rate for ranks in the Fire Department shall not be more than five hundred fifty dollars ($550.00) below the rates for corresponding ranks in the Police Department. For purposes of this section, corresponding ranks shall be as follows:
>
> Firefighter (#50) . . . . . Patrol Officer (#82)
> Fire Motor Driver (#52) . . . . . Detective (#84)
> Fire Captain and Fire
> Inspector (#55) . . . . . Police Sergeant (#85)
> Chief Fire Inspector (#56) . . . . . Police Lieutenant (#87).

Parity also is referred to in the second sentence of Section 6.1, as follows: "Effective July 1, 1983, and continuing thereafter Section 6.2 of this Article, Parity, shall prevail." The City proposes to eliminate parity from the agreement altogether by deleting that sentence and Section 6.2 in its entirety. The Union's last offer of settlement is to maintain the status quo in both Section 6.1 and Section 6.2.

The City advances two justifications for eliminating parity. First, it argues the parity provisions enable the Union to ignore pay increases guaranteed thereunder and negotiate for other benefit improvements as though increased salaries were not a factor. It suggests the Union has done exactly that in this proceeding, by presenting a multitude of demands for contract improvements without acknowledging that its members already have received the benefit of substantial pay increases negotiated in the police bargaining unit: 4.07% on July 1, 1991, 2% on July 1, 1992 and January 1, 1993, and 3% on July 1, 1993. Second, the City finds support for elimination of parity in the fact that it does not exist in any of the comparable communities, in all but one of which (Bay City, where the top base salary for fire fighters exceeds that of the police officers) top police rates exceed corresponding fire fighters' rates by more than $550. In its view, the latter fact is conclusive evidence that parity in this bargaining unit artificially inflates fire fighter salaries.

The Union finds support for maintaining the status quo in Federal and State statutes that set police officers and fire fighters apart from other workers and accord them similar

treatment, Act 312 itself being one example of such legislation, and in arbitration decisions upholding parity in other Michigan communities for historical and morale-related reasons. It notes that parity in this bargaining unit has a formal history going back almost twenty-five years, to the parties' 1970-72 agreement, and has been negotiated into every contract since then until now, including, by stipulation, the two that were subject to previous Act 312 arbitration, in 1976 and 1986. The Union argues the City must justify eliminating a contractual feature of such long standing but failed to offer any coherent reason for such a change. The Union also contends the City's own witness, former personnel director Audrey Richardson, rebutted its argument that parity enables fire fighters to ride on police officers' coattails, by acknowledging there have been instances when salary increases were negotiated for this bargaining unit in advance of police negotiations and later were matched in the police units. The Union also contends lack of formal parity in comparable communities is irrelevant because it is clear police and fire wages are closely related in those communities, with differentials not unlike that guaranteed under Section 6.2. The Union suggests those relationships are evidence of "conceptual" or *de facto* parity and in that respect may be said to favor the retention of parity in this bargaining unit.

Findings. The City's first stated rationale for eliminating parity is essentially a straw man, set up to be knocked down without any factual foundation. It offered no evidence that negotiators for the Union ever have attempted to claim that parity-based pay increases should be ignored in bargaining for other contractual benefits. Nor did the Union seek to obscure the existence of parity-based salary increases received by its members during the pendency of this arbitration; to the contrary, it explicitly sought to preserve and protect those increases by arguing forcefully for maintenance of parity. At bottom, it is little short of ludicrous for the City even to suggest that it could be bamboozled into negotiating in ignorance of parity-based pay increases, or that this (or any other) Act 312 panel would or could be so misled. Thus the chairman must agree with the Union that the City's primary reason for eliminating parity really is no reason at all, and therefore does not favor the City's position under any of the factors in Section 9 of Act 312.

There obviously is more to the City's factor (d) argument, since it is undisputed that none of the seven comparable communities has formal, contractual parity. However, that

in itself is not a reason for abandoning parity in this bargaining unit. Section 9(d) of Act 312 does not require that the wages, hours and conditions of employment of employees involved in the arbitration be *equalized* with those of employees performing similar services in comparable communities; it merely requires that they be compared. In a case such as this, that comparison must consider not only current conditions of employment, but also their history.

In this bargaining unit, parity has a negotiated history going back almost twenty-five years. There is no evidence of any such history in Adrian, Battle Creek, Bay City, East Lansing, Holland, Muskegon, or Port Huron. Thus the relationship between employees in this bargaining unit and their counterparts in those seven cities has always been the same: formal parity guarantees here, none there. These parties had a reason for adopting parity in the first place and preserving it, albeit with changes in the amount of the maximum differential, through several succeeding agreements. It is incumbent upon the City, as the party proposing to eliminate such a long-standing, negotiated condition of employment, to prove that (and how) circumstances have changed to necessitate or justify its elimination.

Merely showing that comparable communities do not have formal parity guarantees in their fire department contracts does not constitute such proof if they never had such guarantees. It could just as well be said that the close relationship between fire and police salaries in those seven cities -- an average of 96.5%, compared to 98.2% for four-year fire fighters in Jackson with the $550 differential -- is evidence of *de facto* parity in the comparable communities. Be that as it may, and whether or not factor (d) actually favors the Union's position, the evidence does not favor the City under Section 9(d) of Act 312. Since the City advanced no other reason for eliminating parity, it must be concluded that there is no statutory basis for adoption of the City's last offer of settlement on this issue.

Decision: The parity provisions of Sections 6.1 and 6.2 shall not be amended as proposed by the City, but shall remain the same in the 1991-94 agreement as they were in the expired agreement.

UNION ISSUE NO. 1: WAGES (ECONOMIC)

The Union's proposal for wage increases during the term of the 1991-94 agreement is to codify the parity-based increases that already have taken effect by adding this paragraph to Section 6.1 of the agreement:

> Effective July 1, 1991 a 4.07% across the board wage increase for all ranks and classifications shall be applied. Effective July 1, 1992 a 2% across the board increase for all ranks and classifications shall be applied. Effective January 1, 1993 a 2% across the board increase for all ranks and classifications shall be applied. Effective July 1, 1993 a 3% across the board increase for all ranks and classifications shall be applied.
>
> Appendix A shall reflect applicable rates of pay accordingly.

The City's last offer of settlement on wages was for exactly this sequence of wage increases, so this issue was settled upon exchange of last offers and need not be discussed further except for the formality of the following order.

Order: The wage increases agreed upon by the parties' in their matching last offers of settlement on this issue shall be incorporated into the 1991-94 agreement by adding the new paragraph proposed by the Union to Section 6.1 and adjusting the salary schedules in Appendix A to reflect the application of such increases.

CITY ISSUE NO. 3: COLA (ECONOMIC)

The expired agreement contains no provision guaranteeing cost of living allowances (COLA) and the City has not paid COLA payments to any employees for more than ten years. However, the third (and final) sentence of Section 6.1(a) gives members of this bargaining unit what the City characterizes as "me too" COLA" protection, as follows: "In addition, if a cost of living allowance is granted to the employees of the Police Department, said cost of living allowance shall be granted to employees in this bargaining unit." The City's last offer of settlement proposes to eliminate this sentence from the agreement. The Union proposes to retain the status quo.

The City bases its proposal on the same "coattails" argument advanced in support of elimination of parity, and on the fact that none of the comparable communities has such a "me too" COLA provision and that in the only comparable community which has a COLA

provision of any kind, Muskegon, payments thereunder have been frozen for the past several years.

The Union points out that contracts for this bargaining unit had COLA provisions from 1971, at the latest, until 1979, when COLA payments were discontinued and the parties negotiated the "me too" provision that the City seeks to eliminate. The Union contends the purpose of that provision was and remains obvious -- to preserve parity between fire fighters' and police officers' wages -- and its continuation is justified for the same reasons as apply to the parity provisions themselves.

Findings. For the same reasons explained in connection with the parity issue -- lack of any evidentiary support for the City's "coattails" argument or for a finding in its favor under Section 9(d) of Act 312 -- there is no statutory basis for adopting its last offer of settlement on this issue either.

Order: Section 6.1(a) shall not be amended by deleting its third sentence, but shall remain the same in the 1991-94 agreement as in the expired agreement.

CITY ISSUE NO. 4: PREMIUM PAY (ECONOMIC)

The expired agreement calls for premium pay in three instances: overtime, in Section 6.4, which calls for "overtime pay for all authorized overtime work at the rate of time and one-half (1-1/2) in cash; "call-back pay," in Section 6.5, which provides for at least four hours work "at one and one-half (1-1/2) times his/her regular rate" when "an employee is called back to work at any time other than his/her regular designated shift;" and call-ins for minimum manning purposes under Appendix B. In all three instances, the premium rate is an annual rate "divided by 2080 hours:" in the first two instances, the employee's current annual rate is the dividend; in the third, as discussed earlier, the dividend is $23,368, that being "the rate of the four (4) year firefighter (as of) July 1, 1982." The City proposes to change the formula and amend the agreement in all three instances by adding this new language to Section 6.1(a):

> For purposes of computation of any premium pay for suppression employees, such as, but not limited to, overtime, call-back, call-in, acting pay, and holiday pay, the employee's hourly rate will be computed by dividing his/her annual salary by hours scheduled to work on an annual

basis (presently 2,912). All relevant contract provisions to be subject to this subsection and amended accordingly.

The Union's last offer of settlement on this issue is to maintain the status quo.

The City finds primary support for its proposal in the fact that none of the comparable communities has a similar premium pay formula but all base employees' premium rates on the number of hours they actually work. It points out that this results in a higher premium hourly pay rate (approximately $22 per hour) than in any of the comparable communities, which average $16.16 per hour, and leads to much higher total overtime costs (an average of $60,743 for the seven comparable cities in 1991-92, compared to $291,824 in the Jackson Fire Department) and average overtime paid per fire fighter. It also notes that no other employees of the City of Jackson receive overtime pay calculated on an annual base of fewer hours than they actually work. For these reasons, plus "common sense," the City contends the premium pay formula for members of the bargaining unit should be changed.

The Union objects, first, to the form of the City's proposal, arguing that if adopted it would lead to confusion and controversy by adding new contract language where it really does not belong and leaving intact contradictory language in other sections to be amended only by reference from the proposed new language. As a matter of substance rather than form, the Union concedes that the existing formula produces a higher overtime hourly rate for members of this bargaining unit than their counterparts in the comparable communities, but notes that adopting the City's proposal would leave them with a rate *lower* than all the comparables, and would represent a very substantial take-away in the form of reduced wages for Jackson fire fighters without any convincing justification or *quid pro quo*. The Union points out that the 2,080 formula has its roots in parity with the police, and was upheld on that basis despite similar take-away proposals in previous Act 312 arbitrations involving this bargaining unit. It argues the same rationale should be applied in this case, and the City's proposal should be rejected.

Findings. Whatever else this proposal would do, it would bring about a very real reduction in the average fire fighter's overtime wages: from $22.08 per hour to $15.76, a 29% cut, which would leave members of this bargaining unit below the average overtime rate of the comparable communities. The burden of justifying such a drastic reduction is

very heavy, and the City has not carried it. While it is true that none of the comparable communities uses such a premium pay formula, there is no evidence that they ever did, whereas this same formula has prevailed in this bargaining unit for more than twenty-five years. Arbitrator Sugerman noted it had been adopted through negotiations in which each party "was completely aware . . . that the hours used for the denominator in the equation bore no relationship whatsoever to the hours worked by fire suppression personnel" and had existed at the time of his award "for two decades, or longer." In light of that history, Sugerman concluded "the mere fact that only two comparable communities pay overtime to 2,080 hours while the rest compute the rate on the basis of actual hours worked by fire suppression staff does not carry the day." As the chairman noted above, Section 9(d) does not require equalization between comparable communities, only comparison, and such comparison must be made with proper historical perspective. Part of the history here also is the award of the Act 312 panel, chaired by Donald Reisig, that arbitrated the 1979-82 agreement. It held that "concepts of parity, now espoused by all of the parties, would likewise dictate that if an equally compensated policeman and fireman both put in an additional hour of work (overtime) they should be compensated for that overtime at an equal rate." Whether or not that was the negotiating parties' original rationale for the 2,080 formula, it has existed for many years under that construction and the chairman agrees with arbitrator Sugerman that merely because comparable communities do not use the same formula is not sufficient reason to change it. Thus it cannot be concluded that Section 9(d) favors the City's position on this issue.

The only other rationale advanced by the City is the simple notion that it costs too much, but the chairman also agrees with arbitrator Sugerman that merely saving money is not a sufficient justification for such a radical reduction in a long-standing, negotiated form of employee compensation. It also must be observed that the City exaggerated the effects of the 2,080 formula by suggesting it is a major cause of indisputably high total overtime costs in the Jackson Fire Department. In reality, less than a third of those expenses may be attributed to the rate differential between the 2,080-hour and 2,912-hour formulas; the bulk of the expense, as the City itself explained in connection with its proposal to reduce minimum manning, is attributable to minimum manning call-ins, which in

turn result from the City's decision not to hire additional fire fighters to maintain contractually required minimum manning without such extensive and frequent call-ins.

For these reasons, it must be concluded that none of the statutory factors favor the City's position on this issue, but the negotiated and arbitral history of the 2,080-hour formula and the lack of convincing justification for the significant compensation reduction that would result from changing to a 2,912-hour formula are factors properly considered under Section 9(h), and they favor the Union's position. Accordingly, the City's proposal to amend Section 6.1(a) by adding new language establishing a 2,912-hour formula for the computation of all forms of premium pay must be rejected.

Order: Sections 6.1(a), 6.4 and 6.5 and Appendix B shall not be amended by adding language to Section 6.1(a) to change the premium pay formula, as the City proposed, but shall remain the same in the 1991-94 agreement as in the expired agreement.

CITY ISSUE NO. 6: CALL-INS (ECONOMIC)

The City proposes to add an entirely new article to the agreement, effective January 1, 1994, dealing with all call-ins of off-duty personnel. The proposal has two parts: first, to revise the formula for premium pay in all call-in situations to a 2,912-hour base; second, to require that all call-ins be "by random draw from an active pool of employees within the rank in which the overtime is to be worked . . ." The second aspect of the proposal is quite lengthy and rather complex, but this is the crux of it and the rest need not be quoted, for reasons soon to become apparent. The Union's last offer of settlement on this issue is to maintain the status quo under Section 6.5 and Appendix B of the expired agreement and call-in practices that have been used in the Department for many years.

As to the first part of the proposal, nothing more needs to be said than was said in the discussion of City Issue No. 4, and it must be rejected -- and the 2,080-hour formula retained -- for the reasons set forth therein. This being an economic issue, and thus an either-or, all-or-nothing proposal on the City's part, the entire proposal must be rejected for this reason alone, without detailed consideration of the random-draw, within-rank aspect of the City's proposal. However, it may be noted that none of the comparable communi-

ties' contracts has such a requirement, although the City says four of them try to make call-ins within-rank as a practical matter, and the City identified no other statutory factor as being applicable to this aspect of its proposal.

Order: The City's proposal for a new article on the subject of Call-Ins is rejected.

HOLIDAY BENEFIT ISSUES

City Issue No. 5: Hours-Worked Precondition for Holiday Leave (Economic). Section 6.3(a) of the expired agreement provides paid leave in lieu of holidays off for platoon system personnel, as follows:

> (a) All personnel in the Fire Department working on the platoon system and thereby required to work on ordinarily observed holidays shall be entitled and are hereby granted leave of absence in the amount of four (4) work shifts (96 hours) in lieu of receiving holidays and this additional time off in lieu of holidays shall be at such time as agreed upon by the Chief of the Department and in accordance with vacation scheduling policy.
>
> Such employees hired after January 1 of any given year, but before October 1 of said year, shall be allowed to select one (1) duty day off for every three (3) holidays which occur during said nine (9) month period, provided said employee is still employed after the holidays occur for which they are claiming duty days off. Such duty days must be taken off prior to December 31 of the year in which hired.
>
> Employees who retire in accordance with either City retirement program on or after January 1 of any given year, shall be entitled to a pro-rata holiday pay-off of one (1) duty day for each three (3) holidays that occur prior to the employee's retirement, unless the employee has elected to schedule the holiday leave days off as part of his/her vacation pick.

The City proposes to amend Section 6.3(a) by adding this new sentence at the end of the first paragraph: "In order for a member to accrue the 96-hour leave in lieu of holidays, an employee must be physically present and work a minimum of 500 hours in the calendar year." Its rationale for this proposal is that the 500-hour precondition will alleviate the purported problem of employees leaving the City's employment early in the year but after having taken holiday leave and thereby having received the benefit of holidays which have not yet occurred. It argues the proposed change is supported by comparison with holiday provisions of contracts in the comparable communities, none of which permit an employee to receive contractual holiday benefits (be they compensatory time or cash payment -- the contracts vary significantly in that regard) before occurrence of holidays with which they are associated.

The Union opposes this proposed change, primarily because it would impinge on employees' rights under the third paragraph of Section 6.3(a). It notes that an employee could lose his pro rata holiday payoff at retirement if forced to retire, for medical reasons for example, before completing 500 hours of work but after occurrence of the first three holidays in the calendar year, New Years Day, Martin Luther King Day and President's Day, all of which occur before the end of February. The Union also finds support for its position in the comparable communities, noting that none of them has an hours-worked precondition to the receipt of holiday benefits, nor do the Jackson Police contracts.

Findings. It is all but impossible to make a meaningful factor (d) comparison of the City's proposal, because none of the comparable community contracts has a holiday leave provision like Section 6.3(a). That problem aside, it is true none of them permit receipt of holiday benefits in advance of the holidays with which they are associated. But it also is true that none impose an hours-worked precondition on the receipt of holiday benefits. Therefore the City achieves nothing better than a stand-off under Section 9(d) of Act 312, and because it is the party proposing to change the agreement, that is not enough to justify the proposed change.

Section 9(h) also comes into play, in that no other group of City employees has the right to receive holiday benefits in advance of holidays with which they are associated. But that fact cannot justify the proposed change either, because no other City employees work 24-hour schedules like platoon-system fire fighters or are required to work a certain number of hours before receiving contractual benefits associated with a particular holiday. Another factor to be considered under Section 9(h) is the one identified by the Union: that the proposed 500-hour requirement could deprive employees of their negotiated rights under the third paragraph of Section 6.3(a). Still another is that the City presented no evidence that the problem its proposal purports to solve ever actually has occurred. For all this panel knows, the concern about employees leaving City employment with benefit of "unearned" holiday leave may be purely theoretical. Whether theoretical or real, however, the problem should not be solved by a measure which only creates another one. Thus the City's proposal cannot be justified under Section 9(h), and having no support under any of the statutory factors it must be rejected.

Order: Section 6.3(a) shall not be amended as proposed by the City, but shall remain the same in the 1991-94 agreement as in the expired agreement.

Union Issue No. 3: Premium Pay for Holidays Worked (Economic). As noted above, Section 6.3 of the expired agreement provides 96 hours of paid leave annually "in lieu of receiving holidays," but no extra compensation for actually working on "ordinarily observed holidays." The Union proposes to change that by adding a new final paragraph to Section 6.3, as follows:

> Effective July 1, 1991, all platoon personnel required to work on Memorial Day, Independence Day, Christmas Day, Thanksgiving Day, or Labor Day shall be paid time and one-half for all hours worked on said holiday. Overtime pay shall be paid in accordance with Section 6.4 of this Agreement.

The Union finds support for this proposal among the comparable communities, four of which provide some form of extra payment for time worked on contractually recognized holidays, and in comparison of the dollar value of all contractual holiday benefits in the comparable communities and this bargaining unit assuming an employee works one-third of the annual holidays. The City opposes this proposal and also contends its position is supported by analysis of the comparable communities, in that three of them provide no extra pay for work on holidays and two of the four that do provide some premium pay on holidays worked provide no holiday benefit other than that. The City further argues the existing holiday benefits provided under Section 6.3 are very generous, both absolutely and relative to the comparable communities, and the overall compensation of bargaining unit members is very high.

Findings. The only statutory factor cited by the Union for this proposal, Section 9(d), does not support its position. Three of the comparable communities -- Battle Creek, Bay City and East Lansing -- provide no additional pay for holidays worked. Adrian pays time and one-half for all holidays worked in addition to compensatory time or holiday pay for every holiday, but the base salary and overall compensation of Adrian fire fighters are substantially below those enjoyed by members of this bargaining unit. In Port Huron, fire fighters get double time for holiday hours worked, but no other holiday benefit. In Mus-

kegon, they receive an additional seventeen hours pay for each holiday worked, but no other holiday benefit. In Holland, they receive an extra day off for each holiday not worked and eight hours pay at time and one-half (equating to four hours additional pay) for each holiday worked. Thus only one of the comparable communities enjoys a benefit equal to or better than what the Union seeks, and that city compares unfavorably to this bargaining unit on other economic criteria. Additionally, according to the Union's own analysis of total dollar value of existing holiday benefits in the comparable communities, this bargaining unit is at the median and slightly above the average without the addition of premium pay for any holidays worked. Accordingly, it must be concluded that the Union has demonstrated no statutory basis for adoption of this proposal, which must be rejected.

Order: Section 6.3 shall not be amended by addition of a new paragraph calling for premium pay for work on certain holidays, as proposed by the Union, and shall remain the same in the 1991-94 agreement as in the expired agreement.

SICK LEAVE ISSUES (ECONOMIC)

City Issue No. 8: Sick Leave for Family Members' Serious Illness. Section 10.1 of the expired agreement provides that 56-hour week employees "accrue twelve (12) hours of sick leave allowance for each completed calendar month of service" and 40-hour employees accrue eight hours per month, and says such leave "may only be used by an employee when incapacitated to perform his duties due to sickness or injury, or when quarantined, or *in the event of a serious illness* or death in the employee's immediate family," which it defines to include "parents, current spouse, children, brothers, sisters, grandparents, grandchildren and current parents-in-law." (Emphasis added.) The City proposes to amend Section 10.1 by deleting the italicized phrase, thus eliminating the use of sick leave for family members' serious illness. The Union's last offer of settlement is to maintain the status quo.

The City's rationale for this take-away proposal is that the existing system is too susceptible to abuse and in fact has been abused. It finds evidence of this in the fact that bargaining unit members took more sick leave days in recent years for family members' ill-

nesses than for any other specific reason. It argues that because the existing language of Section 10.1 does not require verification of family members' illnesses, the only way to remedy the problem of potential or actual abuse is to eliminate sick leave for that purpose. It also suggests employees still will be able to cope with genuine illness on the part of family members by trading work days with other employees.

The Union contends the City failed to offer evidence supporting its proposal under any of the statutory factors. It points out that most of the comparable communities permit use of sick leave for family members' illness in some form and to some extent, and that members of this bargaining unit do not have personal days or compensatory time available for such family needs, as do their counterparts in most of the comparable communities. It notes that Section 10.1 already does contain a control mechanism: the Chief's discretionary right to require doctor's certificates. The Union also notes that City records show sick leave use for family members' illnesses in this bargaining unit in 1992 of only fourteen hours per employee, or 0.48% of a fire suppression employee's annual schedule of 2,912 hours, which it insists cannot be considered abusive.

Findings. The Union clearly is correct. Six of the seven comparable communities permit fire fighters to use sick leave for family members' illness, although the details vary from city to city, and only one does not. The statistical fact that family members' illness is the single biggest cause of sick leave use, as compared to specific causes related to the employee's own health (flu accounted for the next largest percentage of use in 1992) is not surprising, given the greater statistical likelihood of serious illness among the larger population of family members than in the employee himself; it certainly is not a sign of abuse of the contractual right to use sick leave for family members' serious illness. And if the City is genuinely concerned about such abuse, this clearly is not the only way to curb or prevent it. Section 10.1 provides that "In the event of sick leave *for any purpose*, the Chief may require a certificate of a medical doctor or other competent professional individual giving information as to the circumstances involved." (Emphasis added.) As for the employees' right to trade work days, that is not something the City is offering as a *quid pro quo* for eliminating sick leave for family members' serious illness. It already exists and is likely to be an unsatisfactory substitute for sick leave anyway, because there can

be no assurance that an employee could arrange a trade in every instance, no matter what the circumstances or how much advance notice he might have. Thus it must be concluded that the only two statutory factors applicable to this issue -- (d) and (h), the latter in that the City, as the proponent of change, has demonstrated no need for it -- both favor the Union's position, which the panel therefore must adopt.

Order: Section 10.1 shall not be amended, as the City proposed, by deleting language permitting use of sick leave "in the event of a serious illness . . . in the employee's immediate family."

Union Issue No. 6: Sick Leave Payout at Retirement. Under Section 10.1.(c) of the expired agreement retirees from this bargaining unit were paid "an amount equal to seventy-five percent (75%) of salary for unused sick leave at the time of retirement with a maximum of ninety (90) days accumulation." The City proposed to change that language to clarify and conform it to existing practice, by substituting 720 hours for 90 days as the maximum accumulation. The Union, satisfied that the practice was as the City said, put in a last offer on that issue identical to the City's, so Section 10.1(c) must be considered to have been amended accordingly. But the Union seeks another amendment: to change the percentage for calculating the unused sick leave payout from 75% to 100%. It contends that proposal is supported by sick leave payouts in the comparable communities and for other City employee groups. It notes that the latter have sick leave payout formulas of 50% of up to 1,440 hours, identical to 100% of up to 720 hours, and that most of the comparable communities permit higher payouts than that. The City's last offer on this issue is to maintain the revised status quo, thus continuing a payout of 75% of up to 720 hours of unused accumulated sick leave. It also finds support among comparable communities, in that many of them have a payout formula using a percentage of less than 100%, in the fact that increasing the percentage would have a significant cost which it says it cannot afford, and in what it characterizes as the "outstanding overall compensation" of members of this bargaining unit relative to comparable communities.

Findings. Taking up the City's last argument first, the chairman notes that it placed in evidence exhibits purporting to show total annual compensation to fire fighters in this

bargaining unit in the fiscal year ending June 30, 1991 was higher than to their counterparts in any comparable community. However, the City included its pension *contribution* in that calculation, which artificially inflated the purported *compensation* of bargaining unit members. There is no such disparity with regard to pension *benefits* the members of this bargaining unit will receive. The City's much higher current and future costs to fund those benefits is largely attributable to unfunded accrued actuarial liabilities (as will be discussed in more detail later), not high overall compensation payable to the fire fighters. So by including its pension *costs* as part of the fire fighters *compensation*, the City inflated and to that extent falsely portrayed the employees' overall compensation. Excluding those added costs, total annual compensation for fire fighters in this bargaining unit would be very close to both the average and the median among the comparable communities. Thus relative levels of overall compensation cannot be accepted as an argument against the proposed increase in the percentage of unused sick leave to be paid at retirement.

Neither can the fact that six of the seven comparable communities use a payout percentage less than 100. Five of them use 50%, the sixth 45%, but in every case but one the total hours to which that percentage is applied is so high that the total number of hours for which the retired fire fighter can be paid exceeds 720. The exception is Holland, where the retired employee may accumulate up to 1,008 hours of unused sick leave but at retirement is only paid for 50% of his unused sick leave in excess of that limit, up to a maximum of 72.8 hours. The lowest total hours payable among the other six comparable communities is 720, and even including the extraordinarily low total in Holland, the average for all seven is 844 hours; the median is 862. This evidence clearly favors the Union's position under factor (d). The fact that all other City employees have the same total the Union seeks for these employees favors its position under factor (h). As for the cost, at current rates the added expense would be approximately $2,000 for each fire fighter with maximum accumulation at time of retirement (not $8,000 as stated in the City's brief). That is not so significant a cost as to favor the City's position under factor (c), especially not in light of its failure to demonstrate a lack of ability to pay in general and the fact that these are future, not current, costs and as such will be spread over the years in which employees

retire. Therefore it must be concluded that only two of the statutory factors apply to this issue and both of them favor the Union, so its proposal must be granted.

Order: Section 10.1(c) of the expired agreement shall be amended, as proposed by the Union, to read as follows in the 1991-94 agreement:

> Effective July 1, 1991, the City hereby agrees to pay retirees after that date an amount equal to one hundred percent (100%) of salary for unused sick leave at the time of retirement with a maximum of seven hundred twenty (720) hours accumulation.

Union Issue No. 7: Sick Leave Incentive Payments. The Union also proposed to add a new section to Article X to establish a "Sick Leave Incentive Program" under which employees would receive annual payments for *not using* sick leave: $240 for any employee who had "zero (0) sick leave incidents per fiscal year;" $160 for any employee with only one such incident per year; and $80 for employees with only two. In its brief, the Union explained that it made this proposal in response to the City's suggestion that the existing sick leave program was being abused, particularly with regard to leave taken in connection with serious illness in an employee's immediate family. If the City is genuinely concerned about such abuse, potential or actual, the Union argues, it should welcome establishment of a program giving employees a financial incentive not to use sick leave. It also claims to find support for the proposal among some of the comparable communities which provide for sick leave bonuses of one kind or another. The City opposes the Union's proposal on several grounds: that none of the comparable communities have a comparable sick leave incentive program; that no other City employee group does either; and that such incentive is not needed, as evidenced by the fact that many bargaining unit employees have large balances of accumulated sick leave. It also repeats its overall compensation argument and contends there is no support in the statutory factors for making an already generous sick leave program even more generous.

Findings. In light of the findings above regarding the City's proposal to eliminate use of sick leave for family members' illness, the precipitating factor behind this proposal (allegations of sick leave abuse) is really no factor. In short, the evidence shows no need

for an incentive such as the Union proposes. To that extent, and because no other City employee group has such an incentive program, factor (h) clearly favors the City. So does factor (d), in that none of the seven comparable communities has such a program. No other statutory factor has been shown to apply, so the Union's proposal must be rejected.

Order: Article X shall not be amended by addition, in the 1991-94 agreement, of a new section establishing a sick leave incentive program as proposed by the Union.

HEALTH INSURANCE ISSUES (ECONOMIC)

City Issue No. 10(a): Health Insurance for Active Employees. The City proposes to amend Section 11.1 of the agreement to change the health insurance coverage for "regular full-time employees, including their spouse and dependent children under twenty-five (25) years of age" from the existing package of "Blue Cross-Blue Shield MVF-II with a $3.00 co-pay prescription drug rider, catastrophic Master Medical (Option I) rider and an accidental injury and medical emergency benefit (FAE-RC) rider, or comparable coverage from another insurance carrier" to "Blue Cross-Blue Shield Comprehensive semi-private MVF-I with Option V Master Medical, PRE/100, MSO, ML, FAE-RC, and three dollar ($3.00) co-pay prescription drug riders, or comparable policy." Its primary rationale for this proposal is that it will give employees of this bargaining unit the same coverage as other City employees, in particular the police, and in that respect the City's witness on the issue embraced the concept of parity between the police and fire fighters. The City also points to ever-increasing costs for health insurance, and contends this modification in coverage is a reasonable way to alleviate some of that financial burden. It also suggests the modified coverage will be consistent with that provided in comparable communities. At hearing, the Union voiced acceptance of the proposed revision in coverage on the basis of maintaining parity with the police. However, its formulation of such acceptance in its last offer of settlement on this issue differs from the City's in two respects: first, it calls for an effective date of the earlier of the signing of the agreement or June 30, 1994, and rather than replacing the existing language of Section 11.1 describing the coverage it leaves that language intact and adds a new paragraph defining the modified MVF-I coverage package,

prefaced by the phrase "the above coverage shall be modified to include." The City suggests these differences plant seeds of potential confusion and argues its proposal should be adopted for that reason. There being no dispute about the substance of the change agreed upon, it is best to embrace clarity and avoid potential confusion in the *form* in which such change is codified, so that is reason enough to adopt the City's language.

Order: Section 11.1 shall be amended to read as follows in the 1991-94 agreement:

> Section 11.1: Current Employees. Effective upon ratification of this agreement or as soon thereafter as the insurance carrier can implement the change, the Employer shall provide and pay the cost of a medical, surgical and hospitalization plan, being Blue Cross-Blue Shield Comprehensive semi-private MVF-I with Option V Master Medical, PRE/100, MSO, ML, FAE-RC, and three dollar ($3.00) co-pay prescription drug riders, or comparable policy, for all regular full-time employees, including spouses and dependent children under twenty-five (25) years of age in all cases where full family coverage is not provided and paid for by the spouse's employer; provided, however, that in the event of non-duty disability of an employee with resulting incapacity to work, the Employer will continue to pay the premiums of said insurance and on the insurance provided for in Section 11.5 hereof only for the period of time equal to such employee's accrued sick leave or for a period of six (6) months during non-duty disability, whichever period is greater.

City Issue No. 10(b): Insurance for Duty Disability Retirees. The City proposes several changes in the language of Section 11.2 of the expired agreement, which it says are necessary for clarification or to reflect existing practice. The Union agrees that one of the changes, to specify that a duty disability retiree who becomes eligible for Medicare must avail himself of that coverage and thus convert his coverage under Section 11.2 to that of a Medicare supplement, is an accurate reflection of existing practice. However, it argues there is no need or basis for one of the other changes: a proposed requirement that to be eligible for the coverage provided under Section 11.2 retirees must be not only "retire(d) on duty disability pension," as in the existing language, but also "totally physically disabled to work [or subsequently become so] as a result of an illness or injury sustained in the course of their duties while employed by the City of Jackson." The City's brief says the purpose of this change is merely to "make clear that the City's obligation arises if the employee is totally physically unable to work" and to match the duty disability provisions of

the Jackson police contracts. But the Union views it as creating an entirely new, undefined, and unnecessarily stringent eligibility requirement which should be rejected in favor of the status quo because there is no evidence to support it.

Findings. It is true that the new language proposed by the City is the same as that applicable to police patrol duty disability retirees under the current contract covering that bargaining unit. However, it is equally true that the City did not provide any explanation or evidence for that part of its proposal which adds a "totally physically disabled to work" requirement for eligibility. On its face, it cannot be said merely to clarify existing eligibility requirements, because under the old Section 11.2 those requirements are clear enough: the person must have "retire(d) on duty disability pension on or after July 1, 1974," not be covered under "full family coverage . . . provided and paid for by the spouse's employer," and not subsequently take employment providing insurance. Rather than clarifying any of those three requirements or the interrelationship among them, the City's proposal to further require that a duty disability retiree be "totally physically disabled to work" seems to add an independent fourth requirement which could nullify coverage otherwise available under the other three. At worst, this change could lead to loss of benefits for duty disability retirees; at best, it creates confusion and ambiguity where none existed before. Without a clear explanation of and/or evidence supporting a real need for such a change, it must be concluded that these considerations outweigh the parallel language in the police contract under statutory factor (h). Since no other factor was identified as applicable to this issue, the City's proposal must be rejected.

Order: Section 11.2 shall not be amended as proposed by the City but shall remain the same in the 1991-94 agreement as in the expired agreement.

City Issue No. 10(c) and Union Issue No. 8: Non-Duty Disability Retirees. Both parties submitted what appear to be substantively identical offers on the issue of whether non-duty disability retirees should be recognized in the agreement as receiving the same health insurance benefits as "service retirees." The Union proposes simply to add a new sentence at the end of Section 11.3 (now entitled "Service Retirees") saying: "Effective July 1, 1993 the above provision shall also apply to members retiring on a non-duty dis-

ability pension." The City proposes to achieve the same result by retitling Section 11.3 to read "Non-Duty Disability and Service Retirees," rewriting the first sentence of that section to include coverage for employees covered by the agreement "who retire after July 1, 1980, on a non-duty disability or service retirement" and adding "non-duty disability" retirement at one other point in the body of the section. The proposed rewrite also would change that date, which is July 1, 1979 in the expired agreement; the City offered no explanation for this change, which therefore must be regarded as a typographical error. The City's proposed amendment to Section 11.3 adds Medicare supplemental coverage at the retiree's expense and coverage for surviving spouse of a deceased retiree "on a payroll deduction basis, if the spouse is eligible to continue receiving benefits." In its brief, the City said nothing about the Medicare supplemental coverage, although it characterized a similar provision for duty disability retirees as reflecting "current practice." With respect to service and non-duty disability retirees, it also characterized the proposed new language for surviving spouse coverage as "mere codification of existing practice." Interestingly, and inexplicably, the City opposes the Union's proposal to add a sentence to Section 11.3 making it applicable to non-duty disability retirees not because its own proposal achieves the same result, but because of "the skyrocketing cost of health insurance" and alleged lack of support for extending health insurance to non-duty disability retirees among comparable communities.

Findings. That internal contradiction in the City's own brief aside, there really is no dispute between the parties on this issue. They agree that non-duty disability retirees are to receive the same health insurance coverage as service retirees and Section 11.3 should be amended to recognize that, and such agreement in effect constitutes a "stipulation" which is controlling on this panel under Section 9(b) of Act 312. The City's proposal achieves that and also codifies existing practice regarding surviving spouse and Medicare supplemental coverage, and does so in a clear and understandable manner, so it should be adopted instead of the more limited proposal by the Union.

Order: Article 11.3 shall be amended as proposed by the City with respect to health insurance for non-duty disability retirees, and shall appear in the 1991-94 agreement (as

further amended by the panel's findings on the next two issues) as set forth in the panel's order disposing of Union Issues No 9 and 10 below.

Union Issues No. 9 & 10: Dependent and Medicare Supplement Coverage for Non-Duty and Service Retirees. The Union proposes to amend Section 11.3 in two additional respects: to provide health insurance coverage for dependent children as well as spouses, and to provide Medicare supplement coverage for living retirees at the City's expense. It finds support for these proposals in the fact that the Jackson police contracts include both these benefits, and argues that if the City believes in parity between the police and fire fighters regarding health insurance coverage for active employees it should abide by the same result for retirees. It also finds support among the comparable communities. The City opposes both proposals, submitting a last offer of settlement for the status quo as embodied in Section 11.3 as revised by its proposed amendments the panel adopted under City Issue No. 9(c). It argues there is not majority support for dependent coverage among the comparable communities, and that paid Medicare supplement coverage should not be granted because there is no need for such a benefit enhancement which "would only take Jackson further out of line with the comparables with respect to overall compensation." It also opposes both proposals on grounds of "skyrocketing costs."

Findings. The evidence clearly favors the Union on all applicable statutory factors with respect to the Medicare supplement issue: factor (c) in that for all the City's emphasis on "skyrocketing costs" for health insurance it put in no specific evidence regarding the cost of this particular benefit and, as discussed earlier, failed to demonstrate a general inability to pay for this or any other benefit at issue in these proceedings; factor (d) in that five of the seven comparable communities have this benefit; and factor (h) in that not only the police units but also non-union employees of the City of Jackson enjoy paid Medicare supplement coverage. As for the City's "overall compensation" argument, the chairman repeats by reference his findings on that subject in connection with other issues, by way of concluding that since the overall compensation of members of this bargaining unit is not "out of line" with the comparable communities, but very near the median and average,

factor (f) cannot be said to favor the City's position on this or any other issue. Therefore the panel must adopt the Union's proposal on its Issue No. 10.

The evidence is not quite so clear regarding retirees' dependent health insurance. All other City employees enjoy such coverage up to age 65 (after 65, employees in the MAPE unit get up to $80 per month toward the cost of Medicare supplement coverage for themselves only), so factor (h) clearly favors the Union's position. Factors (c) and (f) do not favor either party's position, for reasons stated above. Factor (d) favors the City, in that five of the seven comparable communities do not provide health insurance for non-spouse dependents of retirees. However, another factor (h) consideration -- the historical wage parity relationship between Jackson police and fire department employees -- tips the balance in the Union's favor. Its point is well taken that if the City wishes to extend the concept of parity to health insurance coverage for active employees, as justification for reducing such coverage, the same principle should apply with respect to this modest enhancement in health insurance coverage for retired employees. The chairman uses the word "modest" advisedly, recognizing that family coverage cost almost $50 more per month than two-person coverage as of July 1, 1992, but also making the reasonable assumption that not every retiree will need coverage for dependent children. For these reasons, the panel also must adopt the Union's position on its Issue No. 9.

Order: Section 11.3 as amended by the panel's last preceding order shall be further amended as proposed by the Union under its Issues No. 9 and 10, and shall appear in the 1991-94 agreement as follows:

> Section 11.3: Non-duty Disability and Service Retirees. The Employer shall provide and pay the cost of a medical, hospital and surgical hospitalization plan, designated Blue Cross-Blue Shield MVF-I, or a comparable coverage with another carrier, for all employees covered by this Agreement who retire after July 1, 1979, on a non-duty disability or service retirement. Such policy shall also include their spouse and dependent children. The City's liability for payment of premium thereon shall cease upon the retiree reaching age sixty-five (65) or eligible for Medicare and/or if the retired employee accepts employment with another employer who provides health insurance coverage or if the retired employee's spouse is employed and that employer provides health insurance coverage. A retired employee, who ceases to be covered by the Employer's insurance because of his/her employment or his/her spouse's employment and resulting insurance may, upon termination of coverage elsewhere, re-enter the insurance

coverage specified in this Section. Insurance coverage for all employees who retire after July 1, 1985, on a non-duty disability or service retirement, shall include a three dollar ($3.00) co-pay prescription drug rider, for the retiree and his/her spouse.

Effective July 1, 1991, when a retired employee or spouse reaches an age where he/she is eligible for Medicare coverage, he/she shall apply for said coverage and the Employer shall pay the premium for Medicare supplemental coverage. The above specified insurance coverage and the Employer's liability for the premium thereon shall cease if the retired employee accepts employment with another employer who provides comparable health insurance or if the retired employee's spouse is employed and that employer provides health insurance coverage reasonably comparable to that specified above. A retired employee, who ceases to be covered by the Employer's insurance because of his/her employment or his/her spouse's employment and resulting insurance, may, upon termination of coverage elsewhere, re-enter the insurance coverage specified in this section.

If a retiree who retires after the execution of the Agreement and whose insurance premium is being paid for by the Employer, should subsequently expire, the insurance coverage as provided for his/her spouse and dependent children may be continued on a payroll deduction basis, if the spouse and/or dependent children are eligible to continue receiving pension benefits.

Union Issue No. 11: Dental and Optical. Section 11.4 of the expired agreement provides for reimbursement of "proven dental and/or optical expenses, not to exceed five hundred fifty dollars ($550.00) combined in any given contract year, for the employee, his/her spouse and dependent children," provided such expenses are not covered by some other coverage. The Union proposes to increase the maximum reimbursement to $600 effective July 1, 1991, $625 on July 1, 1992 and $650 on July 1, 1993. It argues such increases are necessary because almost half the bargaining unit reached the $550 maximum in 1991-92 and because comparable communities provide more generous coverage. The City's last offer is to maintain the status quo. It finds support for that in the fact that comparable communities offer only dental coverage, not optical; that all other City employees have the same dental/optical benefits as this bargaining unit; that current level of reimbursement has proven adequate for the majority of bargaining unit members; and that raising the reimbursement level would expose the City to additional costs it can ill afford.

Findings. None of the seven comparable communities provides optical benefits. All seven provide dental coverage in a variety of forms with maximum coverage higher than $550 but subject to co-payment requirements, which means the coverage currently provided in this bargaining unit is actually better for members who do not exceed the $550 maximum by a significant amount. The record shows that a majority of bargaining unit members do not reach or exceed that limit, so on balance the evidence must be said to favor the City's position under statutory factor (d). It favors the City even more strongly under Section 9(h) of Act 312, since all other City employees have the same dental/optical benefits as now exist in Section 11.4. And on this point the police parity argument cuts against the Union; just as the City should not be able to pick and choose those aspects of parity most favorable to its positions, neither should the Union. No other statutory factor has been identified as applicable to this issue, so the Union's proposal must be rejected.

Order: Section 11.4 shall not be amended as proposed by the Union but shall remain the same in the 1991-94 agreement as in the expired agreement.

VACATION ISSUES

City Issue No. 7: Hours-Worked Precondition; Payoff/Reimbursement at Time of Separation or Retirement (Economic). Section 9.3 of the expired agreement reads as follows (emphasis added):

> Section 9.3. Payoff of Accrued Vacation Leave.
>
> Upon separation, employees with six (6) months but *less than five (5) years of credited service* will be paid for any unused vacation leave accrued by their seniority date. To qualify for payoff of accrued vacation leave, employees with five (5) or more years of credited service must be physically at work a minimum of five hundred (500) hours into the calendar year. Hours off-duty in the calendar year which are charged as holiday leave or are hours off when another employee is repaying a previously traded time will be considered as hours physically at work for purposes of meeting the five-hundred (500) hour minimum in this section.

Under a tentative agreement dated November 4, 1991, the parties agreed to eliminate all but the italicized portion of that section and replace it with this new Section 9.3:

> A. If an employee with *less than five (5) years of credited service* who is otherwise eligible for vacation with pay quits or is discharged and not reinstated on or after the monthly anniversary date upon which he qualified for such vacation with pay without having received same, such employee will receive, along with his final paycheck, the vacation pay for

which he qualified as of such monthly anniversary date. If an employee quits or is discharged prior to the monthly anniversary date upon which he would be qualified for a vacation with pay, he will not be entitled to any portion of the vacation pay for which he would have qualified on such monthly anniversary date.

The City now proposes to reinstate the 500-hour requirement for employees with five or more years of service and add to it a new requirement for reimbursement of vacation pay already received by an employee who retires or separates from City employment before working 500 hours, by adding a new subsection to Section 9.3 to read as follows:

B. In order for a separating or retiring employee, with five (5) or more years of service, to receive a vacation or a lump sum payoff for vacation in his/her final year of employment, said employee must actually be physically present and work a minimum of at least five hundred (500) hours during the calendar year. If said employees take their vacation during the year and leave employment with of (sic) the City without working the required five hundred (500) hours, they shall have any vacation paid them deducted from their final wages or other pay-offs. Hours off duty in the calendar year which are charged as holiday leave or are hours off when another employee is repaying a previously traded time will be considered as hours physically at work for purposes of meeting the five hundred (500) hour minimum in this Section.

The City claims support for this proposal among the comparable communities, because none of them permit a fire fighter to take vacation time before it is earned, and among the so-called internal comparables, in that other City employees may take vacation before it is earned but have to repay any received before working five-hundred hours in the final year of employment. The Union's opposition to this proposal is based on the tentative agreement for a new Section 9.3.A.; the fact that vacations accrue on a service anniversary date basis in the comparable communities, for which the issue of vacation taken before it is "earned" therefore simply does not arise; and the fact that this bargaining unit is subject to other restrictions on vacation accrual (for fire fighters with *less than* five years of service) which do not apply to other City employees.

Findings. Statutory factor (b) -- "Stipulations of the parties" -- favors the Union on this issue, insofar as the City's proposal would reinstate a vacation leave payoff restriction that already was negotiated out of the 1991-94 agreement. Factor (d) cannot be said to favor the City's proposal, because none of the comparable communities has a vacation accrual system exactly like this one and none of them has an hours-worked prerequisite such as the City proposes. Furthermore, it appears the system in this bargaining unit, *without*

the proposed 500-hour requirement, really is much like the ones in the comparable communities in that it actually does not permit bargaining unit members with five or more years of service to take vacations before "earning" them. On its face, Article 9 did not provide for any vacation accrual for fire fighters hired before January 1, 1989 until they had one full year of service, so when such a fire fighter accrues vacation on January 1 of a given year, that "accrual" must be for *past* service. Therefore the problem the City seeks to solve does not even appear to exist. As the Union also pointed out, the language of the proposed new Section 9.3.B. is so broad that it would deprive a retiring fire fighter with less than 500 hours of actual work time in the year of retirement of credit for *any* vacation payoff, including that associated with accrued but unused vacation carried over from prior years. Section 9.1(a) permits employees with less than ten years of service to carry over up to 84 hours of vacation; 168 hours for those with ten or more years of service. The potential loss of that negotiated benefit from adoption of the City's proposed new Section 9.3.B. is another factor properly to be considered under Section 9(h) of Act 312, and it too favors the Union's position. The only factor that may be said to favor the City's position is the existence of a requirement such as it proposes in the police contracts and for other City employees, also cognizable under Section 9(d), but it is outweighed by the other statutory factors mentioned above. Therefore this proposal must be rejected.

Order: Article 9 shall not be amended by adding a new Section 9.3.B. as proposed by the City, and the 1991-94 agreement shall contain no such provision.

Union Issue No. 5: Additional Vacation Days for 40-hour Personnel (Economic). The Union proposes to add a new Section 9.4 to provide additional vacation days for 40-hour bargaining unit personnel, as follows:

> Section 9.4. Additional Vacation Days
>
> Effective June 30, 1994, additional furlough time shall be granted to the ranking employees as follows:
>
> Assistant Chiefs -- 2 (8-hour) days
> Inspectors -- 2 (8-hour) days
>
> Employees may add such additional bonus time to their vacation leave, and if so, then must follow the requirements of vacation leave provisions. Employees shall have the option of either

selling the day(s) back or using said day(s) as furlough time. Members entitled to said incentive payments shall make their election no later than July 1 of each year. Members shall be paid on the cash option no later than August of each year.

Requirements Governing Additional Furlough Time:

a) Time shall be given on the 1st of July each year.
b) Newly promoted employees shall be entitled to this furlough on a prorated basis until July 1st following the promotion, at which time they shall start receiving the full benefit.
c) This time shall be used in the fiscal year in which it is given and cannot be carried over.

The Union advances two reasons for this additional vacation time for 40-hour personnel: to reward them for the high level of skill, responsibility and experience necessary for their positions; and to close the gap between them and their counterparts in the comparable communities, who enjoy substantially more vacation time, on the average, at each of the contractual length-of-service vacation benchmarks of five, ten, fifteen and twenty years. The City opposed it on the same basis, with primary reference to its proposed list of comparable communities, and because 40-hour personnel also receive high overall compensation and received generous salary increases during the term of the 1991-94 agreement.

Findings. Statutory factor (f) -- "overall compensation" -- cannot be found to favor the City's position on this issue, because it presented no detailed evidence of the value of 40-hour personnel's overall compensation, either in this bargaining unit alone or compared to such personnel in the comparable communities. The only other statutory factor either party identified as applicable to this issue is (d), which clearly favors the Union's position. At each of the length-of-service benchmarks listed in Section 9.1(b) for increased vacation accrual for 40-hour personnel -- five, ten, fifteen and twenty years -- members of this bargaining unit fare substantially worse than their counterparts in most of the comparable communities. Up to five years, they get ten days (80 hours) of vacation, equal to three cities tied for lowest among the six comparable communities (six instead of seven because Adrian has no 40-hour bargaining unit personnel) and 2.7 days below the average for all six. After five years they get twelve days, lower than all but one of the comparables and three days below the average. After ten years they get fifteen days, equal to the two lowest comparable communities and 3.5 days below average. After fifteen years they get twenty days, equal to the two lowest comparables and three days below the average. After twenty years they get twenty-three days, lower than all but one of the comparables and

a day and one-half below the average for all six comparable communities. The Union's proposal will merely bring this bargaining unit up to or near the average among the comparable communities. Based on Section 9(d) of Act 312 and lacking evidence supporting a contrary conclusion under any other Section 9 factors, therefore, the panel must adopt the Union's proposal on this issue.

Decision: Article 9 shall be amended by addition of a new Section 9.4 providing for two additional vacation "furlough" days as set forth in the Union's last offer of settlement on this issue.

PENSION ISSUES

The parties presented six pension issues to the panel, two based on City proposals to add new restrictions to pension-related provisions of the expired agreement, four related to Union proposals for pension benefit enhancements. They are dealt with individually and sequentially, as follows.

City Issue No. 12: Annuity Withdrawal Limitation (Economic). Section 23.3 of the expired agreement provides employees in the Act 345 Pension System an option, at retirement, to withdraw their contributions and interest thereon. The City proposes to exclude from that option any employee contributions made to purchase military service credits, by amending Section 23.3 with addition of this clause to its second sentence: "excluding contributions made to purchase prior military service." The rationale for the proposal is that it will end what the City characterizes as "double dipping," which it says occurs when an employee purchases prior military service immediately before retirement, thus increasing his pension benefits and costs to the pension system (to which no contributions have been made for those military service years), but then withdraws the money. It finds support for this proposal under Sections 9(d) and (h) of Act 312, in that only one of the comparable communities (Muskegon) has an annuity withdrawal option of any kind and there it does not include employee contributions for military service, and in that no other City employees except the police have such an option. The Union's last offer of settlement on this issue is to maintain the status quo. It finds support for that position in the patrol and command police contracts, both of which have the same annuity withdrawal

option without any such restriction, and contends the City's attempt to take away a negotiated benefit from members of this bargaining unit cannot be justified under Section 9 of Act 312.

Findings. The Union is right. The evidence under Section 9(d) might be said to favor the City's position in that no comparable community even offers the benefit it seeks to eliminate. But it may be said to favor the Union's position in that there is no evidence that any of the comparable communities *ever did* offer such a benefit and later eliminated it. In other words, the absence of such a benefit where none ever existed cannot justify taking it away from this bargaining unit and thereby altering the relationship between this unit and the comparable communities. Thus the comparable community evidence is at best a wash and as such cannot be said to favor the City's position. The evidence under Section 9(h) is quite different, however. It clearly favors the Union's position, in that the only other City employee groups that are part of the Act 345 Pension System and have recourse to binding arbitration under Act 312 have the same annuity withdrawal option as in Section 23.3 of the expired agreement, without any exclusion for purchased military service. The City having offered no evidence pertaining to any other factor in Section 9 of Act 312 on this issue, the evidence favoring the Union's position under Section 9(h) is controlling, and the City's proposal must be rejected.

Order: Section 23.3 shall not be amended as proposed by the City, but shall remain the same in the 1991-94 agreement as in the expired agreement.

City Issue No. 13: Act 345 Selection "Window" (Economic). Most members of this bargaining unit are in the Act 345 Pension System. Only four remain in an old (and long-closed) City Charter plan, as to which the City has substantial unfunded accrued liability, and they have a right to transfer into the Act 345 System at any time up to their 49th birthday or within thirty days of their 25th service anniversary. If and when such a transfer takes place, the employee's pension contribution is transferred into the Act 345 System, but employer contributions remain in the old plan to reduce its unfunded accrued liabilities. As a result, the Act 345 System assumes significant benefit liabilities for which it has collected no employer contributions (which come from a special Act 345 millage,

not out of the City's general fund). According to the City, this problem has been exacerbated by transfers into the Act 345 System immediately before retirement. It seeks to eliminate the latter aspect of the problem by adding a new Section 23.4 to the 1991-94 agreement, as follows:

> Section 23.4. All unit members who are not currently members of the Act 345 Retirement System shall exercise their option to become members of said system by 5:00 p.m., December 31, 1994, by so advising the Director of Personnel and Labor Relations of their election to either remain in the old Police and Firemen Retirement Plan or to become a member of the Act 345 Retirement System. Failure to so notify the Director of Personnel and Labor Relations by said date and time shall bar said unit member from subsequently electing said option. All unit members who are currently members of the Act 345 Retirement System shall remain members of that System.

The City contends this change is justified not only as a reasonable way to limit addition of unfunded liabilities to the Act 345 Pension System, but also because the same "window" is part of the current agreement for the police patrol bargaining unit, which is the only other employee group similarly situated.

The Union contends the members still in the old pension system have a "vested" right to remain there with a right to transfer to the Act 345 system any time before the deadlines mentioned above. It concedes that right is "subject to negotiation," but argues the City should not be permitted to restrict it to a brief "window" in this arbitration without a *quid pro quo*, which it says the police patrol got, in the forms of FAC improvement and option to purchase previous City service, in negotiations for their current agreement.

Findings. The parties essentially agree that only Section 9(h) applies to this issue, as to three factors: limitation of unfunded liability assumption, comparison with another City bargaining unit, and consideration of the history behind the right to transfer from the old police and fire pension system to the Act 345 system. The first two of those clearly favor the City's position. So does the third, as will be seen in the panel's decisions on other pension issues below, in that members of this bargaining unit will receive the same pension benefit enhancements negotiated for the police patrol unit and thus, by the Union's own reasoning, should be subject to the same Act 345 selection window.

Order: Article 23 shall be amended by addition of a new Section 23.4, as proposed by the City, to the 1991-94 agreement.

Union Issue No. 17: FAC Revision (Economic). Currently members of this bargaining unit who are in the Act 345 pension system and take a regular (non-disability) retirement receive an annual pension equal to 2.5% of their final average compensation (FAC) for the first twenty-five years of service and 1% for each additional year of service and FAC is the average of their best consecutive five out of the ten years immediately preceding retirement. The Union proposes to change the FAC calculation by adding a new Section 23.4 to the 1991-94 agreement, as follows:

> Members of the unit who retire under provisions of Act 345 Retirement System on or after July 1, 1991, shall have their retirement benefit calculated on the average final compensation based on an average of the highest annual compensation received by the member during a period of three (3) consecutive years of service contained within his/her ten years of service immediately preceding his/her retirement or leaving service. If he/she has less than three (3) years of service, then the average final compensation shall be calculated on the annual average compensation received during his/her total years of service.

The Union finds support for this proposal under Sections 9(d) and (h) of Act 312: the latter in that it matches the FAC provisions of the Jackson police patrol and command unit contracts and would cost only 1.65% of Act 345 fire fighter payroll (as computed by the City's actuary), which expense would be covered by the special Act 345 millage, not from the general fund; the former in its close similarity to FAC formulas in fire fighters' contracts in the comparable communities.

The City's last offer of settlement on this issue is to maintain the status quo. It points out that its pension contributions for this bargaining unit already are far higher than any of the comparable communities and argues there is no justification for further increasing the level of those contributions or the unfunded accrued liabilities in the Act 345 system. As for the fact that such costs would be covered by a special millage which is adjusted to match Act 345 funding obligations, the City's brief contends "the residents of the City of Jackson already bear an extraordinary tax burden, and must not be further burdened by the Union's excessive proposals." It further contends, without reference to specific figures or comparisons, that the proposed FAC enhancement is not justified because the "overall compensation" of members of this bargaining unit "is already very high."

Findings. The evidence pertaining to Section 9(h) of Act 312 definitely favors the Union's position on this issue. As a result of negotiation with the City the Jackson police units, which share the Act 345 System and with which this bargaining unit has contractual wage parity, have exactly the FAC formula the Union proposes. Section 9(d) comparisons also favor the Union's position, because five of the comparable communities have a three-year FAC formula: best three of five years in three cities and best three of ten in another (both more advantageous to employees than best three *consecutive* years out of ten), and best consecutive three years out of five in another. In percentage terms, the cost to fund this FAC change will be relatively modest, which is another factor in the Union's favor under Section 9(h). It is true that the City's total costs for the employer's contribution for pension benefits in this bargaining unit are very high, both absolutely and relative to such costs in the comparable communities (37.47% of Act 345 fire fighter payroll in Jackson, as compared to an average of 16.6% and a high of 24.35% in the seven comparable cities). But according to the City's actuary, substantially more than half of that cost (21.69%) is attributable to unfunded accrued actuarial liabilities. Changing the FAC formula as the Union asks will increase those liabilities (by $223,288, according to the actuary), but the City has the assured ability to pay additional costs associated therewith from the special Act 345 millage, so neither the magnitude of the employer's total contribution for pension costs in this bargaining unit nor a projected increase in those costs as a result of changing the FAC formula is a Section 9 factor favoring the City's position on this issue.

Neither is the City's broad assertion that overall compensation of bargaining unit members already is "very high." As noted earlier, the City's portrayal of the overall compensation of members of this bargaining unit was artificially inflated by including as part of their *compensation* the amounts of the City's pension *contributions*, which are extraordinarily high not because of the benefit levels being funded but because of the large accrued unfunded liabilities in the pension plans. Removing those inflated numbers, these employees' overall compensation is near the median and average of the seven comparable communities. Thus it must be concluded that none of the statutory factors favor the City's position on this issue, whereas factors (d) and (h) favor the Union's proposal, which therefore must be adopted, but as new Section 23.5, not 23.4.

Order: Article 23 shall be amended by adding to the 1991-94 agreement a new Section 23.5 as proposed by the Union its last offer of settlement on the issue of final average compensation for Act 345 pension purposes.

Union Issue No. 18: Pension Multiplier (Economic). The Union also proposes to increase the pension multiplier by adding a new Section 23.5 to the agreement, as follows:

> The pension benefit shall be calculated at two and three quarters percent (2.75%) of final average compensation for the first twenty-five (25) years of service, plus one percent (1%) per year, for each year of City service over twenty-five (25) years.

In support of this proposal the Union argues that the current formula lags behind that used in one of the comparable communities (Battle Creek, which had the same formula as this bargaining unit until July 1, 1993, when it increased to 3% for each year of service up to a maximum of 75%) and that some of the comparable communities include elements in FAC (such as accrued unused vacation payouts) that are not included in this bargaining unit. In opposition to it, and in support of its last offer of settlement to maintain the status quo, the City points out that no comparable community (except Battle Creek with respect to only the third year of the contract here in dispute) and no other Jackson city employee group has a multiplier higher than 2.5%, that in a majority of the comparable communities the multiplier is even lower, and that pension benefits calculated on average bargaining unit salaries are higher in Jackson than any of the comparable communities. The Union argues that calculation is incomplete and misleading because it does not take into account other elements of FAC in addition to annual salary.

Findings. The two applicable statutory factors -- (d) and (h) -- both favor the City's position. Five of the comparable communities (Adrian, East Lansing, Holland, Muskegon and Port Huron) have a lower multiplier than 2.5% and four of them have a cap on total percentage of FAC (ranging from 65% to 80%), which this bargaining unit does not. Bay City uses a 2.5% multiplier for all years of service, but subject to a 70% cap, which results in a formula marginally higher than Jackson's from the 25th to 32nd year of service for Jackson fire fighters but equal to Jackson's through year twenty-five and lower after year thirty-two. For the first two years of the term of the contract here in dispute, Battle

Creek's multiplier was identical to the current Jackson multiplier, but subject to a 70% cap; only for the third year was it higher. The fact that one comparable community has a higher multiplier for one year hardly is convincing support for the Union's proposal when the existing Jackson multiplier equals or exceeds the other six comparable communities, so the evidence under factor (d) clearly and strongly favors the City's position. So does the evidence pertaining to Section 9(h) of Act 312, namely, that the current multiplier for this bargaining unit is better than the one applicable to the City's unorganized employees and those in the Michigan Association of Professional Employees (MAPE) bargaining unit and identical to that applicable to the two police bargaining units. No other statutory factor being applicable to the evidence before the panel on this issue, the Union's proposal to increase the pension multiplier must be rejected.

Order: Article 23 shall not be amended by adding a new section to Article 23 in the 1991-94 agreement as proposed by the Union to increase the pension multiplier for this bargaining unit, which shall remain at 2.5% of FAC for the first twenty-five years of service and 1% for each year of service in excess of twenty-five years.

Union Issue No. 19: Prior City Service (Economic). The Union proposes to add a new Section 23.6 to Article 23 to provide bargaining unit members an opportunity to purchase prior service in other City departments to be added to their service in the Fire Department for pension purposes, as follows:

> Members of the Jackson Fire Department who have previously been employed in other departments within the City shall be permitted to purchase such prior service, up to six (6) years, for pension purposes only under Act 345 under the following conditions:
>
> 1. Such employees must pay an amount to the City of Jackson Act 345 Pension System equal to 7.5% of their current salary as of the date they make such payment multiplied by the period of time they wish to purchase, up to the maximum credited service of six (6) years. Payments shall be made in a lump sum payable to the City of Jackson and paid to the City Clerk's Office.
>
> 2. Such service must be purchased within 180 days after this Labor Agreement is signed. If such service has not been purchased within the 180 days, the prior City service shall not be available in the future as credited service under Act 345.
>
> 3. The purchase of this prior service shall be for pension purposes only under Act 345 and shall have no effect on departmental seniority, vacation selection, shift selection or bidding positions, or other similar matters except reaching eligibility requirements for service

> retirement under Act 345. City employees who subsequently are transferred into the Jackson Fire Department after the signature date of this agreement and have not had a break in City service, shall be allowed to purchase such prior service by paying an amount to the City of Jackson Act 345 Pension System equal to 7.5% of their current salary as of the date they make such payment multiplied by the period of time they wish to purchase up to the maximum of six (6) years. Payments shall be made in a lump sum payable to the City of Jackson and paid to the City Clerk's Office. They must exercise this option before this Labor Agreement expires. If payment is not made within one calendar year period of transfer into the Jackson Fire Department, they shall not be permitted to purchase such service after that date.

The Union finds statutory support for this proposal in the fact that a similar provision is part of the Jackson Police patrol contract with respect to the purchase of prior City service as a police cadet and similar rights exist in fire fighter contracts in some of the comparable communities, and in the projection by the City's actuary that the costs associated with it would increase the pension contribution rate by only 0.42% of Act 345 fire fighter payroll.

The City finds statutory support for its opposition to this proposal in the facts that the only comparable community that has an Act 345 pension system (Battle Creek) does not provide for purchase of prior city service; that one other (Bay City) does not provide such an option either; that in Adrian, East Lansing and Holland fire department employees can purchase prior city service only within the Municipal Employees Retirement System (MERS) plan; and that in Muskegon prior city service can be purchased only for purposes of retirement eligibility, not for pension benefits.

Findings. According to an exhibit presented by the Union, prior city service transfers automatically when a city employee joins the fire department in four of the comparable communities, but a corresponding exhibit from the City points out that happens only when the prior service was within the same pension system. In the other three comparable cities fire department employees cannot purchase prior city service for pension benefits purposes (and not at all in two of them). Since none of the comparable communities presents a situation truly comparable to this bargaining unit, this evidence cannot be said to favor the Union's position on this issue. Neither can the evidence of a prior service purchase option in the Jackson Police patrol unit, because it relates only to service as a police cadet, not in any and all City departments. What the Union seeks therefore is a much broader benefit than is available to Jackson police officers, as is evident from a Union exhibit showing that

nine of the fourteen bargaining unit members with prior City service obtained such service in neither the fire nor police department. For these reasons, it must be concluded that the evidence pertaining to the only two applicable statutory factors, (d) and (h), favors the City's position and necessitates the rejection of this Union proposal.

Order: Article 23 shall not be amended by adding a new Section 23.6 to the 1991-94 agreement to permit bargaining unit members to purchase prior City service in other departments for pension purposes, as proposed by the Union.

Union Issue No. 20: Surviving Spouse Benefits (Economic). The Union proposes to add another new section to Article 23 to provide death benefits for the surviving spouse of any bargaining unit member who has retired on a duty disability and dies before age 55, as follows:

> Section 23.7. Spouse Death Benefits, Duty Disability
>
> Effective July 1, 1991, upon the death of an Act 345 disability retiree prior to the age of 55, a pension benefit shall be paid to his or her surviving spouse equal to fifty (50%) percent of what should have been the deceased employee's normal regular pension had the deceased employee taken a normal retirement.

An identical provision (except for substitution of the word "would" for "should") is part of the Jackson Police command and patrol contracts, which is the Union's rationale for this proposal. The Union again points to the history of negotiated, contractual wage parity between the City police and fire units and the facts that they are part of the same pension system and their members face similar job hazards as grounds for extending the same benefit to members of this bargaining unit. It also argues the costs of doing so will be minuscule: the City's actuary estimated them at 0.17% of Act 345 fire fighter payroll for a spousal benefit of 60% (as originally proposed by the Union). The City's opposition to this proposal is based on the lack of such a benefit in any of the comparable communities or for any employees of the City of Jackson other than the police.

Findings. Statutory factor (d) favors the City on this issue, it being undisputed that no comparable community has this particular benefit. Strictly speaking, precisely the same benefit could be offered in only one of the comparable communities, Battle Creek, because

it is the only one with an Act 345 pension system. As the City points out, to add such a benefit "would require a local amendment to Act 345," and there is no evidence that such an amendment was adopted in Battle Creek.

However, the need for a local amendment is not a convincing reason for denial of this benefit in this bargaining unit if it is provided to the other City employees who are part of the Act 345 system, as it is. Thus the evidence pertaining to Section 9(h) of Act 312 must be found to favor the Union's position, in that the only other City employees with similarly hazardous work and membership in the same pension system, and with whom the fire fighters have a long history of negotiated wage parity, have the same benefit for surviving spouses of duty disability retirees that the Union proposes for the fire fighters. The other Section 9(h) factor identified by the parties also favors the Union, because the evidence shows the cost will be minimal and covered by the Act 345 millage. On balance, therefore, factors favoring the Union's position under Section 9(h) outweigh the single factor favoring the City's, and the Union's proposal must be adopted, but as new Section 23.6, not 23.7, due to rejection of other proposed changes to Article 23.

Order: Article 23 shall be amended by addition of a new Section 23.6 in the 1991-94 agreement providing a 50% pension benefit for surviving spouse of a duty disability retiree who dies before age 55, as set forth in the Union's last offer of settlement on this issue.

CITY ISSUE NO. 11: DRUG TESTING (NON-ECONOMIC)

Article 20 of the expired agreement established an eight-person "Labor Management Committee" to meet periodically for discussion of "departmental problems" not covered by the grievance procedure. The City proposes to replace it with a new Article 20 setting forth a drug testing policy, prohibiting "any statutorily defined illegal use of drugs by an employee, whether on duty or off duty," as well as reporting for work under the influence of drugs or alcohol, calling for disciplinary action for violation of such prohibitions or for failing a drug test, permitting the City to inspect all Employer-owned property and employee-assigned lockers at any time, and incorporating a General Order on Drug Policy identical to a "Drug Testing Policy" appended to the police patrol contract. The Union opposes the City's proposal, which it characterizes as overreaching, draconian and disre-

spectful of employee rights to privacy and personal liberty, and instead proposes a lengthy and elaborate "Memorandum of Understanding Regarding Alcohol and Drug Policy" also permitting drug testing, but under more strictly controlled circumstances, and requiring the City to establish an Employee Assistance Program. The City opposes that proposal as too elaborate, too expensive and too lenient.

Findings. Neither proposal has support under statutory factor (d), because only one of the seven comparable communities (Adrian) has any contractual provision on the subject of drug testing. The City's proposal has support under Section 9(h) to the extent that the policy in the General Order it seeks to incorporate into the agreement is the same as that appended to the police patrol contract. However, the police contract does not include an additional article on drug policy and testing as proposed for this bargaining unit, nor has the City explained why such an article is necessary here, or why it seeks to eliminate the existing Article 20. The Union argues there is no need for a drug policy in this unit identical to the police policy, because fire fighters' duties do not expose them to illegal drugs as police duties do. However, the potential consequences of drug use or of working under the influence of drugs or alcohol are certainly as dangerous for fire fighters as for police officers, and the City's argument that it should have the same means of preventing and responding to those problems in both units is convincing. The policy set forth in the General Order does include some incursions on employees' privacy (inspection of lockers, for example), but it also includes reasonable procedural safeguards. The Union questions the need for such a policy, given the Chief's acknowledgment that so far there has been no real problem with drug use in the fire department; but as long as that situation prevails the members of the department should have nothing to fear from enforcement of the policy. This being a non-economic issue, the panel need not adopt either party's position in its entirety. On balance, the chairman is convinced there is no support under Section 9 of Act 312 for the Memorandum of Understanding proposed by the Union, but the City has made the case under Section 9(h) for including the General Order as an addendum to the 1991-94 agreement, exactly as in the police contract, but not for adding a new Article 20 on drug testing and thereby eliminating the existing Article 20.

Order: The General Order on Drug Policy, which is in evidence as City Exhibit 376 and appended hereto, shall be added to the 1991-94 agreement as Appendix F.

CITY ISSUE NO. 14 AND UNION ISSUE NO. 24: PROMOTIONS - FIRE INSPECTOR I AND II (NON-ECONOMIC)

Both parties proposed changes in Section 25.3 regarding promotion to Fire Inspector classifications. Relevant parts of Section 25.3 in the expired agreement read as follows:

> Section 25.3. The eligibility to bid on a vacancy and compete in a promotional examination shall be as follows:
>
> | Classification | Eligibility Requirements |
> |---|---|
> | Fire Inspector | Six (6) years of continuous service as a firefighter in the Jackson Fire Department, including two (2) years as a full-time Fire Motor Driver and holding Michigan State Firefighter certification (I and II). The candidate must have an average score of seventy (70) on the last two (2) performance evaluations to be eligible to take the promotional exam. |
> | Chief Fire Inspector | Eight (8) continuous years as a firefighter in the Jackson Fire Department, including two (2) years as a full-time Captain or Fire Inspector and holding a Michigan State Firefighter certification (I and II). The candidate must have an average score of seventy (70) on the last two (2) performance evaluations to be eligible to take the promotional exam. |

In large measure, the parties' proposals to amend these provisions are identical. They agree that the two classifications now should be designated Fire Inspector I and II rather than Fire Inspector and Chief Fire Inspector. They also agree that the language describing eligibility requirements for Fire Inspector I should remain the same, except that the Union proposes to add an alternative experience requirement -- "or one (1) year as a full-time Captain" -- after the current statement of required experience as a Fire Motor Driver. It explains that this really involves no change from current practice or contract language, because (as is apparent elsewhere in Section 25.3) two years as a full-time Fire Motor Driver is a prerequisite for promotion to Captain. For the Fire Inspector II classification, they both propose wholesale changes in the eligibility requirements language. Although the

wording differs somewhat, their proposals are essentially identical to the extent of the language proposed by the City, which is:

> One (1) year as a Fire Inspector I in the Jackson Fire Department, be a Michigan State Certified Fire Inspector, and have successfully completed the Fire Investigation course of the Michigan State Fire Marshal Division or the National Fire Academy. Must have scored seventy (70) or above on the last two (2) performance evaluations as a Fire Inspector I.

However, the Union proposes some additional language granting a temporary exemption from the Fire Investigation course requirement for employees otherwise qualified for promotion but unable to satisfy that requirement for reasons beyond their control, as follows:

> However, if a Fire Inspector I meets the probationary period of one year and cannot meet the educational requirements due to reasons beyond his/her control (i.e. denied admission to a required class, funding cuts, class not available within the one (1) year period, etc.), he/she shall be promoted to Fire Inspector II and shall attend the first available classes to meet the above educational requirements.

The basis for this proposal is testimony by a Union witness, Fire Inspector Drake, that he had encountered difficulties getting into State Fire Marshal and National Fire Academy Fire Investigation courses in the desired time frame a few years ago. He said the State class now is offered only once a year, and there is heavy demand for enrollment in the National courses. In the Union's view, a candidate otherwise eligible for promotion to Fire Inspector II should not be held back by such circumstances beyond his control provided he takes the first course available after promotion.

The City disagrees, arguing that its position merely provides that an employee must have the agreed qualifications for promotion to Fire Inspector II before he receives such a promotion. To promote without that qualification, it says, would be to award additional compensation for a job the employee has not been trained to and thus cannot fully and properly perform. It also contends the problem the Union's proposal seeks to avoid is entirely speculative, and notes that employees interested in promotion to Fire Inspector II have other ways to avoid it. The City points out that a person need not already be a Fire Inspector to take the fire investigation course, so an ambitious member of this bargaining

unit could take it before completing the required periods of service as a Fire Motor Driver or Fire Captain and thereby avoid any potential problem or delay in obtaining such training while serving in the Fire Inspector I classification.

Findings. The City is right. Actual successful completion of the educational course which the parties agree is required to be a Fire Inspector II *before* being promoted to that classification certainly is a reasonable requirement, and thus a factor favoring the City's position under Section 9(b) and (h) of Act 312. It also is right that the problem the Union proposal purports to solve is speculative and capable of alternative solution by employees themselves through simple foresight. Furthermore, to adopt the Union's proposal could create more problems than it would solve: for example, if an employee promoted without having successfully completed the Fire Investigation course neglects to pursue enrollment therein with sufficient diligence after promotion, or enrolls but fails to complete the course successfully. Thus it must be concluded that no statutory factor favors the Union's proposal regarding Fire Inspector II promotion eligibility requirements. As for Fire Inspector I, its proposed alternative service requirement (one year as a Captain) appears to be either a redundancy or an *additional*, not alternative, requirement, and as such also is without support in the statute. Accordingly, the City's proposal on this issue must be adopted and the Union's rejected.

Order: Section 25.3 shall be amended by adoption of the City's last offer of settlement on this issue and shall read as follows in the 1991-94 agreement with respect to promotional eligibility requirements for Fire Inspector classifications:

Fire Inspector I	Six (6) years of continuous service as a fire fighter in the Jackson Fire Department, including two (2) years as a full-time Fire Motor Driver and holding Michigan State Fire Fighter Certification (I and II). The candidate must have an average score of seventy (70) on the last two (2) performance evaluations to be eligible to take the promotional exam.
Fire Inspector II	One (1) year as a Fire Inspector I in the Jackson Fire Department, be a Michigan State Certified Fire Inspector, and have successfully completed the Fire Investigation course of the Michigan

State Fire Marshal Division or the National Fire Academy. Must have scored seventy (70) or above on the last two (2) performance evaluations as a Fire Inspector I.

In addition, all references to "Fire Inspector" and "Chief Fire Inspector" in the expired agreement shall be changed to "Fire Inspector I" and "Fire Inspector II" respectively in the 1991-94 agreement.

UNION ISSUE NO. 2: PAGER PAY (ECONOMIC)

Section 7.1 of the expired agreement provides that "Assistant Chiefs shall rotate availability for call during off-duty hours and shall respond to calls via car radio or a pager, which shall be carried at all times when on call." In practice, two of the three Assistant Chiefs and the Fire Inspector rotate such on-call responsibility a week at a time, so that each of them is on call seventeen weeks a year. Any employee called in while off duty receives call-back pay under Section 6.5, but the on-call forty-hour personnel receive no additional compensation for simply being on call and carrying a pager as required under Section 7.1. The Union proposes to add a new section to Article 6 of the agreement to provide a nominal payment for that responsibility, as follows:

Section 6.6. Pager Pay

Effective July 1, 1991, Assistant Chiefs and any personnel from the Inspection Division who are required by the Employer to carry a pager off duty shall be compensated five dollars ($5.00) per day.

The Union contends such payments are justified by the restrictions that on-call status place on an employee's off-duty activities and by the fact that the police contracts no longer include parallel on-call provisions, as they did in 1985 when the Sugerman panel rejected a Union proposal for $100 per week stand-by pay largely on the basis of police parity. The City opposes the proposal on these grounds: that employees accepting promotion to Fire Inspector or Assistant Chief are well aware of the on-call responsibilities that come with those positions and already are compensated for them in the higher pay such positions command; that such employees can trade days with other forty-hour personnel if they need

more freedom of movement and activity than on-call status will permit; that the Union demonstrated no support for the proposal among either external or internal comparables; and that it would add more than $3,600 in new costs to the budget.

Findings. The Union attempted to turn the City's factor (d) argument back on it by arguing that it failed to present evidence of on-call pager requirements among forty-hour personnel in comparable communities. However, as the party proposing change the Union must bear the burden of producing evidence supporting its proposal, and the significant point under factor (d) is that *the Union* presented no evidence showing that pager pay provisions exist in the fire department contracts in any of the comparable communities. Thus it must be concluded that the proposal has no support under factor (d).

The only other factor alleged to be applicable is (h), in that a nominal daily payment would be a reasonable offset to the restrictions on off-duty activities that are unavoidable when a forty-hour employee is on call. However, any advantage that might give the Union on this issue is negated by the City's three-fold response to that argument: that employees accepting promotion to Fire Inspector and Assistant Chief do so with knowledge of their on-call responsibilities, that such responsibilities are reflected and compensated in higher pay levels for those positions, and that employees who need more freedom than such responsibilities allow can trade on-call days. Therefore it must be concluded there is no support for the Union's proposal under factor (h) either, and it must be rejected.

Order: Article 6 of the agreement shall not be amended by addition of a new Section 6.6 as proposed by the Union.

UNION ISSUE NO. 4: HOURS (ECONOMIC)

Section 7.1 of the expired agreement provides that the "work week of employees in the fire suppression division shall be fifty-six (56) hours per week on a three (3) platoon system (California system)." The Union proposes to shorten the fire suppression work week by three hours, by amending Section 7.1 (and every other reference to that subject in the agreement) to read "fifty-three (53) hours per week" rather than fifty-six. It claims support for this proposal under factor (d), in that average work weeks for fire suppression personnel in comparable communities are lower than in this bargaining unit. The City's

last offer is to maintain the status quo, a position for which it also claims support under factor (d), and under factor (c) in that shortening the work week by three hours would necessitate the hiring of at least two additional fire fighters, which it says would be prohibitively costly.

Findings. The City's position clearly has more support under the applicable statutory factors. Three of the seven comparable communities -- including the two most closely comparable to Jackson, Bay City and Port Huron -- have 56-hour work weeks. The average among all seven is 54.2 hours, less than the existing work week here, but higher than what the Union proposes. Thus factor (d) is either neutral or favors the City; it certainly does not favor the Union's proposal. Factor (c) clearly favors the City, not in that it absolutely could not pay the cost of adding two or more additional fire fighters to maintain contractually required minimum manning with a shorter work week, but certainly in that those costs would be very substantial and could jeopardize the City's ability to keep an appropriate general fund balance in future years. So does factor (h), which neither party relied on but which clearly is applicable, in that reducing the fire fighters' work week would upset the wage parity relationship with the Jackson police units. For these reasons, the Union's proposal must be rejected.

Order: Section 7.1 shall not be amended as proposed by the Union but shall remain the same in the 1991-94 agreement as in the expired agreement.

UNION ISSUE NO. 14:
UNIFORM CLEANING ALLOWANCE (ECONOMIC)

Section 12.1 of the expired agreement provides that "[a]ll uniforms and clothing required shall be furnished by the City" and employees "required to wear and continuously maintain prescribed items of uniform clothing shall clean and maintain such items at their own expense." The Union proposes to add a new paragraph to Section 12.1, as follows:

> Effective July 1, 1993, the City shall pay a cleaning allowance of one hundred twenty five dollars ($125) per year. This shall be paid at the same time as Subsistence Allowance.

It finds support for this proposal among comparable communities that have cash uniform allowances and/or cleaning allowances, and in NFPA standards related to cleaning and

disinfecting contaminated uniforms and protective equipment, and in the testimony of unit members regarding the frequent changing of uniforms necessitated by exposure to smoke and to various contaminants on emergency medical runs. The City opposes the proposal, argues for maintenance of status quo, and also claims its position is supported by analysis of contractual uniform provisions in comparable communities. It further contends that a cleaning allowance is unnecessary in a situation where the employer provides complete uniforms, including shoes, at no cost to the employees, and also has commercial grade laundry facilities available for the employees' use at the main fire station.

Findings. The applicable statutory factors also favor the City's position on this issue. Among the seven comparable communities, only one (Port Huron) provides a uniform cleaning allowance and provides complete uniforms for fire suppression personnel. The other six either pay a cash allowance for purchase of uniforms or furnish uniforms, but make no separate cash allowance for cleaning except in isolated cases and limited amounts for forty-hour personnel. The availability of on-site laundry facilities at one of the stations also is a factor cognizable, and favoring the City, under Section 9(h). As for the NFPA standards, there has been no showing that they are new since the parties last agreement, so they are not a reason for changing the existing contractual arrangements on who pays for keeping uniforms clean. There being no support for the Union's proposal under any of the Section 9 factors, it must be rejected.

Order: Section 12.1 shall not be amended, as proposed by the Union with respect to addition of a cleaning allowance, but shall remain the same in the 1991-94 agreement as in the expired agreement.

UNION ISSUE NO. 15: SHIFT TRANSFERS (ECONOMIC)

Section 14.7 of the expired agreement provides that if an employee bids for and gets a change of shifts, the "transfer could result in some loss of time off or a change in vacation picks for the affected employee," and the employee "awarded the bid will be required to assume the scheduled work cycle that exists for the vacancy." The Union proposes to add this new sentence to this section: "However, effective July 1, 1993, the employee shall be given at least two (2) consecutive calendar days off before working the new shift." The

purpose behind this proposal, it says, is to guarantee sufficient time to recuperate and take care of personal before changing shifts. The Chief testified that it is against the law for an employee to be forced to work two 24-hour shifts in a row and it is the City's practice to always leave at least one day off before an employee begins working a new shift if the transfer is based on department need. He also testified that employees only work back-to-back 24-hour days when they voluntarily trade days or in case of minimum manning call-ins. However, he also said an employee may voluntarily waive such protection, and the Union argues this new provision is necessary to protect employees from the strain of back-to-back work days whether undertaken voluntarily or not. The City opposes the proposal on the grounds that there has been no showing that current practice has caused any real difficulties for bargaining unit members and that there is no support for such a provision among the comparable communities.

Findings. The City must prevail on this issue as well. Factor (d) clearly favors its position, since none of the seven comparable communities has any contractual guarantee of time off between work days in the event of shift transfer. So does Section 9(h), in that the Union did not prove that any actual problems have arisen under existing practice and thus failed to demonstrate actual need for the proposed change. No other statutory factor was identified as applicable to this issue, so the Union's proposal must be rejected.

Order: Section 14.7 shall not be amended as proposed by the Union but shall remain the same in the 1991-94 agreement as in the expired agreement.

UNION ISSUE NO. 16: TRAINING & EDUCATION (ECONOMIC)

Under Article 21 (Section 21.1) of the expired agreement the City agrees "to pay for all course work (including required books) that will improve the employee's work capabilities as determined by the Chief of the Fire Department." The Union seeks to broaden the scope of City support for bargaining unit employees' educational pursuits by deleting the existing language of Section 21.1 entirely and replacing it with a new provision, taken from the police patrol contract, as follows:

> Effective July 1, 1993, the City agrees to furnish the full cost of tuition, books required, and fees for undergraduate courses of study and/or courses within an undergraduate degree for employees covered by this agreement, when such costs are not covered by other programs. Any

such course must have the written approval of the Fire Chief, prior to taking such course, to be eligible. The maximum dollar amount for tuition, books, and fees, per courses, shall be the credit rate charged at Michigan State University, for an equivalent course, or the applicable conversion rate table. In order to be eligible for tuition, books, and fees, the employee must successfully complete the class with a grade of "C" or better, or its numerical equivalent (2.00).

The Union claims primary support for this proposal in the fact that members of the police patrol unit have such a benefit. It also points to studies showing that lack of leadership and management skills is a significant "job stressor" in fire services, and to testimony from a Union witness that the Chief does not approve tuition payments for any courses beyond those required for an associate degree. It also notes that the City's interests are protected by the requirement for the Chief's prior approval of any course taken.

The City's last offer on this issue is to maintain the status quo. It argues that position is fully supported by the comparable communities, none of which provides full payment of tuition, books and fees for non-job-related college studies. It contends there is no support for the Union's proposal in the fact that police patrol officers enjoy such a benefit, given the differences in job content and educational hiring prerequisites in the two departments: high school diploma in the Fire Department, an associate degree in the Police Department.

Findings: The City must prevail on this issue too. None of the seven comparable communities provides a benefit comparable to what the Union seeks, so the proposal finds no support under statutory factor (d). There being no evidence that historical wage parity with the police ever has been extended to education benefits, and there being evidence that general educational requirements in the two departments are different, the mere fact that such a benefit exists in the police patrol contract cannot be considered a factor favoring the Union's position under Section 9(h). There is no reason to doubt the Union's general assertion that appropriate fire service training, including leadership and management skills, can lead to less job stress and better fire service performance; but it has demonstrated no convincing reason why those objectives cannot be attained under the existing language of Section 21.1. In short, no statutory factor favors the Union's proposal on this issue either, so it must be denied.

Order: Section 21.1 shall not be amended as proposed by the Union but shall remain the same in the 1991-94 agreement as in the expired agreement.

UNION ISSUE NO. 17: DISCIPLINE (NON-ECONOMIC)

The concept of "just cause" for discipline is embodied in the expired agreement in two places: Section 22.4, which requires that the determination to be made at any stage of the grievance procedure on "grievances involving the discipline or discharge of an employee" shall be whether "the discharge or discipline was for just cause," including a "review (of) the penalty imposed;" and Section 24.4, which provides that seniority terminates if an employee is "justifiably discharged." The Union contends this is not enough protection against unjust discipline, because of alleged disparities in a few discipline cases several years ago, and proposes to add a new Section 22.5 to the 1991-94 agreement defining the various forms disciplinary action can take (oral and written reprimand, suspension without pay and discharge) and procedures under and time limits within which it may be imposed. It asserts, in its brief, that "a progressive, corrective standard of discipline" will assure "uniformity in discipline" and "remov(e) personality conflicts from such situations." It also claims support for such a detailed contractual disciplinary provision among comparable communities, which it says "provide some measure of corrective discipline." The City opposes this proposal, arguing there is neither support for it among the comparables nor a practical need for it, because challenges to allegedly disparate or unjust discipline can be and have been handled under the existing contractual "just cause" standard and through contractual grievance procedure, including arbitration. It also points to ambiguities in the language proposed by the Union as potentially troublesome.

Findings. The City is right about this too. None of the fire department contracts in the seven comparable communities contains a provision such as the Union proposes, so it has no support under statutory factor (d). Nor does it find any support under Section 9(h) because the Union has indeed failed to demonstrate any practical need for such a detailed and potentially cumbersome and ambiguous disciplinary procedure. As the City says, any potential problem the proposed new provision purports to anticipate and solve already can be addressed and resolved through the grievance procedure and arbitration under the existing "just cause" provisions of the contract. Thus the Union's proposal is entirely lacking in statutory support and must be rejected.

Order: The 1991-94 agreement shall not contain a new Section 22.5 on disciplinary action as proposed by the Union.

UNION ISSUE NO. 22: LAYOFF (NON-ECONOMIC)

The Union proposes to delete one sentence (italicized below) from the layoff and bumping provisions of Section 24.5 in the expired agreement, which reads as follows:

> Section 24.5. When in the judgment of the employer, it is necessary to eliminate a job classification or to reduce the number of occupants in a job classification, the last employee or employees to enter such classification shall be the ones removed therefrom. Employees thus removed from the job classification shall exercise their classification seniority, as defined in Section 24.1 of this Article, in any lower-rated bargaining unit classification, which they have permanently occupied during their employment with the Fire Department. Employees thus displaced from their job classification shall exercise the same right. *The layoff provision shall not apply to the Assistant Chief classification.* Employees bumping into lower-rated classifications shall be paid the rate of said lower classification.

The Union argues this amendment to Section 24.5 is necessary to protect employees in the Assistant Chief classification, who typically are among the most senior employees in the Department, from layoff without recourse to bumping rights. It suggests that eventuality would not only be unfair to the employees thus affected, but contrary to the City's own interests in that it would deprive the Department of the value of such employees' long experience, considerable knowledge and proven leadership skills. The City opposes the proposed amendment on grounds that there is no practical need for it since there have been no layoffs in the department and none are anticipated, and that Assistant Chiefs should be exempt from layoff by seniority within their classification because of their specialized responsibilities. Here too both parties claim support for their positions among comparable communities: the Union in that layoff and bumping rights apply across the board throughout the other bargaining units; the City in that in several of the allegedly comparable cities Assistant Chiefs either do not exist or are not in the bargaining unit.

Findings. On this issue, there is some merit to each party's position. The Union is right that there is no justification for totally denying Assistant Chiefs seniority protection through bumping rights in the event of layoff, which the sentence in question would seem to do if read literally. To that extent, Section 9(h) favors its position. But there is obvious merit to the City's position that application of seniority *within the Assistant Chief classifi-*

cation, requiring the least senior of the employees in that classification to be removed from it if one such position were to be eliminated, would be contrary to the Department's interests in terms of the specialization of duties and responsibilities among the various Assistant Chiefs. To that extent, Section 9(h) favors the City's position. Factor (d) favors neither position clearly, for the reasons summarized above, and no other statutory factor has been identified as applicable to this issue. Since this is a non-economic issue, the panel is free to fashion a compromise, and that is the obvious solution: preserving the exemption from the "last-in-classification-first" rule as to which Assistant Chief is to be laid off from that classification, but adding language clearly stating that an employee laid off from that classification has bumping rights to lower rated classifications the same as all other members of the bargaining unit.

Order: Section 24.5 shall be amended to appear in the 1991-94 agreement as follows (revised language in italics):

> Section 24.5. When in the judgment of the employer, it is necessary to eliminate a job classification or to reduce the number of occupants in a job classification, the last employee or employees to enter such classification shall be the ones removed therefrom, *except in the case of the Assistant Chief classification as provided below*. Employees thus removed from the job classification shall exercise their classification seniority, as defined in Section 24.1 of this Article, in any lower-rated bargaining unit classification, which they have permanently occupied during their employment with the Fire Department. Employees thus displaced from their job classification shall exercise the same right. *As to the Assistant Chief classification, there shall be no requirement that the employee(s) to be removed therefrom if the number of occupants in the classification is reduced be the last to have entered it; however, the employee(s) thus removed shall have the same rights as all other bargaining unit employees to exercise classification seniority to displace less senior employees by bumping into lower-rated classifications.* Employees bumping into lower-rated classifications shall be paid the rate of said lower classification.

UNION ISSUE NO. 26: COURT APPEARANCES (ECONOMIC)

Under current and long-standing practice, members of this bargaining unit are paid for actual time spent in court or before administrative agencies in connection with their duties and such compensation is at overtime rates, based (like other overtime under the expired

agreement) on a 2,080-hour work year. The Union proposes to codify and augment this practice by adding a new section to the agreement, as follows:

> Effective July 1, 1993, when as a result of performing his/her duties as an employee of the Jackson Fire Department, an employee is subpoenaed to make a court appearance or appearance before an administrative agency during off-duty hours, the employee shall be paid for a minimum of two (2) hours at time and one half (1.5) based on a 2080 hour work week or for the actual time necessarily spent at the court or before the administrative agency at time and one-half (1.5) based on a 2,080 hour work week. The two (2) hours guaranteed minimum provision shall not apply if the court appearance or appearance before an administrative agency occurs as a continuation of the employees' regular work shift. The payment for time necessarily spent shall not include any lunch recess taken by the court or administrative agency. As a condition of receiving such payment, the employee shall assign the court or administrative agency appearance fee to the Employer.

Capt. Woodman testified that he had "never gone to court yet where (he) wasn't there at least two hours." In that respect, the Union suggests a two-hour minimum guarantee also reflects existing practice and will impose no new burden on the City. It also contends its proposal has support among the comparables, all of which have contractual provisions governing pay for off-duty court appearances and some of which have minimum hour guarantees, and in the two-hour minimum, time-and-one-half, court appearance pay provision in the Jackson police contracts.

The City argues there is no need for a contract clause on this subject, because fire fighters are paid for off-duty court appearances under existing practice. It also argues the proposal has no clear support among the comparables, because less than half provide a minimum-hours guarantee and some pay straight time, not time-and-one-half, for the guaranteed minimum hours. It also argues a minimum is unnecessary if Woodman is right that every court appearance is at least two hours anyway, or would impose an unnecessary expense in cases (such as canceled hearings) when the appearance takes appreciably less time than that. Finally, the City contends the Union's proposal is vague and ambiguous, because it defines the subject matter and forums for such appearances so broadly as to potentially obligate the City to pay for appearances at arbitration hearings or in civil litigation in which an employee may have acted outside the scope of his authority, and because there is no such thing as "a 2,080 hour work week."

Findings. The City certainly is right on the last point, but that is a correctable clerical error, not a reason to reject the Union's proposal. Whether or not it is necessary to incorporate an existing practice into the agreement is a debatable point. Strictly speaking, it may not be necessary as long as there is reasonable assurance that the practice will continue. But if the City genuinely intends to continue it, there is no particular reason not to incorporate it into the agreement either, and the advantage, in doing so, of putting to rest any potential ambiguity or future disagreement as to the exact nature and scope of the practice. To the extent that the proposal merely codifies existing practice, therefore, statutory factor (h) favors the Union's position. But the proposal does more than that, by creating a two-hour minimum, and the Union cannot skirt that issue by suggesting such a minimum is nothing new because the typical court appearance is longer than two hours. To resolve this issue, therefore, it is necessary to look at other statutory factors.

The proposal does not find clear support under factor (d), because only three of the seven comparable communities have a minimum-hours guarantee for off-duty court appearance time. In Port Huron, the guarantee is three hours and all court time is paid at time-and-one-half. In Adrian and East Lansing it is two hours, at time-and-one-half in East Lansing but straight time in Adrian if the appearance does not exceed the minimum, time-and-one-half for the entire appearance if it is longer than two hours. The other four all have contract provisions governing pay for off-duty court appearances but no minimum-hours guarantee; three specify payment at time-and-one-half for such appearances, the other one (Muskegon) straight time.

The other factor identified as applicable to this issue, also under Section 9(h), is that the Jackson police patrol and command contracts have provisions comparable to the one the Union proposes. It argues that principles of historical wage parity with the police units are another reason to adopt the proposal. However, there is no indication that the court appearance pay provisions are new to the most recent police contracts. If they are not, then it appears that wage parity with the police has not included parallel court appearance pay guarantees, and that to establish a new minimum-hours guarantee in this bargaining unit without any corresponding enhancement of the court appearance pay provisions in the police units would disrupt, not preserve, the existing parity relationship. Thus it must

be concluded that there is no support for this proposal in the applicable statutory factors, and it must be rejected.

Order: The 1991-94 agreement shall not include a new provision concerning pay for off-duty court and administrative agency appearances, as proposed by the Union.

UNION ISSUE NO. 27: EMERGENCY MEDICAL CERTIFICATION PAY (ECONOMIC)

As noted earlier, the Jackson Fire Department is certified only at the First Responder level for emergency medical services. Thus it requires only that level of certification on the part of bargaining unit members. However, most bargaining unit employees actually are certified at a higher level: 28 at the Emergency Medical Technician Basic (EMT) level, many of whom took in-house training in 1993 to upgrade to Emergency Medical Technician Specialist (EMTS), and three at the Advanced EMT or Paramedic level. The Union proposes to add a new Section 21.2 to the agreement to provide premium pay for those attaining such certifications, as follows:

> Section 21.2. Technician Certification
>
> Effective July 1, 1992, all employees who are State of Michigan Certified in the following areas shall be paid an annual merit payment in accordance with the following schedule:
>
> | | |
> |---|---|
> | Emergency Medical Technician: | $300.00/year |
> | E.M.T. Specialist | $400.00/year |
> | Advanced EMT (Paramedic) | $700.00/year |
>
> Said merit payment to be paid on a separate check on or before February 15th of each year.

The Union contends such merit payments are justified because of the heavy volume of emergency medical activity in this Department, the risks inherent in providing such services, the time and expense to the employees in obtaining and maintaining such certification, and contractual provisions for some such merit premiums in all the comparable communities that provide such services. The City contends there is no justification for such payments because none of three certifications in question is required for employment in the department, which is not licensed to respond to medical emergencies at those levels of service; requiring such payments would add more than $10,000 in new costs to the De-

partment's annual budget; and there is not clear support for such payments among the comparable communities.

Findings. It is true that six of the seven comparable communities have some form of additional payment for higher level EMS certifications. (The Port Huron Fire Department does not, but it does not provide emergency medical services.) However, that evidence does not constitute clear support the Union's proposal under statutory factor (d), for several reasons. First, in three of the six the purported EMS premium is rolled into base salary, not paid as separate and additional compensation, and therefore already has been taken into account in the general comparison of fire fighter wages among the comparable communities. Second, in two of the other three the payments are much lower than here proposed: $200 for EMT Basic only in Muskegon; $250 for EMT and EMTS and $300 for Paramedic in Battle Creek. Third, the Union has not shown that those Departments are licensed to and do provide the same level of service as the Jackson Fire Department; the City says they do not. If not, they are not truly "comparable" on this issue.

The other applicable factors are (c) and (h), which are interconnected in that the cost to the City for such certification merit premiums would be very substantial and it would not be getting anything it needs or requires in return, because higher level EMS certifications are not necessary in this department. Accordingly, both those factors favor the City's position. The Union also placed great emphasis on the volume of EMS work in this department, the risks and stresses inherent in such work, and the time and expense involved in obtaining and maintaining higher level EMS certifications, all of which undoubtedly is true but does not constitute a statutory basis for requiring the City to pay large amounts for unnecessarily higher levels of EMS certification.

Order: The 1991-94 agreement shall not include a new Section 21.2 requiring annual merit payments to bargaining unit employees with higher level EMS certifications as proposed by the Union.

CONCLUSION: The arbitration panel adopts the foregoing orders as the final disposition of all issues submitted to it for resolution herein and not otherwise resolved or withdrawn by the parties during the pendency of these proceedings, and such orders, to-

gether with tentative agreements previously ratified by the parties and any provisions of the expired agreement which were not submitted to the panel for decision, shall be part of the parties' agreement for the period from July 1, 1991 through June 30, 1994. The panel adopts these orders by majority as to each issue except Union Issue No. 1, on which the order is unanimous.

Paul E. Glendon, Chairman
November 28, 1994

Joseph W. Fremont, City Delegate[1]
Dated: 12-2-94, 1994

Robert Woodman, Union Delegate[2]
Dated: 11-25-94, 1994

[1] Concurring as to all issues decided in the City's favor, dissenting as to all issues decided in the Union's favor, and dissenting with respect to the holding that minimum daily staffing requirements are a mandatory bargaining subject.

[2] Concurring as to all issues decided in the Union's favor, dissenting as to all issues decided in the City's favor.

Jackson Fire Department

General Order
—

Appendix F to the 1991-94 Agreement

Effective Date _____

By:_____
Donald J. Braunreiter, Fire Chief

Subject: Drug Policy

I. Purpose.

A. The Employer has the responsibility and an obligation to provide a safe work environment by ensuring that employees are drug free.

B. The Employer and the employee may be liable for failing to address and ensure that employees can perform their duties without endangering themselves or the public.

C. There is sufficient evidence to conclude that use of illegal drugs, drug and alcohol dependence and drug and/or alcohol abuse seriously impairs and employee's performance and general physical and mental health. This General Order is meant to ensure an employee's fitness for duty as a condition of employment and to ensure drug and alcohol tests are ordered based on a reasonable objective basis, and to inform the employee that testing is a condition of employment.

II. Definitions.

A. Employee: All personnel employed by the Jackson Fire Department, both sworn and civilian.

B. Supervisor: Both sworn and civilian employees assigned to a position having day to day responsibility for supervisory subordinates, or responsible for command a work unit.

C. Drug Test: A urinalysis or other test administered under approved conditions and procedures to detect drugs.

D. Reasonable Objective Basis:

1. An apparent state of facts and/or circumstances found to exist upon inquiry by the supervisor, which would induce a reasonably intelligent and prudent person to believe the employee was under the influence of drugs/narcotics/alcohol.

2. A reasonable ground for belief in the existence of facts or circumstances warranting an order to submit to a drug test.

III. Policy

A. Any statutory defined illegal use of drugs by an employee,

whether on duty or off duty while employed by the Jackson Fire Department is strictly prohibited.

B. For the well being and safety of all concerned, the manufacture, consumption, possession, ingestion or reporting for work under any influence of alcohol, illegal substances or illegal drugs such as, but not limited to, marijuana, narcotics, stimulants, depressants, hallucinogens, etc., is strictly prohibited.

1. Such consumption, possession, ingestion or being under the influence shall not occur on the Employer's time, premises, equipment, or job site in any way or at any other time or place while in the course of employment.

C. An employee may possess and use a drug or controlled substance providing such drug or controlled substance is dispensed to said employee pursuant to a current, valid medical prescription in the employee's name.

1. Should the employee's prescribing physician indicate that the known side effects of the drug makes it dangerous for the employee to safely work, the employee shall notify the employer or supervisor.

IV. General

A. Hearing.
If the Employer has a reasonable suspicion to believe an employee has violated this policy, the following procedures shall apply:

1. Any employee suspected of violating this policy will be given an immediate hearing with the following persons present:

a. Employee
b. Employee's Union Representative, if applicable
c. Employee's Supervisor
d. Fire Chief or designee

2. The facts forming the basis for the reasonable suspicion shall be disclosed to the employee at this hearing and the employee shall, at the same time, be given the opportunity to explain his/her behavior or actions.

3. If it is determined by the Fire Chief that the reasonable suspicion is substantiated, the employee will be placed on administrative leave pending the results of an appropriate test.

4. Said employee shall be required to submit to an immediate blood and/or other appropriate test to determine whether or not the employee is under the influence of alcohol, a controlled substance or illegal drugs.

5. Such test shall be given pursuant to the procedure as outlined in Appendix A-1.

6. The employee shall submit to such test and release of test results to the Employer; failure to do so shall be presumption that the employee has violated the policy. The employee will then be subject to disciplinary action.

7. After the test has been given and the results known, the employee:

   a. will be put back to work with full pay for time lost, should the test results be negative; or

   b. shall be subject to discipline, including discharge, should the test results be positive.

B. All property belonging to the Employer is subject to inspection at any time without notice, as there is no expectation of privacy.

1. Property includes, but is not limited to, Employer owned vehicles, desks, containers, files and storage lockers.

2. Employees assigned lockers (that are locked by the employee) are also subject to inspection by the Employer in the presence of the employee.

C. Fire Department employees who have reasonable objective basis to believe that another employee is in violation of this General Order shall be obligated to report the facts and circumstances immediately to their supervisor.

D. It shall be the duty of the employee to notify the Employer of any criminal drug statute conviction for a violation occurring in the workplace no later than five (5) days after such conviction.

V. Procedure

A. Drug Testing/Urinalysis

1. <u>Applicants</u>
All applicants for employment shall be tested for drug or

narcotic usage as a part of their pre-employment medical examination. The testing procedure and safeguards set forth in this order shall be followed by the examining physicians and others involved in the testing procedure.

a. Refusal to take the test, or test results reporting a presence of illegal drugs or narcotics, or the use of non-prescription drugs, shall be the basis of discontinuing an applicant in the selection process. Any use or possession that constitutes a felony shall preclude any further consideration for employment.

b. Applicants found to be involved in the illegal sale, manufacture or distribution of any narcotic/drug will be permanently rejected.

c. Applicants demonstrating addiction to any narcotic/drug will be permanently rejected.

d. Any improper use of any narcotic/drug by an applicant after application will be grounds for permanent rejection.

e. After one year from the date of the above drug test, an applicant may reapply for employment if use or possession did not constitute a felony. Applicants who previously refused the test are not eligible for further consideration.

f. The results of drug tests on applicants shall be confidential and used for official purposes only.

2. Current Employees

a. The Fire Chief may order a drug test when there is reasonable objective basis to believe that an employee is impaired or incapable of performing their assigned duties. The contents of any documentation shall be made available to the employee.

b. Current employees may be ordered by the Fire Chief to take a drug test where:
   (1) there is reasonable objective basis to support allegations involving the use, possession or sale of drugs or narcotics; or,
   (2) there has been serious injury to the employee while on the job, or where the employee was directly responsible for the injury to another employee.
   (3) rehabilitated (reformed) substance abusers.

c. A drug test may be a part of any routine physical

examination. Such physical examination may be required for promotion or specialized assignment.

d. Test results reporting the presence of illegal drugs, alcohol or narcotics, in excess of those specified in Appendix A-2, or the use of prescription drugs without a prescription or the abuse of any over-the-counter drug will be submitted as a part of a written complaint by the supervisor, consistent with Item c. above, requesting departmental action.

VI. Responsibility

Failure to comply with the provisions of this order may be used as grounds for disciplinary action. Refusal by an employee to take the required drug test or follow this order will result in immediate suspension from duty pending final disciplinary action.

Appendix A-1
to
General Order ____

Blood/Urinalysis/PBT Procedures

A. Obtaining Urine Samples

1. The employee designated to give a sample must be positively identified prior to any sample being obtained.

2. The room where the sample is obtained must be private and secure with documentation maintained that the area has been searched and is free of any foreign substance. An observer of the appropriate sex shall be present for direct observation to ensure the sample is from the employee and was actually passed at the time noted on the record. Specimen collection will occur in a medical setting and the procedures should not demean, embarrass, or cause physical discomfort to the employee.

3. An interview with the employee prior to the test will serve to establish use of drugs currently taken under medical supervision.

4. Specimen samples shall be sealed, labeled and checked against the identity of the employee to ensure the results match the testee. Samples shall be stored in a secured and refrigerated atmosphere until tested or delivered to the testing lab representative.

B. Processing Urine Samples

1. The testing or processing phase shall consist of a two-step procedure:
   a. Initial screening step, and
   b. Confirmation step.

2. The urine sample is first tested using a screening procedure. A specimen testing positive will undergo an additional confirmatory test. An initial positive report should not be considered positive; rather, it should be classified as confirmation pending.

3. The confirmation procedure should be technologically different than the initial screening test. In those cases where the second test confirms the presence of drug or drugs in the sample, the sample will be retained for six (6) months to allow further testing in case of dispute.

4. The testing method selected shall be capable of identifying marijuana, cocaine, and every major drug abuse, including heroin, amphetamines and barbiturates. Laboratories utilized for testing will be certified as qualified to conduct urinalysis or drug testing.

5. The laboratory selected to conduct the analysis shall be certified by the National Institute on Drug Abuse and any State of Michigan Agency that determines certification for fire/police employment. In addition, the laboratory selected shall use Smith-Kline Laboratories security procedures or equivalent.

6. Any confirmatory test shall be done by chromatograph/mass spectrometer.

7. If the first test is positive, a confirming test shall be run by a second laboratory. Employees who have participated in the drug test program where no drugs were found, shall receive a letter stating that no illegal drugs were found. If the employee requests such, a copy of the letter will be placed in the employee's personnel file.

C. Chain of Evidence/Storage

1. Where a positive report is received, urine specimens shall be maintained under secured storage for a period of not less than 60 days.

2. Each step in the collecting and processing of the urine specimens shall be documented to establish procedural integrity and the chain of evidence.

D. Urinalysis Test Available

The following analytical methods for the detection of drugs in the urine are currently available and may be used:

1. Chromatographic Methods

a. TLC (Thin Layer Chromatography), recommended for initial step, or HPLC (High Performance Thin Layer Chromatography).

b. GLC (Gas Liquid Chromatography).

c. GC/MS (Gas Chromatography/Mass Spectrometry), recommended for confirmation step.

d. HPLC (High Pressure Liquid Chromatography).

2. Immunological Methods

a. RIA (Radioimmunoassay).

b. EMIT (Enzyme Multiplied Immunoassay Technique), recommended for initial screening step.

E. Portable Breath Test (PBT)

An employee suspected of having alcohol present in his/her system shall submit to a PBT immediately upon notification and under the guidelines listed below:

1. The employee, a Fire Department supervisor and a union representative (if employee desires), shall proceed to Jackson City Police Station where the test shall be conducted by a sworn police officer.

2. If the first test indicates the presence of alcohol, a second test on another test apparatus shall be conducted.

3. If both tests are positive, the employee shall be placed on suspension, pending final disciplinary action.

4. Failure to cooperate with the testing officer will result in blood and/or urinalysis testing.

Appendix A-2
to
General Order ___

Drug/Metabolite	Decision Level	CG/MS Confirmation
Amphetamines	1000 ng/ml	500 ng/ml
Barbiturates	300 ng/ml	200 ng/ml
Cocaine Metabolites	300 ng/ml	150 ng/ml
Marijuana metabolites	100 ng/ml	15 ng/ml
Opiates - Codeine	300 ng/ml	300 ng/ml
- Morphine	300 ng/ml	300 ng/ml
Phencyclidine (PCP)	25 ng/ml	25 ng/ml
Benzodiazepines	300 ng/ml	200 ng/ml
Methaqualone	300 ng/ml	200 ng/ml
Methadone	300 ng/ml	200 ng/ml
Propoxyphere	300 ng/ml	200 ng/ml
Alcohol	.04 mg%	.04 mg%

DJB/am
5/20/91

FILE COPY

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
COMPULSORY ARBITRATION

CITY OF JACKSON

-and-

Case No. L91 A-0305
under Act 312, P. A. 1969

JACKSON FIRE FIGHTERS ASSOCIATION,
LOCAL 1306, IAFF, AFL-CIO

SUBJECT

Interim ruling
[redacted] panel's authority to order minimum manpower provisions.

ISSUE

Is minimum manning a mandatory subject of bargaining?

CHRONOLOGY

Petition filed: July 9, 1992
Pre-hearing Conference: November 19, 1992
Hearings: March 29, 30 and 31, April 1, and August 16, 18, 19, 20 and 23, 1993
Briefs and Reply Briefs received: October 12 and November 9, 1993

ARBITRATION PANEL

Impartial Arbitrator/Chairman: Paul E. Glendon
City Delegate: Joseph W. Fremont
Union Delegate: Robert A. Woodman

APPEARANCES

For the City: Dennis B. DuBay, Attorney
For the Union: Ronald R. Helveston, Attorney

SUMMARY OF FINDINGS

Under the applicable law, as announced by the Michigan Court of Appeals and currently interpreted by the Michigan Employment Relations Commission, fire fighters' safety is not considered to be determined by the number of fire fighters at a fire scene, but by what they are required to do there. Thus minimum manning is not a mandatory subject of bargaining, and this panel has no authority to order it.

BACKGROUND

The parties' most recent collective bargaining agreement expired on June 30, 1991. After bargaining to impasse and unsuccessful mediation, the City filed a petition for compulsory arbitration under Act 312, P. A. 1969, an impartial arbitrator/chairman was appointed, pre-hearing conference and hearings were held, and it was agreed that there would be an interim ruling on one of the issues raised by the City: whether the panel has authority to order "minimum manpower" provisions in the new agreement. The parties were given opportunity to brief that issue, and, upon the Union's request, to file reply briefs as well. Submission of last offers of settlement and briefing on all other issues still unresolved has been deferred pending the panel's decision on this threshold question.

Article 8 of the expired agreement provides, *inter alia*, that the "City shall at all times maintain a minimum of fifteen (15) 24-hour fire fighters on duty on each shift." The City's position is that Article 8 and related appendices "are not mandatory bargaining subjects" so the panel has no authority to order continuation of such provisions in a new agreement, and that to the extent that they "require the maintenance of any minimum manpower level" they should "be deleted from the collective bargaining agreement." The Union's position is that minimum manpower is a mandatory subject of bargaining and that the panel may and should order continuation of provisions on that subject in the new agreement.

This issue has arisen and been decided twice before in Act 312 proceedings between these parties. In 1977 a panel chaired by arbitrator Donald L. Reisig dealt with it in almost cursory fashion, finding that the existing minimum manpower requirement of twenty fire fighters on duty per shift should be continued because:

> . . . . National Fire Fighting Standards indicate that a certain minimum component is necessary to run a station or to run a fire rig. In the opinion of the Chairman it is in the interest of safety of the individual fireman that a proper component of fire fighters be available at all times. Though the City has indicated in its Brief and correspondence to the Chairman, that it does not consider minimum man-power to be a subject of mandatory bargaining, particularly when predicated upon the safety of the citizens of the community, the Chairman finds that the arguments of the fire fighters, and the evidence produced by them, supports both the contention that is in the interest of the individual fire fighters (sic) safety, as well as the safety of the community, to have minimum manpower requirements.
>
> Reisig Award, 4-5.

In subsequent agreements the parties continued the minimum manpower requirement but negotiated it down to eighteen and then to fifteen 24-hour fire fighters per shift. Then they returned to the issue in a protracted Act 312 arbitration over the 1985-88 agreement.

In a decision issued in January 1987, panel chairman/arbitrator Donald F. Sugerman wrote that based upon the decision of the Michigan Court of Appeals in *Alpena v Alpena Fire Fighters Association*, 56 Mich App 568 (1974) and two decisions by MERC, especially *City of Trenton v Trenton Fire Fighters Union*, 1985 MERC Lab Op 414 (then on appeal), he was led "to conclude that MERC has determined that shift manning for fire fighters . . . is per se, a mandatory subject of bargaining" and thus "constrained to find that Article VIII, Section 1 is a mandatory subject of bargaining." In a footnote he explained that although under "constraint" to reach that conclusion he "respectfully disagree(d)" with it for several reasons, including that evidence linked safety only to "the number of men on individual pieces of equipment . . . and on job tasks," not "numbers on the shift," and that even though one structure fire was presumptively the same as another there was a wide range of initial response manning in communities across the state. Sugerman then looked at the communities identified as comparable in that arbitration as well as the testimony of Chief Donald Braunreiter regarding manning arrangements in the Jackson Fire Department, and arrived at this conclusion:

> . . . . With the preponderance of the communities having a manning provision, the status quo will be continued. This requirement will not unduly disturb the City inasmuch as Chief Braunreiter testified that 15 men per shift was the most efficient and proper way to run the department and a method he would like to continue.
>
> Sugerman Award, 55.

CITY POSITION

The City has revived its challenge to the arbitrability of minimum manpower issues based on legal developments since the Sugerman award. Without reciting all the details of the argument, it is sufficient to say that the City relies mainly on the decision of the Court of Appeals in *Trenton v Fire Fighters*, 166 Mich App 285 (1988), in particular its holding that "when manpower issues are inextricably intertwined with safety issues, they become mandatory bargaining subjects," *supra*, at 295, and a pair of MERC decisions interpreting and applying that holding to manpower cases in the Detroit Fire Department.

The first, *City of Detroit, Fire Department*, 1992 MERC Lab Op 82, dealt with a department plan to close two fire companies. Rejecting a Union charge that implementing the plan without negotiations would be an unfair labor practice, MERC found that "manning per shift is not *per se* a mandatory subject" of bargaining, and went on to hold that the

. . . applicable test was established by the Court of Appeals in *Trenton*. Under the test, the evidence must show that the safety of employees and the number of employees scheduled per shift is (sic) "inextricably intertwined." That is, there must be, at the minimum, evidence demonstrating a genuine or significant impact on safety.

Both *Trenton* and *Manistee* involved small fire departments in which a small reduction in the number of employees scheduled per shift presented a real danger that fire fighters might be forced to battle fires with less than the prescribed minimum number of fire fighters needed for safety while awaiting reinforcements to be called in from off-duty. The instant case, where no reduction in the number of employees per company is planned and where the Respondent has an elaborate backup system, does not present the same safety issue.

We agree with the ALJ that the evidence did not establish that the elimination of the companies would impact on the safety of fire fighters. The testimony established that upon the arrival of the first response company at a fire, an evaluation of the condition of the fire is made by the supervisor in charge and decisions are made, based on established standards, about whether the fire fighters should enter a structure for purposes of fire-fighting or rescue. Therefore, the fact that a fire may be more advanced at the time of the arrival of the first company *does not* lead to the conclusion that the risk to fire fighters is thereby increased.

1992 MERC Lab Op 85-6.

The second, *City of Detroit, Fire Department*, 1992 MERC Lab Op 698, dealt with a Union proposal in an Act 312 arbitration to require that all companies and tactical mobile squads have not fewer than four members on duty per shift. After noting "contradictions" in Court of Appeals decisions on this subject dating back to *Alpena*, MERC found they had been resolved in *Trenton*, where

. . . the Court of Appeals held that even in a fire department the record must show that a minimum manpower clause is "inextricably intertwined" with safety (or workload) issues before it becomes a mandatory subject of bargaining. The standard set forth by the Court of Appeals in *Trenton* remains the applicable law. *See City of Detroit (Fire Department)*, 1992 MERC Lab Op 82, in which we found that the elimination of fire companies had not been shown to be inextricable (sic) intertwined with either safety or workload. These conclusions leave as a mandatory subject of bargaining what firemen must do according to the number present at a fire scene.

In the instant case, the ALJ credited testimony that companies comprised of less than four firefighters incur significant risks upon entering a burning building for purposes of attack or rescue. He also found that no directives or standard operating procedures precluded entry to burning buildings under these circumstances. He found further that firefighters are routinely expected to incur these additional risks, even though the employer maintains a stated goal of assigning four men per "ride." The ALJ [has] found that safety issues were presented by the Union's manning proposal.

The foregoing conclusion however does not establish that a proposal requiring the employer to staff each company with at least four men per shift would achieve the union's claimed safety objective. The safety of firemen is not determined by the number of men at a fire scene, but how they are deployed and the risks to which they are exposed because of what they are required to do. The Union's minimum manning proposal is not a mandatory subject of bargaining. As noted above, what is bargainable is what firemen are required to do based upon the number at a fire scene.

1992 MERC Lab Op 708-9.

The City also presented factual evidence concerning the safety precautions it takes and will continue to take regardless of the number of fire fighters on shift or at a fire scene. Chief Braunreiter testified at length about these precautions and the City placed in evidence general orders in which they are codified. Important among them are the "incident command system," the designation of a "safety officer" (who also may be the incident commander) at every fire scene, use of protective clothing, extensive and ongoing training, emphasis on physical fitness, a tagging system to keep track of every fire fighter on the fire ground, orders prohibiting any fire fighter from entering a burning building alone and requiring a third fire fighter in a position of command outside the building, and a response plan that even under reduced manpower envisioned by the department will provide an initial response of two engines and a ladder truck or "Quint" (combination pumper and ladder vehicle) with total manning of ten fire fighters and give the incident commander authority at any time to go to an "all-call" to bring additional units and manpower from within the department and through mutual aid assistance from neighboring communities. The City points out that the Union's own expert witness, fire protection consultant John Devine, observed that the Jackson Fire Department has "a remarkable safety program." It also emphasizes that it complies with every applicable safety-related "standard" of the National Fire Protection Association (NFPA), and that NFPA recommendations for minimum manning of four fire fighters per ladder truck or engine and initial low hazard structure fire response with twelve fire fighters are *only recommendations*, not standards. The City further argues that most of the Union's concerns about reduced manning relate not to fire fighter safety, but to response time and risks of potentially greater property loss and citizen endangerment, which are not mandatory subjects of bargaining. The City insists the safety of all members of this bargaining unit has been and will continue to be assiduously protected by departmental orders and procedures, irrespective of the number of fire fighters on shift or on the fire ground at any given time. In its view only the manner in which the fire fighters are deployed and the tasks they are required to perform at a fire scene based upon the number available, not minimum manning levels, are mandatory subjects of bargaining under current Michigan law.

UNION POSITION

The Union takes a different view of the applicable law. It all but ignores the two *Detroit Fire Department* MERC decisions, mentioning them by name only in an "Errata" filed after the reply briefs saying that both cases are on appeal to the Court of Appeals,

and arguing in its reply brief that the City's reliance on MERC decisions following *Trenton* is "flawed" because it "ignores the hierarchical nature of our legal system in relying on the MERC rather than the Court of Appeals." The Union recognizes the central importance of the *Trenton* decision, but argues it did not really change the test for whether minimum manning is a mandatory subject of bargaining. In its view, the test is simply whether eliminating or reducing a minimum manpower requirement would *affect* safety.

The Union notes that the Court of Appeals, having held in *Trenton* that minimum manpower issues "become mandatory bargaining subjects" where they are "inextricably intertwined with safety issues," went on to uphold MERC's finding that the employer could not change a "long-standing policy regarding the eight-man minimum manpower requirement" without bargaining because its "conclusion that the reduced minimum manpower requirement would affect safety is supported by competent, material and substantial evidence and, therefore, is conclusive." *Trenton*, 295. The Union traces this test through previous Court of Appeals decisions, including *Alpena* and *City of Manistee v Manistee Fire Fighters Association, Local 645, IAFF*, 174 Mich App 118 (1989).

In the latter case, the employer filed an unfair labor practice charge against the union for requesting compulsory arbitration over minimum manning. MERC held for the Union, finding that "safety considerations had been raised and, on their face, the manning requirements involved safety issues." *Manistee*, 120-1. The Court agreed that minimum manning was a mandatory subject of bargaining and thus subject to compulsory arbitration, citing *Local 1277, Metropolitan Council No. 23, AFSCME, AFL-CIO v Center Line*, 414 Mich 642 (1982) for the well established proposition that an arbitration panel can decide on only mandatory subjects, not "permissible ones." But it did not reach that conclusion, as MERC had, because manning requirements "on their face" involved safety issues. It explained its reasoning this way:

> Minimum manning requirements for fire fighters have been held to be mandatory subjects of bargaining if the minimum manning requirement is related to the safety of the fire fighters and, therefore, is a term or condition of employment. (Citations, including *Alpena*, omitted.) In addition, this Court recently in *Trenton* . . . held that, where minimum manpower clauses are inextricably intertwined with safety issues, those clauses become mandatory subjects of bargaining.
>
> The record in this case is replete with testimony that the use of only two-man, on-duty shifts would hamper the ability to effectively and promptly respond to and fight fires. This, in turn, causes increased pressure, stress and fatigue on fire fighters. Similarly, rescue efforts with the use of the buddy system are jeopardized without a third man to watch over the operation of the equipment and the supply of water. Without this third fire fighter, rescue attempts subject fire fighters to increased safety risks. The testimony also established that calling in additional help as needed does not remedy this situation, as the loss of the first few minutes of response time hinders the ability of fire fighters to control a fire and thereby serves to increase safety risks to fire fighters. Moreover, peti-

> tioner's own city manager admitted that safety considerations, as well as maintaining the size of respondent's unit, were considerations during bargaining. Therefore, the MERC decision that minimum manpower requirements are a mandatory subject for bargaining is supported by competent, material and substantial evidence on the record.
>
> *Manistee*, 122-3.

As evidence that minimum manpower requirements affect safety in this case, the Union cites a variety of survey statistics correlating increasing incidence and/or severity of fire scene injuries to fire fighters with decreasing numbers of fire fighters per unit. Those statistics came from studies done in the Dallas, Texas and Seattle, Washington fire departments, a 1980 Ohio State University study of fire ground injuries in the Columbus fire department, and from an IAFF "Analysis of Fire Fighter Injuries and Minimum Staffing per Piece of Apparatus in Cities with Populations of 150,000 or More." The Union also relies on NFPA recommendations, in an Appendix to the 1992 NFPA 1500 Standard on Fire Department Occupational Safety and Health Program, for minimum staffing of four fire fighters per engine or ladder company and first response minimum staffing of twelve fire fighters. It also relies on minimum staffing recommendations by the Metropolitan Fire Chiefs Division of the International Association of Fire Chiefs and testimony from fire protection consultant Devine, who was formerly assistant fire chief in the Washington, D.C. fire department, director of the IAFF's Department of Research and Labor Issues, and a member of IAFF's Apprenticeship Program. He said he had reviewed all available studies on the relationship between manning and safety and summarized his conclusions from that research as follows:

> If we summarize all the studies contained in all these documents -- and I've researched them all, and I can't find any study that recommends that a department should operate with less than four fire fighters on each engine and each ladder operating at even the most minimum of fire situations. I also found that the minimum complement when responding to even the minimum level of hazard such as a residential structure should be no less than 12 fire fighters. These are all recommendations that go to minimum safety manning. I can find no studies available as a national recommendation that any company should operate with less than four fire fighters.

With specific reference to the Jackson Fire Department, Devine testified as follows:

> . . . my observation of how the Jackson Fire Department operates at the present time is that they have a remarkable safety program. They follow all the NFPA recommendations as far as protective equipment, as far as self-contained breathing apparatus, as far as the incident management system.
>
> They're following all the national recommendations, and they're pretty much up on the national recommendations as far as minimum manning of the apparatus. They're only down one person as far as their response to a typical incident.

> My feeling right now is they're right about at the national recommendations. To go lower than what they're presently at would be to do so at a risk to fire fighters, as far as their safety and injury rates, based on conclusions made in all these studies and based on my personal conclusions.

With respect to the options available in situations where fewer fire fighters are available on the fire scene, Devine testified as follows:

> . . . You can't always say that, "Okay, this fire is beyond my capabilities. Therefore, I'm going to stand outside and let the building burn down." You do that sometimes, and that's a viable option. But let's take a scenario of a downtown area where we have buildings that are close together, and we have a building that has four exposures. It's surrounded very closely by four other buildings, and we not only have the horizontal exposure, we have the vertical exposure. If we opt to pull out of that building and let it burn down, we're not talking about burning that particular building down; we're talking about burning the surrounding buildings down as well, plus city blocks.
>
> So at times, we do not have that option. We must continue to try and contain that fire as much as we can and get as much assistance in as we can. It's one of the options you make when you have risk assessments.
>
> As far as when you make rescues and what are the options open to you there, we take calculated risks. We make an assessment of what the risk is based on our abilities, physical condition, our training and our protective clothing. We take a risk that the average person would not take. But it's a calculated risk. We're not going to take a risk of that nature and figure that, well, we're probably going to get killed, but we're going to do it anyway. We make a calculated risk that we can perform that rescue and still get out of the building. . . . There's a tremendous risk when attempting a rescue operation if you do not have the proper manpower.

The Union also presented testimony from Robert A. Woodman, captain of the ladder company at Jackson Fire Department Station 1 and a member of the Department since 1981. Having reviewed departmental run sheets, he testified that there were 143 occasions in the first six months of 1993 when two engines were out simultaneously, typically on medical runs. Captain Woodman said that under the reduced staffing contemplated by Chief Braunreiter only seven fire fighters would be available for first response to a structure fire in such situations, and noted that the number of emergency medical runs has increased continually in recent years. Captain Woodman opined that in such cases "Those seven people's workload is going to be doubled, because the same tasks have to be done" no matter how many fire fighters are available to do them. He said the "job is going to get done slower and the workload is tremendously increased for the people that are there." Specifically, he testified that "if I don't ventilate fast enough, that means that engine company there is going to go in and literally take a beating, because they're in tremendously high heat conditions and high smoke conditions if I don't get in there and ventilate appropriately." Woodman described a possible scenario in which only the ladder company could respond immediately to a structure fire, with only two firefighters, saying "you

couldn't have any aggressive interior fire attack at all" and could not perform a rescue under departmental orders, because it would be impossible for two fire fighters to go in together and leave a third outside. He said in such circumstances he still "would attempt the rescue, as most everybody in our fire department would," because "I don't think I could stand out on the street with somebody screaming in a fire . . . and then waiting three or four minutes for another company to come from across town."

The Union contends that all this evidence, combined with the findings of the Reisig and Sugerman panels in previous Act 312 arbitrations between these parties, proves that minimum manning requirements in the Jackson Fire Department affect the safety of the fire fighters, thereby impact the conditions of their employment, and thus are a mandatory subject of bargaining. Accordingly, the Union argues the panel should find that it has authority to decide this issue.

DISCUSSION AND FINDINGS

If this panel had free reign to interpret and apply the *Trenton* decision, standing alone, it might agree with the Union that the test is not whether safety and minimum manpower are "inextricably intertwined," whatever that might mean, but whether a "reduced minimum manpower requirement would affect safety," whatever that might mean. After all, the Court of Appeals said both those things, in consecutive paragraphs. However, we are not free agents with independent authority to construe, interpret and apply the rulings of the Court of Appeals as we see fit. This panel functions under MERC's auspices. The impartial arbitrator/chairman serves under MERC's appointment. According to MERC resolutions applicable to Act 312 proceedings, in addition to its statutory powers under Section 7 of the Act the panel, "by and through the impartial arbitrator, shall have the powers and duties of an administrative law judge." This arbitrator also agrees with the following observations by arbitrator Sugerman in his January 8, 1987 decision in the last Act 312 arbitration between these parties:

> Section 14 of Act 312 provides, in part, that "This act shall be deemed supplementary to Act No. 336 of the Public Acts of 1947, as amended . . ." MERC is the agency established by the legislature to interpret and apply the provisions of Act 336, referred to as the Public Employment Relations Act, subject to its review by the courts. The obligation to bargain over mandatory subjects finds its genesis in Act 336. I thus feel obliged to follow the decisions of MERC and the courts on this subject.

The Union contends this panel should pay heed only to the Court of Appeals decisions, particularly *Alpena, Manistee,* and *Trenton*. Although it did not frame the argument

in these explicit terms, it suggests -- by reference to the "hierarchical nature of our legal system" and by ignoring MERC's two 1992 *Detroit Fire Department* decisions except to note they are on appeal -- that the panel also should ignore those two MERC decisions. But this suggestion stands the legal hierarchy on its head. Where MERC has given specific interpretation and application to a general ruling of the Court of Appeals, an Act 312 panel is as much obliged as an ALJ would be to follow that interpretation and apply it in similar cases. If it is to be ignored or overturned, that falls within the authority and responsibility of the Court of Appeals, not an arbitration panel serving *under* MERC's auspices. Therefore, just as arbitrator Sugerman was "constrained to find that Article VIII, Section 1 (was) a mandatory subject of bargaining" in 1986 because then applicable MERC precedent treated shift manning for fire fighters as *per se* a mandatory subject of bargaining, this panel is constrained by currently applicable MERC precedent to reach the opposite conclusion.

Whatever this panel may think of the Union's evidence purporting to show statistical correlation between lower manning levels and more numerous and more severe injuries, or of the City's countervailing argument that Jackson fire fighters' safety has been and will continue to be determined not by mere numbers but by a "remarkable safety program" and particularly by careful adherence to incident command principles and practices, we must be guided, finally, by the law applicable to these proceedings as stated with unmistakable clarity and specificity in the second MERC *Detroit Fire Department* decision:

> The safety of firemen is not determined by the number of men at a fire scene, but how they are deployed and the risks to which they are exposed because of what they are required to do. The Union's minimum manning proposal is not a mandatory subject of bargaining . . . . what is bargainable is what firemen are required to do based upon the number at a fire scene.
>
> 1992 MERC Lab Op 709

If is of interest that the two MERC *Detroit Fire Department* decisions are on appeal, but not of determinative significance, because they are on appeal not to this panel but to the Court of Appeals. That appellate process may or may not put an end to this recurrent dispute. If the Court eventually decides that MERC went too far and *mis*interpreted its ruling in *Trenton*, these parties may be joined in arbitral battle over minimum manpower requirements a fourth time. But unfortunate as that may be if it so eventuates, this panel must base its decision on the current state of the law, not speculation about how it may change. Accordingly, we must find that minimum manpower requirements are not a mandatory subject of bargaining and the arbitration panel thus has no authority to make a decision or enter an order on that subject.

INTERIM RULING

This panel has no authority to make a decision or enter an order regarding the continuation or inclusion of minimum manpower requirements in the parties' 1991-94 collective bargaining agreement, because minimum manpower requirements are not a mandatory subject of bargaining.

December 10, 1993

Paul E. Glendon, Arbitrator/Chairman

Joseph W. Fremont, City Delegate
(Concurring)

Robert A. Woodman, Union Delegate
(Dissenting)

Paul E. Glendon
Arbitrator/Attorney
320 North Main Street — Suite 400
Ann Arbor, Michigan 48104
313/663-4126 • Fax 313/761-7232

June 27, 1994

Shlomo Sperka, Director
Mich. Employment Relations Comm.
1200 Sixth Avenue, 14th Floor
Detroit, MI 48226

Re: City of Jackson -and- JFFA; Act 312 Proceedings; MERC Case No. L91 A-0305

Dear Sol:

Enclosed is the Second Interim Ruling issued in this case on the question of arbitrability of manning issues. As you will see, the panel issued this ruling a month ago, but I neglected to send you a copy at that time.

The parties only recently submitted final offers of settlement on the manning issue (others were submitted back in late January, before we got sidetracked with reconsideration of the manning arbitrability question after the Court of Appeals *Detroit* decision) and the briefing deadline is August 26.

Cordially,

Paul Glendon

pg/ae
Enclosure

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
COMPULSORY ARBITRATION

CITY OF JACKSON

-and-

Case No. L91 A-0305
under Act 312, P.A. 1969

JACKSON FIRE FIGHTERS ASSOCIATION,
LOCAL 1306, IAFF, AFL-CIO

SECOND INTERIM RULING ON
MINIMUM MANNING AS A BARGAINING SUBJECT

Background. On December 10, 1993, this panel issued an Interim Ruling that it "has no authority to make a decision or enter an order regarding the continuation or inclusion of minimum manpower requirements in the parties' 1991-94 collective bargaining agreement, because minimum manpower requirements are not a mandatory subject of bargaining." The Chairman's opinion accompanying and explaining the ruling made it clear that decision was based, at the City's urging, on two decisions of the Michigan Employment Relations Commission (MERC) arising from unfair labor practice proceedings between the Detroit Fire Fighters Association and the City of Detroit, 1992 MERC Lab Op 82 and 1992 MERC Lab Op 698. In particular, the panel was guided by the MERC's conclusion in the second *Detroit* case that:

> The safety of firemen is not determined by the number of men at a fire scene, but how they are deployed and the risks to which they are exposed because of what they are required to do. The Union's minimum manning proposal is not a mandatory subject of bargaining . . . what is bargainable is what firemen are required to do based upon the number at a fire scene.
>
> 1992 MERC Lab Op 709

On April 18, 1994, the Michigan Court of Appeals reversed that decision, which had overturned the decision of a MERC referee that what the Court referred to as the DFFA's "minimum-staffing proposal" affected fire fighter safety and therefore *was* a mandatory subject of bargaining. The basis for the Court's reversal was that "[t]he MERC did not

make specific references to the record to support its conclusion that safety depended on deployment, nor did the MERC specifically indict the findings of the referee or the testimony of the witnesses that supported the referee's conclusions." *City of Detroit v Detroit Fire Fighters Association*, Court of Appeals Docket No. 161019, Slip Op. at 6. For those reasons, the Court held "that the 'critical finding' of the MERC regarding the minimum-staffing proposal and its relation to the safety of the fire fighters was unsupported by substantial evidence." *Id.* En route to that conclusion, the Court reviewed its own legal precedents regarding public safety staffing issues and summarized them as follows: "It is well-established that where a staffing issue is related to or inextricably intertwined with the safety of the unit member, the issue is subject to mandatory bargaining." *Id.*, at 4-5 (citations omitted).

In light of the Court of Appeals decision, and because in reliance on the MERC's second *Detroit* decision the panel had made no factual determination of whether minimum manpower is "related to or inextricably intertwined with" fire fighter safety in this case, the chairman vacated the Interim Ruling on April 25, 1994. He also invited the parties, if they so desired, to submit supplemental briefs on that question prior to issuance of a second interim ruling. (They already had filed thorough and lengthy briefs and reply briefs on the facts of the case and the law, as it then existed, before the original Interim Ruling.) They both did so, and the chairman received their supplemental briefs on May 10, 1994.

The City's Position. The City contends the second interim ruling should be the same as the first, because the Court's recent *Detroit* decision only involved minimum staffing *per company*, not minimum daily department-wide staffing, and had no effect on the MERC's first *Detroit* decision that a plan to reduce department-wide staffing by closing two fire companies was not a mandatory subject of bargaining. The City also argues the applicable legal standard is whether minimum manning is "inextricably intertwined with" fire fighter safety, not merely whether manning "affects" or is "related to" safety. It based that argument on the first MERC decision and another Court of Appeals decision on which the MERC relied therein, *Trenton v Fire Fighters*, 166 Mich App 285 (1988), as well as another MERC decision, *City of Wyandotte*, 1989 MERC Lab Op 1020, that in-

volved a fire department's unilateral temporary reduction in staffing per shift from eight persons to seven.

The City notes that in *Wyandotte* the MERC held the layoff plan was not an unfair labor practice largely because the possibility that only two fire fighters might respond to a fire did not cause "an inextricable safety danger to the firemen on duty" because in such a case the fire fighters were "under specific instructions not to enter a burning building." *Id.*, at 1028. The City emphasizes that it too has a "rule of three" prohibiting fire fighters to enter a burning building except in pairs with a third person outside the building.

The City also notes that in its first *Detroit* decision the MERC found the "evidence did not establish that the elimination of the companies would impact on the safety of fire fighters" largely because "testimony established that upon the arrival of the first response company at a fire, an evaluation of the condition of the fire is made by the supervisor in charge and decisions are made, based on established standards, about whether the fire fighters should enter a structure for purposes of firefighting or rescue." 1992 MERC Lab Op 86. The City emphasizes that it uses an incident command system with a designated safety officer at every fire scene, and argues that those standards and precautions protect the safety of the fire fighters no matter how many are present. Thus the City insists that minimum staffing per shift is not inextricably intertwined with safety in Jackson, just as the MERC found it not to be in Detroit.

In the interest of brevity and economy, other arguments presented by the City in its original and reply briefs and summarized with the panel's original Interim Ruling will not be repeated here. Instead, the chairman incorporates by reference the summary of both parties' positions from his opinion accompanying and explaining the first Interim Ruling. In addition thereto, the City now argues that even after reducing regular per-shift staffing as contemplated in its new Fire Department Table of Organization its staffing level still will compare favorably with departments in comparable communities.

The Union's Position. The Union contends minimum staffing need only be shown to "relate to" fire fighter safety for it to be a mandatory subject of bargaining. As authority for that, it cites the recent *Detroit* decision of the Court of Appeals and several earlier decisions of that court as cited therein, in particular the statement quoted above that a

"staffing issue" is a mandatory subject of bargaining if it "is related to or inextricably intertwined with the safety of the unit members." *Detroit, supra*, at 4-5. The Union emphasizes that the Court of Appeals expressly reaffirmed its earlier decisions establishing the "related to," "affects" or "involves" test as a less stringent alternative to an "inextricably intertwined" test. It characterizes the "related to" test as an "expansive standard" and further notes that the Court has not imposed a high standard of proof to meet it. On the latter point, the Union calls attention to this statement in the *Detroit* decision: "The fact that the minimum-staffing proposal may not necessarily achieve DFFA's proposed safety objective has little relevance to whether the proposal is a mandatory subject of bargaining." *Id.*, at 6.

The Union contends the MERC's other *Detroit* decision is not controlling, in part because the MERC ignored the "related to" standard and used only the "inextricably intertwined" test in that decision, as it did in *Wyandotte*, which the Union contends is not controlling either for the same reason. It notes further that in the *Detroit* minimum company case the MERC also imposed a higher standard of proof ("at the minimum, evidence demonstrating a genuine or significant impact on safety," 1992 MERC Lab Op 85) than that mandated by the Court of Appeals. The Union also notes significant factual disparities between that case and this one, in that closing two Detroit fire companies would reduce approximately eight fire fighters out of three hundred scheduled for duty on any shift, whereas the staffing reductions contemplated by the City here would cut on-duty staff by as much as one-third of the fifteen-person minimum required by the parties' 1991-94 agreement. The Union points out that in this respect the MERC itself distinguished the *Detroit* minimum company case from two cases, *Trenton, supra,* and *City of Manistee v Manistee Fire Fighters Assn.*, 174 Mich App 118 (1989), in which the Court of Appeals decided minimum staffing issues were mandatory subjects of bargaining, as follows:

> Both Trenton and Manistee involved small fire departments in which a small reduction in the number of employees scheduled per shift presented a real danger that fire fighters might be forced to battle fires with less than the minimum number of firefighters needed for safety while awaiting reinforcements to be called in from duty. The instant case . . . does not present the same safety issue.
>
> 1992 MERC Lab Op 98

With regard to the claimed relationship between continuation of the existing minimum manpower requirement in the Jackson Fire Department and the safety of Jackson fire fighters, the Union relies on the same evidence as summarized in the chairman's opinion with the original Interim Ruling: namely, studies correlating increasing incidence and/or severity of fire scene injuries with decreasing numbers of fire fighters per unit; minimum staffing recommendations by the National Fire Prevention Association (NFPA) for at least four fire fighters per engine or ladder company and at least twelve fire fighters for first response to any low hazard building fire; testimony from its expert witness, fire protection consultant John Devine, regarding his own experience and review of relevant studies and literature; and testimony from Jackson Ladder Company Captain Robert Woodman as to the likely direct, practical effects on Jackson fire fighters if manning is reduced.

The Union also placed in evidence (with the chairman's leave, over City objection) as a supplementary exhibit a Tentative Interim Amendment adding to NFPA Standard 1500 a new Section 6-4.1.1 which, pending full review and adoption in the next edition of the standard, makes it an NFPA "requirement" that "[a]t least four members shall be assembled before initiating interior fire fighting operations at a working structural fire." The Union also put forth practical criticisms of the City's reliance on the "rule of three" as a guarantor of fire fighter safety, pointing in particular to evidence that the intensity of heat and other dangers inside a burning building can be much greater for two fire fighters who enter if there are not enough other fire fighters there to insure effective surveillance of the total fire scene and to provide ventilation, and arguing that incident command and other safety-related policies and procedures cannot offset the inherently greater dangers of fighting fires with less than a safe number of fire fighting personnel.

Discussion and Findings. The City's continued reliance on the MERC's *Detroit* minimum company decision (itself on appeal, but not yet decided by the Court of Appeals) is misplaced. It is technically true that the contractual minimum manpower requirement the City proposes to eliminate only requires that it "maintain a minimum of fifteen (15) 24-hour fire fighters on duty on each shift," not a particular minimum level of manning *per company* as in the MERC's overturned *Detroit* decision. But that narrow truth obscures rather than illuminates the real relationship between the two cases. As the MERC ob-

served in the *Detroit* minimum company decision, a small reduction in number of fire fighters on duty per shift has a much different impact in a small department than in a large department such as Detroit. Even more to the point, the reduction in overall shift manning in Detroit was to be accomplished by closing two companies, which is not what the City plans here. Reductions in *per company* manning are part and parcel of the contemplated reduction in total *per shift* manning. In reality, therefore, this case actually bears much more resemblance to the overturned MERC *Detroit* decision than to the one still in effect.

The City's argument that the "inextricably intertwined" safety test is the sole standard for determining whether minimum manning is a mandatory subject of bargaining also is unconvincing. It ignores the plain language of the recent *Detroit* decision, in which the Court of Appeals explicitly recognized as a "well-established" legal principle "that where a staffing issue is *related to or* inextricably intertwined with the safety of the unit member, the issue is subject to mandatory bargaining." *Detroit, supra*, at 4-5. (Emphasis added.) The Court went on to discuss its own creation of the "inextricably intertwined" test in *Trenton*, but also to reiterate that the "related to" test announced in *Manistee* still was in force, and to explain, or at least suggest, that the two tests were merely alternative ways of demonstrating that a minimum staffing issue "*affects* unit-member safety." *Id.*, at 5. (Emphasis added.)

It cannot be concluded from a careful reading of *Detroit, Trenton, Manistee* or any other Court of Appeals decision on this subject that the Court ever has required proof that manning and safety are "inextricably intertwined" as the sole means of establishing that a manning issue is a mandatory subject of bargaining. The chairman also observes that neither the Court of Appeals nor the MERC ever has defined, in practical terms, what it means for manning to be "inextricably intertwined with" rather than merely "related to" or to "affect" safety. One is tempted to conclude from the Court's discussion of the *Trenton* and *Manistee* decisions in *Detroit* that there really is no practical difference between these concepts, and that the differences, if any, may be more linguistic than substantive. Be that as it may, the panel must conclude that the Union can establish that the City's proposal to eliminate minimum manpower requirements from the parties' agreement is a mandatory subject of bargaining merely by showing that it is "related to" the safety of unit members.

The City's approach to that question in practical terms also is somewhat misdirected. It argues at length that its plan to reorganize the department by reducing total per shift manning from fifteen to ten, with three fire fighters on each of two engine companies and four on a "Quint" backed up as necessary by call-ins within the department and mutual aid assistance from neighboring departments, will not adversely affect unit members' safety or place them at a disadvantage relative to fire fighters in comparable communities. But that really is an argument on the merits of two competing organizational models -- or on two different levels of minimum staffing -- not on whether elimination of all contractual requirements for minimum staffing is related to safety. Nor is it a prerequisite to a finding that such a relationship exists, as the Court of Appeals made clear in *Detroit*, for the panel to find that the Union's proposal to continue the existing fifteen-person minimum staffing requirement is the only way to achieve the objective of protecting unit members' safety.

The evidence offered by the Union in support of its position that minimum manning is related to fire fighter safety included a variety of survey statistics -- from studies in the Dallas and Seattle fire departments, a 1980 Ohio State University study of fire ground injuries in the Columbus fire department, and an IAFF "Analysis of Fire Fighter Injuries and Minimum Staffing per Piece of Apparatus in Cities with Populations of 150,000 or More" -- showing correlation between increased incidence and/or severity of fire scene injuries and decreasing numbers of fire fighters per unit. The City discounts the probative value of such statistical information based on differences in size between the departments and cities surveyed and Jackson, the surveys' remoteness in time, and their failure to take into account the safety practices (incident command, safety officer, careful monitoring of fire fighter fatigue, protective clothing and departmental compliance with applicable NFPA standards) of the Jackson Fire Department. However, it must be concluded that at least in a general way such evidence does indicate a relationship between fire fighter manning and fire fighter safety, and it must be noted that similar (in some cases, identical) evidence has been accepted as demonstrating such a relationship by the Court of Appeals, most recently in the *Detroit* decision.

The Union also relies on the NFPA recommendation (in Section 10, Chapter 4 of the Fire Protection Handbook) for a minimum of twelve fire fighters, one chief officer, two

pumpers and one ladder truck for fires at "low hazard occupancies," and the Tentative Interim Amendment to NFPA 1500 specifying that "[a]t least four members shall be assembled before initiating interior fire fighting operations" and recommending that fire fighters enter a burning structure with less then four on hand only in "those rare and extraordinary circumstances when, in the member's professional judgment, the specific instance requires immediate action to prevent the loss of life or serious injury." NFPA TIA July 23, 1993, Sections 6-4.1.1 and A-6-4.1.1. The City discounts the value of this evidence too, arguing it does not deal with the issue before this panel -- minimum daily staffing or shift strength -- and NFPA has no standards or recommendations on that, as witness Devine conceded. Like the City's attempt to explain away the Court of Appeals *Detroit* decision, however, this objection misses the mark.

It is noteworthy that in its original brief and reply brief the City placed at least as much, if not more, emphasis ahd reliance on the MERC *Detroit* minimum staffing decision as on the minimum company *Detroit* decision. The reason for that is obvious, but bears repeating: in Jackson, as contemplated by the City's reorganization plan, reduced total shift staffing necessarily involves and equates with reduced per company staffing. Thus the NFPA recommendations and requirements for minimum staffing on the fire ground are relevant to the issue presented in this case.

The City also argues that NFPA standards and recommendations do not have the force of law, which of course is true. But its own evidence (City Exhibit 334, an article in the January 1993 issue of "Public Management," published by the International City/County Management Association) recognizes NFPA as a multiple constituency, "nationally recognized fire-safety standards development organization," and the City takes credit for compliance with other NFPA standards. Thus its argument that these NFPA recommendations and interim standards on minimum staffing (the latter being part of NFPA 1500, which explicitly addresses fire fighter health and safety) deserve no weight in this proceeding is unconvincing. Whatever weight they ultimately may be found to have regarding the merits of the City's proposal to eliminate minimum manpower requirements from the contract, they constitute convincing evidence of a relationship between minimum

staffing and fire fighter safety for purposes of deciding whether that proposal is a mandatory subject of bargaining.

The same is true of fire consultant Devine's expert testimony, based on his own experience as a consultant, fire fighter and assistant chief of the Washington, D.C. fire department and his review of all relevant studies and literature on the subject, that reduced fire fighting manpower adversely affects fire fighter safety. He also testified in the *Detroit* MERC proceedings and his similar testimony there was part of the record relied upon by the MERC referee in concluding "that the minimum-staffing proposal affected fire fighter safety" and thus part of what the Court of Appeals characterized as "overwhelming support for the referee's conclusions." *Detroit, supra*, at 6.

Captain Woodman testified at length regarding his own experiences, review of fire department records, and opinions regarding the likely effects of reduced manpower on his and his compatriots' safety at fire scenes. In view of the steadily increasing volume of medical runs by Jackson fire companies and number of times when two engines are out simultaneously (143 times during the first half of 1993), he testified that under reduced staffing contemplated by the department's plans for reorganization there is increased likelihood of initial structure fire response with only seven or fewer fire fighters. In such cases, Captain Woodman opined, their "workload is going to be doubled, because the same tasks have to be done" no matter how many fire fighters are there to do them. Specifically, he pointed to the safety hazards of fire fighters working in a burning building "in tremendously high heat conditions and smoke conditions if I don't get in there and ventilate appropriately." He also said that if manpower were reduced there could be times when only a ladder company would be available to respond immediately to a fire, with only two firefighters, which would rule out even a rescue attempt under departmental orders. He said the temptation to make such an attempt to save a life would be irresistible to him and "most everybody in our department" despite the rule violation and patently unacceptable risks it would entail.

The City correctly points out that the possibility of fire fighters subjecting themselves to undue safety risks in violation of departmental policies cannot serve as valid evidence of a relationship between minimum manning and safety. It also contends the rest of Captain

Woodman's testimony should be discounted because it is possible for fire operations to be conducted sequentially rather than simultaneously. It also emphasizes that it is up to the incident commander to decide, with safety considerations always paramount, how to attack any fire and if and when to call for reinforcements from within the department and/or adjoining mutual aid departments. The City further notes that major fires are a relatively rare occurrence in Jackson, with two or more hoses being used on a structure fire an average of only thirty-three times a year over the past three years, and that it went to a second (or higher) alarm less than twice a month in that same period.

The relative infrequency of major fires is a matter of no significance to this decision. Ideally, of course, the fire department would never have to fight a major structure fire. But such fires occur, no matter how infrequently, and when they do Captain Woodman's point that the fewer fire fighters there are available to fight them the more work they will have to do and the more their safety will be at risk is worthy of serious consideration. It may well be that with reduced manpower the department's incident commanders would decide to take an entirely passive approach, in effect contenting themselves with pouring water on the burning structure from a distance and watching it burn down. But common sense suggests he is correct in believing there will be times when the "rule of three" will be invoked and two fire fighters will be sent into a burning structure either for an aggressive fire attack or a rescue, with only one person outside and nobody yet on hand to perform ventilation, and that such situations are more likely to occur with reduced manpower than under the minimum manpower requirements of the previous agreement.

Captain Woodman's testimony that the risks to fire fighter safety are greater in such cases, due to the lack of ventilation, is unrefuted and stands as additional evidence that manning levels are related to safety. Here again, it is noteworthy that the Court of Appeals has held that such testimony, when "supported by extensive testimony concerning fire fighting practices and procedures," is sufficient to establish such a relationship. *City of Alpena v Alpena Fire Fighters Assn.*, 56 Mich App 568 (1974), at 575. In *Detroit*, the Court also referred with approval to testimony by Detroit Fire Department officials that "fire fighters were routinely expected to fight fires and make rescues using an interior at-